SENTENCERS' ATTITUDES TOWARD WOMEN IN THE CRIMINAL JUSTICE SYSTEM: EXPLANATIONS FOR SENTENCING TREATMENT DISPARITIES BETWEEN INDIGENOUS AND NON-INDIGENOUS WOMEN

BY MARISELA VELAZQUEZ, MASTER OF CRIMINOLOGY AND BACHELOR OF SOCIAL SCIENCE

Supervised by Dr. Theresa Petray and A/Prof. Debra Miles

This thesis was submitted to the College of Arts, Society, and Education (CASE) at James Cook University, Townsville in October 2017, in fulfillment of the requirements for a Doctorate of Philosophy in Sociology

Acknowledgements

I would like to thank my supervisors, Dr. Theresa Petray and Associate Professor Debra Miles for their advice, support, and patience throughout my candidature. Thank you for the intellectual stimulations during the supervisor meetings. I am honoured to have been mentored by the both of you.

I acknowledge with gratitude all of the individuals who took part in the interviews. I would also like to thank the individuals that provided assistance during the courtroom observations, accessing court transcriptions, and interview recruitment phase. I also express my appreciation for the grant support provided by James Cook University's College of Arts, Society, and Education department.

I am thankful to my family and social network for their ongoing support. Lastly, I acknowledge the traditional owners as the sovereign peoples on whose land I conducted this research, and I honour their Elders, past, present, and emerging.

Statement of the contribution of others

I received two grants from James Cook University's College of Arts, Society and Education department for the last two years of this project. I am grateful to Emma Scott for providing formatting advice.

Every reasonable effort has been made to gain permission and acknowledge the owners of copyright material. I would be pleased to hear from any copyright owner who has been omitted or incorrectly acknowledged.

Abstract

Despite the recommendations made by the Royal Commission, a consistent pattern for Aboriginal and Torres Strait Islander people is that they continue to be over-represented across police, court, and prison jurisdictions. When the situation turns to Aboriginal and Torres Strait Islander women, while they make up for only 3% of the total Australian population, they are over-represented across the criminal justice system compared to non-Indigenous women. In Queensland, despite fluctuations in the past 8 years, Aboriginal and Torres Strait Islander women are at least twice as likely to go before the higher courts than non-Indigenous women.

This thesis is about the structures that affect women's experience of the sentencing processes in the higher courts in North Queensland the explanations judges give for the different sentencing treatment of Indigenous and non-Indigenous women sentenced in the higher courts. Insight about the judiciary is crucial to the present research project given their role can legitimise the overzealous racially motivated policing and their sentencing decisions can directly contribute to the numbers of Indigenous women in prison. Another aim of this thesis is to explore the intersections of Indigeneity and gender within the structures of the higher courts.

Using a triangulated approach of interviews with judges, observations of court rooms, and sentencing transcripts, this particular issue of women's sentencing treatment disparities in the higher courts is examined through the lens of Critical Race Theory and feminism. Applicability of Critical Race Theory pays attention to concepts related to the impacts of colonisation in contemporary structures as well as the ways the higher courts as an institution perpetuates the production and ongoing marginalisation of Indigenous women, and Indigenous peoples as a group. With feminism, in contrast to traditional criminology which studies crime and criminal justice, I narrate women's experiences through a feminist criminology lens which addresses crime and criminal justice issues relevant to women.

The thesis concludes that despite some examples of sympathy toward Indigenous women, the masked prejudice of some judges are also drawn out to support forms of new racism, which in turn, emphasizes structural racism in the higher courts. Findings also show that Indigeneity and gender intersect with structures of the higher courts to fundamentally impact the experience of Indigenous women and this complexity accounts for Indigenous and non-Indigenous women's different experiences in the higher courts.

This research proposes to look at the broader context of the criminal justice system given the systemic racism in the higher courts cannot be seen in isolation from police and prison jurisdictions.

Table of contents

List of tables

List of figures

Chapter 1: Introduction

1.1. Background to the project

In the past 30 years, there has been a general increase in the use of custody as punishment across Western countries including Australia, the United States, and the United Kingdom (Matthews, 2014; Baldry et al., 2011; Garland, 2001). This increase in the use of custody, often referred to as a shift toward tougher sentencing practices, commenced during the late twentieth century and start of the twenty-first century (Pratt, 2002; Wacquant, 2000; Cohen, 1994). At the same time there has been a decreased use of fines and an expansion in the range of community sentencing options available (Tarling, 2006). Further, more women are being sent to prison now than in earlier decades (Baldry & Cunneen, 2014; Sim, 2009; Davis, 2003).

When the attention is turned to Australia, it seems that Aboriginal and/or Torres Strait Islander women (respectfully hereafter, Indigenous) are treated differently to non-Indigenous women. In particular, Indigenous women continue to be over-represented in all levels of the criminal justice system (CJS) (ABS, 2017b; see Chapter Three). Despite reports which could serve as blueprints for reducing Indigenous peoples' contact with the justice system (Johnson, 1991) the over-representation of Indigenous peoples remains. There is a good understanding of Indigenous women's overrepresentation, yet the problem persists (Baldry & Cunneen, 2014). For example, there is a remarkable disparity in imprisonment rates between Australian Indigenous and non-Indigenous women (464.8 versus 21.9 per 100,000 according to ABS, 2016a; see also Fitzgerald, 2009; Hogg, 2001).

Imprisoning Indigenous women was once considered a form of welfare and protection; Dodson (1991:136) for example quoted a judge who said, "Sometimes I sentence them to imprisonment to help them… They get cleaned up and fed then" (Dodson, 1991: 136). A more contemporary explanation is that Indigenous women are sentenced differently because they are imprisoned for public order offences (Bartels, 2012) and that "Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women" (Stubbs, 2011: 53). Further, the current disparities in sentence treatment between Indigenous and non-Indigenous women mirror historical facts where white women have received lenient punishment while minority women have been treated harshly (Heidensohn, 1985; Chesney-Lind, 1978). Given these discrepancies, it raises

questions about the role of judges and their sentencing practices toward Indigenous and non-Indigenous women. In particular, judges' attitudes have been claimed to help predict sentencing behaviours (Bohner & Wanke, 2002).

1.2. Origin of research project

My interest in undertaking this doctoral project stems from personal and professional exposure to women who make contact with the criminal justice system. This exposure gave me an insight into how women are marked by experiences of marginalisation regardless of their personal involvement in crime. Women of colour, whether or not they commit an offence, are more likely to be affected by different forms of abuse, poverty and discrimination (Chesney-Lind, 2006; Grande, 2003). Further, given women of colour tend to have more contact with the justice system both as offenders and as victims compared to their white counterparts, my interest in carrying out this project also stems from exploring how the structures of the justice system intersect with gender and race.

I embarked on this project initially drawing from my master's research project on public perceptions of sentencing treatment (Velazquez & Lincoln, 2009). While I wanted to continue exploring what people think about individuals who commit crime, I was eager to get involved in research exclusively about women involved in offending. I also wanted to narrow my focus specifically to the perceptions judges have toward women, particularly minority women such as Australian Indigenous women. I was interested to hear the ways in which judges talk about women. Drawing from research on the impact that attitudes have on behaviour (Bohner & Wanke, 2002), I felt that judges' narratives about women would help better understand the way judges impose punishment. This is important in order to advance insight of how Indigeneity and gender intersect in judges' understandings of an offender and the impacts that these have on sentencing.

Diverse professional experience exposed me to women who offend; this also influenced my interest in tackling this project. I gained vital knowledge about the disadvantages that lead women to commit crime through my work in an emergency domestic violence shelter. There I learned how the critical moment when women decide to leave their male abusive partner leads to displacement embedded with issues surrounding poverty. My work in providing case management services to the historically chronically homeless community of 'Skid Row' in Los Angeles, California had a profound impact on my life. However, I was always hesitant working with women

because their backgrounds were overwhelmingly more complex than men. For instance, chronically homeless women tend to have histories of childhood sexual abuse, continue to be in turbulent relationships with men, and are often not proactive in treating their mental health diagnoses. I saw that chronically homeless women fed drug habits through solicitation or prostitution which in turn created vulnerability to blood borne pathogen risks of human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), and Hepatitis C. These generalised perceptions about the chronically homeless women I worked with impacted the ways I approached their lived experiences. While my intention is not to devalue the histories and struggles of men, the women I worked with impacted my case management services in that the support I provided required me to approach their traumas in very personalised and delicate ways. Another position where I gained insight about women in the criminal justice system was when I was involved in reviewing dossiers of inebriation-related incidents in a Tribal health facility in remote Alaska. This role gave me an understanding into how Native Alaskan women's alcohol-related deaths and suicides were impacted by childhood sexual assault traumas. Additionally, examining parole board case files for the Ministry of Justice in London taught me that the most violent and serious cases warranting life in prison sentences were predominantly served by men compared to women. This pattern in the dossiers resonates with official data on women's offending: that they tend to engage in non-serious offences (Bartels, 2010a). Similarly, my volunteering in prisons showed me the different dynamics of women and men in prison. In particular, I observed how some pregnant women give birth while serving their sentence and raise their child inside the facility for a very short period. The key pattern that stands out across my professional roles is that women engage in criminal behaviour in the context of marginalised lives and this complexity is amplified when other identities are layered with gender.

From the outset however, the essence of my awareness about women involved in crime stems from personal exposure to women in the justice system. In particular, visiting a male family member in prison exposed me to the culture of prison. Experiencing weekend family visitations throughout several correctional facilities in California, and across different timeframes, gave me insight into the continued and alarming issue of over populated prison facilities in select states in the United States. The problem of over populated prisons creates impetus for prisoner transfers to prison facilities in remote locations (Rabuy & Kopf, 2015). This issue in turn develops into a challenging experience for immediate family members like myself who commit to weekly visitations.

My weekend family visits to prison facilities also led me to countless encounters with other prison visitors, mostly women. I observed the loyalty of women visiting a male relative in a prison facility, regardless of the seriousness of the offence. This behaviour was passed on across generations from mother to daughter. The inmate who women visit generally tends to be a father, son, or male partner, which resonates with prison data that show men tend to make up the population of prisons (ABS, 2017b). The prevalence of women as prison visitors is something I experienced and observed first-hand.

I also experienced the tedious waiting areas in prison facilities, which served as a platform to befriend other women visitors. Waiting areas, especially those in rural prisons in the USA, are comprised of lengthy zig zag queues followed by charter buses that take visitors to the actual buildings where inmates are housed. A collective frustration from family visitors was that the lengthy waiting periods were at least five times greater than the 30 to 45 minutes of actual interaction with their inmate relatives. Contact was generally via a window and telephone though sometimes physical touch between inmates and visitors was allowed in allocated visitation rooms with benches. So the waiting period builds a camaraderie with other women visitors; the visitors' waiting area environment gave me the opportunity to listen to stories where the narratives of women who visit men in prison have a lot in common with each other.

Although my intention is not to separate myself from other women who carried the same prison visitor role as myself, I have seen how most women prison visitors experience intersecting oppression because of their race, ethnicity, Indigeneity, socioeconomic class, and gender. In line with the data on women who commit crime (ABS, 2016a), women visitors are overwhelmingly from a minority group, they tend to have small children, are unemployed, have experienced domestic abuse, have histories of alcohol and drug use, and are recipients of public service programs like public housing, social welfare, and food subsidies. These characterizations of women's disadvantaged circumstances eventually develop for some women from victimized experiences to engaging in crime (Bartels, 2010b). Further, reminiscing on childhood family dinners, discussions from my older female relatives revolved around the victimization of women. For instance, one of my relatives is a magistrate in a family court and I recall listening to her stories about women's financial struggles upon divorce. Another example is an aunty who is head of the Prosecutor's Office for the Care of Trafficking Offences and specialises in combatting the human trafficking of Indigenous women. My aunty would explain that women who experience sexual and labour exploitation generally come from

disadvantaged familial backgrounds (see also Flores, 2016). Yet another aunt who is a lawyer would explain that many divorces are based on women's victimized experiences of domestic abuse. However, regardless of whether women's victimization serves as a pathway to criminal activity, my exposure to the narratives about violence against women made me empathise with the complex lives of women.

I feel fortunate to have female relatives who are champions for disadvantaged women. However, as a Mexican American woman I am part of our patriarchal society, particularly the macho culture embedded in my family. My lived experience has also exposed me to female relatives who have battled intimate partner violence (IPV). IPV refers to "physical violence, sexual violence, stalking and psychological aggression (including coercive tactics) by a current or former intimate partner (i.e. spouse, boyfriend/girlfriend, dating partner, or ongoing sexual partner)" (Breiding, et al., 2015: 11). I recall that at a young prepubescent age I was not allowed to be near adult conversations, but yet eavesdropped the storytelling from my elder female relatives. I remember listening to their experiences of violence by their respective husbands. For some, a major issue that contributed to their risk of becoming victimized was alcohol consumption by their spouse. The link between violence and alcohol use is particularly common as the latter factor increases the occurrence and severity of victimization (World Health Organization, 2006). Some of the narratives from my older female relatives involved intimate partner violence in the form of actual physical and sexual abuse such as concussion from a physical altercation, permanent hearing loss stemming from damage to the ear drum from a closed fist assault, forced sexual intercourse, and going through delicate pregnancies after assault. Yet other narratives were related to their experiences of remaining in marriages out of fear of never seeing their children, of food deprivation as punishment, and humiliation in being forced to kneel and polish the shoes worn by their adulterer spouse.

My female relatives' experiences of violence also included narratives about the difficulties in contemplating and sometimes attempting to abandon their turbulent relationships. For example, divorce and de facto relationships are generally non-existent in my family as these are not condoned by the Catholic Church. Similarly, in many traditional Mexican families like mine, it is considered unbecoming of a woman to cohabitate with someone outside marriage. So, of the several female relatives who have experienced IPV, only one has separated from her husband. However, in doing so she

exposed herself to becoming ostracised from some family members because she deviated from her gender role as a wife.

None of my relatives who have endured intimate partner violence have made contact with the justice system as offenders. However, regardless of a woman's criminal history, I am sympathetic to women who have led lives marked by victimization through acting on or rejecting the gender role of female submissiveness. The ultimate value in listening to stories from both my elder female relatives who are champions for disadvantaged women and those who have endured victimized experiences, is that I developed empathy for women given that our socially constructed role in society is linked to marginalised experiences. I bring that empathy to this research.

1.3. Research aim and scope

The aim of this thesis is to examine the structures that affect women's experience of the sentencing processes in the higher courts. Specifically, I explore judges' explanations of the structures in the higher courts that affect Indigenous and non-Indigenous women's sentencing treatment. Given that Indigeneity sits at the core of Indigenous women's over-representation across the CJS (Baldry & Cunneen, 2014), another aim of this thesis is to explore the impact of Indigeneity and gender on the sentencing processes of the higher courts.

I wanted to explore judges' attitudes based on a paradox about judicial perceptions on women and women's imprisonment rate. Judges have stated that prison is a 'last resort' punishment especially for women (Hough, Jacobson & Millie, 2003). The argument that women's treatment is now more severe as evidenced by increases in women's imprisonment rates, largely for trivial offences, refutes judges' claims that they treat women leniently (see Chapter 3). Sentencing trends, particularly imprisonment rates, show that women are now treated more punitively (Baldry et al., 2011); this contradicts judges' claim that they treat women with leniency.

Insight into judges' attitudes about women allows for a better understanding of the discrepancies between women's offending rates and their rate of imprisonment. For example, despite decreases in women's offending rates and the patterns of offending remaining consistent and mostly non-serious, women's imprisonment rates continue to increase (ABS, 2017b; ABS, 2016b). My analysis of judges' discourse around the sentencing of Indigenous and non-Indigenous women in the higher courts will contribute to a more in depth understanding about how women's antecedents and histories are

constructed and the impact that these have in their sentence treatment. Further by focusing on judges' attitudes about women offenders, this research stresses the structural impacts of the CJS as mediated by judges.

A broad goal for this research is to contribute to an approach to women's crime and punishment that aims to reduce suffering while improving the operation of the higher courts and contributes to achieving social justice. Key to gauging judges' explanations for Indigenous and non-Indigenous women's treatment discrepancies is the opportunity to advance understanding of how the intersections of race and gender impact the treatment of minority women who have contact with the higher courts. Specific research questions that I set out to answer include:

- How do structures of the higher courts impact the treatment of Indigenous and non-Indigenous women, especially during sentencing?
- How do Indigeneity and gender intersect to impact the treatment of women by the higher courts?
- What are judges' explanations for differences in Indigenous and non-Indigenous women's sentencing and outcomes?

This research is about the structures of the higher courts that shape women's experience and the explanations judges give for the differences in the treatment of Indigenous and non-Indigenous women sentenced in the higher courts in North Queensland. I argue that Indigeneity and gender intersect with structures of the higher courts to fundamentally impact the treatment of Indigenous women and this complexity accounts for Indigenous and non-Indigenous women's different sentencing in the higher courts in North Queensland.

In contrast to traditional criminology I narrate women's experiences through a feminist criminology lens which addresses crime and criminal justice issues relevant to women (Daly, 2008; Daly & Chesney-Lind, 1988). From this perspective my gender is visibly active throughout my navigation of the multiple structural inequalities of class, race, and gender that are experienced by women offenders (Baldry & Cunneen, 2014; Chesney-Lind, 2006; Chesney-Lind & Pasko, 2004), particularly Indigenous women (Stubbs, 2011; Marchetti, 2008b, 2007). I pay close attention to how gender is constructed in criminal jurisdictions (Carlen & Worrall, 1987; Carlen, 1983). Carrying out research that examines the different ways gender (and race) impact women's experiences across

the justice system is key to my research, as feminist scholars point out that gender is "a complex social, historical, and cultural product" and that "gender relations...are not symmetrical but are based on an organizing principle of men's superiority and social and political-economic dominance over women" (Daly & Chesney-Lind, 1988: 504). Although my focus is on women, my discussion sometimes compares them to men who commit crime. The purpose of discussing men is to further convey the point stressed throughout feminist criminology, that women's offenses and pathways to criminality fundamentally differ from males (Daly, 2008).

My research focuses on women in the higher courts in North Queensland. Initially I wanted to focus on the magistrates' courts for two reasons. Firstly, the majority of women involved in crime are processed in the lower courts (ABS, 2016a). Secondly, most women's cases start and are finalised here too (ABS, 2016a). My interest however evolved from a focus on the magistrates' courts to the higher courts after insight about the select type of criminal cases that start and are completed at the higher courts. As this area is under-researched, I wanted to shed some light on the smaller proportion of women whose cases are processed and finalised in the higher courts. I also grew particularly interested in the higher courts upon learning of recent research that Indigenous people are treated with leniency compared to non-Indigenous people in some Australian higher courts (Jeffries & Bond, 2013).

Regardless of the level of the courts, my interest in having judges as participants remained consistent with my interest in the intersections of gender and race. This involved the demographics of people selected for judicial appointments. Historically, women and minority groups are under-represented in judicial roles. For example, in Queensland, "women, Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds" are specifically encouraged to apply for judicial appointments because they are largely absent from these positions (The State of Queensland, 2017: 1). As I recognized that my judicial participants would mostly be men, and specifically white men, I wanted to see whether the attitudes that judges held about women would be reflected in the way they impose punishment for women offenders.

My research builds on other studies which focus on the ways structures of the justice system intersect with gender and race and in turn affect women's treatment in the various levels of that system (Baldry & Cunneen, 2014; Chesney-Lind, 2006). However, what separates this project from research by my predecessors is my focus in the sentencing processes of the higher courts and on Indigenous women. This intersectional

approach is under-utilised in criminology research. Further, I use a triangulation of qualitative methods involving interviews, observations, and transcript analysis, in contrast to much quantitative research. The scope of this research is in North Queensland's higher courts, a region of Australia which is currently under-researched, in favour of either the major cities or rural and remote areas. However, this regional area is worthy of study, given the high proportions of Aboriginal and Torres Strait Islander people in this region, and the use of both Cairns and Townsville as hubs for many nearby Aboriginal communities.

1.4. Key terms

The Australian government definition of Australian Aboriginal and Torres Strait Islander peoples is, "…a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander [person] and is accepted as such by the community in which he (or she) lives" (Gardiner-Garden, 2003: 4). This three-part definition is widely accepted across government agencies and has evolved in response to issues related to blood-quantum or fractions (Gardiner-Garden, 2003).

I use the general term 'Indigenous' to refer to Australian Aboriginal and Torres Strait Islander peoples. Similarly, all references to Indigenous refer to Australian Indigenous people. I acknowledge that there are issues with referring to Aboriginal and Torres Strait Islander peoples as 'Indigenous' given it is a generic term (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2014). In doing so I follow Indigenous Australian units and communities represented by academic institutions who refer to this as appropriate terminology, "Indigenous Australian peoples are people of Aboriginal and Torres Strait Islander descent, who identify as Aboriginal or Torres Strait Islander and are accepted as an Aboriginal or Torres Strait Islander person in the community in which they live, or have lived" (see Flinders University). I acknowledge that Aboriginal and Torres Strait Islander peoples are two distinct groups, both made up of many more nations with different laws and customs; however I use 'Indigenous' to refer to all Aboriginal and Torres Strait Islander peoples for the practical purpose of distinguishing Aboriginal and Torres Strait Islander peoples from non-Indigenous Australian people. The use of the term 'Indigenous' also allows the broad identification of women whose experience is relevant to this research without presuming their identity as either Aboriginal or Torres Strait Islander women.

Throughout the thesis, I discuss diverse groups of people so use the term relevant to the discussion. For example, in the theoretical framework where I discuss American research on different feminist groups, I refer to women of colour interchangeably as minority women. When specifically discussing different groups of women of colour in America, I use the terms that are adopted by respective authors. These include Black women, Indian/Native American, Native Alaskan, Native Hawaiian, Chamorro in Guam, Latina/Hispanic women, and Chicana women.

I use the term 'white' to refer to a person with European ancestry. In the context of Australia, I refer to individuals as white and non-Indigenous interchangeably. The latter term also includes Australians of various racial and ethnic backgrounds who are not Aboriginal and/or Torres Strait Islander people. Similarly, when I discuss American research, I use the term 'white' interchangeably with Caucasian.

This thesis uses the term 'offender' to refer to a person who commits a crime. I use the term from the Queensland Sentencing Advisory Council Queensland (2017) particularly because they point to the person committing a crime as having contact with the courts through either a guilty plea or having been found guilty. This research particularly focuses on the sentencing phase of court processes and therefore positions the term 'offender' appropriately.

1.5. Royal Commission into Aboriginal Deaths in Custody

An important influence in this research is the Royal Commission into Aboriginal Deaths in Custody (RCIADIC, Royal Commission hereafter) report (Johnson, 1991). Although the Royal Commission report was released more than twenty-seven years ago, it remains an important contribution because of its comprehensive investigation of Indigenous Australians in the CJS and because of its inspiration for advocating for Indigenous justice policy reforms (Marchetti, 2012). The Royal Commission focuses on the treatment of Indigenous peoples by police, courts, and prisons which is central to my research on the impacts that structures of the higher courts have on Indigenous peoples and Indigenous women specifically (Baldry & Cunneen, 2014). Further, the Royal Commission allows us to trace over decades how Indigenous women's voices are silenced in society (Davis, 2007), and in this case, were largely ignored in the report despite being over-represented 'clients' of the justice system.

1.5.1. Issues leading to the report

The key issue that led to the Australian government establishing a Royal Commission related to the deaths of Indigenous people that occurred during police and prison custody (Cunneen, et al., 2013). The two main public concerns about the deaths of Indigenous people while in custody was that their deaths were poorly explained and that these incidences were occurring too often (Johnson, 1991). These concerns in turn raised questions about the conduct of police and prison officers toward Indigenous peoples while in custody.

Prior to the establishment of the Royal Commission (Nagle & Summerrell, 2002) there was significant research which highlighted the marginalisation of Indigenous people and which detailed the disadvantage and discrimination experienced by Indigenous people in their contact with the CJS. For example, some studies concentrated on the effects of the Stolen Generation like the social tensions that impacted Indigenous peoples contact with the justice system (Gale, 1972). Yet others extended on the issue of the over-representation of Indigenous peoples to select groups such as Indigenous youth (Carrington, 1990; Gale et al., 1990; Gale, 1985) and Indigenous women (Payne, 1992; Howe, 1988; Parliament of NSW, 1985). The general outcomes of this early research was both to raise public consciousness about the issues that Indigenous peoples were facing in the justice system while also advocating for legislative and social changes for Indigenous peoples. So prior to the Royal Commission there was a growing concern for the treatment that Indigenous peoples were experiencing, particularly their over-representation across the justice system.

1.5.2. Overview of the Royal Commission report

Following public concern for the deaths of Indigenous peoples in police and prison custody (Cunneen, et al., 2013), in 1987 the Australian government appointed a Royal Commission to investigate the deaths of 99 Indigenous people who died while being held in police custody between 1980 and 1989 (Johnson, 1991). According to the Royal Commission, the 99 deceased individuals were not deliberate deaths caused by police or prison officers. Instead, the key reason to why the deaths had occurred was because they were overrepresented in custody (Johnson, 1991). Specifically, the cause of deaths from the individuals investigated were as a result of physical trauma such as head injuries, self-inflicted hangings, diseases, and alcohol and drug use (Johnson, 1991). An

interrelated finding was that the quality of care provided in police and prison facilities for Indigenous peoples in custody was substandard. An important component of the report was its 339 recommendations to reduce the over-representation of Indigenous peoples in the justice system through a combination of justice reform that also addressed the social disadvantage of Indigenous peoples (Cunneen, 2011).

1.5.3. Response to Royal Commission report

The Royal Commission has attracted a range of responses. One response to the report was positive feedback to its recommendations. The recommendations have always been supported in principle by governments across states and territories, federally, and within Indigenous and non-Indigenous communities (Cunneen, et al., 2013; Mackay & Smallacombe, 1996). While I will not go into detail about the specifics of the recommendations, the proposed ways of decreasing the contact of Indigenous peoples with the justice system extended beyond institutions of the justice system and focused on other areas such as health, particularly alcohol and drug use, poverty issues including unemployment, living environments impacted by housing, education resources for children, land rights, and national reconciliation processes (Johnson, 1991). Part of the appeal of the recommendations is that there is a wide scope of issues which is improved have the ability to impact the lives of Indigenous peoples positively while also decrease their contact with the justice system.

Despite purported support from all levels, the recommendations made by the Royal Commission have not been fully implemented. As a result, we continue to see the over-representation of Indigenous people across the justice system as well as the ongoing deaths of Indigenous people in custody (Cunneen & Tauri, 2016). For example, Indigenous leader Associate Professor Gracelyn Smallwood, quoted in an ABC news report about the Royal Commission's recommendations, argued that Indigenous peoples' lives would improve if all of the recommendations from the Royal Commission were implemented (ABC, 2013). She also refers to the Closing the Gap strategy which similarly focuses on reducing Indigenous peoples' disadvantage (Department of the Prime Minister and Cabinet, 2017).

> Closing the Gap is very, very important from a holistic point of view, and once you start cleaning up poverty then everything will start failing into line. I'm optimistic that if those [RCIADIC] recommendations were implemented that we could start closing

> the gap…we wouldn't have any deaths in custody and wouldn't have a massive increase in the incarceration rates nationally. (ABC, 2013)

However, others take a more critical view of the Royal Commission. For example, Marchetti (2006) argues that comprehensive legal inquiries like the Royal Commission are embedded within colonising practices and even though the Royal Commission had genuine intentions to empower Indigenous approaches, in practice the report fostered adverse impacts.

> Ultimately, the RCIADIC, while attempting to use practices that appeared more culturally inclusive, itself propagated the colonizing agenda. The prevailing colonial legal discourse and processes, which lacked an adequate understanding and appreciation of Indigenous values, culture, and beliefs, instead continued the silencing of Indigenous voices. The group of predominantly non-Indigenous male lawyers used their Western liberal and adversarial knowledge and experience without question in their zealous and sincere pursuit of justice (Marchetti, 2006: 472).

Another critical view of the Royal Commission notes its lack of consideration for the complex lives of Indigenous women (Marchetti, 2012, 2008a, 2008b, 2005b; Kerley & Cunneen, 1995). For example, "…there were almost no recommendations aimed specifically at reducing female contact with the law or reducing levels of violence against Aboriginal women" (Mackay & Smallacombe, 1996: 17). In a similar tone, Marchetti (2012) argues that the report failed to acknowledge issues that Indigenous women face despite research from that time period that noted their over-representation in prison and police custody (see for example Howe, 1988). Further, Marchetti (2012) emphasises that applying an analysis of the intersections of race and gender when examining legal matters is necessary to capture a better picture of how marginalised women are treated in the justice system and to provide a better understanding of Indigenous people as a whole. Likewise, Kerley & Cunneen's (1995) overview of the Royal Commission argues that Indigenous women's treatment in the justice system compared to non-Indigenous women is based on the intersection of their gender, Indigeneity, and legislations that target Indigenous peoples.

1.5.4. Post-Royal Commission

The key goal of the Royal Commission, to reduce Indigenous people's contact with the justice system, has not been achieved. Since the release of the report Indigenous people continue to be over-represented across the justice system (Cunneen & Tauri, 2016; Baldry & Cunneen, 2014; Cunneen, et al., 2013). Deaths of Indigenous peoples in police and prison custody remain high (Cunneen, 2007; Williams, 2001). Specifically, deaths of Indigenous women in custody also continue (Cunneen & Tauri, 2016; Bartels, 2010a; Collins & Mouzos, 2002; Kerley & Cunneen, 1995). As a consequence of the ongoing over-representation of Indigenous peoples in the justice system, studies have examined the issue of Indigenous peoples contact with the justice system from different approaches. Some explanations focus on the criminal conduct of Indigenous peoples as the primary cause for their over-representation (Weatherburn, et al., 2003). However, most researchers in this field acknowledge the impact of history, colonisation and discriminatory social structures in the ongoing problem. Some scholars adopt a critical race lens, pointing out how structures of the justice system treat Indigenous peoples adversely as a group (Cunneen & Tauri, 2016; Marchetti, 2005a; 2005b; Tauri & Webb, 2012). This line of research also extends to the ways the structures of the justice system specifically impacts Indigenous women (Baldry & Cunneen, 2014) and Indigenous youth (Graham, 1999). Others have investigated the over-representation issues through a lens of patriarchy and colonialism and argue that structures and institutions of the justice system are rooted in colonizing practices towards Indigenous peoples (Baldry & Cunneen, 2014; Marchetti, 2006; Hogg, 2001; Tauri, 2014).

So as a whole, even though recommendations from the Royal Commission were well received, these have not been fully executed. Consequently, the over-representation of Indigenous peoples across police, courts, and prison remains. Further, even though the report was released 26 years ago, it remains as an important contribution to social and scholarly understandings of Indigenous over-representation in the CJS. The report has inspired government-led schemes such as the Close the Gap scheme to reduce the social disadvantage of Indigenous peoples (Department of the Prime Minister and Cabinet, 2017). The Royal Commission's limited attention to the situation of Indigenous women has also influenced subsequent research which adopts a gender-specific analysis (Baldry & Cunneen, 2014; Marchetti, 2012; Stubbs, 2011; Bartels, 2012, 2010a, 2010b; Baldry & McCausland, 2009). These studies that emphasise the complexities of Indigenous

women's gender and Indigeneity and how these intersect with structures of the justice system are particularly important to this research (Baldry & Cunneen, 2014; Marchetti, 2012; Jonas, 2002). They show how structures of the justice system intersect with gender and Indigeneity, and thus, impact Indigenous women's treatment.

> When researching and debating criminal justice policies and practices, an intersectional race and gender approach is important because it enhances our understanding of how racialized women experience the criminal justice system as both offenders and victims (Marchetti, 2012: 39).

1.6. Structure of the thesis

The following chapters report on research into the structures of the higher courts that shape the experiences of women offenders who are sentenced in the higher courts in North Queensland. This study is about how the processes of the higher courts are influenced by women's gender and Indigenous status. In light of the continued over-representation of Indigenous women across the justice system, I pay particular attention to women's different experiences in the higher courts based on the intersections of gender and Indigeneity. The purpose in sharing my own experiences, above, is to emphasise that marginalised women lead complex lives, while also to position myself as an active component of the research and thus remain true to a feminist methodology and framework. Because of my lived experience, I understand the need to let marginalised women speak for themselves. Therefore I make no claims to speak on behalf of Indigenous women. Rather, this research is about the structures in the higher courts that shape women's lives.

Chapter 2, 'Theoretical framework', lays the foundation for the approach that I take throughout my research. I provide an overview of feminism through a review of women's movements and waves. Feminist criminology is discussed as I narrate women's experiences through this lens, while emphasising the ways gender shapes the treatment for women processed in the justice system. I then focus on Black feminism and Indigenous feminism to discuss the historical and ongoing ways women of colour experience intersectional oppression based on their race and their gender. A review of criminological research of Indigenous issues is discussed. Theoretical explanations postulated for the treatment of women are presented and critical race theory as a way of explaining how structures of the higher courts intersect with race and adversely affect the

treatment for people of colour, is discussed. This discussion is refined to critical race feminism for its applicability to how the structures of the higher courts intersect with the gender and Indigeneity of Indigenous women impacting their different treatment compared to non-Indigenous women.

Chapter 3, 'Current situation', examines statistical data and previous research to illustrate the complex circumstances in which Australian women come into contact with the criminal justice system through their involvement in crime, in order to provide the context of my own research. After highlighting the limited methods available to capture data on Indigenous women across jurisdictions, the discussion focuses on information about women's contact with the police, their appearance in court, and prison as custodial sentencing. As this research pays close attention to the structures of the judicial system, I provide an overview of the courts such as levels, functioning, and existing research on the higher courts and judicial attitudes. Selected criteria for information about women processed throughout the justice system include relevant material from scholarly sources as well as government reports. The point of this review is to emphasise the ongoing pattern that Indigenous women continue to be over-represented across policing, courts, and prison. This chapter provides an overview of the situation of women's contact with the justice system and shows that Indigenous women are substantially over-represented, yet the data does not clearly indicate why this disparity exists. While all three levels of the justice system are discussed in this chapter, my focus is on the sentencing phase of the higher courts.

Chapter 4, 'Methodology', provides an overview of the approaches used to examine women's sentencing treatment. Information about the qualitative approach used in the research involving interviews with judges, observations in courtrooms, and analysis of court transcripts are discussed. A review of the formal procedures involving recruitment with judges, resources and instruments for courtroom observations, structure of the analysis of court transcriptions, and data analysis is provided. This chapter also explains how I approach each method through a feminist lens where my positionality is embedded in the research. The emphasis of this chapter lies in discussing how the qualitative methodology and feminist framework allow me to navigate structures of the higher courts and their intersection with the gender and Indigeneity for women that come before the higher courts.

Chapter 5, 'Specific Indigenous issues' discusses findings where structures of the higher courts impact the sentencing treatment of Indigenous peoples in the higher courts

differently compared their non-Indigenous counterparts. In particular, court procedures involving mitigating and aggravating submissions are used to illustrate how structures of the higher courts affect the sentencing treatment of Indigenous peoples as a group. Legislation, such as the cultural considerations factor, specifically affect the higher court process for Indigenous peoples as this is formal recognition that the disadvantaged life circumstances of Indigenous peoples are a relevant and important mitigating factor to be considered. However, the automatic overlapping of Indigeneity with disadvantage denies the agency of Indigenous people, assumes the nature of Indigenous people's experience, and points to the paternalistic sentencing practices embedded within higher court procedures. Higher court processes involving the submission of aggravating factors such as criminal history similarly impact Indigenous peoples as a group. Previous involvement in public order offences is prevalent among the histories of criminality for Indigenous peoples compared to non-Indigenous people, however the impact of differential policing charging and sentencing practices for such offences remains invisible in the higher courts.

Chapter 5 also discusses the complexity of judicial perceptions and their influence on the sentence treatment of Indigenous peoples in the higher courts. There were two general perceptions about Indigenous peoples. Judges expressed perceptions that Indigenous peoples experience disadvantaged circumstances. However, despite attitudes of sympathy toward Indigenous peoples, judges claimed that they do not use discretionary powers to provide lenient treatment based on their Indigenous status. This finding suggests that judicial attitudes of sympathy do not impact the processes of the higher courts for sentence cases involving Indigenous peoples.

Building on findings from chapter 5, that structures of the higher courts impact the sentence treatment of Indigenous peoples as a group, chapter 6, 'Indigenous women', highlights this result by demonstrating how the narratives told about women during higher court processes intersect with their gender and Indigenous status. Indigenous women's narratives rarely rely on the imposition of traditional western gender roles. In contrast, non-Indigenous women are recipients of higher court processes through mitigating factors that resonated with traditional women's gender roles of domesticity such as child dependent responsibilities and interpersonal relationships with men. Thus, findings show that non-Indigenous women are subjected to a particular line of narrative. One where their hardships of financial challenges or poor interpersonal relationships with men lead to poor mental health and illicit drug use, and in turn, justified their offending. So from a context of women's gender roles, the cultural expectation of apologizing and conforming is

conduct that overlaps with structures of the higher court processes and is suited more for non-Indigenous women than Indigenous women.

Chapter 6 also discusses how processes of the higher courts must be understood in the context of the historical relations between Indigenous peoples and the police. The offender's cooperation with police authorities was submitted to the higher courts as a mitigating factor for cases involving non-Indigenous women but not for Indigenous women. Another factor which also pointed attention to the historical relations between Indigenous peoples and the police are public order offences. This type of charge, where Indigenous peoples have been historically over-represented with public order offending charges, was evident in higher court processes related to the aggravating factors submitted for sentence cases involving Indigenous women.

Chapter 7, 'Impact of sentencing outcomes' details how processes of the higher courts (sentence outcomes) intersect with institutions affiliated with (ATSILS) and outside (social and political sectors) the higher courts to shape the experiences of Indigenous women, and Indigenous peoples as a group, adversely. Specifically, for the situation of women, findings reveal that future prospects post-sentencing are more complex for Indigenous women than non-Indigenous women given the former will continue to face adversity on the basis of the intersections of their gender, Indigeneity, and structures of the higher courts. This chapter also discusses how judges experience competing tensions for the situation of Indigenous peoples and overcoming disadvantage. Some judges point to other institutions of the justice system such as policing practices to explain Indigenous peoples' adverse experiences of the higher courts. Yet other judges stress that it is Indigenous peoples' lifestyle choices which impact their adverse experiences of the higher courts. Chapter 8, 'Conclusion', provides a summary of the key findings of the research and the future for research about women who make contact with the higher courts.

This chapter has provided an overview of the research aims and foci. The following chapter explores the theoretical frameworks that have informed the analysis.

Chapter 2: Theoretical Framework

2.1. Introduction

Compared to men, women's crimes remain at the low level of seriousness: there is usually a lower recidivism rate, little in the way of 'career' offending, and women's offences are often conducted in concert with those of men (ABS, 2017a; Baldry, 2010; Chapter 3). Therefore, despite predictions from twentieth century commentators that women were becoming increasingly violent (see Adler, 1977, 1975), it remains the case that they do not constitute a major criminal threat. Yet the official data as described in the following chapter does show that there are more women entering the criminal justice system (CJS) and that they increasingly receive custodial sentences (ABS, 2017b; 2014). While it is difficult to tease out all the contributing factors to this greater contact with the justice process for women, it seems that the feminist criminological argument that there is a harsher approach in women's sentencing now than in past decades is borne out by the offending and sentencing data (ABS, 2017a; 2016b).

This chapter provides theoretical explanations for why some groups of women historically receive different treatment than others in the CJS (Cunneen & Tauri, 2016; Delgado & Stefancic, 2001; Heidensohn, 1985). In particular, I argue that race and Indigeneity sit at the core of women's different experiences in the justice system in Australia. This is supported by theoretical explanations that have been posited to explain how women are dealt with across the CJS (Chesney-Lind, 2006). While it is impossible to cover all theories, the discussion here focuses on those that are most relevant to women's treatment during sentencing impacted by the intersections between gender and race (Cunneen & Tauri, 2016; Bond & Jeffries 2011; Stubbs, 2011; Daly, 2008; Piquero, 2008; Delgado & Stefancic, 2001; Carlen, 1983; Kruttschnitt, 1982b).

The chapter commences with an overview of feminist theories, including in particular the contributions of Black feminism and Indigenous feminism. I define feminism using key elements from some of the different strands of feminism (Freedman, 2001). This section stresses that ideas, histories, and practices from the different feminisms are not necessarily unified. I highlight this point because I navigate this chapter, and my thesis overall, through the viewpoint that women's experiences are different, particularly for women of colour such as Australian Indigenous women.

I use a feminist framework to examine the intersections that gender and Indigeneity have on women's lived experiences, and I explore the similarities between Black American feminism and Indigenous feminism. In drawing the focus to Indigenous feminism, I discuss how white feminism is embedded with the assumed superiority of non-Indigenous women toward Indigenous women through their whiteness and identity in white sovereign patriarchy. I also demonstrate how the colonisation of Australia by British settlers is at the forefront of women's different historical and contemporary life experiences. I move beyond women's collective unity based on gender and point to Indigeneity as a key impact to women's different lived experiences. Following a review on feminisms, I highlight the contributions of feminist criminology to criminological research. I present theoretical applications that explain both why women commit crime and the different ways they are treated in the CJS.

The second section of this chapter provides an overview of the areas of criminological research and race. Here I discuss research on Indigenous issues in criminology such as how transgenerational trauma is linked to colonialism. This section also provides some of the research approaches and hypotheses put forward to explain Indigenous peoples' contact with the CJS. I detail the application of Critical Race Theory (CRT) to support my argument that Indigeneity and gender intersect with structures of the justice system to adversely impact Indigenous women across all jurisdictions

It is noteworthy to mention that in some sections I draw from work from the United States (US) and the United Kingdom (UK). I use these points of references for three reasons. Firstly, this is where feminist criminological work related to gender and crime emerged (Daly, 2001). Secondly, Australia has a history of modelling criminal justice initiatives from these countries (Baldry, 2010). Thirdly, I draw from US feminist literature because of their historical work involving the intersection of race and gender (Delgado & Stefancic, 2001), particularly the struggles of Black American women during both slavery and the Civil Rights Movement (Daly, 1997; Simpson, 1991). This scholarly work is important as it resonates with my thesis about the intersectionality of Indigeneity and gender for women in Australia. While the focus is on issues facing Australian women, I build on work from other countries for the purpose of discussing the patterns with the overlap between race and Indigeneity and gender.

2.2. Theoretical understandings of feminism and criminology

2.2.1. What is feminism?

Broadly, feminism refers to diverse ideas and actions related to social change that benefits women (Butler, 1999; Daly & Chesney-Lind, 1988). An analysis of the different strands of feminisms demonstrates that there is collective agreement in principal viewpoints such as the overarching goal of all feminisms to end the oppression of women. I use Freedman's (2001) examination of the multiplicities of feminisms to define feminism: "feminisms concern themselves with women's inferior position in society and with discrimination encountered by women because of their sex" (Freedman, 2001: 1). Yet the specific characteristics of different strands can also oppose each other. It is important to highlight that I do not assume agreement across all feminisms or sameness for all women. For instance, a pitfall of some feminist thought is the lumping of all women together when in reality not all women fit into one group or share one experience of oppression. Consequently, problems arise when it is assumed that other common ground exists beyond the generalised description that links the different feminisms. In particular, the grouping of women together is problematic not only because it identifies women's experiences as the same, but also ignores differences in cultures and race. "Such an assumption of underlying unity or coherence of different feminisms may have the unlooked-for-effect of marginalising different groups of women whose concerns fall outside this definition of feminist unity" (Freedman, 2001: 2). This issue is relevant to my research both because I discuss the specific issues that Indigenous feminists tackle and the different experiences that Indigenous and non-Indigenous women face in the higher courts during sentencing.

2.2.2. Feminist theoretical strands

Key to the diverse definitions of feminism are the different spaces where feminists advocate for societal changes (Chesney-Lind & Faith, 2000). While the baseline for feminists is to end women's discrimination, different feminists tackle different women's issues related to social, economic, political, and cultural sectors (Harding, 1993). Strands of feminisms and feminist groups however tend to fall into three general groups. These theoretical families include liberal feminism, Marxist and socialist feminism, and radical feminism. Liberal feminism advocates for equal rights for women. Liberal feminists use the state as a social structure to argue that equal citizenship rights should be extended to

women just as they are for men (Jaggar, 1983). Marxist and socialist feminism focuses on women's gender inequality and oppression through the capitalist system of production and the division of labour (Harding, 1993). Radical feminism proclaims that the patriarchal system instils men's domination over women (Millett, 1970).

A shortcoming about these feminist theoretical families relates to their labels. For example, Freedman (2001) points out the tendency for this classification to, on one side, emphasise their respective differences while on the other side, cluster their common points. Similarly, Nye (1989) points out that this labelled classification is a rigid approach that does not do justice to the complexities of feminism as feminism is a "tangled and forbidding web" (Nye, 1989: 1).

2.2.3. Women's movements and waves

A similar pattern that excludes some groups of women and their histories is in the description of women's movements through a historical context. For example, the general history of feminism is often discussed through feminist movements as a series of waves (Cudd & Andreasen, 2005). The first wave, the suffrage movement, during the late 19th century and early 20th century, fought for equal political rights and economic opportunities for women (Wollstonecraft, 1792). While Australia granted suffrage to women relatively early, in 1902, this was not universal; Aboriginal and Torres Strait Islander women were still excluded from voting until as late as 1965 (Chesterman & Galligan, 1997). The second wave occurred during the start of the 1950s as supported by Simone de Beauvoir's *The Second Sex* (1952). This wave is identified by concerns related to political and legal resources for women. Here women's subordination to men particularly in interpersonal relationships is highlighted (Millett, 1970). The third wave followed during the late 1980s and focuses on feminist theory and politics. In particular there is an extension from advocating for women's political rights to other sectors including rights within the family, sexuality, and employment. Further, this period of time saw the emergence of the discourse that different feminists have different feminist objectives and so feminism is a diversity as opposed to a unity of women with one unique goal (Butler, 1999).

There are key elements from the third wave relevant to this thesis. The first point relates to criticisms by women of colour that women's concerns (including those from the previous wave) are not only not representative of all women but that issues specific to women of colour are generally overlooked (hooks, 1984). hooks maintains that Betty

Friedan's *The Feminine Mystique* (1963), a key text in second-wave feminism, is a narrative relevant only to the lives of "…a select group of college-educated, middle and upper class, married white women – housewives bored with leisure, with the home, with children, with buying products, who wanted more out of life" (hooks, 1984: 60). Similarly, third wave feminism gives greater visibility to feminists who express sentiments about the intersectionality of gender and race, recognising that "…a privileged White woman and a Black woman of the underclass will both be women insofar as their social positions are affected by the social meanings of being female; and yet the social implications of being female vary for each because sexism is intertwined with race and class oppression" (Haslanger, 2000: 39). Women of colour highlight that women's experiences of oppression differ based on race, and white feminists who overlook issues specific to women of colour perpetuate racism (Cornwell, 1994). These discussions are especially congruent with the different lived experiences between Indigenous women and non-Indigenous women.

The historical context of these feminist movements and waves, while convenient as a general summary, is problematic because "…the grouping together of feminist movements under a general description of 'first wave' and 'second wave' may act to mask the diversity of feminist thought that has existed both within the two waves and between them, by attempting to give one label to a whole series of different theories and actions" (Freedman, 2001: 4). For example, an invisible pattern of feminist agendas across the different waves of women's movements lies in its exclusive relevance to white women, particularly those from the upper class (Moreton-Robinson, 2004). This exclusive focus on white women, in turn, points to a regime of power that Moreton-Robinson (2015: 157) calls "patriarchal white sovereignty" (discussed further below). She argues that this power regime "derives from the illegal act of possession and is most acutely manifest in the state and its regulatory mechanisms, such as the law" (Moreton-Robinson, 2015: 157). Consequently, the racial division where white women benefit from their white privilege is evident by their achieved gains across different sectors, from voting to gaining an education, to paid labour, to reproductive rights.

