SENTENCING AND PUNISHMENT IN THE INDIGENOUS JUSTICES OF THE PEACE COURTS

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I Introduction

This article reports on an evaluation of the Remote Justices of the Peace Magistrates Court Program ('JP Magistrates Court Program'), conducted in 2010 by the current authors.[1] The article provides detail in relation to certain aspects of the operation of the JP Magistrates Court Program and of the analysis of program effectiveness undertaken as part of the evaluation.

Recent academic interest in Indigenous participation in the sentencing process has focused on what have come to be referred to as 'Indigenous sentencing courts'.[2] These courts include the circle sentencing courts in New South Wales and the Australian Capital Territory, the Koori courts in Victoria, the community courts in Western Australia and the Northern Territory, the Murri courts in Queensland, and the Nunga courts in South Australia. The focus of academics upon Indigenous sentencing courts has meant that the long history of various types of tribal courts, community courts and other 'native' courts involving Indigenous peoples in Australia, which date back at least to the early 1930s, has to some extent been overlooked.[3] As the Australian Law Reform Commission ('ALRC') noted, historically, the development of these special courts reflected attempts to adapt general courts to what were perceived to be the special needs of Aboriginal people.[4]

This article casts light on the JP Magistrates Court Program, an Indigenous sentencing initiative currently operating in a number of (generally remote) Indigenous communities in Queensland.[5] The program provides for local justices of the peace (magistrates court) ('JP magistrates') to convene magistrates courts in their respective communities, as required.[6] It is intended, among other things, to overcome disadvantages experienced by Indigenous people in their contact with the criminal justice system, as well as to provide opportunities for Indigenous people to play positive roles within the justice system and community.[7]

In terms of program objectives, the JP Magistrates Court program does not differ substantially from related initiatives, including Indigenous sentencing courts. The latter courts are identified as being intended to reduce Indigenous over-representation in the criminal justice system, to provide a culturally appropriate justice process, to increase community participation, and to contribute to reconciliation – goals that are broadly similar to those of the JP Magistrates Court Program.[8] Further, the emphasis in both the Indigenous sentencing courts and in the JP Magistrates Court Program on direct community participation by Indigenous elders or respected persons in decision-making that forms part of the sentencing process is seen as particularly important to achieving these objectives.[9]

Whilst there is some common ground between these initiatives, courts operating under the JP Magistrates Court Program differ from Indigenous sentencing courts in one particularly significant respect: Indigenous sentencing courts (such as the Murri Court) retain sentencing power for the magistrate, who in the overwhelming majority of cases will be non-Indigenous. Within the JP Magistrates Court Program, however, Indigenous JP magistrates have power to directly control sentencing and other outcomes. The program provides for Indigenous justices of the peace ('JPs') to constitute a magistrates court in the absence of a magistrate, and to hear and determine charges for specified minor offences, including certain indictable matters that can be dealt with summarily where a defendant pleads guilty. In addition, a JP magistrates court is able to deal with bail

applications and applications for domestic violence orders (where there is consent), and to conduct committal hearings.

Thus, in those communities where the JP Magistrates Court Program operates, offenders may consent to be dealt with judicially by Indigenous community members appropriately qualified to serve as JP magistrates. In this sense, the program stands apart from Indigenous sentencing courts on the basis of its potential capacity for comparatively greater Indigenous community control and ownership of criminal justice-related outcomes and processes. Whether or not program potential in these and other respects is currently being realised is an important question and one point of discussion in this article.

II The Recent Legislative and Historical Context of Indigenous JP Magistrates Courts in Queensland

Indigenous JPs have been convening court in communities within Queensland for a number of years, although not always as JP magistrates. Indeed, there has been legislative capacity in this jurisdiction for reserve superintendents to constitute courts from 1939, and for Aboriginal JPs or members of an Aboriginal Council to constitute an Aboriginal court in designated communities from 1965.[10]

More recently, legislation enacted in 1984 led to the establishment of 'community courts' (or 'Aboriginal' or 'Island courts') in specified Indigenous communities.[11] After 1984, Indigenous residents were able to convene community courts either as JPs or as members of the community council. These courts focused on hearing and determining by-law breaches, including those where a defendant did *not* plead guilty. They were restricted, however, to the imposition of fines and fine option orders only, with a maximum penalty of $500. There was also some capacity (rarely used) for the courts to hear and determine disputes 'governed by the usages and customs of the community' – that is, matters that did not fall under by-law or state legislation.[12]

Prior to 1991, there existed only one class of JP in Queensland, with all persons appointed to the office eligible to exercise the full range of JP powers granted to them under the *Justices Act 1886* (Qld).[13] New legislation introduced in 1991, following a Queensland government review of the operation of the then-current JP system and of problems arising therein,[14] created a three-tiered system of JP appointments. The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ('*JP Act*') provided that justices could be appointed either as JP magistrates, JPs (qualified) or commissioners for declarations.[15] The powers bestowed upon the different types of JP office-holders were also set out in this legislation, and remain current today.

Under the 1991 Act, JP magistrates are able to carry out all the duties of JPs (qualified) (such as granting bail or witnessing documents), but are also empowered to carry out additional duties. The *JP Act* provides for two or more JP magistrates to constitute a JP magistrates court and to impose sentences upon defendants charged with limited categories of offences where the defendant pleads guilty. [16] The JP magistrates court can deal with both local by-law breaches, as well as offences under state legislation; relevant offences might include local council 'law and order' by-law offences such as public drunkenness, driving under the influence,[17] being drunk in a public place[18] or wilfully destroying property (causing loss of $250 or less).[19] Further, JP magistrates are also able to conduct committal hearings and to take or make procedural actions or orders (defined so as to include, in effect, the issuing of a warrant, the granting of bail, or the making of a domestic violence order by consent, for instance).[20]

After the aforementioned changes to the categorisation of JPs, two Indigenous JP magistrates were required to convene community courts established under the 1984 legislation. It is important to note that with the introduction of the 1991 legislation, no specific category of *Indigenous* JP magistrate was established. However, from around 1993, and as a component of the Queensland government's implementation of the Royal Commission into Aboriginal Deaths in Custody recommendations,[21] training to encourage appointment of Indigenous JP magistrates commenced.[22] Some of these JP magistrates convened community courts and some convened JP magistrates courts, which were formally piloted in three remote communities in 1998.[23] The pilot program was initiated following the 1997 amendments to the *Criminal Code 1899* (Qld) ('*Criminal Code*'), which empowered JPs residing in specified Indigenous communities to impose sentence on defendants charged with certain indictable matters; that is, indictable matters with capacity to be heard summarily.[24] Relevant indictable offences might include less serious assault,[25] stealing[26] or unlawful possession of a motor vehicle.[27] The pilot was intended to indicate whether JP magistrates courts would 'aid in a more efficient system of justice' and enable 'culturally appropriate processes and sentencing'.[28] Whilst there had been some limited use of JP

magistrates courts on Indigenous communities prior to 1998, these amendments effectively created a 'special class' of JP magistrates with additional powers to those of 'ordinary' JP magistrates.[29] Again, these powers are still in place today.

The pilot also coincided with a 1998 Department of Aboriginal and Torres Strait Islander Policy ('DATSIP') review of community courts. This review recommended abolishing the community courts and focusing instead on JP magistrates courts in Indigenous communities, with an emphasis upon appointment of Indigenous JP magistrates to convene them.[30] DATSIP found that a number of anomalies existed between the community courts and JP magistrates courts. For instance, JP magistrates in community courts could hear matters where a defendant pleaded *not* guilty, whilst in JP magistrates courts they required a plea of guilty in order to do so; conversely, in JP magistrates courts, JPs had a greater range of sentencing options open to them.[31] Further, DATSIP had identified a number of problems with community courts themselves as part of this review. These included, for instance, a lack of standardised records systems for the courts, insufficient local council resources for the operation and administration of the courts, a lack of integrated support structures for JPs, insufficient numbers of available JPs, and insufficient 'legitimacy' for the courts in the eyes of the relevant communities. As noted below, some of these difficulties have continued to plague the JP magistrates courts.

