INDIGENOUS SENTENCING OUTCOMES: A COMPARATIVE ANALYSIS OF THE NUNGA AND MAGISTRATES COURTS IN SOUTH AUSTRALIA

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Indigenous sentencing courts are touted by Australian governments as a key response to the Royal Commission into Aboriginal Deaths in Custody. Despite their introduction over a decade ago, research on these courts, particularly in terms of sentencing outcomes for Indigenous offenders, has been limited. This study provides a comparative analysis of sentencing outcomes for Indigenous offenders sentenced through Indigenous and conventional court processes. Using data from the South Australian conventional Magistrates Court and Nunga Court between 2007 and 2009, the analysis highlights three sentencing outcomes of particular importance for their recognised differential impacts on Indigenous offenders: imprisonment, monetary, and disqualification of driver's licence orders. Independent of other crucial sentencing factors, defendants sentenced in the Nunga Court were significantly less likely than Indigenous offenders in the conventional courts to receive these types of orders.

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I INTRODUCTION

There continues to be ongoing political and community concern around Indigenous contact with the criminal justice system, especially the over-representation of Indigenous peoples in prison.[1] At present, Indigenous Australians are incarcerated at a rate of 1,868 per 100,000, or 14 times higher than the non-Indigenous imprisonment rate of 130 per 100,000.[2] These concerns about the rates of Indigenous incarceration have been particularly prominent since the Royal Commission into Aboriginal Deaths in Custody, with a number of jurisdictions introducing Indigenous justice agreements in a renewed commitment to reducing Indigenous over-representation.[3]

Although incarceration has generated the most concern,[4] the Royal Commission also highlighted the imposition of monetary sentencing penalties (e.g. fines) and the sentencing of defendants for motor vehicle offences as areas of concern.[5] Contemporary commentators have expressed unease that fines (or more accurately, fine default) and motor vehicle offences have become an indirect route to imprisonment for Indigenous people.[6] The relative

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1 Thalia Anthony, 'Sentencing Indigenous Offenders', (Brief no 7, Indigenous Clearinghouse, 7 March 2010).

2 Australian Bureau of Statistics, *Prisoners in Australia, 2011* (2011) 56.

3 Fiona Allison and Chris Cunneen, 'The Role of Indigenous justice agreements in improving legal and social outcomes for Indigenous people' (2010) 32(4) *Sydney Law Review* 66, 650.

4 For example, the Royal Commission stated that for Indigenous offenders, Australian governments should legislate to enforce the principle that imprisonment should be a sanction of last resort: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991) ch 2, Recommendation 92 ('*Royal Commission into Aboriginal Deaths in Custody*').

5 Ibid Recommendations 95, 117, 120; Chris Cunneen, 'Judicial Racism' (Paper presented at the Australian Institute of Criminology Conference: Aboriginal Justice Issues, Canberra, 23-25 June 1992).

6 See, eg, Mary Spiers-Williams and Robyn Gilbert, 'Reducing the Unintended Impacts of Fines' (Current Initiatives Paper no 2, Indigenous Clearinghouse, January 2011); Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011); Harry Blagg, Neil Morgan, Chris Cunneen and Anna Ferrante, *Systemic Racism as a Factor in the*

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).[7] In other words, as argued by Cunneen[8] for many Indigenous persons, the imposition of a fine becomes the equivalent of imprisonment.

Akin to the imposition of a monetary penalties, sentencing courts that disqualify Indigenous defendants' drivers' licences could also be 'paving the way' to imprisonment. As was the case at the time of the Royal Commission, contemporary data shows that driving licence offences are a particular problem for Aboriginal communities. For example, in New South Wales, driving licence offences equate to the third highest offence category for convictions of Indigenous people. More than a third of convictions within this category are for driving while disqualified; the most common penalty attached to this offence is imprisonment.[9] The disqualification of driving licences is likely to have differential impacts on Indigenous people who are more likely than non-Indigenous person to reside in rural and remote communities where public transportation options are limited or non-existent.[10] Arguably

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Overrepresentation of Aboriginal People in the Victorian Criminal Justice System (Equal Opportunity Commission, 2005); Queensland Government, 'Women and the Criminal Code' (Taskforce Report, Department of Communities, Child Safety and Disability Services Office for Women, November 1998).

7 Ibid.

8 Cunneen, above n 5, 126.

9 New South Wales Government, 'Driving Offences and Aboriginal People' (Offence Targeting Project Stage 1, Department of Attorney General and Justice, May 2003) <http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/driving_offences_aboriginal_people_stage1_offence_targeting_project_ajac_may2003.pdf/$file/driving_offences_aboriginal_people_stage1_offence_targeting_project_ajac_may2003.pdf>.

10 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper Overview Project 94 (2006) 16.

under these circumstances, the loss of a driver's licence is likely to contribute further to Indigenous disadvantage. Like non-Indigenous people in rural locations, Indigenous people may need to drive for the purpose of maintaining employment, appearing in court, attending funerals, or seeking medical treatment.[11] However, Indigenous offenders may also risk driving unlicenced in order to meet their cultural obligations.[12] If the choice to drive is made, there is a risk of being caught, charged with driving while disqualified and consequently facing a sentence of imprisonment.