In beginning this chapter with a description of women's movements as situated in this neat historical context, I realise I too am guilty of potentially neglecting the different experiences of women of colour. The pervasive nature of a neat historical timeline of women's feminist activity is reflected in the way these timeframes coincide with the theoretical explanations of women's involvement in crime and their treatment by the CJS.

For example, the third wave corresponds with the liberation thesis which explains why women, particularly white women, engage in crime and how they are treated (discussed in the next section). Despite these pitfalls of feminist theory, I am committed to the key aim of feminist thought to overcome women's inferior position within different societal sectors, and therefore use a feminist framework to examine Indigenous and non-Indigenous women's experiences in the higher courts. The following sections of this chapter detail important components of this framework which show that some aspects of feminism are, in fact, relevant to women of colour. In particular I discuss how structures of the justice system intersect with gender and race and shape the experiences of women offenders, and thus, take on an intersectional race and gender approach. The point of this information is to show how this thesis takes an intersectional approach.

2.2.4. Black feminism

As previously discussed, the narratives of privileged white women demanding changes in the lives of all women ignores the different lived experiences of working class women and women of colour. A particular argument by feminists of colour involves the race bias that assumes "that all female experiences are similar" (Messerschmidt, 1995: 170). Although Black women were invited to take part in feminist activities alongside white women during the 1970s, joining a feminist movement was always problematic for Black women. For example, where some Black women who took part in public protest alongside white women experienced racist hostility in the form of patronizing behaviour from white women (Cornwell, 1994), other Black women experienced being labelled and perceived as angry when they raised concerns about sidelining issues relevant to women of colour:

> …I enrolled in a graduate class on feminist theory where we were given a course reading list that had writings by white women and men, one black man, but no material by or about black, Native American Indian, Hispanic, or Asian women. When I criticised this oversight, white women directed an anger and hostility at me that was so intense I found it difficult to attend the class. When I suggested that the purpose of this collective anger was to create an atmosphere in which it would be psychologically unbearable for me to speak in class discussions or even attend class, I was

> told that they were not angry. *I* was the one who was angry (hooks, 1984: 66).

Yet a more crucial point for why Black women are reluctant to join a feminist movement relates to the historical relationship between white and Black women. According to Black feminist scholar, bell hooks (1989), some Black women trivialize feminism because it is "a rage rooted in the historical servant-served relationship where white women have used power to dominate, exploit, and oppress" (hooks, 1989: 179). hooks further refers to Black peoples' lived experiences of domination and oppression by white people during slavery to note that Black women's reluctance to adopt feminist identifies identities is based on seeing feminism as "a white female thing that has nothing to do with Black women" (hooks, 1989: 179).

Further, because Black women have been historically oppressed by white women, there are different perceptions of femininity for Black and white women. This power relationship between white women and Black women is rarely the focus of white feminism. Steffensmeier & Allan (1991) claim that women are unable to engage in violent conflict. In particular, the misperceptions of women's gendered conduct intersected with race resonate with overlooking the historical treatment of white women toward Black women. However, Messerschmidt (1995) disagrees with Steffensmeier & Allan (1991) that women are unable to engage in violent conduct out of morality instilled in women through gendered roles. In contrast, Messerschmidt (1995) identifies white women plantation owners who physically abused and exploited Black women and argues that women, especially white women, have engaged in violent conduct that is not necessarily 'feminine' behaviour. White women's violent conduct towards Black women is similar to the historical relations between Australian Indigenous and non-Indigenous women (Huggins, 1998; discussed further below).

2.2.5. Intersectionality

As a whole, Black women's experiences of oppression and subordination resulted in the emergence of Black feminism. More importantly, these issues point to the concept of intersectionality. The intersectionality framework is the concept that the overlap of social identities such as gender, race, and class provides a more accurate representation of lived experiences as opposed to single-axis frameworks (Crenshaw, 1989). Intersectionality originates from Black women of colour debunking notions from feminist discourses and theory led by white women that gender determines the experiences of all

women as being the same. hooks (1984: 10) states, for example, "My persistent critique has been informed by my status as a member of an oppressed group, experience of sexist exploitation and discrimination, and the sense that prevailing feminist analysis has not been the force shaping my feminist consciousness". Further, according to Crenshaw (1989), race and gender should not be used as single-axis frameworks or as exclusive categories in the analysis of experiences because this approach distorts experiences. Instead, race and gender should be mutually combined for a richer way of addressing the experiences by women of colour through the interaction of their race and their gender. She says, "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated" (Crenshaw, 1989: 140). The advantage then of the overlap of women's race and gender is not only to avoid overlooking the different experiences of women of colour and white women but also to emphasise the oppression, marginalisation, and discrimination experienced by women of colour.

The intersection issues highlighted by Black feminism in the United States that draw on the historical and contemporary different lived experiences for women of colour and white women transcend national boundaries. This especially includes settler societies that have colonialist histories like Australia, Canada, and New Zealand (Baldry & McCausland, 2009; Bracken, et al., 2009). The relationships and roles for white and Black women in the United States are relevant to women in Australia because of the historical experiences impacting the privileged and oppressor role for non-Indigenous women and the oppressed and disadvantaged role for Indigenous women (Fredericks, 2010). This contribution is critical to my research as I take an intersectional approach to the situation of Australian Indigenous and non-Indigenous women.

2.2.6. Indigenous feminism

Indigenous feminism in Australia has similarities to Black feminism in the United States. In particular, Black women's intersectional experiences echo Indigenous women's denied access to the privileges that non-Indigenous women historically receive. As with Black feminism, which is imbued with issues including class, race, and gender (hooks, 1989), "An Indigenous woman's standpoint is informed by social worlds imbued with meaning grounded in knowledges of different realities from those of White women" (Moreton-Robinson, 2000: xvii). In similar fashion, Indigenous scholar Aileen Moreton-

Robinson (2000), argues that feminism in Australia is a women-centred movement run by non-Indigenous women, especially white middle class women (Moreton-Robinson, 2000). That is, as feminism is grounded in whiteness it is designed exclusively for the benefit of non-Indigenous women (Moreton-Robinson, 2000). Similarly, Indigenous scholar Jackie Huggins (1994) also identifies feminism in Australia as a movement by and for non-Indigenous women. Consequently, Indigenous women feminists express their reluctance to join non-Indigenous feminists "until non-Indigenous women address the issues of whiteness, racism and classism" (Fredericks, 2004: 2). At the same time however, it is not necessarily that Indigenous women do not exhibit feminist practices. Rather Indigenous women's lived experiences of marginalisation and oppression by white sovereignty validate their lack of interest in and commitment to the causes that interest non-Indigenous women.

2.2.7. Colonial experiences of Indigenous women

The general narratives about feminism in Australia by Indigenous feminists tend to be linked to the socially constructed relationships and roles between Indigenous and non-Indigenous women during colonialism (Behrendt, 2016; Huggins, 1998). Anita Heiss (2003: 45) defines colonization as "…the process of coming in and taking people's land and sovereignty away from them". Participation in feminism with non-Indigenous women perpetuates the denial of the role that non-Indigenous women played during colonialism (Moreton-Robinson, 2000). For example, Fredericks (2004: 1) suggests that, "Historically Aboriginal women generally found little comfort or support from non-Indigenous women in Australia who were active participants in the marginalization and the denial of human, civil, political, legal, sexual and Indigenous rights of Aboriginal women".

Similar to Messerschmidt's (1995) portrayal of American white women's violent conduct toward Black American women, Australian Indigenous historian and Aboriginal rights activist Jackie Huggins argues that non-Indigenous women deviated from 'feminine' behaviour when they engaged in violent conduct toward Indigenous women. Her book, *Sister Girl*, showcases six Indigenous women's narratives about their experiences as domestics during the 1920s and 1930s. These narratives depict violent acts by white Australian women:

> You see this scar on my face, well I reckon that was done by her [the mistress] because we had to scrub the pots and pans. And

> you know those Steelo pads with the gold threads through them, well I went off cleaning and she came in while I was cleaning the silver and I wasn't doing it right according to her. So, she got it [the Steelo] and scrubbed my face and said: "Now this is the way you rub!" (Huggins, 1998: 7).

Further, Indigenous women's experiences of colonialism include changes in societal roles, removal and dispossession from land, and reproductive and partner control from the state (Liddle, 2017). For instance, before the invasion of British settlers:

> Aboriginal women's position and participation in productive activities was parallel to that of men, rather than subservient, subordinate or oppressive…Aboriginal women…had specific and important roles within the broader construct of community. Aboriginal women were valued and respected and were not of lesser value to men…Aboriginal women had and have their own ceremonies, songs, dances, law and sacred sites through which connections, association and affiliations to country, people and culture were strengthened (Fredericks, 2004: 1).

The experiences of colonization created a drastic shift in Indigenous women's roles from empowered women with important roles to fulfil in society to complete loss of autonomy (Moreton-Robinson, 2000). Their reproductive freedom in particular was violated as a form of birth prevention that suggests intentions of genocide.

> From time to time allegations surface that State medical services engaged or engage in administering contraceptive 'therapy' without informing the women of its purpose: in Western Australia, the use of Depo-Provera, producing three-to-six-month infertility. Depo-Provera, by injection, has alarming side effects, necessitating dire warnings about contraindications and the need for stringent physical examination before administration. Another allegation is the permanent sterilization of Aboriginal women: in Queensland, a series of 'non-explained' tubal litigations (Tatz, 2001: 24).

These lived experiences are also heavily impacted by the active participation from non-Indigenous women (Paisley, 2000). For example, Indigenous women were placed in

subservient roles which is a colonial practice (Fredericks, 2004). While non-Indigenous women too were restricted to gendered subordinate roles in relation to non-Indigenous men, their experience was different because they actively participated in the oppressor role in the exploitation of Indigenous women.

While in some cases Indigenous and non-Indigenous women lived alongside each other, their relationship was never equal. Indigenous women worked as domestic servants whereas non-Indigenous women were heads of households (Haebich, 2014). Non-Indigenous women directly benefited from Indigenous women's unpaid labour (Haebich, 2014), and profited from the dispossession of their land, restricting their traditional relationships and practices (Fredericks, 2010). With respect to the genocide of Indigenous peoples (Tatz, 2001), non-Indigenous women directly participated in the assimilation of Indigenous women, Indigenous children, and Indigenous female adolescents through their roles in missions, schools, and households (Cole et al., 2005; Paisley, 2000). As Haebich (2014: n.pag.) says, "Assimilation promised to transform them [Indigenous women and girls] into popular images of white suburban mothers and homemakers. Girls could become office workers, nurses and teachers". In short, the colonial experience was different for Indigenous and non-Indigenous women. The lack of acknowledgement by non-Indigenous women of the role they played in the trauma of colonization is at the heart for Indigenous women's reluctance to join non-Indigenous women's feminist causes (Huggins, 1994).

Indigenous women also experienced negative portrayals when their role in Indigenous society changed, "With the onset of white colonialization…the position of black women plummeted…from being people of recognized spiritual growth to that of being of virtual animal status in the eyes and the behalf systems of their exploiters" (Evans, 1982: 9). Indigenous women were debased and demeaned compared to non-Indigenous women. In particular, the different gendered perceptions for Indigenous women impacted eugenics measures toward them whereas attitudes toward non-Indigenous women's domesticity were idolised:

> …the contrasting pro-natalist treatment of white women: their idealisation as mothers; their esteemed duties as bearers and nurturers of the nation's future citizens; the benefits they received to carry out these duties-the maternity allowance, basic family wage, housing, public amenities, and medical services and education for their children. By contrast, Aboriginal women were

> devalued as mothers: their children were taken to be raised by the state; the state also intervened to prevent them from bearing children by controlling their sexual and marriage partners; and women, expected to work, were confined to poorly paid domestic service. Denied the benefits assumed as a right by white women for their children, Aboriginal women were forced to live in extreme poverty, thereby providing officials with further reason to remove their children 'for their own good' (Haebich, 2014: n.p.).

The different gendered perceptions based on race are also used by Indigenous feminists to explain how Indigenous women are viewed as 'other' (Huggins, 1994). This perceived 'otherness' sidelines Indigenous women in non-Indigenous feminism.

> Aboriginal women are viewed as the 'other' based on a menial or sexual image: as more sexual but less cerebral, more interesting perhaps but less intellectual, more passive but less critical, more emotional but less analytical, more exotic but less articulate, more withdrawn but less direct, more cultural but less stimulating, more oppressed but less political than they are (Huggins, 1994: 77).

As settler colonialism lays the foundation for the different lived experiences of Indigenous and non-Indigenous women, this also includes their different gendered perceptions. Moreover, this historical context shows similar patterns to women's different experiences today.

2.2.8. Ongoing oppression

Part of the rationale for Indigenous women's reluctance to join feminist causes with non-Indigenous women relates to the impacts of colonization that remain today (Fredericks, 2004). One ongoing colonising practice is Indigenous women's denial of the privileges that non-Indigenous women receive. This in turn mirrors the marginalisation and oppression of Indigenous women and racial sovereignty of non-Indigenous women (Fredericks, 2010). An example of Indigenous women's ongoing oppression is when their voices are not heard or considered in Australian society compared to non-Indigenous women:

> …the recent controversy about violence and sexual assault against Aboriginal women in communities was not triggered by the excellent scholarship of Indigenous women such as Audrey Bolger, Judy Atkinson or Boni Robertson – it was triggered by a white woman echoing identical concerns to that of Aboriginal women (Davis, 2007: 10).

Another example of the ongoing impacts of colonisation is tokenism (Moreton-Robinson, 2000). These examples highlight that key to racial power structures is the way in which non-Indigenous women are privileged by their association to the dominant patriarchal white society (Fredericks, 2010). Non-Indigenous women's advantages compared to Indigenous women is borne out of their membership in the dominant race whereby, "…women who do not express positions or opinions in outright support of these activities still benefit from their position by proxy and contribute to the cultural dominance of non-Indigenous women" (Fredericks, 2010: 546). Furthermore, these examples point out that Indigenous women's position in Australia is overlooked not only by non-Indigenous women but by society as a whole. Historical and contemporary differences in lived experiences for Indigenous and non-Indigenous women provide a compelling argument for why Indigenous feminists are hesitant to participate in women's causes alongside non-Indigenous women. In fact, the oppression of Indigenous women within the feminist movement is a mirror for the ongoing oppression of all Indigenous peoples in Australia. It is based on the premise that the exploitation and oppression of Indigenous people remains (Huggins, 1994); that "…the term 'post-colonialism' is largely meaningless to Aboriginal people, bearing in mind the political, social and economic status we currently occupy", because Indigenous Australians are still colonised (Heiss, 2003: 43).

2.2.9. Whiteness

A concept that is brought up across this thesis is the topic of whiteness. Whiteness relates to the normalised privileges and power that 'white' people, or individuals from European ancestry, receive or are entitled to, based on their socially constructed race (Frankenberg, 1993). The emphasis of whiteness studies is that white people are at a structural advantage in society because their norms and customs are unquestioned (Cowlishaw, 2004). Whiteness is multidimensional. White people experience power and privilege in their behaviours and conduct (Frye, 1983). 'White' exists at the top of the

racial hierarchy so individuals not in this category are identified as the 'other' (hooks, 1989; 1984). Moreover, the privileges of whiteness are invisible to white people (but not to marginalised groups) which perpetuates their lack of understanding experiences that people of colour face such as oppression (Moreton-Robinson, 2004).

2.3. Feminism's contributions to criminology

The key contribution of feminism to criminology lies in the focus on gender and crime in criminological research (Chesney-Lind, 2006; Gelsthorpe, 1997). In particular, feminist theory is used to explain the ways gender shapes the treatment of women who have contact with the criminal justice system (CJS) (Daly, 2006). The emphasis that feminist criminology places on gender to examine particular issues related to women inspired me to take on this project from this standpoint.

Emerging from women's movements in the 1970s, and with the majority of criminal justice 'clients' generally being male, feminist criminology argues that historically mainstream criminology ignores women (Vold, et al., 2002; Smart, 1976; Klein, 1973). Feminist criminology critiques mainstream criminology for its exclusive focus on men and for the way criminological studies applies theories, based on men's situations and behaviour, to women (Baldry, 2010; Naffine, 1987). The forthcoming chapters demonstrate that the characteristics for men and women in the CJS are different; they enter the justice system for fundamentally different reasons and their offending patterns differ (Vold, et al., 2002; Leonard, 1983). In particular women's pathways into crime are impacted by complex issues involving child dependencies, homelessness, drug and alcohol use, histories of interpersonal violence, childhood emotional, physical, and sexual abuse, and poor mental health (Forsythe & Adams, 2009; Corston, 2007; Butler & Milner, 2003).

On a global scale, feminist criminology has for the past forty years focused on the treatment of women within the justice system (Chesney-Lind, 2006, 1978; Smart, 1976; Adler, 1975). While the most significant feminist contribution to criminology remains Eileen Leonard's *Women, Crime and Society* (1983), the body of research includes topics such as offending (Worrall, 1990), sentencing (Gelsthorpe & Loucks, 1997), prison (Carlen & Worrall, 2004), community supervision (Carlen, 1990), prisoner resettlement (McIvor et al, 2009; Carlen, 2002; Eaton, 1993), vulnerable women (Bartels, 2010a; Corston, 2007), and media representations of female offenders (Jewkes, 2004; Storrs, 2004). The literature from feminist criminology firstly highlights that women's offences

and pathways for criminality fundamentally differ from males (Daly, 2008), and secondly, that there is a significant cohort of women who should not serve prison sentences but do (Chesney-Lind, 2006).

2.3.1. Early concepts for women's crime & treatment

Chivalry thesis

One early theory that was used to explain women's offending and treatment is the chivalry thesis. Relying on biological factors, the chivalry thesis maintains that justice practitioners treat women in a more lenient manner than men (Pollak, 1950). According to Otto Pollak (1950) women's involvement in crime is much lower compared to men because their biology alongside socially gendered expectations allows for their crimes to go unreported, undetected, and in turn, out of social expectation, receive favourable treatment compared to men.

> Thus, for biological as well as for cultural reasons, woman seems to possess greater powers of concealment than does man…therefore better equipped to achieve the supreme goal of most criminals, namely, to remain undetected…Men hate to accuse women and thus indirectly to send them to their punishment, police officers dislike to arrest them, district attorneys to prosecute them, judges and juries to find them guilty, and so on (Pollak, 1950: 151).

A key drawback of the chivalry thesis is its use of gender as a variable for examining sentence treatment (Eaton, 1986). Further, the lenient treatment is not extended to women of colour or to women whose crimes fall outside of gendered expectations (Heidensohn, 1985; Chesney-Lind, 1978).

Liberation thesis

Another approach put forward to explain women's crime and treatment is liberation theory. Liberation theory asserts that women's increased involvement in crime during the 1970s and 1980s reflects the liberation of women, and a shift in their behaviour to be more like men, which led to harsher treatment in the CJS (Adler, 1977, 1975). According to Freda Adler, changes in social status through the liberation of women such as the break-down of social gender roles, which allegedly prevented and protected women from offending, allowed women to engage in more male-like behaviours such as violent and serious criminal offences. However, liberation theory is too constricted to white

women's criminality while ignoring the differences in social class and race among women (Daly & Chesney-Lind, 1988). Further, it is based on inappropriate assumptions about women's offending patterns established from misinterpreted statistical analysis on crime data (Daly, 2001; Mann, 1984; Smart, 1979). While Adler's concepts are now generally acknowledged as outdated explanations for women's treatment, her work did attract attention to women's experiences of the CJS. Neither the chivalry thesis nor liberation thesis holds up when identities like gender and race are intersected and so consequently, I do not apply any of their concepts to this thesis. In contrast, the double deviance theory is another historical explanation which does have concepts that I consider in my framework.

Double deviancy

According to British criminologist Francis Heidensohn (1985), the double deviance argument maintains that women are subject to harsher punishment compared to men when they deviate from traditional female roles such as engagement in serious crime, particularly violence or sexualised behaviour. In other words, some women who are considered unfeminine by virtue of class, race, or occupation, or demeanour are actually singled out for harsher treatment than men in similar circumstances (Datesman & Scarpetti, 1980). Further, Nagel et al (1980) similarly found that women who conform to traditional roles of femininity are punished less severely than women who deviate from feminine expectations. Thus, Nagel et al.'s claim mirrors Heidensohn's point that punishment is dependent on whether women deviate from their accepted role in society. Double deviance theory has relevance to my examination of how the intersection of Indigeneity and gender overlaps with structures of the higher courts to impact their sentence treatment. The key argument that some women are subject to harsher treatment when they deviate from expected behaviour is relevant to this thesis in the context that Indigenous women are likelier to be charged with violent offending, and have been considered more animalistic and sexualised than non-Indigenous women (Haebich, 2014).

Another concept from double deviance that I consider involves the role that women's family background and marital status play during their sentencing treatment. For example, the applicability of double deviance is observed in Chesney-Lind's (1978) findings that women who abused or abandoned their children or who did not have their own family to look after had a disadvantage in court because of their lack of perceived feminine behaviour. Similarly, Farrington & Morris (1983) assert that while it is possible

for gender to have no effect on sentencing when specific variables like seriousness of offence and criminal history are accounted for, family background and marital status are factors that judges consider more for women than men; therefore, divorced and separated women are treated more harshly than married women.

2.3.2. Equality versus differential treatment debate

A separate discussion in feminist criminology about women's treatment by the CJS is the differential versus equality debate. Where the former suggests that differences in terms of available resources specifically designed and tailored for each sex should be considered, the latter advocates equal treatment of both men and women (Matthews, 2009). On the one side, supporters of the equality approach stress that a shift from laws that treat men and women differently is necessary because "…. women will be victimized by law created from 'concern and affection' that are designed to protect them" (Chesney-Lind & Pasko, 2004: 158). The opposing arguments in this debate propose that because women's needs and their pathways into crime are fundamentally different from men's, their treatment experiences will always be different: "On a more global level, given the differences between male and female prisoners, it seems extremely unlikely that women's experiences of imprisonment will ever mirror men's experience – no matter how often the legal system insists on a gender-neutral stance" (Chesney-Lind & Pasko, 2013: 147). For instance, some of these different experiences of imprisonment for women are that they become separated from their young children (and sometimes lose custody), their remote location predisposes them to difficulty in maintaining social ties, they lose accommodation, and they go through embarrassing and humiliating moments during strip searches and through a lack of private toilets (especially during menstrual cycles) inside prisons (Corston, 2007).

A point stressed about differential treatment, however, is that this approach could imply that women are different and less than men: "Given legal and social realities, differential treatment for women will always be unequal treatment and by accepting different definitions and treatment, women run the risk of perpetuating the stereotype of women as 'different from' and 'less than' men" (Chesney-Lind & Pasko, 2013: 141). Here 'different' is being interpreted as 'less than', which is not necessarily the case considering the desperate urge to reform women's punishment and; given that custodial sentences often lead to a negative ripple effect into women's lives (Corston, 2007). As a

whole the debate on whether women are treated equal or different than men is an issue in feminist criminology that stands out when we examine how women should be treated.

2.3.3. Feminist jurisprudence

It is also the case that the debate about women's equality versus differential treatment have been used to argue that neither approach is necessarily a more appropriate shift in women's treatment by the CJS. As a result of the shortcomings of both the equality and differential approaches, some have called for a feminist jurisprudence (MacKinnon, 1987; Scales, 1981). First emerging during the 1970s in the U.S., feminist jurisprudence is a philosophy of law which focuses on the equality of the sexes from political, economic, and social standpoints (MacKinnon, 1987). Catherine MacKinnon (1987) argues for a feminist jurisprudence because of criticisms that in either approach men are the standard to which women are compared.

> Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure (Mackinnon, 1987: 33).

For MacKinnon, a feminist jurisprudence would consist of a judicial system that is not male-dominated and would instead respond to the needs of women. While this legal scholarship highlights the impact that gender has in the legal environment, it is also an optimistic shift toward treating all groups of women with the same opportunities because this jurisprudence downplays a hierarchy of groups, and instead seeks fair legal treatment across all defendants such as white women and women of colour.

2.4. Race and criminology

2.4.1. Criminology Research in Indigenous issues

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) proved to be a watershed moment in understanding the nature of Indigenous peoples' relationship with the criminal justice system. A significant amount of criminological research examining the position and treatment of Indigenous peoples in the CJS has occurred in ensuing years. Research focuses on a variety of topics including offending patterns and

the treatment of Indigenous peoples across the CJS (Cunneen, 2006b; Tatz, 2001). Specifically, research has examined the ways the police responds to crimes committed by Indigenous people (Blagg, 2008) and on examining patterns of sentence treatment such as custodial versus non-custodial, community orders. Other areas studied include restorative justice and specialised Indigenous courts (Cunneen, & Tauri, 2016; Cunneen, 2001). By far the most extensive and thorough criminological research of Indigenous issues explores prisons. This is especially justified given the gradual increase in the use of imprisonment as punishment during the late twentieth century (Findlay, Odgers & Yeo, 2014). The social and economic consequences of prison for Indigenous peoples has led to research related to employment, education, and rehabilitative schemes aimed at strengthening Indigenous peoples' reintegration into society (Baldry et al., 2011; Baldry, 2010). Recognition of the interconnection between criminology and the complex issues of mental health, drug and alcohol use, and histories of victimization such as transgenerational trauma of Indigenous peoples has also influenced the research in this field (Baldry et al., 2015). Criminological research of Indigenous issues also draws attention to juvenile delinquency (Cunneen & Libesman, 1995). Studies examining juveniles particularly focus on the impact of detention centres as forms of retributive and rehabilitative sentencing approaches. Indigenous access to legal assistance and representation in the justice system (Cunneen, et al., 2014) especially through the public assistance provided by the Aboriginal and Torres Strait Islander Legal Services (ATSILS) is another focus of the literature.

Different methodological approaches are used to examine Indigenous issues. However, the most common methods are quantitative. This resonates with the broad field of criminology which tends to examine issues through quantitative methodological approaches. For example, statistical data is used to tease out patterns of criminality and contact across criminal justice agencies within local communities, state-wide, and nationwide in the form of percentage and rates from populations involving Indigenous peoples (ABS, 2016a, 2016b).

A scan of criminological research on Indigenous issues reveals more attention to Indigenous men than Indigenous women. Again, this resonates with the broad field of criminology which tends to study men over women primarily because men tend to be involved in crime more than women and so are more likely to have contact with the justice system than women (ABS, 2017a).

The Australian Institute of Criminology (AIC) which reports on patterns of criminality provides information about women who offend in Australia but does not distinguish between Indigenous and non-Indigenous women (Bartels, 2010a; See Chapter 3). The limited criminological research studies about Indigenous women which do exist have focused on their contact with the police (Cunneen, 2001) and prison (Baldry & Cunneen, 2014; Bartels, 2012; Baldry, 2010). An area of the literature which has received little attention is that of Indigenous women's contact in the higher courts. Hence all the more reason why I was interested in carrying out research that focuses on the ways structures of the higher courts impact the lives of Indigenous women.

While the above topics provide a broad description of some of the diverse Indigenous issues discussed in the criminology literature, a common consequence of these studies is the acknowledgement of the ongoing over-representation of Indigenous peoples across policing, courts, and prison despite all the efforts of the Royal Commission.

2.5. Theoretical framework

A number of different understandings over Indigenous peoples' contact with the justice system have been posited in the literature, each of which especially contributes to different ideas about the way in which the issue of Indigenous peoples' over-representation should be addressed. One approach is the *differential involvement hypothesis* which concludes that:

> …minorities are overrepresented at every stage of the criminal and juvenile justice system because they commit more crimes, for more extended periods of their lives, and more of the types of crime, such as violence, that lead to processing with the criminal justice system (Piquero, 2008: 64).

According to Weatherburn, Fitzgerald, & Hua (2003: 65) the over-representation of Indigenous peoples in prison is a reflection of "…high rates of Aboriginal involvement in serious crime". In other words, these authors attribute Indigenous peoples' contact with police, courts, and prisons to their patterns of criminality, particularly their involvement in serious offences. Samantha Jeffries and Christine Bond have also applied the differential involvement hypothesis to their examination of sentencing disparities which result in the imprisonment of Indigenous and non-Indigenous people (Bond, Jeffries & Loban, 2011; Bond & Jeffries; 2011). These authors argue that even though Indigenous peoples are more likely than non-Indigenous people to be imprisoned, the sentence of

imprisonment for Indigenous and non-Indigenous people is similar under like circumstances. Weatherburn, Fitzgerald, & Hua suggest that in order to address the over-representation of Indigenous peoples in the CJS, government should invest more substantially in specific social and economic programs for Indigenous people that increase employment and education, and reduce substance use.

Another explanation for the disparities in treatment between Indigenous and non-Indigenous people also put forward by Jefferies and Bond is the *positive discrimination hypothesis* which asserts that people of colour receive lenient treatment based on their minority status (Bond & Jeffries, 2011; Jeffries & Bond, 2011). In Australia, the positive discrimination hypothesis has been applied to argue that Indigenous status plays out as a mitigating factor and benefits the sentence treatment of Indigenous peoples.

> In circumstances where disparity remains, more often than not, Indigenous defendants appear to be treated leniently in comparison with their non-Indigenous counterparts. Research thus provides some support for the positive discrimination hypothesis, with results showing that Indigeneity often reduces sentence severity either directly or in interaction with other sentencing factors (Jeffries and Bond, 2010: 10).

In a similar vein research from Snowball and Weatherburn (2007) suggests that the aggravating factor of criminal history was taken into consideration more for non-Indigenous people than Indigenous peoples possibly because "judicial officers, like many in the broader community, are very concerned about Indigenous overrepresentation in prison" (Snowball and Weatherburn, 2007: 286). However, both differential involvement and positive discrimination theories rely primarily on the statistical analysis of Indigenous people already in the CJS, and the issues identified 30 years ago in the Royal Commission remain. Indigenous people continue to be apprehended by the police, are still appearing before the courts, and are still given custodial sentences at higher rates than their non-Indigenous counterparts (ABS, 2017b). This reality questions how advantageous the treatment really is and how is this alleged positive treatment continuing to impact the lives of Indigenous peoples adversely.

To be clear, my focus on the impacts of structures of the higher courts particularly discredits differential involvement and positive discrimination hypotheses. The differential involvement hypothesis explains crime through an emphasis on individual

pathology and strays from attention to the impacts that structures of the justice system has on the lives of Indigenous peoples. This is precisely what my research focuses on – how underlying forces that are embedded in structures of the higher courts adversely shape the experiences of Indigenous peoples. The differential involvement hypothesis does not consider the impacts of colonialism on individual outcomes to explain the offending conduct by Indigenous peoples. However, the structures of the justice system, including criminal law, must be understood historically (Sumner, 1982). This historical context "must inevitably turn us towards colonialism…crime is not behaviour universally given in human nature and history, but a moral-political concept with culturally and historically varying form and content" (Sumner, 1982: 10). In the same fashion, Cunneen & Tauri (2016) argue that excluding colonialism from theorising Indigenous peoples' contact with the justice system results in attributing offending and victimised experiences to individualised pathology explanations.

> On a theoretical and practical level, it [silencing colonialism] has resulted in decontextualized and dehistoricised accounts of Indigenous criminality and victimisation that explain these complex phenomena as simple manifestations of individual, aberrant Indigenous behaviour (Cunneen & Tauri, 2016: 11).

Further, the positive discrimination hypothesis might explain some lenient treatment based on the antecedents of Indigenous peoples who appear before the courts, but this approach ignores why criminality occurs in the first place and it does not explore why Indigenous peoples are apprehended by the police more than non-Indigenous people.

This thesis uses an alternative framework based on Critical Race Theory (CRT) and highlights the impact of colonization on Indigenous peoples' contact with the higher courts through victimization and offending (Cunneen & Tauri, 2016). Critical Race Theory emerged in the United States during the 1970s from the legal discourse of the Civil Rights Movement of the 1960s (Delgado & Stefancic, 1993). Developed as a movement in the law, this school of thought studies the intersections of race, racism, and power and examines "…the entire edifice of contemporary legal thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination" (West, 1995: xi). A core tenet of CRT is that racism is normal and a common experience for people of colour. This normality in the lives of people of colour in turn makes racism difficult to detect.

> Its ordinariness makes racism hard to recognize, much less address, and means that formal rules that demand colorblind treatment will be able to remedy only the most flagrant forms of it (Delgado & Stefancic, 2007: 136).

In the criminal justice system, CRT focuses on the ways in which law adversely affects people of colour not as individuals but as a group (Delgado & Stefancic, 2001). Further, an important dimension of CRT is the way "It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better" (Delgado & Stefancic, 2001: 3).

In considering the situation of Australian Indigenous peoples, CRT argues that the structures and institutions of the Australian criminal justice system promote institutionalised racism toward Indigenous peoples. According to Chris Cunneen, Indigenous peoples' treatment in the justice system is based on racism and institutional bias embedded in the justice system. Drawing from postcolonial theory, Cunneen maintains that the impacts of colonisation are "not simply historical events" but active in the contemporary processes of social, economic, and cultural institutions (Cunneen & Rowe, 2014: 50). In a similar vein Cunneen argues that the structures and institutions of the justice system have an adverse impact on Indigenous peoples' treatment.

> The over-representation of Indigenous people in some categories of offences may tell us as much about detection by police as about the frequency with which crimes are committed (Cunneen, 2006b: 190).

The over-policing concept is characterised as policing conduct that is different 'and more intensive' compared to the policing of non-Indigenous peoples (Cunneen, 2006: 189b). This too mirrors the adverse use of police discretion where different levels of intervention toward Indigenous peoples, specifically in public situations, are unnecessary and provoked (Cunneen & McDonald, 1997). For instance, where police are able to make discretionary decisions during their intervention, Indigenous peoples are more likely to be charged while non-Indigenous people are more likely to be given a summons (Luke & Cunneen, 1998). Being charged is more intensive because it is combined with arrest, formal processing at the police station, and bail is set prior to the actual attendance in court. Indigenous communities are further impacted when tendencies towards over-policing, based on inherent and institutionalised racist processes, is combined with the

imposition of public order offences. A public order offence is conduct such as offensive public behaviour or language, public drunkenness, and resisting arrest (ABS, 2017a, See Chapter 3). Cunneen (2006b: 189) argues that "These charges are often representative of direct police intervention and potential adverse use of police discretion". Each of the elements of the justice system are contributing factors in the over-representation of Indigenous peoples in the CJS, from over-policing in Indigenous communities, to the discretionary decisions police make after intervention, which impact the imposition of charges from legislations like public order offences (Cunneen 2006b).

The argument that structures of the justice system adversely impact Indigenous peoples' treatment is especially amplified by the emphasis on the historical relations between Indigenous peoples and the justice system. For example, "…police have been required to enforce legislation which denied basic rights and protections to Aboriginal and Torres Strait Islander people. Colonial legislation embodied in various Protection Acts was used to exert control over Aboriginal people and communities in a racially discriminatory manner" (Cunneen, 2006b: 192). Police officers have participated in the removal of Indigenous peoples from their lands, the relocation of Indigenous peoples to reserves and missions, and the forced removal of Indigenous children from their families (NISATSIC, 1997). For Indigenous peoples, this tragic background has contributed to the disadvantages experienced across generations (Cunneen, 2006a, 2006b; NISATSIC; 1997).

Although laws that actively exercised overt racial discrimination are today revoked, we continue to see legislations targeting Indigenous peoples and the ways the police use their discretionary powers which can impact indirect discrimination, as discussed above. Further, indirect discrimination can occur in other ways the police use their discretionary powers. For example, Indigenous peoples are more likely to be denied bail by the police compared to non-Indigenous people (Cunneen & Tauri, 2016; Wootten, 1991). The denial of bail for Indigenous peoples could be explained by their higher rate of unemployment and homelessness than non-Indigenous people, and as a method for preventing their failure to appear in court (Cunneen & McDonald, 1997). However, this primarily points to the historical relations between Indigenous peoples and the police. The use of police discretionary powers reinforces the different treatment of Indigenous peoples, and in turn highlights how the structures of the justice system, such as police jurisdictions, impact Indigenous peoples adversely.

Another example of how the historical relations between Indigenous peoples and their contact with the justice system impact contemporary treatment of Indigenous peoples is the work of Harry Blagg (2008), who like Cunneen (2011) draws from postcolonial theory and focuses on the effects of colonization. Blagg notes that the over-representation of Indigenous peoples in the justice system (as both offenders and victims) stems from experiences of marginalisation across generations of Indigenous peoples. He argues that the process of colonisation – dispossession, genocide, and assimilation – remains given the ongoing marginalisation and denial of Indigenous peoples' cultures and laws. In particular Blagg maintains that the over-representation of Indigenous peoples' in the justice system is a result of the existing power structures which are predominantly Western, or non-Indigenous. Further, the example of violent offences helps to explain the impact of colonisation. For Blagg (2008), violence carried out by Indigenous people is not a product of their culture but rather results from imposing non-Indigenous practices on Indigenous peoples, and through the marginalisation that non-Indigenous practices are imposed on Indigenous peoples within broader society.

The Stolen Generation provides a specific example of how the historical relations between Indigenous peoples and the justice system reflect ongoing treatment of Indigenous peoples (NISATSIC, 1997). The impacts of forced removal directly affect Indigenous contact with the CJS, with "greater numbers of the Stolen Generation among Indigenous arrests and deaths in custody" (Cunneen, 2006b: 201). Further, the incarceration of Indigenous peoples has been pointed out as another form of removing Indigenous children from their Indigenous families (Blagg, 2008).

Blagg's approach to the treatment of Indigenous peoples in the justice system is a process of decolonisation of justice, "founded upon respect for, and recognition of, the Aboriginal domain and its laws and cultures, and we need to do it now" (Blagg, 2008: 207). The first step away from colonising practices is a change in perspective from viewing disadvantaged experiences of Indigenous peoples as an 'Indigenous problem' to acknowledging that the issues they face can be traced to the settler history. In the same tone, acknowledgment of the impacts of colonial policies and practices toward Indigenous peoples also enables the recognition that racism is embedded in the structures of the justice system. The aim of this change in perspective is to shift the ways issues are addressed within the structures of the CJS (Blagg, 2008). More specifically, he discusses hybridity, or the emergence of new structures from a partnership of Indigenous and non-Indigenous domains, that is developed when Indigenous peoples and their traditions are

included in addressing the treatment of Indigenous peoples in the justice system. For example, some of the existing partnerships between Indigenous communities and criminal jurisdictions who have changed the structures of the justice system include specialised Indigenous courts, elders' groups, and community justice groups. As a whole then, Blagg's approach to addressing the issues surrounding the treatment of Indigenous peoples in the criminal justice system is to shift from colonisation to decolonisation, whereby Indigenous peoples and their traditions are included in the structures of the justice system.

It is important to emphasise that this thesis is not simply characterising the Australian criminal justice system (CJS) as racist toward Indigenous peoples. This would be a too simplistic explanation for Indigenous people's treatment with the justice system. Individual police officers do not always act in a racist way toward Indigenous peoples. However, we do see police officers respond to criminal legislations through levels of intervention and discretionary practices which impact Indigenous peoples contact with the justice system. This difference in processing Indigenous peoples in the form of police discretion, targeting Indigenous communities, targeting a specific crime, and imposing a charge over a summary, in turn impacts their contact with other justice systems such as courts and prison, thus, contributing to their over-representation across the CJS (Piquero, 2008). Further, one of the justice areas also associated to the criminalisation of women and Indigenous people is child safety (Cunneen & Tauri, 2016; NISATSIC, 1997). Especially for Indigenous women, the child safety system impacts the experiences of Indigenous women and their contact across police, courts, and prison jurisdictions differently (Stubbs, 2013; 2011).

It is the complex ways the CJS operates as a whole which offers a richer explanation of how the specific structures of the courts adversely impact the treatment of Indigenous peoples, especially as "measures of 'crime' need to be understood as social, political, and historical artefacts" (Cunneen, 2006b: 202). Therefore, theorising the structures of the higher courts and their ways of operating which adversely impacts the treatment of Indigenous peoples can be supported by critical race theory (CRT).

While CRT is the most appropriate to examine the impact that structures of the higher courts have on Indigenous peoples processed as offenders, this approach has shortcomings. Comments about CRT relative to this research is that this approach has overlooked issues related to Indigenous peoples as compared to non-Indigenous people of colour (Cunneen & Tauri, 2016: 9, 36). For example, Moreton-Robinson comments on

the absence of Indigenous experiences in the discipline of whiteness studies: "the problem with American literature is that it tends to locate race and whiteness with the development of slavery and immigration, rather than the dispossession of Native Americans and colonisation" (Moreton-Robinson, 2000: viii).

Another approach and one that is linked to CRT is Indigenous criminological perspectives. Similar to CRT, key tenets of this approach include its emphasis on intersectional analysis for a richer understanding of inequalities underlined through race, gender, and class, promotes activism in working to changing structures for better justice outcomes, and examines how structures maintain inequality through racist legislations and race (Schneider, 2003). A key tenet particularly from Indigenous criminological perspectives is its advocacy for centring Indigenous knowledge (Cunneen & Tauri, 2016). Meaning that Indigenous criminological perspectives encourages for representations of Indigenous knowledge through Indigenous experiences of settler colonial crime. Yet another main feature is their advocacy for non-Indigenous collaborators who conduct research on issues related to Indigenous peoples to work with Indigenous peoples as opposed to carrying out research on Indigenous peoples (Menzies, 2001: 21). This is an important consideration for further research, but is outside the scope of this thesis. This research is about the structures of the higher courts that shape women's experience and the explanations judges give for the different sentencing treatment of Indigenous and non-Indigenous women processed in the higher courts.

As a whole, this approach will examine ways structures of the higher courts affect women's sentencing treatment. In particular, CRT will pay attention to concepts related to the impacts of colonisation in contemporary structures as well as the ways the higher courts, as an institution, perpetuate the production and ongoing marginalisation of Indigenous peoples as a group. In the same tone, it is imperative to acknowledge that I am central to the research, so my positionality as a woman and a woman of colour is embedded in the research.

2.6. Conclusion

In this chapter I lay the foundation for the critical race and feminist approaches that I take throughout my research. I provide an overview of feminism through a review of women's movements and waves. Feminist criminology is discussed as I narrate women's experiences through this lens, while demonstrating the ways gender shapes the treatment for women who make contact with the criminal justice system as offenders. I

narrow the focus to Black feminism and Indigenous feminism and discuss the historical and ongoing ways women of colour experience intersectional oppression on the basis of their race and their gender. A review of criminological research of Indigenous issues is discussed. Theoretical explanations postulated for the treatment of women are presented to explain how structures of the justice system intersect with race and adversely affect the treatment for people of colour. I discuss the applicability of Critical Race Theory to how the structures of the justice system intersect with gender and Indigeneity, and in turn, impact their different experiences in court compared to non-Indigenous women.

Chapter 3: Current Situation

3.1. Introduction

A consistent pattern for Aboriginal and Torres Strait Islander people is that they continue to be over-represented across police, court, and prison jurisdictions (ABS, 2017a, 2017b). Although reports provide recommendations on ways to decrease Indigenous peoples' contact with the criminal justice system (CJS), their over-representation remains (ABS, 2017b) despite the fact that Indigenous people make up only 3% of the total Australian population (AIATSIS, 2014). Indigenous women also continue to be over-represented across the CJS compared to non-Indigenous women (ABS, 2017a, 2017b; Bartels, 2010a). The issue of Indigenous women's over-representation extends to women processed in the higher courts despite the evidence that Indigenous and non-Indigenous women have much lower rates of contact in the higher courts compared to the magistrates' courts because of their engagement in generally non-serious offending (ABS, 2017a).

This chapter discusses women's contact with three tiers of the justice system, examining both statistical data available and previous research, to establish the context in which the research occurred. The chapter commences with a brief overview about the limited research about women's involvement in crime, which is one of the reasons I carried out this project. As the focus of this thesis is on Indigenous women, I also discuss data limitations relevant to this group of women. Each section discusses women's contact across the three criminal jurisdictions: policing, courts, and the prison system. While my attention is on the higher court jurisdictions as an under-researched court area and the focus of my thesis, I discuss general information about the role of courts in the justice system, how they are organized, and the function and kinds of decisions that judges make. Existing research about policing, court, and custodial practices is also presented to demonstrate how the treatment of women, and particularly Indigenous women, within the whole system is relevant to theoretical concepts discussed in the previous chapter.

3.1.1. Current research on women's contact with the CJS and data limitations

The limited research on women involved in crime has been well documented (Bartels, 2010a). In particular, there is a lack of research exclusive to women who make contact with police, court, and prison jurisdictions as offenders. For example, data from

the Australian Bureau of Statistics (ABS) that exclusively focuses on women charged with a criminal offence has limited reporting periods. Similarly, there is limited available data about women's appearances in court or in custody. The Australian Institute of Criminology (AIC) collects prisoner census information on the date of the census (Bartels, 2010a) but this information excludes prisoners not in prison on the census date. This then excludes women on short sentences for minor offences (ATSISJC, 2002).

While there are some exceptions to the limited research that distinguishes between Indigenous and non-Indigenous women (Bartels, 2010a; Jonas, 2002; Gardiner & Takagaki, 2002; Kerley & Cunneen, 1995), research that focuses exclusively on Indigenous women is scarce. Editions of *Australian Crime: Facts and Figures* provide data on women in Australia but do not distinguish between Indigenous and non-Indigenous women (Bartels, 2010a). There is ABS data which reports on the number of Indigenous women finalised in court but not sentenced. This information is exclusive to only three jurisdictions – New South Wales, Queensland, and the Northern Territory (ABS, 2015). It is only relatively recently, from 2007, that the ABS has reported on women's rate of charge with a criminal offence and summary characteristics by Indigenous status. Reports like the AIC's National Police Custody surveys fail to indicate what proportion of the total women's police custody population was Indigenous (Taylor & Bareja, 2005). However, while reporting periods are too small to show trends and official data on women offenders is limited, there are patterns that can be drawn from an overview of women's treatment throughout policing, court, and prison jurisdictions. This chapter discusses these patterns and provides a snapshot in time demonstrating that Indigenous women remain over-represented across all levels of the CJS. Again however, even though all three levels of the criminal justice system are discussed, my focus in this research is on sentencing in the higher courts.

Despite the limitations of the data from the ABS on Indigenous and non-Indigenous women who come into contact with the police, courts, and prison jurisdictions as offenders, this is the main data source I use given its accessibility. Data collected by the ABS are statistics from administrative records from police, court, and prison agencies across selected Australian states and territories. I show exact rates as reported by the ABS, without rounding to the nearest whole number. However, where there are numbers listed by the ABS, I modify the actual numbers and use percentages instead. Further, the ABS report their data during the period 1 July to 30 June. This implies the timeframe when women were processed by police, court, and prison authorities. Instead of discussing the

data from the period that is reported by the ABS, I write in a yearly basis. For example, for a reporting year 2008-09, I identify 2009.

3.2. Police jurisdictions

3.2.1. Police Data

Although the latest eight annual reports from the ABS is too few to show long term trends, there are fluctuations in the national rate of women charged by police with a criminal offence (ABS, 2017c). There are three methods by which the police charge women with criminal offences; arrest, complaint, and summons to appear in court (ABS, 2017c). There is a steady decrease in women's rate of charge from the 2010 and 2012 reporting periods from 902.6 to 858.2. Figure 3.1 shows that 2012 is both the year that women experienced the lowest charge rate across this period and also the start of the consistent increase of women's police charge rate. For example, in the last five reporting years, the offending rate for women shows an increase of 64.5 per 100,000 between 2012 and 2017 (See Figure 3.1.).

Figure 3.1. Women's national offender rate, 2009-2016.

