

# **The Sentencing of Indigenous Offenders in the Lower Courts: A Study of Three Australian Jurisdictions**

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## TABLE OF CONTENTS

List of tables.....	4
Acknowledgments.....	5
Executive summary.....	6
Background.....	6
Aims.....	6
Method and Analytic Approach.....	7
Results and Discussion .....	7
Research and Policy Implications .....	8
Chapter 1: Background .....	9
Introduction.....	9
The Differential Involvement Hypothesis .....	10
The Negative Discrimination Hypothesis .....	10
The Positive Discrimination Hypothesis .....	11
The Sentencing Disparities Hypotheses and Past Empirical Evidence .....	12
Native American Sentencing Disparities Research .....	13
Aboriginal Canadian Sentencing Disparities Research .....	14
New Zealand Māori Sentencing Disparities Research.....	14
Indigenous Australian Sentencing Disparities Research .....	15
Other Key Factors Influencing Sentencing.....	17
Legislative context.....	17
Prior evidence of important predictors of sentencing outcomes.....	18
Aims of the current research .....	19
Research questions.....	20
Chapter 2: Indigeneity and Lower Court Sentencing in South Australia .....	21
Introduction.....	21
Data and Methods .....	21
Measures .....	21
Stages of Analysis.....	22
Stage 1: Baseline Differences by Indigenous Status.....	22
Stage 2: Adjusted differences in sentencing outcomes by Indigenous status .....	24
Indigeneity and the Likelihood of Imprisonment .....	25
Indigeneity and Imprisonment Length.....	26
Indigeneity and the Likelihood of Monetary Orders .....	27
Indigeneity and Monetary Order Amount.....	28
Summary .....	29

Chapter 3: Indigeneity and Lower Court Sentencing in New South Wales .....	30
Introduction.....	30
Data and Methods .....	30
Measures .....	30
Stages of Analysis.....	31
Stage 1: Baseline Differences by Indigenous Status.....	31
Stage 2: Adjusted differences in sentencing outcomes by Indigenous status.....	33
Indigeneity and the Likelihood of Imprisonment .....	33
Indigeneity and Imprisonment Length.....	35
Indigeneity and the Likelihood of Monetary Orders .....	36
Indigeneity and Monetary Amount.....	37
Summary .....	38
Chapter 4: Indigeneity and Lower Court Sentencing in Western Australia .....	39
Introduction.....	39
Data and Methods .....	39
Measures .....	39
Stages of Analysis.....	40
Stage 1: Baseline Differences by Indigenous Status.....	40
Stage 2: Adjusted differences in sentencing outcomes by Indigenous status.....	42
Indigeneity and the Likelihood of Imprisonment .....	42
Indigeneity and Imprisonment Length.....	43
Indigeneity and the Likelihood of Monetary Orders .....	44
Indigeneity and Monetary Order Amount.....	45
Summary .....	46
Chapter 5: Summary and Discussion.....	47
Introduction.....	47
Does the Initial Decision to Imprison Differ Between Indigenous and Non-Indigenous Offenders?.....	48
Does Length of Sentenced Prison Term Differ Between Indigenous and Non-Indigenous Offenders?.....	50
Does the Initial Decision to Impose a Monetary Sentencing Order Differ Between Indigenous and Non-Indigenous Offenders? .....	51
Does Sentenced Monetary Order Amount Differ Between Indigenous and Non-Indigenous Offenders?.....	52
Limitations and Directions for Future Research and Policy .....	52
References.....	55
Appendix A.....	60

## LIST OF TABLES

Table 2.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902) .....	23
Table 2.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902).....	24
Table 2.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902) .....	25
Table 2.4. Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Lower Adult Courts (South Australia, 2005-2007, N=2,822) .....	27
Table 2.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Lower Adult Courts (South Australia, 2005-2007, N=123,080) .....	28
Table 2.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only, Lower Adult Courts (South Australia, 2005-2007, N=46,349).....	29
Table 3.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982) .....	32
Table 3.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982).....	33
Table 3.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982).....	34
Table 3.4 Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Adult Lower Courts (New South Wales, 2005-2007, N=21,935) .....	35
Table 3.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Adult Lower Courts (New South Wales, 2005-2007, N=262,047) .....	37
Table 3.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only, Adult Lower Courts (New South Wales, 2005-2007, N=131,828).....	38
Table 4.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729) .....	41
Table 4.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729).....	42
Table 4.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729) .....	43
Table 4.4. Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Lower Adult Courts (Western Australia, 2005-2007, N=6,090) .....	44
Table 4.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Lower Adult Courts (Western Australia, 2005-2007, N=177,624) .....	45
Table 4.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only Lower Adult Courts (Western Australia, 2005-2007, N=143,402).....	46
Table A.1 Description of Study Variables (South Australian Lower Adult Courts, 2005-2007) .....	60
Table A.2 Description of Study Variables (New South Wales Lower Adult Courts, 2005-2007) .....	61
Table A.3 Description of Study Variables (Western Australian Lower Adult Courts, 2005-2007) .....	62

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## **EXECUTIVE SUMMARY**

### **Background**

Indigenous disparities in imprisonment sentences are well-documented. Yet, there have been few systematic attempts made by researchers in Australia to explain these disparities in the imprisonment decision-making of the lower courts (see Bond, Jeffries and Weatherburn, 2011; Bond and Jeffries, 2011a). Further, little is known about how Indigeneity impacts non-custodial decision making. This is especially pertinent with regard to monetary orders decision, because there is ongoing concern in Australia about the differential impact of fining and fine default on Indigenous people (e.g. Spiers-Williams and Gilbert, 2011).

Although there is little work on non-custodial penalties, theoretical explanations for disparities in imprisonment are well-developed. In particular, three hypotheses have been identified (Bond, Jeffries and Loban, 2011; Bond and Jeffries, 2011a):

- Differential involvement. Pre-existing differences between Indigenous and non-Indigenous defendants on key sentencing factors explain baseline differences in imprisonment outcomes.
- Negative discrimination. Due to unconscious perceptions of threat, this hypothesis predicts that Indigenous offenders will be sentenced more harshly than non-Indigenous offenders even when appearing before the court under like circumstances.
- Positive discrimination. Recognising existing marginalised experiences of Indigenous offenders, judicial officers will sentence Indigenous offenders more leniently than non-Indigenous offenders under like circumstances.

In Australia, there has recently been a proliferation of studies in the area of Indigenous sentencing disparities. However, there have only been three prior investigations of Indigeneity and sentencing in Australia's lower courts, of which only one has focused on non-imprisonment outcomes (Bond and Jeffries, 2011a, 2011e; Bond, Jeffries and Weatherburn, 2011).

### **Aims**

This study examines sentencing outcomes for Indigenous and non-Indigenous adult offenders convicted in the lower courts of South Australia, New South Wales and Western Australia between 2005 and 2007. In order to better understand the influence of the Indigenous status on sentencing outcomes in Australian lower courts, the current research focuses on two key research questions:

1. Does the severity of penalty (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances?
2. Does the magnitude of penalty (length of imprisonment term and amount of monetary order) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances?

## **Method and Analytic Approach**

This research relied on administrative lower court data collected by the South Australian Office of Crime Statistics and Research, New South Wales Bureau of Crime Statistics and Research, and the Crime Research Centre (the University of Western Australia). Both exploratory and explanatory regression-based analyses were conducted on the data. Through the estimation of multivariate models, the direct impact of Indigenous status on imprisonment and monetary order decision making can be disentangled from other important sentencing factors, including: offenders' social background characteristics, offenders' past and current criminality and court processing factors.

## **Results and Discussion**

In all study jurisdictions, there were three consistent findings:

- Indigenous defendants were more likely than non-Indigenous offenders to be sentenced to prison. While Indigenous/non-Indigenous disparity was consistently more pronounced in the baseline statistics, it remained even after accounting for other influential sentencing determinants. These results support both differential involvement and negative discrimination hypotheses.
- Indigenous defendants were less likely than non-Indigenous offenders to be sentenced to a monetary order (compared to other non-imprisonment penalties). The initial baseline difference was reduced, but did not dissipate completely after controlling for other important sentencing factors. Although these results support the differential involvement hypothesis, they do not necessarily suggest negative or positive discrimination. This is because monetary orders may not always be harsher than other non-imprisonment orders.
- Indigenous defendants were sentenced to monetary orders of a lesser amount than non-Indigenous offenders. Adjusting for other important sentencing factors reduced initial differences, but evidence of a continuing direct effect was found. Thus, the results support both differential involvement and positive discrimination hypotheses.

Focal concerns perspective of sentencing may provide insight into these patterns of findings. The focal concerns framework argues that, in making sentencing decisions, judicial officers are motivated by three focal concerns: blameworthiness, community protection or risk, and practical constraints and consequences (Steffensmeier, Ulmer and Kramer, 1998). Our results suggest that practical constraints may be particularly important in understanding the sentencing process in the lower courts. In particular:

- Negative discrimination in the imprisonment sentence outcome may be the result of the tight time constraints of, and the limited information available to magistrates, in lower court sentencing hearings. This may trigger the reliance on what focal concerns scholars have called 'perceptual shorthands' (i.e. community based stereotypes) in making sentencing decisions, disadvantaging Indigenous defendants.
- Continuing Indigenous/non-Indigenous differences in monetary order imposition and amount may be linked to practical constraints (a focal concern) around the ability of Indigenous offenders to pay fines, and perhaps a broader concern around the impact of fine default on Indigenous persons.

In contrast, to the other decision outcomes, our analyses find that the prison term length decision varied across the study jurisdictions. In South Australia, Indigenous defendants were

sentenced to shorter terms than non-Indigenous offenders. In New South Wales, Indigenous offenders were sentenced to almost equal prison terms. In Western Australia, Indigenous offenders received longer terms of imprisonment.

The explanations for this variation across jurisdictions may lie in local political, social and legal cultures, as well as local court organisational factors (Johnson, Ulmer and Kramer, 2008; Bond, Jeffries and Weatherburn, 2011). Further, prior Australian and international research suggests that ethnic minority statuses may have differential impacts by sentencing stage.

## **Research and Policy Implications**

The findings of the current research have a number of implications for existing policy and research. First, here are several factors that may be influential to sentencing (e.g. familial situation, mental health, context of the commission of the offence) which are not contained in court administrative databases. These missing factors may further explain the Indigenous/non-Indigenous differences found in this study. At the lower court level, further information on offenders and their cases requires coding of audio-recorded sentencing hearings (if access is possible) or observation of sentencing hearings.

Second, there is a need for qualitative research strategies to be added to existing statistical analyses. While our statistical analyses helped to establish that Indigeneity *does* matter when it comes to sentencing, we cannot fully explain the effect of Indigeneity. Future research could include observation of lower court sentencing hearings and interviews with magistrates about their Indigenous sentencing philosophies and practices.

Finally, the consistent finding of harshness in the decision to imprison for Indigenous offenders raises important policy concerns. Although this needs to be confirmed by further research, a possible reason for this pattern is lack of time and information. The pressures on lower court decision-making, and its consequent impact on Indigenous defendants, points to the need for the extension and development of strategies that allow more detailed and reliable information to be placed before magistrates at the time of sentencing (e.g. Indigenous sentencing courts).



# CHAPTER 1: BACKGROUND

## Introduction

People have the right to be free of discrimination; respecting this right helps build strong communities based on equality and tolerance. Discrimination in the administration of criminal justice can cause harm to individuals and society alike, and have lasting consequences for future generations (Human Rights and Equal Opportunity Commission, 2006). In Australia, baseline lower court data suggest that Indigenous people receive relatively harsher sanctions than non-Indigenous offenders. For example in the most recently available data on Indigenous defendants in the lower courts, Baker (2001: 5-6) reported that in New South Wales Indigenous offenders were more likely than non-Indigenous offenders to be sentenced to prison (17% compared with 15%). In South Australia, Castle and Barnett (2000: 21-42) reported that sentences of imprisonment were issued in 11% of Indigenous cases and 5% of non-Indigenous cases before the lower courts. Similarly, in Western Australia, Loh and Ferrante (2003: 20-24) found that Indigenous defendants were more likely than their non-Indigenous counterparts (13% compared with 8%) to receive sentences of imprisonment in the lower courts. Understanding the source of this apparent sentencing disparity is vital for researchers, policy-makers and those working in the criminal justice system.

To date, Australian research on the sentencing of Indigenous offenders has been limited in two important ways. First, most systematic Australian research on Indigenous sentencing has not focused specifically on the lower courts (cf. Bond, Jeffries and Loban, 2011; Bond and Jeffries, 2011a; Bond, Jeffries and Weatherburn, 2011), and where it does, there has been little focus on non-custodial outcomes (cf. Bond, Jeffries and Loban, 2011). Second, until recently, most prior empirical descriptions of lower court sentencing outcomes (see e.g. Baker, 2001; Castle and Barnett, 2000; Loh and Ferrante, 2003) have suffered from significant methodological limitations, making any conclusions tentative at best. International sentencing researchers concur that methodological rigour is enhanced by the use of multivariate statistical techniques that allow the researchers to unravel the effect of race/ethnicity/Indigeneity from other sentencing determinates (Spohn, 2000; Mitchell, 2005). Given that the overwhelming majority of criminal defendants have their cases finalised in the lower courts, a better understanding of sentencing processes in the lower courts is essential to improving practices. (In 2006-2007, the lower courts finalised 581,001 adult defendants, cf. 16,172 in the higher courts: Australian Institute of Criminology, 2009: 76-77.)

The current research examines imprisonment and monetary sentencing outcomes for Indigenous and non-Indigenous offenders sentenced in three Australian lower court jurisdictions: New South Wales, South Australia, and Western Australia. By using multivariate techniques, this research identifies the impact of Indigenous status, as well as other social background characteristics, past and current criminality, and court processing factors, on lower court sentencing outcomes. This chapter provides the context in which the current project is located, including: an overview the main explanations for Indigenous sentencing disparities; a review of past research on Indigenous sentencing, and racial/ethnic sentencing more generally; and the identification of key factors known to predict sentencing outcomes.

## **Sentencing Disparities Hypotheses**

Sentencing disparities scholars have identified three hypotheses to explain well-documented baseline differences in imprisonment outcomes for defendants from racial, ethnic and Indigenous backgrounds before the criminal courts. These are: (1) differential involvement; (2) negative discrimination; and (3) positive discrimination (for a fuller discussion, see Bond, Jeffries and Loban, 2011; Bond and Jeffries, 2011a).

### ***The Differential Involvement Hypothesis***

According to this hypothesis, existing differences in other relevant sentencing factors between Indigenous and non-Indigenous offenders may mediate the relationship between Indigenous status and sentence outcomes. For example, base-line sentencing disparity may simply be a response to differences in the criminality (e.g. past and current offending) of Indigenous and non-Indigenous offenders. In other words, the apparent relationship between Indigeneity and sentencing results from other factors differentially associated with Indigenous status. Thus, there is no direct discrimination in the sentencing of Indigenous defendants because Indigeneity plays little or no direct role, once other crucial sentencing factors are controlled (Weatherburn, Fitzgerald and Hua, 2003:1). This hypothesis predicts that Indigenous and non-Indigenous offenders will receive similar sentences under like circumstances (Bond, Jeffries and Loban, 2011: 26; Bond and Jeffries, 2011a: 2).

### ***The Negative Discrimination Hypothesis***

This hypothesis argues that Indigenous status directly impacts sentencing, resulting in harsher outcomes. In other words, the baseline sentencing disparity noted in the government court data (see above) is *not* attributable to differences in other influential sentencing determinates (e.g. past and present offending) as suggested by the differential involvement hypothesis. Developed in early United States sentencing research, the theoretical foundations for this hypothesis are based in the conflict school of criminology, where sentencing discrimination was thought to be inevitable for minority groups because they posed a 'threat' to the privileged position of whites in American society (Peterson and Hagan, 1984; Hawkins, 1987; Steen et al., 2005). Applying the conflict perspective in an Australian context, harsher sentencing of Indigenous peoples would be predicted, given this country's history of colonisation and the continuing oppression of Indigenous people as evidenced by their marginalised and disadvantaged social, political and economic status (Jeffries and Bond, 2009: 50).