Further, in 1998, the Queensland Law Reform Commission ('QLRC') examined the office of JP under terms of reference directed to consideration of the 'desirability of maintaining this office in the light of a changing society'.[32] The QLRC made a number of recommendations in its review, none of which pertained specifically to Indigenous JP magistrates, including that JPs should no longer need to be nominated by a member of State Parliament for appointment, and that police officers should not be permitted to hold office as JP magistrates or JPs (qualified). There was some discussion by the QLRC about the utility and appropriateness of JP magistrates' power to sentence. In this regard, the potential benefits included a reduction of time spent in custody, reduction of the workload of the Magistrates Court, and application of local knowledge to sentences and court processes.[33] Potential problems were identified as lack of expertise in relation to sentencing, as well as local knowledge being seen to give rise to possible bias in JP decision-making.[34] There was also some specific consideration of Indigenous JP magistrates courts by the QLRC, still in their infancy at this stage. Public submissions to the QLRC in relation to Indigenous JP magistrates suggested that they might well contribute efficiency and a level of community ownership to the justice system. It was also suggested that they should be more aware of relevant cultural factors, and could therefore enhance 'community ownership of the justice process, leading to more effective rehabilitation and crime prevention'.[35]

By 2005 there were 17 Indigenous communities that had received Department of Justice and Attorney-General (Qld) ('DJAG') JP magistrate training, and 12 communities had fully operational JP magistrates courts. The program was said to have reached capacity with these numbers.[36] DJAG at this time identified a number of factors likely to contribute to the success of JP magistrates courts in a community, including having sufficient grassroots community support for the program prior to setting up the courts, as well as for particular individuals prior to their appointment as JP magistrates; developing effective communication channels between JPs and magistrates to provide JPs with advice and sentencing guidance; and the use of by-laws in the courts by local councils and police. The benefits of using by-laws at a local level were said to include by-law penalty revenue returning to the community, community involvement in the justice system, and a reduction of Indigenous incarceration rates.[37]

There have been various appeals to the government over recent years to evaluate the JP Magistrates Court Program, so as to determine the extent to which its potential is being realised and how relevant improvements might be made.[38] In terms of program potential, the evaluation of the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* in 2005, for instance, indicated that the program might provide more culturally responsive and relevant justice, but stressed the need for a comprehensive review of the program in order to achieve maximum effectiveness in this regard.[39] Others have suggested that the JP magistrates might provide more regular sittings and hence timely and efficient administration of justice for those communities only serviced by circuiting magistrates courts, and may also facilitate greater use of diversionary sentencing options such as community-based sentences where JP magistrates are sufficiently linked in with and knowledgeable about relevant local programs.[40]

In formally responding to the *Justice Agreement* evaluation, the Queensland government committed to independently

evaluating the JP Magistrates Court program 'with respect to sentencing outcomes, recidivism, culturally appropriate processes and other community justice issues'.[41] In 2009, the Queensland Crime and Misconduct Commission ('CMC') again repeated the call for a 'much overdue' evaluation of the program in a report examining policing on Indigenous communities, with particular reference to exploration as to how the JP magistrates courts might have their capacity enhanced to deal 'creatively and responsively with local problems' and to 'effectively contribute to reducing crime and violence in Indigenous communities'.[42] The CMC noted that although JP magistrates courts had been established in 14 communities, only seven or eight were active as at 2008. In responding to the CMC report, the Queensland government agreed to an immediate review of the program.[43]

III Evaluation of the JP Magistrates Court Program

In 2010, the authors conducted an independent review of the JP Magistrates Court Program on behalf of DJAG, to be used to inform the program's future development and operation.[44] The review combined a number of different research methods: namely, legal research, qualitative interviews and quantitative analysis, with an emphasis upon consultation with and input from key stakeholders of the JP Magistrates Court Program.

As a first step, seven communities were selected, in collaboration with DJAG, as principal research sites for the qualitative aspects of the study. The nominated communities intentionally included sites where JP magistrates courts were then currently operating (Cherbourg, Aurukun, Mornington Island, Kowanyama), sites where they had been operating but had ceased to do so (Thursday Island and Yarrabah), and sites where JPs had been trained but the court had never operated (Wujal Wujal). Communities were selected on this basis, in part, because of their potential to provide clues as to why JP magistrates courts were sustained in one community, but not another.[45]

Qualitative data was gathered, predominantly through face-to-face interviews with program stakeholders, with a focus on these same communities. Interviews were semi-structured, with questions directed towards determining the program's strengths and weaknesses, as well as legislative, administrative and other barriers to its success. All stakeholders were again selected in consultation with DJAG on the basis of their involvement or professional interest in the JP Magistrates Court Program. Upon selection, relevant stakeholders were contacted and invited to participate in an interview.

The majority of stakeholders interviewed resided in, were located within and/or were servicing the selected communities, and a significant number of the latter stakeholders also participated directly in the program itself, predominantly as Queensland Police Service ('QPS') staff, JP magistrates and DJAG staff.[46] In each of the nominated communities, the following persons were interviewed, where available:

- JP magistrates (including those that had received training as part of the JP Magistrates Court Program but had ceased to participate or had not yet participated in it);
- community representatives (community elders, community justice groups members, local council members); and
- state and community police and police liaison officers.

Interviews also took place outside the nominated communities, with non-resident stakeholders who worked with relevant communities, including registrars and magistrates; corrections staff; and staff of Aboriginal and Torres Strait Islander Legal Services ('ATSILS'), of Indigenous Family Violence Prevention Legal Services ('IFVPLS'), and of relevant offices of Aboriginal and Torres Strait Islander Services (ATSIS), again where available.

Statewide stakeholders with no particular attachment to an individual community were also asked to attend an interview (again at a place outside the nominated communities). These included, among others, JP Magistrates Court Program and other related policy staff from DJAG, staff from the QPS Cultural Advisory Unit and from the Department of Infrastructure and Planning (Qld), and representatives of the Queensland Aboriginal and Torres Strait Islander Advisory Council ('QATSIAC').[47]

The evaluation was also required to describe and analyse JP magistrates court data to measure the impact of the courts on sentencing outcomes and recidivism. Quantitative data on JP magistrates court sittings was provided by DJAG from the Queensland Wide Integrated Court ('QWIC') system for the three-year period from 2007 to 2009. The data on

JP magistrates court sittings for this period related to 10 communities.[48]

We turn now to consider the analysis of the QWIC data provided in the evaluation, at least so far as it relates to sentencing in these courts.

IV Sentencing in the Indigenous JP Magistrates Courts

During the period of 2007–2009, the JP magistrates courts dealt with 5,210 matters. These included bail remand matters, adjournments and committals, as well as matters where two JP magistrates convened court and imposed sentences upon defendants (sentencing matters). We are particularly interested in the sentencing powers and sentencing matters of the JP magistrates courts, given that it is the extent or nature of community input in this function of these courts that may distinguish them from other Indigenous sentencing initiatives. For that purpose, we limit the discussion here to those matters where the Indigenous JP magistrates courts imposed a sentence on an offender. We thus exclude any matter relating to bail, remand or further outcomes other than a sentence. During the three-year period between 2007 and 2009, there were 2,612 matters where sentences were imposed in the JP magistrates courts.[49]

Some of the JP magistrates courts to which the QWIC data referred were far more active in sentencing matters than others during the relevant period. In the three years under review, some 30 per cent of all the matters sentenced by the JP magistrates courts were in Kowanyama, followed by Mornington Island (29 per cent). Overall, 94 per cent of these matters were in five courts (Kowanyama, Mornington Island, Woorabinda, Aurukun and Cherbourg), with the remaining five courts (Bamaga, Lockhart River, Pormpuraaw, Thursday Island and Yarrabah) dealing with only six per cent of all matters (see Table 1).

The nature of the legislation that different communities utilised and sentenced under varied significantly depending largely on whether a respective community had local by-laws available to it as an option. In this context, the three communities with law-and-order by-laws enacted by local council – Kowanyama, Woorabinda and Cherbourg – relied heavily on by-law offences, where they comprised 75 per cent, 86 per cent and 77 per cent of sentencing matters, respectively. In contrast, in Aurukun, where there are no local law-and-order by-laws in place, sentencing matters fell primarily under the *Criminal Code* (31 per cent), the *Summary Offences Act 2005* (Qld) ('*Summary Offences Act*') (28 per cent), and the *Liquor Act 1992* (Qld) ('*Liquor Act*') (23 per cent) (Table 2).