Source: ABS, 2017c

3.2.2. Women's patterns of offending

Despite these fluctuations over time in women's charge rate, a key pattern lies in the type of crime they are charged with. The types of crimes that bring women into contact

with the justice system as offenders include theft, fraud, property damage, offences against justice procedures, break and enter, and public order offences (ABS, 2017c). Although men and women engage in similar offences, an important consistent gender difference is that women take part in generally non-violent and non-serious offending (ABS, 2017c). In the reported eight-year period from 2009 to 2016, the highest proportions of women's involvement in crime were those of minor offences. For example, the top five most common offences were theft, illicit drug offences, acts intended to cause injury (AICI), public order offences, and offences against justice. This latter offence includes a variety of behaviours including breaching bail, parole, or a restraining order and other offences against justice procedures like resisting or hindering a police officer or justice official (ABS, 2017c) (See Table 3.1).

Table 3.1. Women's principal offence rate, 2009-2016.

Principal Offence	2009	2010	2011	2012	2013	2014	2015	2016
Theft	244.7	268.1	254.8	243.5	233.1	219.8	215.7	238.7
Illicit drug offences	116.4	114.9	115.5	121.4	130.5	149.7	173	184.4
Acts intended to cause injury	154.2	158.1	157.3	148.4	145.1	145.1	146	152.3
Public order offences	128.5	139.4	134.1	129.2	138.7	147.5	135.2	126.5
Offences against justice	59.3	56.8	52	49.7	50.1	50.3	51.2	53.4
Fraud/deception	38.2	34.5	31.9	30.1	34.3	38.5	40.3	36.8
Property damage	38.6	37	35.2	33	32.2	30.9	31	30.3
Miscellaneous offences	20.8	28.1	36.3	40.4	50.2	32.6	29.5	26.9
Unlawful entry w/ intent	21.5	21.4	19.7	19.2	17.8	17.7	17	18.4
Prohibited/regulated weapons	9.3	8.9	9.2	11	12.1	12.1	14.4	17.2
Abduction/harassment	6.5	7.7	6.4	6	6.9	7.2	7.9	8.4
Sexual assault	2.3	2.4	2.1	2.8	3.3	4.9	5.3	5.8
Robbery/extortion	6.2	5.6	5.6	5.2	5.6	5.6	4.7	4.7
Dangerous/negligent acts	3.1	3.2	3.2	3.6	3.1	3.3	3.4	4
Homicide	1.1	1.4	1.2	1.1	1	1	1.2	1
TOTAL	865.5	902.6	877.9	858.2	864.6	878.5	888.8	922.7

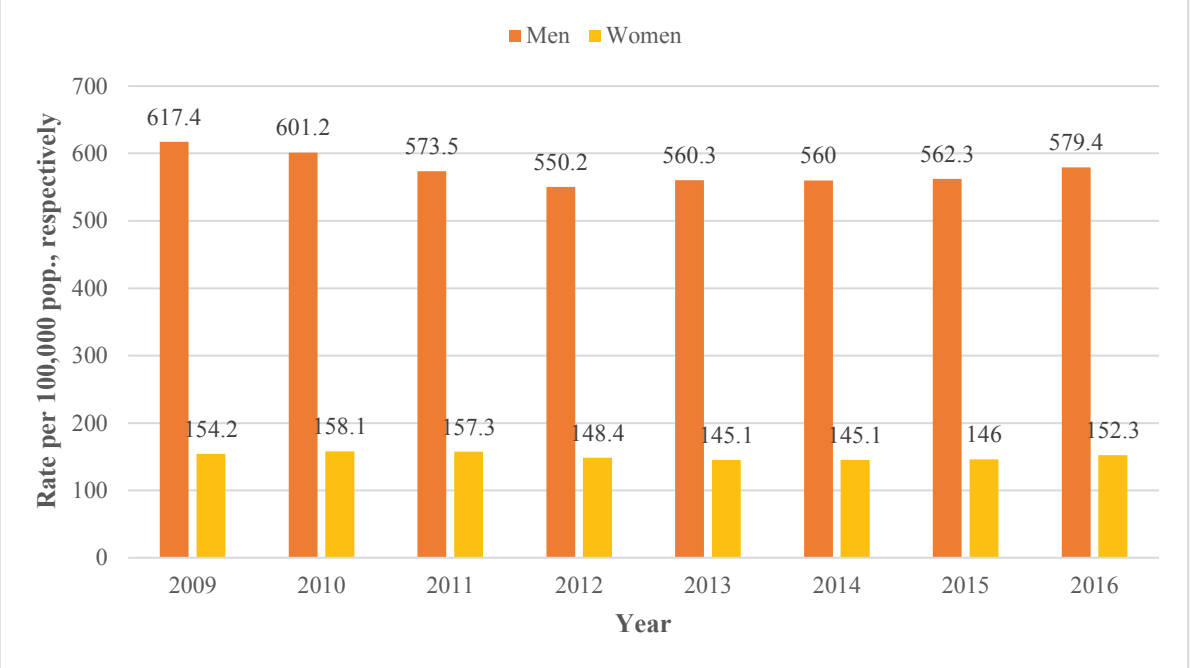
Source: ABS, 2017c
Rates are shown per 100,000 women's population

Table 3.1 shows that offences with the highest increase across the period included prohibited/regulated weapons, illicit drugs, and miscellaneous offences. For instance, prohibited/regulated weapons charges show general increases across the reported period. Rates of illicit drug offences increase by 68 per 100,000 between 2009 and 2016. However, theft offences experienced mostly decreases between 2010 and 2015 from a rate of 268.1 to 215.7, though there was an increase during last year's 2016 report from a

rate of 215.7 in 2015 to 238.7. Similarly, the charge rate for property damage also reveals consistent decreases each year from a rate of 38.6 in 2009 to 30.3 in 2016. Further, the rate for miscellaneous offences shows increases between 2009 and 2013, then decreases from 2014 to 2016. Miscellaneous offences are charges for a variety of crimes that are not dealt with under any other division like nuisance phone calls, unsafe handling of legally purchased drugs, and disobeying rules of parks (ABS, 2017c).

With the exception of the AICI offence which is classified as violent conduct, women's most common offences demonstrate that they are generally charged with non-violent offences. Although the AICI offence is the third most common offence that women are charged with, it is important to note that their rate is much lower compared to men. For example, Figure 3.2 demonstrates that the rate of charge for AICI offence is consistently at least 3.5 times higher for men compared to women across the same reported timeframe.

Figure 3.2. Rate of charge for AICI offence, by gender, 2009-2016.



Source: ABS, 2017c

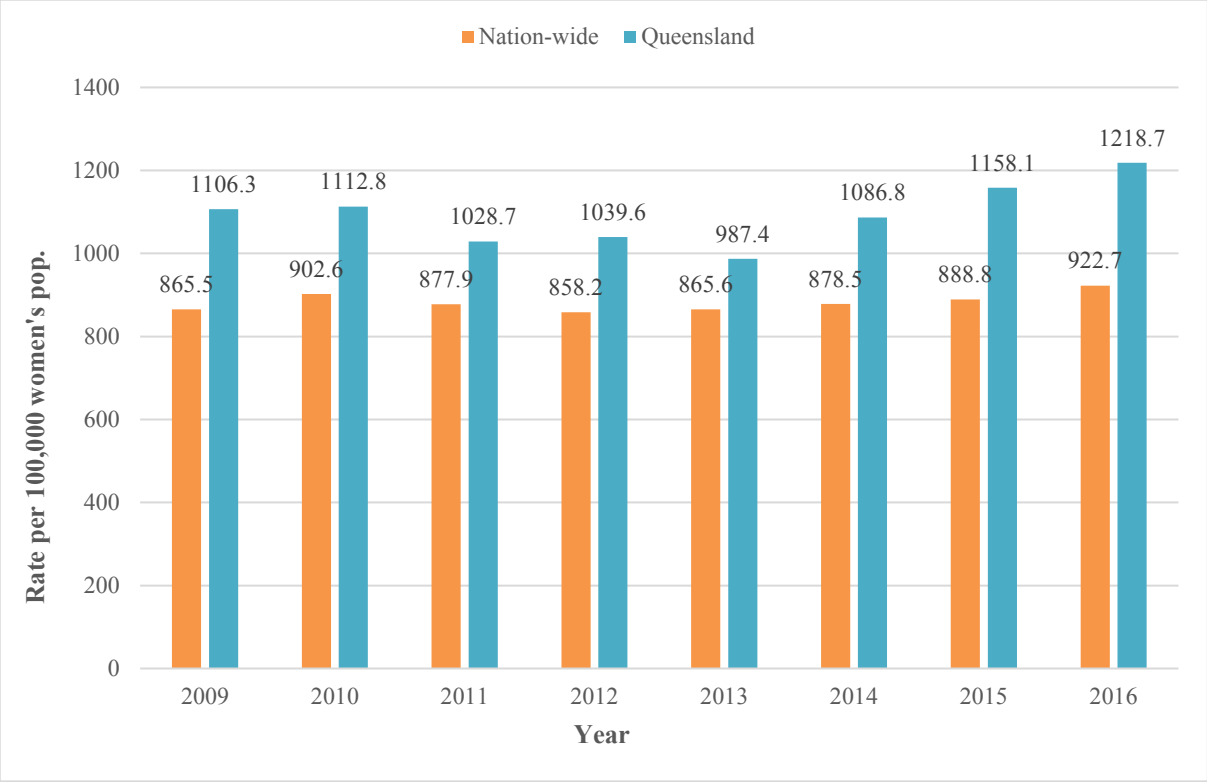
Women's involvement in offences involving violence like homicide, sexual assault, and dangerous/negligent acts is consistently low. Homicide had the lowest rate of 1 per year across the entire reported period. While sexual assault charges increased, this violent offence remains as the third lowest offence committed by women. Dangerous/negligent acts also reveals increases during 2015 and 2016 from a rate of 3

and 4, yet, is still an offence with very low offending rates. These consistent low charge rates for violent offences thus supports the assertion that women are generally non-violent offenders and engage in mostly minor offences.

3.2.3. Women's offending rate in QLD

More specifically to my project, the rate of charge for women in Queensland shows there is very little change across the periods from 2009 to 2016 (ABS, 2017c). For example, the charge rate for women in Queensland experienced increases between 2013 and 2016 from a rate of 987.4 to 1218.7. Figure 3.3 also shows decreases in their rate of charge between 2010 and 2011 from 1112.8 to 1028.7 and again during 2012 and 2013 from 1039.6 to 987.4. Regardless of these fluctuations, the rate of offending for women in Queensland has not changed significantly across recent years. Instead, there are more patterns that stand out when comparing women's charge rate at the state and national levels.

Figure 3.3. Women's national and state offender rate, QLD, 2009-2016.



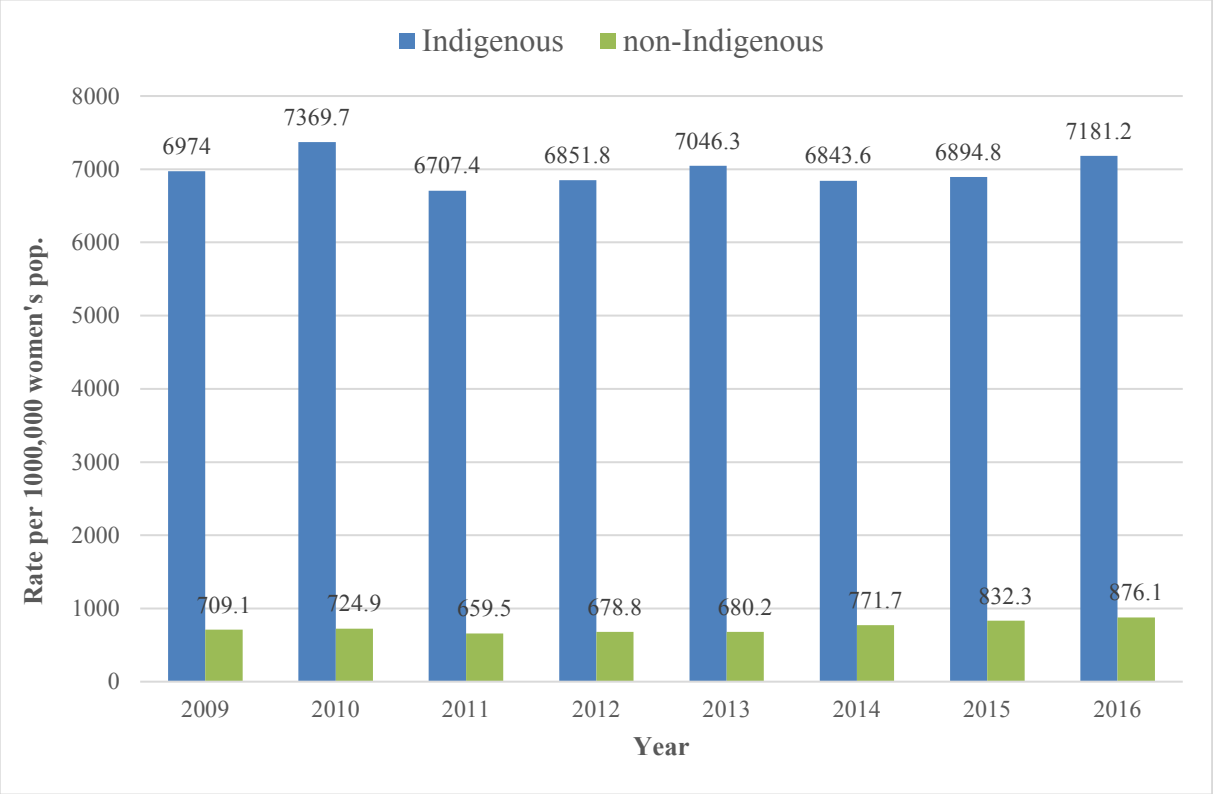
Source: ABS, 2017c

Current reports from the ABS reveal that the charge rate for criminal offences for women is consistently higher in Queensland than nationally (ABS, 2017c). Further, in some instances women's charge rate at state and national levels increased during the same timeframe. For instance, the national offender rate for women increased between 2012 and 2016 from a rate of 858.2 to 922.7. Similarly, the charge rate at the state level also shows increases during 2013 and 2016. Women's offending rate in Queensland was 987.4 in 2013 and increased consistently to a rate of 1218.7 in 2016. Both women's national and state charge rates also experienced decreases from 2010 to 2011. The national charge rate for women decreased from a rate of 902.6 to 877.9. Then although at higher rates, women's state charge rate decreased too from a rate of 1112.8 to 1028.7. Again, however, even though women's charge rate experienced fluctuations at both state and national levels, their respective charge rate remains generally consistent.

3.2.4. Indigenous and non-Indigenous women's offender rate in Queensland

Key to differences in non-Indigenous and Indigenous women's rate of charge in Queensland is the over-representation of the latter group. Figure 3.4 shows that the police charge Indigenous women with criminal offences at much higher rates than non-Indigenous women: the rate of charge for Indigenous women was at least 8 times higher than for non-Indigenous women across the reporting period.

Figure 3.4. Indigenous and non-Indigenous women's rate of charge, QLD, 2009-2016.



Source: ABS, 2017c; 2015

Further, while the police charge rates for both groups of women show minor fluctuations the consistent pattern is the disparity between Indigenous and non-Indigenous women's rate of charge clearly evidencing that the police charge Indigenous women with criminal offences much more often than non-Indigenous women.

The police data from the ABS discussed above shows two distinct patterns: that women's rates of being charged with an offence remains relatively stable across the reported timeframe; and the rate that the police charge Indigenous women with criminal offences is much higher compared to non-Indigenous women. This pattern of Indigenous women's over-representation in charge rates is not new. Historical studies report that the rate that the police charge Indigenous women with an offence is considerably higher than non-Indigenous women (Kerley & Cunneen, 1995; Payne, 1992; Howe, 1988; Parliament of NSW, 1985).

3.2.5. Existing research on Indigenous women's contact with the police

An examination of previous research related to Indigenous women who have contact with the criminal justice system highlights two overlapping issues – institutional racism and the colonial project (Cunneen & Tauri, 2016; Blagg, 2008; Perera, 2002). I use Blagg's (2008) interpretation of institutionalised racism as formalised through the institutions and structures of the justice system when discriminatory practices become legitimate. Whereas I refer to Baldry, Carlton & Cunneen's (2015: 2) description of the colonial project as "Indigenous experiences of dispossession, genocide and ongoing struggles for self-determination". The position of Indigenous women as colonised women in the justice system involves complex dimensions of power and oppression as issues of race and gender intersect to contribute to institutionalised adverse treatment when compared to Indigenous men and non-Indigenous women (Marchetti, 2008b; Lucashenko, 1996; Howe, 1988). The contact between Indigenous women and policing jurisdictions is critical and impacts on Indigenous women's over-representation in court and prison jurisdictions.

The Royal Commission Into Aboriginal Deaths in Custody (RCIADIC) (1987-1991) is the most cited source to explain the situation of Indigenous peoples and the justice system (Marchetti, 2008b). The Royal Commission investigated the deaths of 11 Indigenous women and determined that their deaths were a result of the over-representation of Indigenous people in the justice system coupled with social structural disadvantages (Johnson, 1991). However, the Royal Commission does not go so far as to describe these structural disadvantages as formalised processes maintaining Indigenous women's marginalisation. Further, when it came to Indigenous women's contact with the police, the report describes policing conduct as a contributing factor that impacted the over-representation of Indigenous women in offence charges and rates of police custody, however again does not directly describe policing conduct as racist discrimination, nor does the report make any links to the colonial project.

There are other government reports which do describe police treatment of Indigenous women as a form of institutionalised racism embedded within the colonial project (Parliament of NSW, 1985). For example, the *Social Justice Report 2002* claims "The rising rate of over-representation of Indigenous women is occurring in the context of intolerably high levels of family violence, over-policing for selected offences, ill-health, unemployment and poverty" (ATSISJC, 2002: 315). The report's broad overview

of the issues that Indigenous women face in the justice system draws attention to how the power dynamics of race and gender neglects their needs as Indigenous women; "Indigenous women indeed live in 'a landscape of risk' and suffer at the crossroads of race and gender" (ATSISJC, 2002: 177). Indigenous women suffer both as offenders and victims in their relationships with police authorities. The Social Justice Report highlights over-policing in the form of intervention, and the adverse use of police discretion as directly impacting Indigenous women's over-represented contact across criminal justice jurisdictions (ATSISJC, 2002). With respect to Indigenous women as victims, the report claims that the unsatisfactory police responses to Indigenous women's victimization is linked to colonialist practices related to Indigenous women being seen as undeserving of police protection. Therefore, Indigenous women are subjected to over-policing as potential offenders and under supported by police as victims (ATSISJC, 2002). This adverse treatment impacts their over-representation across the justice system and is linked to institutional racism and historical colonialist practices (ATSISJC, 2002).

Further research draws attention to colonial Australia where police jurisdictions were a source of oppression to Indigenous communities with an aim to eradicate Indigenous culture (Tatz, 2001). With respect to the relations between Indigenous women and policing during the 1990s, Gardiner & Takagaki (2002: 319) identify "racial selectivity in policing" and "colonial structures and ideologies" that oppresses Indigenous women by virtue of their Indigeneity and gender.

The over-representation of Indigenous women in police jurisdictions is further explored in scholarly research by Cunneen (2006a; 2001), Marchetti, (2008a), Stubbs (2011) and Blagg (2008). Each of these studies emphasises that the overlap between the colonial project and institutionalised racism, combined with power dynamics that positions Indigenous women as invisible because of their Indigeneity and gender, impacts the adverse treatment of Indigenous women in police jurisdictions (Marchetti, 2008b).

Further, these studies highlight that recommendations of the Royal Commission have not been fully implemented, perpetuating the way the justice system disregards the needs of Indigenous women (Marchetti, 2006, 2005b). Early work by Kerley and Cunneen (1995) which is often cited across other research (i.e. Marchetti, 2012; ATSISJC, 2002) points out the lack of consideration for the position of Indigenous women in the RCIADIC report despite their clear over-representation across the justice system. This lack highlights Indigenous women's invisibility in society, marked by both their gender and their Indigeneity (Marchetti, 2008). Kerley and Cunneen go on to

examine the individual circumstances involving the deaths of the 11 Indigenous women investigated by the Royal Commission and stress that the ways gender overlaps with police intervention can be traced to the colonial project. In particular, common features of the Indigenous women who died in custody relate to experiences of interpersonal and institutional violence. The women all had victimized histories of ongoing violence while also experiencing government intervention through both child removal and institutionalisation. Thus, Indigenous women's different treatment to non-Indigenous women "…reflects the intersection of gendered and neo-colonial criminal justice policies" (Kerley & Cunneen, 1995: 31).

Indigenous women have a higher likelihood of being charged and taken into police custody for mostly non-violent offences, such as public intoxication, compared to non-Indigenous women. According to Kerley & Cunneen, (1995: 11), a particular factor surrounding policing practices in these situations is that the discriminatory conduct in the form of intervention becomes legitimated and embedded in the structures of the justice system as Indigenous women continue on to the courts and prison jurisdictions.

Another feature of the research that examines the adverse effects of over-policing on Indigenous women is that these effects continue to impact Indigenous women's contact with court and prison jurisdictions (Stubbs, 2016; Baldry, Carlton & Cunneen, 2015; Marchetti & Daly, 2004) and contribute to the significant structural social disadvantages that marginalise Indigenous women in different sectors (Cunneen & Rowe, 2014). Over-policing is a contributing factor for the over-representation of Indigenous women in policing jurisdictions, and police practices continue to have an adverse impact on Indigenous women's contact with court and prison jurisdictions (Cunneen & Tauri, 2016).

3.3. Judicial system

3.3.1. Hierarchy of Australian courts

The Australian court system is a multi-level hierarchy. This includes various courts at both the federal and state and territory levels (Findlay, Odgers & Yeo, 2014). For example, the hierarchy of the federal law courts is comprised of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, the Federal Circuit Court of Australia, and the Military Court of Australia (Findlay, Odgers & Yeo, 2014). The High Court of Australia is regarded as the highest court in the Australian

judicial system (Crawford & Opeskin, 2004). This court serves as both superior court to all Federal Courts and the final destination of appeal from all of the Supreme and Federal Courts in each state (Cook et al., 2015). Each of Australian states and territories also has a hierarchy of courts (Crawford & Opeskin, 2004). Each state and territory has a Supreme Court which is recognised as the highest state court (Findlay, Odgers & Yeo, 2014). Particularly relevant to my project are the Queensland criminal courts which are comprised of the Supreme Court, the District Court, the Magistrates' Court, and the Civil and Administrative Tribunal (ABS, 2017a).

3.3.2. Role of courts

With criminal cases, the main role of the court is to hear the evidence presented and to decide whether the offender is guilty of the charge that they broke the law (Meek, 2008). The court serves as a legal platform for the defendant to argue their case against the charges brought against them by police authorities (Chisholm & Nettheim, 2012). In the state of Queensland, two types of charges exist - summary and indictable offences. Summary offences include minor criminal offences such as disorderly behaviour and traffic offences. Indictable offences are more serious crimes such as murder, rape, robbery, and assault. Both types of offences require the defendant to appear before a magistrates' court. Depending on the level of seriousness, indictable offences are then transferred to the District or Supreme Court for hearing, trial, and sentencing (Caxton Legal Centre, 2017).

A feature of the courts in Queensland is the *Penalties and Sentences Act (1992)* (Shanahan, et al., 2016). Key to this legislation is the purpose of sentencing laws and the factors that judges consider when imposing a sentence (Caxton Legal Centre, 2017). The principles of sentencing set out by Section 9 of the *Penalties and Sentences Act* include retribution, rehabilitation, deterrence, denunciation, and community protection. While the judiciary of Queensland exercise their power in a system of courts and tribunals, the courts apply the sentencing laws made by the Parliament of Queensland, who hold legislative power (Caxton Legal Centre, 2017).

During the period of this research several legislative and government changes occurred in Queensland. In the 2015 state election the Liberal National Party (LNP) led by Campbell Newman was ousted by the Australian Labor Party (ALP), currently led by Annastacia Palaszczuk. Particularly relevant for this research on Indigenous women is the fate of the diversionary program, the Murri Courts, which was axed by the LNP

government in 2012 and re-instated by the Labor Government in 2016 (Department of Justice and Attorney-General, 2016). Further, the Palaszczuk Government also reinstated the Queensland Sentencing Advisory Council last year (Department of Justice and Attorney-General, 2016).

Relevant new initiatives introduced in 2017 include the court-led specialist High Risk Youth Court launched to combat youth crime in Townsville (Shanahan, et al., 2016). Especially pertinent to Indigenous women is the current on-going report from the Australian Law Reform Commission into the incarceration rate of Aboriginal and Torres Strait Islander peoples. Further, following alcohol-fuelled violence late at night within licensed premises, the *Tackling Alcohol-Fuelled Violence Legislation Amendment Act (2016)* came into effect. Additionally, the public image of the judiciary of Queensland came under scrutiny in the course of this project when a public dispute about the appointment and subsequent early resignation of a Chief Justice of Queensland was widely publicised in the media. While this public dispute between judges does not have a direct impact on this research, this argument amongst the judiciary highlights how their opinions about who is appropriate and not appropriate to serve in the judiciary attracts attention.

3.3.3. Function of Queensland courts

Lower courts

Key to understanding the court systems is that the role varies depending on their level. The lowest level of the courts in Queensland is the Magistrates' Court (Shanahan, et al., 2016). This court processes the least serious crimes like traffic infringements and public nuisance offences. Special courts that are part of the magistrates' court include the Coroner's Court and the Children's Court. Although the Queensland Drug Court ceased operation in 2013, the magistrates' court currently processes drug related diversion programs like the Queensland Magistrates Early Referral into Treatment (QMERIT), the Illicit Drugs Court Diversion (IDCD), and the Drug and Alcohol Assessment Referral (DAAR) programs (Department of Justice and Attorney-General, 2016). This lower level of court is relevant to my research because all criminal cases start at the magistrates' court (Caxton Legal Centre, 2017), however, my focus is on the higher courts as they receive less research focus.

Higher courts

In the state of Queensland, the intermediate court is the District Court of Queensland. The role of the District Court is to process serious criminal cases like armed robbery, rape, and dangerous driving (Shanahan, et al., 2016). Criminal cases involving juveniles are also processed in the District Court under the specialised Children's Court of Queensland (CCQ). The highest level of court is the Supreme Court of Queensland (Caxton Legal Centre, 2017). Here the most serious criminal cases are processed. This includes crimes like murder, attempted murder, manslaughter, and the most serious drug offences (Caxton Legal Centre, 2017). Although the types of cases that are heard before the District and Supreme Courts differ by the seriousness of the offence, both courts share similarities in the way criminal cases are processed.

Criminal hearings and trials in the higher courts consists of two parties presenting information about a criminal case. The defence party is made up of the offender, and their legal representatives, a solicitor and/or a barrister (Caxton Legal Centre, 2017). The other party, the prosecution, is a solicitor or barrister from the Department of Public Prosecution (DPP), who presents evidentiary information against the accused. This latter party, the prosecution, presents information about the case first then the defence proceeds to present their case. Information presented by both parties relates to evidence with the purpose of supporting their case (Caxton Legal Centre, 2017). Witnesses too are used by both parties to support their respective cases who are then questioned by both parties.

In instances when the person accused pleads not guilty to the charges brought, their case goes to trial (Caxton Legal Centre, 2017). This involves a randomly selected jury of 12 people from the community. The role of the jury is to decide the guilt of the accused on trial based on the facts about the case presented to them (Caxton Legal Centre, 2017). The presiding judge then dismisses the charges if the jury find the accused not guilty. A sentence is imposed by the presiding judge if the jury finds the accused guilty. In criminal trials without a jury, the presiding judge decides whether the person charged with a crime is guilty or not guilty (Caxton Legal Centre, 2017).

The main group of people who attend criminal cases are those involved directly with the criminal case like the presiding judge, prosecution, solicitor and/or barrister representing the accused, the accused, and any witnesses. Other groups of people who attend court include individuals who work in the court like judge's associates, bailiffs, and interpreters. Corrections Officers who escort defendants in custody at the time of their

criminal proceeding, also attend court. People from the public may also attend court such as support people, students, and media reporters.

In addition to criminal cases, the other division of the higher courts is the Court of Appeal. The Court of Appeal deals with cases where a person appeals the decision of another court based on new evidence or an error of law from the previous judge. The higher courts also process civil cases; however, the focus of this research is on criminal cases. The main role of judges in the higher courts is to firstly hear cases and secondly to impose sentences where the offender is found guilty (Caxton Legal Centre, 2017). Contributing to the judge's capacity to make sentencing decisions is the facts about the case submitted by the prosecution and defence, as well as any information from witnesses summoned to court. One aspect about the case submitted to the judge relates to mitigating issues about the offender and circumstances that led to the offence (Caxton Legal Centre, 2017). In cases where judges apply the law by imposing punishment, they refer to sentencing guidelines issued by the Court of Appeal and Sentencing Council (Cook et al., 2015). The objective of adhering to sentencing guidelines is to maintain consistency in the sentencing of similar cases (Shanahan et al., 2016).

3.3.4. Court Data

The proportion of women who are dealt with by the Australian criminal courts supports the fundamental patterns about women involved in crime based on their gender and race. The scope of the data below relates to women offenders who have been finalised in the higher courts and magistrates' courts. 'Finalised' refers to all charges being formally completed and dealt with by the court; that is, the case has ended and is therefore finalised (ABS, 2016a). The method of finalisation includes adjudicated outcomes like being acquitted or proven guilty (ABS, 2016a). Other non-adjudicated outcomes included are those transferred to other court levels or those withdrawn by prosecution (ABS, 2016a). Similar to the language used in the ABS, I use the term 'higher courts' to collectively refer to the Supreme and District courts in Australia in general, and in Queensland. Further, data collected by the ABS used in these discussions also includes female children above 10 years of age. This relates to the collection of data about the children who are treated as adults by the higher courts (ABS, 2016a).

The first pattern generated from the Australian Bureau of Statistics criminal court data relates to the generally low proportion of women who appear before the higher courts as offenders. Table 3.2 shows that less than 25% of those finalised in the magistrates' and

higher courts during 2009 and 2016 were women. In contrast, men made up more than 75% of the proportion of defendants finalised at both the magistrates' and higher courts. Table 3.2 also shows that less than one fifth of women who do appear in court between 2009 and 2016 are finalised at the higher court level demonstrating that far fewer women appear before the higher courts than men.

Table 3.2. Proportion of women and men finalised in Australian criminal courts, 2009-2016, (%).

Magistrates' courts and higher courts								
	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Women	21	21	22	22	22	22	23	23
Men	79	79	78	78	78	78	77	77
Higher courts only								
	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Women	13	13	12	12	12	13	12	12
Men	87	87	88	88	88	87	88	88

Source: ABS, 2017c

The second pattern evident in the data demonstrates that the gap between the proportion of men and women finalised widens when the attention turns exclusively to the higher courts. As can be seen in Table 3.3, women are primarily processed in the magistrates' court because of the type of offences that women are more likely to commit. Given that summary offences are finalised at the magistrates' courts, while the more serious, indictable offences, proceed to the higher courts, the majority of women are finalised in the lower, magistrates' courts. This pattern demonstrates women's involvement in mostly non-violent and non-serious offending.

Table 3.3. Proportion of women finalised in criminal courts by Australian court level, 2009-2016, (%).

	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Magistrates	98	98	98	98	98	98	99	98
Higher courts	2	2	2	2	2	2	1	2

Source: ABS, 2017c

While the most recent ABS data on women finalised by offence is limited to a four-year period and therefore too small to demonstrate trends, there are patterns with the type of offences that bring women before the courts. Table 3.4 shows that the main

offences for women's finalisation in all criminal courts included traffic and vehicle offences, theft, AICI, and public order offences; that is generally non-violent offences.

These patterns are also evident in Queensland data where women finalised in the higher courts consistently make up two per cent of the total while most of the women overwhelmingly came before the magistrates' courts. Women finalised across Australia and in Queensland generally appear before the magistrates' courts and mostly for non-violent crimes.

Table 3.4. Women finalised in all courts, by principal offence, 2013-2016, (%).

Principal Offence	2013	2014	2015	2016
Homicide	0.1	0.1	0.1	0.1
Acts intended to cause injury	11	11	10	10
Sexual assault	0.1	0.1	0.1	0.1
Dangerous/negligent acts	5	5	5	4
Abduction/harassment	0.4	0.4	0.6	0.6
Robbery/extortion	1	1	0.4	0.4
Unlawful entry w/ intent	1	1	1	1
Theft	12	11	11	12
Fraud/deception	4	4	3	3
Illicit drug offences	7	8	10	11
Prohibited/regulated weapons	1	1	1	1
Property damage	2	2	2	2
Public order offences	7	7	7	5
Traffic & vehicle offences	40	39	38	39
Offences against justice	6	6	7	7
Miscellaneous offences	2	3	3	3
Total	99.6	99.6	99.2	99.2

Source: ABS, 2017c

The only available current criminal court data from the ABS on women's Indigenous status involves Indigenous and non-Indigenous women's proportion of finalization (ABS, 2017c; 2016b; 2015; 2014). While the ABS further limit this criminal court data to selected states and territories, Queensland is a state on which the ABS consistently report. Table 3.5 shows that more non-Indigenous women appeared before the criminal courts than Indigenous women in Queensland during the reported periods. The key pattern from Indigenous and non-Indigenous women's finalization in Queensland criminal courts is the over-representation of Indigenous women across the reports from 2010 to 2016. However Indigenous women consistently represent close to

one third of the women finalised in criminal courts and yet the overall Indigenous population is 3 per cent. This data is key to my project and clearly demonstrates Indigenous women's consistent over-representation in the court system.

Table 3.5. Women finalised in Queensland criminal courts, 2009-2016.

Indigenous women							
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Number	6475	6053	5885	6462	7464	7382	7417
Proportion	33	32	31	33	33	30	28
Non-Indigenous women							
Number	13384	12764	12799	13370	15485	17529	18895
Proportion	67	68	69	67	67	70	72

Source: ABS, 2017; 2016; 2015; 2014

In summary, court data collected from the ABS about women who appear before the courts as offenders shows three patterns. Firstly, women are less likely to commit crimes than men based on their contact with criminal courts. Secondly, women's involvement in crime is generally non-serious and non-violent given their proportion of finalisations is greater at the magistrates' courts than higher courts. Thirdly, similar to policing trends on women's arrests, court patterns for Indigenous and non-Indigenous women clearly demonstrate that Indigenous women are over-represented in the court system compared to non-Indigenous women.

3.3.5. Existing research on Indigenous women's contact with the courts

An overview of research on the treatment of Indigenous peoples by the courts again highlights the impact of institutionalised racism and the colonial project (Marchetti, 2005a). For example, early research on judges' attitudes about Indigenous peoples showed such attitudes were often overtly racist and contributed to the harsh treatment of Indigenous peoples (Charles, 1991; Markus, 1990; McCorquodale, 1987; Coe, 1980; O'Shane, 1980; Eggleston, 1976). The research that pays attention to historical judicial perceptions about Indigenous peoples shows that judges use their positions of power to deny or legitimate conduct by the police and thus reinforce over-policing practices (Cunneen, 2001; Cunneen & Libesman, 1995). In a similar tone, Marchetti & Ransley, (2014: 2) emphasise the importance of judicial power in embedding the over-representation of Indigenous people across the entire CJS: "The sentencing process is

critical because it provides an opportunity either for intervention and diversion, or for a deepening engagement with the criminal justice system". Further, while there is no contemporary research that points to overtly racist judicial attitudes toward Indigenous peoples, Indigenous peoples' treatment by the court has been identified as institutional racism with links to the colonial project in a way that maintains their marginalisation in society (Blagg, 2008). For instance, research identifies the court treatment of Indigenous peoples as a contributing factor to the ongoing over-representation of Indigenous peoples in prison, which is argued to be a significant aspect of their marginalisation in society (Cunneen & Tauri, 2016).

Research about Indigenous women processed in court as offenders points to their historically discriminatory treatment by the courts based on their Indigeneity and their gender (Blagg, 2008; Marchetti & Daly, 2004). A feature specific to Indigenous women's treatment in the courts are the historical court practices where Indigenous women were imprisoned for their own 'protection'; a paternalistic practice that serves to maintain the oppression of Indigenous women (ATSISJC, 2002). While contemporary research on the court treatment of Indigenous women does not suggest that the courts imprison them for their protection, it does highlight that Indigenous women are more likely to receive short term prison sentences for minor offences and therefore are subjected to all the adverse impacts of prison both during their sentence and post-release from prison (Baldry & McCausland, 2009). The discretionary exercise of power by the judiciary contributes to the complex discriminatory treatment that maintains Indigenous women's marginalisation in the justice system and in society more broadly (Baldry & McCausland, 2009).

> The discrimination faced by Indigenous women is more than a combination of race, gender and class. It includes dispossession, cultural oppression, disrespect of spiritual beliefs, economic disempowerment, but from traditional economies, not just post-colonisation economies and more (ATSISJC, 2002: 155).

3.3.6. Judicial research

A critical gap in the current research on the treatment of women in the courts is judge's attitudes about women who offend. For example, one study that examined sentencing trends, and that did interview judges, did not explore judges' beliefs about women offenders in depth (Hough, Jacobson & Millie, 2003). Similarly, early studies that

examine the relationship between sentencing treatment and gender ignore judges' attitudes about women offenders (Eaton, 1986; Farrington & Morris, 1983; Carlen, 1976; Nagel & Weitzman, 1971). The above sources are English studies and a main feature that inspired this study, is the lack of research in Australia on judges' attitudes towards Indigenous and non-Indigenous women.

In terms of the methodological approaches to measuring judges' treatment about women, research has been historically dominated by statistical analyses (Farrington & Morris, 1983; Nagel & Weitzman, 1971). Again, these are English studies. There is some existing qualitative research where the method approaches include observations in courtrooms (Carlen, 1976), case study (Eaton, 1986), and a combination of court data (Flood-Page & Mackie, 1998; Hedderman & Gelsthorpe, 1997), however this work is both outdated and primarily from English and American court jurisdictions (Chesney-Lind, 1978). Even more profound, however, is the lack of research in Australia that gauges judges' attitudes towards Indigenous women and how the overlap between Indigeneity and gender may impact the sentence treatment of Indigenous women who offend.

One historical English study relevant to my research is work by Farrington & Morris (1983). Although this study does not explore judges' attitudes on women offenders, it is relevant to my research because of its findings that women's treatment can be influenced by their family and social background when crucial sentence related factors are examined. In particular, Farrington & Morris examined whether after controlling for sentence related factors, gender influenced the severity of punishment as well as reconviction. Findings indicate that it is not so much about the gender of the offender but rather the seriousness of the offence and the criminal history of the offender which influences the severity of the punishment handed by judges. This is supported by more recent research which claims the key predictors for judges' sentence severity is seriousness of offence and criminal history (Cook et al., 2015).

Another historical English study on women's treatment is research by Gelsthorpe & Loucks (1997). Their findings indicate that what judges say about women is not necessarily what they do (Gelsthorpe & Loucks, 1997). Further, in spite of other results where magistrates held perceptions that the way they treat women offenders is impacted by their own gender, Gelsthorpe & Loucks pointed out that it can also be the case that sentence treatment has nothing to do with the gender of magistrates and instead more to do with personality. This finding is in line with other research which also found that

judges' practices are not necessarily impacted by gender. For example, when male and female judges engage in similar judicial practices, Steffensmeir & Hebert (1999) claim that it is a reflection "that both are governed more by their legal training and legal socialization than by their socially structured personal experiences" (Steffensmeir & Hebert, 1999: 1187). This is particularly important in order to acknowledge that judges' practices will not always reflect gender stereotypes of submissiveness and dominance.

Even though the above research by Farrington & Morris, Gelsthorpe & Loucks, and Steffensmeir & Hebert are historical English studies, they are nevertheless relevant to my research. Each one touches on different aspects that I discuss in my research such as the impact that the gender of the offender and roles of femininity has on the sentence treatment of women, how judges' attitudes about women affects their sentence decision-making, and the ways the gender of judges and their legal training influences their sentencing practices. Further, research by Gelsthorpe & Loucks is particularly important to my research given it is the only comprehensive study to date that has interviewed the judiciary on their attitudes about women who offend.

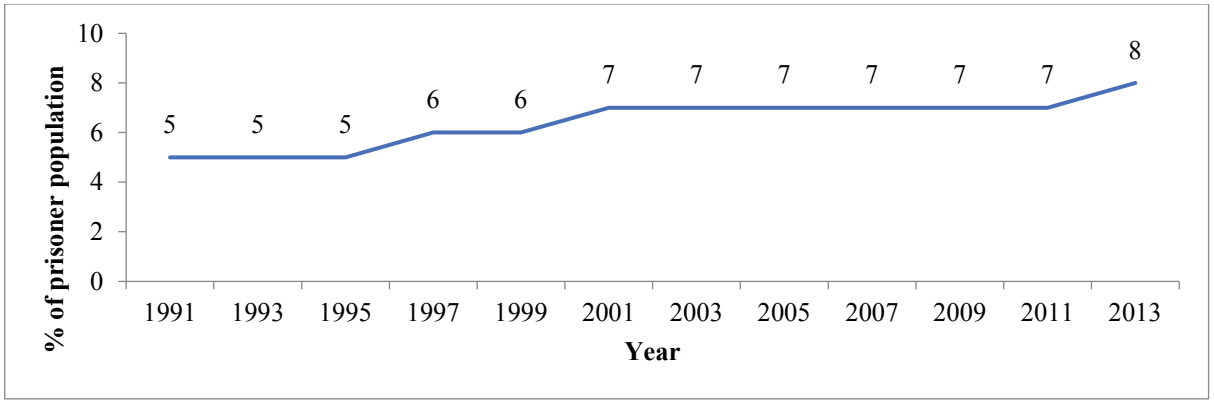
3.4. Prison jurisdiction

3.4.1. Prison data

In contrast to the limited data on Indigenous and non-Indigenous women's contact with police and court jurisdictions, data about women in custody (both generally and by Indigenous status) is much more comprehensive. Women's custody data provides detailed information and has consistent reporting periods for both Indigenous and non-Indigenous women. In fact, the growing body of research about women who offend generally tends to focus on the custodial system (Baldry & Cunneen, 2014). For example, prison information held by the Australian Bureau of Statistics (ABS) is especially useful to supplement the limited information from the prison census data which excludes women serving short sentences or those not present during the census date (ABS, 2017c). Data shows that women continue to account for a small fraction of the entire prison population (ABS, 2016b). However, women's prison population has experienced increases. Figure 3.5 shows increases in the percentage of women in the Australian prison population during the early 1990s and in the first decade of the 21st century. In the 22-year period from 1991 to 2013 the women's prisoner population experienced a gradual increase from

5 per cent in 1991 to eight per cent in 2013. The point that stands out is that the use of prison for women involved in crime continues to increase.

Figure 3.5. Women's total prisoner population (in %), 1991-2013.

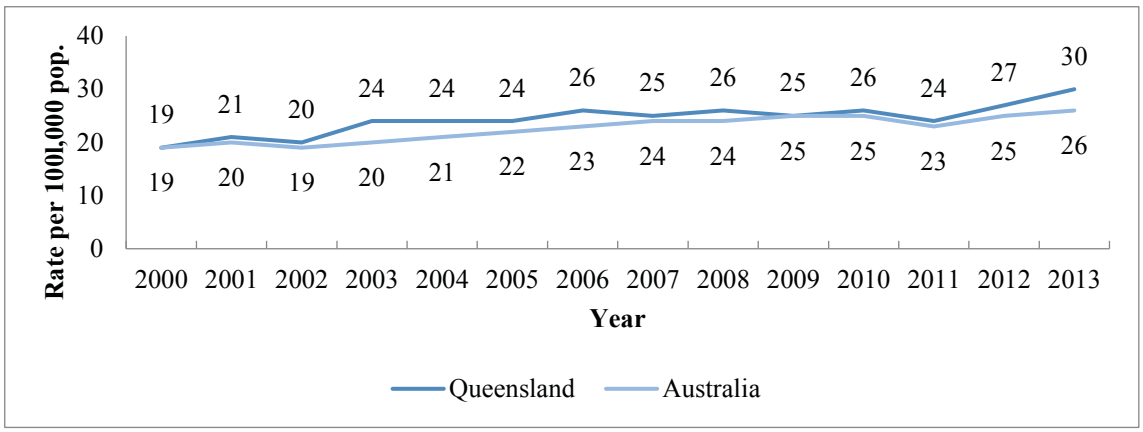


Source: ABS, 2013; 2001

Similar to the proportional increases of women prisoners in the overall prison population, the imprisonment rate of women has also increased. Figure 3.6 shows the imprisonment rate for women increased from 19 in 2000 to 25 in 2010, with a slight dip in 2011, followed by an increase to 26 in 2013. Despite these slight fluctuations, the imprisonment rate for women in Australia has increased.

Particular to the situation in Queensland, the rate of imprisonment for women has been generally higher in Queensland than Australia-wide between the reported timeframe. Further, despite fluctuations, the rate of women's imprisonment in Queensland has also increased. Figure 3.6 below shows that the imprisonment rate for women in Queensland increased from 19 in 2000 to 26 in 2010, with a slight dip in 2011, followed by an increase to 30 in 2013.

Figure 3.6. Women's imprisonment rate, Australia and Queensland, 2000-2013.

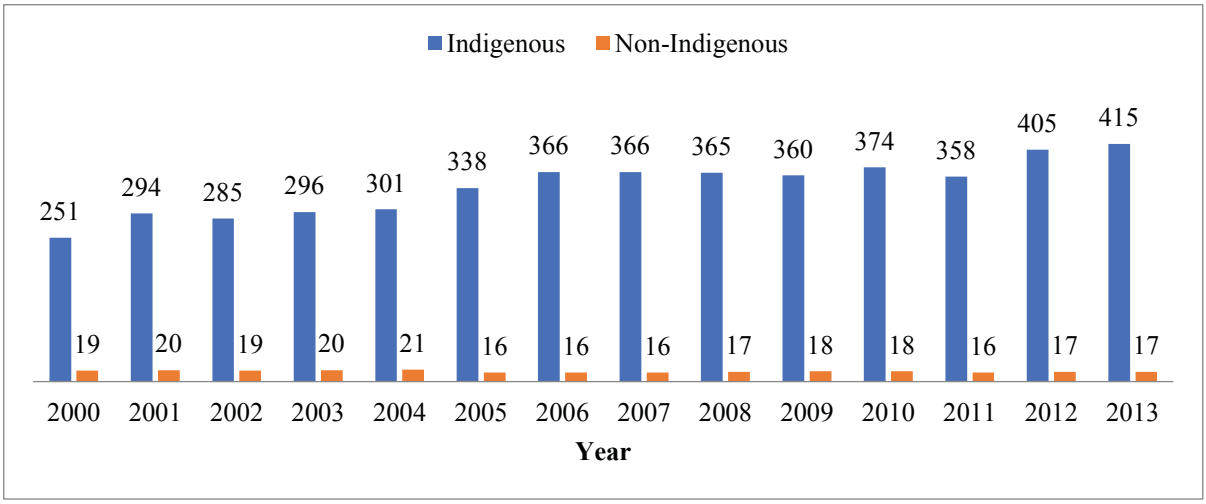


Source: ABS, 2014

Further, when it comes to the rate of women's imprisonment across Australian states and territories, the highest rates of women's imprisonment by jurisdiction were generally in the Northern Territory, Western Australia, New South Wales, and Queensland between 2001 to 2011 (ABS, 2014). However, between the 2012 and 2013 timeframe, the imprisonment rate for women in Queensland experienced a slight increase impacting the state to become the third highest imprisonment rate for women across other jurisdictions. In contrast to the jurisdictions with the highest rates of women's imprisonment, the states and territories with the generally lower rates throughout the 2000-2013 timeframe include the Australian Central Territory, Victoria, Tasmania, and South Australia (ABS, 2013).