More recently, the negative discrimination hypothesis has been theoretically positioned within the focal concerns perspective (Bond and Jeffries, 2011a: 2). Research suggests that sentencing decisions are guided by a number of judicial focal concerns, particularly: offender blameworthiness and harm caused by the offence; community protection or risk; and practical constraints presented by individual offenders, organisational resources, political and community expectations (Steffensmeier, Ulmer and Kramer, 1998: 766-767). Similar concerns have been found among Australian judges (see Mackenzie, 2005).

The first focal concern, *blameworthiness*, focuses on judicial assessments of offender culpability and the degree of harm caused by the crime committed. This focal concern is driven by the sentencing philosophy of retribution, or the more modern 'just deserts'. It is punishment-focused, requiring the seriousness of an offence be balanced by the imposition of a punishment proportional to the criminal harm caused (Steffensmeier, Ulmer and Kramer,

1998:766-767). This focal concern centres on the *current* behaviour of an offender: the offence, its circumstances and seriousness (Jeffries and Bond, 2009: 52; Bond and Jeffries, 2011d: 20-21).

The second focal concern of *risk*, or *community protection*, is driven by the sentencing philosophies of incapacitation and deterrence (Steffensmeier, Ulmer and Kramer, 1998:766-767; Johnson, 2006). The ultimate aim of both incapacitation and deterrence is community protection in the short and long term. Judicial sentencing decisions reflect a desire to protect the community by incapacitating offenders deemed at high risk of re-offending or deterring other potential offenders in the community. Thus, the focal concern of risk (or community protection) involves judicial assessments of the predicted future dangerousness of an offender, so it is concerned with an offender's *future* behaviour (Jeffries and Bond, 2009:52; Bond and Jeffries, 2011d: 20-21).

The final focal concern of sentencing is *practical constraints* presented by organisational resources, individual offenders and the community (Steffensmeier, Ulmer and Kramer, 1998: 767–768; Johnson, 2006: 266). A key organisational constraint often identified in past research is that sentencing often occurs with restricted information under time pressures (see e.g. Steffensmeier, Ulmer and Kramer, 1998: 767–768; Johnson, 2003:454). Judges and magistrates can only sentence based on the information that is provided in court about the offence and the offender by the prosecution, defence, and sometimes probation officers and psychologists. Further, in modern western societies such as Australia, judges, and to a greater extent magistrates, are faced with increased workload and subsequent time pressures, which raises the possibility that they may have insufficient time to properly consider cases before them (Mackenzie, 2005:28). These practical constraints may allow community-based stereotypes (i.e. 'perceptual shorthands') about certain types of offenders (e.g. Indigenous versus non-Indigenous, men versus women, older versus younger offenders) to influence judicial perceptions of blameworthiness and risk (Steffensmeier, Ulmer and Kramer, 1998; Johnson, 2003; Jeffries and Bond, 2009: 52-53). If, for example, Indigenous status carries with it criminal stereotypes, then magistrates may rely on that status characteristic as an indicator of blameworthiness and risk. Thus, the attribution of increased threat and criminality to Indigenous offenders produces sentencing differentials (Jeffries and Bond, 2009: 52-53).

In addition to organisational constraints, sentencing decisions are also affected by offender, community and political constraints. An example of an offender level constraint is the ability to 'do time'. The judiciary may make assessments that certain types of offenders are more able to 'cope with prison' than others, such as older versus younger offenders (Wu and Spohn, 2009). At the broader community level, there may be fewer social costs to incarcerating certain kinds of offenders, such as men who are unlikely to have primary child care responsibilities (Daly, 1989; Jeffries, 2002). Finally, policy context may impact on sentencing decision making, such as political discourses concerned with 'getting tough on crime' (Steffensmeier, Ulmer and Kramer, 1998: 767; Johnson, 2003: 454–455; Jeffries and Bond, 2009: 67).

### ***The Positive Discrimination Hypothesis***

Finally, the positive discrimination thesis suggests that minority group statuses may mitigate sentencing outcomes, leading to lenience treatment of minority group offenders by the courts. The focal concerns approach also allows us to recognise that a defendant's Indigeneity may

operate as a mitigating influence on sentencing decision-making, because it may trigger attributions about the causes or reasons for offending and broader social and policy expectations. Within the framework of focal concerns, there are two possible reasons for predicting sentencing leniency for Indigenous defendants in Australia (Jeffries and Bond 2009: 54-55; Jeffries and Bond, 2010a; Bond and Jeffries, 2011a: 2).

First, and as noted above, sentencing decisions are known to be impacted offender constraints, including judicial perceptions of the ability of defendants to serve time in prison (Steffensmeier, Ulmer and Kramer, 1998: 767-768; Jeffries and Bond, 2009: 53; Jeffries and Bond, 2010a: 3; Bond and Jeffries, 2011a: 3; Bond and Jeffries, 2011b: 261). In comparison to the non-Indigenous population, Indigenous people tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health inequities with roots in the historical contexts of colonisation and governmental Indigenous policies. Potentially these differences in offender level constraints could mitigate sentence severity and lead to more lenient outcomes for Indigenous defendants (Jeffries and Bond, 2009: 53; Jeffries and Bond, 2010a; Bond and Jeffries, 2011a:3; Bond and Jeffries, 2011b: 261).

Second, community and political constraints may place pressure on judges to reduce sentence severity for Indigenous defendants. In particular, the Royal Commission into Aboriginal Deaths in Custody (1991) is likely to have sensitised Australian courts to the marginalised position of Indigenous Australians and the impact of Indigenous over-representation in imprisonment on Indigenous communities. In particular, the Royal Commission argued that “the powers and decisions of sentencing courts present considerable opportunity for reducing the numbers of Aboriginal people in custody” (1991, Chapter 2, recommendation 92). As noted by Anthony (2010: 1), “when sentencing Indigenous offenders, courts in Australia ... do their work in the knowledge that the rates of Indigenous imprisonment are much higher than the rates for the community as a whole”.

There have been subsequent developments in sentencing law that suggest Indigeneity could act as a mitigating factor in sentencing. In at least three Australian jurisdictions (South Australia, Australian Capital Territory, Queensland), sentencing legislation allows consideration be given to the cultural background of defendants. Further, recent precedent exists in case law for factors associated with offenders’ Indigenous status (e.g. associated disadvantage) and Indigeneity itself (e.g. historical legacy of colonisation) to mitigate sentencing (see discussions by Edney, 2003; Edney and Bagaric, 2007: 246; Anthony, 2010). In addition, a number of Australian jurisdictions have developed alternative ways of sentencing Indigenous offenders (including Indigenous and circle sentencing courts) which seek to acknowledge the differential needs of Indigenous defendants (Harris, 2006; Jeffries and Bond, 2009: 54). Therefore, we might expect to find evidence of Indigenous sentencing leniency (i.e. positive discrimination) because there is likely to be judicial recognition of the marginalised status of Indigenous defendants, connected to broader societal concerns regarding the ‘plight’ of Indigenous peoples as a colonised group within the criminal justice system (Jeffries and Bond, 2009; Jeffries and Bond, 2010a; Bond and Jeffries, 2011a; Bond and Jeffries, 2011b).

### **The Sentencing Disparities Hypotheses and Past Empirical Evidence**

Prior research on sentencing disparities has been dominated by statistical studies undertaken in the United States. The majority of this research has explored white/African American (racial) and white/Latinos (ethnic) disparities in sentencing (Spohn, 2000; Weinrath, 2007),

with the main focus being imprisonment outcomes. Overall, prior racial/ethnic sentencing disparities research shows that, once other relevant sentencing factors (particularly current and past crime seriousness) are controlled for, initial baseline differences (as seen in court statistics) reduce, but do not *always* dispel completely (see reviews by Spohn, 2000 and Mitchell, 2005). This means that, while some of the initial disparity in sentencing between racial/ethnic groups can be explained by the *differential involvement* thesis, there is support for the *negative discrimination* hypothesis. Thus, offenders' race/ethnicity continues to have a direct impact on sentencing outcomes, independent of other relevant variables (for further discussion, see Jeffries and Bond, 2011b).

However, in this body of work, there are two findings of additional interest. First, the size of the statistical relationship between race/ethnicity and sentencing is dependent on how criminal history and current crime seriousness are measured, with less precise measures producing more substantial estimates of direct racial disparity (Mitchell, 2005: 457). Second, the impact of race/ethnicity on sentence appears to vary by sentencing stage. Offenders of racial/ethnic backgrounds are more negatively disadvantaged at the initial decision to imprison, than at the subsequent decision on length of imprisonment (Spohn, 2000: 455-456).

In contrast, research on the sentencing of Indigenous offenders is sparser, with most available published research being conducted in Australia. Like the racial/ethnic disparities studies, this research is overwhelmingly concerned with imprisonment sentencing outcomes. Also similarly, Indigenous sentencing studies indicate some support for differential involvement hypothesis: initial disparities suggesting that Indigenous defendants are sentenced more harshly than non-Indigenous defendants reduce, after controlling for other important sentencing factors. However, unlike the racial/ethnic disparities research, evidence of *both* positive and negative discrimination remains, depending on the jurisdiction. (For a more detailed review, see Jeffries and Bond, 2011b). We discuss the main findings of this research by national context. (An overview table of the studies in alphabetical order is provided in Appendix A.)

### ***Native American Sentencing Disparities Research***

Over the last two decades (1991 to 2011), there have been four studies published using multivariate statistical techniques to examine the impact of Indigenous status on the decision to imprison in the United States (namely, Alavarez and Bachman, 1996; Munoz and McMorris, 2002; Everett and Wojtkiewicz, 2002; Wilmot and Delone, 2010). In analyses of sentencing of offenders convicted of felonies<sup>1</sup>, findings are mixed and often dependent on the type of offence.

For instance, Alavarez and Bachman's (1996) analysis of Native/white American differences in length of prison term found that, after adjusting for sex, prior record and education, Native American defendants received: shorter sentences for homicide, longer sentences for burglary, and equal sentences for assault and sexual assault. Similarly, Everett and Wojtkiewicz (2002: 205-207) found that Native American offenders sentenced in United States Federal Courts received equal prison sentence lengths, net of a range of other sentencing factors, except for violent offences. Native American defendants convicted of violent offences continued to receive longer prison sentences than comparable 'white' defendants. Wilmot and Delone's (2010) study of the sentencing of Native Americans under Minnesota's sentencing guidelines looked at four decision stages that occur in the application of the guidelines. Native American

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<sup>1</sup> In general, felonies are equivalent to the types of offences heard in Australian higher courts.

defendants were found to receive harsher outcomes at three decision points and more lenient outcomes at one decision stage, after adjusting for other sentencing factors (Wilmot and Delone, 2010: 171).

In contrast, a study of the relationship between Indigenous status and the decision to imprison in a sample of misdemeanour<sup>2</sup> offences from three United States counties did not find evidence of positive discrimination (Munoz and McMorris, 2002). This analysis showed that while offence seriousness reduced the effect of Indigenous status, Native American offenders were almost five times more likely to be incarcerated in jail. However, this may be an over-estimate of the direct effect, as there was no measure of criminal history. (Less precise measures of offence seriousness and the absence of a criminal history measure may result in the over-estimation of direct racial disparity: see e.g. Mitchell, 2005).

### ***Aboriginal Canadian Sentencing Disparities Research***

Over the last 20 years, there have been two Indigenous Canadian sentencing disparities studies in which multivariate statistical techniques have been used (these are: Weinrath, 2007; Welsh and Ogloff, 2008). These studies are supportive of both the differential involvement and positive discrimination hypotheses.

Weinrath (2007: 23-24) analysed length of sentenced prison term for men convicted of drunk driving offences in Alberta (Canada) and found no significant differences by Indigenous status either at the base-line level or after controls (i.e. current and past criminality). A similar finding of equality was identified in Welsh and Ogloff's (2008) study on the impact of the 1996 reforms to the Canadian Criminal Code which introduced a specific Aboriginal provision (s.718.2(e))<sup>3</sup>. There were no significant differences in the likelihood of Aboriginal and non-Aboriginal defendants receiving a custodial disposition either prior to or after adjusting for past and current criminality, context of current offence, court processing factors, social history characteristics<sup>4</sup>, and offenders' rehabilitative efforts (Welsh and Ogloff, 2008: 503-504). However, these results are more likely applicable to Canadian higher court sentencing rather than lower court, due to sample limitations. For example, the sample was drawn from an electronic legal database which did not contain all, especially less serious cases heard in busy courts, criminal sentencing decisions (Welsh and Ogloff, 2008: 497).

### ***New Zealand Māori Sentencing Disparities Research***

In New Zealand, there are two published and publicly available multivariate statistical explorations of Indigenous sentencing disparity (see Deane, 1995; Triggs, 1999). Both studies found no evidence of direct negative or positive discrimination against Māori defendants, but rather support for the differential involvement hypothesis. Deane's (1995) study of defendants sentenced in one district court in New Zealand in 1989 found that, when Māori and non-Māori appeared before the court for similar offences with comparable criminal histories, they were equally likely to be sentenced to a term of imprisonment. Similarly, Triggs (1999), in an analysis of sentencing outcomes for all cases New Zealand-wide

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<sup>2</sup> The majority of misdemeanours are equivalent to the types of offences heard in Australian lower courts.

<sup>3</sup> In 1996, parliamentary reforms to the Canadian Criminal Code created a set of guidelines for the sentencing of all offenders including a specific provision recognising the unique circumstances of Indigenous defendants: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders" (s.718.2(e))

<sup>4</sup> Sex and age at sentencing was missing from this analysis.

involving an imprisonable offence<sup>5</sup> in 1983, 1987, 1991 and 1995, found no difference between Māori and non-Māori defendants, after controlling for plea, frequency and seriousness of current and past offending, age and gender.

### ***Indigenous Australian Sentencing Disparities Research***

Compared to the United States, Canada and New Zealand, the use of multivariate statistical techniques to explore the impact of Indigenous status on sentencing has been more prolific in Australia (see Snowball and Weatherburn 2006, 2007; Jeffries and Bond, 2009; Bond and Jeffries, 2010a; Bond and Jeffries, 2011a; Bond and Jeffries, 2011b; Bond and Jeffries, 2011c; Bond, Jeffries and Loban, 2011; Bond, Jeffries and Weatherburn, 2011). Furthermore, Australian sentencing scholars have generally included a wider range of sentencing factors than international research in this area. The findings of this research are varied, with outcomes somewhat dependent on jurisdiction (e.g. Western Australia versus New South Wales), court level (i.e. higher or lower) and the sentence outcome being studied (e.g. imprisoned/not imprisoned versus length of imprisonment term). Note that the focus has been primarily on imprisonment outcomes (cf. Bond and Jeffries, 2011e). Collectively, these sentencing studies are strongly supportive of differential involvement as an explanation for at least some of the initial baseline differences between Indigenous and non-Indigenous defendants, regardless of jurisdiction or court level. However, evidence of both positive and negative discrimination has been found. Overall, in higher court sentencing, there is parity or leniency towards Indigenous defendants in the decision to imprison, but mixed findings for length of prison term. In contrast in the lower courts, Indigenous defendants are more likely to receive a prison term (based on a single study in Queensland, see Bond and Jeffries, 2011a), with shorter prison sentences (based on a single study in New South Wales, see Bond, Jeffries and Weatherburn, 2011). Thus, the focus of this research has been on custodial outcomes.

Below, we briefly review the findings by jurisdiction.

#### ***New South Wales***

Snowball and Weatherburn (2006) are the first Australian researchers to investigate, using multivariate statistical techniques the direct impact of Indigenous status on sentencing. Using a sample of adult offenders (with legal representation, no past prison sentence, and not on remand for another offence) sentenced in New South Wales' higher and lower courts combined, Snowball and Weatherburn (2006) found no significant difference between Indigenous and non-Indigenous offenders in the likelihood of imprisonment, after controlling for a large range of factors including current and past offending, plea, age and sex. In their 2007 study, which broadened their original sample to include *all* convicted offenders, Snowball and Weatherburn made similar findings. The higher rate of Indigenous offenders sentenced to prison in New South Wales could be explained in the most part by two particular variables: more serious and more frequent nature of their current and past offending; and more frequent breach of noncustodial sanctions (Snowball and Weatherburn, 2007).

Bond, Jeffries and Weatherburn (2011) examined the impact of Indigeneity on length of imprisonment sentences in the New South Wales higher (i.e. District and Supreme Courts) and lower courts (i.e. Local Courts) after controlling for sex, age, criminal history factors, current offence seriousness and plea. Results from the higher court analysis suggested that

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<sup>5</sup> This study includes offences that would be heard in both higher and lower courts in Australia.