A The Specific Use of Aboriginal Council By-Laws

As noted above, Kowanyama, Woorabinda and Cherbourg JP magistrates courts relied heavily on by-law offences. Kowanyama was the JP magistrates court with the most sentencing matters over the three-year period. It was also a court where 75 per cent of such matters were charged under the local council by-laws. More than three-quarters of the by-laws offences in Kowanyama were related to school truancy (causing a child between the age of six and 15 years to be absent from school) (Table 3). Similarly, in Woorabinda some three quarters (76 per cent) of all the by-law matters related to school attendance (Table 4). Public drunkenness also constituted a significant proportion of by-law offences in Kowanyama and Woorabinda (21 per cent and 13 per cent respectively). By way of contrast, in Cherbourg more than half of the by-law matters (51 per cent) related to disorderly behaviour (Table 5).

The other two communities where the JP magistrates court sat relatively frequently, Mornington Island and Aurukun, did not have locally enacted council law-and-order by-laws. In these courts, defendants were sentenced under the *Criminal Code* (particularly for property offences),[50] the *Liquor Act* (including possession of alcohol in a restricted area)[51] and the *Summary Offences Act* (particularly, public nuisance or public drunkenness)[52] (Tables 6 and 7). In addition, on Mornington Island matters related to homebrew were dealt with under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) ('*ATSI Communities Act*').

B Sentencing and the Gender of Defendants

The gender of the defendants being sentenced in the courts was also significant. The majority of Indigenous defendants in the JP magistrates courts were women (57 per cent) (Table 1). This stands in stark contrast to the profile of defendants in Queensland magistrates courts, where typically 23 per cent of defendants are female.[53]

TABLE 1: SENTENCED MATTERS IN THE JP COURT BY GENDER ACROSS ALL COURTS, 2007–2009

Location	Female		Male		Total	
	No	%	No	%	No	%
Aurukun	60	4.0	218	19.3	278	10.6
Bamaga	20	1.3	40	3.5	60	2.3
Cherbourg	141	9.5	121	10.7	262	10.0
Kowanyama	588	39.6	199	17.6	787	30.1
Lockhart River	55	3.7	31	2.7	86	3.3
Mornington Island	364	24.5	402	35.6	766	29.3
Pormpuraaw	1	0.1	4	0.4	5	0.2
Thursday Island		0.0	6	0.5	6	0.2
Woorabinda	255	17.2	107	9.5	362	13.9
Total	**1,484**	**100.0**	**1,128**	**100.0**	**2,612**	**100.0**

TABLE 2: SENTENCED MATTERS BY TWO JPs IN FIVE COURTS BY STATUTE, 2007–2009

Statute (Qld)	Aurukun %	Cherbourg %	Kowanyama %	Mornington Island %	Woorabinda %	Total %
Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984	0.7	5.7	1.3	25.2	0.0	7.0
Bail Act 1980	6.1	0.0	1.1	0.1	0.0	1.1
Cherbourg by-laws	0.0	77.1	0.0	0.0	0.0	8.2
Criminal Code	30.9	0.0	0.6	2.0	0.3	4.4
Criminal Proceeds Confiscation Act 2002	0.0	0.0	0.1	0.0	0.0	0.0
Domestic and Family Violence Protection Act 1989	0.7	0.0	0.0	0.4	0.0	0.2
Drugs Misuse Act 1986	0.4	0.0	0.1	1.2	0.0	0.4
Justices Act 1886	0.4	0.0	0.0	0.0	0.0	0.0
Kowanyama Aboriginal Council by-laws	0.0	0.0	74.6	0.0	0.0	23.9
Liquor Act 1992	23.4	13.0	9.1	34.9	1.4	18.0
Motor Accident Insurance Act 1994	0.0	0.0	0.1	0.0	0.0	0.0
Penalties and Sentences Act 1992	1.8	0.0	0.0	0.0	0.0	0.2
Police Powers and Responsibilities Act 2000	4.0	1.9	2.4	4.0	1.4	2.9
Regulatory Offences Act 1985	0.0	0.0	0.0	0.1	0.0	0.0
Summary Offences Act 2005	28.1	1.5	9.1	30.9	11.0	17.6
Transport Operations (Road Use Management – Driver Licensing) Regulation 1999	0.0	0.0	0.3	0.0	0.0	0.1

Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999	0.0	0.0	0.1	0.0	0.0	0.0
Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999	0.0	0.0	0.3	0.0	0.0	0.1
Transport Operations (Road Use Management) Act 1995	2.9	0.8	0.4	1.0	0.0	0.9
Undefined statute	0.0	0.0	0.1	0.0	0.0	0.0
Weapons Act 1990	0.7	0.0	0.1	0.1	0.0	0.2
Woorabinda Aboriginal Council by-laws	0.0	0.0	0.0	0.0	85.9	12.7
Total	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

It is instructive to look more closely at the type of offences for which Indigenous women have appeared before the JP magistrates courts. More than half of the matters (56 per cent) for which Indigenous women were sentenced were offences under the local by-laws of Kowanyama, Woorabinda and Cherbourg. Kowanyama and Woorabinda were also communities which made extensive use of by-laws to respond to school truancy. Indeed, in the Kowanyama JP Magistrates Court – which dealt with the greatest number of matters of all the JP magistrates courts – Indigenous women were the defendants in 75 per cent of all sentenced matters, and 71 per cent of all the matters involving Indigenous women related to school truancy. There were few Indigenous males brought before the courts for these types of charges. In Kowanyama, 93 per cent of sentenced matters relating to truancy involved a female defendant. Clearly Indigenous mothers, grandmothers and carers were viewed by both the police bringing the charges and the courts in disposing of the matters as having primary responsibility for ensuring that a child attend school.

Some 17 per cent of sentenced matters involving Indigenous women related to charges brought under the *Summary Offences Act*. Over 90 per cent of these charges involved being a public nuisance. A further 16 per cent of sentenced matters involving Indigenous women related to charges brought under the *Liquor Act*. Some 83 per cent of these matters related to either possession of alcohol or possession of more than a prescribed quantity of alcohol in a restricted area. The types of offences with which women were charged under both the *Summary Offences Act* and the *Liquor Act* were similar to the offences for which men were charged, although fewer men than women were sentenced by the courts under the *Summary Offences Act*. The offences for which Indigenous men were more likely to be sentenced than Indigenous women fell under the *Criminal Code* (including assaults, unlawful use of motor vehicle and enter dwelling) and the *Police Powers and Responsibilities Act 2000* (Qld) (in particular, charges for assault or obstruct a police officer).[54]

In summary, however, the most significant gender difference was in relation to the use of local council by-laws relating to school truancy. It was a major reason for Indigenous women appearing before the JP magistrates courts, yet it was also an area of regulation which had virtually no impact on Indigenous men.[55]

C Penalties Imposed by the JP Magistrates Courts

The data on sentencing in the JP magistrates courts showed that the favoured sentencing option utilised by the JP magistrates was a monetary fine, which was imposed in 72 per cent of all sentences between 2007 and 2009 (Table 8). Other penalties involved forfeiture of property (seven per cent of sentencing outcomes), general orders (five per cent) and 'no action' taken by the court (four per cent). Bonds and community service orders ('CSOs') were virtually absent from the sentencing repertoire, each being used in only 0.2 per cent of matters. Probation was used as a sentence in 1.9 per cent of matters, and imprisonment in 1.8 per cent.

The overall picture in terms of sentencing is a very heavy reliance upon fines to the exclusion of most other sentencing options. However, the use of the fine in the JP Magistrates Courts is not significantly different from its use in Magistrate Courts more generally. National data indicate that fines make-up 71 per cent of non-custodial sentencing

TABLE 3: SENTENCED MATTERS, KOWANYAMA COUNCIL BY-LAWS, 2007–2009

By-law Matter	Total	
	No	%
Behave in a riotous, violent, disorderly, indecent, offensive, threatening or insulting manner	10	1.7
Cause child between six and 15 years to be absent from school	447	76.1
Drunk and disorderly in public place	121	20.6
Possession of dangerous animal, article or firearm to cause injury	4	0.7
Possession of dangerous animal, article or firearm to destroy or damage any property	1	0.2
Unlawfully assault a person in the area	2	0.3
Wilful damage or destruction of property	2	0.3
Total	**587**	**100.0**

TABLE 4: SENTENCED MATTERS, WOORABINDA COUNCIL BY-LAWS, 2007–2009

By-law Matter	Total	
	No	%
Assault/obstruct police	2	0.6
Children to attend school	235	75.6
Consumption of liquor where council has made no declarations	2	0.6
Consumption of methylated spirits	6	1.9
Drunk in a public place	40	12.9
Inhalation of petrol, glue paint	6	1.9
Person given noise abatement direction fails to comply with the direction	5	1.6
Possession or consumption of liquor on controlled or dry place	3	1.0
Throwing stones, rocks etc.	1	0.3
Trespass	1	0.3
Unlawful assault	7	2.3
Wilful damage/destruction	3	1.0
Total	**311**	**100.0**