As one strategy to address these types of concerns, the Royal Commission more broadly argued that criminal courts should provide a more culturally appropriate sentencing environment through more Indigenous involvement, and thus self-determination in the process. In particular, the Commission recommended that:

- sentencing authorities consult with Aboriginal communities and organisations as to the cultural appropriateness of sentences;
- more Indigenous court staff be recruited; and
- judicial officers should be more culturally aware and gain an understanding of the historical and social factors which contribute to Indigenous disadvantage.[13]

Since the Royal Commission, one significant development which seeks to provide a more culturally aware sentencing process has been the formation of Indigenous sentencing courts. Australian governments in particular tout these courts as being a response to the Royal Commission into Aboriginal Deaths in Custody, particularly around decreasing Indigenous over-representation in prison and increasing Indigenous self-determination.[14]

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[11] Ibid 10; Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia* (Crime Research Centre, University of Western Australia, 2003).

[12] Law Reform Commission of Western Australia, above n 10.

[13] *Royal Commission into Aboriginal Deaths in Custody*, above n 4, Recommendations 96, 100, 104.

[14] Law Reform Commission of Western Australia, *Aboriginal Customary Laws,* Aboriginal Courts Discussion Paper (2006) 142.

II INDIGENOUS COURTS

The first Indigenous Court – South Australia's Nunga Court – commenced in 1999, about eight years after the Royal Commission into Aboriginal Deaths in Custody. This was followed by the Victorian Koori Court, New South Wales and Australian Capital Territory Circle Sentencing Court, Queensland Murri Court and Indigenous Community Courts in Western Australia and the Northern Territory. Thus today, Indigenous sentencing courts of some type operate in all Australian jurisdictions except for Tasmania; they are constantly expanding in numbers and are 'now considered a permanent feature of the Australian criminal court system.'[15]

Although Aboriginal Courts where Indigenous judicial officers enforce the local community by-laws have operated in some Australian jurisdictions at different points in time, the "new" Indigenous courts have a broader jurisdiction, operating within the "conventional" court system both on and outside of Indigenous community land, including major metropolitan areas. With no requirement for an Indigenous judicial officer, these courts operate as sentencing courts for Indigenous offenders who have been convicted of criminal offences.[16] At their heart, these courts aim to engender change in Indigenous/non-Indigenous relations by establishing relationships of respect and trust,[17] through increased participation of Elders and other Indigenous community members as

[15] Allan Borowski, 'The Children's Koori Court at Work: Findings From an Evaluation' (2010) 57 *International Journal of Offender Therapy and Comparative Criminology* 1112. Note: the future of Queensland's Murri Courts are now in doubt with the recently elected State Government withdrawing all funding to the program in September 2012.

[16] Mark Harris, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap' (2004) 16 *Current Issues in Criminal Justice* 27-8.

[17] Ibid. Elena Marchetti and Kathy Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415; Elena Marchetti, 'Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43 *Australian and New Zealand Journal of Criminology* 265.

personnel and advisors, and more Indigenous directed and culturally appropriate sentencing processes.[18]

Philosophically the Indigenous sentencing courts have been aligned with both therapeutic jurisprudence and restorative justice.[19] However, the approaches of 'restorative justice and therapeutic jurisprudence lack a political dimension that is more often present in Indigenous sentencing courts.'[20] As noted by Marchetti and Daly, 'Indigenous sentencing courts…are concerned with group-based change in social relations [i.e. Indigenous/non-Indigenous relations] (a form of political transformation), not merely [rehabilitative] change in an individual.'[21]

To date, research on Indigenous courts has tended to focus on the broader social and community aims, with studies generally concerned with improvements in court responsiveness to Indigenous communities, Indigenous community empowerment through increased community participation and improvement in Indigenous/non-Indigenous community relations.[22] The

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[18] Ibid; Harris above n 16; Annette Hennessy and Carolyn Willie, 'Sentencing Indigenous Offenders in Domestic and Family Violence Matters: A Queensland Experience' (Paper presented at the Australian and New Zealand Society of Criminology Conference, Criminology and Human Rights, Hobart, 7-9 February 2006); Elena Marchetti, 'Indigenous Sentencing Courts' (Brief, Indigenous Clearinghouse, 5 December 1 2009); Law Reform Commission of Western Australia, above n 14, 142.

[19] Marchetti, above n 17, 2; Marchetti and Daly, above n 17; Judge Marshall Irwin, 'Queensland Murri Court' (Paper presented at the Law Asia Conference, Kuala Lumpur, 29 October – 1 November 2008) 13.

[20] Marchetti and Daly, above n 17, 429.

[21] Ibid 429-30.