Indigenous status did not have a direct negative influence on length of imprisonment orders. In the lower courts, being Indigenous reduced the length of term imposed, after adjusting for controls (Bond, Jeffries and Weatherburn, 2011).

### *Western Australia*

Using higher court data (i.e. District and Supreme Courts) from Western Australia, Bond and Jeffries (2010) examined whether Indigenous women were more likely than non-Indigenous women to receive a sentence of imprisonment over a ten-year period (1996 to 2005). After controlling for age, plea, current and past offending, Indigenous women were less likely than their non-Indigenous counterparts to receive a prison sentence when being sentenced under similar circumstances to non-Indigenous females (Bond and Jeffries 2010: 7). However, as remand status was not able to be included in the analysis, the findings are tentative.

In later research which explored the decision to imprison and length of imposed prison term for all sentenced offenders in Western Australia's higher courts, after a wide range of controls, there was no evidence of statistically significant difference in the likelihood of a prison sentence between Indigenous and non-Indigenous offenders (Bond and Jeffries, 2011b). The majority of the initial difference by Indigenous status was explained by the variance in the past and present offending of the Indigenous versus non-Indigenous defendants (Bond and Jeffries, 2011b: 271-272). However, there was evidence that Indigenous offenders received on average shorter sentences, after adjusting for social background and history characteristics, current and past criminality, offence context, and court processing factors (Bond and Jeffries, 2011c).

### *Queensland*

There is evidence of parity in the decision to imprison between Indigenous and non-Indigenous defendants sentenced in Queensland's higher court (Bond and Jeffries, 2011a). After the introduction of controls for social characteristics (e.g. age, gender, familial situation, employment status), current and past criminality, the context of offence commission (e.g. presence of co-offenders, evidence of premeditation), court process (e.g. remand, plea), culpability/blameworthiness factors (e.g. substance abuse, health status), Indigenous and non-Indigenous defendants were equally likely to be sentenced to a prison term. In contrast to the higher courts, Bond and Jeffries' (2011a) analysis of Indigenous status and sentencing in Queensland's Magistrates Courts found Indigenous offenders remained significantly more likely than non-Indigenous offenders to be sentenced to prison, net of other sentencing factors.

In one of the few known multivariate studies of non-imprisonment sentencing outcomes, Bond and Jeffries (2011e) found differences between Indigenous and non-Indigenous outcomes in Queensland's higher courts. Net of social background characteristics, past and current criminality and court processing factors, Indigenous offenders were more likely (than non-Indigenous offenders) to receive a suspended sentence of imprisonment or a type of supervised order versus other non-imprisonment orders (such as good behaviour bonds and community service orders).



### *South Australia*

In South Australia, Jeffries and Bond (2009) analysed a matched sample<sup>6</sup> of Indigenous and non-Indigenous offenders sentenced in the higher courts. The study found that Indigenous offenders were less likely than their non-Indigenous defendants to be sentenced to imprisonment, independent of other factors. Indigenous status, in this sample, had a direct yet positive impact on the decision to imprison. However, after controls, Indigenous offenders received longer periods of incarceration than similarly situation non-Indigenous offenders (Jeffries and Bond, 2009).

Indeed, in later qualitative analyses of higher court sentencing remarks in South Australia, Jeffries and Bond (2010a: 15) found that differences in judicial assessments around culpability and risk of Indigenous and non-Indigenous offenders. For example, compared with non-Indigenous offenders, judicial descriptions of Indigenous familial circumstances during sentencing were more frequently rooted in dysfunction and trauma, especially the “dislocation or isolation from community and culture, living in communities ravaged by dysfunction, and relative societal marginalisation and disadvantage” (Jeffries and Bond, 2010a: 15). Further, imprisonment was construed as a harsher form of punishment for Indigenous offenders and as a significant social cost to Indigenous communities (Jeffries and Bond, 2010a: 15-17). However, the opposite direction for sentence length may be an artefact of the earlier lenience at the initial sentencing stage (Jeffries and Bond, 2009: 67): “[p]erhaps judges in South Australia felt, after giving Indigenous offenders numerous ‘chances’ by diverting them from custody, that community/political expectations pertaining to retribution, incapacitation and deterrence needed to be prioritised”. However, we do not know if the same judicial assessments around Indigeneity occur in lower court decision-making in South Australia.

### **Other Key Factors Influencing Sentencing**

As prior research has shown, to determine the separate independent impact of Indigenous status on sentencing outcomes, it is vital to disentangle the effects of other sentencing determinates (von Hirsch and Roberts, 1997) We briefly identify other key sentencing factors that may influence the sentencing decision.

#### ***Legislative context***

Sentencing courts in Australia generally have a broad discretion to consider a range of circumstances about offenders and their offences. In South Australia, sentencing is governed by the *Criminal Law (Sentencing) Act 1988*. Section 10(1) sets out a list of matters to which the court must have regard when sentencing offenders. These include (but are not limited to): (1) the seriousness of the offence (e.g. if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character); (2) the degree to which the defendant has shown contrition for the offence (e.g. if a defendant pleads guilty to the offence charged); (3) the characteristics of the defendant (e.g. age, criminal antecedents); (4) the impact of sentencing on the offender and others (e.g. on the likelihood of being rehabilitated, on any dependants of an offender). Remand status may also be taken into account by judges/magistrates (e.g. reduction of sentenced prison term). Further, special consideration may be given to Indigenous offenders. Before sentencing Indigenous defendants, the court may, with the defendant’s consent and the assistance of an Aboriginal Justice Officer,

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<sup>6</sup> Offenders were matched by seriousness of current sentenced offence, number of sentenced offences, number of prior criminal convictions, court type and plea.

convene a sentencing conference and take into consideration view expressed at the conference (s.9c).<sup>7</sup>

New South Wales' sentencing process is governed by the *Crimes (Sentencing Procedure) Act 1999* (see Division 1). In determining the appropriate sentence for an offence, the court is to take into account an extensive range (listed in ss.21A(2) and (3)) of aggravating and mitigating circumstances which can be broadly grouped into four categories of factors: (1) the nature/seriousness and impact of the crime (e.g. use of violence, whether or not the offence occurred as series of criminal acts); (2) offender characteristics (e.g. re-offending risk including prior criminal history, age); (3) victim characteristics; (4) contextual factors about the commission of the offence. However, while the court is directed to take into account this list of factors, section 21A[5] states that "the fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence". Further, in section 21A(1c), judicial officers may also consider any other objective or subjective factor that affects the relative seriousness of the offence when making sentencing decisions. However, under sections 22(1) and 24(a)(b), judicial officers must take into account: (1) a plea of guilt by imposing a lesser penalty than it would otherwise have imposed; (2) any time for which the offender has been held in custody in relation to the convicted offence.

Compared to sentencing legislation in South Australia and New South Wales, the Western Australian *Sentencing Act 1995* is less prescription in terms of providing details about what should and should not be taken into account at sentencing. The underlying principle is that the sentences must be commensurate with the seriousness of the offence (s.6(1)). In section 6(2), the seriousness of an offence is to be determined by taking into account: the statutory penalty for the offence, the circumstances of the commission of the offence, and any aggravating factors and mitigating factors. Aggravating factors are those circumstances which, in the court's opinion, increase the culpability of the offender (s.7(1)). However, an offence is not aggravated by an offender's prior criminal history or decision to plead not guilty (s.7(2)). Similarly, mitigating factors those circumstances which, in the court's opinion, decrease the culpability of the offender or the extent to which the offender should be punished (s.8(1)). While not guilty pleas cannot be considered aggravating, guilty pleas can mitigate sentence severity, especially if made (or indication is given that they will made) early in the court process (s.8(2)). When a prison sentence is imposed, judges/magistrates can take time on remand into account by either reducing the term or ordering the term to start on a prior date when the offender was remanded.

Previous research has shown that case characteristics like those commonly noted in sentencing legislation (i.e. current crime serious, remand, plea, criminal history, age) impact judicial sentencing decisions. Other factors highlighted in the prior research important in determining penalties (e.g. gender) may not specifically noted in legislation, but are linked to other aggravating and mitigating circumstances (e.g. childcare).

### ***Prior evidence of important predictors of sentencing outcomes***

Three key groups of predictors of sentencing outcomes can be seen in prior studies of sentencing. Within each category, a range of aggravating and mitigating factors have been used in prior research and recognised in sentencing legislation. Here, we identify the most common predictors across sentencing disparities studies. Further, these factors are also the

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<sup>7</sup> This is an adaption of the earlier Nunga Court initiative.

most likely to be available in administrative court databases—an important issue for study feasibility.

### *Offender social background characteristics*

In addition to Indigenous status, past research has shown that offenders' social histories may mitigate sentencing outcomes. For instance, sex and age often impact judicial focal concerns around assessments of blameworthiness/risk, practical constraints and may also trigger stereotyping (Steffensmeier, Ulmer and Kramer 1998; Johnson 2003; Wu and Spohn, 2009; Jeffries and Bond, 2010b). This makes adjusting for both age and sex especially important in studies of sentencing outcomes.

### *Prior and current criminal offending*

Research consistently shows that current crime seriousness and criminal history are key predictors of sentencing outcomes (Hagan, 1975; Pennington and Llyod-Bostock, 1987; Albonetti, 1991; Bickle and Peterson, 1991; Hesketh and Young, 1994: 49-52; Ashworth, 1995: 131-164; Rattner, 1996; Spohn, 2000; Mitchell, 2005). Offence seriousness is typically measured by statutory classifications or prescribed penalties (White and Perrone, 2005: 155) and the number of concurrent offences or convictions. Prior criminal history is generally measured by the number of prior convictions, but may also include the period of time between convictions and a history of similar offending (e.g. Hagan, 1975; Albonetti, 1991; Ashworth, 1995; Jeffries, Fletcher and Newbold, 2003).

### *Court processing factors*

Type of plea and bail outcome have been identified as potentially important influences on sentencing outcomes. Refusal by police and previous judicial actors to release offenders back into the community may influence judges' perceptions of risk (Jeffries, Fletcher and Newbold, 2003; Jeffries and Bond, 2009). Guilty pleas may be associated with sentencing outcomes, although this may be due to expression of remorse (i.e. reduced blameworthiness) inherent in that plea, or due to the saving of time and work to the court and its personnel (i.e. practical constraint) (White and Perrone, 2005: 155).

## **Aims of the current research**

To date, there have been few systematic investigations of lower court sentencing disparity between Indigenous and non-Indigenous offenders in Australia, even though:

- this is where the majority of offenders are sentenced
- baseline lower court data shows that Indigenous people are more likely to be imprisoned than non-Indigenous offenders (see Baker, 2001; Castle and Barnett, 2000; Loh and Ferrante, 2003)
- the sparse research on lower courts suggests that lower court sentencing around the imprisonment decision may be quite different than the patterns found in the higher courts.

Furthermore, there are no comprehensive published analyses of judicial decision making regarding monetary order imposition in Australia, despite the fact that both academic and government commentators express unease about the differential impact of fining and fine default on Indigenous people (e.g. Queensland Government, 1998; Blagg et al., 2005; Commonwealth of Australia, 2011; Spiers-Williams and Gilbert, 2011). The relative

disadvantage (e.g. inability to pay) experienced by Indigenous persons, combined with cultural difference and language barriers, disproportionately increases the likelihood of fine default by Indigenous defendants, which in turn, culminates in a series of events that eventually lead to imprisonment (e.g. imposition of a community based order on a fine defaulter which if breached can result in a prison sentence) (see most recently, Commonwealth of Australia, 2011: 230-232; Spiers-Williams and Gilbert, 2011).

Thus, there is a need for empirically rigorous research on Indigenous sentencing disparity that focuses specifically on mainstream adult lower court sentencing outcomes, and examines both custodial and non-custodial outcomes. The current research will address this gap, by examining the relationship between Indigenous status, and imprisonment and monetary orders in three Australian jurisdictions (South Australia, New South Wales and Western Australia). Other sentencing outcomes are outside the scope of the current project.

### ***Research questions***

The current research focuses on two key research questions:

3. Does the severity of penalty (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances (e.g. with comparable criminality)?
4. Does the magnitude of penalty (length of imprisonment term and amount of monetary order) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances (e.g. with comparable criminality)?

Drawing on court administrative data from the adult lower criminal courts in South Australia, New South Wales and Western Australia, we use multivariate techniques to disentangle the independent effect of Indigenous status from other key sentencing factors. In the following chapters, we report the results of these analyses of sentencing outcomes for Indigenous versus non-Indigenous adults by lower court jurisdiction.

## CHAPTER 2: INDIGENEITY AND LOWER COURT SENTENCING IN SOUTH AUSTRALIA

### Introduction

This chapter presents results of our statistical analyses of defendants convicted in South Australia's Magistrates Courts between 2005 and 2007. The purpose of these analyses is to explore in South Australian lower criminal courts: (1) whether sentencing outcomes (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear under similar circumstances; and (2) whether sentence weightings (length of imprisonment term and monetary order amount) differ between Indigenous and non-Indigenous offenders when they appear under similar circumstances. In this chapter, we report:

- baseline differences between Indigenous and non-Indigenous defendants in sentencing outcomes, social background, past and current criminality and court processing status
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to imprison and length of term
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to impose a monetary order and amount of order.

### Data and Methods

We rely on data on cases resulting in a conviction between 2005 and 2007 in the South Australian Magistrates Court. These data were obtained from the South Australian Office of Crime Statistics and Research's court database which tracks criminal cases through the court system, augmented by information from South Australian Police criminal history data and Department of Correctional Services. Sentencing outcomes in these data are for cases convicted, rather than individual offenders<sup>8</sup>. This means that individual offenders may appear more than once in the data. The use of cases as the unit of analysis is common in sentencing disparities research; the presence of repeat defendants is taken into account in our analyses (see later). Between 2005 and 2007, there were a total of 135,223 convicted court cases in the South Australian Magistrates Court. Approximately 6.9% of cases were lost due to data entry errors and missing data. Thus, our analysis relies on 125,902 cases. Of which, 11.19% were identified as Indigenous, 20.16% were female, and the mean age was over 32.03 years.

### Measures

The dependent variable (the sentence decision) is treated as a two-stage process: (1) the decision to imprison<sup>9</sup> (or not) for the principal offence<sup>10</sup> and the decision to impose a monetary order (or not) for the principal offence; (2) the length of the imprisonment term imposed for the principal offence and monetary order amount for the principal offence. We

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<sup>8</sup> Note while our analyses relates to cases, we will use the term "offender" for ease of reference.

<sup>9</sup> For the purposes of this study, we define imprisonment ("in") as only including orders of immediate incarceration in a custodial facility.

<sup>10</sup> By principal offence, we refer to the offence that received the highest sentencing penalty (ranked from 1–10 with 1 being imprisonment and 10 being no penalty) (see South Australian Office of Crime Statistics and Research, 2004:188 for a description). If two offences received the same penalty, the offence with the highest statutory penalty attached is recorded as the principal offence. If the charges are the same, the first charge is recorded as the principal offence (see South Australian Office of Crime Statistics and Research, 2004).

code the most serious penalty attached to the principal offence. Note there are legislative limits placed on sentencing in South Australia's lower courts: magistrates may not impose for any single offence a sentence of imprisonment that exceeds two years, or a fine that exceeds \$150,000 (s.19(3) *Criminal Law (Sentencing) Act 1988* [SA]).

We include three groups of independent variables in our analysis of the relationship between Indigenous status and sentencing. These were determined based on the matters listed in the South Australian *Criminal Law (Sentencing) Act 1988* and other factors highlighted in past studies as influential to sentencing decisions (see discussion in Chapter 1). Our models included:

- *Offender social background characteristics.* We use measures of Indigenous status, sex, and age at disposition.
- *Prior and current criminal offending.* Prior criminal history is measured through two variables: number of prior conviction counts and presence of prior imprisonment term. The seriousness of principal offence is measured by the reverse coded National Offence Index score and the presence of multiple convictions.
- *Court processing factors.* In addition to the presence of a guilty plea and bail status, we include a measure of the imposition of a global sentence. In our length of term and monetary amount models, we include a control for global sentencing: under s.18A of the *Criminal Law (Sentencing) Act 1988*, "if a person is found guilty by a court of a number of offences, the court may sentence the person to the one penalty for all or some of those offences". Global sentencing can inflate the length and amount attached to the principal offence's sentence because the penalty recorded applies to a cluster of convictions.