When the attention turns exclusively to Indigenous women in prison, data indicates that they experience higher imprisonment rates than non-Indigenous women (Figure 3.7.). In a fourteen-year period from 2000 to 2013, Indigenous women have consistently been at least thirteen times more likely to be imprisoned than their non-Indigenous counterparts and by 2013 were twenty-four times more likely to be imprisoned than non-Indigenous women (ABS, 2013). Despite fluctuations for both groups of women, what stands out is their disparities in imprisonment rates and the widening gap between the two groups which leads to the significant over-representation of Indigenous women in prison.

Figure 3.7. Women's prisoner rate per 100,000 by Indigenous status, 2000-2013.



Source: ABS, 2014, 2013

In addition to the slight increases in women's imprisonment rate is the offence data which shows women are sent to prison for both serious and non-serious offences.

Prisoner data for the twenty-year period of 1994 to 2013, reveals that despite fluctuations, the highest proportion of women sent to prison were convicted of illicit drug offences (Table 3.6). The AICI offence also increased from nine per cent in 1994 to fifteen per cent in 2013. Offences showing decreases included the unlawful entry with intent offence from 12 per cent in 1994 to 10 per cent in 2013. Interestingly, robbery, extortion and related offences show its highest proportion of women sent to prison between 1997 and 2003. Similarly, fraud, deception and related offences experienced its highest proportion of women in prison for this offence between 1996 and 1997. Further, the lowest proportion of women in prison were convicted of sexual assault offences despite a one per cent increase, this offence continued to show the least number of women sent to prison for.

Table 3.6. Sentenced women prisoners, by selected offence (in %), 1994-2011.

	Homicide and related offences	**AICI**	**Sexual assault and related offences**	**Robbery, extortion & related offences**	**Unlawful entry w/ intent**	**Fraud, deception & related offences**	**Theft & related offences**	**Offences against justice**	**Illicit drug offences**
2013	11	15	2	6	10	11	8	11	18
2012	12	14	2	6	9	12	9	9	17
2011	12	14	3	7	7	11	8	10	17
2010	11	15	2	6	8	12	9	10	17
2009	10	13	2	7	7	13	11	11	16
2008	11	15	2	6	9	12	8	12	15
2007	11	13	2	6	10	12	10	12	15
2006	11	14	2	6	10	10	11	13	14
2005	11	12	2	7	10	15	11	11	13
2004	11	12	1	8	10	13	12	10	15
2003	11	12	1	12	11	12	9	9	14
2002	11	11	1	13	10	10	11	10	15
2001	11	11	1	13	10	12	9	14	11
2000	11	9	1	13	10	12	9	11	13
1999	9	12	1	10	11	12	9	14	12
1998	10	10	1	11	12	13	10	13	12
1997	8	10	2	10	11	17	10	9	14
1996	9	9	1	9	11	16	10	9	17
1995	10	10	n.a.	7	13	n.a.	9	n.a.	18
1994	9	9	n.a.	7	12	n.a.	11	n.a.	17

Source: ABS, 2014, 2013
n.a. Not applicable

When it comes to the types of crimes for which Indigenous and non-Indigenous women are sent to prison, their offences differ. Despite fluctuations, the highest proportion of Indigenous women in prison between 2007 and 2013 were consistently for offences involving AICI, unlawful entry with intent, and offences against justice procedures, government security and operations offences (ABS, 2013). In contrast, the most common offences for non-Indigenous women in prison during the same timeframe included illicit drug offences, deception and related offences, and homicide (Tables 3.7 and 3.8.).

It is also the case that there are similarities in the offences both Indigenous and non-Indigenous women are least likely to be imprisoned for such as abduction, weapons and explosives, public order offences and miscellaneous offences. In the same fashion, despite their relatively low involvement for both group of women, the proportions doubled for offences involving dangerous or negligent acts endangering persons and abduction and related offences.

Table 3.7. Proportion of Indigenous women in prison by selected offence type (in %), 2007 – 2013.

	2007	2008	2009	2010	2011	2012	2013
Homicide	8	9	8	7	9	8	8
AICI	30	33	31	35	33	33	34
Sexual assault and related offences	1	0.5	0.7	1	0.6	0.5	0.8
Dangerous or negligent acts	1	1	2	3	3	4	3
Abduction and related offences	n.a	0.7	0.5	0.8	1	0.8	1
Robbery, extortion and related offences	8	9	9	7	8	9	9
Unlawful entry with intent	14	13	10	11	12	15	15
Theft and related offences	10	8	9	9	8	7	8
Deception and related offences	3	2	3	2	3	4	3
Illicit drug offences	4	4	6	4	2	4	4
Weapons and explosives offences	0.5	0.7	0.5	0.5	0.5	0.5	0.4
Property damage and environmental pollution	2	2	1	0.8	2	1	2
Public order offences	n.a	1	0.8	0.8	1	0.9	0.9
Road traffic and motor vehicle regulatory	6	5	5	4	5	4	5
Offences against justice procedures, government security and operations	13	12	14	13	10	9	9
Miscellaneous offences	0.5	0.5	0.5	n.a	n.a	n.a	0.4

Source: ABS, 2014, 2013
n.a.: Not applicable

Table 3.8. Proportion of non-Indigenous women in prison by selected offence type (in %), 2007 – 2013.

	2007	2008	2009	2010	2011	2012	2013
Homicide	12	12	11	12	13	12	11
AICI	10	11	10	11	11	9	9
Sexual assault and related offences	2	2	2	3	3.1	3	3
Dangerous or negligent acts	1	1	2	2	2	2	2
Abduction and related offences	0.5	0.9	0.9	0.8	0.9	0.9	1
Robbery, extortion and related offences	7	6	6	6	5	6	6
Unlawful entry with intent	8	9	7	7	6	7	8
Theft and related offences	10	8	11	9	8	9	8
Deception and related offences	14	14	15	14	13	14	12
Illicit drug offences	19	19	22	23	24	25	25
Weapons and explosives offences	0.4	0.7	0.6	0.5	0.3	0.4	0.4
Property damage and environmental pollution	1	2	1	1	1	2	0.8
Public order offences	0.6	1	0.6	0.5	0.5	0.5	0.4
Road traffic and motor vehicle regulatory	3	3	3	2	3	2	2
Offences against justice procedures, government security and operations	10	10	7	8	8	8	10
Miscellaneous offences	0.8	2	0.8	0.8	1	0.3	0.6

Source: ABS, 2014, 2013

3.4.2. Existing research on Indigenous women's contact with prison

The research on Indigenous women's prison treatment is by far the most comprehensive body of research when compared to research regarding police and court jurisdictions. While imprisonment of Indigenous women is not the main focus of the present research, it is nevertheless imperative to provide a brief overview of the existing research (Cunnen & Tauri, 2016). A snapshot of the body of research on Indigenous women in prison includes: contributing factors for Indigenous women's ongoing over-representation in prison (Baldry, 2010), characteristics of Indigenous women in prison (Bartels, 2012, 2010a), Indigenous women in prison as contemporary examples of the Stolen Generation and removal of children from their mothers (Marchetti 2005a), reviews of the 11 women whose deaths were investigated by the Royal Commission (Marchetti, 2008a, 2008b, Kerley & Cunneen, 1995), and the complex issues that Indigenous women face during and post-release from prison (Baldry & Cunneen, 2014).

Existing research on Indigenous women and their prison treatment again identifies the impact of institutionalised racism and the colonial project (Cunneen & Tauri, 2016; Blagg, 2008; Perera, 2002). This line of research emphasises that prison is a form of

responding to the social structural disadvantages experienced by Indigenous women, and Indigenous people as a group (Baldry, Carlton & Cunneen, 2015). In the same fashion, this discourse also highlights that advancing the colonial project has evolved from the historical regulation and punishment of Indigenous peoples to contemporary racialized punishment via apparently legitimate means (Hogg, 2001). Further, the racialized discrimination that leads Indigenous women to prison is impacted by their position in society as colonised Indigenous women (Baldry & Cunneen, 2012; Stubbs, 2011; Lucashenko, 2002).

3.5. Conclusion

This chapter provided a snapshot in time demonstrating that Indigenous women remain over-represented in the data across all levels of the criminal justice system: police; courts; and prison jurisdictions. The racially motivated discrimination which leads Indigenous women into the justice system in turn continues to impact all aspects of their experience contributing to marginalised lives. As a whole, the adverse treatment that Indigenous women received is caused through the complex interaction of factors related to their Indigeneity and their gender. Judicial attitudes have an impact on the over-representation and discrimination of Indigenous women in all three jurisdictions because their attitudes legitimise the overzealous racially motivated policing and their sentencing decisions directly contributes to the numbers of Indigenous women in prison.

Chapter 4: Methodology

4.1. Introduction

In this chapter I discuss the methodological approaches used for the present research. This chapter commences with a discussion about the qualitative approaches used including interviews, observations, and analysis of court transcripts. A brief overview of the method approaches used in criminological research is provided. Information related to formal procedures used such as recruitment of judicial participants, processes used during courtroom observations, and the structure of the analysis of court transcriptions is provided. Details related to ethical considerations and limitations about the research are also discussed. In this chapter I emphasise how each method is informed by a feminist lens where my positionality as a woman of Mexican descent is visibly active throughout the research. This chapter stresses how I navigate the structures of the higher courts and apply the qualitative methodology and feminist framework approach.

4.2. Methods for present research

4.2.1. Methodological approaches to criminological research

Quantitative approaches are the traditional methods used to undertake criminological research (Gadd, Karstedt & Messner, 2012). An overview of the common criminological research methods includes quantitative approaches such as statistical analysis and survey questionnaires (Kleck, Tark & Bellows, 2006). For instance, the research literature about Australian women's treatment in the criminal justice system (CJS) shows that this field is dominated by quantitative research involving the analysis of official government data (ABS, 2017c; Bartels, 2010a; Parliament of NSW, 1985). However, an ongoing limitation of criminological research using quantitative approaches is reflected in the following comment:

> …there is a need for qualitative research strategies to be added to existing statistical analysis. 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 (Jeffries & Bond, 2011: 8).

Key features of the qualitative research strategies advocated by Jeffries & Bond (2011) above lie in how the researcher is embedded in the research and the broad social justice aims of the research (Bartels & Richards, 2011). For example, qualitative methods emphasise that researchers must reflect on their role in the research while also working towards social change through an awareness of the impact that social structures have on crime and criminal issues (Bartels & Richards, 2011).

Criminological research about judges' attitudes and sentencing practices is strengthened through the integration of in-depth interviews with court transcript analyses; the combination of approaches providing a more accurate gauge to judicial attitudes and sentencing practices (Daly, 1994). In similar vein, Farrington & Morris (1983: 246) claim that "analysis of records, observation in court, interviews with magistrates, and the completion of sentencing exercises" should all be used.

This triangulated method is also more reliable than single method approaches especially with a complex phenomenon like attitudes, which change constantly and can contradict each other as "some inconsistency is a product of human nature" (Doble, 1987: 9). The present research integrates interviews with observations and court transcript analyses to provide a more in-depth investigation of the ways in which judges' perceptions toward Indigenous and non-Indigenous women shape their sentencing practices. This triangulated approach also allows me to explore ways Indigenous women's treatment in the higher courts is impacted by the intersection of their Indigeneity and their gender.

The main aim of combining approaches is to collect a richer and more holistic data set with more rigour than a single method offers (Bartels & Richards, 2011). I integrate the advantages of interviews, observations, and analysis of court transcripts to avoid the gaps that could otherwise arise in single method approaches (Bartels & Richards, 2011). This research also investigates the similarities and differences between what I observe during court proceedings, how judges articulate their decisions, and whether this matches with the actual sentencing outcomes in court transcripts.

This triangulated approach provides the opportunity to explore issues that are not fully addressed during my interviews with judges. For example, other methods like statistical analyses ignore the ways social structures—as they are expressed through police, court, and prison jurisdictions—impact women's treatment by courts because of

the emphasis on individual pathology to explain crime. My observations in courtrooms focus on how individual aspects such as appearance, behaviour and demeanour are understood through a social structural lens and it is these structural interpretations which are then reflected in the treatment, particularly sentencing. Thus, my observations in courtrooms assist in identifying how gender and Indigeneity may impact the court proceedings. Sentencing court transcripts especially enhance the value of the project as they allow me to compare my interviews and observations with formal court record and investigate whether judges' attitudes (what they say in the interviews) resonate with sentence practices (what they do in the courtroom). Therefore, I am able to identify whether judges' stated beliefs about women impacts their sentencing practices.

The focus of this research is on the treatment of Indigenous and non-Indigenous women. However I also draw on data that is relevant to Indigenous people as a whole, especially during my observations. For example, in discussing the impact of Indigeneity on sentencing treatment and practices, I refer to my observations of both Indigenous men and women in the higher courts. I have included observations of Indigenous male offenders because of the low numbers of Aboriginal women appearing before the higher courts (ABS, 2017a), and because understanding Indigenous peoples' treatment in the CJS in general is relevant to understanding the impact of Indigeneity and gender for Indigenous women specifically (Marchetti, 2012).

4.2.2. Epistemological issues

Western approaches such as the qualitative approaches used in this research are intimately connected with and embedded in 'the colonial project' (Rowe, Baldry & Earles, 2015). Even though Western research frameworks are considered superior techniques in academic contexts, I am aware of the colonising and racist assumptions embedded in those frameworks and approaches (Tauri, 2013; Marchetti, 2008b; Rose, 1996). Consequently, I have integrated this knowledge in my research. This includes being alert, during my observations, to how the CJS denigrates Indigenous knowledge and culture and maintains the status quo through the structures of the justice system.

I acknowledge that I am a non-Indigenous researcher engaged in research about Indigenous people. I am aware that as a non-Indigenous researcher there are limits to my knowledge and interpretations of Indigenous women's experiences and how the CJS impacts Indigenous subjectivity. In this research I have closely examined the historical and political contexts that shape Indigenous peoples' treatment in the CJS, and explored

these using critical theories which highlight the ongoing social injustices perpetuated by the continual imposition of a western world view. Because of my position as a non-Indigenous researcher, I emphasise that this research is not *about* Indigenous peoples, nor do I make any claim to explore Indigenous experiences. Instead, I examine the structures that impact Indigenous peoples', specifically Indigenous women's, treatment in the higher courts. In particular, I look to deconstruct the ongoing racialized and colonising politics that impact the treatment of Indigenous women in the in the higher courts (Cunneen & Tauri, 2016).

Further, in light of my insight that reality is shaped by social, political, and cultural values, including mine and the way I interpret different surroundings, I attempt to be explicit about the context and environment in which my research has been conducted. This will assist in exposing the way these factors impact Indigenous women, and Indigenous people as a group. Likewise, understanding my role as a researcher through feminist lens enables me to position myself as a learner engaged in multi-dimensional reflexivity (Rowe, Baldry & Earles, 2015: 304).

> In simple terms, reflexivity is the process through which a researcher recognizes, examines, and understands how her social background, positionality, and assumptions affect the practice of research. The researcher is as much a product of society and its structures and institutions as the participants she is studying. One's own beliefs, backgrounds, and feelings become part of the process of knowledge construction…Reflexivity also requires that the researcher makes visible to both the research audience and possibly the participants one's own social locations and identities (Hesse-Biber & Yaiser, 2004: 115).

4.2.3. Location of the research

Three locational elements of the research involve the level of court that I examined, the location in the regional north of Queensland, and the three data sources used. Given the substantial body of work on the magistrates' courts and on judges in the magistrates' court jurisdiction (Roach Anleu & Mack, 2010), I have chosen to explore a relatively under-researched jurisdiction the higher courts. This research interviews judges from the higher courts to gain a better understanding of their attitudes about women processed before the higher courts and of their sentencing decision-making processes. In

particular, interviewing judges from the higher courts allows examination of the ways their attitudes about women, and especially Indigenous women, resonate with how they carry out their sentencing practices for women processed in the higher courts.

Another locational element of the research involves the area in Queensland that was examined. The people involved in my interviews are appointed judges in the Supreme and District Courts from Cairns. My observations took place in both Cairns and Townsville. I selected this area of North Queensland because it was convenient to my own location, it is an under researched location, and there is a relatively high population of Indigenous people in this area. I also selected this area because Cairns and Townsville are both regional cities located near Indigenous communities. Some Indigenous peoples from remote communities such as Palm Island, Thursday Island, and Weipa who become involved in crime have their cases processed in the higher courts in Townsville and Cairns. As a whole, my interest in this area stems from wanting to gain insight into judges' attitudes about Indigenous peoples who reside in these regional cities or nearby remote communities.

I also elected to interview judges from the higher courts where I did the actual observations for a more holistic approach where I could match what judges that I interviewed articulated with what I observed when they presided in the court processes, particularly sentence outcomes, that I observed. The data from interviewing judges and actual observations was then matched with sentence court transcripts for a richer data set. While I could have interviewed judges from around the state, or analysed transcripts from cases I had not observed, the contexts that shape indigeneity and race in other locations will be different from that of the regional cities in North Queensland I was able to delve into during the ethnographic component of my research.

4.2.4. Interviews

According to the qualitative literature on criminological research, the interview approach allows for depth over breadth and enables an in-depth examination of participants' attitudes and perceptions that is otherwise not possible in statistical analyses or broad attitudinal questionnaires (Tewkesbury, Dabney & Copes, 2010; Tewksbury, 2009). In this research project an in-depth interview was seen as an appropriate method to gain insight and understanding into the attitudes and perceptions of high court judges who make decisions about Indigenous women in their courts.

Even though previous qualitative studies have examined attitudes of different legal practitioners, judges are the most appropriate people with whom to discuss Indigenous women's sentence treatment because it is their attitudes about these offenders that most directly influence sentences. The judiciary role of judges comes with power and influence (Cunneen, 2006b). Part of their judicial power is discretion (Marchetti & Ransley, 2014) so understanding their role and influence in Indigenous and non-Indigenous women's lives contributes to a more in-depth understanding of women's experiences of the justice system overall, and specifically of the higher courts.

I initially set out to recruit judges who only preside over cases in Queensland's higher courts. I originally assumed my presence in higher court courtrooms would serve as a recruitment strategy for interviews because I believed I would build rapport and this would lead to interview opportunities with higher court judges. However, this did not occur for structural reasons. I introduced myself to the registry personnel in the higher courts and informed them about my research project. On their advice I submitted details about my project which the registrars then forwarded to individual judges. However, all of the judges approached in this manner from the higher courts in Townsville declined to participate in my research project. A similar approach to the registry personnel in the higher courts in Cairns resulted in one judge from the Cairns magistrates courts agreeing to be interviewed. Thus, while the focus of the research was on judges from the higher courts, I also interviewed two magistrates. I included their data in my analysis because 98% of women involved in criminal activity have their cases processed in the lower courts (ABS, 2016a), and as the following chapters will show, many women processed in the higher courts have previous histories in the lower courts. These lower court judges, then, have an important role in determining the treatment of women even when they reach the higher courts.

The most successful recruitment strategy consisted of the snowball sampling technique where people who knew about my research referred me on to potential participants (Bartels & Richards, 2011). Referrers included justice practitioners such as lawyers and barristers who attend courtrooms, individuals employed by the courts like registrars, and judges who participated in the research and then referred me on to their judicial colleagues. For example, the first higher court judge that I interviewed was recruited through barristers who I befriended during my courtroom observations. I sent a general email to judges who were referred to me by barristers from private law firms and lawyers from Queensland Legal Aid. I also asked judges who took part in my interviews

to share information about my project with their colleagues so potential participants could contact me directly. This snowball recruitment strategy resulted in an additional seven judges contacting me with an interest in participating in the research. The same recruitment processes resulted in contact from one magistrate from the magistrates' courts. As mentioned above I accepted their interview specifically because the majority of women who offend get processed in this level of court.

Therefore, eight judges in total contacted me directly and were then provided with an information sheet and a more detailed description of the project and what to expect from participation. I also asked participants to sign a consent form prior to being involved in my research. The following Table 4.1 provides some basic demographic data about the group of judges who participated in this research. However, I provide these details with some caution as it is impossible to protect the anonymity of such a small group in such a localised area. Rather than providing this information for each judge, I provide it in the aggregate. For example, with so few female judges in Queensland, providing any details about them would likely make them easily identifiable, compromising their confidentiality. Thus, this demographic data is purposefully limited.

Table 4.1. Number of judicial officers interviewed by court jurisdiction and demographic information

Total # of interviews		8
Gender	Women	2
	Men	6
Race	Indigenous	0
	Non-Indigenous	8
Jurisdiction	Supreme	1
	District	5
	Magistrates	2

Despite my initial difficulties in recruiting judges to participate in my research I found that rapport with the judges was developed early during the interviews. This rapport resulted in some judges providing me with useful material to better my understanding of judicial processes. Several judges also extended me an invitation to sit next to their associate while observing women's cases in their courtrooms. Yet other judges granted

me permission to sit in on cases involving under-age females which are generally restricted to the public.

I conducted 8 in-depth interviews where I asked 23 questions in a semi-structured format. I structured the interview to flow from broad topics related to general sentence practices to more specific practices based on the offender's gender, followed by Indigenous status, and then particularly on Indigenous women offenders. For each topic I asked between three or four questions. However, while the questions were asked in ways where conversation was established, the questions were not always in order. The purpose of interviewing judges through a semi-structured format was to have every participant answer in a schematic presentation of the same open-ended in-depth interviews. In similar vein, this semi-structured, in-depth format allowed both for the participants to speak in their own terms, and to respond in a range of responses. Therefore, although I allowed judges to go wherever the questions led them individually, I also prompted judges in order to keep the interview focused on the pre-set topics (See Appendix 1 for interview questions).

Areas discussed with judges included factors that influenced their decision-making practices, the impact of legislation on their use of custodial sentences and the impact of psychiatric and pre-sentence reports on their sentence decision-making. I also asked judges about their attitudes to tougher sentencing practices, how they characterise women's involvement in crime, their views about Indigenous people who come into contact with the justice system, and how this impacts their sentencing practices. Finally, I asked judges about whether their experiences in North Queensland reflects research claiming that Indigenous and non-Indigenous women are treated differently.

To build rapport and ensure participants felt comfortable, I started the interviews by seeking information related to their personal demographics such as age, education, and number of years as a judge. With participant consent, I audio-taped interviews and took notes to record body language and other non-verbal communication during each interview which took approximately one hour to complete. I conducted the interviews mainly in each participant's chambers and at the request of one participant I conducted the interview in a coffee shop, then continued the interview in their office.

I transcribed each interview in verbatim (Birt et al., 2016). Once transcribed I returned each transcript to the participant to allow them to verify that their responses were all they wanted to say, as well as to ensure that I interpreted what they said and implied

accurately (Seale, 2012). None of the participants changed what was transcribed but a number added more detail to further explain issues they had previously discussed.

4.2.5. Observations

Another qualitative method used in criminological research is the court observations approach (Copes & Miller, 2015). Observing court proceedings in criminological research generally focuses on observing jury participants, the judiciary, and legal practitioners who attend court (Mack & Roach Anleu, 2007; Eaton, 1986; Carlen, 1976). Previous observational studies in court have mostly focused on the magistrates' courts (Mack & Roach Anleu, 2011). The advantage of observational research in courtrooms is that this approach captures behaviours that are not displayed in formal documents like court records or in statistics (Mack & Roache Anleu, 2007). For example, complex behaviours are captured through observations: "when we examine judges' courtroom behaviour, we see judges constituting richly complex legal and non-legal realities" (Philips, 1998: xi).

I observed a total of 72 cases between July 2014 and November 2015. I observed 20 cases involving women. In 12 cases the offender was a non-Indigenous woman and in eight cases the offender was an Indigenous woman. These numbers resonate with the proportion of women who appear before the higher courts based on their population per 100,000 (ABS, 2017a). Noteworthy about the differences in numbers of Indigenous and non-Indigenous women is that the rate was higher for Indigenous women given they make up a much smaller portion of the population compared to non-Indigenous women, and thus, points to structural of inequalities on the basis of Indigeneity. Further, in terms of differences based on gender, the smaller proportion of women who make contact with the higher courts also points to the higher volume of men who are involved in crime and who commit more serious offences compared to women (ABS, 2017c).

I observed all aspects of the court process, from arraignment to sentence hearings, although the focus of my analysis is on the sentence outcomes. In addition to sentence hearings, other court matters observed include indictment presentation, mention, arraignment, and trial matters. Indictment presentation, mention, and arraignment matters were generally 25 minutes in length, respectively, whereas trial and sentence matters were longer. Trial matters were the lengthiest since this process takes days, sometimes longer than one week. I observed some cases that involved trial matters over several days. In these instances, I spent 4 hours per day observing the same cases with 15-minute tea

breaks for jury participants and 15-minute comfort breaks for offenders sometimes included. However, for the most part, I spent 2 hours observing trial matters and one and a half hours observing sentence matters. Wherever possible, I followed cases throughout the whole process, observing as many of these stages as I could.

Most of the cases I observed physically in courtrooms and in some circumstances virtually through teleconference. While my main interest was the sentencing cases involving Indigenous and non-Indigenous women offenders and judges in courtrooms, I recorded a range of observations relevant to the general environment.

4.2.6. Physical environment of observations

My observations took place in courtrooms in the higher courts of Townsville and Cairns in North Queensland. The physical layout of each courtroom differed but generally I observed that the seating sections were divided and indicative of the person's role in court. For example, at the front of the courtroom was the judge's bench while below was the seating section for their associate. The witness stand was located between the judge's associate and bailiff's seating area. In the middle of the courtroom was a long desk which was designated for the prosecutor on one side and the defence on the other. Across from this table was the jury seating section made up of twelve chairs. At the back of the counsel seating area is the dock area, or offender box and at the end of the courtroom was the section for the public and media who sit in the public gallery to observe and listen to court processes. In this public gallery section, I often sat at the far end beside the wall. Other general physical surroundings across the courtrooms included four separate doors, one for the judge and associate, another for defendants in custody, one for jury members, and the main double doors of the courtroom entrance. These double doors displayed courtroom instructions such as mobiles are to be turned off or placed on silent prior to entering the courtroom. Finally, behind the judge is a plaque, the seal of the Queen of England, which was the only ornament hung in the courtrooms.

4.2.7. Interpersonal interactions in courtrooms

I generally did not have direct contact or communication with the people whose behaviour I observed; my observations were that of a non-participant observer. I never presented myself as anyone other than a lay member of the public carrying out a postgraduate research project through a courtroom observation approach. At the beginning of my observations I was asked by people who sat near me whether I was a law

student or lawyer given my note-taking on what I witnessed. I always presented myself as a postgraduate student undertaking a research project. I assured them that none of my notes would be delivered to the media and clarified that, although the name details about offenders are public information listed on the daily docket outside courtrooms as well as online, I would respect confidentiality of all cases.

4.2.8. Observation information collected

Initially I did not record the names attached to the observations. I wanted to protect the anonymity of the cases I observed and so described them in ascending order by number of observations such as observation case no. 1, observation case no. 2, etc. For instance, some of the initial information about the cases observed that I would note in my field notebook included the date and time of the observation, judges' respective surnames and the courtroom number and level. This helped me keep track of cases that were processed at a different time. For example, I could observe the initial arraignment during one observation and then, during a subsequent observation, the trial for the same case. However, as my routine observations developed, I learned that some of the information I had written in my field notebook limited my future prospects of accessing court transcripts from the cases I had observed. For example, while I had naively avoided writing the offender's case number and exact name details in my field notebook to preserve their anonymity, this was crucial information required to access court transcripts. After learning that name details are public information, I began to record the names of the cases I observed.

My early observations mostly focused on the courtroom factors that were easily observable for me. I paid close attention to specific legal details about the cases that I observed like plea, crime type, and court matter (i.e. arraignment, trial, sentence) and recorded these in my field notes. Other visible factors that I observed were the demographics of people in courtrooms like Indigenous status, gender, and approximate age. Early on I also focused on the demeanour of people like posture and dress attire and the way people followed court etiquette procedures like bowing, standing, remaining silent, and sitting was recorded and commented on in my notes. As I reflect on my observation data I recognise that my early focus on the factors mentioned above detracted from my observation of other court processes. For example, during my initial observations I failed to observe and record details about the sentence outcome, judges'

remarks and the interaction between offenders and judges. I rectified this in later observations.

I observed the culture of men and their over-representation in courtrooms through legal professions (ABS, 2003). These legal professionals included judges, associates, council, prosecutors, corrections officers and court personnel like bailiffs, court security, and court aides. I also made use of extended observations involving male offenders given that males engage in more serious offenses and thus are processed in the higher courts more than female offenders (ABS, 2013). In particular, extended observations involving cases about male offenders were used as benchmarks from which to compare the treatment of women processed in the higher courts.

I also recorded the presence of Indigenous people in courtrooms. For example, given the over-representation of Indigenous offenders in the higher courts (ABS, 2017a, 2016a), I observed Indigenous people in courtrooms as offenders, support people, plaintiffs, and witnesses. I looked for Indigenous people as jury people, judges, associates, bailiffs, corrections officers, and barristers and lawyers and found no Indigenous people in these roles which resonates with information that Indigenous people are under-represented as jury participants and in legal professions (Schubert, 2017).

In general, these extended observations impacted my understanding of the complex roles of people in courtrooms based on gender and Indigeneity. The extended observations also made me reflect on my positionality as a woman and on my ethnic background. I identified with the under-representation of Indigenous people in legal professions and in jury participation. I recalled how my own extended family consistently declines jury participation because of their dissatisfaction and lack of confidence with the courts and their limited English skills.

4.2.9. Recording observations

I took detailed field notes during each observation where I recorded what I observed into a journal fieldwork. As much as possible I noted the behaviour of the people involved in the cases that I witnessed. With respect to ethical considerations and issues related to people being observed, I recorded the non-verbal behaviour of people inside courtrooms so long as the courtroom was open to the public. Data recording forms were also used when possible. These included very brief general information that was filled out each time a courtroom was observed. See Appendix 4 for data recording form for information.

Even though cameras and microphones may have facilitated observing verbal and non-verbal behaviour and communication, I did not use these as this is considered an invasion of privacy and therefore not allowed in courtrooms. Only reporters are allowed to use voice recorders and even then, permission from judges has to be granted beforehand. While the observation technique did not provide insight into what the person was thinking, why they engaged in a behaviour, or what motivated a behaviour or comment, there were some attempts at also recording what people said inside courtrooms. I attempted to link what people said to my observations about their demeanour, tone, and make some observations about apparent intent.

I noted what judges said to offenders during court processes, particularly women offenders. I also noted what the defence counsel and the Department of Public Prosecutors (DPP) counsel said to one another during court procedures and any adjournments. Further, I made an effort to record what people who were summoned for jury service said as this allowed me to learn about their experiences as jury participants (Warner et al., 2009; Matthews, Hancock & Briggs, 2001).

I also took note of the way in which people in court talked to me to understand what motivated their comments toward me. For example, there were instances when I had communication with courtroom bailiffs. On occasion during a break or when court was adjourned, and no one else was present in the courtroom, I would inquire about details regarding the schedule of court proceedings. There was also the opportunity to befriend a group of barristers who assisted with legal queries during court breaks. Another instance was a brief conversation with an associate to a judge who provided me with information after the court's adjournment. I also spoke to some people awaiting jury selection when they were outside the courtroom in the waiting area. The conversations I had with different groups of people who attended court enriched my observations data by alerting me to how the different roles of people in court act as part of the structures of the court.

There are several resources that I used to ensure I was able to observe relevant cases. The Daily Law Logs, also known as a docket, is an online government service that provides the schedule of details of cases processed, and was the main supplementary resource used. (See Appendix 5 for copy of example.) This document is updated every 24 hours, available online for public view, and is pinned to the wall near the entrance of each courtroom. The information provided in the docket informed me about the people and their role in court for each scheduled docket date. Higher courts security personnel in Townsville and the courtroom bailiffs in Townsville and Cairns also provided guidance

as to the relevant cases processed for the day. During my early observations, the Townsville Supreme Court registry personnel would notify me of upcoming cases with women offenders. The details provided to me were limited to courtroom number and the time of the court hearing so the offender's confidentiality was not breached.

Other resources to support my observations were legal practitioners that I befriended who would forward upcoming court case matters. Some of the judges who took part in interviews also assisted in providing information about future relevant cases to observe in their courtrooms. However, the information that I was provided was limited to the type of court matter (i.e. arraignment, trial, sentence), date, gender, and Indigenous status of the offender. As a whole, the impact of these resources is that these helped enrich the data by assisting with the process of my observations.

4.2.10. Transcripts

I accessed transcriptions of court proceedings that came before the higher courts directly from Auscript Australasia Ptd Ltd. This company is the sole provider of recording and transcription services to Queensland courts. The high cost of these transcripts meant that I was able to purchase four transcripts related to sentence remarks of relevant cases that I had observed in the sentencing phase, involving Indigenous and non-Indigenous women offenders processed in the higher courts in Townsville and Cairns.

I selected the four cases based on the type of offence and included cases that involved serious offending including illicit drugs, violent, and fraud offences because these are the most common offences for which women are processed in the Supreme Courts and District Courts (ABS, 2017a). These offences are also the main cause of both Indigenous and non-Indigenous women's imprisonment (ABS, 2016b).

Another reason I selected these transcripts is that I did the actual observations in these cases, which were also presided over by the judges who I chose to interview. In particular, the transcripts selected allows me to investigate the ways the sentence outcomes from these four cases match with what I observed in their respective court processes, and with how the judges that presided in these cases, who I interviewed, articulate their decisions. Thus, these selected transcripts allow for a rich and holistic data set.

Transcripts were 'verbatim', meaning that the transcriptions were the exact words used by the speaker (Birt et al., 2016). Each transcript was related to judges' sentence outcome, and so the words mostly involved remarks from judges. The general structure

of the judges' sentence remarks included a summary about the offending details and an overview of the mitigation and aggravation factors the judge took into account in reaching the sentencing decision.

I describe the four cases of transcripts in the form of labelling them chronologically. For example, in my findings chapters I refer to transcripts as: Transcript no. 1, Transcript no. 2, etc.

Ensuring that the transcripts I accessed recorded specific cases that I observed allowed me to compare my interviews and observations with court transcripts, and strengthened my interpretation of the observed cases. The transcripts also supported my interpretations of cases that resulted in suspended sentence outcomes that were otherwise not available in the observations such as the period of imprisonment, the period of suspension (or operational period), and whether a conviction was recorded. This small sample of transcripts allowed for the confirmation of the patterns captured in my interviews with judges and observations in courtrooms.

4.3. Boundaries and limitations of the research

4.3.1. Ethics

This research project was conducted within the guidelines of the James Cook University Human Research Ethics Committee (HREC) and was approved on 13 August 2014 (approval number H5777).

Each participant was asked to sign an informed consent form which specified that all efforts would be taken to ensure confidentiality and anonymity. The strategies taken include minimal demographic data reported on in the thesis, all interviews de-identified and allocated a number, and all direct quotes attributed to unidentified pseudonyms (or numbers) which cannot be correlated to identifying demographic data. I also addressed identified ethical issues by discussing with each participant the possibility of identification given the small population of judicial officers.

Even though I went out of my way to protect the identity of judges, the possibilities of being identified exists. Higher courts in North Queensland like Cairns and Townsville are small localities with a small number of judges. It was possible that some judges could become aware of each other's participation because of the snowball sampling technique where I asked judges who took part in my interviews to share information about my project with their colleagues. However, I emphasised that their

answers and responses were kept anonymous and all their information kept confidential. (See Appendix 2 for copy of Consent Form and Appendix 3 for information on the Information Sheet.)

4.3.2. Researcher positionality

Informed by critical race theory and feminism in the context of power and objectivity issues, I was acutely aware of my positionality during the interviews. As mentioned above, the rapport that I developed with judges also impacted my speaking frankly about what they said. For instance, I experienced feelings of cautiousness in wanting to portray judges in a positive light throughout the following chapters. However, informed by critical race theory and feminism, I was acutely aware of my positionality during interviews, while also mindful of issues related to power and objectivity. This prompted me to continually reflect on my role as a researcher which outweighs these particular feelings of personal solidarity to the judges. So, although I was fortunate to develop rapport with judges, I ensured my researcher biases were overcome through a critical analysis of what judges said during my interaction with them. Further, as I am embedded in the research, the member check strategy prevented participant responses to be interpreted from my own biases and instead that what they said was accurate.

4.3.3. Recruitment and sampling

It is common in qualitative research to have small sample sizes when the aim is for depth rather than breadth. The interviews with judges from the higher courts are locally specific and builds on observations from 72 cases, including all stages of the court process. In addition to these observations, I interviewed judges who mainly presided over these cases. Therefore, even though I only conducted eight interviews, the combination of observations and transcript analysis of court cases increased the depth and richness of the data, enabling the opportunity to answer questions that were not answered during my interviews.

There were some issues that arose during the recruitment for my interviews. For instance, Judge 8 initially cancelled on the day of the scheduled interview. After arriving in Cairns from Townsville for the scheduled interview that had been arranged weeks in advance, I was unexpectedly notified by a mutual contact that one judge had been advised by the Chief Judge in Brisbane to cancel the interview. I attempted to overcome scepticism from judges by extending detailed information about the aims and objectives

of my project during the recruitment phase. I clarified that the intention was not to portray judges as racist but rather to investigate judges' sentence treatment of Indigenous and non-Indigenous women processed in the higher courts.

There was also a mixture of explanations for why judges who agreed to be interviewed did not inquire with the Chief Judge for permission. One, judges were aware that their permission to be interviewed would be denied. Two, there were some judges who expressed witty remarks about the requirement of seeking approval by the Chief Judge to participate in my project, "I don't need to ask for permission about what to do with my spare time or how to run my courtroom". Three, one judge used their recently retired judicial role to exclude them from seeking formal permission. In spite of the complex issues with the restricted access to interview willing participants, judges were eager to be interviewed. Their enthusiasm was especially evident when they recommended their colleagues to also take part in my project.

4.3.4. Complexities of interviews

Judges were not immune to the interviewing effect where participants respond to questions in a socially acceptable manner:

> People may answer…questions so that they look good in their own eyes and in the eyes of others. Consequently socially 'desirable' behaviours…are over-reported while socially 'undesirable' behaviours and attitudes (e.g. alcohol consumption, sexist and racist attitudes) are under-reported (de Vaus, 2014: 107).

Judges in particular are susceptible to answering questions in a positive manner because they are the key figures in how the court system responds to crime. In light of the historical over-representation of Indigenous people across the criminal justice system and the treatment disparities between Indigenous and non-Indigenous women (Bartels, 2010), judges are prone to accusations of discrimination so could be susceptible to guarding their actual attitudes during the interview. For example, some judges responded to questions in what they likely considered were socially acceptable manners by expressing sympathetic perceptions toward Indigenous people involved in crime. However, as a whole, capturing complex attitudes was key to gauging unconscious attitudes that could exist alongside conscious attitudes and that, in turn, impact their decision-making practices, especially during sentencing.

4.3.5. Observation limitations

One limitation in making courtroom observations is the Hawthorne Effect where people react to being observed (Cash & Culley, 2015; Parsons, 1974). I was a regular audience member who generally sat around the same seating area, observed courtroom processes, interactions and behaviours, and combined this with field note writing. Through spending time in courtrooms, I talked with barristers, lawyers, court registry personnel, and courtroom bailiffs about my purpose and I suspect that they communicated with other legal practitioners about my presence and purpose in courtrooms. However, while some people inside courtrooms, especially the judiciary, associates to judges, barristers, lawyers, and courtroom bailiffs, may have been aware that they were being observed, it is unlikely that my presence changed their behaviour noticeably. I observed them to carry out their roles in a consistent manner across the timeframe of my observations (and interviews), thus, suggesting that my presence did not impact their conduct. I also felt that the demands of their respective roles in court outweighed any attempts to react to my position as a researcher.

Results from my courtroom observations also demonstrates that the observation approach could be used as a single method approach to gauging judges' sentencing decisions. However, a limitation for researchers using court observations as a single approach to explain judge's sentence practices involves legal knowledge. There were instances where I did not fully understand criminal justice processes, or sentencing guidelines in particular, and this impacted the ways I interpreted judges' sentence practices. For example, during one case that I observed, I initially interpreted the sentencing outcome as 'lenient punishment'. However, shortly after the court was adjourned, the associate to the presiding judge assisted in a detailed breakdown of the sentencing outcome of this case. They revealed that the punishment handed down was not necessarily lenient and that the presiding judge had imposed a sentence in accordance with the order for prison sentences. So while the single method approach from observations could misinterpret judges' sentencing practices when the research observer lacks legal knowledge, I found that combining observations with interviews and transcripts supplemented and enriched the observational data and allowed for the appropriate interpretation of my observations.

Another feature that is stressed in observational research in courtrooms is that two observers enhance objectivity and consistency of the data; "To limit reliability and limit

subjectivity, the two co-authors undertook all court observations…" (Mack & Roach Anleu, 2007: 347). This recommendation for observational research in courtrooms however falls outside my framework where I specifically stress my visibility given I am embedded in the research.

A further potential limitation of the research is the possibility of missing important observations that change or amend the situation being observed. The court environment is fast paced as court matters often have time pressures (Mack & Roach Anleu, 2011). So, in this context where the researcher relies on hearing and listening to court processes that occur rapidly, observational researchers advocate for court records to be added to the research process to ensure accurate interpretation of the observational data (Mack & Roach Anleu, 2011). This point in particular compelled me to supplement my observational data with court transcripts.

4.4. Data analysis

The data collection from my interviews, observations, and court transcripts was analysed through thematic coding. The data was analysed looking for evidence of patterns within the data recorded from each method approach (Rossman & Rallis, 2003). My thematic analysis involved reading and reviewing the data from interviews, observations, and court transcripts several times. Through this process of repeatedly reading and reviewing the data from each approach, I coded words and phrases that stood out. For example, in weaving together data from each approach, in the beginning cycle I discovered words and phrases including Indigenous status, compelling circumstances, gender and Indigeneity, ideologies of victimization, socioeconomic circumstances, and mental health and substance use. From this process of coding I reflected on the themes that emerged from the above codes. In particular, from the set of themes that emerged from the analysis, I categorized patterns and concepts such as women's sentencing treatment impacted by gendered perceptions, courts' formal response to Indigenous status through disadvantaged circumstances, and competing tensions that judges' experience in their sentencing practices.

As I refined the themes and associated these into categories, I referred to my research questions. This process of refining the themes that arose from the data also enabled me to link the themes and categories to my theoretical frameworks of critical race and feminism. For example, I reflected on my lens as twofold, first through a feminist criminology where I am embedded in the research, and second through a critical race

where I looked for patterns of inequality through the construction of racially motivated adverse practices. In doing so, I became aware of dominant paradigms such as the imposition of structures through power in the higher courts that expose bias and criminalisation toward Indigenous peoples. In the same tone, I linked themes and categories to judicial perceptions and practices that represented patterns of perpetuating marginalisation. Further, I was also alert of my feminist lens with interpreting the themes and categories that were supported by the data. In particular, while recognising my subjective stance of my feminist lens, I was alert to the connections between overlapping themes with the ways crime is understood and constructed by the dominant and powerful (socially constructed) race, and how the higher courts responds to criminal behaviour and cultural practices by Indigenous women.

4.5. Conclusion

In this chapter, I discuss the methods for the present research. This research varies from the norms of traditional criminological research approaches, and instead applies qualitative approaches in the form of interviews, observations, and analysis of court transcripts. Details related to the formal procedures used during each approach is provided. Information about ethical considerations and limitations about the research are also discussed. Each approach is carried out through a feminist lens so pays attention to gender. I emphasise the ways I navigate the structures of the higher courts and their intersection with the gender and Indigeneity for women that are processed in the higher courts through the qualitative methodology and feminist framework approaches.

Chapter 5: Specific issues related to Indigenous people

5.1. Introduction

As established in previous chapters, Indigenous women's treatment within the criminal justice system (CJS) are shaped by the intersection of their race and their gender. The over-representation of Indigenous people in the CJS is well established, and previous research shows that they experience different outcomes at all levels of the justice system (Cunneen & Tauri, 2016; Baldry et al., 2015). In this chapter I examine the data from my research findings about the sentencing treatment of Indigenous and non-Indigenous women offenders. I focus on the treatment of Indigenous women processed in the higher courts to discuss how the court structures impact Indigenous offenders on the basis of their Indigeneity specifically. These structures include factors submitted to the court to act as aggravating and mitigating factors, legal representation from Australian and Torres Strait Islander Legal Services (ATSILS), and judicial perceptions about Indigenous people. I navigate this chapter through the Critical Race theoretical lens and argue that Indigenous people's experiences in the higher courts are shaped by race and Indigeneity. Despite judges' attempts to ensure that 'justice is blind', the structures of the higher courts are still essentially racist.

5.2. Submissions to the court

5.2.1. Aggravating factors

A court has regard to many factors when determining the sentence for an offence (Cook et al., 2015). One of these factors that is taken into considerations are aggravating factors submitted by the prosecution. The court takes aggravating submissions into consideration to assess culpability of the offenders, seriousness of the offence, and could impact the sentencing by warranting a higher penalty (Cook, et al., 2015). Data from this research shows that while aggravating factors were brought up for both Indigenous and non-Indigenous people, it is the way they were brought up and used which differs based on Indigeneity. I found that key aggravating factors that disproportionately affect Indigenous people are criminal history and the lack of police cooperation and this resonates with previous research (ATSISJC, 2002).

Previous research has demonstrated that criminal history aggravates the assessment of the severity of the offence (Bartels, 2010a). While sentencing guidelines

mandate judges to take this factor into consideration when sentencing an offender, the impact of an offender's criminal history on the sentence severity is complex. I observed differences in the aggravating submissions of criminal history on the basis of Indigenous status. For instance, Indigenous people had lengthy criminal histories raised in two of the transcripts and in several of the cases that I observed. In one case, the sentence transcript for an Indigenous woman revealed an extensive history of minor crimes notes by the presiding judge:

> There are a number of street type offences dating back to 1989, with the last of those being in 2009. A variety of different types of offending conduct, but all of relatively minor nature (Judges' sentencing remarks. Transcript no. 1).

More serious issues like attempting to pervert the court of justice also appeared in the criminal history of another Indigenous woman and these were brought up during her sentencing:

> You deceived the court. And not for the first time had you used that other person's name to try to avoid the attention of the police and the authorities – you had apparently done so in November 2012 (Judges' sentencing remarks. Transcript no. 2).

Similar to the transcripts data above, I also observed cases where criminal history was brought up in the aggravating submissions phase by the prosecution and mentioned by presiding judges during their sentencing remarks. For example, in one case involving an Indigenous male, the prosecution submitted to the courts and mentioned their "juvenile and adult criminal background of assault" and this echoed with the presiding judges' sentence remarks, "Such a young man, you have a substantial history" (Observation case no. 56). In another case involving an Indigenous male, I documented in my field notebook the prosecution's aggravating submissions, "Prosecutor reads a number of previous offences involving violence toward his partner over jealousy", which resonated with the judges' sentence remarks, "I have to balance that [sentence punishment] with your personal circumstances…unfortunate history of violence" (Observation case no. 62).

In contrast to the way aggravating submissions like criminal history was used for Indigenous people, my observational data shows that for non-Indigenous people having a criminal history did not always adversely affect their sentence. In some instances the narrative by the prosecution and counsel for sentencing matters about non-Indigenous people with previous criminal offending impacted judges who either, (1) explicitly

mentioned that they would not take the criminal history factor into consideration or (2) did not mention it at all during their sentencing remarks. For example, one case about a sentence matter that I observed included mention of the non-Indigenous woman's "drug offence about 20 years ago" and so the judge remarked "I give no weight to this at all" as part of their sentence decision-making (Observation case no. 51). In the same fashion, for a case involving a non-Indigenous male, their criminal history submissions had a similar narrative, "Previous drug conviction, very dated, 1991, was fined" (Observation case no. 59). In this case with a description of a long-ago criminal history, the presiding judge did not mention this factor in the sentence remarks, suggesting that the previous offending was not taken into consideration in the judges' sentence decision-making.