[22] See, Marchetti, above n 17; Borowski, above n 15; Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010) 10; Mark Harris, *"A Sentencing Conversation" Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (Department of Justice, 2006); Ivan Potas, Jane Smart and Georgia Brignell, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003); Bridget McAsey, 'A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' (2005) 10 *Deakin Law Review* 654; Heather Aquilina,

consideration of criminal justice aims has been primarily limited to the impact of Indigenous courts on reoffending.[23]

Perhaps the focus of past research is unsurprising. The primary goal of the Indigenous courts is to reduce offending, and in turn decrease rates of over-representation. If the broader social and cultural aims of the Indigenous courts are met – and Indigenous offending decreases – this should positively impact rates of Indigenous imprisonment in the long term. However, the power of sentencing outcomes to reduce the number of Indigenous people imprisoned in the short term is also important. After all, the Royal Commission did recommend that imprisonment should be utilised as a sanction of last resort for Indigenous defendants. Further, concerns around the imposition of monetary penalties and loss of drivers' licences are continually highlighted as problematic because these sentence outcomes may constitute a pathway to Indigenous incarceration.

Given the social and cultural sensitivities underpinning the Indigenous courts, sentencing outcomes of Indigenous defendants in these courts may differ to those given in the conventional courts. Nonetheless, most assessments of the Indigenous Courts have focused on anecdotal evidence that imprisonment is being used as a sentence of

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Jennifer Sweeting, Helen Liedel, Vickie Hovane, Victoria Williams and Craig Somerville, *Evaluation of the Aboriginal Sentencing Court of Kalgoorlie* (2009); Cultural and Indigenous Research Centre, Attorney General's Department (NSW), *Evaluation of Circle Sentencing Program* (2008); Natalie Parker and Mark Pathe, Department of Justice and Attorney General (Qld), *Report on the Review of the Murri Court* (2006); Jillian Clare, 'Murri Courts: Indigenous Magistrate Courts Communicating for Better Outcomes' (Paper presented at the 20th Biennial Conference of the World Communication Association, University of Ireland, 24-28 July 2009).

[23] Harris, above n 22, 85-8; Morgan and Louis, above n 22, 102-14; Aquilina et al, above n 22, 52-65; Cultural and Indigenous Research Centre, above n 22, 49-65; Morgan and Louis, above n 17, 102-14; Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending' (Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No 115, New South Wales Bureau of Crime Statistics and Research, May 2008) 2; Kathleen Daly and Gitana Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending* (Griffith University, 2009).

last resort,[24] or baseline sentencing data, without adjusting for other factors known to impact sentencing.[25] Further, there have been no comprehensive analyses of monetary orders and generally no analyses of drivers' licence disqualification sentences in the Indigenous Courts. Thus far, there has been only one in-depth comparative investigation of sentencing outcomes in an Indigenous versus conventional court. In this case, custodial penalties were the only sentences considered[26] (see below for a more detailed discussion).

Clearly, there are significant gaps in our understanding of Indigenous sentencing courts. As argued by Daly and Proietti-Scifoni:[27]

> when we consider that these courts began just a decade ago, there is considerable documentation about them. However, the quality of the research is provisional, preliminary, and impressionistic. Systematic research on court ... outcomes over time has not yet been carried out in any jurisdiction to date. Even [rarer] are comparative analyses of Indigenous and conventional court processes.

The current paper is a step towards addressing this gap. We report results from a comparative multivariate statistical analysis of sentencing outcomes in South Australia's Nunga (Indigenous) and conventional Magistrates Court. More specifically, we consider whether or not in each type of court, similarly positioned Indigenous defendants (e.g. comparable past and current criminality) are equally likely to be sentenced to prison, monetary penalties and drivers' licence disqualification.

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[24] For anecdotal evidence see Parker and Pathe above n 22, 24; McAsey, above n 22, 663-4.

[25] Morgan and Louis, above n 22, 90-2; Harris, above n 22 79-80, 87-8; Aquilina et al, above n 22, 34-6; John Tomaino, 'Aboriginal Nunga Courts' (Information Bulletin No 39, South Australian Office of Crime Statistics and Research, 2004) 9-11.

[26] Morgan and Louis, above n 22, 97.

[27] Daly and Proietti-Scifoni, above n 23, 10.

III PRIOR RESEARCH, SENTENCING OUTCOMES AND INDIGENOUS COURTS

Given the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the initial focus of research on the sentencing outcomes of Indigenous Courts was the use of imprisonment. At first, and as noted above, this assessment was made primarily through anecdotal evidence suggesting that Indigenous sentencing courts only use prison as a sentence of last resort, and by extension, implying that Indigenous defendants were more likely to be incarcerated by a conventional court. For example, in her qualitative evaluation of the Victorian Koori Court, McAsey[28] argued that the Royal Commission's recommendation on the use of imprisonment was supported by her observations of sentencing hearings and interviews with Koori court personnel, which showed that Koori Court magistrates had a changed attitude towards imprisonment as lacking in its usefulness for rehabilitation purposes. In Queensland, Parker and Pathe's[29] evaluative research suggested that Murri Courts divert Indigenous offenders from custody, as anecdotally magistrates indicated that 'many offenders appearing in the Murri Court would otherwise have received prison sentences'.