The coding of the variables is summarised in Appendix A.

### ***Stages of Analysis***

To explore the direct effect of Indigenous status on sentencing outcomes, we conduct our analyses in two stages. First, we examine the baseline differences between Indigenous and non-Indigenous defendants. Second, we identify the direct effect of Indigenous status on sentencing outcomes, adjusted for other sentencing factors (e.g. current and past criminality). Results from each analysis stage are presented below.

#### **Stage 1: Baseline Differences by Indigenous Status**

Tables 2.1 and 2.2 report the descriptive statistics for the full population, as well as by Indigenous status. As shown in Table 2.1, there were differences between Indigenous and non-Indigenous offenders for all sentencing outcomes. Compared to non-Indigenous offenders, a greater proportion of Indigenous defendants were sentenced to a prison term (5.42% vs. 1.84%), but a lower proportion received a monetary order (32.75% vs. 37.32%). Once sentenced to either prison or a monetary order, Indigenous offenders average sentence length or amount is lower than non-Indigenous offenders. On average, Indigenous defendants sentenced to prison received a mean term of 194.33 days, while non-Indigenous defendant's terms were 224.62 days. The mean monetary amount for Indigenous defendants sentenced to a monetary order was \$191.57, compared to \$244.24 for non-Indigenous offenders.

**Table 2.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902)**

Sentence Order	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Type of order</i>			
% received imprisonment order	2.24	5.42	1.84
% received monetary order	36.81	32.75	37.32
<i>Duration of order</i>			
Mean length imprisonment order (in days)	216.43 (309.47)	194.33 (316.01)	224.62 (290.12)
Median length	91.00	91.00	91.00
Mean amount monetary order (in dollars)	239.00 (521.66)	191.57 (191.12)	244.24 (545.79)
Median amount	164.00	150.00	175.00
Total number of cases	125,902	14,084	111,818
Total number of cases with imprisonment orders	2,822	763	2,059
Total number of cases with monetary orders	46,349	4,613	41,736

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As the duration of order is skewed (for length, skewness statistic of 3.28; for amount, skewness statistic of 28.90), medians are also reported.
- As this shows the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that, with one exception (imprisonment length), all differences between Indigenous and non-Indigenous offenders are statistically significant at the  $p < 0.05$ . Although the mean difference in length was statistically significant, the test of equality of median length between Indigenous and non-Indigenous cases was not statistically significant at the  $p < 0.05$  level.
- Global sentences were imposed in 68.6% of cases with imprisonment orders and 25.34% of cases with monetary orders. In particular, the length of imprisonment for the principal offence exceeds 2 years in just under 5% (or 140) cases.

The baseline sentencing outcomes (reported in Table 2.1) suggest Indigenous/non-Indigenous sentencing disparity. However, as shown in Table 2.2, there are key differences by Indigenous status in other sentencing factors that might explain initial base-line sentencing disparities. For example, substantial differences in prior and current offending are evident and these could potentially explain why Indigenous defendants are more likely to be sentenced to prison. Compared with non-Indigenous offenders, Indigenous defendants' prior offending appeared more frequent and more serious. On average, Indigenous offenders had a mean of just over 31 prior convictions, and almost 40% had served a prior term of imprisonment. For non-Indigenous offenders, the mean number of prior convictions is just over 12, and almost 15% had been previously incarcerated. Further, the mean seriousness of the current sentenced principal offence is higher for Indigenous than non-Indigenous defendants (50.69 vs. 48.24), and a larger proportion of Indigenous offenders (93.5% vs. 88.3%) are sentenced for multiple offences. Indigenous defendants were also slightly younger, more likely to be female, and not be released on bail, but less likely to have pled guilty or to have received a global sentence (see Table 2.2).

**Table 2.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902)**

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Social background</i>			
% Indigenous	11.19	---	---
% Female	20.16	28.83	19.06
Mean age at disposition	32.03 (10.82)	31.00 (9.26)	32.15 (10.99)
<i>Prior and current criminal offending</i>			
Mean prior convictions	14.39 (24.76)	31.01 (37.70)	12.29 (21.73)
Median prior convictions	5.00	17.00	4.00
% Presence of prior imprisonment term	17.61	39.90	14.80
Mean seriousness of principal offence	48.52 (41.24)	50.69 (39.52)	48.24 (41.45)
% Convicted of multiple counts	45.98	43.95	46.23
<i>Court processing factors</i>			
% Entered a plea of guilty	86.65	82.65	87.16
% No bail	10.68	19.41	9.58
% Global sentence imposed	38.38	34.61	38.85
Total number of cases	125,902	14,084	111,818

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As prior convictions is skewed (skewness statistic of 3.39), the median is also reported. (Age and offence seriousness had skewness statistics below 1.0).
- As this shows the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that all differences (mean, rank and proportional) between Indigenous and non-Indigenous offenders are statistically significant at  $p < 0.05$ .

## Stage 2: Adjusted differences in sentencing outcomes by Indigenous status

Two logistic regression models were estimated to identify the direct effect of Indigenous status on the likelihood of imprisonment (versus non-imprisonment order) and the likelihood of a monetary order (versus another non-imprisonment order), controlling for social background, past and current criminality and court processing factors. The results are reported as odds ratios (OR), which can be interpreted as multiplier of the likelihood of receiving that sentencing outcome (rather than the other outcome) for a one-unit increase in the predictive factor of interest. An odds ratio greater than 1.0 indicates increasing odds, and values less than 1.0 indicates decreasing odds. Two negative binomial regression models<sup>11</sup> were estimated to determine the direct effect of Indigenous status on length of prison term and amount of monetary order, after controlling for other sentencing factors. We report the incident rate ratios (IRR) from these models. To interpret, incident rate ratios are a multiplier of the count (number of day for imprisonment, dollar for monetary orders), with values greater than 1.0 indicating an increase in the number of days/dollars and values less than 1.0 indicating a reduction in the number of days or dollars. In all models, robust standard errors were calculated to adjust for repeat appearances of offenders in the population being analysed. The results are presented in Tables 2.3 to 2.6.

<sup>11</sup> The length and amount variables are skewed. Conventionally, a logged OLS model is used. However, we have chosen to use the negative binomial model as it allows us to take account of the skewness of the dependent variable, but also produces more interpretable coefficients.



### ***Indigeneity and the Likelihood of Imprisonment***

Table 2.3 summarises the logistic regression results of the decision to imprison in the South Australian lower courts. Of particular interest, we find that after controlling for other sentencing factors, Indigenous defendants are more likely than non-Indigenous offenders to receive an imprisonment order (compared to other outcomes). The baseline difference in the imposition of imprisonment by Indigenous status (reported in Table 2.1) equates to an odds ratio of 3.05 ( $p < 0.001$ ). That is, Indigenous defendants are just over three times as likely as non-Indigenous defendants to receive a prison sentence (versus other penalties). After adjusting for social background, past and current criminality and court processing factors, the odds of imprisonment decrease to 1.27 ( $p < 0.001$ ). Or, Indigenous offenders are 1.27 times as likely as non-Indigenous offenders in comparable circumstances to receive a prison sentence.

**Table 2.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (South Australia, 2005-2007, N=125,902)**

	B	s.e.	O.R.
<i>Social background</i>			
Indigenous	0.242***	0.065	1.274
Female	-0.587***	0.094	0.556
Age at disposition	-0.027***	0.003	0.974
<i>Past and current offending</i>			
Prior conviction count	0.013***	0.001	1.013
Prior imprisonment	1.864***	0.069	6.450
Seriousness principal offence	0.015***	0.001	1.015
Multiple conviction counts	1.457***	0.051	4.292
<i>Court processing factors</i>			
Plea of guilt	0.381***	0.086	1.464
No bail	0.394***	0.053	1.483
Constant	-6.296***	0.131	
$\chi^2$ (d.f.)	7187.03(9)***		
Pseudo R <sup>2</sup>	26.60		
% correctly classified	97.74		

#  $p < 0.10$ ; \*  $p < 0.05$ ; \*\*  $p < 0.01$ ; \*\*\*  $p < 0.001$

Notes:

- Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 70,214 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- The variable 'global sentence' is not included in this model, as it is a factor related to length of sentence, rather than sentence type.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

Thus, the base-line difference in imprisonment orders is partially explained by Indigenous/non-Indigenous differences in other key sentencing factors, supporting the differential involvement hypothesis. Nonetheless, there remains evidence of negative discrimination. This finding may appear somewhat contradictory to the most prior Australian research which is broadly unsupportive of the negative discrimination thesis. However, this prior work was primarily conducted within higher court settings. There is only one published study of the initial decision to imprison by Indigenous status at the lower court level: this research showed that Indigenous defendants in Queensland's Magistrates Courts were more

likely to be incarcerated than similarly positioned non-Indigenous offenders (Bond and Jeffries, 2011a).

The pattern of findings of the other sentencing factors largely conforms to expectations based on prior research (see Table 2.3). For instance, in line with past studies showing that prior criminal history and current offence seriousness are important predictors of sentencing outcomes (Mitchell, 2005; Steffensmeier and Demuth, 2006), more extensive criminal histories, more serious current offences, and presence multiple conviction counts increases the odds of an imprisonment order. Similarly, female offenders are less likely to be incarcerated than male offenders, and youthfulness decreases the odds of incarceration. These findings are consistent with an extensive body of sentencing research showing that women and younger offenders tend to be sentenced with more leniently (for sex and sentencing: see Daly and Bordt, 1995, and in Australia, see Jeffries and Bond, 2010b; for age and sentencing: see Wu and Spohn, 2009). In South Australia, the evidence of leniency towards female offenders may in part be explained by sentencing legislation, which requires sentencing judges to consider the impact of a particular sentence on a defendant's dependents (s.10(1)(n) *Criminal Law (Sentencing) Act, 1998* [SA]). Removal of a parent through imprisonment negatively impacts children; and in contrast to men, women are more frequently primary care givers.

However, the finding that the presence of a guilty plea increases the odds of imprisonment was unexpected. Theoretically, guilty pleas may reduce the likelihood of imprisonment due to its indication of remorse, or the saving of time and work to the court and its personnel (White and Perrone, 2005). As the data records the final plea entered by defendants, we do not know to what extent these pleas were made late in the process. Arguably, under these circumstances, sentencing discounts for pleas of guilt may not occur. Anecdotal evidence from ongoing qualitative analyses of sentencing remarks in higher courts being undertaken by the authors provides some support for this argument.

### ***Indigeneity and Imprisonment Length***

Table 2.4 presents the results from the negative binomial model for length of imprisonment term in South Australia's Magistrate Court. The initial baseline difference in length of imprisonment term by Indigenous status (provided in Table 2.2) equates to an incident rate ratio of 0.87 ( $p < 0.05$ ). In other words, Indigenous defendants had prison terms 87% of the terms of non-Indigenous defendants. Even after adjusting for other social background characteristics, past and current criminality and court processing factors, Indigenous defendants (compared to non-Indigenous defendants) continued to receive shorter incarceration periods (IRR=0.84,  $p < 0.01$ ). The magnitude of this effect was similar to the baseline estimate. A finding of Indigenous sentencing leniency (i.e. positive discrimination) or equality at one sentencing stage, and harsher treatment at another, is a common feature in the Australian sentencing disparities research (see discussion of past Australian research in Chapter 1).

Of the other factors in the model, the presence of prior imprisonment and multiple conviction counts were important predictors of length of prison term. Unsurprisingly, a global sentence substantially increased length of term (see Table 2.4).

**Table 2.4. Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Lower Adult Courts (South Australia, 2005-2007, N=2,822)**

	B	s.e.	I.RR.
<i>Social background</i>			
Indigenous	-0.178**	0.054	0.837
Female	-0.137	0.088	0.872
Age at disposition	0.003	0.003	1.003
<i>Past and current offending</i>			
Prior conviction count	0.001#	0.001	1.001
Prior imprisonment	0.256***	0.059	1.292
Seriousness principal offence	0.015***	0.001	1.015
Multiple conviction counts	0.559***	0.085	1.748
<i>Court processing factors</i>			
Plea of guilt	0.008	0.067	1.008
No bail	0.017	0.049	1.018
Global sentence	0.637***	0.067	1.890
Constant	2.877***	0.113	
$\chi^2$ (d.f.)	1213.44(10)***		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 2,030 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered model), confirming the use of the negative binomial model.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and the Likelihood of Monetary Orders***

Table 2.5 summarises the logistic regression results of the decision to impose a monetary order in South Australia's Magistrates Courts. The analysis shows that the initial baseline difference (O.R=0.86, p<0.001) between Indigenous and non-Indigenous defendants remains after adjusting for the other key sentencing factors (OR=0.85, p<0.001). Indigenous defendants, compared to non-Indigenous defendants, are 0.85 times as likely to receive a monetary order (versus another non-imprisonment order). These lower odds may be due to judicial recognition of the relative economic disadvantage experienced by Indigenous Australians more generally.

In addition, monetary orders (compared to other non-imprisonment orders) were less likely for female defendants, those with multiple conviction counts defendants, and those who were not released on bail at some stage of the process (see Table 2.5). Interestingly, however, pleading guilty reduced the odds of a monetary penalty. As fines are relatively low in terms of sentence severity, sentencing discounts for plea may more likely in decisions about the ordered amount. However, this finding may also be due to the definition of the dependent variable: the reference category for monetary orders includes penalties such as good behaviour bonds and community service hours, which may be seen as more lenient sentencing options.

**Table 2.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Lower Adult Courts (South Australia, 2005-2007, N=123,080)**

	B	s.e.	O.R.
<i>Social background</i>			
Indigenous	-0.165***	0.028	0.848
Female	-0.228***	0.018	0.796
Age at disposition	-0.001*	0.001	0.999
<i>Past and current offending</i>			
Prior conviction count	-0.007***	0.001	0.993
Prior imprisonment	-0.097**	0.031	0.908
Seriousness principal offence	-0.006***	0.000	0.994
Multiple conviction counts	-1.536***	0.015	0.215
<i>Court processing factors</i>			
Plea of guilt	-1.367***	0.020	0.255
No bail	-0.282***	0.024	0.754
Constant	1.808***	0.031	
$\chi^2$ (d.f.)	22,334.64(9)***		
Pseudo R <sup>2</sup>	13.48		
% correctly classified	72.23		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- The analysis presented in this table is restricted to defendants receiving non-imprisonment outcomes. Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 69,801 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- The variable 'global sentence' is not included in this model, as it is a factor that relates to length of sentence rather than sentence type.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and Monetary Order Amount***

Table 2.6 reports the results of the negative binomial regression of monetary order amount in the South Australia's Magistrate Court. Without adjusting for other factors, Indigenous offenders received monetary orders on average \$50.00 lower than non-Indigenous offender (see Table 2.2), or 78% of the amount imposed on non-Indigenous offenders (IRR=0.78, p<0.001). After adjusting for other social background characteristics, past and current offending and court processing factors, the gap between Indigenous and non-Indigenous amounts closes, but a difference remains (IRR=0.84, p<0.001). In other words, when setting a monetary order amount, South Australian magistrates appear to treat Indigenous offenders more leniently at the decision stage of monetary amount: Indigenous defendants on average receive 84% of the amount ordered for non-Indigenous defendants in statistically similar circumstances. As was suggested earlier for the lower likelihood of a monetary penalty, this finding may be explained by the economically disadvantaged position of Indigenous defendants.

Female defendants, on average, had lower sentenced monetary order amounts. The presence of multiple conviction counts and the imposition of a global sentence increased the amount of the monetary order; while not being released on bail also increased the ordered amount (see Table 2.6).