TABLE 5: SENTENCED MATTERS, CHERBOURG COUNCIL BY-LAWS, 2007–2009

By-law Matter	Total	
	No	%
Behave in a disorderly manner	103	51.0
Cause or permit a child between the ages of six and 15 years, for whom a parent/guardian is responsible, to be absent from school without reasonable cause	30	14.9
Obstruct police officer in performance of duties	5	2.5
Unauthorised consumption of liquor	58	28.7
Use profane, indecent or obscene language while in or near a public place	4	2.0
Without reasonable excuse have an animal/article in his/her possession where it is reasonably likely that the animal/article would be used unlawfully	1	0.5
Without reasonable excuse possess open vessel or utensil containing liquor in public place other than licensed premises or place designated by council	1	0.5
Total	**202**	**100.0**

TABLE 6: SENTENCED MATTERS, MAJOR OFFENCES, MORNINGTON ISLAND, 2007–2009

By-law Matter	Total	
Liquor Act 1992	No	%
Drunk or disorderly in premises to which a permit/licence relates	1	0.4
Fail to leave licensed premises	4	1.5
Possess more than the prescribed quantity of a type of liquor in a restricted area without a permit	169	63.3
Possession of liquor in restricted area	93	34.8
Total	**267**	**100.0**
Summary Offences Act 2005		
Commit public nuisance	235	99.2
Trespass – entering or remaining in dwelling or yard	1	0.4
Trespass – entering or remaining yard or place for business	1	0.4
Total	**237**	**100.0**
Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984		
Possess home-brew kit or home-brew alcohol in community area or prescribed area or prescribed community	193	100
Total	**193**	**100.0**

TABLE 7: SENTENCED MATTERS, MAJOR OFFENCES, AURUKUN, 2007–2009

By-law Matter	Total	
Criminal Code	No	%
Assaults occasioning bodily harm	6	7.0
Common assault	2	2.3
Attempted unlawful use of motor vehicles	7	8.1
Dangerous operation of a vehicle	2	2.3
Demanding property with menaces with intent to steal	2	2.3
Deprivation of liberty – unlawfully detain/confine	1	1.2
Enter dwelling and commit indictable offence	9	10.5
Enter dwelling with intent	1	1.2
Enter premises and commit indictable offence	15	17.4
Enter premises with intent	3	3.5
Receiving stolen property (or property fraudulently obtained)	1	1.2
Robbery	2	2.3
Stealing	2	2.3
Unlawful entry of vehicle for committing indictable offence	2	2.3
Unlawful use of motor vehicles aircraft or vessels – use	18	20.9
Wilful damage	9	10.5
Wilful damage of police property	2	2.3
Other	2	2.3
Total	**86**	**100.0**
Liquor Act 1992		
Attempt to enter restricted area in possession of more than the prescribed quantity of a type of liquor for the area	1	1.5
Possess more than the prescribed quantity of a type of liquor in a restricted area without a permit	64	98.5
Total	**65**	**100.0**

TABLE 7: SENTENCED MATTERS, MAJOR OFFENCES, AURUKUN, 2007–2009 (cont)

Summary Offences Act 2005	No	%
Being drunk in a public place	26	33.3
Commit public nuisance	41	52.6
Possession of implements that was being or about to be used in relation to particular offences	5	6.5
Trespass – entering or remaining in dwelling or yard	4	5.1
Trespass – entering or remaining yard or place for business	2	2.6
Total	**78**	**100.0**

TABLE 8: PENALTIES IMPOSED BY TWO JPs, 2007–2009	No	%
Admonished	42	1.6
Bond	4	0.2
Community service order	4	0.2
Imprisonment	46	1.8
General order	141	5.4
Monetary	1872	71.7
No action	103	3.9
Other	54	2.1
Probation	50	1.9
Prohibition order	54	2.1
Property forfeited	184	7.1
Unproven	58	2.2
Total	**2612**	**100.0**

TABLE 9: FINES IMPOSED BY TWO JPs BY STATUTE, 2007–2009	No	%
Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984	172	9.2
Bail Act 1980	17	0.9
Cherbourg Aboriginal Council by-laws	169	9.0
Criminal Code	10	0.5
Domestic and Family Violence Protection Act 1989	1	0.1
Drugs Misuse Act 1986	8	0.4
Education (General Provisions) Act 2006	9	0.5
Kowanyama Aboriginal Council by-laws	356	19.0
Liquor Act 1992	367	19.6
Motor Accident Insurance Act 1994	4	0.2
Penalties and Sentences Act 1992	2	0.1
Police Powers and Responsibilities Act 2000	59	3.2
Regulatory Offences Act 1985	2	0.1
Summary Offences Act 2005	410	21.9
Transport Operation (Road Use Management – Driver Licensing) Regulation 1999	2	0.1
Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999	1	0.1
Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999	7	0.4
Transport Operations (Road Use Management) Act 1995	20	1.1
Woorabinda Aboriginal Council by-laws	256	13.7
Total	**1872**	**100.0**

outcomes in the courts.[56] The use of fines by the JPs may also reflect the history of Queensland community courts, where originally Indigenous JPs were restricted to utilising sentences involving fines (as noted above). Perhaps the more significant difference between JP magistrates courts and the general magistrate courts is the infrequent use of imprisonment in the JP magistrates courts (1.8 per cent of sentenced outcomes compared to nine per cent in the general courts).[57] Also noteworthy are CSOs: these are used relatively infrequently in all magistrates courts (4.6 per cent of non-custodial sentencing outcomes).[58] However, they are virtually absent as a sentencing option in the JP magistrates courts (see further discussion relating to CSOs below).

As noted above, fines were the most common penalty imposed by the JP magistrates. Fines were imposed for a wide range of offences under various statutes. The largest proportion of fines was imposed under council by-laws (41.7 per cent of all fines), the *Summary Offences Act* (21.9 per cent) followed by the *Liquor Act* (19.6 per cent). A further 9.2 per cent of fines were imposed for convictions under the *ATSI Communities Act*, which deals, among other things, with issues relating to home brew. Some 56 per cent of the fines imposed under the council by-laws were for school truancy, 92 per cent of the fines under the *Summary Offences Act* were for committing a public nuisance, and 53 per cent of the fines under the *Liquor Act* were for possessing more than the prescribed quantity of alcohol in a restricted area (Table 9).

Nearly 70 per cent of fines imposed in the JP magistrates courts were for amounts between $100 and $500. Some 18.2 per cent of fines were for less than $100. A further 9.2 per cent of fines were for amounts between $500 and less than $1,000 (Table 10). A small proportion (3.2 per cent) of fines were $1,001 or over, to a maximum of $3,000. The small group of heavy fines of $1,001 or more overwhelmingly arose from convictions under the *Liquor Act* or the *ATSI Communities Act*, and related to possession of alcohol or home brew. More generally, a majority of the fines of $500 or more also related to offences under these same two Acts. JP magistrates courts also imposed forfeiture of property as a penalty in per cent of outcomes. In almost all cases where the nature of the property was listed, forfeiture of property outcomes involved the forfeiture of alcohol.

General orders were listed as a sentencing outcome in five per cent of sentencing matters. The vast majority of 'general orders' (96 per cent) were imposed in Kowanyama, and all related to offences under the by-laws prohibiting keeping a child absent from school. No further detail was available but presumably these orders involved an undertaking that the child attend school.[59] Some 3.9 per cent of matters resulted in 'no action' taken by the court. Further analysis showed that 89 per cent of these outcomes were related to school attendance by-laws. It would seem in these matters that the court was satisfied that bringing the matter of school attendance before the JPs was sufficient to ensure that school attendance obligations would be met in the future.[60]

As noted above a small proportion of sentencing outcomes (1.8 per cent) were terms of imprisonment. Nearly 90 per cent of the sentences of imprisonment were imposed in JP magistrates courts in Mornington Island and Aurukun. Some 63 per cent of sentences of imprisonment were for periods of three to six months, and more than half the sentences of imprisonment arose from convictions under the *Criminal Code*. *Criminal Code* offences leading to imprisonment included assaults,[61] unlawful use of motor vehicles[62] and wilful damage.[63] Offenders were also sentenced to imprisonment by the JP magistrates courts for offences under the *Liquor Act*, the *Summary Offences Act* and for breaches of domestic violence orders.[64] Almost all offenders (98 per cent) who were sentenced to a term of imprisonment were male (Tables 11 and 12).