Quantitative explorations of sentencing in the Indigenous courts have for the most part been limited to percentage distributions by sentence outcome in the Indigenous courts and/or cross-tabular analyses of penalty outcomes and sentencing court (e.g. Indigenous versus conventional courts). In South Australia, published sentencing data from three Nunga Court locations showed that just over 29 percent of offenders sentenced between 2003 and 2004 were given a fine, around 13 percent had their driver's licence disqualified and nearly 9 percent received a prison term.[30] In an evaluation of two Koori Courts in Victoria, data gathered between 2002 and 2004 showed comparable proportions of offenders "dealt with" by way of fine (24 percent, Shepparton Koori Court; 27 percent,

[28] McAsey, above n 22, 663-4.
[29] Parker and Pathe, above n 22, 24.
[30] Tomaino, above n 25, 9-11.

Broadmeadows Koori Court) and imprisonment (1 percent, Shepparton Koori Court; 9 percent, Broadmeadows Koori Court).[31]

Similarly, cross-tabular data was used to compare sentencing outcomes between Indigenous and conventional Magistrates Courts in Western Australia. This study found few differences in the proportion of Indigenous defendants sentenced to prison between the conventional Magistrates Courts (7 percent in Kalgoorlie and 7 percent in the region) and Aboriginal Sentencing Court of Kalgoorlie (6 percent), but substantial variation in fining. The percentage of defendants receiving fines in the Aboriginal court (31 percent) was less than half the proportion of those being fined in the conventional Kalgoorlie court (65 percent) and all Magistrates Courts in the region (67 percent).[32] These studies can only tell us about the baseline differences in sentencing outcomes by court type. Their analyses do not take into account differences in the cases and histories of Indigenous defendants. What is needed is a comparative analysis that controls, statistically, for the influence of other relevant sentencing determinants. Without such controls, evidence of differences in the sentencing of Indigenous offenders between courts is at best suggestive because there may be substantial divergence between the sentenced defendants in each court (e.g. current crime seriousness and past criminality may vary).[33]

Multivariate analytic techniques such as regression allow researchers to estimate the separate independent impact of variables (e.g. court type), *controlling* for other variables (e.g. current and prior criminality). The use of regression techniques exploring disparity in the sentencing of Indigenous and non-Indigenous offenders in the conventional courts has been used extensively by

[31] Harris, above n 22, 79-81. No data on driver's licence disqualification was reported.

[32] Aquilina et al, above n 22, 35-6. Driver's licence disqualification was not considered in this study.

[33] Andrew Von Hirsch and Julian Roberts, 'Racial Disparity in Sentencing: Reflections on the Hood Study' (1997) 36 *The Howard Journal* 227.

researchers in Australia and internationally.[34] However, this technique has only been used once to explore the impact of court type (i.e. conventional versus Indigenous) on sentence outcomes.[35]

The recent evaluation of the Queensland Murri Court compared the sentencing outcomes of a matched sample of Indigenous defendants sentenced in the conventional Magistrates and Murri Courts.[36] Defendants were matched by gender, age, prior and past criminality.[37] Initial cross tabular analyses suggested that Indigenous offenders sentenced in the Murri Court were more likely to be sentenced to custody in a correctional institution compared with their matched counterparts (21 percent compared with 10 percent). In contrast, Indigenous defendants in the Murri Court were less likely than their matched counterparts in the conventional court to receive a monetary order (14 percent compared with 55 percent).[38] Further regression analyses adjusting for current criminality, criminal history, gender, age and remand showed that offenders in the Murri Court were not significantly more likely than Indigenous defendants in the conventional Magistrates Court to receive a *custodial* sentence. However, custodial has a broad meaning including immediate parole release, fully suspended sentences of imprisonment and custody in the community. Thus, the likelihood of receiving an immediate *prison* sentence in the Murri versus conventional court, after adjusting for other factors known to impact sentencing, was unexplored.

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[34] In Australia, see, eg, Samantha Jeffries and Christine Bond, 'Does Indigeneity Matter?: Sentencing Indigenous Offenders in South Australia's Higher Courts' (2009) 42(1) *Australian and New Zealand Journal of Criminology* 47; Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison? (2007) 40 *Australian and New Zealand Journal of Criminology* 272. For a review of the statistical Indigenous sentencing disparities research worldwide, see Samantha Jeffries and Christine Bond, 'The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature from the United States, Canada and Australia' (2012) 10 *Ethnicity in Criminal Justice* 223.

[35] In some circumstances, the lack of multivariate analyses may be due to inadequacies in the court administrative data maintained by governments.

[36] Morgan and Louis, above n 22.

[37] Ibid 18-9.

[38] Ibid 95. There was no analysis of driver's licence disqualification.

IV FACTORS KNOWN TO IMPACT SENTENCING

Judicial sentencing decisions are known to be driven by assessments of offender blameworthiness, harm caused by the offence and community protection (i.e. risk posed by an offender to the community in the future).[39] The seriousness of an offender's crime and their past criminal behaviour are vital to judicial appraisals of blameworthiness, harm and risk.[40] Sentencing research consistently shows a strong correlation between the seriousness of the offender's criminal history, the severity of the offender's crime(s) and sentencing outcomes**.** Offenders with more extensive and more serious forms of criminality tend to receive harsher sentences because they are perceived as more blameworthy, have caused more harm and pose a greater risk to the community in the future.[41] Being held on remand has also been found to have a significant yet negative impact on sentence outcomes.[42]

Further, sentencing research has established that judicial decision making is often impacted by perceptions relating to a defendant's ability to 'do time', but may also be influenced by stereotyping.[43] Age and gender can be important in deciding whether a sentence of imprisonment may be unduly harsh. For example, younger people

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[39] Brian Johnson, 'Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction' (2003) 41 *Criminology* 449; Darrel Steffensmeier, Jeffery Ulmer and John Kramer, 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male' (1998) 36 *Criminology* 763. See also Geraldine Mackenzie, *A Question of Balance: How Judges Sentence* (Federation Press, 2005).