**Table 2.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only, Lower Adult Courts (South Australia, 2005-2007, N=46,349)**

	b	s.e.	I.RR.
<i>Social background</i>			
Indigenous	-0.172***	0.015	0.842
Female	-0.210***	0.015	0.811
Age at disposition	0.005***	0.001	1.005
<i>Past and current offending</i>			
Prior conviction count	0.001#	0.001	1.001
Prior imprisonment	-0.081**	0.027	0.922
Seriousness principal offence	0.006***	0.000	1.006
Multiple conviction counts	0.507***	0.030	1.661
<i>Court processing factors</i>			
Plea of guilt	-0.088***	0.019	0.916
No bail	0.145***	0.022	1.156
Global sentence	0.259***	0.028	1.296
Constant	4.872***	0.025	
$\chi^2$ (d.f.)	15,349(10)***		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 34,858 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered model), confirming the use of the negative binomial model.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

## Summary

This chapter presented the key findings of statistical analyses of offenders convicted in South Australia's Magistrates Courts over a three year period (2005-2007). Its primary aim was to identify whether there was a relationship between Indigenous status, imprisonment and monetary sentencing outcomes, after controlling for other social background characteristics, past and present criminality and court processing factors.

The analyses showed that when sentenced under comparable circumstances, Indigenous offenders were: (1) more likely to receive a sentence of imprisonment, but once incarcerated received shorter terms; (2) less likely to receive a monetary order, and once ordered received lower monetary amounts. Thus, the findings are mixed. Although the inclusion of other sentencing factors reduced initial base-line differences between Indigenous and non-Indigenous offenders, a direct effect remained, with evidence in support of both the negative and positive discrimination hypotheses. Under seemingly similar circumstances, Indigenous defendants are either being sentenced more harshly or leniently than their non-Indigenous counterparts, depending on the decision.

## CHAPTER 3: INDIGENEITY AND LOWER COURT SENTENCING IN NEW SOUTH WALES

### Introduction

This chapter reports the results of our statistical analyses of defendants convicted in the New South Wales Local Courts between 2005 and 2007. Its purpose is to investigate in New South Wales lower criminal courts: (1) whether sentencing outcomes (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear under comparable circumstances; and (2) whether sentence weightings (length of imprisonment term and monetary order amount) differ between Indigenous and non-Indigenous offenders when they appear under comparable circumstances. Similar to the South Australian analyses (see Chapter 2), we report:

- baseline differences between Indigenous and non-Indigenous defendants in sentencing outcomes, social background, past and current criminality and court processing status
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to imprison and length of term
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to impose a monetary order and amount of order.

### Data and Methods

Our analyses are based on cases convicted between 2005 and 2007 in the New South Wales Local Court. These data were provided by the New South Wales Bureau of Crime Statistics and Research. Like the South Australian data, sentencing outcomes in the New South Wales data are court case-based, and not offender-based. We take account of the presence of repeat appearances in our analyses (see later). Between 2005 and 2007, there were a total of 327,656 convicted cases in the New South Wales Local Courts. Approximately 13.3% of these cases were lost due to data entry errors and missing data. Thus, our final analyses use 283,982 cases. Of these, 15.2% were identified as Indigenous, 18.1% were female, and the mean age was 32.2 years.

### Measures

We focus on the same dependent variables as used in the South Australian analysis. Treating the sentence decision<sup>12</sup> as a two-stage process, the dependent variables are: (1) the decision to imprison (or not) for the principal offence<sup>13</sup> and the decision to impose a monetary order (or not) for the principal offence; (2) the length of the imprisonment term imposed for the principal offence and monetary order amount for the principal offence. In New South Wales, magistrates may not impose for any offence a sentence of imprisonment that exceeds two

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<sup>12</sup> Recall we define imprisonment ("in") as only including orders of immediate incarceration in a custodial facility.

<sup>13</sup> By principal offence, we refer to "that offence charged which received the most serious penalty according to the following rules: a) where an offender was found guilty of more than one offence, the offence which received the most serious penalty type is the principal offence, b) where there were two or more offences which received the same penalty type, that offence which received the greatest quantum of that penalty type is the principal offence, c) if there was more than one offence with a custodial penalty [the penalty type ranked the most serious], the offence with the longest total sentence is selected as the principal offence. If there was more than one offence with a custodial penalty with the same quantum of total sentence, the offence with the longest non-parole period is selected as the principal offence" (New South Wales Bureau of Crime Statistics and Research, 2009: 132).

years, or a fine that exceeds 100 penalty units (which was approximately \$100 per penalty unit during the study period) (s.267 *Criminal Procedure Act 1986* [NSW]).

In measuring the independent variables, we attempted to ensure that definitions and coding were as close as possible to those used in the South Australian study. Again, there were three categories of independent variables (whose coding is summarised in Appendix A):

- *Offender social background characteristics.* Indigenous status, sex, and age at disposition were included.
- *Past and current offending.* Current offence seriousness was measured in the same way as in the South Australian study: reverse coded National Offence Index of the principal offence and the presence of multiple conviction counts. Prior criminal history was measured by a single variable: the number of prior court appearances, proven and unproven. Unlike in South Australia, the data did not include number of prior convictions or imprisonment terms.
- *Court processing factors.* Type of plea and bail outcome was available. Unlike in South Australia, global sentencing is not a legislative sentencing option in New South Wales, so is not included in our analysis.

### ***Stages of Analysis***

A two stage analysis was again used to explore the direct effect of Indigenous status on sentencing outcomes. First, we examine the baseline differences between Indigenous and non-Indigenous defendants. Second, we identify the direct effect of Indigenous status on sentencing outcomes, adjusted for other sentencing factors. Results from each analysis stage are presented below.

### **Stage 1: Baseline Differences by Indigenous Status**

Tables 3.1 and 3.2 report the descriptive statistics for the full population of cases, including by Indigenous status. The baseline pattern of results was similar to that found in South Australian lower courts (see Tables 2.1 and 2.2, Chapter 2). Compared to non-Indigenous offenders, Indigenous defendants in New South Wales lower courts were more likely to be sentenced to a prison term (18.01% vs. 5.88%), but less likely to receive a monetary order (38.85% vs. 47.78%). Once sentenced to a monetary order, the mean amount was lower for Indigenous defendants (\$405.06 compared to \$527.00 for non-Indigenous). However, in contrast to South Australia, there was no substantial difference in mean length of prison term by Indigenous status. On average, Indigenous defendants received imprisonment terms around four days longer than non-Indigenous offenders.

**Table 3.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982)**

Sentence Order	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Type of order</i>			
% received imprisonment order	7.72	18.01	5.88
% received monetary order	46.42	38.85	47.78
<i>Duration of order</i>			
Mean length imprisonment order (in days)	261.52 (172.36)	263.95 (175.86)	260.18 (170.39)
Mean amount monetary order (in dollars)	511.46 (574.33)	405.06 (316.95)	527.00 (601.20)
Median amount	400.00	308.00	450.00
Total number of cases	283,982	43,225	240,757
Total number of cases with imprisonment orders	21,935	7,784	14,151
Total number of cases with monetary orders	131,828	16,794	115,034

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As the amount of monetary orders is highly skewed (skewness statistic=44.02), medians for monetary amount is also reported. Surprisingly, length of imprisonment was not highly skewed (0.71).
- As the analysis is based on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that, with one exception (length of imprisonment), all differences between Indigenous and non-Indigenous cases are statistically significant at the  $p < 0.05$ . For length of imprisonment, test of equality of mean difference between Indigenous and non-Indigenous cases was not significant at  $p < 0.05$ .

The baseline data (reported in Table 3.1) suggest that Indigenous and non-Indigenous defendants sentenced in the New South Wales Local Courts may be treated differently. However, differences by Indigeneity in key sentencing determinants might explain these initial base-line disparities (see Table 3.2). First, there were substantial differences in current crime seriousness and criminal history. Compared to non-Indigenous offenders, Indigenous offenders had a higher mean number of prior court appearances (6.81 vs. 2.58); higher mean offence seriousness scores (59.87 vs. 56.04); and were more likely to have multiple conviction counts (46.2% vs. 33.3%). Compared to non-Indigenous offenders, Indigenous defendants were slightly younger, more likely to be female, and to not be released on bail. Fewer Indigenous defendants pled guilty. These New South Wales' baseline differences in offender and case characteristics are identical to those found in South Australia (see Table 2.2, Chapter 2).



**Table 3.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982)**

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Social background</i>			
% Indigenous	15.22	---	---
% Female	18.14	24.44	17.02
Mean age at disposition	32.16 (11.08)	30.41 (9.23)	32.47 (11.35)
<i>Prior and current criminal offending</i>			
Mean number of prior appearances	3.22 (4.64)	6.81 (6.10)	2.58 (3.99)
Median number priors	1.00	5.00	1.00
Mean seriousness of principal offence	56.62 (38.76)	59.87 (42.35)	56.04 (38.05)
% Convicted of multiple counts	35.29	46.16	33.34
<i>Court processing factors</i>			
% Entered a plea of guilty	79.55	74.82	80.40
% No bail	8.88	20.31	6.82
Total number of cases	283,982	43,225	240,757

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As the number of prior appearances is skewed (skewness statistic=3.84), the median is also reported. The skewness statistics for the other continuous variables (age and offence seriousness) are below the absolute value of 1.
- As the analysis is based on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that all differences between Indigenous and non-Indigenous cases are statistically significant at the  $p < 0.05$ .

## Stage 2: Adjusted differences in sentencing outcomes by Indigenous status

Logistic regression models were again used to examine the extent to which Indigenous status impacts the likelihood of receiving a prison term and a monetary penalty, controlling for social background, criminality (past and current) and court processing factors. Similarly, negative binomial regression models were estimated to determine whether Indigenous status has a direct effect on the length of sentenced prison term and monetary order amount after controlling for other sentencing factors. (Recall that an odds ratio and an incident rate ratio of 1.0 indicates parity; values greater than 1.0 represent increasing odds or count; and values less than 1.0 represent decreasing odds or counts.) The results are summarised in Tables 3.3 to 3.6.

### *Indigeneity and the Likelihood of Imprisonment*

Table 3.3 reports the results of the logistic regression model of the decision to imprison in the New South Wales Local Court. As can be seen in Table 3.3, Indigenous status has a direct impact on the likelihood of imprisonment, net of other key sentencing variables. Without controlling for other differences in sentencing factors, Indigenous offenders are 3.52 ( $p < 0.001$ ) times as likely to have an imprisonment order (versus non-imprisonment order), compared to non-Indigenous offenders. The introduction of other sentencing factors into the model reduces the baseline odds ratio to 1.23 ( $p < 0.001$ ). Thus, while the differential involvement hypothesis provides a partial explanation for the baseline differences in imprisonment orders, the continued—although reduced—direct effect suggests negative discrimination. As in the South Australian study (see Table 2.3 and Chapter 2) and in a prior sentencing analysis in Queensland lower courts (see Bond and Jeffries, 2011a), Indigenous

offenders in New South Wales are more likely to be imprisoned at the lower court level, than non-Indigenous defendants in statistically comparable circumstances.

**Table 3.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Adult Lower Courts (New South Wales, 2005-2007, N=283,982)**

	b	s.e.	O.R.
<i>Social background</i>			
Indigenous	0.205***	0.040	1.228
Female	-0.578***	0.036	0.561
Age	0.006***	0.001	1.006
<i>Past and current offending</i>			
Prior appearances count	0.123***	0.007	1.131
Seriousness principal offence	0.008***	0.000	1.008
Multiple conviction counts	1.031***	0.021	2.805
<i>Court processing factors</i>			
Plea of guilt	0.252***	0.028	1.286
No bail	3.698***	0.023	40.383
Constant	-5.638***	0.069	
$\chi^2$ (d.f.)	78,834.46(8)***		
Pseudo R <sup>2</sup>	51.04		
% correctly classified	95.44		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 194,991 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- See footnote 14 re prior appearances count.
- Results of tests of significance are provided. As the analysis is based on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required.

The influence of social background, past criminality and seriousness of current offence are generally consistent with past research as well as the findings from South Australian lower courts (see Table 2.3, Chapter 2). For instance, in Table 3.3, the likelihood of imprisonment was independently increased for those with more serious current criminality and prior offending histories. Male defendants were more likely to be incarcerated than women. Again, we found guilty plea increased the odds of imprisonment, net of other factors. As we previously speculated, this may be due to the timing of the plea of guilt, with late pleas not attracting strong sentencing discounts. However, we are unable to test this hypothesis, as information on the timing of plea was not available in our data.

One particular finding needs to be noted. The magnitude of the odds ratio for bail status (not released on bail) is surprisingly large: net of other factors in the model, those not released on bail are 40.38 (p<0.001) times as likely to receive a prison sentence (compared to those on bail). Cross-tabular analyses showed that there was a strong relationship between imprisonment order, prior appearances and bail status. For example, only 2.78% of cases without bail did *not* receive a prison sentence.<sup>14</sup> Until recently (but during the study period),

<sup>14</sup> One option was to remove this variable from the model. However, there were convergence problems when the model was estimated without bail status. This problem can be resolved by dichotomising the prior appearances variable; however, this inflates the estimate for Indigenous status (as would be expected from international findings that crude measures of prior history result in larger estimates of the effect of race/ethnicity: see Mitchell, 2005). We note that the pattern of direction of

there was a strong presumption for bail in New South Wales. Thus, although we recommend caution in interpretation, the failure to be released on bail is a strong indicator of serious offences and/or aggravating circumstances, and the perceptions of danger and risk inherent in this type of offending.

### ***Indigeneity and Imprisonment Length***

Table 3.4 presents the negative binomial results for length of imprisonment term in the New South Wales lower courts. Before controlling for social background characteristics, past and present criminality and court processing factors, the effect of Indigenous status was minimal (IRR=1.01, n.s.). Table 3.2 shows that Indigenous defendants received on average terms that were approximately four days longer than non-Indigenous defendants. The independent effect of Indigenous status remained minimal, after adjusting for other sentencing factors, although its direction reversed (IRR=0.99, n.s.). This result suggests sentencing equality. In other words, at this sentencing decision making point, there is little support for the differential treatment of Indigenous offenders.

**Table 3.4 Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Adult Lower Courts (New South Wales, 2005-2007, N=21,935)**

	B	s.e.	IRR.
<i>Social background</i>			
Indigenous	-0.007	0.011	0.993
Female	-0.148***	0.017	0.863
Age	0.002**	0.001	1.002
<i>Past and current offending</i>			
Prior appearances count	0.000	0.001	1.000
Seriousness principal offence	0.003***	0.000	1.003
Multiple conviction counts	0.254***	0.011	1.289
<i>Court processing factors</i>			
Plea of guilty	0.014	0.012	1.014
No bail	0.056***	0.011	1.058
Constant	5.091***	0.028	
$\chi^2(d.f.)$	1158.08(8)***		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 15,107 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered models), confirming the use of the negative binomial model.
- The estimated coefficient for prior appearances is 0.00005 (s.e.=0.001, p=0.971), with IRR. of 1.00005.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders convicted in the lower courts from 2005 to 2007, these tests are not required.

This finding of equality appears to contradict earlier research on length of imprisonment term in the New South Wales lower courts (see Bond, Jeffries and Weatherburn, 2011 where Indigenous terms of incarceration were significantly shorter—although small—than non-Indigenous terms). However, there are differences in the population of cases used (e.g.

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effects was similar. As the primary purpose of this study was to identify the separate direct effect of Indigenous status, we report the model with all variables with their original measurement.

different years being studied) as well as differences in the measures included in the models. For example, Bond, Jeffries and Weatherburn (2011) did not control for bail status, while the current analysis did not control for prior breaches.<sup>15</sup>

In addition, being male and being sentenced for more serious offending (i.e. larger seriousness of offence scores and the presence of multiple conviction counts) resulted in increases in sentenced prison length. Recall that these factors also increased the likelihood of an imprisonment in New South Wales lower courts (see Table 3.3). Furthermore, this pattern of findings mirror those found in our South Australian analysis (compare Table 3.4 with Table 2.4 in Chapter 2).

### ***Indigeneity and the Likelihood of Monetary Orders***

Table 3.5 presents the results of the logistic regression models of the likelihood of a monetary order in New South Wales Local Courts. Initially, Indigenous offenders were 0.87 ( $p < 0.001$ ) times as likely to receive a monetary order. After adjusting for other social background factors, past and present criminality and court processing factors, Indigenous defendants continue to have a lower likelihood of receiving a monetary order, compared to other non-imprisonment orders. However, the magnitude of the remaining direct effect is small ( $OR = 0.94$ ,  $p < 0.001$ ): Indigenous defendants are 0.94 times as likely to receive a monetary order than non-Indigenous defendants. An adjusted direct effect was also found in South Australian lower courts (see Table 2.5, Chapter 2). The lower odds of a monetary penalty may be due to magisterial awareness of the relative economic disadvantage of Indigenous defendants.