V Support for the JP Magistrates Courts

Interviews with various Indigenous and non-Indigenous stakeholders involved with the JP magistrates courts indicated almost unanimous support for the JP Magistrates Court Program. Stakeholders suggested that the program has 'greatest potency' as an alternative to mainstream justice approaches, as well as on the basis of its potential to build capacity for Indigenous communities to own solutions to offending within them. The location of the JP magistrates courts within the communities where the courts operate was preferred to the fly-in, fly-out nature of magistrates and their circuit courts. JP magistrates courts were also said to provide an opportunity for genuine community participation and input into justice processes and outcomes and to provide for the development of a realistic alternative to mainstream justice mechanisms.

Local JPs saw themselves as connected to community. One JP commented that '[w]e want to be seen as serving our people. Coming before us, they're more relaxed. We know

TABLE 10: FINES IMPOSED BY TWO JPs BY DOLLAR AMOUNT, 2007–2009

Fine Amount	Total	
	No	%
$30	11	0.6
$50	156	8.3
$75	175	9.3
$90	1	0
$100	158	8.4
$101 to $200	495	26.4
$201 to $500	643	34.3
$501 to $1,000	199	10.6
$1,001 to $3,000	34	1.8
Total	**1872**	**100.0**

TABLE 11: IMPRISONMENT BY TWO JPs, 2007–2009

Imprisonment Period	Aurukun	Kowanyama	Mornington Island	Pormpuraaw	Total
	No	No	No	No	**No**
7 days			2		2
9 days		2			2
1 month			6		6
2 months			6	1	7
3 months	5	1	5		11
4 months	2		2		4
6 months	13			1	14
Total	**20**	**3**	**21**	**2**	**46**

TABLE 12: IMPRISONMENT BY TWO JPs, 2007–2009

Statute	Aurukun	Kowanyama	Mornington Island	Pormpuraaw	Total
	No	No	No	No	**No**
Bail Act 1980		2			2
Criminal Code	16	1	9	1	27
Domestic and Family Violence Protection	2		2	1	5
Liquor Act 1992			4		4
Police Powers and Responsibilities Act 2000			1		1
Summary Offences Act 2005	1		3		4
Transport Operations (Road Use Management) Act 1995	1		2		3
Total	**20**	**3**	**21**	**2**	**46**

why they did this. It may be alcoholism, drug abuse. We find out why this is happening. We have an understanding'. The connection to community was also recognised by non-Indigenous personnel, as the following quote from a QPS officer indicated:

> The Court works very, very well here. … Given the option defendants will opt for JPs rather than outsiders hearing the matter. At times it is confusing, because although the JPs can be harder on them the defendants still choose it. … They're judged by their peers and not by outsiders. Sometimes they give them a pasting and bring things into it a magistrate wouldn't know about such as family history, ancestors, deceased members of their family or community who would be shamed by their behaviour. They use cultural influence and the defendants don't like to be shamed like that. They respect the JPs.

It was seen as a great strength of the courts that JPs spoke the same language and shared the same cultural background as the people who appeared before them in court. As one JP magistrate explained:

> some people don't understand English. I talk language so that people can understand. We get Aurukun people here and I can speak their language. If they are in trouble for urinating in public … and [are] embarrassed, I can talk to them in language. I can guide them in court. I ask them if they will plead guilty, and if they want to plead guilty I can tell them how to say it. It's the same for sly grogging. I tell them not to lie when they say they didn't do it because I know. I do it in language and then they tell me everything! Speaking language to them is good (JP).

JP magistrates courts also provide communities with an opportunity to take responsibility for local law and order-related problems as they arise and to respond to those problems directly, especially in the context of by-law offences. Both the law-making function of local (Indigenous) councils and judicial decision-making by JP magistrates might be seen as operating at the least serious end of criminal offending. However our interviews revealed that the issues they attempted to regulate were far from unimportant. JPs felt that they could use their sentencing power to tackle problems of particular relevance to their respective communities, and the use of by-laws for non-attendance at school in Kowanyama and Woorabinda is an example of this approach. That sense of responsibility was captured by the comments of a JP who was located in a community where the JP magistrates courts had ceased to operate: 'It was our problem, our people sorting it out in our language when necessary. I'd like to see it again. It's challenging, its leadership. We become part of the solution to the problem'. Other Indigenous people in the community also commented on a similar sense of empowerment. An Indigenous person working for a legal service noted, '[i]t really is empowering for our people when the JP magistrates courts are working well. They should be overseeing these matters in the community and taking responsibility'.

Significantly, Indigenous and non-Indigenous community members and personnel working in justice agencies often supported the program as an initiative with symbolic significance and predominantly on the basis of its potential capacity to achieve outcomes of cultural relevance and community capacity building, rather than because of its tangible achievements to date. Alongside comments about the strength of the JP magistrates courts and a concern that the program be sustained, there were a number of issues and criticisms raised by those who were interviewed. We turn now to consider some of the limitations of the program.

VI Increasing the Longer-term Viability of the JP Magistrates Courts

We noted above that over a three-year period there were over 2,600 sentences imposed, and 5,200 matters (including bail) heard in the JP magistrates courts. We also noted that the majority of those matters were heard in only a few courts. There was a general perception in the interviews that we conducted that the JP magistrates courts were not hearing as many matters as they might. There are a number of reasons for this problem, which can be divided between problems associated with the JPs themselves (including recruitment, training and availability) and the issue of referrals to the court.

A Recruiting and Retaining Indigenous JPs

A fundamental issue impacting upon the program's immediate and longer-term capacity is the lack of JPs available to constitute a court. There are three main effects of the current shortage of JP magistrates: (1) there are no available JPs to convene court when it is scheduled to sit; (2) there is a loss of commitment to and support for the program by the existing JPs (who become overworked) and by other

justice personnel (such as QPS officers), who feel there is a lack of certainty around the functioning of the court; and (3) with fewer JPs, it can be difficult to deal with legal and cultural conflicts should they arise. Conflicts might occur for cultural or family reasons between JP magistrates and those appearing in JP magistrates court. It may be difficult, in some instances, for JP magistrates from one family group to sentence someone from another group or, obviously, for them to sentence their own close family members.[65]

Most initial JP magistrate training is provided on site at communities by DJAG staff. It is provided intensively over three non-consecutive weeks. While the JP magistrates we interviewed who attended DJAG training were satisfied with its content and delivery, there are issues with the lack of frequency with which the training is provided. Further there is little by way of ongoing in-service training, and there is a lack of ongoing support for JPs when they are convening court.

It is important to note in this context that although almost all community-based stakeholders supported retention of the JP Magistrates Court Program, their support did not always materialise in a practical and ongoing sense for JP magistrates and the work they performed. This might, in a few instances, be caused by tensions created between community members and JP magistrates because of particular matters heard in JP magistrates courts. As one registrar stated, JP magistrates court is 'very stressful in small communities. They are making judgments about people – its no fun'. It is more likely, however, to be derived from or manifest itself as insufficient community understanding of, or involvement in, the JP magistrates courts. JP magistrates courts regularly operate only with two JP magistrates and a police prosecutor present. The majority of stakeholders reported that, other than the JP magistrates, Community Justice Group members with some peripheral involvement in the JP magistrates courts (on some occasions) and those appearing before the JP magistrates courts, other Indigenous residents of a community may not know very much about the role and duties of JP magistrates. This may lead to JP magistrates feeling isolated within and unsupported by the community, which again affects JP retention and recruitment, and ultimately the viability of the JP Magistrates Court Program.

A further major barrier to the effectiveness of the JP Magistrates Court Program is the legislative exclusion of persons from appointment as a JP on the basis of prior convictions. The exclusion disproportionately impacts on Indigenous males, resulting in a greater likelihood that matters will be heard by female JP magistrates in the courts, with all the cultural implications that this may give rise to for Indigenous communities.

There are two legislative aspects to the present disqualification provisions needing consideration. Firstly, the *JP Act* specifically disqualifies persons from appointment or continuing appointment if convicted of certain offences.[66] Secondly, JPs are not able to rely upon spent convictions legislation, which might otherwise remove past convictions from a person's criminal record once a period of rehabilitation has expired.