[40] Johnson, above n 39; Steffensmeier, Ulmer and Kramer, above n 39; Mackenzie, above n 39.

[41] Ojmarrh Mitchell, 'A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies' (2005) 21 *Journal of Quantitative Criminology* 439; Cassia Spohn, 'Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process' in J. Horney (ed) *Criminal Justice 2000 Volume 3 Policies, Processes, and Decisions of the Criminal Justice System* (National Institute of Justice, 2000).

[42] With regard to sentencing decision making, remand and Indigenous status, see, eg, Jeffries and Bond above n 34; Christine Bond and Samantha Jeffries, 'Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts' (2011) 51(2) *British Journal of Criminology* 256.

[43] Johnson, above n 39; Steffensmeier, Ulmer and Kramer, above n 39.

may be perceived as less able to cope with imprisonment.[44] At the same time, and somewhat paradoxically, criminality (or the threat of criminality) is often associated with youthfulness.[45] This means that being younger could potentially increase the chances of imprisonment. Prior studies also show that compared with men, women consistently received less serious sentencing penalties. Women are perceived by the judiciary as being less blameworthy than men, as posing fewer risks to the community (i.e. re-offending risks are lower) and there are higher social costs attached to the removal of mothers, as primary caregivers, from families.[46]

V RESEARCH QUESTION

To summarise, despite ongoing concerns about Indigenous over-representation in prison, the imposition of monetary penalties and driver's licence disqualification, comparative research of conventional and Indigenous court sentencing outcomes is extremely limited. Thus, using sentencing data from the Nunga and the conventional South Australian Magistrates Courts, we ask: do sentencing outcomes (i.e. immediate imprisonment, monetary penalties and drivers licence disqualification) differ for Indigenous defendants in the Nunga Court and conventional Magistrates Courts when they are sentenced under comparable circumstance?

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[44] Jawjeong Wu and Cassia Spohn, 'Does an Offender's Age Have an Effect on Sentence Length? A Meta-Analytic Review' (2009) 20 *Criminal Justice Policy Review* 379.

[45] Steffensmeier, Ulmer and Kramer, above n 39.

[46] Kathy Daly, *Gender, Crime and Punishment* (Yale University Press, 1994); Kathy Daly and Rebecca Bordt, 'Sex Effects and Sentencing: An Analysis of the Statistical Literature' (1995) 12 *Justice Quarterly* 142. Samantha Jeffries and Christine Bond, 'Sex and Sentencing Disparity in South Australia's Higher Courts' (2010) 22 *Current Issues in Criminal Justice* 81.

VI RESEARCH METHOD

A *Research Setting*

Like other Indigenous courts, the Nunga Court is a magistrate court, which deals only with Indigenous people who have pled guilty to an offence that can be heard at the lower court level. The structure of hierarchy and adversarial processes evident in the conventional court has been removed in the Nunga Court. Similar to all Indigenous courts in Australia, there have been changes made to courtroom aesthetics, procedure and mechanisms that allow Indigenous involvement in the sentencing process. Key differences in the sentencing hearing include: the judicial officer sitting off the bench at the same level as the offender; an Indigenous Elder/Respected Person sitting next to the magistrate and provides advice on cultural/community matters and sentencing; the judicial officer actively interacting with the offender to understand offending motivations; the offender's family, community members and the victim given the opportunity to address the court; and Aboriginal Justice Officers in court assisting offenders, their families and members of the Aboriginal community with queries about court process or sentencing outcomes.[47]

B *Data Source and Sample*

We use a sample of adult Indigenous cases convicted between 2007 and 2009 sentenced in the Nunga Court and the general criminal jurisdiction of the Magistrates Courts in South Australia.[48] The sample was drawn from administrative court data provided by South Australian Office of Crime Statistics and Research. These data provide information on sex, Indigenous status, age, offence seriousness, prior criminal offending, plea, bail status and sentence

[47] Tomaino, above n 25; Magistrates Court of South Australia, *Aboriginal Sentencing Courts – Nunga Courts* (2012) Courts Administration Authority of South Australia <http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html>.

[48] Although this is a sample of cases, not unique offenders, we adjust for the presence of repeat offenders in our analysis.

type. During 2007 to 2009, there were 625 cases sentenced in the Nunga Court and 14,746 Indigenous cases sentenced in the conventional Magistrates Courts. After missing data and coding errors[49] (less than 1 percent) our final sample consists of 15,292 Indigenous cases, with 564 (3.69 percent) cases in the Nunga Court and 14,728 (96.31 percent) cases in the conventional Magistrates Courts. Of these, about 30.77 percent were female, with a mean age of approximately 31.24 years at the time of sentencing. Around 5.77 percent had a prison sentence imposed, 14.42 percent had their driver's licence disqualified, and 28.92 percent received monetary orders as the most serious sentencing outcome.