Similar to the South Australian results, the likelihood of receiving a monetary order was lower for female offenders, increasing seriousness of the principal offence and increasing number of prior appearances (see Table 3.5). As we have seen before, the presence of a plea of guilt also lowers the odds of a monetary penalty. Earlier we speculated that this counterintuitive finding may be due to the types of other penalties in the comparison group.

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<sup>15</sup> We were able to construct a measure of prior breaches of community-based orders (a factor that is mentioned in New South Wales sentencing legislation). However, this measure could not be included in our models as almost 99% of cases did not have this type of prior breach recorded.

**Table 3.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Adult Lower Courts (New South Wales, 2005-2007, N=262,047)**

	b	s.e.	O.R.
<i>Social background</i>			
Indigenous	-0.061***	0.015	0.941
Female	-0.277***	0.011	0.758
Age at disposition	-0.010***	0.000	0.990
<i>Past and current offending</i>			
Prior appearances count	-0.026***	0.002	0.975
Seriousness principal offence	-0.016***	0.000	0.985
Multiple conviction counts	-0.441***	0.009	0.644
<i>Court processing factors</i>			
Plea of guilt	-1.196***	0.012	0.302
No bail	-0.914***	0.028	0.011
Constant	2.456***	0.020	
$\chi^2$ (d.f.)	38,596.86(8)***		
Pseudo R <sup>2</sup>	10.63		
% correctly classified	63.20%		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- The analysis presented in this table is restricted to defendants receiving non-imprisonment outcomes. Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 189,171 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and Monetary Amount***

Table 3.6 summarises the results of the negative binomial model of monetary order amount in the lower courts of the New South Wales. Unadjusted for other differences in sentencing factors, Indigenous offenders received on average 77% (IRR=0.77, p<0.001) of the amount of non-Indigenous monetary orders (approximately \$122 less). Net of other sentencing factors, the gap between Indigenous and non-Indigenous monetary amount closes, but a direct effect remains (IRR=0.83, p<0.001). In other words, when setting a monetary order amount, New South Wales magistrates appear to treat Indigenous offenders more leniently than non-Indigenous offenders in statistically similar circumstances. Indigenous defendants receive on average 83% of the amount of non-Indigenous orders, net of other factors. Recall that this finding of positive discrimination was also found in the South Australian lower courts (see Table 2.6, Chapter 2). Again, the economically disadvantaged position of Indigenous defendants may explain this pattern of leniency around monetary orders.

**Table 3.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only, Adult Lower Courts (New South Wales, 2005-2007, N=131,828)**

	b	s.e.	I.RR.
<i>Social background</i>			
Indigenous	-0.191***	0.008	0.827
Female	-0.161***	0.006	0.851
Age at disposition	0.005***	0.000	1.005
<i>Past and current offending</i>			
Prior appearances count	-0.012***	0.001	0.988
Seriousness principal offence	0.004***	0.000	1.004
Multiple conviction counts	0.014*	0.006	1.014
<i>Court processing factors</i>			
Plea of guilt	-0.103***	0.008	0.902
No bail	-0.098***	0.026	0.906
Constant	6.039***	0.011	
$\chi^2(d.f.)$	10,006.60(8)***		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 106,940 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered model), confirming the use of the negative binomial model.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders convicted in the lower courts from 2005 to 2007, these tests are not required.

## Summary

This chapter presented the key findings of statistical analyses of offenders convicted in New South Wales Local Courts between 2005 and 2007. Its primary focus was the identification of the direct effect of Indigenous status (if any) on imprisonment and monetary sentencing outcomes, net of other social background characteristics, past and present criminality and court processing factors.

We found that when sentenced under comparable circumstances, Indigenous offenders were: (1) more likely to receive a sentence of imprisonment, but once incarcerated received equal terms; (2) less likely to receive a monetary order, but once ordered received lower monetary amounts. Although the inclusion of other sentencing factors reduced initial base-line differences between Indigenous and non-Indigenous offenders, a direct effect remained, except for the length of term decision. Thus, there is similar evidence of support for all three sentencing disparities hypotheses, depending on the decision stage.

## CHAPTER 4: INDIGENEITY AND LOWER COURT SENTENCING IN WESTERN AUSTRALIA

### Introduction

This chapter presents the results of our statistical analyses of defendants convicted in the Western Australia Magistrate Court<sup>16</sup> between 2005 and 2007. Its purpose is to explore in Western Australian lower criminal courts: (1) whether sentencing outcomes (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear under similar circumstances; and (2) whether sentence weightings (length of imprisonment term and monetary order amount) differ between Indigenous and non-Indigenous offenders when they appear under similar circumstances. As for the other jurisdictions, we report:

- baseline differences between Indigenous and non-Indigenous defendants in sentencing outcomes, social background, and past and current criminality
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to imprison and length of term
- adjusted differences between Indigenous and non-Indigenous defendants for the decision to impose a monetary order and amount of order.

### Data and Methods

The analyses use convicted criminal cases in the Western Australian Magistrate Court between 2005 and 2007. Data was drawn from databases maintained by the Crime Research Centre at the University of Western Australia. The Crime Research Centre collates and transforms administrative data provided by the Western Australian police and Department of the Attorney-General into a usable form. As in our South Australian and New South Wales data, we have a population of cases; however, we take account of repeat appearances in our analyses (see later). Between 2005 and 2007, there were a total of 227,263 convicted cases in the Western Australian Magistrate Court. As approximately 19.1% was lost due to data entry errors and missing data, our analyses relied on 183,729 cases. Of these, 26.96% were identified as Indigenous, 21.24% as female, and a mean age of 30.37 years.

### Measures

We consider the same dependent variables as used in our South Australian and New South Wales analyses, namely: (1) the decision to imprison<sup>17</sup> (or not) for the principal offence<sup>18</sup> and the decision to impose a monetary order (or not) for the principal offence; (2) the length of the imprisonment term imposed for the principal offence and monetary order amount for the principal offence. Unlike the previous two jurisdictions, sentencing maximums in Western Australia are offence specific being set out in the *Criminal Code Act Compilation Act 1913*.

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<sup>16</sup> Note the Court of Petty Sessions amalgamated with the Small Claims Tribunal and the Local Court in 2005.

<sup>17</sup> Recall we define imprisonment ("in") as only including orders of immediate incarceration in a custodial facility.

<sup>18</sup> By principal offence, we refer to what is described by the Crime Research Centre as the most serious offence: "the most serious offence is the crime for which the defendant got the most severe penalty"; "if an offender has two offence counts with the same severity, the one which attracts the longer period or larger fine is selected as the most serious offence" (Ferrante et.al. 2005: 63). This is similar to the definitions of principal offence in South Australia and New South Wales.

For the Magistrate Court, there are no offences to which an imprisonment term greater than a 3 years and a fine exceeding \$36,000 are attached.

The independent variables included in the following analyses are grouped into the three same categories as in our previous analyses. Similarly, the identification of independent variables was based on Western Australia sentencing legislation, as well as past research on sentencing. The measurement of these variables was kept as similar as could be achieved to the other jurisdictions studied. Thus, our models included (see Appendix A for their coding):

- *Social background characteristics.* There are measures for Indigenous status, sex and age at court.
- *Past and present criminality.* Offence seriousness was measured as the reverse coded National Offence Index score of the principal offence, and the presence of multiple conviction counts. Unlike in the other jurisdictions, prior criminal history was measured by number of prior arrests, as information on prior contact with the courts was not available. Presence of prior imprisonment terms was also included.
- *Court processing factors.* There was a single variable in this category: the imposition of a global sentence. Global sentencing is an option in Western Australia but only applies to fines (s.54 *Sentencing Act 1995* [WA]). Thus, it was included only in our monetary order amount model. Unfortunately, court processing factors such as type of plea and bail status were not available in this jurisdiction.

### ***Stages of Analysis***

A two stage analysis was again used to explore the direct effect of Indigenous status on sentencing outcomes. First, we examine the baseline differences between Indigenous and non-Indigenous defendants. Second, we identify the direct effect of Indigenous status on sentencing outcomes, adjusted for other sentencing factors. Results from each analysis stage are presented below.

### **Stage 1: Baseline Differences by Indigenous Status**

Tables 4.1 and 4.2 summarise the descriptive statistics for the full population of offenders convicted in the Western Australian Magistrate Court during 2005 to 2007, as well as by Indigenous status. As shown in Table 4.1, there were differences by Indigeneity across all sentencing outcomes. Consistent with previous findings in both South Australia and New South Wales, compared to non-Indigenous offenders, Indigenous defendants in Western Australia were more likely to receive a prison term (6.79% vs. 2.04%) and less likely to be sentenced to a monetary order (68.42% vs. 82.36%). Of those sentenced to a monetary order as the most serious penalty, Indigenous offenders had a lower mean amount than non-Indigenous offenders (\$450.93 vs. \$488.81). However, in contrast to South Australia and New South Wales, when sentenced to prison, Indigenous Western Australians received (on average) longer terms than non-Indigenous defendants (232.32 vs. 195.54 days).



**Table 4.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729)**

Sentence Order	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Type of order</i>			
% received imprisonment order	3.32	6.79	2.04
% received monetary order	78.60	68.42	82.36
<i>Duration of order</i>			
Mean length imprisonment order (in days rounded)	215.77 (126.26)	232.31 (130.58)	195.54 (117.69)
Mean amount monetary order (in dollars rounded)	479.97 (474.41)	450.93 (441.15)	488.81 (483.73)
Median amount	300.00	300.00	400.00
Total number of cases	183,729	49,531	134,198
Total number of cases with imprisonment orders	6,105	3,362	2,743
Total number of cases with monetary orders	144,418	33,890	110,528

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As the duration of order is skewed (skewness statistic of 8.32), median is also reported.
- In 0.25% of cases with imprisonment orders, and 0.70% of cases with monetary orders, the duration of the order was missing.
- Global sentences were imposed in 4.51% of cases with monetary orders.
- As this shows the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that all differences between Indigenous and non-Indigenous offenders are statistically significant at the  $p < 0.05$ .

As shown in Table 4.3, there were differences by Indigenous status in current crime seriousness and criminal history which might explain these initial base-line differences in sentencing outcomes. Indigenous defendants had (on average) more prior arrests than non-Indigenous offenders (18.0 vs. 6.40) and were more likely to have served prior terms of imprisonment (45.0% vs. 20.8%). Mean offence seriousness scores were also higher for Indigenous defendants (59.7 vs. 54.9), and a greater proportion of Indigenous offenders had multiple conviction counts (48.2% vs. 40.9%). Overall, this shows Indigenous defendants face the sentencing court with criminality of a more seriousness current and historical nature than do non-Indigenous offenders. A greater proportion of Indigenous defendants was female. Recall that similar baseline differences by Indigenous status in current and past offending were found in South Australia and New South Wales (see Tables 2.2 (Chapter 2) and 3.2 (Chapter 3)).

**Table 4.2. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729)**

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
<i>Social background</i>			
% Indigenous	26.96	---	---
% Female	21.24	34.28	16.43
Mean age at court	30.37 (10.05)	30.30 (9.62)	30.40 (10.20)
<i>Prior and current criminal offending</i>			
Mean prior arrests	9.53 (13.99)	18.02 (19.96)	6.40 (9.19)
Median prior arrests	4.00	11.00	3.00
% Presence of prior imprisonment term	27.35	45.04	20.82
Mean seriousness of principal offence	56.21 (38.92)	59.68 (41.47)	54.93 (37.86)
% Convicted of multiple counts	42.94	48.23	40.99
<i>Court processing factors</i>			
% Global sentence imposed	8.31	9.58	7.84
Total number of cases	183,729	49,531	134,198

Notes:

- Table reports means or percentages as indicated. Standard deviations are provided in brackets where relevant. As prior arrests is skewed (skewness statistic of 3.32), the median is also reported. (Age and offence seriousness had skewness statistics approximately 1.0 or lower).
- As this shows the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, tests of significance are not required. However, we note that, with one exception (age), all differences (mean, rank and proportional) between Indigenous and non-Indigenous cases are statistically significant at  $p < 0.05$ . The mean age difference between Indigenous and non-Indigenous cases was significant at  $p < 0.10$ .

## Stage 2: Adjusted differences in sentencing outcomes by Indigenous status

We use the same analytic strategies as in South Australian and New South Wales study. Logistic regression models were used to examine the extent to which Indigenous status impacts the likelihood of receiving a prison term and a monetary penalty, controlling for social background and criminality (past and current). Similarly, negative binomial regression models were estimated to determine whether Indigenous status has a direct effect on length of sentenced prison term and monetary order amounts after controlling for other sentencing factors. (Recall that an odds ratio and an incident rate ratio of 1.0 indicates parity; values greater than 1.0 represent increasing odds or count; and values less than 1.0 represent decreasing odds or counts.) The results are summarised in Tables 4.3 to 4.6.

### *Indigeneity and the Likelihood of Imprisonment*

Results of the logistic regression model of the decision to imprison in Western Australian lower courts are reported in Table 4.3. This table shows that Indigenous offenders remain more likely than non-Indigenous defendants to be imprisoned, when sentenced for comparable criminality (current and historical) and with similar social backgrounds. In the baseline model (no controls), the odds ratio for Indigenous status was 3.49 ( $p < 0.001$ ). Or, Indigenous offenders were 3.49 times as likely to receive a prison sentence as Indigenous offenders. The direct effect of Indigenous status partially dissipates, net of other sentencing factors. Compared to non-Indigenous offenders, Indigenous offenders are 1.50 ( $p < 0.001$ ) times as likely to receive a prison sentence (versus not prison). Thus, while the differential involvement hypothesis provides a partial explanation for the initial Indigenous/non-

Indigenous disparity in the likelihood of imprisonment, an independent direct effect remains (as was the case in both South Australia and New South Wales, as well as in prior work on lower court sentencing in Queensland, see Bond and Jeffries, 2011a). However, caution must be exercised in making conclusions about lower court sentencing in Western Australia, as unlike the other study jurisdictions, we were not able to control for court processing factors such as type of plea and bail status in the Western Australian analyses.

The pattern of effects of other sentencing factors is similar to the findings in South Australia and New South Wales. Female defendants are less likely to be imprisoned; while past and current offending increase the odds of imprisonment (see Table 4.3).

**Table 4.3. Likelihood of an Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Lower Adult Courts (Western Australia, 2005-2007, N=183,729)**

	b	s.e.	O.R.
<i>Social background</i>			
Indigenous	0.402***	0.039	1.495
Female	-0.679***	0.056	0.507
Age at court	-0.013***	0.002	0.987
<i>Past and current offending</i>			
Prior arrest count	0.018***	0.001	1.018
Prior imprisonment	2.170***	0.053	8.755
Seriousness principal offence	0.016***	0.000	1.016
Multiple conviction counts	1.175***	0.035	3.238
Constant	-6.497***	0.077	
$\chi^2$ (d.f.)	15,609.03(7)***		
Pseudo R <sup>2</sup>	29.14		
% correctly classified	96.67		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 91,980 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- The variable 'global sentence' is not included in this model, as it is a factor that related to length of sentence, rather than sentence type.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and Imprisonment Length***

Table 4.4 presents the negative binomial model of length of imprisonment term for Western Australian lower courts. Before controls for other sentencing factors, the length of prison terms for Indigenous defendants was increased by 1.19 (p<0.001), compared to non-Indigenous defendants. That is, Indigenous defendants had a mean imprisonment sentence length of about 37 days longer than non-Indigenous defendants (see Table 4.2). After controlling for other social background characteristics and criminality (current and past), the direct effect of Indigenous status remained virtually unchanged (IRR=1.14, p<0.001). Indigenous offenders received 14% longer terms than the non-Indigenous offenders in similar circumstances. Thus, the differential involvement thesis cannot explain the baseline Indigenous effect. Unlike the findings in New South Wales (equal sentences) and South Australia (shorter sentences), these results suggest negative discrimination. Under comparable circumstances, Indigenous offenders in the Western Australian Magistrate Courts

are sentenced on average to longer terms of imprisonment than non-Indigenous defendants. However, again, caution must be exercised as variables such as type of plea and bail status are not included in the model.