The *Criminal Law (Rehabilitation of Criminal Offenders) Act 1986* (Qld) ('*Rehabilitation of Criminal Offenders Act*') provides that a person is no longer required to disclose convictions upon expiration of a 'rehabilitation period', depending on the seriousness of the offence in question.[67] Ordinarily, persons convicted of an offence may benefit from these provisions, which effectively remove convictions from an individual's criminal history after a rehabilitation period of five to 10 years, the latter period applicable to convictions for indictable offences.[68] Section 6 of this Act states that a person need not disclose a conviction after the relevant rehabilitation period has expired, unless the disclosure is to be made in circumstances 'that are expressed by section 9(2) to be a case to which the provisions of section 9(1) do not apply'. Section 9(1) imposes upon persons or authorities an obligation to disregard any conviction of a person applying to be admitted to a profession, occupation or calling when assessing that person's fitness for admission.

Section 9A of the *Rehabilitation of Criminal Offenders Act* provides that categories of persons applying for appointment to specified positions or offices have to disclose convictions for certain offences regardless of the aforementioned spent convictions provisions. JPs are included in the listed categories of persons. Relevant offences for those seeking appointment as a JP are also generously defined as 'contraventions of or failures to comply with any provision of law, whether committed in Queensland or elsewhere'. Those seeking to become JPs are therefore required to disclose *any* past convictions, regardless of the time at which they were acquired; and a conviction for any offence will also result in disqualification if already qualified as a JP.

Our interviews with Indigenous and non-Indigenous individuals recognised the specific impact that the disqualification provisions had within Indigenous communities. As a QPS officer noted, it was 'very rare' to find someone without a criminal history in the community as 'there are so many police here as a ratio of people that you're bound to get in trouble because of over-policing'. A court registrar also commented as follows:

> You cannot be a JP if you have a criminal record and that's ridiculous because we know of people who have records dating 15–20 years' back for minor offences and they are hardworking people who want to get ahead with their lives, and they can't do the JP training. Something needs to be done about that legislation so that there are exceptions to allow people to be sitting members, or so that they can undergo the training. This is something that impacts disproportionately on Indigenous people.

Stakeholders spoke of the growing numbers of persons amassing criminal histories under Alcohol Management Plan ('AMP') provisions, which have led to convictions under the *Liquor Act*. One registrar noted:

> It's hard to get eligible people because of convictions. [Their conviction] could be reasonably simple in nature. AMP convictions wipe out a hell of a lot [of eligible JPs]. It seems to be any conviction. I'd support a review of the current restrictions. Even if a one off situation and they lacked sense and reason and they did something silly. They may be upstanding in the community.

Most stakeholders we interviewed recognised that JP magistrates are exercising a judicial role commanding respect and a certain status within the community. However, the present disqualification provisions are unnecessarily broad ranging in terms of those they exclude.

By way of contrast, we note three different examples that are more inclusive and flexible in how they deal with applications by individuals who may have previous criminal convictions: Victorian bail justices (*Magistrates Court Act 1989* (Vic)); appointment as a local Commissioner with the Family Responsibilities Commission (*Families Responsibilities Commission Act 2008* (Qld)); and the process for application for a blue card to work or volunteer with children in Queensland (applications are made to the Commission for Children and Young People and Child Guardian). In each of these examples there are levels of discretion and/or an attempt to target disqualification to convictions for specific offences, which are relevant to the duties being undertaken. They each also have a higher threshold in terms of disqualifying offences.

Inevitably, the existing JP exclusionary provisions result in a greater reliance upon *non-Indigenous* JP magistrates to convene court on Indigenous communities. It is not always possible to have two Indigenous JP magistrates convening JP magistrates courts in Indigenous communities, given the problems associated with numbers available to perform bench duties. Whilst the degree of separation from community life and family connections that non-Indigenous JPs will bring to JP magistrates courts can be useful and even essential in certain circumstances, including where there is a conflict of interest that must be responded to, stakeholders indicate that qualified Indigenous JP magistrates ought arguably to be (and to be seen to be) primarily responsible for JP magistrates courts in Indigenous communities, given the Indigenous focus of the program. Again, the importance of recruiting and retaining sufficient Indigenous JP magistrates is emphasised.

B Referral of Matters to the JP Magistrates Courts

The commitment of state police to JP magistrates courts is absolutely essential for the effective operation of the courts. The role of police usually encompasses charging offenders, referring matters to the JP magistrates courts, and appearing in court as prosecutors. Police may also provide administrative assistance by taking carriage of paperwork produced in court, assistance with State Penalties Enforcement Registry ('SPER') fine payments after JP magistrates court, bringing offenders to court, assisting JPs in court with court procedures and ensuring that there are sufficient JPs to hold court to hear matters listed.

Overwhelmingly, the most significant function for police is listing matters before the JP magistrates courts. Police provide the cases for the courts; they are the gatekeepers to the court. When they cease to refer matters or do so without consistency, the JP magistrates courts will fail to thrive, or in more extreme cases, collapse. As one DJAG staff member noted, '[t]hey can make or break the courts by way of the matters they chose to set down. If an officer in charge doesn't like JP magistrates courts then they won't have a court list and the court will die'.

One of the key issues that emerged from the current research was the lack of clear or consistent criteria in deciding to refer matters to the court. Localised factors can come into play where QPS officers determine the relevant capacity of the JPs to hear matters. Other factors which influence decisions about which forum to use for offenders can include personal attitudes of individual officers to the JP magistrates courts, whether a defendant prefers to appear before the JPs or the magistrate, law and order issues arising in a particular community, and the level of police understanding about the powers of JP magistrates courts. In some communities police were mistakenly of the belief that only local by-law matters could be set down before the courts. To the extent that there was some de facto consistency in police decision-making, the key factors in deciding not to list a matter before the JP magistrates courts included the seriousness of the offence, the defendant's criminal history, whether the defendant was already subject to an existing order (such as a CSO, probation or suspended sentence), or whether there was a direct conflict of interest between the offender and sitting JPs.

Many interviewees, including police, recognised the need for consistency. As one QPS officer in charge noted,'[w]e need clarification about what should be put before the JPs. This would allow for streamlined consistency. To do this, it'd be like it is for children. You issue a set of guidelines or principles as to cautioning and conferencing for first and second offences'. In our view guidelines should state at a minimum that there is a presumption that certain matters will be referred to JP magistrates courts. However, alongside any QPS direction, there should be scope for formal input at a *local* level by various stakeholders (including JPs) about the types of matters JPs can and are willing to hear.

Magistrates may also have some influence upon the number of matters that JP magistrates courts are able to deal with. The research revealed some cases where magistrates had referred matters back to JP magistrates courts to sentence as appropriate. There were also examples where particular types of matters were removed from the JP magistrates courts to the magistrates courts. In one community alcohol-related offences were removed to the magistrates courts so that Indigenous offenders from the community could access the Queensland Indigenous Alcohol Diversion Program.[69]

C The Range of Matters Determined in the JP Magistrates Courts

The research revealed little need or desire for JPs to have greater legislative power to deal with more serious matters. The JP magistrates courts generally deal with minor offences within their legislative powers and appear content in doing so. Matters may be limited to those unlikely to lead to any level of community conflict or significant problems for the JPs in their communities. JPs themselves, along with other stakeholders, may determine what is appropriate for their respective communities in this regard. One JP stated that 'our court is the minor one. We give them the fines. The Magistrate has all the things there and full pay … [so] he should get the difficult ones'.[70]

Offending behaviour with potential to impact negatively upon the community as a whole (such as drinking in public and fighting) was often seen as more appropriate for JP magistrates courts rather than offences that may lead to inter-family conflict such as domestic violence, or other matters involving serious violence.[71] As one JP commented:

> We don't want to do violence matters. … [T]oo much responsibility on the JPs because they have to live here and you might be seen as favouring one family over another. It could put JPs in a very difficult situation. There could be backfiring and repercussions on the JPs. We haven't had anything come back at us, touch wood, but that could change with the more seriousness of the offences like DV. [A] serious property offence is okay – it is the personalisation of the offence that is the problem.[72]

As occurs with offences involving domestic violence, some JPs were unwilling to deal with AMP-related charges because of the lack of community consensus around the relevant provisions and the potentially heavy penalties applicable:

> We want to be able to take the vehicle and maybe have a big fine for them like $10,000. But we would build a fire in town if we did that! We want the magistrate to do it. We want to do the minor stuff. We want to keep it this way. If there is lots of grog then the magistrate must do it (JP).