Another similar narrative that I recorded in my observations data relates to a case about a non-Indigenous woman whose previous criminal offending was outside Queensland jurisdictions. Aggravating factors presented to the court included submissions of previous offending outside of Queensland courts, "Antecedents: None in Queensland" yet these were explicitly not taken into consideration by the presiding judge in their sentence decision-making, "You as I say are the type of person we never want to see again. I'm talking in particularly about your age and the fact that you've never been in the courts before" (Observation case no. 69).

Yet another trend of the presiding judges not mentioning the criminal history as an adverse factor in their sentence remarks involved descriptions by the prosecution or defence counsel of previous criminal history where the type of offending behaviour was irrelevant to the current case. For example, in a drug case about a non-Indigenous male I noted the prosecution's description of the offender's previous criminal history as anti-social behaviour offending. In turn the judge mentioned in their sentence remarks, "I have to look at your overall situation, street offending, no previous convictions for drug matters" (Observation case no. 63). This judge's remarks suggest that despite having a criminal history, this factor was not used adversely in the sentence decision-making. Similarly, in a drug case about a non-Indigenous male, description about his previous criminal history included, "Has no *relevant* criminal history", and in turn, the presiding judge had no mention of this factor in their sentence remarks (Observation case no. 71). This narrative implied that their different offence type from their previous offending was irrelevant to the current case, and therefore seemed to impact judges' sentence decision-making into not taking the previous criminal history factor into consideration. The transcripts and observations records show that the diverse ways the criminal history factor

is narrated for non-Indigenous people differed from the narratives about Indigenous people and aggravating submissions about their involvement in previous criminal history.

Therefore, although criminal history is a well-known key factor in predicting sentence severity (Cook et al., 2015), interpreting whether and how criminal history impacted the sentence severity of people who previously offended was complex and depended on the way the presiding judge chose to interpret the aggravating information submitted to the court. My observations data revealed that criminal history was brought up for Indigenous people while non-Indigenous people did not always have their criminal history taken into consideration. The emphasis is that unlike cases involving non-Indigenous people, the observations and transcripts data show that Indigenous people's criminal history is commented on during their sentencing in the higher courts regardless of whether previous offences were processed in the magistrates' courts and despite crimes dating back many years ago.

An issue closely related to related to criminal history is Indigenous people's involvement in public order offenses (ATSISJC, 2002). As previously discussed, public order offences which are listed under the *Summary Offences Act* 2005 concern behaviour in public that could endanger and/or disrupt other people. According to the *Summary Offences Act* 2005 (QLD), these are offences that affect the quality of community use of public places such as public nuisance behaviour, urinating in a public place, or being intoxicated in a public place.

> The cornerstone of public order legislation is usually a provision that permits police to act where behaviour in a public place is regarded as offensive, insulting, abusive or indecent. Such provisions are inevitably vague and open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates (Brown et al., 2011: 752).

The issue about public order offences is that charges are mostly laid against Indigenous people (ATSISJC, 2002). Public order offences add length to the criminal histories of Indigenous people which then impacts their sentencing for cases processed in the higher courts. Further, differences in the rate of public offences on the basis of Indigenous status reflect how legislations are rooted in structural racism and are constructed based on Indigenous status (Delgado & Stefancic, 2001; Harris, 1995). Consequently public order offences are illegal within the dominant white patriarchal CJS

because these are behaviours that are deemed offensive by the dominant race. Indigenous people are essentially punished in an ongoing manner for their existence as non-members of the dominant social group.

Historically, Indigenous people have experienced a higher rate of being charged with public order offences compared to non-Indigenous people (Bartels, 2010a; ATSISJC, 2002). My findings resonate with this pattern from the existing research about this legislation (Cunneen & Tauri, 2016; ATSISJC, 2002). My observations show that involvement in previous public order offences was mostly shared by Indigenous women and men. I observed a case involving an Indigenous male whose previous offences included public order offences, "Antecedents relate to assault and street offences" (Observation case no. 64). Similarly, in the case mentioned above (Transcript no. 1) of an Indigenous woman whose previous involvement in public order offences were brought up as aggravating submissions, "Has a criminal history of street offences" (Observation case no. 54). In contrast, I did not observe any cases involving non-Indigenous people whose aggravating factors included submissions related to involvement in public order offences. Therefore, these observations data show that public order offences dealt with in the magistrates' courts are brought up as aggravating factors under criminal history in the higher courts mostly impacted Indigenous people.

Another aggravating factor as a structure of the higher courts that I documented in my observation data involves breach of court order. I observed that breach of court order was overwhelmingly shared by most cases about non-Indigenous people. For example, in a drug case about a non-Indigenous woman the presiding judge noted in their sentence remarks, "You continued to offend even after bail" (Observation case no. 51). Similarly, I observed a drug case involving a non-Indigenous male where he breached his court order, "Reoffended after his first offences. Had already been given notice to appear, was already charged" (Observation case no. 55). I documented this similar theme with another drug case in the judge's sentence remarks, "Committed all these offences whilst on bail" (Observation case no. 58). Then in a drug case of a non-Indigenous male charged with supply and possession of methamphetamines, the judge mentioned the breach of court order factor during the sentence remarks, "Whilst on bail, he was caught with cannabis. So he's not too bright either...that was more stupid than serious, that's how stupid he is" (Observation case no. 63). Breach of court order for non-Indigenous people were not limited to drug cases. In an armed robbery case about a non-Indigenous woman

who had breached parole the judge noted that, "…probation was breached twice, was on probation at time of offence" (Observation case no. 57).

In contrast, none of my observations of Indigenous women's cases involved breach of court orders. Yet the breach of court factor was shared by most cases involving Indigenous men. In a case about an Indigenous man, the presiding judge referred to his breach of court orders during their sentence remarks, "Subject to protection order and probation so he breached these" (Observation case no. 56). The presiding judges' sentence remarks also mentioned the breach of court orders for a case involving a non-Indigenous male, "Breached parole on two occasions" (Observation case no. 62). In another case related to an Indigenous male, the presiding judge also mentioned their breach of court order during their sentence remarks, "Has committed multiple offences on same day. All of violence and breach of domestic violent court order" (Observation case no. 70).

My observations data therefore indicate that regardless of Indigenous status, the breach of court order factor was actually taken into consideration as part of the judges' sentence decision-making for non-Indigenous people and Indigenous men with breach of court orders. Acting as an aggravating factor, which is an important structure of the higher courts, the breach of court order factor is not necessarily shaped by Indigeneity. However, when added to the things that are taken into consideration, it is a compounding factor that contributes to Indigenous peoples' experience of the higher courts more adversely than non-Indigenous people given the interaction with additional aggravating submissions of previous criminal history and lack of police cooperation taken into consideration in their sentencing.

An aggravating factor that particularly impacted Indigenous peoples' different treatment within the higher courts was the factor that they often refused to cooperate with police authorities. Similar to the previous discussion on criminal history and breach of court order, the police cooperation factor was brought up for both Indigenous and non-Indigenous people during my court observations, but again, it is the way this factor was used and interpreted by the court which differed based on Indigeneity. For example, in Transcript no. 1, the Indigenous woman's refusal to take part in a police interview was used against her and formally submitted to the court as an aggravating factor by the prosecution. The judge noted this in their sentence remarks, indicating that it was part of the decision-making:

> The police arrested you and you declined to take part in an interview (Judges' sentence remarks, Transcript no. 1).

My analysis of sentence transcripts resonate with my court observations on police cooperation during sentence matters. I observed a case involving an Indigenous male who did not cooperate with the police, of which the judge noted his "silence when police tried to interview him" (Observation case no. 62). I also documented a case about an Indigenous male who did cooperate with the police, yet his false testimony explicitly acted as an aggravating factor, "Offender had made statements to police that deceased had simply fallen over her foot and hit her head so he was released without charge…He denied having hit her throughout the taped interview…Denied taped conversation of actual incident" (Observation case no. 64).

In contrast, a common theme that I observed in the sentencing remarks about most non-Indigenous people was their willingness to cooperate with the police. For example, I observed a case involving a non-Indigenous man who cooperated with the police, "Made admissions to supplying cannabis, admitted to police that he also used pot" (Observation case no. 59). Other cases demonstrate that non-Indigenous offenders were often given recognition for their willingness to cooperate with the police (Observation case no. 43). For example, offenders were described as giving police "frank admissions" (Observations case no. 51), and being "cooperative with police" (Observation case no. 41). Even where police cooperation indicated criminal history, it was treated positively, "Has a history of cooperating with the police…Pleaded guilty, cooperated with police" (Observation case no. 48).

Therefore, as my transcripts and observations data reveal that non-Indigenous people were noticed as cooperating with the police while Indigenous people were noticed for the opposite, police cooperation reflected a structure of the CJS that was interpreted differently on the basis of Indigeneity – that regardless of whether these submissions were brought up by the prosecution or defence counsel, Indigenous people are seen as non-cooperative.

Further, my transcripts and observations data also resonated with the historical relations between Indigenous people and the police. In particular, the unwillingness of Indigenous people to cooperate with the police is not surprising given the long history of over-policing and violence at the hands of police authorities experienced by Indigenous people in Australia throughout history (Kerley & Cunneen, 1993). Many Indigenous people generally lack confidence and trust in police authorities (Horowitz, 2007; Weitzer

& Tuch, 2005), and avoid interviews with police authorities as a self-protection strategy (ATSISJC, 2002). The point of cooperating with police authorities is that this factor is an essential element of good citizenship and a positive characteristic which reflects the prominence and unquestioned status of Western paradigms that in turn permeate the criminal justice system to the detriment of Indigenous people (Rowe, Baldry & Earles, 2015). Therefore, submissions to the court related to aggravating factors impact different court experiences for Indigenous people. The overuse of public order offences impact lengthy criminal histories for Indigenous people while lack of police cooperation and breach of court orders adds to the aggravating factors that are taken into consideration by presiding judges during sentencing. Thus, aggravating submissions reported above are compounding factors that contribute to Indigenous peoples' different experience of the higher courts

5.2.2. Mitigating factors

Mitigating factors assist in determining culpability and impact sentencing by encouraging the court to consider a lower penalty (Cook et al., 2015). In contrast to aggravating factors, the explicit consideration of cultural factors is a crucial mitigating factor that sets court experiences for Indigenous people apart from non-Indigenous people. The issue with mitigating factors is that the court must take cultural factors into consideration by linking Indigenous status to Indigeneity, consider factors that are culturally relevant, and listen to submissions from community justice group representatives. According to the *Penalties and Sentences Act* 1992 (QLD) the court must have regard in sentencing an offender, to submissions made by community justice group representatives (s.9(2)(p)). However the court interprets this to reflect disadvantage and therefore Indigenous people are constructed through these lens of disadvantage.

> PENALTIES AND SENTENCES ACT 1992 - SECT 9
>
> (2) In sentencing an offender, a court must have regard to—
>
> (o) if the offender is an Aboriginal or Torres Strait Islander person—

> any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—the offender's relationship to the offender's community; or any cultural considerations; or any considerations relating to programs and services established for offenders in which the community justice group participates.

In principle, the concept of 'cultural considerations' may seem straight forward in cases involving Indigenous people, however, my findings show that this concept is more than judges simply taking Indigenous status into account when sentencing Indigenous people. For example, research on the legal principles underlying the sentencing of Indigenous offenders shows that Indigenous people do not get leniency because of their Indigenous status alone but instead it is their "background, education, cultural outlook" (Queensland Court of Criminal Appeal in R *v Gibuma and Anau* (1991) 54 A Crim R 347 at 349) that impact the court. This means that while the courts require Indigenous people to prove their cultural links, and this is an example of the dominant paradigm determining what is appropriate behaviour for Indigenous people and what is not. More importantly, this highlights that it is still a white judge who gets to determine whether an Indigenous person's voice is heard or silenced despite representations from Indigenous communities.

The complexities of the concept of 'cultural considerations' in legislation also resonates with the attitude of one judge whom I interviewed. I found that for this judge, 'cultural considerations' is the formal way to explain and justify how disadvantaged circumstances impact offending by Indigenous people. This judge had particular expectations about how this would be raised in court and mentioned that cultural considerations must be formally submitted by the offender's legal representatives in order for the court to take consideration.

> Very often, for example, they will expect you to take it ...because they were Aboriginal. They were raised in a life of disadvantage, forget to say it out loud. You've gotta say it. I don't sentence on the basis of the fact that they're Aboriginal, I sentence on the basis they had a lifetime of disadvantage. So you gotta make the

> link, something as simple as that is commonly overlooked (Interview 5).

The judge above conveys their view that the association of disadvantage must be explicitly raised for it to be considered as relevant for sentencing decision making even though he also demonstrates he already knows this connection exists. Although this judge was the only judge that specifically touched on this issue and had a particular attitude about cultural consideration, their insistence on certain structural rules being followed reinforced the structural racism inherent in the higher courts. Although not a specific reference to cultural considerations factor, relevant attitudes on acknowledgement of Indigenous peoples' circumstances linked with disadvantage were actually shared by most judges and this is explained in detail further below.

I observed similar complexities about the consideration of cultural factors between the judges' attitude above and my court room observations data. While making the case for cultural considerations involved verbal and formal submissions to the court, an issue was a lack of clarity about some of the Indigenous offenders' disadvantaged circumstances. One example is a case that I observed where legal representatives made clear, succinct submissions about the offender's Indigenous status: "Client is Indigenous as she's supported by ATSILS" (Council's submissions. Observation case no. 72). However, when the judge asked whether there were any Indigenous community references in order to consider the cultural considerations mitigating factor, the legal representatives said that there are no reference letters (Observation case no. 72).

In this case the judge was not presented with, and thus did not hear, information to support the Indigenous woman's disadvantaged circumstances like histories of alcohol use, transgenerational trauma, and reliance on government support (Bartels, 2010a). Instead the judge heard the opposite. Her lawyers stated that she possessed a TAFE certificate with a record of employment and was educated. Similarly, her "swerving the car toward the complainant" (Council's submissions. Observation case no. 72) is not the common criminal pattern for Indigenous women whose cases are processed in the higher courts (ABS, 2017a). Thus her lawyers presented her in ways that are atypical for Indigenous people processed in courts, and which suggested a certain level of success in education and employment. In the aftermath, I observed the judges' sentence remarks to make no reference about the offender's Indigeneity and instead reflected a generic description of women involved in crime, or more specifically, toward the stereotype about non-Indigenous women who commit offences.

> Sentence based on plea of guilty, [age removed for confidentiality], no criminal history, psychological report said difficult background, unhappy relationships, extreme anxiety and stress, behaviour was out of character and is a single parent (Judge's sentence remarks. Observation case no. 72).

The central point about this observation is not whether the Indigenous woman offender was harshly treated because her legal representation failed to link Indigeneity to disadvantage. This observation is about the importance of submitting relevant factors that support disadvantaged circumstances to justify use of the cultural considerations mitigating factor for Indigenous people. Adding to the previous judges' comments (Interview 5), that legal representatives have to make the link between being Indigenous and having disadvantaged experiences, the judge above requested explicit information to link Indigeneity to disadvantage. This assumption that Indigenous people should meet a certain stereotype of disadvantage to mitigate their sentencing is central to how structural racism in the higher courts impacts Indigenous women's experiences, and thus, an example supported by Critical Race Theory where the experiences of Indigenous people are shaped by their Indigenous status.

In contrast, some cases did provide more stereotypical information about cultural considerations to aid judges' decisions. For example, one of the case I observed involved a young Indigenous male from Cape York was charged with two offences: unlawful violence and wilful damage to a police station. The submissions made by the offender's legal representative included:

> Identifies with the [specific Aboriginal community removed for confidentiality] people, he's been on Centrelink, has a sister and father, level 8 education, and plays football in his spare time (Observation case no. 62).

The presiding judge linked the offender's Indigeneity to disadvantage as evidenced by the sentencing remarks that focus on the offender's criminal activity and background.

> What happened up there was disgraceful, as it is the police have enough work to do. Fifteen months would have been sufficient however I have to balance that with your personal circumstances (Judges' sentence remarks. Observation case no. 62).

Yet in another case I observed involving a male Indigenous offender, the legal representation also made no submissions about the offender's Indigeneity. This case

involved an Indigenous male in his 40s charged with three offence counts; unlawful wounding, unlawful wounding with a weapon, and breach of a domestic violence order. I observed that his legal representation made no submissions concerning Indigenous status. However, they did make submissions over the offender's disadvantaged background:

> Has four sisters, mother still alive, grew up in a domestic violence environment. He witnessed mother go into a shelter for a period of time. His father died when he was twenty-five. He left home at fourteen as he became a father (Observation case no. 70).

Despite no concrete submissions about the offender's Indigenous status, I observed that the judges' sentence remarks involved comments about the offender's background, in particular alcohol consumption that escalates to violence toward Indigenous women.

> You have a shocking history of violence toward women. When he gets drunk, he gets violent toward women. Your behaviour toward her was prolonged and violent. You resorted to violence during the course of an argument. Your criminal history dossier and folder shows the way you have treated Aboriginal women. You have that history toward women. Aboriginal women should not be treated as punching bags by Aboriginal men. You punched her in the face, split her eyebrow. That was a cowardly thing to do. Senseless violence for no reason at all (Judge's remarks. Observation case no. 70).

Again the point about the above cases involving Indigenous men is not whether they were treated harshly, rather it is about the narratives related to Indigenous peoples' disadvantaged circumstances that judges use to justify the way they include 'cultural considerations' as a mitigating factor in sentence decision making. The complexity of applying 'cultural considerations' as a potential mitigating factor, was demonstrated in judges' diverse attempts to link Indigenous status to disadvantaged circumstances. Some cases revealed direct submissions about Indigeneity while others showed less clarity in their remarks about Indigenous status. Even though 'cultural considerations' is required by legislation to be taken into account in sentencing as a response to historical disadvantages for Indigenous people (Marchetti & Daly, 2004), my data suggest this is used differently depending on the presiding judge, the offence and the judge's personal

interpretation of the mitigating submissions submitted to the court. Using the lens of Critical Race Theory supports that different court processes are applied based on the perceptions of those who hold positions of power in the higher courts "which strangles affirmative action principles by protecting the …interest of whiteness" (Harris, 1995: 290). This results in different court treatment of Indigenous people, despite the cultural considerations factor in place as a mitigating factor on the basis of Indigeneity.

Aggravating and mitigating factors were brought up differently based on the offender's Indigeneity. Criminal history and police cooperation were narrated differently for cases involving non-Indigenous people even when submitted by prosecutors for the court to aggravate their offending and sentencing outcome. Whereas for Indigenous people, criminal history and lack of police cooperation were aggravating factors submitted and taken into consideration by the court. In particular, the emphasis about these aggravating factors lies in the different narrative by the courts on the basis of Indigenous status. Similarly the mitigating factor 'cultural considerations' was specific to cases involving Indigenous people, yet was inconsistently considered by the court. The highlight about both aggravating and mitigating factors is that both are a structure of the higher courts that ultimately impact differences in court experiences between Indigenous and non-Indigenous people

5.3. Indigenous status

As was demonstrated in the discussion above, Indigenous status impacts the court experiences of Indigenous people processed in the higher courts. An attitude shared by most participants was that they generally acknowledged that legislation mandates the court to take Indigenous status into account when sentencing Indigenous people. In interviews, I asked judges whether an offender's Indigenous status impacts their sentencing practices. Responses were varied.

> Not that I'm aware of…. specifically, you can have regard (Interview 1).
>
> ***
>
> "Yup" (Interview 2).
>
> ***
>
> …you're obliged to take it into account (Interview 3).
>
> ***

> Yes, it does (Interview 5).
>
> ***
>
> Well you take it into account (Interview 6).
>
> ***
>
> Yes, because there are specific provisions to take into account (Interview 7).

The remarks from the judges above highlight their awareness that their judicial treatment toward Indigenous people is mandated in some way by legislation. One judge differed from this trend. This judge initially stated that Indigenous status did not impact their sentencing practices, but then presented views that resonate with the consideration of cultural factors on the basis of Indigenous peoples' disadvantaged circumstances.

> I don't think I do things differently… I'm very conscious of what they've been through and their backgrounds and the challenges and the difficulties they have in court. And I try and explain things in very basic terms (Interview 8).

The judge above initially suggested that Indigenous status does not impact sentencing practices but eventually described a conscious consideration of the disadvantaged circumstances for Indigenous people. This highlights the complexities of interpreting the nature of judges' perceptions. It was evident in my interview data that judges do not want to appear to treat Indigenous offenders favourably based only on their Indigeneity yet Indigeneity did impact their treatment as they consistently linked disadvantage circumstances to Indigenous status. Further, my interview data shows clear examples of compassion and sympathy toward Indigenous people shared by most judges. For example, some judges clearly attributed Indigenous peoples' low socioeconomic status as an impacting factor for their contact across the criminal justice system (CJS), not just the courts. One judge suggested that it is sometimes discouraging for Indigenous people to seek an education because they are victims of bullying behaviours.

> Where do you start? Tenth generation maybe that they don't get an education… Are you growing up in a household where there's any regard for the law or where getting a job and education is encouraging? …. I have friends who are Indigenous and they got picked on (Interview 1).

Likewise, another judge said that Indigenous people enter the CJS based on a combination of low socioeconomic status and substance abuse:

> Because they commit offences. They're impacted by socioeconomic status, substance abuse, I suspect they suffer a lot more…. they seem to not cope with it as well as white Australians (Interview 3).

I found similar perceptions from a judge who referred to the low socioeconomic status of Indigenous people as a contributing factor for why Indigenous people enter the CJS:

> Displacement, lack of employment, boredom, poor social structures, lack of self-respect, low education (Interview 2).

Another judge linked social forces like being excluded and being targeted by the police (i.e. over-policing) as causes to Indigenous peoples' contact with the justice system:

> Because they're so marginalised in our society and so disempowered and I think they're over-policed as well (Interview 7).

Yet another judge said that Indigenous people appear before police, court, and prison jurisdictions for the same reasons as other people involved in crime but that for Indigenous people, their disadvantages cause their contact with the criminal justice system.

> Generally, the same reasons as anyone does. The fact that per head they come into contact with the criminal justice system more than other areas of the community is a product of the disadvantage that's more common to Aboriginal and Torres Strait Islander persons than other walks of life (Interview 5).

However, apparent in many of these comments is the inherent assumption of superiority perceived by many of my judicial participants. For example, the comment above that the judge "explain[ed] things in very basic terms" (Interview 8), highlights a perception of incompetence for Indigenous people. This judge was not alone; a number of other judges similarly described Indigenous peoples' circumstances as lesser, involving poorer coping skills, less self-respect, and little, if any, income, skill, and educational attainment. While not explicitly stated by judges during my interviews, the values and assumptions inherent in these comments colour the various ways judges engage with Indigenous people in the court room further enforcing the institutional racism embedded in the structures of the higher courts. Another judge referred to interpersonal

familial problems in households to describe the processes which lead to Indigenous people's involvement in crime.

> Well I think they've got their lives against them since the day they're born. It's very rare to have someone Aboriginal, come before me, who hasn't seen violence first hand and witnessed and experienced violence. Is it such a shock in those situations that they would resort to violence? (Interview 8).

The remarks from the judge above explains Indigenous people's participation in crime through a shift from experiences of victimization to eventual offending. Using Critical Race Theory as my lens, my interview data show that judges' explanations suggest that the problem with Indigenous peoples' participation in crime lies within Indigenous people themselves rather than within the dominant social, political and cultural structures of Australia, which further demonstrates how acknowledgement of systemic racism is not evident in these attitudes. In similar fashion, judges' perceptions ignore how institutions within and outside of the justice system impact Indigenous peoples' pathways to crime and therefore are part of the structures of the court system that perpetuates systemic racism in the higher courts and across police and prison jurisdictions.

There was one response which stood out because there was no attempt to acknowledge any links related to Indigenous people's socioeconomic status and their contact with the justice system. In response to a question about why Indigenous people come into contact with the CJS, the response was:

> Because they commit offences (Interview 6).

This outlier is just as important as the previous judges' collective responses. This attitude does not acknowledge any links between Indigenous peoples' disadvantaged circumstances to individuals or the Indigenous community, and also shows a disregard for the role that societal structures like the justice system have on the adverse experiences of Indigenous people.

Aside from the judge above, collectively judges' shared descriptions about Indigenous people demonstrate that they understand a link between Indigenous peoples' disadvantaged circumstances and their eventual pathway to crime. However, in looking for patterns of structural racism, despite some examples of sympathy, for judges the problems are seen to lie primarily in individuals or in Indigenous communities. Even though judges have varying understandings of the way in which circumstances and

disadvantage impact on Indigenous people and their contact with the justice system, judges do not recognise the inherent embedded racism of the structures and the processes of the criminal justice system itself.

5.4. Visibility in the streets

Another issue particular to Indigenous people's disadvantaged circumstances and offending activity involved judicial perceptions about their visibility in public areas. For example, one judge mentioned that Indigenous peoples' homelessness made their crimes more conspicuous.

> The reality is there are more destitute homeless people who are Aboriginal than the other. Therefore, likely you encounter them in alleys and night time streets and so on (Interview 5).

Other judges similarly suggested that Indigenous people have a likelihood to be processed through the courts because their crimes are more noticeable.

> They're more likely to be on the streets, more likely to be living outside in a sense. They are more visible and therefore come into contact with the criminal justice system whereas White Australians, the crimes are more hidden inside, I suppose (Interview 7).

***

> So, there are areas of Cairns for example where you can almost pin point where's a higher crime rate because those areas are where the public housing is. So, when you look at those areas, there is a combination of Indigenous and non-Indigenous people but within those areas you'll find a greater populous of Indigenous concentrated in that area (Interview 2).

The above perceptions show that, for some judges, Indigenous peoples' disadvantaged circumstances contributes to higher visibility in public places because of homelessness, and therefore offending conduct occurs in public. These judicial attitudes about higher visibility resonate with the literature on Indigenous peoples' charges for specific crimes that are argued to be based on structural racism. For instance, the over-representation of Indigenous people apprehended by the police for public intoxication points to the social issue of alcohol consumption in public areas (Cunneen & Tauri, 2016). Furthermore, policing and judicial institutional practices in upholding law and order for

behaviour that targets Indigenous people implies that legislations like public order offences involving public drunkenness is racialized on the basis of Indigenous status (Blagg, 2008).

5.5. Alcohol use vs. drug use

In Chapter Six I provide an in-depth discussion about the manner in which substance use interacts with Indigeneity for women. The following section lays the groundwork for that intersectional analysis by exploring how the patterns of substance use are understood in terms of Indigenous status. In my observations Indigenous men and women were more likely to appear for alcohol related offences than for drug related offences. This pattern mirrors the broader statistics on Indigenous people who make contact with police, court, and prison jurisdictions for alcohol use matters (ABS, 2016a). Non-Indigenous men and women were more likely to appear before the courts for involvement in drug related offences compared to alcohol use crimes. Again, non-Indigenous peoples' higher likelihood of appearing before the courts for drug related offences compared to alcohol use is in line with data on non-Indigenous people who enter the CJS for drug related issues (ABS, 2017a). Although there are differences in offending patterns, ultimately race shaped Indigenous and non-Indigenous peoples' lives in court rooms with regards to substance use.

With cases involving drug use, this is often a criminal activity in and of itself. In such cases legal representatives use mental health as a reason for the drug use and therefore for any offence that might result from the drug use. In contrast, alcohol use in an of itself is not a crime so it is raised in court as a mitigating factor. However, unlike drug use which is then linked to mental health trauma, alcohol use is often left to stand alone as part of the Indigenous stereotype. For example, transgenerational trauma issues are not linked to alcohol use and in turn, is left to be considered as one of those 'lesser' aspects of Indigeneity.

In particular, the ways alcohol use was emphasised for Indigenous people had a negative undertone which prevailed over mental health as a mitigating factor. When it came to the ways alcohol use was submitted as a mitigating factor compared to drug use, I found that structures in court impacted Indigenous people and non-Indigenous peoples' lives differently. With Indigenous people, their lives were narrated similarly when it came to how alcohol use impacted spur of the moment violent offending. For example I observed cases involving Indigenous males where violent offending had escalated from

alcohol use. Almost all of the Indigenous men that I observed charged with non-premeditated violent offending had consumed alcohol.

> When he gets drunk, he gets violent toward women
> (Judges' remarks. Observation case no. 70).

The legal representation for Indigenous men did not link alcohol use to mental health factors (beyondblue, 2016; American Psychiatric Association, 2013) which are more prevalent among Indigenous people compared to non-Indigenous people (National Mental Health Commission, 2014). This link is important because it helps support and justify underlying issues that impact consumption (Bishop et al., 2017). Indigenous men's alcohol use then was not necessarily perceived as a compelling circumstance to address their disadvantage and to further explain violent offending.

> He's a product of heavy drinking and violence, violence toward
> women (Judges' remarks. Observation case no. 64).

This is not just the case for Indigenous men. For example, in a case involving an Indigenous woman intoxicated at the time of her violent offences involving burglary and sexual assault the judge noted that she:

> Was intoxicated at the time of offence (Judges' sentence remarks.
> Observation case no. 54).

Her legal representation did make the link between alcohol use and mental health factors that eventually impacted violent offending. Yet the point that stood out were the different ways alcohol use was submitted as a mitigating factor for this Indigenous woman. There was a less direct link placed in her poor mental health to justify her alcohol use that ultimately impacted violent offending (Blagg, 2008). This is in contrast to the heavier weight placed on non-Indigenous peoples' poor mental health to explain their drug use and eventual drug related offending.

So again, although this Indigenous woman's mental health was brought up to explain experiences and struggles with trauma, her poor mental health was overpowered by her alcohol use as an impacting factor that lead to her offending. Whereas for non-Indigenous people, narrating their stories by focusing on mental suffering and struggles helped justify their offending conduct. Consequently, using Critical Race Theory as my lens, for Indigenous people as a whole, patterns of structural racism are identified in the manner and tone in which alcohol use was highlighted, particularly where Indigenous people were intoxicated at the time of their offending, which overshadowed their mental health mitigating factor.

5.6. Remoteness in court rooms

Indigeneity also impacted the treatment of Indigenous offenders who appeared before the higher courts in remote courtrooms. According to two judges, some of the sympathetic treatment that they extend to Indigenous people in remote courtrooms includes not sitting Indigenous offenders in the defendant box and instead having them sit next to their council, talking in very basic language, and summoning elders to court to provide feedback about the offender.

> I run my court very differently there...I don't put them in the dock, they sit at the bar table with their legal team and the elders come to the bar table as well...it makes it easier and certainly I do get eye contact then...they seem to be more comfortable (Interview 7).
>
> ***
>
> I'm very conscious of how to deal with people like that. I go to the communities and I'll talk to them (Interview 8).

These comments suggest judges are particularly aware of the powerful impact that remoteness has on Indigenous offenders and on the way judges process court matters.

My observations included cases involving Indigenous offenders from remote communities like Weipa, Palm Island, Thursday Island, and Aurukun, but I did not observe presiding judges' extending of culturally sensitive treatment as described in the accounts from the judges above. One explanation is that I only physically observed cases in regional court rooms and none in remote court rooms. Even when I did observe Indigenous offenders whose cases were processed via teleconference, the remote courtroom was linked to a presiding judge in a regional court. In these situations I did not observe judges extending culturally sensitive practices.

While the claims above reveal that some judges may go to special extents to engage with Indigenous offenders in remote communities, I did not directly observe this. This different treatment based on Indigeneity, and in particular on remoteness, is not unheard of or new. If anything, this sort of treatment is the expected conduct from judicial and legal practitioners throughout Australian Indigenous courts.

> In many Australian states and the Northern Territory, judicial officers are (and have been for some time) using culturally

> sensitive practices when on circuit….He or she sits at eye level to the offender, usually at the bar table rather than the bench, with a respected Indigenous person (or elder)….While there is greater informality and less reliance on legal actors than one would see in a regular courtroom, and there are more Indigenous court workers and groups present on the day, it operates as an Indigenous court in a regular courthouse (Marchetti & Daly, 2004: 4).

Further, although I acknowledge that the efforts made by judges like those above are meant to engender a more proactive form of social justice for Indigenous people in courts, it is also the case that these so-called culturally sensitive behaviours could be interpreted as tokenistic and paternalistic practices. That is, some of judges' behaviours, while culturally sensitive, are also indicative of the colonial history of justice relations between Indigenous people and white judges (Cunneen & Tauri, 2016). For example, for the judges who spoke about their interaction with Indigenous people in remote communities, the subtle and invisible powers appeared when judges talked about their experiences on circuit court and being in remote communities. In particular, judges' personal experiences with the physical environment in Aurukun was described as a disheartening location "If you've been to these communities, Aurukun, is just the most depressing place" (Interview 8), with deprived and poor living conditions "I'd been interviewing her in the watch house, sweaty little watch houses up there in Aurukun" (Interview 5).

5.7. Character references and support people

While judges, and the legislation that constrains them, are an important part of the structure of the higher courts, they are not the only aspect that shapes Indigenous peoples' experiences in court. My interview data shows that legal representation is also an important factor. When it came to the information that is presented to the court, I found differences in judicial perceptions involving the legal representation for Indigenous people. For example, one judge claimed that lack of carrying out and establishing a strong defence was key to Indigenous offenders' disadvantage in the court room.

> You really do get concerned that the professional performance of the lawyers involved is not up to scratch. …You get concerned

> about what have they double checked…often with Aboriginal and Torres Strait Islander Legal Services, it's not a solicitor at all, it's just a field clerk who doesn't really have that much training at all in the law and all….there are many crimes where the issue isn't with who's done it or who did it. Probably the majority of crimes are in fact what degree is involved here. They did it but is what they did actually an offence? Is there a defence? The provocations, are they self-defence? Is accident at play? All of the subtleties that were applied to 'hang on' or is a lesser charge appropriate? Have the police over-charged? They're all common features in criminal offence work. And a crap job is done with all of those from what I see, overwhelmingly by those who represent the Aboriginal people (Interview 5).

This judge's description of the legal representation for Indigenous people also extended to lack of character letters, or references. A character or reference letter is a document that is submitted by legal representatives on behalf of their clients to help support their case (Queensland Government, 2015). Reference letters tend to be written by people known to the offender and so describe the offender in a positive way. For instance, a letter might explain that the offender is to become a respectful or respected member of their community and that the offender is genuinely remorseful for the criminal conduct which is out of their character. Although my interview data shows that this was the only judge who expressed their attitude about the quality of legal representation for Indigenous people, thematic analysis of my observations data shows similar themes.

I documented in my observation data that the references that were submitted for non-Indigenous cases were generally made by immediate family members. In one case that I observed involving a non-Indigenous woman charged with armed robbery, their lawyer pointed out a letter from the defendant's mother who was also present in the audience for support:

> …has a letter of support from mother (Observation case no. 57).

Another case that I observed involving a non-Indigenous male charged with supply and possession of methamphetamines and cannabis had his fiancée in court for support while his council mentioned that the offender's:

> mom wrote letter of support to judge (Observation case no. 63).

I also observed a non-Indigenous woman charged with indecent treatment of a child under 17, who similarly had family support in the audience alongside a number of references submitted:

> Five references, some are from her children that they were protected by her, she was loving" disclosed her council (Observation case no. 65).

Then there were other references submitted for cases involving non-Indigenous people that did not necessarily involve the offender's family members. I observed a case about a non-Indigenous woman charged with production of cannabis who had support in court and submitted several references: "You have a number of impressive references," said the judge when discussing sentence remarks (Observation case no. 41).

Another drug case involving a non-Indigenous male charged with drug production who although he did not have any court support, I observed that he did have a reference submitted to the court:

> …has a good reference (Observation case no. 48).

However, the same judge above who commented on quality of legal representation for Indigenous people highlighted how the situation concerning submitting references to the court was very different for Indigenous offenders.

> Often there are no references handed in. A private client, Caucasian client, there'll be quality references where they've gone and gotten references from neighbours and so on. But there would be people out there who give references for Aboriginal people, "I'm an elder of such and such…good boy, this is the one thing he's done wrong, blah, blah, blah". You know, whatever it might be. But that takes work. And it's not happening. I'm unimpressed by the quality of representation for Aboriginal people (Interview 5).

The critical view from the judge above about the quality of the legal representation for Indigenous people is in line with some observations I made during court processes. In particular, it was rare to observe the submission of character and reference letters for Indigenous people compared to non-Indigenous people.

The pattern with most of the cases involving non-Indigenous people is that in combination with their references, and regardless of their type of offending, and in some

cases their previous history, they also had support people in the audience. This combination of references and support contributed to a positive portrayal of non-Indigenous people as being linked to having support in the community.

In contrast, of the seven cases I observed that had references submitted during sentence court matters, only one was an Indigenous offender. Her reference was from a community outreach agency.

> There are prospects of rehabilitation, a letter from Anglicare (Observation case no. 54).

The irony was that this Indigenous female offender had six support people in the courtroom audience. The fact that she had support people in court suggest that she had support in the community, and in her life in particular. However given that she did not provide formal information about her in the form of a reference letter resonates with a dominant stereotype where the written English word is valued more over the presence of supports, both verbal and physical supports from Indigenous people.

Even though most of the cases that I observed involving Indigenous people did not submit references, this does not imply that there was no one to write a description about the offenders' character. Initially it seems a reflection of the lack of effort that Indigenous peoples' legal representatives go to ensure a strong case for their clients. However a more plausible explanation could be related to the time constraints, turn-over rates for staff, and work over load that legal representatives for Indigenous people experience (Cunneen, Allison & Schwartz, 2014). Although these are internal issues more relative to funding and budget cuts to Indigenous legal aid services than to Indigenous offenders specifically, these factors nonetheless impact the sentence outcome of Indigenous people as well as their court experiences altogether. Furthermore, evidence from my observation and interview data where the absence of supports and documentation in cases involving Indigenous people is accepted by the courts on a regular basis points to the possibility that this contributes to a different court experience. From a Critical Race perspective, this also highlights how structures of the courts are embedded with structural racism through perpetuating the possible adverse outcomes for Indigenous people.

5.8. Perceptions of leniency

An attitude shared by most judicial participants was acknowledgement that their experiences in North Queensland resonate with the recent research that Indigenous women are treated more leniently than non-Indigenous women on cases processed in the higher courts (Jeffries & Bond, 2013). Most of the judges explained that leniency is extended to Indigenous people based on poor life histories, and they identified these as disadvantaged circumstances.

> I'm more likely I suspect to go looking for leniency for two reasons. One is my experiences tell me it's more likely to be there. It's almost invariably the case that the same story applies, almost hopeless disadvantage in terms of their upbringing, good mentoring influences, good peers, group influences, lack of economic support, lack of enthusiasm as they get older, lots of examples of other offending by other people in their lives. All those things. But secondly, I'm concerned about the quality of representation for Aboriginal people. That's why I tend to go looking more than I might for somebody who's well represented (Interview 5).

A recurrent pattern with judges' attitudes were the claims that they do not extend lenient treatment based on Indigenous status. Structural narratives by judges involved perceptions that Indigeneity acts as a mitigating factor whose disadvantaged circumstances ultimately produce lenient outcomes. Thus, for some judges Indigenous status means that Indigenous people are extended lenient treatment on the basis on their Indigeneity.

For example, two judges provided insight into their understanding of the interplay between the legislative Indigenous status as a mitigating factor and factors related to an Indigenous person's disadvantaged circumstances. Both judges discussed the circumstances surrounding Indigenous people in ways to justify that the judicial decision-making process treatment is initially the same but the sentence outcome is different because the life histories of Indigenous people are not the same compared to non-Indigenous people.

> It might give rise to a higher number of those people going to jail not because of the colour of their skin but because of the

> disadvantage they've been raised under. So they're more likely to offend but equally those…disadvantages mean that they get a better sentence than the white kid who had it all made and still blew it (Interview 5).
>
> ***
>
> I don't think they'll be treated more leniently but their antecedents warrant it. It's not a matter of leniency but rather proper considerations…So you're not lenient just because they're Indigenous but because of all of their tragic life and circumstances. When you look at each of the factors, there is a heavier weight towards the mitigating factors. And therefore a sentence will reflect that. Sentencing considerations do produce a more lenient outcome…you still go through the same considerations. But in looking at those considerations they are different. So the outcome is different. The treatment is the same. But in applying the law or the discretionary factors to their circumstances which are less fortunate than others then it is necessarily different (Interview 2).

I found two indications about the idea of leniency that judges do not explicitly acknowledge. The first indication is that judges referred to the circumstances of Indigenous people and refrained from using the term 'lenient' treatment when discussing different sentence treatment based on Indigeneity. Again, according to the *Penalties and Sentences Act 1992* in sentencing an offender, the court must have regard to submissions made by community justice group representatives involving cultural considerations (s.9(2)(p)). So for Indigenous people, their Indigeneity is linked to their disadvantaged circumstances to act as a mitigating factor.

The second possibility for why some judges refrained from using the term leniency is because this would imply that they extend favourable treatment to offenders based on Indigeneity, contradicting general sentence philosophies that everyone who comes before the courts is treated fairly, equally, and consistently (Caxton Legal Centre, 2017). Under this framework the mere suggestion that they are being lenient would also imply that they are not doing their job properly. An example of this complexity is a response from one judge who claimed to practice equal and consistent sentence treatment

while also admitting that they are lenient toward Indigenous women based on disadvantaged circumstances.

> Look I think I would be a little bit more lenient with the Indigenous women, if I'm honest about it. But you know, we like to think that we're consistent and we're fair to everybody, and everyone gets the same sort of deal. But I think, well, often the story behind them, the Indigenous women, is just, you know, so much to be said, so much to mitigate, what they've done (Interview 7).

Further, the way in which judges' bristle at the suggestion that they are being lenient tells me another two things about their attitudes on leniency. One point is that while judges appeared supportive of special measures that foster greater equality to Indigenous people and so gave regard to submissions made involving Indigenous offenders' background, they did not interpret cultural considerations as extending leniency. That is, some judges felt that because Indigenous people experience greater disadvantage than non-Indigenous people, their circumstances alone mitigate the severity of the sentence. Their motivations behind giving regard to Indigenous peoples' circumstances without interpreting this as extending leniency lies in judges' awareness that Indigeneity impacts a different disadvantage for Indigenous people.

The second point for why judges bristle at the suggestion that they are being lenient is that having regard to submissions made related to the offender's cultural considerations is mandated by legislation. In other words, judges do not necessarily have to be personally supportive of these submissions. This would also explain why other judges strayed from the suggestion that they are lenient toward Indigenous people. For judges who were not personally supportive of cultural considerations, it could be that they were unlikely to feel that Indigenous people experience discrimination in sentencing during the sentencing processes, especially given the mandated court regard for the mitigated cultural considerations already in place.

5.9. Capturing judges' complex sympathetic attitudes

Some judges seemed to want to disconnect themselves from the historical labels that judges are punitive toward Indigenous people, as asserted for example by Coe (1980). Their references to previous work in remote communities, were other indications that some judges appeared to disconnect themselves from the perceptions that judges are out

of touch with Indigenous offenders and their ways of living (Coe, 1980). Some judges even seemed to be committed to engaging in ways in which their court treatment and sentence outcome would not cause further negative impacts to Indigenous peoples' lives. At the same time, the sympathy expressed was indicative of complex attitudes embedded with paternalism and structural racism in the higher courts toward Indigenous people.

My interview data with judges shows that overt sympathetic attitudes overshadowed racist attitudes. Even though I rarely captured judges' overt and explicit racist attitudes about Indigenous people, it is not that these are not true in contemporary judges, these attitudes just were not as transparent compared to previous research from the 20th century (Charles, 1991; Markus, 1990; McCorquodale, 1987; O'Shane, 1980; Eggleston, 1976). Instead, the intolerance by some judges toward cultural diversity in particular pointed to new racism (Sniderman et al., 1991). For example, there were some judges who showed sympathetic perceptions where they described disadvantaged circumstances whereas their negative attitudes about Indigenous people came to light when they discussed Indigenous peoples' lifestyles and choices. In one instance, one judge initially expressed sympathy toward Indigenous people while also blaming them for their disadvantaged circumstances.

> Understanding humanity, that's an art. For most Aboriginal people, their SES, environment is below standard, leads to prejudice against them, and that's a resentment and a less acceptance of the rule of law. Cultural sensitiveness is something we all should understand…[Solution] education and they're not getting [it] because they choose to live in communities that are remote. And their choice is expensive. They choose to stay there (Interview 4).

Another complex perception is from a judge who recognized Indigenous peoples' disadvantaged circumstances yet appeared to have little, if any, sympathy for them. The expressed sympathy by this judge could instead be interpreted as simply having regard for Indigenous peoples' legislative cultural consideration factor. Meaning that it is not so much that they are sympathetic toward Indigenous people, but rather, they adhere to legislative guidelines.

> I would be less likely to give a fine because that impacts on their family burden. To impose an even small fine is a significantly more adverse impact on them…You feel you need to be

> careful…you can't be as hard on them…Community justice groups give the court advice about cultural issues, becomes a quasi-sentence stretched up, favoured by these affirmative action [groups]... (Interview 3).

The above attitudes by judges which touch on Indigenous peoples' disadvantages originally gives out sympathetic perceptions. However their more subtle prejudice as forms of new racism (McConahay, 1986) appear when they provided examples and solutions on how to approach issues surrounding Indigenous people. Therefore in these accounts, the applicability of Critical Race Theory is supported by judges' intellectually masked prejudice toward Indigenous people which in turn preserves the structural racism in the higher courts and thus.

A more transparent paternalistic perception from judges 3 and 4 were their attitudes about Indigenous specialised courts. Both 3 and 4 were not supportive of Indigenous specialised courts:

> You shouldn't have a bias. We're all equal before the law, same starting place. No quantitative evidence that it [specialised Indigenous courts] reduced recidivism (Interview 3).

***

> There should be one law, theoretical view (Interview 4).

On the surface, their attitudes suggest that they adhere to fundamental equality concepts of the Australian legal system, "All judicial officers take an oath to administer the law without fear, favour, affection or ill will" (Judicial Commission of NSW, 2006: 1103). Yet their attitudes also ignore the different tone and manner in which Indigenous and non-Indigenous people's mitigating and aggravating factors are played out in court. Again, the masked prejudice by these two judges where they seemingly brush aside the historical role that the justice system, and courts specifically, has played in Indigenous peoples' experiences (Moreton-Robinson, 2015) points to how structural racism remains in the higher courts.

5.10. Conclusion

In this chapter specific issues related to Indigenous people in the higher courts are discussed with a focus on Indigeneity. Critical Race Theory is used as lens to explain how Indigenous people's experiences in the higher courts was impacted by their Indigenous status. This chapter details how court procedures involving mitigating and aggravating

submissions played out in court reinforced structural racism for Indigenous people. The overlapping of Indigeneity with disadvantage as a formal way to mitigate Indigenous peoples' offending denied their autonomy and postulated different court processes and also pointed to the paternalistic sentencing practices embedded within court procedures. Judges generally acknowledged Indigenous peoples' circumstances with disadvantage and used these to explain Indigenous peoples' contact in the courts and across the justice system as a whole. Yet judges did not recognize the embedded racism of the structures of police, court, and prison jurisdictions. Similarly, despite some examples of sympathy toward Indigenous people, the masked prejudice of some judges were also drawn out to support forms of new racism, which in turn, emphasised structural racism in the higher courts. In the next chapter I explore more in depth how the intersectionality of Indigenous status and gender for Indigenous and non-Indigenous women impacted their experiences in the higher courts differently.