In addition to Indigeneity having a direct impact on length of imprisonment term, being male and being sentenced for more serious current criminality increase the sentenced prison length (see Table 4.4). Recall that these variables had similar impact on imprisonment terms in the lower courts in South Australia and New South Wales (see Tables 2.4 (Chapter 2) and 3.4 (Chapter 3)).

**Table 4.4. Length of Imprisonment Order on Key Offender and Case Characteristics, Principal Offence, Imprisonment Orders only, Lower Adult Courts (Western Australia, 2005-2007, N=6,090)**

	b	s.e.	I.R.R.
<i>Social background</i>			
Indigenous	0.135***	0.017	1.145
Female	-0.131***	0.028	0.877
Age at court	0.005***	0.001	1.005
<i>Past and current offending</i>			
Prior arrest count	-0.000	0.001	1.000
Prior imprisonment	0.002	0.002	1.002
Seriousness principal offence	0.003***	0.000	1.003
Multiple conviction counts	0.067**	0.019	1.069
Constant	4.865***	0.039	
$\chi^2(d.f.)$		324.12(7)***	

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 4,487 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered model), confirming the use of the negative binomial model.
- The estimates for prior arrest count are: IRR=0.9996; b=0.0004; s.e.=0.001; p=0.540).
- Global sentence is not included in this model as it applies to aggregate fine amounts.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and the Likelihood of Monetary Orders***

The logistic regression results of the decision to impose a monetary order in the Western Australian Magistrate Court are reported in Table 4.5. At the baseline level, Indigenous defendants were 0.52 (p<0.001) as likely than non-Indigenous offenders to receive a monetary order. After adjusting for other social background characteristics and criminality (past and current), the direct effect of Indigenous status becomes close to 1.0 in magnitude, but remains: Indigenous defendants, compared to non-Indigenous defendants, are 0.65 (p<0.001) as likely to receive a monetary order (versus other non-imprisonment order). Although this finding is consistent with findings from South Australia and New South Wales (to a lesser extent), recall that controls for court processing factors are missing from the Western Australian model.

Similar to the patterns seen in the other study jurisdictions, the likelihood of a monetary order is reduced for female defendants (compared to male defendants), those with a history of prior

imprisonment terms, for those with multiple conviction counts, and those with more serious offences (see Table 4.5).

**Table 4.5. Likelihood of a Monetary Order on Key Offender and Case Characteristics, Principal Offence, Non-Imprisonment Outcomes only, Lower Adult Courts (Western Australia, 2005-2007, N=177,624)**

	B	s.e.	O.R.
<i>Social background</i>			
Indigenous	-0.429***	0.017	0.651
Female	-0.398***	0.017	0.671
Age at court	-0.008***	0.001	0.992
<i>Past and current offending</i>			
Prior arrest count	-0.001 <sup>#</sup>	0.001	0.999
Prior imprisonment	-0.558***	0.019	0.572
Seriousness principal offence	-0.017***	0.000	0.983
Multiple conviction counts	-0.162***	0.013	0.850
Constant	3.247***	0.025	
$\chi^2$ (d.f.)	17,384.84(7)***		
Pseudo R <sup>2</sup>	10.16		
% correctly classified	81.93		

<sup>#</sup> p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- The analysis presented in this table is restricted to defendants receiving non-imprisonment outcomes. Odds ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 91,008 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons.
- The variable 'global sentence' is not included in this model, as it is a factor that relates to duration of sentence rather than sentence type.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests are not required.

### ***Indigeneity and Monetary Order Amount***

The negative binomial regression model of monetary order amount in Western Australian lower courts is presented in Table 4.6. Without controls for sex, age, prior history and current offence seriousness, Indigenous offenders received marginally lower monetary order amounts by 0.97 (p<0.001). Compared to non-Indigenous offenders, the mean amount was about \$37 lower for Indigenous offenders with a monetary order (see Table 4.2). Controlling for other sentencing factors had no substantial impact on the direct effect of Indigenous status (IRR=0.98, p<0.001). Indigenous defendants received 98% of the amount of non-Indigenous defendants. Similar to New South Wales and South Australia, Indigenous defendants on average have lower amounts than non-Indigenous defendants in statistically similar circumstances. However, not only the magnitude of this effect is very small, the model lacks controls for type of plea and bail status.

We also find similar impacts for the social background and criminality (past and current) as in the other study jurisdictions (see Chapters 2 and 3). Being female lowers the ordered amount; more serious past and current criminality increases the amount of the monetary order, although some effects are small (see Table 4.4). Cases in which a global sentence was imposed increased the monetary amount by 1.55 (see Table 4.6), as would be expected.

**Table 4.6. Amount of Monetary Order on Key Offender and Case Characteristics, Principal Offence, Monetary Orders only Lower Adult Courts (Western Australia, 2005-2007, N=143,402)**

	b	s.e.	I.RR.
<i>Social background</i>			
Indigenous	-0.024**	0.007	0.976
Female	-0.126***	0.007	0.882
Age at disposition	0.008***	0.000	1.008
<i>Past and current offending</i>			
Prior arrest count	-0.003***	0.000	0.997
Prior imprisonment	0.023**	0.009	1.023
Seriousness principal offence	0.007***	0.000	1.007
Multiple conviction counts	0.002	0.005	1.002
<i>Court processing factors</i>			
Global sentence	0.440***	0.012	1.553
Constant	5.599***	0.010	
$\chi^2(d.f.)$	19,704.09(8)***		

# p<0.10; \* p<0.05; \*\*p<0.01; \*\*\*p<0.001

Notes:

- Incident rate ratios reported. Robust standard errors are provided to take account of the clustering due to repeat appearances of the same offender on new matters. There were 80,445 clusters of repeat defendants. Fit statistics are based on the unclustered model for technical reasons. The likelihood ratio test is statistically significant (based on the unclustered model), confirming the use of the negative binomial model.
- Results of tests of significance are provided. However, as this analysis relies on the population of offenders (with non-missing data) convicted in the lower courts from 2005 to 2007, these tests not required.

## Summary

This chapter presented the key findings of statistical analyses of offenders convicted in Western Australian Magistrate Court for 2005 to 2007. The analysis aimed to establish whether there was an independent direct effect of Indigenous status on imprisonment and monetary sentencing outcomes, net of other social background characteristics, as well as past and present criminality.

The analyses showed that when sentenced under similar circumstances, Indigenous offenders were: (1) more likely to receive a sentence of imprisonment, but once incarcerated received longer terms; (2) less likely to receive a monetary order, but once ordered received lower monetary amounts (although the magnitude of the effect is small). Overall, the inclusion of other sentencing factors reduced initial baseline differences between Indigenous and non-Indigenous offenders. However, a direct effect largely remained. Thus, there is similar evidence of support for all three sentencing disparities hypotheses, depending on the type of decision.

## CHAPTER 5: SUMMARY AND DISCUSSION

### Introduction

Indigenous sentencing disparities research has only been undertaken recently, and thus far, dominated by higher court studies of imprisonment decisions (see Jeffries and Bond, 2009; Bond and Jeffries, 2010; Jeffries and Bond, 2010; Bond and Jeffries, 2011a, 2011b, 2011c; Bond, Jeffries and Weatherburn, 2011). To date, there have been only two prior investigations of lower court sentencing (see Bond and Jeffries, 2011a; Bond, Jeffries and Weatherburn, 2011). Findings from the higher court studies are mixed, generally equality or leniency are found. This has led sentencing researchers to suggest that in Australia's post-Royal Commission into Aboriginal Deaths in Custody environment, higher court judges are sensitive to the unique needs of Indigenous offenders including the problem of over-representation. At the lower court level, prior research has shown harshness in the initial decision to imprison and leniency (albeit it slight) in length of sentenced prison term (Bond and Jeffries, 2011a; Bond, Jeffries and Weatherburn, 2011).

Explanations for these sentencing disparities are well-established. In prior research, three hypotheses have been put forward. First, the disparities are a function of *differential involvement*, or pre-existing differences by Indigenous status on key factors that impact judicial sentencing decisions. Second, differential outcomes result from negative discrimination, which may be based on unintentional and unconscious judicial perceptions of racial threat. Sentencing decisions are guided by three focal concerns: offender blameworthiness and harm caused by the offence, community protection or risk, practical constraints presented by individual offenders, organisational resources, political and community expectations. Judicial perceptions and assessments of blame and risk could be influenced by stereotypical attributions based on offender characteristics like Indigenous status, especially when sentencing under constrained conditions. Constrained conditions such as limited time and information are particularly likely in the lower courts (compared to the higher courts). Finally, as found in prior higher court studies of Indigeneity and sentencing in Australia, the positive discrimination thesis suggests that Indigenous offenders will be treated more leniently after controlling for other sentencing factors. Differences favouring Indigenous offenders may be due to judicial concern around their unique circumstances, as well as political and community expectations post-Royal Commission and the potential role of sentencing in reducing Indigenous over-representation (Bond, Jeffries and Loban, 2011: 42-43).

Finally, there have been no systematic analyses of monetary order decision making either in Australia or internationally. This is despite the fact that both Australian academic and government commentators express unease about the differential impact of fining and fine default on Indigenous people (e.g. Queensland Government, 1998; Blagg et al., 2005; Commonwealth of Australia, 2011; Spiers-Williams and Gilbert, 2011).

This current research is therefore important because it presents findings from comprehensive statistical analyses of Indigeneity and sentencing in the lower courts of South Australia, New South Wales and Western Australia. The aim was to better understand the influence of Indigenous status on lower court sentencing in Australia. In particular, the current research asked:

1. Does the severity of penalty (imprisonment and monetary orders) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances (e.g. with comparable criminality)?
2. Does the magnitude of penalty (length of imprisonment term and amount of monetary order) differ between Indigenous and non-Indigenous offenders when they appear before the lower courts under similar circumstances (e.g. with comparable criminality)?

To address these questions, the research relied on administrative databases maintained by the: South Australian Office of Crime Statistics and Research, New South Wales Bureau of Crime Statistics and Research, and the Crime Research Centre (the University of Western Australia).

In this chapter, we summarise the results in terms of: the key research questions, the evidence of support for the three sentencing disparities hypotheses, and the theoretical framework of focal concerns. We then consider the significance and limitations of this research, particularly policy implications and directions for future research.

### **Does the Initial Decision to Imprison Differ Between Indigenous and Non-Indigenous Offenders?**

In all three study jurisdictions, results from the statistical analyses show that Indigenous defendants are more likely than non-Indigenous offenders to be sentenced to prison. While Indigenous/non-Indigenous disparity was consistently more pronounced in the baseline statistics, it remained even after accounting for other influential sentencing determinants. Specifically:

- In the South Australian Magistrates Court, when sentenced under comparable circumstances, Indigenous offenders were more likely than non-Indigenous defendants to be sentenced to prison (about a 27% increase to the odds of imprisonment for non-Indigenous defendants).
- In the New South Wales Local Courts, when sentenced under comparable circumstances, Indigenous offenders were more likely than non-Indigenous defendants to be sentenced to prison (around a 23% increase to the odds for non-Indigenous defendants).
- In the Western Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were more likely than non-Indigenous defendants to be sentenced to prison (around a 50% increase to the odds for non-Indigenous defendants).

The reduction of initial Indigenous/non-Indigenous differences in the likelihood of receiving a prison term shows support for the differential involvement hypothesis. That is, Indigenous offenders come to the courts with different types of offences, and different criminal and social histories. However, evidence of discrimination remains, even after adjusting for differences in other crucial sentencing factors. Thus, consistent with prior research undertaken in the Queensland lower courts (Bond and Jeffries, 2011a), our analyses of the imprisonment sentencing decision in the lower courts in three additional Australian jurisdictions supports both the differential involvement and negative discrimination hypotheses. These findings of negative discrimination in Australia's lower courts stand in



stark contrast to prior research at the higher court level which finds Indigenous offenders are treated equally or more leniently at the decision to imprison.

There are at least two possible explanations for the contrasting findings in the higher/lower courts research. First, according to the focal concerns perspective, sentencing can be impacted by practical constraints, including limited organisational resources which place pressure on judicial officers. In contrast to the higher courts, lower court magistrates are required to make sentencing decisions under tighter time constraints and with less information. Sentencing determinations in the lower courts are frequently made within a matter of minutes. Information provided about defendants and their circumstances is limited to brief statements made by defence counsel, the offender or police prosecutors. In contrast, higher court judges are often presented with extended pleas of aggravation and mitigation by defence counsel and prosecution, are provided with written or oral pre-sentence reports and victim impact statements, and may adjourn proceedings to consider the appropriate sentence. The focal concerns perspective suggests that when faced with such practical constraints, judicial officers may utilise ‘perceptual shorthands’ (i.e. community based stereotypes) to make sentencing determinations (Steffensmeier, Ulmer and Kramer, 1998). In the North American racial/ethnic sentencing disparities research, these perpetual shorthands are argued to play out in ways that increase judicial assessments of risk and blameworthiness about African American and Latino defendants. Perceptions of Indigenous peoples as ‘deviant’ also pervade Australian society. For instance, the Royal Commission into Aboriginal Deaths in Custody itself reported that “Aboriginal communities are seen as troublesome, untrustworthy and given to criminal conduct” (cited in Cunneen, 2001: 91). Further, discourses of Indigenous ‘dysfunction’, ‘disintegration’ and ‘pathology’ are frequently used in Australian government, populist, and sometimes even academic environments to explain high rates of Indigenous offending (see State of Queensland, 1999; Gordon, Hallahan and Henry 2002; State of Victoria, 2003; New South Wales Attorney General’s Department, 2006; Northern Territory Government, 2007; Mullighan, 2008). However, previous qualitative research of higher court sentencing indicates that these stereotypes play out in ways that reduce rather than increase sentence severity (see Jeffries and Bond, 2010; Jeffries and Bond, 2011a). Whether, how and in what ways these broader discourses about Indigenous people impact magistrates’ sentencing decisions is beyond the scope of this research.

Second, differences in the higher/lower court research findings may reflect variance in the number and kinds of sentencing factors considered in these studies. Typically in Australia, statistical explorations of Indigeneity and higher court sentencing include a broader range of sentencing factors, such as information about offenders’ social (e.g. employment status, familial situation, health) and offence contexts (e.g. presence of co-offenders, evidence of premeditation) (see e.g. Jeffries and Bond, 2009). Even if these factors could have been included in the current analyses (they were not available in the court data), their impact on the Indigenous effect at least with regard to the South Australian and New South Wales analyses may be minimal. As discussed above, the restrictive context of lower court sentencing environments suggests that this more detailed level of information is less likely made available to sentencing magistrates. The application of this argument is not as clear for the Western Australian analyses, as we were unable to control for key court processing factors (bail status and type of plea). Still, regardless of controls, the Indigenous finding is consistent across these Australian lower court jurisdictions. Therefore, the empirical evidence is suggestive of a higher likelihood of imprisonment for Indigenous offenders in lower court sentencing, when sentenced under comparable circumstances to non-Indigenous offenders.

## **Does Length of Sentenced Prison Term Differ Between Indigenous and Non-Indigenous Offenders?**

Unlike the decision to imprison, results of the imprisonment term analyses differed by study jurisdiction. In South Australia, baseline data showed that Indigenous offenders were (on average) sentenced to shorter periods of incarceration than non-Indigenous offenders; longer periods were recorded in New South Wales and Western Australia. After controlling for other sentencing variables, the size and direction of these Indigenous effects were virtually unchanged in South and Western Australia. In New South Wales, the Indigenous effect essentially dissipated. In other words:

- In the South Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were sentenced to shorter average terms of imprisonment than non-Indigenous defendants (about 84% of the term for non-Indigenous defendants).
- In the New South Wales Local Courts, when sentenced under comparable circumstances, there were no differences on average by Indigenous status in length of sentenced prison term (about 99% of the term for non-Indigenous defendants).
- In the Western Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were sentenced to longer average terms of imprisonment than non-Indigenous defendants (about 15% longer compared to the term for non-Indigenous defendants).

After the introduction of control variables, changes in the strength of the statistical relationship between Indigenous status and length of imprisonment term in South and Western Australia lower courts provides some support for the differential involvement hypothesis in these jurisdictions. (Remember that type of plea and bail status could not be included in the Western Australian model, so the Indigenous effect should be interpreted cautiously.) In New South Wales, differential involvement appears to fully explain initial baseline differences in average sentence length between Indigenous and non-Indigenous offenders. In the South Australian analyses, the original baseline leniency effect remained, as did harsher treatment in Western Australia. Thus, the negative and positive discrimination hypotheses find some support in the length of term decision. The question is how can mixed findings between jurisdictions and sentencing stages be explained?