Regardless of any overarching legislative powers enabling JP magistrates to hear certain types of matters, the local JP magistrates appeared to take a pragmatic view of the types

of offences that were suitable to be determined in the local JP magistrates courts. Certainly it was a common view that magistrates should deal with more serious matters involving violence. This division between more serious and less serious offences is reminiscent of William's famous study of Aboriginal dispute resolution in Yirrkala, where local authority was maintained over 'little trouble', while 'big trouble' (usually involving serious inter-personal violence) was seen as more appropriately dealt with by white authorities.[73]

VII The Legal Rights of Those Appearing before the JP Magistrates Courts

Indigenous defendants are generally unrepresented in the JP magistrates courts. The lack of legal representation available in these courts is an important issue, but one that generates conflicting views. Many stakeholders did not identify lack of representation as a problem. Some JP magistrates indicated that offenders wanted to have their matter dealt with swiftly by the JPs, and that they are better able to achieve this and to speak freely about an offence without legal representation. JP magistrates courts were seen as different to magistrates courts in this regard, reflecting the view that these courts are intended to be an alternative to existing judicial approaches to Indigenous offending.

However, legal service providers raised a number of concerns relating to the lack of representation in the courts. Offenders regularly plead guilty and are sentenced here without legal advice; moreover, sentences were often disproportionate to the offences committed, and lacked consistency. As one court registrar noted, if JP magistrates court penalties 'went to the District Court on appeal they would be overturned, for sure. But people appearing in these courts don't appeal, they don't have legal representation and they wouldn't know'.

At present, the ATSILS are only resourced to travel to Indigenous communities for magistrates court appearances. Their visits do not coincide with JP magistrates court sittings, and therefore defendants are rarely represented, although sometimes offenders appearing before JP magistrates might seek advice or information from ATSILS lawyers or field officers in relation to a penalty imposed by them. At only one JP magistrates court is more regular ATSILS representation provided, in that case because the relevant legal service is located within 10 kilometres of the community in question. ATSILS identified access to representation as a legal right for all Aboriginal and Torres Strait Islander people but also acknowledged that mandating representation in JP magistrates courts would effectively lead to the demise of the program because of the absence of resources to fund legal representation at this level of court.

It is important to acknowledge that despite the relatively minor nature of offences heard in these courts, defendants should *at least* have access to legal assistance and advice. Penalties imposed by JP magistrates may be practically restricted to fines for the most part, but those fines may be hefty ones, with further legal consequences arising due to failure to pay (see below); moreover, convictions are recorded,[74] and sentencing outcomes may impact upon or be relevant to sentences imposed in magistrates courts. Access to legal assistance would also serve to reinforce the legitimacy of the JP magistrates courts as a judicial forum. At a minimum, those charged to appear before a JP magistrates court should be advised of the right to speak with a lawyer and of the availability of the 24-hour ATSILS 1800 phone number. In our view, police should be trained to ensure that this occurs on a consistent basis.

VIII The Limitations on Sentencing in the JP Magistrates Courts

The sentencing options available to JP magistrates are as broad as those of any magistrate in Queensland. They have access to the full range of outcomes set out in the *Penalties and Sentences Act 1992* (Qld), regardless of whether charges are brought with respect to relevant provisions of state legislation or of council by-laws. Despite the available options and the general sentiment amongst stakeholders (including JPs) that fining offenders is largely ineffective, as we noted previously monetary penalties are imposed by JP magistrates courts in the majority of cases (72 per cent).

A monetary fine can seriously disadvantage Indigenous people given low incomes, high unemployment, lack of literacy and numeracy skills, poor health, overcrowded housing and a range of other socio-economic factors.[75] Most Australian states and territories have provisions that require judicial officers to consider an offender's means to pay when determining a fine.[76] However it is unclear whether JPs are aware of these requirements. Unpaid fines are a significant issue for Indigenous people, with one New South Wales survey indicating that half of all Indigenous license holders had their licenses suspended or cancelled, and that of these

the major reason for suspension or cancellation (in 59 per cent of cases) was unpaid fines.[77]

JP magistrates courts are not providing an effective alternative to the heavy reliance placed upon fines in magistrates courts; as noted above, they appear to be replicating the approach of the latter courts in this regard. In interviews, JP magistrates and others expressed a preference for penalties that require offenders to give back to the community, such as orders that require them to clean up facilities on the community or to undertake community work. Some JPs indicated in interviews that they would prefer to use CSOs, good behaviour bonds or mediation. The reliance upon fines as a sentencing option may be due to lack of understanding amongst JPs and others about their sentencing powers. One JP commented '[w]e need more help with this. All service providers should provide positions for offenders on CSO. When I first became a JP I didn't know I could do CSOs. They didn't tell me'. What might appear to be an over-reliance on fines in JP magistrates courts may in fact result from insufficient support from justice agencies, which might better assist JPs to access alternative sentencing options.[78] The recent CMC report into policing on Indigenous communities found that magistrates courts on circuit also failed to use diversionary options as much as they might, due in part to a lack of service provision by criminal justice services such as corrections.[79] Inadequate service provision and a lack of relevant programs to address underlying causes of offending such as alcoholism or mental health is thus not a problem solely for those appearing before JP magistrates courts in Aboriginal and Torres Strait Islander communities. Offenders appearing in magistrates courts may also be left out in this regard. However, it is clear that JP magistrates courts are often less connected than magistrates courts with services such as community corrections and available programs.

A Consistency and Guidelines

A further criticism of the fines imposed by JPs relates to their inconsistency and lack of proportionality: they are inconsistent when compared to those imposed by magistrates, and are too high relative to the seriousness of the offence. Sentences rarely go to appeal in a higher court. As a court registrar explained:

> The JPs impose sentencing far above what [defendants] would be getting in Cairns from the magistrate. In Cairns if you get picked up for public drunkenness you go to the watch house and you're out for 10 cents, in the communities we're seeing penalties of $300! JPs don't want to be toothless, but is it reasonable to make that decision? It's inconsistent and unfair when measured against the wider community. I don't know what their training is. I don't think anyone is reviewing the penalties being imposed but they should.

It was clear from the interviews we conducted that JPs require assistance with sentencing. Some attempt at consistency was provided in two of the communities visited during the research where there are sentencing guidelines in place specifically for JP magistrates court: one was provided by a local magistrate, and the other by council to cover by-law offences.

JPs are trained by DJAG in relation to sentencing principles and options.[80] However, given the lack of legal representation of defendants and the general lack of judicial or administrative oversight in JP magistrates courts, they exercise a relatively unfettered discretion in sentencing, particularly noteworthy given practical difficulties associated with lodging an appeal in a remote community against a decision of a JP magistrate. What appears to be a lack of training around consistency and proportionality may also reflect a desire to impose penalties that reflect the local community's dismay at particular types of offending behaviour. However, it may also reflect the more general problem of a lack of knowledge around available sentencing options and the type of matters that can be dealt with by the JP magistrates courts.

IX Conclusion

The JP magistrates courts were established with the purpose of addressing the alienation commonly experienced by Indigenous people within the criminal justice system, enabling culturally appropriate processes and sentencing, fostering the development of positive Indigenous role models within relevant communities and increasing community capacity building by providing a local Indigenous court system to address localised issues. Other outcomes variously relate to reducing Indigenous over-representation in the court system and aiding in a more efficient system of justice.

There is certainly no simple or singular answer to the question of whether JP magistrates courts have been 'effective' in their outcomes. Our research showed that at a local level, communities supported the retention of the JP magistrates courts as they are seen as delivering a culturally

sensitive justice process which is more inclusive of both the Indigenous community and the Indigenous offender. Where the JP magistrates courts are working well, there is a sense that local issues of importance can be responded to appropriately by the courts.

We note again, however, the need for enhanced community understanding of, ongoing support for, and involvement in the work the JP magistrates do, and for sufficient participation by Indigenous people as JP magistrates, if the Program is to achieve its stated objectives. It is also clear that the courts are essentially a Western justice model, despite the local adaptations. The choices of penalties imposed largely reflect the approach of mainstream courts, at least in the use of fines. Further, arguments surrounding consistency and proportionality reflect the positioning of the courts within a much wider judicial system over which Indigenous people have little control.