C *Measures*

As discussed earlier, certain sentencing outcomes (such as prison, fines, disqualification orders) may be particularly problematic for Indigenous offenders. Thus, our *dependent variable* is a categorical measure of most serious sentencing outcome for the principal offence,[50] comparing those who received an immediate imprisonment order (coded as 1), those who had their driver's licence disqualified (coded as 2), those who received a monetary order (coded as 3), with those who received community-based orders (coded as 4). Because we have grouped community-based orders together, we do not treat this variable as categorical, rather than a ranked, measure of sentencing outcome.

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[49] There were 61 cases heard in the Nunga Court that were coded as involving non-Indigenous defendants. We were unable to resolve this inconsistency, so the cases were excluded from our analysis.

[50] 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). 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. This is based on the definition of major offence found guilty: South Australian Office of Crime Statistics and Research, *Crime and Justice in South Australia 2004 - Adult Courts and Corrections* (2004) 185.

Our analysis includes three groups of independent variables which as discussed previously are standard in sentencing research (see Table 1 for a summary.) The first group consists of offender social background: sex and age at the time of disposition. The second group of independent variables is prior and current criminality. These include prior criminal history, seriousness of principal offence, and presence of multiple conviction counts. For prior criminal history, we use two measures: the number of prior convictions and the presence of at least one prior term of imprisonment. We measure the seriousness of an offender's principal offence using the Australian National Offence Index (NOI).[51] The NOI ranking ranges from 1 (most serious) to 156 (least serious). For ease of interpretation, this index was reverse-coded, so that higher scores mean more serious offences. In addition, we include the presence of multiple conviction counts. Finally, the last group of independent variable captures two court processing factors: refusal to grant bail and plea of guilt (both measured dichotomously). Plea is of little relevance in the Nunga Court (pleas of guilt are a prerequisite), but this factor may still impact sentencing in the conventional court and as such requires inclusion in our analysis. Sentencing scholars note that guilty pleas likely impact sentences because they provide an indication of remorse and also save the court time.[52]

[51] Developed by the Australian Bureau of Statistics, the NOI ranks the seriousness of all offence classifications defined by law: Australian Bureau of Statistics, *National Offence Index, 2009* (2009).

[52] Steffensmeier, Ulmer and Kramer, above n 39, 767; Johnson, above n 39, 454.

Table 1. Description of Study Variables, Indigenous Offenders only, South Australia (2007-2009, N=15,293).

Variables	Description
Dependent variable	
Sentence outcome	1=immediate imprisonment order; 2=disqualification of driver's licence order; 3=monetary order; 4=community-based orders based on the most serious sentencing outcome for the principal offence.
Independent variables	
Offender social characteristics	
Sex	0=male; 1=female.
Age	At time of disposition (in years).
Prior and Current Criminal Offending	
Prior convictions	Number of all prior convictions known.
Has prior term of imprisonment	0=no prior imprisonment term; 1=at least one prior imprisonment term.
Seriousness of principal offence	Reverse coded National Offence Index (NOI).
Convicted of multiple counts	0=no; 1=yes.
Court Processing Factors	
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.
Guilty plea	0=no, not guilty/no plea; 1=yes, guilty plea.
Court type	
Nunga court	0=in the conventional Magistrates Court; 1=in the Nunga Court

VII FINDINGS

Our analysis – exploring the impact of being heard in the Nunga Court on the sentencing outcomes for Indigenous offenders – first examines the baseline differences between the Nunga and conventional Magistrates Court cases for Indigenous defendants. Then, we estimate the separate independent effect of being heard in the Nunga Court (compared with the conventional Magistrates Courts) on sentencing outcomes. In other words, what is the impact of court type (Nunga versus conventional) on sentencing outcomes after controlling for the influence of other important factors?

The descriptive statistics for the full sample, and for each court type, are reported in Table 2. There are significant differences in the social background and cases of Indigenous defendants sentenced in the Nunga Court, compared with those who remain in the conventional Magistrates Courts. In particular, as shown in Table 2, Nunga Court cases were less likely to be female, present with more serious past and current criminality and more likely to be on remand. Unsurprisingly, compared with the conventional Magistrates Courts, Nunga Court cases were more likely to have entered pleas of guilt (note: in the data supplied 16 offenders in the Nunga Court were recorded as not having entered a guilty plea. This likely indicates that they entered no plea at their first appearance before the court).

There was also a statistically significant difference in sentencing outcomes for Indigenous cases in the Nunga and conventional Magistrates Courts. The proportion of Indigenous cases receiving an immediate prison sentence was significantly higher in the Nunga Court than the conventional Magistrates Courts. In contrast, the proportions with monetary and disqualification orders as the most serious outcome were significantly lower in the Nunga compared with the conventional Magistrates Courts.

Table 2. Descriptive Statistics by Court Type, Indigenous Offenders only, South Australia (2007-2009).