Chapter 6: The Intersections of Indigeneity and Gender

6.1. Introduction

This chapter describes how structural racism in the higher courts is amplified for Indigenous women because their Indigeneity intersects with their gender. The intersections of women's Indigenous status and gender impact the different ways Indigenous and non-Indigenous women are processed in the higher courts, as I saw both in my court observations and during my interviews with judges. In this chapter, I explore the narratives that were presented in the higher courts about women. Non-Indigenous women were recipients of mitigating factors in line with traditional gender roles of women's domesticity. For example, narratives about non-Indigenous women centred on things like child dependent responsibilities and interpersonal relationships with men. The particular narrative that non-Indigenous women were subjected to was one where their hardships of financial stress or poor interpersonal relationships with men lead to poor mental health and illicit drug use, and in turn, explained their offending. For Indigenous women, these Western gender roles were rarely used in narratives about their circumstances, suggesting that gender roles are constructed differently depending on Indigenous status. This is in line with arguments made by Black feminists (Crenshaw, 1989; hooks, 1989). Indigenous women did not fit traditionally 'feminine' traits like apologizing and conforming, both factors which influence judges' interpretation of mitigating and aggravating factors during their sentencing decision-making process.

The findings in this chapter show that the lived experiences of Indigenous and non-Indigenous women were narrated differently in court. Even though both groups of women submitted information related to their disadvantaged experiences to explain their offending, these experiences were understood and interpreted differently in court. Furthermore, differences in narratives highlight how structures of the higher courts responded to intersections of Indigeneity and gender during court procedures, impacting different court experiences on the basis of women's Indigenous status.

6.2. Narratives about Indigenous women

For non-Indigenous women their narratives included interrelated experiences of poor mental health, drug use, subordinated relationships with men, dependent child responsibilities, and financial pressures. These experiences were discussed as mitigating

factors and were used to link disadvantage to their offending. The narratives for non-Indigenous women below are based on what others personify not what non-Indigenous women say about themselves.

6.2.1 Poor mental health status

Irrespective of the crime committed, the mental health of non-Indigenous women was discussed as a disadvantage that influenced their offending conduct. Anxiety, depression, and mental illness were linked to offenses in judges' sentence remarks, sometimes because of the 'attendant pressures' that mental health problems came with (Observation case no. 40, 41, 65). For non-Indigenous women, mental health problems were a mitigating factor regardless of whether treatment was received. For example, I observed that medical certificates were part of a mitigating submission for a non-Indigenous woman charged with fraud (Observation case no. 40). Likewise, I also observed that a non-Indigenous woman charged with production of cannabis included her mental health diagnosis and treatment in her mitigating submission:

> Diagnosed with anxiety. Took prescribed medication. She was being treated in 2013 for grief and loss by psychologists (Mitigating submissions for a non-Indigenous woman charged with production of cannabis. Observation case no. 41).

However, some non-Indigenous women did not receive treatment for their mental health problems until after offending, and this too was considered a mitigating factor by judges (Observation case no. 69). This observations data therefore reveal that for non-Indigenous women, the higher courts facilitate mental health as a factor that impacted their lives and led to their offending conduct.

Another issue relevant to non-Indigenous women's narratives in court was the way their personal use of substances was linked to their poor mental health status. In particular, non-Indigenous women charged with drug related offences including drug trafficking, drug production, and drug possession discussed their drug use in reference to their poor mental health. The circumstances precipitating personal drug use included severe stress, depression, anxiety, grief, chronic pain and childhood trauma. Poor mental health was employed to justify not only their personal drug consumption but also their drug-related offending. For example, in a case involving a non-Indigenous woman

charged with drug cultivation, her legal representation explained her motive for drug cultivation as a response to unresolved grief and subsequent depression.

> Report from counselling; 2011 her daughter overdosed at age 25 and this impacted her life. Consumed cannabis to relieve anxiety and stress. Defendant is opposed to anti-depressants to treat her depression so she grew cannabis for personal use (Mitigating features involving a non-Indigenous woman's drug cultivation case. Observation case no. 69).

These mitigating factors were accepted by the court given the presiding judge took into consideration her personal drug use as a response to her mental health. It also highlights how her mental health was connected to her role as a mother, and the disruption of that role (interpersonal relationships are discussed further below).

> I particularly take into account you've had a difficult life, especially after your loss of daughter. It seems you found yourself in this situation because of how you've chosen to treat your depression. It has been accepted you grew plants for personal use (Judge's sentence remarks. Observation case no. 69).

Another drug related case that similarly linked drug use with mental health involved a non-Indigenous woman charged with armed robbery and possession of dangerous drugs. A key feature of the explanation as to how her drug use led to her offending was that she initially became dependent on pain medications to help ease the physical pain from surgery. Once unable to get more medically prescribed medications, she sought illegal means such as forging prescriptions, and progressed to consuming illegal drugs, while also becoming involved in more serious crimes like armed robbery to finance her drug use.

> Turned to illicit drugs when she couldn't get prescribed meds. Drug addiction is the ultimate factor, detriment…No longer drug dependent, sought help from the nurse. 10-months drug free of prescription medication (Mitigating submissions involving a non-Indigenous woman charged with armed robbery and possession of dangerous drugs. Observation case no. 57).

Other details of her poor mental health status that were brought up to explain her offending were related to experiences of childhood sexual assault. This, too, is related to the construction of femininity, as although anyone can be sexually assaulted, it is women who are overwhelmingly the victims of this crime (ABS, 2016).

> At 15 raped by man known to family. No formal counselling or has addressed this trauma (Mitigating submission. Observation case no. 57).
>
> ***
>
> Victim of rape offence and this has impacted on you (Judges sentence remarks. Observation case no. 57).

These experiences where she had not addressed her mental health were accepted and taken into consideration by the court. The link between this mitigating submission and the presiding judges' remarks indicate that for the situation of Indigenous women, difficult tragic life circumstances impact poor mental health which is used to explain offending and justify lenient sentences.

6.2.2 Non-Indigenous women's victimization via interpersonal relationships with men

In addition to poor mental health, non-Indigenous women's narratives were also discussed through traditional gender constructs of femininity. Among stereotypically feminine attributes used to describe how disadvantage led to offending were domestic roles including childrearing responsibilities and submissive victimisation in interpersonal relationships with men. At the same time, non-Indigenous women were also criticised when they deviated from these feminine roles.

It was common for some of the judges that I interviewed to describe non-Indigenous women's interpersonal relationships with men through a lens of victimization.

> The women I'm most likely to see, the white women I'm most likely to see are the ones who steal. And the motivation there is usually the same as everyone else – greed, gambling commitments, debts you can't pay, violence, drugs. The violence is often in a turbulent relationship in any event (Interview 8).

These explanations involve perceptions that women are influenced by men into taking part in crime and that their involvement in crime alongside men tends to be in the subordinate role.

> I would say more of an accessory. Very rarely a principal offender (Interview 2).
>
> ***
>
> Well it's [women's offending] less than men's. It's [women's offending] often influenced by men, by male offenders and by gambling (Interview 6).
>
> ***
>
> …In drug cases, almost invariably they are not the major protagonists in the drug trafficking or the dealing. They've got caught up, because they got caught up with the wrong fellow. Very commonly there is a link to the predominant male, very commonly there is a complainant, a male on behalf of the defendant, that that male was overbearing and that the woman, learned behaviours was raised in a house hold where there was domestic violence and she like mom keeps picking losers who are violent to her. All of that pattern that learned behaviour stuff (Interview 5).

Further, the way in which judges described non-Indigenous women's involvement in crime with men resonates with the literature on judicial attitudes that women can be coerced, predominantly by a male partner, into taking part but that they tend to have a lesser role in the criminal offense (Gelsthorpe & Loucks, 1997). Some judges have emphasised that women's role in crime is usually described as a lesser role, and that the crimes are often led by men. This is consistent with the literature, but in both cases the discussion of *women* is ultimately referring only to non-Indigenous women.

In the same fashion, judges' perceptions of non-Indigenous women's subordination to men also resonated with my observations where some non-Indigenous women were presented as being involved in poor emotionally and violent relationships with men. In particular I observed that some for non-Indigenous women their role in crime was assisting, or being guided by, men.

> was foolishly advised by a man [into growing cannabis for commercial purposes] (Mitigating submissions. Observation case no. 41).

In another example, one non-Indigenous woman charged with drug trafficking was clearly presented as a victim of male oppression (see Case Study 1). A key mitigating

factor stressed by her counsel involved her submissiveness to her husband, evidenced by a history of domestic violence. This culminated in her 'coercion' into taking part in her husband's drug trafficking activity to avoid physical abuse.

> Her husband had a drug debt, when he went to prison she had to continue the trade… She was presented with a drug dealer with little aspects to say no, to pay off husband's debt…Things became more complex with her when she got involved with her husband… Never touched substances prior to meeting husband…There's a Protective Order due to domestic violence... In the beginning she was not involved but was suspicious of husband's trafficking… She would suffer some form of violence towards her or the children if she didn't assist husband in trafficking... Since his arrest there has been no contact... That relationship is over. (Mitigating submissions. Observation case no. 51).

While the presiding judge took into account a number of other mitigating factors submitted to the court, the judge also highlighted her submissiveness to her husband during the sentence remarks.

> She's acting as husband's assistant in a sense… He was a dominant figure in your relationship… Motivating features are your husband on top of you and your own use (Judge's sentence remarks. Observation case no. 51).

Case Study 1. Observation case no. 51.

Observation case no. 51: non-Indigenous female

Offence: A drug case involving a non-Indigenous woman convicted on trafficking methamphetamines and cannabis. The offender was directly involved in drug sales. There was profit from the sales of these drugs. Key circumstances of the offence concerned the offender continuing the drug trade once her husband went to prison; she had to clear his drug debt. Offender was also involved in personal drug use.

Aggravating factors: Criminal history. Used padded brassiere to conceal drugs rather than for mastectomy purposes. Offending came to light after wiretap investigation. Continued to offend while on bail.

Mitigating factors: Plea of guilt. Suffered severe illness several years ago. Has 5 children. Active Protection Order due to domestic violence. Law abiding citizen until she became involved with husband. Would suffer some form of violence toward her or the children if she did not assist husband in drug trafficking. Use of methamphetamines helped her cope with the stress of marriage. Was threatened by people in her community due to not paying off husband's drug debt. Has employment history in the education sector and has specialist skills. Is currently receiving training whilst on remand for a TAFE certificate. Has family support.

Sentence: Custody for 3 years and 4 months with a total of 282 days serving. Will have a shift from parole to suspended sentence after a set timeframe. The conviction was recorded.

Another example is a case involving a non-Indigenous woman charged with indecent treatment of a child (see Case Study 2). Again, it was the defendant's circumstances involving her submissive relationship with her husband that was stressed by her legal representation throughout the course of her case. The presiding judge took into account a number of mitigating submissions including plea of guilt, character references from her adult children, and her physical and mental health. However, it was her lesser role in the offence she committed alongside her husband combined with fear of violence from her husband which stood out from her narrative.

> Fear and intimidation. Left home at 15 and met her husband at 16 years of age (Mitigating submissions. Observation case no. 65).
>
> ***
>
> Incredible abuse, violence, disgusting and degrading way he treated you…The children confirm he was very violent toward you and child, very alcoholic…He made serious threats to kill you (Judge's sentence remarks. Observation case no. 65).

Descriptions about the above cases suggests that the higher courts view non-Indigenous women as behaving in feminine roles as wife and mother, yet also as victims of men and that their submissiveness and victimisation by men led to their offending.

Case Study 2. Observation case no. 65.

Observation case no. 65: non-Indigenous female

Offence: Violent case involving a non-Indigenous woman convicted on indecent treatment of a child under the age of 17. The offender was in her 30s at the time of the offence which occurred more than forty years ago. The offender played no part in the assault, but knowingly left the victim with the attacker. The crime was described as a breach of the victim's trust and failure to protect the victim from sexual assault.

Aggravating factors: Complaint was made more than 5 years ago. Victim impact statement was submitted to the court. While the complainant was not present in the courtroom, her letter detailing the impact that childhood sexual abuse had had on her was read aloud by the prosecution.

Mitigating factors: Five character references. Plea of guilt. Poor physical and mental health. No history of criminal offending. Volunteers and has previously work history.

Sentence: Good bond for 12 months. If this is breached, she would be fined $500.00.

6.2.3 Deprived financial circumstances

Other descriptions about non-Indigenous women in the context of female roles of domesticity involved their changes in finances. For some non-Indigenous women, a lack of income was ascribed to the breakdown of their marriage, which in turn led to offending in order to meet dependent child responsibilities. For example, in another case I observed a non-Indigenous woman convicted of producing cannabis in her home (see Case Study 3). While her mental health and other circumstances were submitted as mitigating factors, it was her marriage breakdown that was described as the main factor that impacted her income and in turn motivated her offending. In line with her defence focusing on the poverty created by divorce as the main motivation for her offending, this circumstance too was referred during the presiding judges' sentence remarks.

> No financial support for kids once divorce occurred… Grew cannabis to meet financial needs… Financial position led to growing cannabis… Playing in a desperate financial situation (Council's mitigating submissions. Observation case no. 41).
>
> ***
>
> Broken relationship. Financial consequences in particular contributed to your offending (Judge's sentence remarks. Observation case no. 41).

Although her personal drug use was submitted as another mitigating factor, lack of income and domestic hardship was the emphasis of her defence, suggesting that these mitigating factors outweighed her drug use. This is especially relevant to my argument in

that for non-Indigenous women, the gender role was imposed on them and used as a form to explain how breakdown of marriage and child responsibilities led to their offending.

Case Study 3. Observation case no. 41.

Observation case no. 41: non-Indigenous female

Offence: Drug case involving a non-Indigenous woman convicted on aggravation of production of cannabis. The defendant produced over 500 grams of cannabis in her property. Her legal representation focused on presenting her motive as a means to meet financial needs particularly based on breakdown of marriage.

Aggravating factors: Cultivated cannabis in her property.

Mitigating factors: Forensic report details poor mental health as supported by a diagnosis. Takes prescribed medication. Was introduced to cannabis upon getting off prescribed medication. Financial pressures to support children upon divorce. There were no plans for commercial sale of the cultivated cannabis. Plea of guilt, first time offender, and submitted character references. Currently employed in a managerial position and was recently offered a new job position out-of-state.

Sentence: Fine of $3,000 to be paid in 12 months. The conviction was recorded.

In another case featuring a non-Indigenous woman, I found that reduction in income was a driving force to explain the circumstances of her offending (see Case Study 4). However, she did not have a breakdown of marriage nor was there an exclusive focus on her child dependent responsibilities. In line with her defence that fraud was motivated by changes in income, her financial burden stood out during the judge's sentence remarks.

> She was in a very dire financial situation. They were acts of desperation (Council's mitigating submissions. Observation case no. 40).
>
> ***
>
> Found yourself under significant financial pressure (Judge's sentence remarks. Observation case no. 40).

This case shows that even when a non-Indigenous woman has not been obviously victimised by their relationship with a man, or experienced trauma, judges tend to see them in terms of disadvantage in order to explain their 'unfeminine' criminal behaviour.

Case Study 4. Observation case no. 40.

Observation case no. 40: non-Indigenous female

Offence: A fraud case involving a non-Indigenous woman convicted on three counts of dishonest property of the trust. The offender was employed in a managerial role handling financial accounts. She transferred more than $40,000 from the company to three personal accounts.

Aggravating factors: Concealed illegal conduct by failing to supply delivery of records in accordance with job duties. An impact statement from the complainant detailing the financial loss. Breach of trust based on illegal transactions. Previous history of criminality.

Mitigating factors: Medical certificate disclosing a medical diagnosis, financial pressures, plea of guilt, currently employed, incomplete high school education, working on further study, and being a wife and mother for two young children.

Sentence: The offender was given a custodial sentence involving five months imprisonment for count 1; three years imprisonment for count 2, and 10 months imprisonment for count 3. The imprisonment sentence was to be suspended after serving 224 days in prison.

The above observations resonated with the interview data on some judges' descriptions about disadvantages that led non-Indigenous women to commit crime, "For some of that more fraud stuff, it's more based on need. A sense of need for family or personal welfare. Sometimes it might be a sort of an addiction, whether it's drugs or gambling" (Interview 2). Although some judges did not necessarily specify whether they were referring to Indigenous or non-Indigenous women, their explanations were in line with official government data on non-Indigenous women's offending patterns (ABS, 2016b). Further, research in the field of intersectionality shows that when people generalise about women, they tend to mean white women; women of colour are not seen as representative of all women (Crenshaw, 1989).

Another judge also mentioned lack of financial stability and addictions when they discussed women's crimes. Other examples from my observations data and interviews with judges similarly show that non-Indigenous women's crimes are justified by the higher courts based on a wide variety of explanations like financial need, meeting family obligations to support, and drug or gambling dependencies.

> Shoplifting is about no money. Fraud cases are addiction based.
>
> Theft are luxury driven (Interview 1).

Yet another judge that I interviewed also commented on women's economic status and drug consumption. Again, this perception suggests that this judge too was referring to disadvantages that lead non-Indigenous women to commit crimes as opposed to all women involved in crime, irrespective of their Indigenous status.

> Usually socioeconomic circumstances and drugs (Interview 4).

6.2.4. Domestic Roles

Women's stereotypical roles of domesticity involving dependent child responsibilities were also included in the narratives ascribed to non-Indigenous women. In Observation case 42 discussed above, child caring responsibilities were not presented as a direct disadvantage that led to offending, though it was mentioned, perhaps to more convincingly construct the offender as fulfilling feminine roles. In other cases, this was more explicitly used to describe their engagement in roles of domesticity. For example, in a case involving a non-Indigenous woman convicted of production of cannabis, her domestic roles of having to raise children was used as mitigating factor to describe her life experiences. Her dependent child responsibilities were introduced by her lawyers to explain where she invested her time and as a response to justify her lack of employment history.

> She's spend a lot of time raising children so hasn't worked (Mitigating submissions. Observation case no. 69).
>
> ***
>
> You've been a family woman (Judge's sentence remarks. Observation case no. 69).

The presiding judge acknowledged the non-Indigenous woman's description of her life experiences by also emphasising her role as a 'family woman'. In the same tone, the legal representation of a non-Indigenous woman also described her roles of domesticity involving raising children.

> She was a protective and loving mother (Mitigating submissions. Observation case no. 65).

At the same time, constructs of women's femininity were also used to denounce non-Indigenous women who *did not* engage in roles of domesticity. I noted that some judges criticised non-Indigenous women who deviated from expected child rearing responsibilities. In the case above where the offender was called a 'protective and loving mother' by her lawyer, the complainant was her daughter, which complicated this mitigating factor (Observation case no. 65, Case Study 2). The presiding judge touched on the non-Indigenous woman's lack of maternal protectiveness toward her daughter who was the complainant.

> You've received the admiration of your other children. Even when failing to protect that girl…As the mother of this, this

> amounts to serious breach of trust from your part (Judge's sentence remarks. Observation case no. 65).

I observed this theme in several cases: non-Indigenous women with children who did not engage in roles of domesticity were criticised and denounced by judges. For example, in a previously discussed case involving a non-Indigenous woman convicted of fraud, my data also reveal that the presiding judge made a specific point about the impact that prison will have on her children.

> The presiding judge mentioned to the non-Indigenous woman to reflect on the impact of her going into custody and what it will feel like for her children not have their mother for Christmas (My notebook reflections on Judge's remarks. Observation case no. 40).

In this case, the offender was not choosing to be away from her children; that was the direct result of the judge's sentencing decision. However, the judge highlighted the non-Indigenous woman's culpability in not meeting this gender role.

6.2.5 Education and Employment

The narratives about non-Indigenous women also included descriptions about their educational and skill attainment. These socioeconomic factors were submitted as mitigating factors, and they were discussed as examples of positive future prospects.

> She has good prospects in her life. Currently attempting to get her 10th grade certificate in community services to gain employment. Wants to work with women with her background. Linen service employment in prison. Achieved highest incentive level in prison (Mitigating submissions for a case involving a non-Indigenous woman convicted on armed robbery. Observation No. 57).
>
> ***
>
> Has a good work history; 2006-14 as teacher aid. Has been training in certificate in aged care whilst on remand (Counsel's mitigating submissions for a case involving a non-Indigenous woman convicted on drug trafficking charges. Observation No. 51).

The above court observations data where legal representatives discussed non-Indigenous women with positive future prospects resonated with perceptions from a judge that I interviewed.

> …if we look at the mitigating factors and their personal circumstances, are usually at a higher socioeconomic level. Their education is usually at a better and higher level. Their employment or prospects of employment are far better. This is the white woman. Medical and health issues, might still be present but they've been treated and there is a greater access to treatment and ability to do so because they're in a metropolitan area, generally. They've got family and support structure so their prospects of rehabilitation and support are prominent (Interview 2).

A common narrative about non-Indigenous women processed in the higher courts involved discussions about how their lived experiences of disadvantage led to offending. My observations data found that the courts acknowledged the interrelated disadvantages of non-Indigenous women such as poor mental health and drug use as mitigating factors. In line with the observations data, discussions from my interviews with judges about non-Indigenous women's disadvantages also touched on poor mental health, drug use, poor interpersonal relationships with men, and gender constructs of domesticity roles. In the context of gender roles of domesticity, both the observations and interview data show that the higher courts considered experiences of subordinated relationships with men, child dependent responsibilities, and financial pressures as connected disadvantages that impacted non-Indigenous women's participation in crime. Some of the narratives of non-Indigenous women also included skill attainment and previous employment. These mitigating factors were not necessarily discussed as disadvantages but rather as supportive evidence of future prospects, which characterised non-Indigenous women positively and in line with women's 'traditional' femininity. In turn, non-Indigenous women's narratives of complex disadvantage that led to offending and supportive evidence of future prospects illustrate the higher courts' structural position. That is, the higher courts' consideration and acknowledgement of descriptions that overlap with gender constructs of femininity and their non-Indigeneity contributes to the higher court experience and outcome altogether for non-Indigenous women.

6.3. Narratives about Indigenous women

My observations and interview data shows that Indigenous women share many of the same experiences of disadvantage I have discussed above. Indigenous and non-Indigenous women are both more likely to offend because of some marginalised experience in society. However, although Indigenous women's experiences of disadvantage were used sometimes as mitigating factors, I observed that these were not always discussed in depth, used inter-relatedly between disadvantages, or as main contributors that led to their offending. This theme is in line with attitudes from the judges I interviewed who also did not explicitly narrate Indigenous women's experiences of disadvantage in ways that mitigated their offending. In particular, the emphasis of judges was not to talk about Indigenous women's disadvantage on the basis of their gender but on their Indigeneity. This resonates with Crenshaw's (1989) argument that women of colour are excluded from the interplay between their race and their gender. The disadvantages of Indigenous women were also not described in a manner where their gender could be used as supportive evidence linking offending to roles of domesticity.

For example, official data shows that regardless of Indigeneity, women involved in crime experience poor mental health (Baldry, 2010). Yet my observations of this poor mental health factor as a regular discussion point particularly for non-Indigenous women experiencing poor mental health. I observed that Indigenous women's mental health was only briefly discussed in court and not emphasised as a main factor that impacted other disadvantages or their offending. I observed this in a case about an Indigenous woman charged with burglary and sexual assault (Case study 5).

> My client is a deeply troubled alcoholic…She has support from her family, but alcohol is a problem (Mitigating submissions about an Indigenous woman charged with burglary and sexual assault. Observation case no. 54).
>
> ***
>
> Was intoxicated at the time of the offence…Took into account psychiatric report. Sad background. There are prospects of rehabilitation, letter from Angli-Care, some degree of family support (Judge's sentence remarks. Observation case no. 54).

Supportive evidence to that described her poor mental health included her own experiences of childhood sexual assault referring to her experiences of child sexual abuse,

homelessness, and alcohol use. However, the fact that she was under the influence of alcohol at the time of her offending was presented more prominently than her poor mental health in her narrative of contributing factors to explain her offending. The dialogue between her legal representation and presiding judge shows that her alcohol use was highlighted as a main contributing factor that led to her offending.

Case Study 5. Observation case no. 54.

Observation case no. 54: Indigenous female

Offence: Assault case involving an Indigenous woman convicted on one count of burglary and three counts of sexual assault. The offender stole antiques as well as engaged in indecent assault of an elderly woman. The items were ultimately recovered. The burglary consists of the offender being in the complainants' home by invitation rather than breaking in. Offender was intoxicated at the time of offence.

Aggravating factors: Criminal history of street offences.

Mitigating factors: Early guilty plea, psychiatric report detailing history of child sexual abuse, homelessness, and alcohol addiction. Character reference from Angli-Care and family support.

Sentence: 2-year probation order. Suspended sentence for 9 months and suspected at 12 months. The conviction was recorded.

Thus, alcohol use overshadowed the mental health of the Indigenous woman as a factor that impacted her offending. I accept that the presiding judge's focus was on her alcohol use since this was the focus of her defence, and especially given she was under the influence at the time of her offending. However, what this narrative demonstrates is that the attention to her alcohol use as basis for her having committed both burglary and sexual assault sidelined the inter-connectedness of other disadvantaged factors.

Similarly, the link between Indigenous women's alcohol use and offending reflected perceptions from one judge who I interviewed. They too described Indigenous women generally being under the influence of alcohol at the time of their offending.

> Well most Indigenous women commit offences of violence, in my experience, and most are drunk at the time… (Interview 6).

The emphasis about the above court observations data and attitudes by one of the judges interviewed is that this reflects social attitudes toward Indigenous people and possibly shifts the accountability onto Indigenous people for their offending as opposed to explaining alcohol use on the basis of experiences of disadvantage. I observed the same pattern yet again for a manslaughter case that I observed where the victim was an

Indigenous woman. The manner in which the deceased Indigenous woman was referred to stood out as discussed by presiding prosecutors of this case.

> She was a drunk, intoxicated woman (Prosecutor's aggravating submissions involving a deceased Indigenous woman complainant. Observation case no. 64).

Here, even the prosecution seems to be blaming this Indigenous woman for being the victim of a crime because she was drunk. The point highlighted is that Indigenous women were under the influence of alcohol at the time of their involvement in crime, whether as offenders or victims, and this overshadowed discussions about their probable poor mental health or other interrelated disadvantages. In contrast to the narratives of non-Indigenous woman whose drug use was acknowledged as a disadvantaged circumstance impacted by their poor mental health, the higher courts' emphasis of Indigenous woman's alcohol use factor more than their mental health points to structural processes that impact the court experience differently based on women's Indigenous status.

I also observed another case involving an Indigenous woman whose narrative had no discussions about her mental health or experiences with substance use. This was a case about an Indigenous woman charged with attempting to pervert the court of justice. The offender lied about her identity and had taken another person's name details. The complete disregard by the prosecution and her legal representation in bringing up her disadvantage factors contrasts with the cases of non-Indigenous women, discussed above. Research shows that women who engage in crime generally tend to experience poor mental health and likely struggle with substance use (Baldry et al., 2011). Further, the fact that this information was absent from her narrative demonstrates that the courts acknowledged this disregard despite extensive research showing Indigenous woman's disadvantaged experiences of poor mental health and issues with substance use (Baldry & McCausland, 2009).

Another key difference in the narratives of Indigenous and non-Indigenous women is explanations of offending through gender roles of domesticity, such as child dependent responsibilities. In the previously discussed case that I observed involving an Indigenous woman charged with attempting to pervert the court of justice, her dependent child responsibilities were presented differently to those of non-Indigenous women. This Indigenous woman is the mother of a toddler, and there was some discussion in her sentencing of arrangements for her child during her custodial sentence. However, this dialogue was brief.

> Child is currently 4. She's not breastfeeding anymore (Mitigating submissions. Observation case no. 42).
>
> ***
>
> What stood out from this sentence is that the judge did not speak about the impact of imprisonment on her child (My fieldnotes. Observation case no. 42).

In particular, any severity of the impact that custody would have between the relationship of a mother and her young son was downplayed to a simplistic acknowledgement where because she was no longer nursing, she could schedule her time inside prison with no implications for her child. In other words, her role as a mother, and as an Indigenous mother, was not really considered important by the court. Further, this sort of discussion that disregarded Indigenous women's role as a mother was in contrast to narratives about non-Indigenous mothers. There was no mention of denunciation from deviating from her dependent child responsibilities like I had observed in cases involving non-Indigenous women. Nor did this presiding judge ask the Indigenous woman to reflect on how her going into custody would impact her child. This case stands in stark contrast to the non-Indigenous mother who was shamed by the judge for missing Christmas with her children due to her prison sentence (Observation case no. 40). This lack of emphasis on the Indigenous woman's role as a mother highlights differences in the narratives that are constructed about Indigenous and non-Indigenous women on the basis of gender roles of femininity. This occurs because of the way in which mitigating factors are submitted and discussed by their legal representation, and as acknowledged by presiding judges. However what this observations data points to is that in the higher courts Indigenous women were not viewed in terms of traditional gender roles such as that of 'mother'. My interviews and observations both revealed that judges did not comment on their attitudes about Indigenous woman's dependent child responsibilities. Only one judge discussed family responsibilities in relation to Indigenous women and these remarks focused more on kin responsibilities rather than the role of Indigenous women as mothers.

> Family pressures can place an interesting role and can put people in a difficult position (Interview 1).

Indigenous women's lack of income as a mitigating factor was also described quite differently to non-Indigenous women. In my observations, non-Indigenous women's income had a key role in mitigation narratives, while it was only a tertiary discussion in cases involving Indigenous women. However, in interviews Indigenous women were

described by judges to be *more* disadvantaged than non-Indigenous women but only on the basis of their Indigeneity as a group. Although judges viewed Indigenous women as more disadvantaged than non-Indigenous women, these attitudes were not referred to explicitly during sentencing decision making and were not linked with women's gender roles or perceptions of their femininity. There was only one judge who did explicitly perceive Indigenous women's greater disadvantage than non-Indigenous women. Again, there were no links to between Indigenous women's disadvantage and roles of femininity.

> So circumstantially the mitigating factors are far heavier because of poor socioeconomic circumstances of an Indigenous woman as opposed to a white woman (Interview 2).

In fact, this was the only judge who provided a general description about Indigenous women who come before the higher courts.

> So if you're looking at an Aboriginal woman, personal family circumstances would be, you know, looking after several nieces and nephews, not married, not employed, poor education, probably got some alcohol problem, suffering depression and anxiety, terribly remorseful because she might have been drunk, and this has had an impact on family, kids in particular, and she's completely, otherwise, a good person and more likely than not has very little previous convictions (Interview 2).

This suggests that judges are aware of historical and ongoing inequalities, but that these inequalities are not expressed as central to their decision-making. Unlike non-Indigenous women, Indigenous women were rarely presented in terms of domestic roles, and issues like breakdown of marriages or relationships are not presented as a factor linked to income stressors and thus offending.

In the previously discussed case about an Indigenous woman who was charged with burglary and sexual assault, the offender was homeless and had no income. However, I observed that her homelessness was referred to in a passing way to describe her socioeconomic disadvantage as a contributing factor that caused her offending, even though her crimes were acquisitive; she had intentions to sell the stolen items for monetary gain.

> She's a carer for her mother so sometimes stays there. Homelessness is certainly an issue with my client (Council's mitigating submissions. Observation case no. 54).

This Indigenous woman appeared to be in a dire financial situation, and yet this was not discussed as a main motive for her conduct. Yet, although her lack of security of tenure in a dwelling was evident by her current living arrangement which included sometimes staying at her mother's home, even then, her homelessness was not key to justifying her offending conduct.

Other socioeconomic factors involving Indigenous women that were discussed differently than non-Indigenous women involved Indigenous women's histories of employment and level of education. I documented in my observation data that Indigenous and non-Indigenous women's differences in narratives about education and skill attainment was not simply that one group is more disadvantaged than the other. It was also that non-Indigenous women were discussed with descriptions that they had taken measures to improve their quality of life and so showed future prospects. In the case above about the Indigenous woman charged with burglary and sexual assault, no information related to her level of education, skill, or employment history was discussed during her sentencing in court (Observation case no. 54). Thus, there was no reference to future positive prospects related to her skills or educational attainment. Although her volunteering was brought up, there was no mention of the sort of skills she had attained from her volunteer role. Further, regardless of whether she possessed any skills at all or had a limited education, these could have been submitted to the court as mitigating factors to explain disadvantaged circumstances. In particular, as mitigating factors, education and skill attainment factors would have supplemented her story as to what she has achieved, and what she has struggled to accomplish.

Even when I did observe that Indigenous women's skills and level of education were discussed, they were still not presented in the same manner that I observed for non-Indigenous women. For example, descriptions from previous positions held by Indigenous women were not elaborated in the form that skills attained from employment were heightened for non-Indigenous women.

> Tenth grade education, has been employed in the community
> (Council's mitigating submissions. Observation No. 42).

Therefore, whether details pertaining to Indigenous women's employment and level of education were brief or not mentioned at all, together with lack of expressed positive tone in future prospects, are yet other mitigating factors that were not really imposed on Indigenous women processed in the higher courts. This pattern in turn reinforced structures of the higher courts which accepted and perpetuated the lack of, if any, regard

to Indigenous women's narratives about their education and skill attainment. Further, applying Critical Race Theory to this pattern also highlights issues of structural racism which results in low expectations for Indigenous women and Indigenous people as a group (Cunneen & Tauri, 2016). The particular line of narrative that I observed in the higher courts is that Indigenous women's experiences of mental illness, dependent child responsibilities and educational and skill attainment were rarely commented on in detail. This finding was similarly supported by my interviews with judges who, with the exception of one judge, did not link these factors to disadvantaged circumstances or make explicit links to gender constructs of 'traditional' femininity. Therefore, for Indigenous women, their gender coupled with their Indigenous status amplified structural racism in the higher courts given they were rarely recipients of mitigating factors in line with traditional women's gender roles of femininity.

In stark contrast to non-Indigenous women and similar to Indigenous men discussions about Indigenous women did focus on aggravating factors including a lack of cooperation with police and a previous history of crime. So while potential mitigating factors such as poor mental health, lack of income, dependent child responsibilities, and education and skill attainment were minimally discussed, Indigenous women's history of crime and lack of police cooperation were emphasised. For example, Transcript no. 3 details the situation of an Indigenous woman who refused to take part in a police interview. This refusal was used against her and formally submitted to the court as an aggravating factor.

> The police arrested you and you declined to take part in an interview (Judges' sentence remarks. Transcript no.3).

Her unwillingness to be interviewed by police authorities is in line with the general lack of confidence and distrust in police authorities by groups over-represented across the criminal justice system (see Chapter Five; Horowitz, 2007; Weitzer & Tuch, 2005). Similar to my court observations findings addressed in Chapter 5, the fact that this Indigenous woman's refusal to take part in an interview with police authorities was used against her as an aggravating factor ignores the colonial history of police and Indigenous relations (Cunneen & Tauri, 2016; Blagg, 2008) and reinforces the courts' structural racism toward Indigenous women, and Indigenous people as a group.

Further, other descriptions that I documented in my observation data that were ignored in the narratives of Indigenous women included character references and

remorseful conduct, which was performed publicly in the form of crying. I observed several cases involving non-Indigenous women who provided reference letters regardless of their offence or offence history. For non-Indigenous women, reference letters were predominantly submitted by family members. In contrast, cases involving Indigenous women had no reference letters submitted by family members. Similar to my findings discussed in Chapter 5, differences in reference letters based on Indigenous status highlights that it is not necessarily that Indigenous women did not have family members who could have provided references, but rather as supported by Critical Race Theory, that this aspect of the courts is a concept from a white system which has adverse impacts on people of colour like Indigenous women.

Remorseful conduct in the form of crying was another behaviour that I observed discussed differently based on women's Indigenous status. Crying is associated with femininity (Kachel, Steffens & Niedlich, 2016). There is some evidence that judges are swayed by this performance of femininity and that this could lower their penalty based on representations of remorseful behaviour (Gelsthorpe & Loucks 1997). In my observations, non-Indigenous women appeared teary-eyed throughout court processes while Indigenous women did not display their emotions or their remorse through tears. This was a topic that some judges noticed, too, however with mixed attitudes as they commented in interviews that there are differences in women's expressions of emotions on the basis of Indigeneity.

> My experience is that white women are overtly upset so cry, it's holding in the emotion with straight face, whereas Indigenous women might cry but it's almost emotionless, you'll see a tear, but not necessarily the facial expression…they're different. They're shy. Avoid eye contact, look down, almost a blank, emotionless facial expression (Interview 2).

In the same tone, one judge expressed attitudes about Indigenous women's demeanour in courtrooms where they associated Indigenous women's behaviour with life tragedies.

> Well the Aboriginal women often find it difficult to engage. They just tend to sit there, blankly ahead…it's consistent with all their lives, it's just like talking to a brick wall sometimes. They just cop. They've just cop so much in life (Interview 8).

Another judge expressed contradicting attitudes where Indigenous women cry whereas non-Indigenous women make eye contact yet both group of women act on these emotions in order to impact a positive outcome on their respective cases.

> Non-Indigenous women are perhaps more socially, Western, know how to act, [make] eye contact, provocatively dressed for a better deal. Indigenous women are overwhelmed and so tearful, can be more touching…quite funny, you can see it (Interview 1).

Yet another judge also commented on the differences in expressed emotions between Indigenous and non-Indigenous women. Their attitude on non-Indigenous women's expressions was in particular was in line with 'traditional' gender roles of femininity.

> Non-Indigenous women display high level of anxiety, emotional upset, they listen to what is said. Indigenous women are completely ambivalent to what's going on. Wouldn't empathise with their victims, not the same degree of remorse (Interview 3).

In contrast to the judges' attitudes above, one judge did not comment on Indigenous women's emotions but rather on their demeanour

> Well, look, sometimes the Aboriginal women look as if they've just come from the park and don't care how they look (Interview 6).

However, despite judges' attitudes on Indigenous and non-Indigenous women's different expressed emotions and demeanour, a point that judges emphasised was their claim that differences in conduct on the basis of Indigeneity does not shape or impact their sentence treatment. Nonetheless, as my research shows, judges looked favourably on women who conform to stereotypically feminine roles. However, this construction of femininity is viewed through a white lens and cultural differences in emotional displays are likely to be considered 'unfeminine'. This research is qualitative and does not suggest a direct causal relationship, however it does illustrate the complex ways that gender and Indigeneity influence women's experiences of the higher courts.

Responses from some judges also highlight that judges construct women as victims by the choices they make based on their involvement with men. This attitude constructed women as victims is in line with white women's constructs of femininity (hooks, 1989) yet is also a description limited to non-Indigenous women which ultimately

excludes women of colour like Indigenous women (Crenshaw, 1989). In contrast, I found only one judge who claimed that both Indigenous and non-Indigenous women commit crime out of poor interpersonal relationships with men.

> It's usually in Indigenous women it's violence, in white women it's more likely to be fraud. I think in both cases, it's a response to domestic pressure of relationships. It's just kind of a way of letting off steam which is obviously totally inappropriate. In other words there is usually some sort of domestic background to the offending, whether it's violent or not (Interview 7).

6.4. Conclusion

Findings from this chapter demonstrate that Indigenous and non-Indigenous women's narratives were constructed differently in the higher courts. Even though non-Indigenous and Indigenous women shared similar experiences that led to their offending, narratives of disadvantage were presented in different ways for the two groups. Non-Indigenous women were presented according to traditional gender roles, presented as feminine and/or victims to explain how disadvantage led to their offending. In contrast, Indigenous women were subjected to a particular line of narrative that emphasised their alcohol use, while disregarding their mental health, child dependent responsibilities, educational and skill attainment. I acknowledge that the different ways in which gender roles of femininity were used based on women's Indigeneity could be explained through their different offending patterns. However, a more plausible explanation is that Indigenous women were singled out and disregarded from the advantages that come from perceptions of femininity based on not conforming. Further, as Black feminism informs us that women of colour are often excluded from white constructions of femininity (Moreton-Robinson, 2000; hooks, 1989), using Critical Race Theory as my lens, structural racism is amplified in the higher courts for Indigenous women given their lack of conforming to 'traditionally' social constructs of femininity (Crenshaw, 1989). This highlights how the higher courts are embedded with structural racism especially through observation, interview, and transcript data findings that the intersections of Indigeneity and gender placed Indigenous women in a more disadvantaged position than non-Indigenous women. In the following chapter I discuss how the social and political issues surrounding Indigenous women remain once the entirety of their court procedures is

finalised. Unlike non-Indigenous women, Indigenous women continue to face adversity even after their sentence is served.

Chapter 7: Differences in sentence outcomes and their impacts for Indigenous and non-Indigenous women

7.1. Introduction

In this chapter I focus on how processes of the higher courts intersect with other institutions inside and outside the higher courts to adversely shape the experiences of Indigenous women. I argue that while Indigenous women came before the higher courts already experiencing significant disadvantages (discussed in Chapter 6), and although there were specific legislative measures to mitigate their treatment based on Indigeneity, their higher court experience ultimately creates more adverse impacts that contribute to their on-going marginalization. In particular, for Indigenous women, structural racism embedded in higher court processes posed adverse impacts once their experience in court was finalised on the basis of their gender and Indigeneity. In this chapter I analyse four court transcripts to explore the differential treatment of Indigenous women uncovered in the previous two chapters. Whereas previous chapters focused primarily on observations and interviews with judges about women's experiences of court processes in general, using transcript data this chapter examines sentencing outcomes specifically. I do so in the context of legislation and social attitudes that influence judicial decision making. Despite legislation that intends to 'close the gap' for Indigenous people, this chapter shows that structural racism still exists in the form of new racism given judges' complex attitudes of prejudice and sympathy toward Indigenous people.

7.2. Interpretation of offending type based on Indigeneity

My research reflects the official statistics on the main types of crime for which women appear before the higher courts. Although my research is not statistically generalizable it does suggest that North Queensland is comparable to the national average. According to the ABS (2016a) the main types of crimes involving women who are processed in the higher courts as a whole are drugs, fraud, and violent offences. This was in line with the cases that I observed. Likewise, in interviews, judges reflected on the same types of offences.

> I mean women probably come before the court charged with fraud, in a higher percentage than the normal percentage of women for other offences (Interview 5).

In line with official data, the cases I observed with Indigenous women offenders includes cases for violent offences, sexual assault, and deception offences (ABS, 2015). Non-Indigenous women also appeared for violent and sexual assault offences and additionally appeared for drug, fraud, and theft offences.

Even though both groups of women committed violent and sexual assault offences, the nature of these crimes differed. For violent offences, while a non-Indigenous woman appeared for armed robbery, Indigenous women came before the higher courts for assault and burglary. This difference was also noted by some of the judges that I interviewed, showing consistency with the literature on women who offend (Bartels, 2010a).

> Well most Indigenous women commit offences of violence in my experience, and most are drunk at the time… (Interview 6).
>
> ***
>
> It's usually in Indigenous women it's violence, in white women it's more likely to be fraud (Interview 7).
>
> ***
>
> The women I'm most likely to see, the white women I'm most likely to see are the ones who steal. And the motivation there is usually the same as everyone else; greed, gambling commitments, debts you can't pay, violence, drugs (Interview 8).

Another difference that I documented in my observation data is that there is a consensus that non-Indigenous women commit premeditated offences while Indigenous women engage in impulsive crimes as explained by defence counsels, the prosecution, and presiding judges. In particular, presiding judges' sentencing remarks sometimes explained non-Indigenous woman's involvement in crime as premeditated, deliberate, and carried out across time.

> No degree of premeditation…emotionally charged (Mitigating submissions. Observation case no. 72).

This aligns with societal stereotypes of women of colour, including Indigenous women, as more emotional and reactive, with judges perhaps upholding the 'angry black woman' trope described by Moreton-Robinson (2000).

I found the opposite interpretation for offences involving non-Indigenous women. I observed a case of violence involving a non-Indigenous woman charged with armed

robbery. Armed robbery suggests some level of planning and pre-meditation, as the prosecution's case argued.

> Held a knife, "this is a hold up". Was covering her facial features with scarf, glasses. She was asking for a bag of drugs. Planned offending as she drove … to the chemist shop rather than her local town … where she lives (Aggravating submissions. Observation case no. 57).

However, the presiding judge did not take the opportunity to punish the non-Indigenous woman for 'unfeminine' behaviour. Instead, her crime was explained through a victim lens, in this case her struggles with drug addiction.

> Specific request of drugs was deliberate. Spur of the moment due to drug addiction (Judges' remarks. Observation case no. 57).

The presiding judge also interpreted her type of crime as more complex given their emphasis on her drug addiction that impacted her criminal behaviour as both deliberate and spur of the moment. This suggests that the power of these stereotypes is significant when judges make their sentencing decisions.

7.3. Sentence considerations

While the offense is a key part of judges' decisions about sentencing, alongside the mitigating and aggravating factors discussed in Chapter 6, other key factors considered for sentencing include the impact on the victim, legislated sentencing guidelines, and precedents from similar cases (Shanahan et al., 2016). In my observations, even though both groups of women who are processed in the higher courts come from disadvantaged backgrounds, for Indigenous women, their Indigeneity impacts their starting point of disadvantage (see Chapter 6). In this section, I present four court transcripts to discuss the way the mitigating factors and these other sentencing considerations are combined, and the result they had on the women. I particularly selected these transcripts to investigate the ways the sentence outcomes from these four cases match with what I observed in their respective court processes, and with how the judges that presided in these cases, who I also interviewed, articulated their decisions. Another highlight from the present four case studies is that these allowed to analyse for structural interpretations in the higher courts which are reflected in the treatment, particularly the sentencing of Indigenous women.

7.3.1. Transcript 1

The first example is a non-Indigenous woman charged with production of cannabis and possession of a drug-related 'thing'. She was charged with producing over 500 grams of cannabis on her property. Circumstances involving breakdown of marriage, financial struggles, and mental health were submitted as factors that led to her offending. Her character references, a lack of previous criminal activity and an early guilty plea also contributed to her sentence outcome. For her offending conduct she was given a $3,000 fine.

There are two key points of consideration to evaluate the seriousness of a drug offence: type and amount of drug. Different types of drugs will reflect a different penalty. For example, production of cannabis is classified in the Schedule II category of drugs, alongside morphine and barbiturates. This group of drugs carry lesser penalties than Schedule I drugs which includes amphetamines, cocaine, heroin, LSD, and ecstasy. According to Shanahan et al. (2016), the maximum sentence in Queensland for production of cannabis is 15 years imprisonment. In terms of the amount of the drug, evaluating seriousness lies in whether the amount of the drug was for personal use as opposed to selling drugs for commercial purposes. The former, personal use, is treated with a more lenient outcome. In contrast, trafficking drugs for sale with the intention of profits carries a penalty of 25 years imprisonment. If details of this defendant's cannabis production had included a profit component, her offence would have been drug trafficking and required that at least 80% of the imprisonment sentence to be served in custody.

7.3.2. Transcript 2

This case similarly involved a non-Indigenous woman charged with drug offenses. This offender was charged with production of cannabis and possession of a drug-related 'thing', which in this case was for personal use. Particular circumstances submitted as mitigating factors included linking her drug use to her poor mental health. For example, her cannabis production was justified through mitigating submissions where her conduct was a response to self-treat her depression through cannabis use. Other circumstances submitted as mitigating factors included her guilty plea, police cooperation, and a psychologist's report detailing her mental health condition and the treatment she had received since the offence. For her production of cannabis charge, she

was given 6 months imprisonment, however the sentence was fully suspended for an operational period of one year. This means that if she stays away from committing crime for 12 months she will not return to the courts and be re-sentenced. The penalty for her other charge, possession of a 'thing', was included in the overall six-month imprisonment sentence. As I previously mentioned, production of cannabis has a maximum penalty of 15 years imprisonment while possession of a 'thing' carries a maximum two-year imprisonment sentence. Her sentence then was indicative of being in the lower range of punishment.

7.3.3. Transcript 3

In contrast to the two transcripts above, Transcript 3 involved an Indigenous woman charged with burglary and three counts of unlawful and indecent assault. She was charged with burglary and not break-and-enter because she had been invited onto the property and was already there when the offense occurred. Her assault charges fell under the sexual assault offence category given she had touched the complainant, an elderly woman, inappropriately and without her consent.

In this case the offender was homeless and used alcohol, but according to her lawyers she did have family support. Her alcohol use was particularly stressed by her defence council and the presiding judge as a factor that motivated her conduct. They noted that she was under the influence of alcohol at the time of the offence. Unlike the cases above involving non-Indigenous women, this Indigenous woman's sentence did include a rehabilitative order.