Focal concerns theorists argue that sentencing may be influenced by “distinctive and localized organizational, political, and legal cultures” with “local sociopolitical and court organizational factors such as court size, caseload, and political climate likely to influence case processing and sentencing” (Johnson, Ulmer and Kramer, 2008: 744-745; Bond, Jeffries and Weatherburn, 2011: 287). Furthermore, prior Australian research suggests that Indigenous status may have differential impacts by sentencing stage. Similarly, in the United States, the impact of race/ethnicity on sentencing is noted to be dependent on the outcome analysed: minority offenders more negatively disadvantaged at the imprisonment sentencing stage than the subsequent decision concerning length of imprisonment (Spohn, 2000: 455-456; Bond, Jeffries and Loban, 2011:32; Jeffries and Bond, 2011b). A similar pattern of results is evident here. There are clear patterns of negative discrimination at the initial imprisonment sentencing stage but mixed results by jurisdiction with regard to length of term imposed. Tentatively, differences in the social, political and legal contexts of South Australia, New South Wales and Western Australia may explain this latter pattern of results.

However, the above assumption is at best speculative. Mixed results, including a finding of leniency in prison term length for South Australia, seem contradictory to our prior finding of harshness in the decision to imprison. However, our ability to explain this is limited by our methodological approach. Statistical analyses can establish whether or not Indigenous status matters when it comes to sentencing—and the current results suggest that it does—but we can only surmise *how* and *why* it comes to matter. This issue is highlighted in prior work by Jeffries and Bond (2009). After finding that Indigeneity had a statistical impact on higher court sentencing in South Australia, they were unable to fully explain why this was the case until after qualitative analyses of judicial sentencing remarks (Jeffries and Bond, 2010). Ideally, future lower court sentencing research should incorporate a qualitative component in its design. This type of analysis could include observation of lower court sentencing hearings and interviews with magistrates about their Indigenous sentencing philosophies and practices.

### **Does the Initial Decision to Impose a Monetary Sentencing Order Differ Between Indigenous and Non-Indigenous Offenders?**

In all three study jurisdictions, results from the statistical analyses show that Indigenous defendants are less likely than non-Indigenous offenders to be sentenced to a monetary order (compared to other non-imprisonment penalties). This Indigenous effect was more substantial in the base-line statistics but continued after controlling for other important sentencing factors, thus:

- In the South Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were less likely than non-Indigenous defendants to be sentenced to a monetary order (about 85% as likely as non-Indigenous offenders to receive a monetary order).
- In the New South Wales Local Courts, when sentenced under comparable circumstances, Indigenous offenders were less likely than non-Indigenous defendants to be sentenced to a monetary order (about 94% as likely as non-Indigenous offenders).
- In the Western Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were less likely than non-Indigenous defendants to be sentenced to a monetary order (about 65% as likely as non-Indigenous offenders). Recall court processing factors could not be controlled in this jurisdiction.

Findings from the statistical analyses of monetary order imposition, therefore, suggest that differential involvement cannot fully explain why Indigenous defendants are less likely to receive a monetary penalty. Unlike the decision to imprison, length of prison term and length of monetary order (discussed below), this outcome is neither suggests negative nor positive discrimination. This is because monetary orders are not always necessarily harsher than other non-imprisonment orders. In part, this direction of effect could be construed as positive, given ongoing concerns about the differential impacts of fining (e.g. increased likelihood of default and eventually imprisonment) on Indigenous offenders (see most recently, Commonwealth of Australia, 2011: 230-232; Spiers-Williams and Gilbert, 2011).

Theoretically, the application of focal concerns theory in the context of non-imprisonment orders is unclear, as these penalties (including monetary orders) involve releasing offenders back into the community. To date, the focal concerns perspective has only been applied for judicial decisions involving incarceration. Its appropriateness to magistrates' deciding between monetary orders as other community-based sanctions has not yet been explored.

Perhaps this gap is because most statistical disparities research occurs in North America, where the range of community-based alternatives tends to be more limited than in Australia. This study cannot resolve this issue. However, to the extent that focal concerns may be applicable, our research suggests that practical constraints around the ability of Indigenous offenders to meet monetary order commitments could be affecting monetary order decision making (Bond and Jeffries, 2011e). Once again, while these statistical analyses show that Indigenous status is important in monetary order decisions, how or why it matters requires further investigation.

### **Does Sentenced Monetary Order Amount Differ Between Indigenous and Non-Indigenous Offenders?**

In all three study jurisdictions, results from the statistical analyses show that, on average, Indigenous defendants are sentenced to monetary orders of a lesser amount than non-Indigenous offenders. This Indigenous effect was more substantial in the baseline statistics but continued after controlling for other important sentencing factors. Thus:

- In the South Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were sentenced to monetary orders of a lesser amount than non-Indigenous defendants (about 84% of the amount for non-Indigenous defendants).
- In the New South Wales Local Courts, when sentenced under comparable circumstances, Indigenous offenders were sentenced to monetary orders of a lesser amount than non-Indigenous defendants (about 82% of the amount for non-Indigenous defendants).
- In the Western Australian Magistrate Courts, when sentenced under comparable circumstances, Indigenous offenders were sentenced to monetary orders of a lesser amount than non-Indigenous defendants (about 98% of the amount for non-Indigenous defendants). (Recall type of plea and bail status could not be included in the model.)

The reduction of initial Indigenous/non-Indigenous differences in monetary order amount provides support for the differential involvement hypothesis. However, positive discrimination continues. In all three jurisdictions, after adjusting for other sentencing variables, Indigenous defendants received monetary orders of lesser amounts than similarly situated non-Indigenous offenders. As, was argued for the decision to impose a monetary order, this finding may be linked to practical constraints (recognised as important to sentencing decisions in the focal concerns perspective) around the ability of Indigenous offenders to pay fines, and perhaps a broader concern around the impact of fine default on Indigenous persons. Nonetheless, further research is required to confirm this argument.

### **Limitations and Directions for Future Research and Policy**

A statistical design was used in this research to explore whether there were Indigenous disparities in sentencing, controlling for key factors known to impact sentencing outcomes (e.g. offender's social characteristics, the seriousness of the current sentenced offence, criminal history, court processing factors). Our findings, and the limitations of our approach, have a number of implications for future research and policy: (1) a broader range of measures to capture factors that legislation, theory and past research have considered important in

making sentencing decisions; (2) the ability of quantitative measures to explain sentencing disparities;

First, our finding of Indigenous/non-Indigenous sentencing disparity in the lower courts may be an artefact of our research design. In contrast to prior analyses of Australian higher court sentencing, this lower courts study included fewer control variables. In particular, other key social history and offence context variables that may have impacted judicial focal concerns about blame, risk, and practical constraints were missing.

Prior studies suggest that personal histories of abuse and victimisation, poor health and substance abuse, strong familial ties (including having responsibility for the care of others), and employment may mitigate sentences by changing judicial assessments of offenders' level of culpability and future risk (Kruttschnitt, 1982; Allen 1987; Daly, 1989; Jeffries, Fletcher and Newbold, 2003; Bond and Jeffries 2009). Further, there may be practical constraints around offenders with health problems because they may find prison especially difficult. There is also a social cost attached to the removal of parents (usually mothers) from families via incarceration (Daly, 1989; Freudenberg, 2001; Jeffries, 2002; Birmingham, 2003). The circumstances under which the offence occurred may also impact judicial perceptions of blameworthiness and future risk (Daly 1994: 95; Ashworth 1995: 129–30; Jeffries, Fletcher and Newbold, 2003; Jeffries and Bond 2009; Bond and Jeffries 2010). For example, whether there were co-offenders involved; whether the offence occurred in a private residence; whether there was evidence of premeditation; and whether there was any physical injury caused to a victim.

Unfortunately, we could not include these additional factors in our analyses because the data was not available in the administrative systems from which we drew our data. In previous analyses at the higher court level, these variables are typically drawn from judges' written sentencing transcripts and/or pre-sentence reports. These sources of information are not usually available at the lower court level. Here sentencing proceedings tend to be audio taped and the submission of pre-sentence reports is less likely. We cannot therefore 'rule out' the possibility that the sentencing disparities found in this current research might be explained by Indigenous/non-Indigenous differences in other unmeasured sentencing determinants. This concern around the need to include a wider range of sentencing variables in the analyses was especially problematic in the case of Western Australia, because bail status and plea could not be included in the analyses. Thus, further work on lower court sentencing needs to consider alternative research strategies than the conventional statistical analyses of administrative databases. Such strategies might include the coding of audio-recorded sentencing hearings (if access is possible) or observations of sentencing hearings.

However as argued earlier, unlike the higher courts where detailed information about offenders and the context of their offence is provided to judges, the time restrictive contexts of lower court sentencing could make the inclusion of more detailed information in lower court studies redundant. Furthermore, our current findings are strengthened by consistency (for the most part) across the three study sites—length of sentenced prison term is the only outcome for which jurisdictional variance was found.

Second, while the statistical design used in this research was arguably robust in that key factors known to impact sentencing were included (at least in the South Australia and New South Wales), coding schemes used in statistical sentencing research designs have been criticised as being limited in their ability to provide a comprehensive understanding of

sentencing (Daly, 1994: 264–265). The limitations of quantitative research designs in fully articulating judicial decision-making are evident in the current research. As noted previously, while our statistical analyses helped to establish that Indigeneity *does* matter when it comes to sentencing, we cannot fully explain the effect of Indigeneity. For example, we cannot fully explain the bifurcation in the lower courts' responses to Indigenous offenders between possible sensitivity to marginalised experiences of Indigenous offenders in the decision to impose a monetary order, and lack of recognition of these experiences in the decision to imprison. Future research needs to incorporate a qualitative component, including observation of lower court sentencing hearings and interviews with magistrates about their Indigenous sentencing philosophies and practices.

Third, of particular concern, given the continuing upward trend in Indigenous imprisonment rates, is the consistent finding of harshness in the decision to imprison for Indigenous offenders. Although this needs to be confirmed by further research, a tentative reason for this pattern may be lack of time and information such that magistrates are forced to rely on perceptual shorthands. The pressures on lower court decision-making, and its consequent impact on Indigenous defendants, points to the need for strategies that allow more detailed and reliable information to be placed before magistrates at the time of sentencing. We recognise that this occurs in Indigenous sentencing courts (e.g. New South Wales circle sentencing, Nunga Courts/Aboriginal Sentencing Conferences in South Australia). However, the vast majority of Indigenous offenders are still being sentenced in the mainstream lower courts. For example, in the South Australian data, between 2007 and 2009, a total of 625 Indigenous offenders in South Australia were sentenced through the Nunga Court/Aboriginal Sentencing Conference initiative. This compared with a total of 14,846 Indigenous defendants sentenced in the mainstream Magistrate Court. A recent evaluation of circle sentencing in New South Wales identified a key limitation of the program was the limited numbers involved. As of June 2007, about 230 Aboriginal offenders had participated in a Circle Sentence (New South Wales Attorney General's Department, 2008: 4). While further lower court research is obviously needed to better understand why Indigenous offenders are more likely to be sentenced to terms of imprisonment than their non-Indigenous counterparts, we suggest that Indigenous sentencing initiatives continue to be supported and perhaps expanded to include a larger number of defendants.

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## APPENDIX A

**Table A.1 Description of Study Variables (South Australian Lower Adult Courts, 2005-2007)**

<b>Variables</b>	<b>Description</b>
<i>Dependent variable</i>	
<u>Sentence type</u>	
Sentence of imprisonment order	0=no, not sentenced to imprisonment; 1=yes, sentenced to imprisonment.
Sentence of monetary order	0= no, sentenced to another non-custodial sentence, 1=yes, sentenced to a monetary order (fine, compensation).
<u>Duration of order</u>	
Length of imprisonment term	In days.
Amount of monetary order	In dollars (rounded).
<i>Independent variables</i>	
<u>Offender social background characteristics</u>	
Indigenous status	0=non-Indigenous; 1=Indigenous. Indigenous status is based on self-identification from July 2007, and on apprehending police officer's assessment of offenders' physical appearance (prior to July 2007).
Sex	0=male; 1=female.
Age	At time of disposition (in years).
<u>Prior and Current Criminal Offending</u>	
Prior convictions	Number of all prior convictions known.
Has prior imprisonment terms	0=no prior imprisonment terms; 1=at least one prior imprisonment term recorded by Corrective Services.
Seriousness of principal offence	Reverse coded National Offence Index (NOI). The NOI was developed by the Australian Bureau of Statistics (2009) and ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score for the principal offence to make the analyses more readable, so that higher scores indicated more serious offences.
Convicted of multiple counts	0=no; 1=yes.
<u>Court Processing Factors</u>	
Entered a final plea of guilty	0=no; 1=yes.
Not granted bail	0=no; 1=yes. Refers to whether or not bail was ever cancelled, excluded, revoked, ineligible, or refused at any stage of the court process.
Global sentence	0=no, not a global sentence; 1=yes, global sentence. Global sentence refers to an aggregate penalty imposed for the case (or part of) as a whole, instead of specific sentences for each individual convicted offence (see s.18A <i>Criminal Law (Sentencing) Act 1988</i> (SA)).

**Table A.2 Description of Study Variables (New South Wales Lower Adult Courts, 2005-2007)**

<b>Variables</b>	<b>Description</b>
<i>Dependent variables</i>	
<u>Sentence type</u>	
Imprisonment order	0=no, not sentenced to imprisonment; 1=yes, sentenced to imprisonment.
Monetary order	0=no, sentenced to another non-custodial order; 1=yes, sentenced to a monetary order (fine, compensation).
<u>Duration of order</u>	
Length of imprisonment order	In days (rounded).
Amount of monetary order	In dollars.
<i>Independent variables</i>	
<u>Offender social background characteristics</u>	
Indigenous status	0=non-Indigenous; 1=Indigenous. Indigenous status is self-identified.
Sex	0=male; 1=female.
Age	At time of disposition (in years).
<u>Prior and Current Criminal Offending</u>	
Prior court appearances	Number of prior court appearances (proven and unproven) since 1994. Reverse coded National Offence Index (NOI). The NOI was developed by the Australian Bureau of Statistics (2009) and ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score for the principal offence to make the analyses more readable, so that higher scores indicated more serious offences.
Seriousness of principal offence	
Convicted of multiple counts	
	0=no; 1=yes.
<u>Court Processing Factors</u>	
Entered a final plea of guilty	0=no; 1=yes.
Not granted bail	0=no; 1=yes. Refers to whether or not an offender had bail refused or was already in custody on another offence.

**Table A.3 Description of Study Variables (Western Australian Lower Adult Courts, 2005-2007)**

<b>Variables</b>	<b>Description</b>
<i>Dependent variable</i>	
<u>Sentence type</u>	
Sentence of imprisonment order	0=no, not sentenced to imprisonment; 1=yes, sentenced to imprisonment.
Sentence of monetary order	0=no, sentenced to another non-custodial sentence, 1=yes, sentenced to a monetary order (fine, compensation).
<u>Duration of order</u>	
Length of imprisonment term	In days (rounded).
Amount of monetary order	In dollars (rounded).
<i>Independent variables</i>	
<u>Offender social background characteristics</u>	
Indigenous status	0=non-Indigenous; 1=Indigenous. Indigenous status is recorded by police, based on physical appearance.
Sex	0=male; 1=female.
Age	At court (in years).
<u>Prior and Current Criminal Offending</u>	
Prior arrests	Number of prior arrests since 1984.
Has prior imprisonment terms	0=no identified prior imprisonment term; 1=at least one prior imprisonment term.
Seriousness of principal offence	Reverse coded National Offence Index (NOI). The NOI was developed by the Australian Bureau of Statistics (2009) and ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score for the principal offence to make the analyses more readable, so that higher scores indicated more serious offences.
Convicted of multiple counts	0=no; 1=yes.
<u>Court Processing Factors</u>	
Global sentence	0=no, not a global sentence; 1=yes, global sentence. Global sentence refers to an aggregate penalty imposed for the case (or part of) as a whole, instead of specific sentences for each individual convicted offence (see s.54 <i>Sentencing Act 1995</i> (WA)[fines]).