	Total cases	Nunga Court cases	Magistrates (general) Court cases	Sig.
Offender social background				
% female	30.77	22.87	31.07	p<0.001
Mean age at disposition	31.24 (9.57)	31.28 (8.72)	31.24 (9.61)	n.s.
Current and past offending				
Mean prior convictions	29.45 (37.16)	55.82 (47.23)	28.44 (36.34)	p<0.001
% prior imprisonment term	37.07	63.65	36.05	p<0.001
Mean seriousness of current offence	53.49 (39.57)	64.98 (39.42)	53.05 (39.51)	p<0.001
% with multiple conviction counts	92.68	97.34	92.50	p<0.001
Court processing factors				
% not released on bail	17.47	36.17	16.75	p<0.001
% guilty plea	84.67	97.16	84.19	p<0.001
Court Type				
Nunga Court	3.69	---	---	
Most serious sentence outcome				
% with imprisonment order	5.77	12.94	5.50	p<0.001
% with disqualification order	14.42	6.91	14.71	p<0.001
% with monetary order	28.92	8.16	29.72	p<0.001
Total number of cases	15,293	564	14,728	

n.s. refers to p≥0.10

Notes:

1. Means (with standard deviations in brackets) are reported for continuous variables; percentages are reported for dichotomous variables.
2. The high percentage of guilty pleas in the Nunga Court is due to the eligibility to be heard by that court. The reason that the percentage is not 100 likely indicates that defendants entered no plea at their first court appearance.
3. T-tests for difference between group means, and z-test for difference between group proportions, are used to test whether there is a significant difference between Nunga Court and general Magistrates Court cases. For sentence severity (median), the Wilcoxon rank-sum test was used.
4. Median age = 30.00 (skewness 0.717); median number of prior convictions = 16 2.304); median current offence seriousness = 44 (skewness 0.678) ; median sentence rank score = 3
5. Rank difference for age is not significant (-0.873, p=0.3828); for prior convictions not significant (-16.749, p=0.0000); for current offence seriousness (-7.844, p=0.0000).

A *Do Sentencing Outcomes Differ for Indigenous Defendants in the Nunga Court and Conventional Magistrates Courts When They Are Sentenced Under Comparable Circumstances?*

Table 3 (see page 380) summarises the results of a multinomial model of the likelihood of key sentencing outcomes on offender social background, prior and current criminality, court processing factors and court type.[53] The results are reported as *relative risk ratios*, which represent the probability of being in one sentencing outcome over the probability of being in the designated reference outcome (here community-based orders). In interpreting relative risk ratios, a relative risk ratio above 1.0 (or equal odds) indicates an increase in the likelihood of receiving a particular sentence outcome compared with the reference outcome. Similarly, a relative risk ratio below 1.0 indicates a decrease in the likelihood of receiving one sentence outcome over the reference outcome. For example, for each year increase in an offender's age, there is a 0.98 decrease in the relative log odds of receiving a prison sentence versus a community-based order.

There are four key findings that are of particular interest. First, for our sample of Indigenous cases, gender has a significant direct effect on the relative likelihood of receiving a prison sentence versus a community-based order. Compared with male offenders, female offenders are less likely to receive a prison sentence (versus a community-based order), net of other sentencing factors. There is no significant direct effect of gender on the likelihood of the other sentencing outcomes, compared with a community-based order. Second, in general, past and current offending has a significant direct effect on sentencing outcomes in the direction that would be

[53] We are unable to adjust for the issue of selectivity in our models, as we do not have data on the prior decision stage (the decision to convict). However, correction for selection bias relies on theoretically appropriate exclusion restrictions, which are typically unavailable to researchers and consequently, uncorrected estimates can be more accurate than poorly corrected estimates: Shawn Bushway, Brian Johnson and Lee Slocum, 'Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology' (2007) 23(2) *Journal of Quantitative Criminology* 151. Thus, uncorrected estimates are presented here.

anticipated. Thus, more extensive past offending and more serious current offending increase the relative log odds of receiving a prison sentence versus a community-based order, but decrease the relative log odds of receiving a disqualification order (versus a community-based order) or a monetary order (versus a community-based order). In contrast, the presence of multiple conviction counts behaves the same way across all sentencing outcomes (versus a community-based order). Most likely, this reflects the nature of the other convictions sentenced as part of the same matter: these convictions are usually for similar types offences of the same or lesser seriousness. Third, not surprisingly, not being released on bail significantly increases the relative likelihood of receiving a prison sentence (versus a community-based order), while it significantly decreases the relative likelihood of a disqualification or monetary order (versus a community-based order).

Finally, being sentenced in the Nunga Court (versus the conventional Magistrates Courts) has a direct significant impact on sentencing outcomes. After adjusting for a range of sentencing factors, Indigenous cases in the Nunga Court have a 0.94 decrease in the relative log odds of receiving an imprisonment order, compared with a community-based order; a 0.51 decrease in the relative log odds of receiving a disqualification order (versus a community-based order); and a 0.34 decrease in the relative log odds of receiving a monetary order (versus a community-based order). Thus, although baseline differences indicated a greater use of imprisonment by the Nunga Courts, we found that Indigenous cases in the Nunga Court were less likely to receive a prison sentence (compared with a community-based order), once we account for differences in other factors.