Other factors submitted by her defence counsel to mitigate her conduct were her early guilty plea, a letter of support from Angli-Care, and a psychiatric report. This report detailed her disadvantaged circumstances like how her alcohol use was impacted by childhood sexual abuse. The aggravating factors submitted by the prosecution included a prior history of crime, lack of cooperation with police authorities and her sexual conduct toward the complainant who was an older woman. The offender was sentenced to a two-year probation order for her involvement in the burglary. For the three sexual assault offences she was given a nine-month imprisonment sentence that was fully suspended for an operational period of one year.

According to the *Penalties & Sentences Act* (1992), burglary is entering someone's dwelling with the intent to steal and carries a maximum penalty of 14 years imprisonment. Sexual assault carries a maximum sentence of 10 years in prison, though

this sentence covers offenses ranging from groping to rape. The sentence that she received appears to sit low in the range of punishment. This is more noteworthy when considering particular circumstances that impacted her sentence, namely lack of cooperation with police authorities, previous history of crime, and recorded conviction.

7.3.4. Transcript 4

Transcript 4 highlights quite different experiences to the previous three. This case involved an Indigenous woman charged with attempting to pervert the course of justice. Details about the offender's circumstances that were used as aggravating factors included a prior history of crime. Relevant history of deceiving justice authorities particularly impacted her offending level of seriousness. This was evident by the presiding judge who considered her conduct very serious and as a result an actual period of custody was warranted.

> To deceive the court of justice in this way is regarded very seriously, and the only appropriate penalty is one of actual imprisonment (Judges' remarks. Transcript 4).

She received a custodial sentence of one and a half years of imprisonment, however this sentence was partly suspended after serving three months in prison. According to the *Penalties & Sentences Act 1992* a person who is found guilty of obstructing justice procedures could be sentenced to a maximum penalty of seven years imprisonment. From a penalty range, her sentence was low considering she got a custody sentence that was less than one quarter of the maximum penalty. Similar to the previous cases, this offender too received a recorded conviction and this would likely impact her future employment prospects.

7.4. Transcript Discussion

7.4.1. Fines, custodial sentences, and mothering

These four cases highlight that the narratives of women who are processed in the higher courts are different on the basis of their Indigeneity. This is consistent with other observations, as well as interview data. For example, in my research, non-Indigenous women tended to be given fines. Transcript 1 reveals how fines work for non-Indigenous women. In my observations of the case detailed in Transcript 1, I saw her mitigating submission which included child dependent responsibilities as a circumstance that led to

her offending. But as discussed, her offending conduct was particularly explained by her legal representation as motivated by financial issues and to be able to meet the demands from supporting children upon divorce. This contrasts with the charge itself, which suggested personal use; that is, if she was producing drugs because of financial pressures, surely that requires selling some for profits. But as discussed in Chapter 6, this non-Indigenous woman's role as a mother was a key mitigating factor. Further, it was her mothering role that led to a fine rather than a custodial sentence. While a fine seems a further financial burden, this punishment meant she did not have to experience the detrimental impacts caused by time apart from her children while in custody.

I did not see this sort of punishment given in cases involving Indigenous women. This is explained by one judge that I interviewed:

> I would be less likely to give a fine because that impacts on their family; burden. To impose an even small fine is significantly [a] more adverse impact on them (Interview 3).

This response above points to judge's paternalistic attitudes where their perceptions about Indigeneity impact their different sentence decision-making practices toward Indigenous women.

In fact, Indigenous women were not given fines even when a custodial sentence meant time away from her children. In my observations of the case presented in Transcript 4, I saw discussions between the presiding judge and her legal representation to ensure that her child was to be cared by a family member while the offender served her sentence in prison. Sentiments about the detrimental impacts of custody for women and children was expressed by one judge that I interviewed. They expressed the tragedies that women, particularly Indigenous women, experience during custody.

> I mean I was very conscious when I was dealing with women in remote communities that sending them to jail was usually going to be hundreds of kilometres away, it's so disruptive too, they're really sent into exile because they're unlikely to get visits or anything. So yeah, I was very conscious of that, of the particular, the particularly onerous effect of imprisonment on women from remote communities particularly (Interview 7).

This case stands in stark contrast to Transcript 1, where the non-Indigenous woman was given a fine in order to avoid separating her from her children. However, given the

argument presented in Chapter 6 that Indigenous women are held to different standards of femininity, it is perhaps not surprising that this Indigenous women's mothering was not considered in quite the same way.

7.4.2 Rehabilitative sentencing principle

Another key difference between the sentencing treatment of Indigenous and non-Indigenous women revolves around rehabilitation as a sentencing principle. In neither Transcript 1 nor Transcript 2, both involving non-Indigenous women, did I observe a component related to therapeutic aims that specifically addressed the issue of drug use. Particularly for cases about drug offences where there was personal drug use involved, I initially assumed there would be something along the lines of drug courts which tend to impose a rehabilitative component as part of the sentence outcome. So while drug courts' operations and aims emphasise on a rehabilitative component, and so differ completely from the processes in other courts, the higher courts are in a position where their aims of punishment should attempt to rehabilitate women suffering from drug use whose extent of drug consumption led to crime. However, the lack of rehabilitative sentences suggests that the courts are more interested in punitiveness than rehabilitation, in line with the general turn towards punitiveness in the past few decades (Baldry & Cunneen, 2014).

In contrast to the two previous drug related cases above, the sentence outcome from Transcript 3 about an Indigenous woman is that this case involved a rehabilitative component to address her alcohol use. To a large extent, this rehabilitation explains why a light sentence was given in this case. This added sentence component of a rehabilitative order to address her alcohol use was in line with the mitigating submissions. Circumstances relevant to her rehabilitation order were that she had been proactive in seeking assistance with her alcohol use. While she was already addressing her alcohol use, the presiding judge gave her a rehabilitative order to formalize her attempts in overcoming alcohol use. This rehabilitative order involved cooperation with supervisions and attendance to programs.

On the surface, the rehabilitative order as a sentencing principle was an appropriate source of treatment. However, if this Indigenous woman breached the court-ordered rehabilitation component, she faced re-sentencing. Given this woman's homelessness, and how common relapse is in cases of addiction (Bartels, 2012), it is more likely that she will serve her prison sentence as compared to the non-Indigenous woman in Transcript 2, who had no court order to comply with in order to avoid her prison

sentence. This singling out of Indigenous women for court-ordered rehabilitation indicates a paternalistic sense that the (white) judges have a responsibility to 'fix' Indigenous women, an attitude which could lead to increased punishment for these Indigenous women.

7.4.3 Aggravating and mitigating submissions

Transcript 3 particularly highlights the emphasis on aggravating submissions for Indigenous women in the courts. With respect to the aggravating submission on lack of cooperation with police authorities, this Indigenous woman's unwillingness to be interviewed by the police was not particularly surprising. As discussed in Chapters 5 and 6, this behaviour is in line with the general lack of confidence and distrust for police authorities by groups over-represented across all criminal jurisdictions, not just the higher courts (Cunneen & Tauri, 2016; Horowitz, 2007; Weitzer & Tuch, 2006, 2005). Further, her likely distrust for police authorities resonated with the colonial history on police and Indigenous relations (ATSISJC, 2002). The offender's prior history of crime shows mostly public order offences, indicating that the seriousness of her involvement in crime increased in this case. As previously discussed, public order offenses have historically impacted Indigenous and non-Indigenous women differently (Bartels, 2010a). More notably, there have been more deaths in police custody for Indigenous women compared to their non-Indigenous counterparts (Collins & Mouzos, 2002). Thus, cooperation with police as a mitigating factor and lack of cooperation as an aggravating factor are structures of the higher courts that are likely to directly and negatively impact on sentencing outcomes for Indigenous offenders.

What stood out about Transcript 4, both in my observations and transcript analysis, was that there were no circumstances about the offender's mental health or drug and alcohol use submitted as mitigating factors and brought up during her sentence matter. However, this disregard did not imply that the offender had not experienced poor mental health or drug or alcohol use. The lack of information that could have been included in her narrative was consistent with my other observations involving Indigenous women. I regularly saw cases where mitigating submission for Indigenous women were brief, while non-Indigenous women had more detailed stories about their lives. In contrast, Transcript 1 suggests that non-Indigenous women's cases involve strong links between drug use and mental health. For example, her counsel's submission that she had

stopped using prescribed mental health medication suggested that she was self-medicating through cannabis use.

> Was introduced to cannabis upon getting off prescribed medication… There was no plan for commercial sale of the cultivated cannabis (Mitigating submissions. Observation case no. 41).

While this possession of 'things' offense carries a maximum sentence of 2 years imprisonment (Queensland Government, 2016), this non-Indigenous offender was given a recorded conviction with no custodial sentence or fine. This punishment was on the lowest range of punishments given possession of a 'thing'. Her main offence, cannabis production, would already automatically give her a recorded conviction, so the judge imposed no additional hardship with this sentence. Her circumstances included a history of employment and a recent job offer in another state. The impact that her recorded conviction will have involved future employment prospects. Taken together, these cases point to how offending conduct is explained in court on the basis of women's Indigeneity. In particular, this emphasises that Indigenous women's narratives consisted of aggravating factors to explain their crimes while the narratives about non-Indigenous women justified their involvement in crime as a response to poor mental health and experiences with drug use.

Another aggravating factor that impacted the experience of Indigenous women in the higher courts, and their sentence outcome in particular, was their criminal history. As I mentioned earlier, both of the court transcripts involving Indigenous women had a prior history of crime. Their criminal history was addressed by presiding judges in their respective sentence remarks. This seemed straightforward in that previous history of crime acted as an aggravating factor toward the sentence severity (Cook et al., 2015). Yet, the criminal history factor was not universally applied to non-Indigenous women.

Further, not all judges explicitly discussed previous criminal history as a factor they took into account during the sentence remarks phase. Still, not discussing the criminal history factor did not mean that it was not taken into account. This discrepancy in judges' sentencing practices made it all the more challenging to interpret whether and how criminal history impacted the punishment for women who had previously offended. The point then that stood out was that criminal history contributed to the different court experiences of women on the basis of their Indigeneity. That is, the difference lied in the

criminal history factor being considered for Indigenous women while not always for cases involving non-Indigenous women.

Although both groups of women shared similar personal circumstances, these impacted their sentence outcome, and higher court experience as a whole, differently. The process of the higher courts that made Indigenous women's experience different from non-Indigenous women was the way their circumstances were considered and discussed. Circumstances for non-Indigenous women were submitted as extensive mitigating factors to explain offending conduct while Indigenous women's circumstances tapped more toward aggravating features. Further, a key example about similar circumstances used differently was drug and alcohol use. While the sentence outcome for non-Indigenous women battling drug-use did not include a rehabilitative component, the opposite occurred for an Indigenous woman struggling with alcohol use.

In terms of sentencing decisions to record a conviction, regardless of Indigeneity, a conviction would likely impact various aspects of women's personal lives from prospects of employment, to public office, to travel to some countries. However, given a recorded conviction was always imposed on Indigenous women in my observations, compared to non-Indigenous women, who had some recorded convictions, is reflective of the structural racism embedded in the higher court system. This pattern in turn contributes to the on-going marginalisation of Indigenous women even after their experiences in the court room.

7.5. Judges' macro justifications for different impacts

As I have detailed in Chapters 5 and 6, the hallmark of judges' perceptions about Indigenous women was that they notice that Indigenous women experience more disadvantaged circumstances than their non-Indigenous counterpart, and judges commonly view this disadvantage as *because* of their Indigeneity. In spite of judges' general consensus that Indigenous women came before the higher courts with circumstances that placed them at great disadvantage, and although there are specific legislative measures to mitigate their conduct based on Indigeneity, Indigenous women ultimately experienced more negative outcomes than those imposed on non-Indigenous women.

7.5.1. Factors outside judicial powers

Key to judges' explanations of the different sentences experienced by women were factors outside of their judicial powers. In particular, judges view their sentencing decision-making processes as "constrained by the law" (Interview 7). At the heart of judges' claims that external factors influenced their sentence decision-making process was that they are governed by sentencing guidelines.

> [We are] governed by the guidelines of sentencing (Interview 1).
>
> ***
>
> So we've got a general sentencing obligation under Sentencing 9 of the Penalties & Sentences Act…we can't just make up any sentence. There's always some guidance by the court to look at (Interview 2).
>
> ***
>
> I follow sentencing guidelines (Interview 3).
>
> ***
>
> Obviously bear in mind things like the maximum penalty that the legislature [mandates] (Interview 5).

One judge in particular pointed to a self-perception that personal attitudes are subordinate to a judicial role:

> [Judicial discretion] must be in accordance with the legislation, with judicial norms, having regard to the evidence presented to the judges, and sentencing standards set by the appellate courts. To exercise such a discretion is essentially an intellectual exercise, and one in which personal attitudes should be and mainly are subjugated to the intellectual task…All this means is acting in accordance with the judicial oath, to do justice accordingly with the law (Interview 4).

Further, in line with judges' collective perceptions that they are governed by sentence guidelines, over which they have little control or discretion, was that they also adhere to legislative changes. As one judge said,

> You gotta have regard to the penalties that are imposed. Be as cynical as you like about politicians, parliament still have the right to introduce legislation and we have to work within it. If you don't like that you don't do the job (Interview 8).

It seems judges believe that with legislative changes, the introduction of mandatory sentencing impacts their sentence decision. For examples, some judges perceived fixed-term penalties like mandatory sentences as impacting custody rates.

> Current government make it mandatory to impose mandatory minimum sentences (Interview 3).
>
> ***
>
> There's more mandatory sentences, there's a requirement to serve prison time." (Interview 2)
>
> ***
>
> We are constrained by the law and some of it is mandatory imprisonment so it's not much we can do there (Interview 7).

Other judges attributed legislative changes to changes in the severity of punishment. In other words, they suggest that the crime is not changing but rather the political perceptions about crime are. For example, one judge commented that women's prison rates have more to do with how legislature responds to women involved in crime rather than women committing more and worse crimes.

> I think it's just the community's severe response to the crime rather than the crime itself (Interview 7).

Indigenous and non-Indigenous women's different treatment in the CJS seems to be based on legislation targeting specific criminal offences. Some legislation targeted offences which are more often committed by Indigenous women while other laws are aimed at crimes typically carried out by non-Indigenous women. For example, drug trafficking offences involving methamphetamines have shifted in the level of seriousness from a Schedule II to a Schedule I. In my observations, non-Indigenous women were the only offenders of this crime. The laws currently require convicted offenders to serve 80% of their sentence in custody. At the same time, serious violent offence laws now also mandate that 80% of the custody sentence be served imprisoned. In my observations, Indigenous women were more likely to appear in court for this offence, and thus are more likely to be impacted by this mandatory sentence law.

> If it's a serious offence, violent offence, they gotta serve 80% of their time (Interview 2).

Another judge also believes that there has been an increase in the severity of punishments. However, this judge expressed more complex attitudes that reveal a perception that

sentences have become more severe, at the same time that the rate of crime has not increased.

> I think in all the time I have been involved in the law, penalties have increased, by that I mean the actual penalties not the national penalties. There's been an increase, there's no doubt. If parliament increases, we have to have regard to that…The penalties have become potentially harsher…I don't think crime rates have increased (Interview 8).

In contrast, there were also judges who did not believe that the severity in sentences have increased. One judge believed that while changes in legislation have occurred, they denounced that sentences have become punitive. In particular, this judge used legislative changes where custody periods are now shorter than in previous years to make the point that sentencing has not become punitive. Thus, this judge suggested that sentencing should be *more* punitive.

> I don't think there has been any real tougher sentencing in Queensland. Sentencing judges try but often the sentences are reduced by the court of appeal. And if you were to look at sentences over the last 24 years at the court of appeal, I don't think you'd find that they were getting any heavier…Its [custodial use] gone down. We're not sending less people to jail, we're sending people for shorter periods (Interview 6).

Another judge similarly claimed that the severity of sentences was "harder in the late 80s, longer sentences than they are now" (Interview 3). While it is true that custodial sentences have decreased in terms of the amount of time a person is required to serve, short term prison sentences impact people, especially Indigenous women, adversely (Bartels, 2010a). In turn, the adverse punishment based on the consequences brought upon by the short periods of custodial imprisonment is suggestive of more severe punishment (Baldry & Cunneen, 2014). Another judge had different perceptions about changes in legislation altogether. This judge mentioned that the increased rates of custody resulted from policing in the streets, population growth, alcohol management plans in Aboriginal communities, and inappropriate measures to address mental health. In fact, this judge perceived population growth and policing practices as key factors that have impacted the rates of imprisonment as opposed to changes in legislation.

> Has there been a shift? The factors remain the same. Less to do with legislative change, than to population growth and policing (Interview 1).

Regardless of judges' views on changes in legislation, the point that stood out was that they see themselves as abiding by their judicial role and adhering to sentence guidelines. The result of this perception is to externalise responsibility and liability for imposing different sentences for Indigenous and non-Indigenous women. That is, judges used changes in legislation to justify women's different treatment, rather than their own attitudes or structural racism.

7.5.2. Attributing responsibility to other legal officials – 'Buck passing'

Building on judges' explanations for women's treatment differences on the basis of Indigeneity was their attribution of responsibility to law officials from different jurisdictions. The legal body officials that judges brought up when they discussed racial differences in treatment included police authorities, judges from different courts, ATSILS legal representatives, and legislators. For example, some judges referred to the way police officials apprehend Indigenous people to explain racial differences in treatment – in other words, they see the differential sentence outcomes as a result of how charges are laid, rather than their own sentence decisions. One judge expressed sympathy for people who are charged with disqualified driving because the court is required to impose a prison sentence.

> For disqualified driving, victimless offence, people risk it, the court has to consider prison. Jailed just because you didn't have a licence? Doesn't sit well with me, it's horrific. [Police authorities] couldn't address it better? (Interview 1).

From the judge's point of view, this charge is a victimless offence that could be better dealt with by police authorities. It is noteworthy that this is the same judge who previously identified more punitive social conditions as the reason for changes in sentencing. Yet another judge claimed that the plea of guilty rates for Indigenous people is sometimes explained by the inclined admittance of Indigenous peoples' offending behaviour when apprehended by police authorities.

> Aboriginal and Torres Strait Islander people are more inclined to be candid and honest. They'll admit what they did. That's one explanation. It might reflect the disadvantage in that power

> dichotomy between them and the coppers and the tendency to restrictively concur because they've been spoken to by someone in authority so they agree, 'yes, I did it'…. Cultural in a sense because they're Aboriginal, they're so disadvantaged, there's that power dynamic that's even more overwhelming (Interview 5).

The response above reflects paternalistic attitudes where as a white person of authority, the judge's explanation allows for an avoidance of self-awareness because the blame goes to the police and the tendencies of Indigenous people.

Judges also attributed responsibility to police authorities to explain Indigenous peoples' differences in the rate of contact with the courts. One judge explicitly claimed that police authorities engage in over-policing practices toward Indigenous people. They expressed this tactic from police authorities to justify why Indigenous people are more likely than non-Indigenous people to enter the CJS.

> I think they're over-policed…It's not so much that judicial officers are tougher on Indigenous people, it's just they're [Indigenous people] more likely to come into contact with the system (Interview 7).

Another judge expressed sentiments that it is not necessarily over-policing practices but rather the way police authorities use their police discretion during contact with Indigenous people.

> I wouldn't say over-policing. I think at times, I think I'd like to see a bit more discretion applied in some potentially hidden situations which might not have gone as far if an experienced [police] officer was handling it. But I don't think over-policing for policing's sake, the only over-policing is, I think, these beat things and all. Just pay it (Interview 8).

The pattern from the judges who commented on the way police authorities apprehend Indigenous people points to two things - the crime itself and the actual detaining. For example, the crime itself that judges were referring to involved summary offences like public order offences or public nuisance offences. These are lower level crimes which do not get processed at the higher courts so judges were speaking generally rather than reflecting on their current courtroom situations. Its relevancy is when an Indigenous person appears before the higher courts with a previous history of summary offences which are submitted by the prosecution as aggravating factors. With regards to the actual

detaining by police authorities, this practice impacts the rate of Indigenous people being detained by the police at a police station. Ultimately though, whether judges claimed that police engage in over-policing tactics toward Indigenous people, both the crime itself and the actual detaining do influence judges' different treatment for Indigenous people.

In contrast, other judges' comments about practices from police authorities were less transparent and accusatory in explaining Indigenous peoples' contact with the courts. For instance, one judge gave details related to Indigenous people in public domains who carry out street crime to explain how they attract police attention.

> Is it more likely because of their Aboriginality that they'll attract investigating police, the sort of, the American theme of 'well he was a Negro so he got pulled over by a White guy?' I have to say I haven't encountered a lot of that. I deal with the more serious stuff…. I don't think because of their Aboriginality they attract more attention for the serious crime I deal with. I accept it might be so for street crime. The reality is there are more destitute homeless people who are Aboriginal than the other. Therefore, likely to encounter them in alleys and night time streets and so on (Interview 5).

This judge's perceptions that racism is unlikely stems from white privilege, enabling a lack of awareness about the extent of marginalisation and oppression experienced by Indigenous women who make contact with the CJS (Moreton-Robinson, 2004). In a similar fashion, in spite of being an educated man, this judge's language and choice of words to refer to a Black or African American man as a 'Negro' also highlights that such perceptions stem from a white, patriarchal lens (hooks, 1989).

Another category of law official to whom judges attributed racial treatment differences was Indigenous people's legal representation. One judge commented on the lack of legal resources experienced by ATSILS which in turn impacts the quality of legal representation for Indigenous defendants.

> Look, the quality of lawyers who you get working there just aren't as good. They're not as good, I mean, their heart might be in the right place. A lot of the time I detect that in those groups, high up in those groups, they're not keeping lawyers who are good and experienced because they move on to better pastures where they get paid more money. So, the young ones, who are

> getting lots of experience, aren't being mentored. So instead, they're learning, "what's the path of least resistance?" (Interview 5).

Politicians are another category blamed by judges for the different sentencing treatment based on Indigenous status. This justification is of special interest because of the ripple effect that lawmaking practices have on peoples' lives across different sectors (Brown et al., 2016; Matthews, 2014). In particular, I am referring to the way laws impact lay people and their contact with policing, courts, and prison jurisdictions, legal representation agencies, health care settings, and social work, to name a few (Baldry & McCausland, 2009). The judge below expresses dissatisfaction with politicians, an attitude in line with the public opinion literature showing that law reforms, particularly harsh sentences, have not resulted in increased public satisfaction with the ways courts impose sentences (Roach Anleu & Mack, 2010).

> Maximums is determined by parliament, parliament is purely dominated by political matters. And that's where public perception might become more important to them than does reality. In other words, if the public are saying crime is worse, then poor crime is worse. Even if the stats are less than that…I'm a bit cynical about politicians and games of play. Like we get the aftermath of it. You know you have cases where police try and stop young people and they take off. They endanger life and limb. They introduce harsh penalties. But can you tell the idiot that bought that law in that it applies to that little Thai woman today? ...I get annoyed by all of that (Interview 8).

The main point that stood out during judges' conversations about other legal bodies was the ease with which they attributed responsibility for treatment differences. Most of the judges' comments consisted of a negative assessment about the quality of work carried out by other legal bodies toward offenders, particularly Indigenous people. None of the perceptions from judges felt encouraging or words of approval for their colleagues in other parts of the legal industry. Interestingly, at the same time, no judge ever brought up whether they have an open line of communication with other legal bodies. Instead, judges discussed other legal bodies in ways where these legal practitioners impact Indigenous and non-Indigenous women's different treatment while together drove out their own

judicial responsibility and liability for imposing different sentences on the basis of women's Indigeneity.

As a whole, judicial perceptions about other legal bodies shows their absence of discussion about how judges themselves could impact different treatment given their significant discretion. In fact, this data demonstrates that judges conveniently outsource the blame to on-going over-policing practices (Cunneen & Tauri, 2016), miscarriages of justice and courts of appeal (Sangha & Moles, 2015), ATSILS being under resourced (Cunneen, Allison & Schwartz, 2014), and the poorly designed law reforms by politicians solely echoing public sentiment and votes (Indermaur & Roberts, 2005). Despite the weaknesses from other legal bodies, as I discuss in Chapter 3 on the impacts of judicial power, judges *are* in a position to implement change. They hold considerable agency within the legal system despite their sense that they are constrained by legislation and the practices of other parts of the legal system.

7.5.3. Sentence practices and personal attitudes

As judges are guided by precedent, they review sentence outcomes from previous relevant cases as part of the sentence decision-making process. The objective of giving regard to the precedent cases is so that judges avoid miscarriages of justice (Cook et al., 2015).

> In order to reach what might be in the range or the spectrum of sentences, I'm looking for something that might be similar, what was the sentence that that court gave, is it worse, more serious or less serious than (Interview 2).
>
> ***
>
> I mean, there are some judges who say the most important consideration is, "well what do the other cases say the penalties should be in a case like this?", but I mean, I'm sure for those lawyers they go, things tend to be categorised, you know, in terms of keeping things general. You look for a culpable sentence, in similar cases, what does someone get? That's relevant…It is correct that we have regard to the sentences that have been imposed in cases of a similar kind because it's in the general interest of the community that there be a degree of predictability

> about what the court do, with how they sentence people (Interview 5).

However, a potential issue with judges referring to the sentence outcomes of previous relevant cases lies in perpetuating the structural racism that is embedded in courts.

Judges feel like they experience competing tensions with regards to support for specialised Indigenous courts and expressing their own sympathetic attitudes. Based on the comments below, judges supportive of specialised Indigenous courts felt that the court system is unsuccessful in the way Indigenous people are treated.

> I don't think the current system works well at all. I think it was tragic when they [Murri courts] stopped. But I don't [think] Queensland really ever put the resources and input to make it work. Victoria is doing better, I think (Interview 7).

***

> I'm very supportive. I think there should be, the court have got to make allowance for what's going on. It's very hard for a magistrate who's dealing with 60 matters. I think some of the magistrates, some of the Aboriginal matters, take a bit more time than that (Interview 8).

Judges who were supportive of specialised Indigenous courts were also sympathetic to a favourable outcome for Indigenous people. Sympathy is complex, though, and often reflects paternalism and white privilege, as discussed above. For example, one judge reflected on previous experience as a barrister while working alongside ATSILS. This judge pointed to the barriers that Indigenous people experience through their legal representation from ATSILS, believing that a professional job should be carried out while representing Indigenous people.

> I did recommend "you gotta get serious psychiatric reports of this woman". They're [ATSILS] not well funded organizations. Barristers like me would insist on a professional job being done. I was dropped from the case [and] as far as I know they never bothered getting the report (Interview 5).

At the same time, although this judge was in favour of specialised Indigenous courts, this support was conditional. This judge supported Indigenous courts only for crimes that are processed at the Magistrates Court and where the sentence was aimed at therapeutic forms of punishment.

> Very supportive [Indigenous courts] and with exceptions. Only in the magistrate's court because of minor crimes. Principally therapeutic rather punitive. I am supportive only at the lower courts (Interview 5).

Judges' support of specialised Indigenous courts was in tension with mandatory sentencing legislation. The sympathetic attitudes of judges supportive of specialised Indigenous courts were particularly highlighted given there are already cultural factors in place in the sentence guidelines for judges to take into consideration. However, it seemed that the cultural considerations factor is insufficient and falls short of an appropriate and fair sentencing practice which is why for these judges they expressed support for specialised Indigenous courts.

Not all judged supported specialised Indigenous courts, though. The main reason provided by these judges were about Australian jurisprudence. These judges said that all people involved in crime, regardless of race, should be tried and processed under the same legal system. For example, one judge was not supportive of specialised Indigenous courts. However, this judge also expressed perceptions of sympathy for Indigenous people, suggesting that this opposition to the courts was not about *explicit* racism. The contradictory attitudes expressed by this judge were especially highlighted when they mentioned that people should be processed under the same law yet they claimed that society should understand cultural sensitiveness.

> There should be one law, theoretical view (Interview 4).
>
> ***
>
> Understanding humanity, that is an art. Cultural sensitiveness is something we all should understand (Interview 4).

Another judge not supportive of Indigenous courts similarly referred to the importance of people being processed under the same law. The clashing point was that they claimed to be cautious when sentencing Indigenous people. These comments initially epitomised sympathy for Indigenous people. However, a more plausible explanation is that this judge wants to avoid being targeted for racial prejudices and having their sentence judgements appealed. For this judge, based on their opposition to specialised Indigenous courts, the way they treat Indigenous people was not reflective of sympathetic attitudes about Indigenous people. Instead, their complex attitudes demonstrate that while they are not in accord with specialised considerations for Indigenous people, they nevertheless adhere to sentence guidelines.

> You shouldn't have a basis. We're all equal before the law, same starting place. No quantitative evidence that it [Indigenous courts] reduced recidivism (Interview 3).
>
> ***
>
> You feel you need to be careful. You can't be as hard on them (Interview 3).

I also found one judge whose perceptions were transparently harsh. This judge clearly opposed specialised Indigenous courts and supported increasing the severity of punishments for women.

> Not supportive. Well we might as well have a Spanish court, an Italian court. I mean the law is the same for everyone. And you can take into account any defendants' background for special circumstances…I don't think it [Indigenous courts] was necessary (Interview 6).
>
> ***
>
> They should go higher, sentences. But we're constrained by the court of appeal. But they [women] should get higher sentences (Interview 6).

Regardless of judges' views on how Indigenous people should be treated, their perceptions show that they conduct themselves in accordance to their judicial role. The group of judges who expressed support for specialised Indigenous courts suggest that their sentiment is one of acknowledgement and awareness that the current legislature is not appropriate for the way Indigenous people are treated. Their sympathetic comments suggested law reform in order to improve the current treatment for Indigenous people. This demonstrates a limited awareness of the actual challenges Indigenous people face within the legal and political framework in Australia; simple law reform without concurrent cultural change is unlikely to be effective. Perceptions from some judges also demonstrate that were it not for the sentence guidelines currently in place, like cultural considerations, judges opposed to specialised Indigenous courts would enforce punishments in line with their attitudes on Indigenous people. With their views that people should be sentenced under one rule of law, therefore ignoring the disadvantaged circumstances that Indigenous people experience, this group of judges would be more likely to sentence Indigenous people harshly.

7.6. Conclusion

This chapter shows how structures of the court adversely impact the treatment of Indigenous women. Even though Indigenous women were recipients of specific legislative measures to mitigate their treatment based on Indigeneity, their different court experience ultimately created more adverse impacts that contribute to their on-going marginalization. This includes their likelihood of reoffending and re-entering the courts, while also remaining oppressed on the basis of the overlap with law, their gender and their Indigeneity. Data from this chapter also emphasises how Indigenous women's position in society where they continue to rely on government agencies is linked to the adverse impacts of the structural racism embedded in the courts.

Chapter 8: Conclusion

8.1. Introduction

This thesis has reported on research examining the structures that affect women's treatment throughout the sentencing processes in the higher courts. Specifically, I explored judges' explanations of the differential sentencing treatment of Indigenous and non-Indigenous women, alongside observations and transcript analysis of the structures in the higher courts that affect Indigenous and non-Indigenous women's sentencing treatment. Another aim of this research explored the impact of Indigeneity and gender on the sentencing processes of the higher courts. This final chapter provides an overview of the research aims and foci and provides some ideas and recommendations for future use of the research outcomes.

8.2. Summary of the Thesis Context

My interest in undertaking this project stems from my exposure to women who make contact with the criminal justice system (CJS) through both victimization and offending. Personal and professional contact with women gave me an insight into how women of colour are marked by experiences of marginalisation and affected by different forms of abuse, poverty, and discrimination. My interest in this project also overlaps with a curiosity for exploring how the structures of the justice system intersect with women's gender and race.

Diverse professional experience which exposed me to women who offend particularly influenced my interest in tackling this project. I gained vital knowledge about the disadvantages that lead women to offend through professional roles such as my work in an emergency domestic violence shelter, providing case management services to the historical chronically homeless community of 'Skid Row' in Los Angeles, California, reviewing dossiers of inebriation-related incidents in a Tribal health facility in remote Alaska, and examining parole board case files for the Ministry of Justice in London. Similarly, my volunteer experience in prisons showed me the complex experiences of women and men in prison. The key pattern throughout my professional roles is that women offend in the context of marginalised lives and this complexity is amplified when other identities are layered with their gender.

I also embarked on this doctoral project initially drawing from my master's research project on public perceptions of sentencing treatment. Although I was eager to continue exploring what the public thinks about people who offend, I also wanted to narrow my focus to judicial attitudes about minority women like Australian Indigenous women. I was interested in learning about the ways judges talk about Indigenous and non-Indigenous women because I felt that judges' narratives about women would help better understand the way judges impose sentencing.

From the beginning, however, my interest in tackling this doctoral project stems from reflecting on my positionality as a minority woman of Mexican descent. I began this thesis by reflecting on my positionality as a Mexican American woman where I am part of the macho culture embedded in my family. In particular, my lived experience exposed me to women in the justice system through the narratives from my older female relatives. The highlight in listening to stories from both my female relatives who are champions for disadvantaged women and those who have endured victimized experiences is that I developed empathy for women given that women's socially constructed role in society is linked to marginalised experiences. I brought this empathy to my doctoral research.

In the first chapter I also introduced the Royal Commission into Aboriginal Deaths in Custody, which remains an important contribution to social and scholarly understandings of Indigenous peoples' experience of the criminal justice system. An important limitation of this report that I stress, and that is relevant to this doctoral project, is that it pays limited attention to the situation of Indigenous women. I point to this limitation as an example of Indigenous women's on-going oppression where their voices are not heard or considered in legal structures and society as a whole because of the intersections of their gender and Indigeneity. I also detail how the Royal Commission set out the framework for much of the research that followed, so the limitation pointed above is important given the current lack of understanding of the complexities on how gender and Indigeneity intersect with structures of the justice system, and the higher courts in particular, to impact Indigenous women's sentencing treatment.

8.3. Indigenous women and the CJS and higher courts

The second chapter of this doctoral project lays the foundation for the feminist and critical race approaches that I took throughout my research. I provided an overview of feminism through a review of women's movements and waves and defined feminism using key elements from some of the different strands of feminism. I stressed that ideas,

histories, and practices from the different feminisms are not necessarily unified. It was crucial to highlight this point because I navigated my research through the viewpoint that women's experiences are different, particularly for women of colour such as Australian Indigenous women. My overview on feminist theories focused on the contributions of Black feminism and Indigenous feminism as I discussed the historical and ongoing ways women of colour experience intersectional oppression on the basis of their race, Indigeneity, and gender. In drawing the focus to Indigenous feminism, I discuss how white feminism is embedded with the assumed superiority of non-Indigenous women toward Indigenous women through their whiteness and identity in white sovereign patriarchy. I also demonstrated how the colonisation of Australia by British settlers is at the forefront of women's different historical and contemporary life experiences. A key point about this discussion is that I move beyond women's collective unity based on gender and point to Indigeneity as a key impact to women's different lived experiences.

Following a review of feminisms, I highlighted the contributions of feminist criminology to criminological research. Feminist criminology was discussed as I narrated women's experiences through this lens, while demonstrating the ways gender shapes the treatment for women who make contact with the criminal justice system as offenders. I narrowed the focus to Black feminism and Indigenous feminism and given my discussion over the historical and ongoing ways women of colour experience intersectional oppression on the basis of their race, Indigeneity, and gender. I also presented theoretical applications to explain why women commit crime and the different ways they are treated in the CJS. An overview about the theoretical explanations for why some groups of women historically receive different treatment than others in the CJS was provided.

A review of criminological research of Indigenous issues was also discussed. I discussed research on Indigenous issues in criminology such as how transgenerational trauma is linked to colonialism. This section provided some of the research approaches and hypotheses put forward to explain Indigenous peoples' contact with the CJS. In particular, I discussed the applicability of Critical Race Theory (CRT) to how the structures of the justice system, specifically the higher courts, intersect with gender and Indigeneity, and in turn, impact their different experiences in court compared to non-Indigenous women. My discussion on CRT especially paid attention to concepts related to the impacts of colonisation in contemporary structures as well as the ways the higher courts as an institution perpetuates the production and ongoing marginalisation of Indigenous peoples as a group. Specifically for Indigenous women, I also detail the

application of CRT to examine the ways structures of the higher courts affect women's sentencing treatment. In the same tone, it was imperative to acknowledge that I am central to the research, so my positionality as a woman and a woman of colour was embedded in the research.

To establish the context of my research, in Chapter 3 I discussed women's contact with the three tiers of the criminal justice system, examining both statistical data available and previous research. Each section discussed women's contact across all criminal jurisdictions: police, courts, and the prison system. The key highlight of this snapshot in time demonstrated that Indigenous women remain over-represented in the data throughout all levels of the criminal justice system. The data also revealed that racially motivated discrimination leads Indigenous women into the justice system and in turn continues to impact all aspects of their lived experience, contributing to marginalised lives. The data also shows that the adverse treatment that Indigenous women received by the CJS is caused through the complex interaction of factors related to their Indigeneity and their gender. My key point about presenting existing research on policing, court, and prison practices was to demonstrate how women's treatment, particular Indigenous women's treatment, within the whole system is relevant to theoretical concepts like Critical Race Theory.

While my attention was on the higher court jurisdictions as an under-researched court area and the focus of my research, in Chapter 3 I discuss general information about the role of courts in the justice system, how they are organized, and the function and kinds of decisions that judges make. In particular, I detail how judicial attitudes have had an impact on the over-representation and discrimination of Indigenous women in all three jurisdictions given judge's attitudes legitimise the overzealous racially motivated policing while their sentencing decisions directly contribute to the numbers of Indigenous women who go to prison.

Another area that I detail in Chapter 3 involves the existing research on how Indigenous women and their prison treatment identifies the impact of institutionalised racism and the colonial project. This line of research emphasises that prison is a form of responding to the socially structured disadvantages experienced by Indigenous women, and Indigenous people as a group. In the same fashion, in this discourse I highlight how advancing the colonial project has evolved from the historical regulation and punishment of Indigenous women, and Indigenous peoples as a group, to contemporary racialized punishment via apparently legitimate means.

8.4. The research approach

Chapter 4 presents the approach to the research, consisting of qualitative approaches used including interviews, observations, and analysis of court transcripts. The main aim of combining these qualitative approaches was to produce a rich, holistic data set beyond the scope offered by a single method. For example, interviews with judges allowed me to explore the ways their stated attitudes about women, especially Indigenous women, resonate with how they carry out their sentencing practices for women. Observations in courtrooms focused on how individual aspects such as appearance, behaviour and demeanour are understood through a socially structured lens and it is these structural interpretations which are then reflected in the treatment, particularly sentencing. Sentencing court transcripts enhanced the value of the project as they allowed me to compare my interviews and observations with formal court record and investigate whether judges' attitudes (what they say in the interviews) resonate with sentence practices (what they do in the courtroom). Therefore, I was able to identify whether judges' stated beliefs about women impacts their sentencing practices. This triangulated approach also allowed me to explore ways Indigenous women's treatment in the higher courts is impacted by the intersection of their Indigeneity and their gender.

The data was collected in North Queensland and the people involved in my interviews are appointed judges in the Supreme and District Courts from Cairns. This location was convenient to my own location; more importantly, it is an under researched location; and an area with a relatively large proportion of Indigenous people in this area. Thus, I was able to gain insight into judges' attitudes about Indigenous peoples who reside in regional areas and remote communities. I conducted eight in-depth interviews with judges, including interviews with two magistrates from the magistrates' courts. The interviews with judges from the higher courts build on courtroom observations as the judges interviewed mainly presided over these cases.

Chapter Four also discusses my observations in courtrooms in the higher courts of Townsville and Cairns in North Queensland. I observed a total of 72 cases between July 2014 and November 2015. I observed 20 cases involving women where in 12 cases the offender was a non-Indigenous woman and in eight cases the offender was an Indigenous woman. Although the focus of my analysis is on the sentence outcomes, I observed all aspects of the court process, not simply sentence hearings. In this chapter I also detail that most of the cases I observed physically in courtrooms and in some

circumstances virtually through video conference. While my main interest was the sentencing cases involving Indigenous and non-Indigenous women offenders and judges in courtrooms, this chapter details how I recorded a range of observations relevant to the general courtroom environment.

Details about how I accessed transcriptions of court proceedings involving Indigenous and non-Indigenous women offenders processed before the higher courts in Townsville and Cairns is also discussed in Chapter Four. I selected four cases based on the type of offence and included cases that involved serious offending including illicit drugs, violent, and fraud offences. The four transcripts related to the sentence remarks of relevant cases where I had conducted actual observations and were presided over by the judges who I chose to interview. In particular, the transcripts selected allowed me to investigate the ways the sentence outcomes from these four cases compared with what I observed in their respective court processes, and with how the judges that presided in these cases, who I interviewed, articulated their decisions. Thus, these selected transcripts allowed for a rich and holistic data set.

While the scope of this research is on the treatment of women processed in the higher courts in North Queensland, specifically Indigenous women, I also drew on data that is relevant to Indigenous people as a group. Information related to formal procedures used such as recruitment of judicial participants, processes used during courtroom observations, and the structure of the analysis of court transcriptions is also provided. This includes details related to ethical considerations and limitations about the research. Further, discussion about how both critical race and feminist theoretical lenses were integrated with the qualitative methods for conducting the research are discussed in this chapter. This research was particularly approached from a feminist lens so I was acutely aware of my positionality as embedded in the research, especially during the interviews with judges and observations in higher court courtrooms.

8.5. Findings

The first aim of this research was to examine the structures of the higher courts that impact the treatment of Indigenous women in the sentencing process. The findings discussed in the thesis indicate that court procedures involving mitigating and aggravating submissions narrated in court reinforced structural racism for Indigenous women. While Indigenous women came before the higher courts already experiencing significant disadvantages, and although there were specific legislative measures to mitigate their

treatment based on Indigeneity, their higher court experience ultimately created more adverse impacts that contribute to their on-going marginalization. Yet mitigating submissions also denied Indigenous women's autonomy and postulated different court processes, which pointed to the paternalistic sentencing practices embedded within higher court procedures. Other structures of the higher courts that impacted the treatment of Indigenous women and reinforced structural racism included legal representation from Australian and Torres Strait Islander Legal Services (ATSILS) and judicial perceptions about Indigenous women. Some of the structures of the higher courts that impacted the treatment of Indigenous women on the basis of their Indigeneity similarly extended to impact Indigenous people as a group.

The second aim of this research was to examine how Indigeneity and gender intersect to impact the treatment of women by the higher courts. The findings discussed in the thesis show that the intersectionality of Indigenous status and gender for Indigenous and non-Indigenous women impacted their experiences in the higher courts differently. Even though non-Indigenous and Indigenous women shared similar experiences that led to their offending, their lived experiences were understood and narrated differently in court. Non-Indigenous women were presented according to traditional gender roles, presented as feminine and/or victims to explain how disadvantage led to their offending. A particular narrative that non-Indigenous women were subjected to was one where their hardships of financial stress or poor interpersonal relationships with men lead to poor mental health and illicit drug use, and in turn, explained their offending.

In contrast, Indigenous women were subjected to a particular line of narrative that emphasised their alcohol use, while disregarding their mental health, child dependent responsibilities, educational and skill attainment. For Indigenous women, these western gender roles were rarely used in narratives about their disadvantaged circumstances, suggesting that gender roles are constructed differently depending on women's Indigenous status. While the different ways in which gender roles of femininity were used based on women's Indigeneity could be explained through their different offending patterns, a more plausible explanation is that Indigenous women are singled out and disregarded from the advantages that come from perceptions of femininity based on not conforming. Using Critical Race Theory as my lens, these findings show that structural racism is amplified in the higher courts for Indigenous women given their lack of conforming to 'traditionally' social constructs of femininity.

The third aim of this research was to examine judges' explanations for the different sentencing and outcomes between Indigenous and non-Indigenous women processed in the higher courts. The findings discussed in the thesis reveal that key to judges' explanations of the different sentences experienced by Indigenous and non-Indigenous women were factors outside of their judicial powers. Although judges' perceptions show that they are aware of the historical and ongoing inequalities and so perceive Indigenous women as more disadvantaged than non-Indigenous women, and while judges commonly view this disadvantage on the basis of their Indigeneity, these judicial attitudes were not referred to explicitly during sentencing decision making. Thus, at the heart of judges' claims that external factors influenced their sentence decision-making process was that they are governed by sentencing guidelines.

Further, regardless of judges' views on changes in legislation, the point that stood out was that they see themselves as abiding by their judicial role and adhering to sentence guidelines. The result of this perception is to externalise responsibility and liability for imposing different sentencing treatment for Indigenous and non-Indigenous women. That is, judges used changes in legislation to justify Indigenous and non-Indigenous women's different treatment, rather than their own attitudes or structural racism in the higher courts. Building on judges' explanations for women's treatment differences on the basis of Indigeneity was their attribution of responsibility to law officials from different jurisdictions. Judges conveniently outsource the blame to on-going over-policing practices, miscarriages of justice and courts of appeal, ATSILS being under resourced, and the poorly designed law reforms by politicians solely echoing public sentiment and votes, when they discussed racial differences in women's treatment.

8.6: Implications and Recommendations

This thesis has filled several gaps in the existing research. The focus on women, and particularly Indigenous women, and how structures of the higher courts impact their treatment across all court processes, specifically sentencing, is an important contribution to the scholarly literature on feminist criminology. Further, the findings of the research have implications for the practical application of the research in areas of practice, policy and future research.

8.6.1. Criminological practice in the courtroom

The potential implications for actual practice relate to the importance of increased cultural awareness for court practitioners across a variety of sectors in the courts. Comprehensive cultural awareness should emphasise on developing the skills and how to put these to practice. Training should be aimed at the overlap between the understandings of aggravating factors and how the issues of colonisation and institutional racism impact in the court. For instance, interpretations and circumstances surrounding public order offences should be addressed in the training. This sort of training on the issues of colonisation and institutional racism should also focus on how transgenerational trauma is linked to mental health and substance use.

In my interaction with judges I highlighted their sympathetic view in my research and learned about their intelligence and willingness to consider issues surrounding Indigenous people. However, their compassion and sympathy is not enough given they are part of the structures of the court system that impact Indigenous people. Therefore, training should focus on developing judicial cultural awareness that could potentially shift beyond sympathy toward empathy. For example, extending awareness of judges' attitudes on over-policing is important given they are in a position to implement change in the courts. Further, although I also observed first hand a lot of compassion for Indigenous women, cultural awareness should be extended specifically to the lived experiences of Indigenous women. This training should highlight the importance of increased education and awareness of not just Indigeneity and gender but the complex intersections. In particular, training should include the circumstances surrounding mitigating factors and intellectual understandings of both, motherhood impacted by race and femininity impacted by Indigeneity.

8.6.2. Criminological Policy

Policy implications should address the gaps in data available to highlight the particular situation of Indigenous women. There should be support for more dimensions of in-depth data gathering that distinguish between Indigenous and non-Indigenous women who make contact with the criminal justice system through offending. This should include more in-depth data on reporting periods, appearances in police stations, data on all court levels, and prison information should also include women on short sentences for minor offences, or those not present during the census date.

Specifically for Indigenous women, data should report on both the number of Indigenous women finalised and sentenced in court. Data information highlighting Indigenous women should move beyond the current three jurisdictions (NSW, Qld., and NT) to all Indigenous women in Australia who are processed in criminal jurisdictions. Similarly, there should also be support for the implementation of policy recommendations put forward by the RCIADIC report. I would like to further add my voice for the continued implementation for criminal policies to review our criminal justice system so that women's voices and the intersectionality of Indigeneity and gender is addressed.

8.6.3. Further research

Throughout the research I emphasised on my positionality as a minority woman of Mexican descent. Although I am not an Indigenous woman and so I did not report on Indigenous women's experiences, the actual experiences of Indigenous women are important. There is a need for further content for research that does explore Indigenous women's experiences so that the void with their voice is fulfilled. In particular, it is vital that we give voice to Indigenous women through future research about their experiences of the higher courts. This future research will complement the findings from this research which contribute to and resonate with the continued historically different treatment experienced by Indigenous and non-Indigenous women who offend.

8.7. The research process

An important aspect of the contributions from the present research is that it is qualitative and draws on triangulation of several research methods. The observational approach was a useful source to understanding judicial sentencing practices and the ways court matters are processed in the courtroom setting. On its own, however, participant observation in the court system is difficult because of the risks associated to misinterpreting procedures that occur in courtrooms, and more importantly, legal knowledge associated to legislations and processes like ranges of sentencing. I found that knowledge of legal processes was crucial and necessary in order to avoid misinterpreting sentencing outcomes. Likewise, interviews are a rich source of in-depth information. But a challenge of interviews is that people self-censor and present themselves as they want to be, not always accurately representing their true attitudes and beliefs. Analysis of court

transcripts is more common in criminological research but as a sole method it misses the detail that sitting in a court room and speaking to judges offers. Thus, the triangulated approach of this research where I combined interviews, observations, and transcript analysis of court cases increased the depth and richness of my data. I suggest that future research on complex issues also consider such an approach.

A specific area for future research with judges is their judicial practices, which should centre on observational research. While observational research approaches are common in courtrooms to gauge judicial practices, most tend to narrow the focus to sentencing practices. Instead of observations in courtrooms limited to the sentencing phase, findings from this research demonstrate that the emphasis should be observing court matters from arraignment to sentence, that is, from start to finish, for a more in depth understanding of the role that gender and Indigeneity plays in judiciary practices and inside courtroom settings as a whole.

This research suggests that we need a shift away from the narrative that Indigenous women's continued over-represented contact with the court system is an 'Indigenous problem'. Instead, we must acknowledge that structures and institutions shape the treatment of Indigenous women and contribute to their marginalised lives. This research into the judiciary is just the beginning; future research should continue to focus on the structures inside the court. Drawing from the results of this research, more research focusing on judicial attitudes is necessary given the important role judges play in impacting the over-representation and discrimination of Indigenous women across all three jurisdictions: policing, courts and prisons. More research on judges' attitudes is particularly necessary because their perceptions legitimise the racially motivated policing, and their sentencing practices contribute to the numbers of Indigenous women who go to prison.

8.8. Conclusion

This thesis reported on research that examines the structures that affect women's experience of the sentencing processes in the higher courts in North Queensland. The key aim of this research was to explore judges' explanations of the structures in the higher courts that affect Indigenous and non-Indigenous women's sentencing treatment. Another aim of this research explored the impact that the intersections of Indigeneity and gender has on the sentencing processes of the higher courts. Findings show that despite some examples of sympathy toward Indigenous women, the masked prejudice of some judges

were also drawn out to support forms of new racism, which in turn, emphasized structural racism in the higher courts. This research proposes to look at the broader context of the criminal justice system given the systemic racism in the higher courts cannot be seen in isolation from police and prison jurisdictions.

References

ABC News (2013, 24 May). Aboriginal deaths in custody numbers rise sharply over past five years. ABC Radio Australia. Retrieved from http://www.abc.net.au/news/2013-05-24/sharp-rise-in-number-of-aboriginal deaths-in-custody/4711764

Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) (2002). *Social justice report.* Sydney, NSW: Human Rights and Equal Opportunity Commission.

Adler, F. (1975). *Sisters in crime: the rise of the new female criminal*. New York, NY: McGraw-Hill.

Adler, F. (1977). The interaction between women's emancipation and female criminality: a cross-cultural perspective. *International Journal of Criminology and Penology, 5*, 101-112.

American Psychiatric Association (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Arlington, VA: American Psychiatric Publishing.

Australian Bureau of Statistics (ABS) (2017a). *Criminal courts.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2017b). *Corrective services.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2017c). *Recorded crime.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2016a). *Criminal courts.* Canberra, ACT: ABS

Australian Bureau of Statistics (ABS) (2016b). *Prisoners in Australia.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2015). *Recorded crime - offenders, selected states and territories*. Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2014). *Prisoners in Australia.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2013). *Prisoners in Australia.* Canberra, ACT: ABS.

Australian Bureau of Statistics (ABS) (2003). *Legal practices.* Canberra, ACT: ABS.

Australian Institute of Aboriginal and Torres Strait Islander Studies (2014). Indigenous Australians: Aboriginal and Torres Strait Islander peoples. Retrieved from https://aiatsis.gov.au/explore/articles/indigenous-australians-aboriginal-and-torres-strait-islander-people

Baldry, E. (2010). Women in transition: From prison to... *Current Issues in Criminal Justice, 22*(2), 253-267.

Baldry, E., Brown, D., Brown, M., Cunneen, C., Schwartz, M., & Steel, A. (2011). Imprisoning rationalities. *Australian & New Zealand Journal of Criminology, 44*(1), 24-40.

Baldry, E., Carlton, B., & Cunneen, C. (2015). Abolitionism and the paradox of penal reform in Australia: Colonialism, context, cultures and co-option. *Social Justice*, *41*(3), 168-189.

Baldry, E. & Cunneen, C. (2014). Imprisoned Indigenous women and the shadow of colonial patriarchy. *Australian & New Zealand Journal of Criminology, 47*(2), 276-298.

Baldry, E. & Cunneen, C. (2012). Contemporary penality in the shadow of colonial patriarchy. Proceedings of the 5th Annual Australian and New Zealand Critical Criminology Conference, pp. 1-15. From: 5th Annual Australian and New Zealand Critical Criminology Conference, 7-8 July 2011, Cairns, QLD., Australia.

Baldry, E. & McCausland, R. (2009). Mother seeking safe home: Aboriginal women post-release. *Current Issues in Criminal Justice, 21*(2), 288-301.

Bartels, L. (2012). *Sentencing of Indigenous women.* Indigenous Justice Clearinghouse Brief 14. Canberra, ACT: Australian Institute of Criminology.

Bartels, L. (2010a). *Indigenous women's offending patterns: A literature review.* Research and Public Policy Series No. 107. Canberra, ACT: Australian Institute of Criminology.

Bartels, L. (2010b). *Diversion programs for Indigenous women*. Research in Practice Report No. 13. Canberra, ACT: Australian Institute of Criminology.

Bartels, L. & Richards, K. (2011). Qualitative criminology: Stories from the field. Sydney: Hawkins Press.

Beauvoir, S. (1952). *The second sex.* New York: Vintage Books.

Behrendt, L. (2016). *Finding Eliza: Power and Colonial Storytelling.* St. Lucia, QLD: University of Queensland Press.

beyondblue (2016). What is mental health? Retrieved from https://www.beyongblue.org.au/the-facts-/what-is-mental-health on 26/06/2017.

Birt, L., Scott, S., Cavers, D., Campbell, C., & F. Walter (2016). Member checking: A tool to enhance trustworthiness or merely a nod to validation? *Innovative Methods, 26*(3), 1802-1811.

Bishop, L., Ransom, A., Laverty, M., & Gale., L. (2017). *Mental health in remote and rural communities.* Canberra, ACT: Royal Flying Doctor Service of Australia.

Blagg, H. (2008). Crime, Aboriginality and the decolonisation of justice. Sydney, NSW: The Federation Press.

Bond, C. & Jeffries, S. (2011). Indigeneity and the judicial decision to imprison: A study of Western Australia's higher courts. *British Journal of Criminology, 51*: 256-277.

Bond, C., Jeffries, S. & Loban, H. (2011). *Exploring Indigenous and non-Indigenous sentencing in Queensland*. Brisbane: Queensland University of Technology.

Bracken, D. C., Deane, L. & Morrissette, L. (2009). Desistance and social marginalization: The case of Canadian Aboriginal offenders. *Theoretical Criminology, 13*(1), 61-78.

Breiding, M. J., Basile, K. C., Smith, S.G., Black, M.C., & Mahendra, R.R. (2015). *Intimate partner violence surveillance: Uniform definitions and recommended data elements, Version 2.0.* Atlanta, GA: National Center for Injury Prevention and Control: Centers for Disease Control and Prevention.

Bohner, G. & Wanke, M. (2002). *Attitudes and attitude change.* Hove, UK: Psychology Press.

Bond, C. & Jeffries, S. (2013). Differential sentencing of Indigenous offenders: What does research tell us? *Indigenous Law Bulletin, 8*(7), 15-18.

Bond, C. & Jeffries, S. (2011). Indigeneity and the judicial decision to imprison: A study of Western Australia's Higher Courts. *The British Journal of Criminology, (51)*2: 256-277.

Brown, D., Cunneen, C., Schwartz, M., Stubbs, J., & Young, C. (2016). *Justice reinvestment: Winding back imprisonment.* Basingstoke, UK: Palgrave Macmillan.

Brown, D., Farrier, D., McNamara, L., Steel, A., Grewcock, M., Quilter, J., & Shwartz, M. (2011). *Criminal laws: Materials and commentary on criminal law and process of New South Wales.* Annandale, NSW: The Federation Press.

Butler, J. (1999). *Gender trouble* (2nd ed.). New York: Routledge.

Butler, T. and Milner, L. (2003). *The 2001 New South Wales inmate health survey.* Sydney, NSW: Corrections Health Service.

Carlen, P. (2002). Women's imprisonment: Models of reform and change. *Probation Journal, 49*(2): 76-87.

Carlen, P. (1990). Alternatives to women's imprisonment. Milton Keynes: Open University Press.

Carlen, P. (1983). *Women's imprisonment: A study in social control*. London, UK: Routledge & Kegan Paul.

Carlen, P. (1976). *Magistrates' justice.* London: Martin Robertson.

Carlen, P. & Worrall, A. (1987). *Gender, crime and justice.* Milton Keynes, UK: Open University Press.

Carrington, K. (1990). Aboriginal girls and juvenile justice: What justice? White justice. *Journal for Social Justice, 3*, 1-18.

Cash, P. & Culley, S. (2015). The role of experimental studies in design research. In P.A. Rodgers & J. Yee (Eds.), *The Routledge companion to design research* (pp. 175-189). New
York, NY: Routledge.

Caxton Legal Centre (2017). *Caxton Legal Centre's lawyers practice manual Queensland*. North Ryde, NSW: Law Book Co.

Charles, C. (1991). Sentencing Aboriginal people in South Australia. *Adelaide Law Review, 13*(1): 90-96.

Chesney-Lind, M. (2006). Patriarchy, crime, and justice: Feminist criminology in an era of backlash. *Feminist Criminology, 1*(1), 6-26.

Chesney-Lind, M. (1978). Chivalry re-examined: Women and the criminal justice system. In L.H. Bowker (Ed.), *Women, crime and the criminal justice system*. Lexington: Massachusetts: D.C. Heath & Company.

Chesney-Lind, M. & Faith, K. (2000). What about feminism? Engendering theory-making in criminology. In R. Backman (Ed.), *Explaining criminals and crime: Essays in contemporary criminological theory.* Los Angeles, CA: Roxbury.

Chesney-Lind, M. & Pasko, L. (2013). *The female offender: Girls, women and crime, 3RD Edition.* Thousand Oaks, CA: Sage Publications.

Chesney-Lind, M. & Pasko, L. (2004). *The female offender: Girls, women and crime, 2ND Edition.* Thousand Oaks, CA: Sage Publications.

Chesterman, J. & Galligan, B. (1997). *Citizens without rights: Aborigines and Australian citizenship.* Cambridge: Cambridge University Press.

Chisholm, R & Nettheim, G. (2012). *Understanding law: An introduction to Australia's legal system* (8th ed.). Chatswood, NSW: LexisNexis Butterworths.

Coe, P. (1980). Aborigines and the criminal justice system. In Proceedings of the Institute of Criminology, *Aboriginals and the criminal law in New South Wales.* Sydney: Sydney University Law School, 2 July.

Cohen, S. (1994). Social control and the politics of reconstruction. In D. Nelken (Ed.), *The futures of criminology* (pp. 63–88). London, UK: Sage Publications.

Cole, A., Haskins, V., & Paisley, F. (2005). *Uncommon ground: White women in Aboriginal history*. Canberra, ACT: Aboriginal Studies Press.

Collins, L. & Mouzos, J. (2002). *Death in custody: A gender-specific analysis* (Trends & Issues in Crime and Criminal Justice No. 238). Canberra, ACT: Australian Institute of Criminology.

Connell, R. (1987). *Gender and power.* Stanford: Stanford University Press.

Cook, C., Creyke, R., Geddes, R., Hamer, D., & T. Taylor (2015). *Laying down the law* (9th ed.). Chatswood, NSW: LexisNexis Butterworths.

Cornwell, A. (1994). Three for the price of one: Notes from a gay Black feminist. In J. Karla and A. Young (Eds.), *Lavender culture*. New York, NY: New York University Press.

Corston, J. (2007). *The Corston Report: a review of women with particular vulnerabilities in the criminal justice system*. London, UK: Home Office.

Cowlishaw, G. (2004). Racial positioning, privilege and public debate. In A. Moreton-Robinson (Ed.), *Whitening race* (pp. 59-74). Canberra, ACT: Aboriginal Studies Press.

Crawford, J. & Opeskin, B. (2004). *Australian courts of law* (4th ed.). Oxford, UK: Oxford University Press.

Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum: 1*(8), 139-167.

Cudd, A. E. & Andreason, R. O. (2005). Feminist theory: A philosophical anthology. Oxford, UK: Blackwell Publishing.

Cunneen, C. (2011). Punishment: Two decades of penal expansionism and its effects on Indigenous imprisonment. *Australian Indigenous Law Review, 15*(1), 8-17.

Cunneen, C. (2007). Reflections in criminal justice policy since the Royal Commission into Aboriginal Deaths in Custody. In N. Gillespie (Ed.), *Reflections: 40 years on from the 1967 Referendum* (pp. 135-146). Adelaide, SA: Aboriginal Legal Rights Movement, Inc.

Cunneen, C. (2006a). Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: Some conceptual and explanatory issues. *Current Issues in Criminal Justice, 17*(3), 329-346.

Cunneen, C. (2006b). The criminalisation of Indigenous people. In R. C.A. Maaka & C.Andersen (Eds.), *The Indigenous experience: Global perspectives* (pp. 189-205). Toronto: Canadian Scholars' Press, Inc.

Cunneen, C. (2001). *Conflict, politics and crime: Aboriginal communities and the police.* Sydney: Allen and Unwin.

Cunneen, C., Allison, F., & M. Schwartz (2014). Access to justice for Aboriginal people in the Northern Territory. *Australian Journal of Social Issues, 49*(2), 219-240.

Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M., & A. Steel (2013). *Penal culture and hyperincarceration: The revival of the prison.* Surrey, UK: Ashgate Publishing Limited.

Cunneen, C. & Libesman, T. (1995). *Indigenous people and the law in Australia*. Sydney: Butterworths.

Cunneen, C. & McDonald, D. (1997). *Keeping Aboriginal and Torres Strait Islander people out of custody.* Canberra, ACT: Aboriginal and Torres Strait Islander Commission (ATSIC).

Cunneen, C. & Rowe, S. (2014). Changing narratives: Colonised peoples, criminology and social work. *International Journal for Crime, Justice and Social Democracy, 3*(1), 49-67.

Cunneen, C. & Tauri, J. (2016). *Indigenous criminology.* Bristol, UK: Policy Press.

Daly, K. (2008). Feminist perspectives in criminology: A review with gen Y in mind. In E. McLaughlin & T. Newburn (Eds.), *The handbook of criminal theory* (pp. 225-246). London, UK: Sage Publications.

Daly, K. (2006). Feminist thinking about crime and justice. In S. Henry & M. Lanier (Eds.), *The essential criminology reader* (pp. 205-213). Boulder, CO: Westview Press.

Daly, K. (2001). Feminist criminologies. In E. McLaughlin & J. Muncie (Eds.), *The Sage dictionary of criminology* (pp. 119-121). London, UK: Sage Publications.

Daly, K. (1994). *Gender, crime, and punishment*. New Haven, CT: Yale University Press.

Daly, K. & Chesney-Lind, M. (1988). Feminism and criminology. *Justice Quarterly, 5*(4), 497-538.

Datesman, S. & Scarpetti, F. (1980). *Women, crime, and justice.* New York: Oxford University Press.

Davis, A. (2003). *Are prisons obsolete?* New York, NY: Seven Stories Press.

Davis, M. (2011). A reflection on the Royal Commission into Aboriginal Deaths in Custody and its consideration of Aboriginal women's issues. *Australian Indigenous Law Review, 15*(1), 25-33.

Davis, M. (2007). How do Aboriginal women fare in Australian democracy? *Indigenous Law Bulletin, 6*(27), 9-11.

Delgado, R. and Stefancic, J. (2007). Critical race theory and criminal justice. *Humanity & Society, 31*, 133-245.

Delgado, R. and Stefancic, J. (2001). *Critical race theory: An introduction.* New York: New York University Press.

Delgado, R. and Stefancic, J. (1993). Critical race theory: An annotated bibliography. *Virginia Law Review, 79.* Charlottesville, VA: Virginia Law Review Association.

Department of the Prime Minister and Cabinet (2017). *Closing the gap: Prime Minister's report 2017.* Canberra, ACT: Commonwealth of Australia.

Department of Justice and Attorney-General (2016). *Family with complex needs and the intersection of the family law and child protection systems.* Canberra, ACT: Commonwealth of Australia.

de Vaus, D. (2014). *Surveys in social research* (6th ed.). Sydney, NSW: Allen & Unwin.

Doble, J. (1987). *Crime and punishment: The public's view.* New York, NY: Public Agenda Foundation.

Dodson, P. (1991). Regional report of inquiry into underlying issues in Western Australia. *Royal Commission into Aboriginal Death in Custody.* Canberra, ACT: Australia: The Australian Government Publishing Service (AGPS).

Eaton, M. (1993). *Women after prison.* Buckingham, England: Open University Press.

Eaton, M. (1986). *Justice for women? Family, court and social control.* Milton Keynes: Open University Press.

Eggleston, E. (1976). *Fear, favour or affection*. Canberra: Australian National University Press.

Evans, R. (1982). Don't you remember Black Alice, Sam Holt: Aboriginal women in Queensland history? *Hectate, 8*(2), 7-21.

Farrington, D. & Morris, A. (1983). Sex, sentencing and reconviction. *The British Journal of Criminology, 23*(3): 229-248.

Findlay, M., Odgers, S., & Yeo, S. (2014). *Australian criminal justice* (5th ed.). Oxford, UK: Oxford University Press.

Fitzgerald, J. (2009). *Why are Indigenous imprisonment rates rising?* (Crime and Justice Statistics Bureau Brief No. 41.) Sydney, NSW: BOCSAR. Retrieved from http://www.bocsar.nsw.gov.au/Documents/BB/bb41.pdf

Flinders University: General information folio 5: Appropriate terminology, Indigenous Australian peoples. Retrieved from https://www.ipswich.qld.gov.au/__data/assets/pdf_file/0008/10043/appropriate_indigenous_terminoloy.pdf

Flood-Page, C. & Mackie, A. (1998). *Sentencing practice: An examination of decisions in magistrates' courts and in the Crown Court in the mid-1990s.* Home Office Research Study 180. London: Home Office.

Flores, M. (2016, 26 July). Explotan sexual y laboralmente a mujeres e indígenas hidalguenses. *Quadratin.* Retrieved from https://hidalgo.quadratin.com.mx/principal/explotan-sexual-y-laboralmente-a-mujeres-e-indigenas-hidalguenses/

Forsythe, L. & Adams, K. (2009). *Mental health, abuse, drug use and crime: Does gender matter?* (Trends and Issues in Crime and Criminal Justice Series No. 384). Canberra, ACT: Australian Institute of Criminology.

Frankenberg, R. (1993). *White women, race matters: The social construction of whiteness.* Minneapolis, MN: University of Minnesota Press.

Fredericks, B. (2010). Re-empowering ourselves: Australian Aboriginal women. *SIGNS: A Journal of Women in Culture and Society*, *35*(3): 546-550.

Fredericks, B. (2004). A reconstituted social environment feminism and the plight of Aboriginal women in Australia. *Newtopia Magazine (Ideological Issue), 3*(18), Newtopia Magazine.

Freedman, J. (2001). *Feminism*. Buckingham, UK: Open University Press.

Friedan, B. (1963). *The Feminine mystique.* New York, NY: W.W. Norten & Company.

Frye, M. (1983). On being White: Thinking toward a feminist understanding of race and race supremacy. In T. Burg (Ed.), *Politics of reality: Essays in feminist theory*. New York, NY: Crossing Press.

Gadd, D., Karstedt, S., & Messner, S.T. (2012). *The SAGE handbook of criminological research methods.* London, UK: SAGE Publications, Ltd.

Gale, F. (1985). *Aboriginal youth and the law: Problems of equity and justice for Black minorities.* London, UK: Australian Studies Centre, Institute of Commonwealth Studies.

Gale, F. (1972). *Urban Aborigines.* Canberra, ACT: Australian National University Press.

Gale, F., Bailey-Harris, R. & J. Wundersitz (1990). *Aboriginal youth and the criminal justice system: The injustice for justice?* Cambridge, UK: Cambridge University Press.

Gardiner-Garden, J. (2003). *Defining Aboriginality in Australia.* Canberra, ACT: Department of the Parliamentary Library.

Gardiner, G. & Takagaki, T. (2002). Indigenous women and the police in Victoria: Patterns of offending and victimization in the 1990s. *Current Issues in Criminal Justice 13*, 301-321.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society.* Oxford, UK: Oxford University Press.

Gelsthorpe, L. (1997). Feminism and criminology, in M. Maguire, R. Morgan & R. Reiner (Eds.), *The Oxford handbook of criminology.* Oxford, UK: Oxford University Press.

Gelsthorpe, L. & Loucks, N. (1997). Magistrates' explanations of sentencing decisions. In. C. Hedderman & L. Gelsthorpe (Eds.), *Understanding the sentencing of women.* Home Office Research Study 170. London: Home Office.

Graham, K. (1999). Aboriginal marginalisation and racism in the juvenile justice system. Paper presented at the Children and Crime: Victims and Offenders Conference, Brisbane, 17-18 June 1999. Canberra, ACT: Australian Institute of Criminology.

Grande, S. (2003). Whitestream feminism and the colonialist project: A review of contemporary feminist pedagogy and praxis. *Educational Theory, 53*(3), 329-346.

Haebich, A. (2014). *Aboriginal women.* Australia: Australian Women's Archives Project.

Harding, S. (1993). Rethinking standpoint epistemology: What is 'strong objectivity'? in L. Alcoff and E. Potter (eds.), *Feminist Epistemologies.* New York, NY: Routledge.

Harris, C. (1995). Whiteness as property. In K. Crenshaw, N. Gotanda, G. Peller, & K. Thomas (Eds.), *Critical race theory: The key writings that formed the movement*. New York, NY: The New Press.

Haslanger, S. (2000). Gender and race: (What) are they? (What) do we want them to be? *Nous, 34*(1), 31-55.

Hedderman, C. & Gelsthorpe, L. (1997). *Understanding the sentencing of women.* Home Office Research Study 170. London: Home Office.

Heidensohn, F. (1985). *Women and crime.* London, UK: Macmillan Press.

Heiss, A. (2003). *Dhuuluu-Yala: To talk straight.* Canberra, ACT: Aboriginal Studies Press.

Hesse-Biber, S. and Yaiser, M. (2004). Feminist perspectives on social research. Oxford: Oxford University Press.

Hogg, R. (2001). Penality and modes of regulating Indigenous peoples in Australia. *Punishment and Society, 3*(3), 355-379.

hooks, b. (1984). *Feminist theory: From margin to center.* Boston: South End Press.

hooks, b. (1989). *Talking back: Thinking feminist, thinking Black.* Boston, MA: South End Press.

Horowitz, J. (2007). Making every encounter count. Building trust and confidence in the police. *National Institute of Justice Journal, 256*,1-11.

Hough, M., Jacobson, J. & Millie, A. (2003). *The decision to imprison: Sentencing and the prison population.* London, UK: Prison Reform Trust.

Howe, A. (1988). Aboriginal women in custody: A footnote to the Royal Commission. *Aboriginal Law Bulletin, 30*(1), 5-7.

Huggins, J. (1998). *Sister girl.* Queensland: University of Queensland Press.

Huggins, J. (1994). A contemporary view of Aboriginal women's relationship to the white women's movement, in N. Grieve and A. Burns (eds.), *Australian Women and Contemporary Feminist Thought.* South Melbourne, VIC: Oxford University Press.

Huggins, J. (1987). Black women and women's liberation. *Hecate, 13*(1), 77-82.

Hulls, R. (1993). Opening address. Paper presented at the Aboriginal Justice Issues Conference, Canberra, 23-25 June 1992. Canberra, ACT: Australian Institute of Criminology.

Indermaur D & Roberts L 2005. *Perception of crime and justice*. In S. Wilson, G. Meagher, R. Gibson, D. Denemark, & M. Western (Eds.), *Australian social attitudes: The first report*. Sydney, NSW: UNSW Press.

Jaggar, A. (1983). *Feminist politics & human nature.* Lanham, Maryland: Rowman & Littlefield.

Jeffries, S. & Bond, C. (2013). Gender, Indigeneity, and the criminal courts: A narrative exploration of women's sentencing in Western Australia. *Women & Criminal Justice, 23*(1): 19-42.

Jeffries, S. & Bond, C. (2011). *The sentencing of offenders in the lower courts: A study of three Australian jurisdictions.* Canberra, Australia: Criminology Research Council.

Jewkes, Y. (2004). *Media and crime.* London: Sage.

Johnson, E. (1991). *Royal Commission into Aboriginal Deaths in Custody, National Report* (Vols. 1-5). Canberra, ACT: Australian Government.

Jonas, W. (2002). *Social justice report 2002.* Sydney, NSW: Human Rights and Equal Opportunity Commission.

Judicial Commission of New South Wales (2006). *Equality before the law bench book.* Sydney, NSW: Author.

Kachel, S., Steffens, M. & Niedlich, C. (2016). Traditional masculinity and femininity: Validation of a new scale assessing gender roles. *Frontiers in Psychology, 7,* 1-19.

Kerley, K. & Cunneen, C. (1995). Deaths in custody in Australia: The untold story of Aboriginal and Torres Strait Islander women. *Canadian Journal of Women and the Law, 8*(2), 531-551.

Kleck, G., Tark, J. & Bellows, J.J. (2006). What methods are most frequently used in research in criminology and criminal justice? *Journal of Criminal Justice, 34*, 147-152.

Klein, D. (1973). The etiology of female crime: A review of the literature. *Issues in Criminology, 8*, 3-30.

Kruttschnitt, C. (1982b). Women, crime, and dependency: An application of the theory of law. *Criminology, 19*(4), 495-513.

Leonard, E.B. (1983). *Women, crime & society.* New York, NY: Longman.

Liddle, C. (2017, 22 January). Why I don't support changing the date of Amnesia Day. *Eureka Street*. Retrieved from https://www.eurekastreet.com.au/article.aspx?aeid=50528

Lucashenko, M. (2002). Many prisons. *Hecate, 28*(1), 139-144.

Lucashenko, M. (1996). Violence against Indigenous women: Public and private dimensions. *Violence Against Women, 2*(4), 378-390.

Luke, G. and Cunneen, C. (1998). *Sentencing Aboriginal people in the Northern Territory: A statistical analysis.* Darwin, NT: North Australian Aboriginal Legal Aid Service.

Mack, K. & Roach Anleu, S. (2011). Opportunities for new approaches to judging in a conventional context: Attitudes, skills, and practices. *Monash University Law Review, 37*(1), 187-215.

Mack, K. & Roach Anleu, S. (2007). Getting through the list: Judge ccraft and legitimacy in the lower courts. *Social and Legal Studies, 16*, 341-61.

Mackay, M. & Smallacombe, S. (1996). Aboriginal women as offenders and victims: The case of Victoria. *Aboriginal Law Bulletin, 3*(80), 17-23.

MacKinnon, C. (1987). *Feminism unmodified: Discourses on life and law.* Cambridge, MA: Harvard University Press.

Mann, C. (1984). *Female crime and delinquency.* Tuscaloosa, Alabama: University of Alabama Press.

Marchetti, E. (2012). Victims of offenders: Who were the 11 Indigenous female prisoners who died in custody and were investigated by the Australian Royal Commission into Aboriginal Deaths in Custody? *International Review of Victimology, 19*(1), 37-49.

Marchetti, E. (2008a). Indigenous women and the RCIADIC – Part II. *Indigenous Law Bulletin, 7*(2), 6-10.

Marchetti, E. (2008b). Intersectional race and gender analysis: Why legal processes just don't get it. *Social Legal Studies, 17*(2), 155-174.

Marchetti, E. (2007). Indigenous women and the RCIADIC – Part I. *Indigenous Law Bulletin, 7*(1), 6-9.

Marchetti, E. (2006). The deep colonizing practices of the Australian Royal Commission into Aboriginal Deaths in Custody. *Journal of Law and Society, 33*(3), 451-74.

Marchetti, E. (2005a). Unconscious racism: Scrutinizing judicial reasoning in 'Stolen Generation' cases. *Social & Legal Studies, 14*(4), 533-552.

Marchetti, E. (2005b). *Missing subjects: Women and gender in the Royal Commission into Aboriginal Deaths in Custody.* PhD Thesis. Griffith University.

Marchetti, E. & Daly, K. (2004). *Indigenous courts and justice practices in Australia* (Trends & Issues in Crime and Criminal Justice Series No. 277). Canberra, ACT: Australian Institute of Criminology.

Marchetti, E. & Ransley, J. (2014). Applying the critical lens to judicial officers and legal practitioners involved in sentencing Indigenous offenders: Will anyone or anything do? *University of New South Wales, 37*(1): 1-33.

Markus, A. (1990). *Governing savages.* Sydney: Allen and Unwin.

Matthews, R. (2014). *Realist criminology.* Hampshire, UK: Palgrave MacMillan

Matthews, R. (2009). Doing time: An introduction to the sociology of imprisonment, 2nd Edition. New York: Palgrave Macmillan

Matthews, R., Hancock, L., & Briggs, D. (2001). *Juror perceptions and understanding of the court process.* London: Home Office.

McConahay, J. B. (1986). Modern racism, ambivalence, and the modern racism scale. In J. Dovidio & S. L. Gaertner (Eds.), *Prejudice, discrimination, and racism.* New York, NY: Academic Press.

McCorquodale, J. (1987). Judicial racism in Australia? Aboriginals in civil and criminal cases. In K. Hazlehurst (Ed.), *Ivory scales: Black Australians and the law.* Kensington: New South Wales University Press.

McIvor, G., Trotter, C., & Sheehan, R. (2009). Women, resettlement and desistance. *Probation Journal, 54*(4): 347-361.

Meek, M. (2008). *The Australian legal system* (4th ed.). Pyrmont, NSW: Lawbook Co.

Menzies, C. (2001). Reflections on research with, for, and among Indigenous peoples. *Canadian Journal of Native Education, 25*, 19-36.

Messerschmidt, J. W. (1995). From patriarchy to gender: Feminist theory, criminology and the challenge of diversity, in N. Hahn Rafter and F. Heidensohn (Eds.), *International Feminist Perspectives in Criminology* (pp. 167-188). Buckingham, UK: Open University Press.

Millett, K. (1970). *Sexual Politics.* Chicago, IL: University of Illinois Press.

Moreton-Robinson, A. (2015). *The White possessive: Property, power, and Indigenous sovereignty.* Minneapolis, MN: University of Minnesota Press.

Moreton-Robinson, A. (2004). Whiteness, epistemology and Indigenous representation. In A. Moreton-Robinson (Ed.), *Whitening race* (pp. 75-88). Canberra, ACT: Aboriginal Studies Press.

Moreton-Robinson, A. (2000). *Talkin' up to the White woman.* St. Lucia, QLD: University of Queensland Press.

Naffine, N. (1987). *Female crime: The construction of women in criminology.* Boston, MA: Allen and Unwin.

Nagel, I., Cardascia, J., & Ross, C. (1980). Institutional sexism: The case in criminal court. In, R. Alvarez (Ed.) *Discrimination in organizations*. San Francisco: Jossey-Bass.

Nagel, I. & Weitzman, L. (1971). Women as litigants. *Hastings Law Journal, 23,* 171-198.

Nagle, P. & Summerrell, R. (2002). *Aboriginal deaths in custody: The Royal Commission and its records, 1987-91.* Canberra, ACT: National Archives of Australia.

National Mental Health Commission (2014). *The national review of mental health programmes and services.* Sydney, NSW: National Mental Health Commission.

NISATSIC (1997). *Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander Children from their families.* Sydney, NSW: Human Rights and Equal Opportunity Commission.

Nye, A. (1989). *Feminist theory and the philosophies of man*. New York, NY: Routledge.

O'Shane, P. (1980). Aborigines and the criminal justice system. In Proceedings of the Institute of Criminology, *Aboriginals and the criminal law in New South Wales.* Sydney: Sydney University Law School, 2 July.

Paisley, F. (2000). *Loving protection? Australian feminism and Aboriginal women's rights 1919-1939.* Melbourne, VIC: Melbourne University Press.

Parliament of New South Wales (1985). *Report of the task force on women in prison to the Minister for Corrective Services.* Sydney, NSW: Parliament of New South Wales.

Parsons, H.M. (1974). What happened at Hawthorne? *Science, 183*, 922-932.

Payne, S. (1992). Aboriginal women and the law. In C. Cunneen (Ed.) *Aboriginal perspectives on criminal justice* (pp. 31-40). Sydney, NSW: The Institute of Criminology, Sydney University Law School.

Perera, S. (2002). What is a camp? *Borderlands e-journal, 1,*1. Retrieved from http://www.borderlands.net.au/vol1no1_2002/perera_camp.html

Philips, S. (1998). Ideology in the language of judges: *How judges practice law, politics, and courtroom control*. Oxford: Oxford University Press.

Piquero, A. (2008). Disproportionate minority contact. *The future of children, 18*(2), 59-79.

Pollak, O. (1950). *The criminality of women*. Philadelphia, PA: University of Pennsylvania Press.

Pratt, J. (2002). *Punishment and civilization: Penal tolerance and intolerance in modern society.* London, UK: Sage Publications.

Queensland Sentencing Advisory Council (2017). *Sentencing spotlight technical information*. The Queensland Government. Retrieved from

http://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0003/517773/Sentencing-Spotlight-Technical-Information.pdf

Rabuy, B. & Kopf, D. (2015). Separation by bars and miles: Visitation in state prisons. *Prison Policy Initiative*. Retrieved from https://www.prisonpolicy.org/reports/prisonvisits.html

Roach Anleu, S. & Mack, K. (2010). The work of the Australian judiciary: Public and judicial attitudes. *Journal of Judicial Administration, 20*(1): 3-17.

Rose, D.B. (1996). Land rights and deep colonising: The erasure of women. *Aboriginal Law Bulletin, 3(85)*: 6-13.

Rossman, G.B. & Rallis, S.F. (2003). *Learning in the field: An introduction to qualitative research.* Thousand Oaks, CA: Sage Publications.

Rowe, S., Baldry, E., and Earles, W. (2015). Decolonising social work research: Learning from critical Indigenous approaches. *Australian Social Work, 68(3),* 296-308.

Sangha, B. & Moles, R. (2015). *Miscarriages of justice: Criminal appeals and the rule of law in Australia.* Chatswood, NSW: LexisNexis Butterworths.

Scales, A. (1981). Towards a feminist jurisprudence. *Indiana Law Journal, 56*(3), 375-444.

Schneider, C. J. (2003). Integrating critical race theory and postmodernism implications of race, class, and gender. *Critical Criminology, 12*, 87-103.

Schubert, S. (2017). Zak Grieve: *Indigenous people under-represented on juries, lack faith in legal system, lawyer says.* ABS News. Retrieved from http://www.abc.net.au/news/2017-08-25/zak-grieve-indigenous-people-underrepresented-on-nt-juries/8840058

Seale, C. (2012). Researching society and culture. London: Sage.

Shanahan, M. J., Ryan, S. M., Rafter, A. J., Costanzo, J. J., & Hoare, A. (2016). *Carter's criminal law of Queensland* (21st ed.). Chatswood, NSW: LexisNexis Butterworths.

Sim, J. (2009). *Punishment and prisons: Power and the carceral state.* London, UK: Sage Publications.

Smart, C. (1979). The new female offender: reality or myth? *British Journal of Criminology, 19* (1), 50-59.

Smart, C. (1976). *Women, crime and criminology: A feminist critique.* Boston, MA: Routledge and Kegan Paul.

Sniderman, P. M., Piazza, T., Tetlock, P. E., & Kendrick, A. (1991). The new racism. *American Journal of Political Science, 35*(2), 423-447.

Snowball, L. & Weatherburn, D. (2007). Does racial bias in sentencing contribute to Indigenous overrepresentation in prison? *Australian and New Journal of Criminology, 40:* 272-290.

Steffensmeier, D. & Allan, E. (1991). Gender, age, and crime. In J. Sheley (Ed.), Criminology: A contemporary handbook (pp. 67-93). Belmont, CA: Wadsworth.

Steffensmeier, D. & Hebert, C. (1999). Women and men policymakers: Does the judge's gender affect the sentencing of criminal defendants? *Social Forces, 77*(3): 1163-1196.

Storrs, E. (2004). 'Our scapegoat': An exploration of media representations of Myra Hindley and Rosemary West. *Theology & Sexuality, 11*(1): 9-28.

Stubbs, J. (2016). Downsizing prisons in an age of austerity? Justice reinvestment and women's imprisonment. *Oñati Socio-legal series 6*(1), 91-115. Retrieved from http://ssrn.com/abstract=2636756.

Stubbs, J. (2013). Indigenous women and penal discourse. In K. Carrington, M. Ball, E. O'Brien & J. Tauri (Eds.), *Crime, justice and social democracy* (pp. 248-266)**.** Houndmills, UK: Palgrave Macmillan.

Stubbs, J. (2011). Indigenous women in Australian criminal justice: Over-represented but rarely acknowledged. *Australian Indigenous Law Review, 15*(1), 47-63.

Sumner, C. (1982). *Crime, justice and underdevelopment.* London: Heinemann.

Tarling, R. (2006). Sentencing practice in magistrates' courts revisited. *The Howard Journal of Criminal Justice, 45*, 29–41.

Tatz, C. (2001). Confronting Australian genocide. *Aboriginal History, 25*, 16-36.

Tauri, J. (2014). Settler colonialism, criminal justice and Indigenous peoples. *African Journal of Criminology and Justice Studies, 8*(1): 20-37.

Tauri, J. (2013). Criminological research and institutional ethics protocols: Empowering the Indigenous other or the academy? In Richards, K. & Tauri, J. (Eds.) *Crime, Justice and Social Democracy: Proceedings of the 2nd International Conference.* Crime and Justice Research Centre: Queensland University of Technology, Brisbane, QLD., pp. 202-210.

Tauri, J. & Webb, R. (2012). A critical appraisal of responses to Maori offending. *International Indigenous Policy Journal, 3*(4): 1-16.

Taylor, N. & Bareja, M. (2005). *2002 National police custody survey*. Canberra, ACT: Australian Institute of Criminology.

Tewksbury, R. (2009). Qualitative versus quantitative methods: Understanding why qualitative methods are superior for criminology and criminal justice. *Journal of Theoretical and Philosophical Criminology, 1,* 38-58.

Tewksbury, R., Dabney, D., & Copes, H. (2010). The prominence of qualitative research in criminology and criminal justice scholarship. *Journal of Criminal Justice Education, 21,* 391-411.

The State of Queensland (Queensland Courts). *Protocol for Judicial Appointments in Queensland*, 2017. Retrieved from http://www.courts.qld.gov.au/__data/assets/pdf_file/0011/472439/ja-pub-protocol-for-judicial-appointments-in-queensland.pdf

Velazquez, M. & Lincoln, R. (2009). What the public thinks about sentencing. *The National Legal Eagle, 15*(1), 9-13.

Vold, G. B., Bernard, T. J, & Snipes, J. B. (2002). *Theoretical criminology.* New York, NY: Oxford University Press.

Wacquant, L. (2000). The new 'peculiar institution': On the prison as surrogate ghetto. *Theoretical Criminology, 4*(3), 377-389.

Warner, K., Davis, J., Walter, M., Bradfield, R., & R. Verney (2009). *Gauging public opinion on sentencing: Can asking jurors help?* Trends & Issues in Crime and Criminal Justice No. 371. Canberra: Australian Institute of Criminology.

Weatherburn, D., Fitzgerald, J., & Hua, J. (2003). Reducing Aboriginal over-representation in prison. *Australian Journal of Public Administration, 62*(3), 65-73.

Weitzer, R., & Tuch, S. (2006). *Race and policing in America: Conflict and reform.* Cambridge, UK: Cambridge University Press.

Weitzer, R., & Tuch, S. (2005). Determinants of public satisfaction with the police. *Police Quarterly, 8*(3), 279-297.

West, C. (1995). Foreword. In K. Crenshaw, N. Gotanda, G. Peller, & K. Thomas (Eds.), *Critical race theory: The key writings that formed the movement* (pp. xi-xii). New York, NY: The New Press.

Williams, P. (2001). *Deaths in custody: Ten years on from the Royal Commission* (Trends & Issues in Crime and Criminal Justice Series No. 203). Canberra, ACT: Australian Institute of Criminology.

Wollstonecraft, M. (1792). Of the pernicious effects which arise from the unnatural distinctions established in society. In A. E. Cudd and R. O. Andreasen (Eds.), *Feminist theory* (pp. 11-16). Oxford, UK: Blackwell Publishing.

Wootten, H. (1991). *Regional report of inquiry in New South Wales, Victoria, and Tasmania.* Royal Commission into Aboriginal Deaths in Custody. Canberra, ACT: Australian Publishing Government Service.

World Health Organization (2006). Intimate partner violence and alcohol. Retrieved from http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/fs_intimate.pdf

Worrall, A. (1990). Offending women: *Female lawbreakers and the criminal justice system.* London: Routledge and Kegan Paul.

Appendix 1.

INTERVIEW SHEET

Judge Number: ___ Sex: ___ Courthouse pseudonym: _____ Date: _____

Personal demographic information

1). How many years have you been a judge/magistrate? _____

2). Age: 41-45 46-50 51-55 56-60 61-65 66-70 71+

3). Highest education completed: _____

4). What sort of judicial training have you received? _____

5). Have you attended any cultural diversity training? _____

6). How many cases have been Indigenous ____ Women ____ Indigenous Women ____

General sentence practices

7). What factors most influence your decision-making practices at the sentencing phase?

8). For you, what are the main factors which influence sentence severity?

9). Do you think that changes in legislation have contributed to the shift toward the greater use of custody? (for offences that use to dealt with non-custodial sanctions)

10). To what extent do psychiatric and pre-sentence reports impact your sentence decision?

Sentence practices between sexes

11). Looking back to the last 24 years, do you think that the trend toward tougher sentencing practices (most evident by the increases in the use of custodial sanctions) affected women or male defendants more strongly?

12). How would you characterize women's involvement in crime?

13). Do you think that women's imprisonment rates reflect the severity of their crimes?

14). Do you find that you generally treat women leniently and resort to the use of custody as a 'last resort' or are you tough on women who commit crimes?

Sentence practices between Indigenous and non-Indigenous defendants

15). Why do you think Indigenous people come into contact with the criminal justice system?

16). Do you think Indigenous peoples' contact with the justice system reflects the prisoner rates between Indigenous and non-Indigenous people?

17). Does a defendant's Indigenous status impact your sentencing practices?

Sentence practices between Indigenous and non-Indigenous women defendants

18). Recent research based on cases which go before the Higher courts show that Indigenous women may be treated more leniently than non-Indigenous women. Do your experiences in North Queensland reflect this? Why?

19). Do you treat Indigenous and non-Indigenous women differently if they appeared for theft, drug, or violent offences?

20). Are there any trends in courtroom demeanour between Indigenous and non-Indigenous women? If so, why might this be?

Other personal demographic information

21). Indigenous courts: On a scale from one to five, one being not supportive and five being very supportive, rate how supportive you are of specialist Indigenous Courts (e.g. Murri Courts in Queensland, Koori Courts in Victoria, Nunga Courts in South Australia):

1	2	3	4	5
Not supportive				Very supportive

22). Religious affiliation: On a scale from one to five, one being very religious and five being not at all religious, rate where you most consider yourself to be:

1	2	3	4	5
Very religious				Not at all religious

23). Political affiliation: On a scale from one to five, one being the Liberal Party and five being the Labour Party, rate where you most consider yourself to be:

1	2	3	4	5
Right				Left

Thank you for taking part in this research project.

Principal Investigator: Marisela Velazquez
Contact: 0747814833/marisela.velazquez@my.jcu.edu.au

Appendix 2.

INFORMED CONSENT FORM

This administrative form
has been removed

Appendix 3.

INFORMATION SHEET

PROJECT TITLE: **"Sentencers' attitudes toward women in the criminal justice system: Explanations for sentencing treatment disparities between Indigenous and non-Indigenous women"**

You are invited to take part in a research project about sentencers' attitudes toward women defendants in the Criminal Justice System. This project will investigate why Indigenous women may be treated leniently in the higher courts. The study is being conducted by Marisela Velazquez and will contribute to her Doctor of Philosophy at James Cook University.

If you agree to be involved in the study, you will be invited to be interviewed. The interview, with your consent, will be audio-taped, and should only take approximately 1 hour of your time. The interview will be conducted at a venue of your choice.

Direct quotations will be used in the reporting of results. A number will be assigned to each participant (judge) interviewed to ensure anonymity and confidentiality. For the same reason, individual names will not be identified when quoting the views of a participant (judge). The 'M' or 'F' will designate each judge as male or female. Example: Judge 3 (M). You will be offered the opportunity to review transcripts from your interview.

Taking part in this study is completely voluntary and you can stop taking part in the study at any time without explanation or prejudice.

If you know of others who might be interested in this study, I would greatly appreciate it if you could please pass on this information sheet to them so they may contact me to volunteer for the study.

Your responses and contact details will be strictly confidential. The data from the study will be used in a dissertation, research publications and reports. You will not be identified in any way in these publications.

If you have any questions about the study, please contact Marisela Velazquez or her supervisor, Theresa Petray.

Principal Investigator:
Marisela Velazquez
School of Arts and Social Sciences
James Cook University
Phone:
Email: Marisela.Velazquez@my.jcu.edu.au

Supervisor:
Name: Theresa Petray
School of Arts and Social Sciences
James Cook University
Phone:
Email: Theresa.Petray@jcu.edu.au

If you have any concerns regarding the ethical conduct of the study, please contact:
Human Ethics, Research Office
James Cook University, Townsville, Qld, 4811
Phone: (07) 4781 5011 (ethics@jcu.edu.au)

Appendix 4.

CHECKLIST/GUIDE FOR COURTROOM OBSERVATIONS

Offence & Type of crime:
- Grievous bodily harm (GBH) ☐
- Drug Related ☐
- Homicide – Manslaughter ☐
- Other ☐

Notes _____

_____

Legal Representation:
- Yes ☐
- No ☐

Notes _____

_____

Remorse:
- Behavioural ☐
- Verbal ☐

Notes _____

_____

Dress Attire:
- Appropriate ☐
- Inappropriate/Poor ☐

Notes _____

_____

Body Posture/Language:
- Gestures (Movement of hands, face) ☐
- Facial Expressions ☐
- Eye Movement ☐
- Attentiveness ☐
- Boredom ☐
- Relaxed State ☐

Notes _____

_____

Employment Status:
- Unemployed ☐
- Employed ☐

Age of defendant: ☐

Discussion _____

Extent of involvement in hearing:

Did they just stand to receive sentence?
Who answered questions from the judge?
Who runs their own defence?
Discussion _____

Narrative of observations: _____

_____

_____