Table 3. Likelihood of Key Sentencing Outcomes on Offender Social Background, Past and Current Criminality, Court Processing Factors and Court Type, Indigenous Offenders only, South Australia (2007-2009, N=15,292).

	Immediate imprisonment order			Disqualification order			Monetary order		
	B	s.e.	rr	B	s.e.	rr	B	s.e.	rr
Offender social background									
Female	-0.777***	0.148	0.460	-0.058	0.067	0.943	-0.711	0.057	0.931
Age at disposition	-0.024***	0.005	0.976	0.034***	0.003	1.035	0.014***	0.003	1.014
Past and current offending									
Prior conviction count	0.005***	0.001	1.005	-0.015***	0.002	0.985	-0.007***	0.001	0.993
Prior imprisonment term	1.150***	0.109	3.157	-0.317**	0.092	0.728	-0.102	0.079	0.903
Seriousness principal offence	0.011***	0.001	1.011	-0.009***	0.001	0.991	-0.007***	0.001	0.993
Multiple conviction counts	2.473***	0.506	11.853	2.741***	0.230	15.507	0.234**	0.081	1.263
Court processing factors									
No bail									
Plea of guilt	0.700***	0.081	2.015	-0.676***	0.081	0.763	-0.646***	0.070	0.524
	0.037	0.178	1.038	-0.668**	0.215	0.508	-1.981***	0.065	0.138
Court type									
Nunga Court									
	-0.062	0.171	0.940	-0.668**	0.215	0.513	-1.089***	0.208	0.337
Constant									
	-5.564***	0.536		-3.643	0.270		1.183	0.132	
χ^2(d.f.)				4621.45(27) ***					
Pseudo R^2				0.13					

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

Notes:

a. Relative risk 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 5,683 repeat defendants. Fit statistics are based on the unclustered model for technical reasons.

b. Referent category for sentencing outcome is community-based orders.

VIII SUMMARY AND CONCLUSION

This study addressed a key gap in our understanding of Indigenous courts, by providing a comparative analysis of sentencing outcomes for Indigenous offenders sentenced through Indigenous and conventional court processes. Using data from the South Australian conventional Magistrates Court and Nunga Court between 2007 and 2009, results showed that compared with similarly positioned Indigenous defendants in the conventional courts, Nunga Court defendants were significantly *less* likely to be sent to prison, receive a monetary penalty and have their drivers licences disqualified (versus a community-based order). Thus, this suggests that sentences that have problematic impacts for Indigenous offenders (namely imprisonment, monetary penalties, disqualification of drivers' licence[54]) are being used less frequently by the Nunga Court.

As the establishment of Indigenous sentencing courts has been a key response to the Royal Commission by Australian governments,[55] these findings provide important evidence supporting arguments for more culturally responsive processes in the sentencing of Indigenous offenders. As noted by the Royal Commission over two decades ago, the powers and decisions of sentencing courts present considerable opportunity for reducing the numbers of Aboriginal people in custody.[56]

While the bulk of past research on the Indigenous courts has been 'provisional, preliminary and impressionistic',[57] its conclusions have been consistently positive. Overall, scholars working in this area

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[54] See *Royal Commission into Aboriginal Deaths in Custody*, above n 4; Cunneen, above n 3; Spiers-Williams and Gilbert, above n 6; Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 6; Blagg et al, above n 6; Queensland Government, above n 6; New South Wales Government, above n 9; Ferrante, above n 11.

[55] See Borowski, above n 15; Harris, above n 16; Harris, above n 22; Morgan and Louis, above n 22; Hennessy and Willie, above n 18; Marchetti, above n 17; Marchetti and Daly, above n 17.

[56] *Royal Commission into Aboriginal Deaths in Custody*, above n 4.

[57] Daly and Proietti-Scifoni, above n 23.

have argued that Indigenous courts have improved court responsiveness to Indigenous peoples, empowered Indigenous communities through increased participation in the criminal justice process, and more broadly – albeit in a small way – may have positive reconciliatory outcomes by improving Indigenous/non-Indigenous community relations.[58] Within this context, the current research findings are perhaps unsurprising. In the more Indigenous-aware processes of the Nunga Court, magistrates will be acutely cognisant of the devastating impact of incarceration on Indigenous people and the differential impacts of monetary penalties and driver's licence disqualification. Tentatively at least, both in the short and long-term, Indigenous courts could make positive inroads towards addressing the problem of prison over-representation.

At present, Australian government rhetoric is very much concerned with developing evidence-based policy. Although informative and positive, more researchers should start moving beyond 'provisional, preliminary and impressionistic'[59] analyses of Indigenous courts. Keeping evidence-based policy in mind, future rigorous comparative (i.e. Indigenous versus conventional courts) sentencing research is needed in other Australian jurisdictions.

[58] See, eg, Marchetti, above n 17; Marchetti and Daly, above n 17; Daly and Proietti-Scifoni, above n 23.

[59] Daly and Proietti-Scifoni, above n 23.