Similarly, issues around legal representation for Indigenous offenders before the courts also show the complexity of the relationships within justice systems: in this case between Indigenous organisations like the ATSILS (with responsibilities for representing Indigenous people in legal proceedings) and local Indigenous JPs with responsibilities for imposing a proper sentence. The laws which are imposed also reflect these ambiguities and tensions: from local, Indigenous-generated by-laws (such as those covering school truancy) to externally imposed regulation (such as the offences attached to AMPs) where there is far more community division over the law's legitimacy.

Criminal justice measures of effectiveness, such as reducing recidivism, are unlikely to capture the more nuanced outcomes of programs like the JP Magistrates Court Program, although the capacity for Indigenous elders and other participants in the court process to impact upon individual offenders' 'attitude and behaviour' through shaming processes are also highlighted in our research. JP magistrates courts may not directly adopt Indigenous customary laws, and are not wholly Indigenous-controlled; rather, they are embedded within and reliant upon Australian criminal laws and procedures. However, as Marchetti and Daly note in relation to Indigenous sentencing courts, the application of 'white law' through these processes 'is inflected by Indigenous knowledge and cultural respect'.[81] The courts themselves represent a hybridity in justice. Rather than simply seeing the JP magistrates courts as a type of mainstream justice model imposed from the outside, they also represent a framework through which local Indigenous people are able to influence the way justice is done at a community level.

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1 Chris Cunneen et al, Queensland, Department of Justice and Attorney-General, *Evaluation of the Remote JP Magistrates Court Program: Final Report* (2010). The research presented in this article was current at the time of conducting the JP Magistrates Court Program evaluation in 2010. We have referred, however, to the content of the 2011 government response to the evaluation where appropriate: see Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Evaluation of the Remote Justices of the Peace Magistrates Court Program* (2011).

2 Elena Marchetti, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, December 2009); Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.

3 See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1985) vol 2, 30–52; Kate Auty, *Black Glass: Western Australian Courts of Native Affairs 1936–1954* (Fremantle Arts Centre Press, 2005).

4 *The Recognition of Aboriginal Customary Laws*, above n 3, 30.

5 In December 2011, the program was operating in Aurukun, Bamaga (Northern Peninsula Area), Cherbourg, Kowanyama, Lockhardt River, and Pormpuraaw: *Queensland Government Response to the Evaluation of the Remote Justices of the Peace Magistrates Court Program*, above n 1, 4.

6 Generally, however, the JP magistrates courts sit in the same courtroom used by magistrates courts, with JP magistrates seated at the bench, as other magistrates do. We further note that in a number of other jurisdictions (other than NSW and ACT), JPs are also able to carry out judicial rather than simply administrative functions. An overview of relevant provisions is provided in: Aboriginal Legal Service of Western Australia, Submission to the Department of the Attorney General, Government of Western

Australia, *Proposal to Investigate the Introduction of a 'Two Tier' Framework for Justices of the Peace in Western Australia*, December 2010, 21–33. For discussion of a similar scheme that has operated in Western Australia, the Aboriginal Justice of the Peace Scheme, see Annie Hoddinott, *That's 'Gardia' Business: An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (Criminology Research Council, 1984).

7 *Queensland Government Response to the Evaluation of the Remote Justices of the Peace Magistrates Court Program*, above n 1, 3.

8 Marchetti, above n 2, 3.

9 Ibid 2.

10 *The Recognition of Aboriginal Customary Laws*, above n 3, 30–1.

11 *Community Services (Aborigines) Act 1984* (Qld) ss 40–3; *Community Services (Torres Strait) Act 1984* (Qld) ss 42–5.

12 For these and other details pertaining to the operation of community courts see Department of Aboriginal and Torres Strait Islander Policy, *Review of the Aboriginal and Torres Strait Islander Community Courts* (1998) 18–19.

13 Under the *Justices Act 1886* (Qld), JP powers included the power to issue a warrant of apprehension (ss 57, 59), to commit a defendant to trial or sentence where the committal hearing was uncontested (s 110A(6)), and to remand a defendant in custody in the case of an indictable offence (s 84).

14 Office of the Attorney-General (Qld), *A Green Paper on the Justices of the Peace in the State of Queensland* (1990).

15 At the time of writing, JPs (qualified) have powers and responsibilities lesser than those of JP magistrates, but greater than those of commissioners for declarations. For instance, JPs (qualified) can convence court and grant remand, refuse bail, forfeit bail (and issue an arrest warrant) and grant an adjournment, as can JP magistrates. JPs (qualified), however, are not empowered to impose sentence. Only JP magistrates are able to do this. Commissioners for declarations are not able to convene court.

16 *JP Act* s 29(4) permits two or more JP magistrates:

(a) [to hear and determine] a charge of a simple offence or regulatory offence under the *Justices Act 1986* where a defendant pleads guilty;

(b) [to conduct] an examination of witnesses in relation to an indictable offence under the *Justices Act 1986;* and

(c) [to take or make] a procedural action or order.

Section 3 defines procedural action or order as 'an action taken or order made for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate, for example the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings'. For the respective powers of JPs (qualified) and commissioners for declarations, see ss 29(3) and (5).

17 *Transport Operations (Road Use Management) Act 1995* (Qld) s 79.

18 *Liquor Act 1992* (Qld) s 164(a).

19 *Regulatory Offences Act 1985* (Qld) s 7.

20 In this context, it is important to note that various laws other than the *JP Act* confer relevant powers upon JPs *without* reference to categories of JP appointment, including legislation passed both prior and subsequent to the 1991 Act. Section 4(3) of the *Domestic and Family Violence Protection Act 1989* (Qld) ('*Domestic Violence Act*'), for example, provides that two or more 'justices' may deal with an application for a domestic violence order where parties consent to its terms, or a temporary protection order (or its extension) where a magistrate is not available to constitute a magistrates court. Any legislation dealing with the powers of justices, including the *Domestic Violence Act*, will generally need to be read in conjunction with the *JP Act*, which serves, in a sense, to draw legislative boundaries around powers thus conferred upon JPs, unless the operation of the *JP Act* is expressly excluded (eg, as occurs in *Child Protection Act 1999* (Qld) s 102(4)).

21 See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5.

22 Department of Justice and Attorney-General (Qld), *Profile: Justice of the Peace (Magistrates Court) Training and Instituting Court Sittings on Remote Communities* (2005) ('*DJAG Profile*').

23 The three communities were Kowanyama, Thursday Island and Bamaga/Injinoo: ibid 4.

24 At the time of writing, *Criminal Code* s 522C provides that this is only permitted where the offender pleads guilty, is punishable by a penalty that does not exceed the maximum penalties set out in s 552H (100 penalty units or six months' imprisonment), and where any property involved (for relevant property offences) does not exceed the value of $2,500. Further, these 1997 amendments empowered JP magistrates to hear such matters only at an 'identified' place if gazetted by the Attorney-General for appointment to do so, the latter restricted to locations which are (a) within a community government area under the *Local Government (Community Government Areas) Act 2004* (Qld); (b) a local government area of an Indigenous regional council under the *Local Government Act 1993* (Qld) (although this category was removed by a subsequent legislative amendment); or (c) one which the Attorney-General considers 'remote'.

25 *Criminal Code* s 245.

26 *Criminal Code* s 391.

27 *Criminal Code* s 406A.

28 Explanatory Memorandum, Aboriginal, Torres Strait Islander and

Remote Communities (Justice Initiatives) Amendment Bill 1997 (Qld) 3, cited in Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Issues Paper WP No 51 (1998) 21 (‘*Role of JPs Issues Paper 1998*’). This bill amended the *Criminal Code*, as above.

29 *Role of JPs Issues Paper 1998*, above n 28, 22.

30 *Review of the Aboriginal and Torres Strait Islander Community Courts*, above n 12.

31 Ibid 22.

32 *Role of JPs Issues Paper 1998*, above n 28; Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Discussion Paper WP No 54 (1999) (‘*Role of JPs Discussion Paper 1999*’); Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Report No 54 (1999).

33 *Role of JPs Discussion Paper 1999*, above n 32, 152–5.

34 Ibid 152 ff.

35 Ibid 220–1.

36 *DJAG Profile*, above n 22.

37 Ibid 4.

38 See, eg, Justice Tony Fitzgerald, Department of Communities (Qld), *Cape York Justice Study Report* (2001); Chris Cunneen, Neva Collings and Nina Ralph, ‘Evaluation of the Aboriginal and Torres Strait Islander Justice Agreement’*,*(Sydney Institute of Criminology, University of Sydney, 2005); Heron Loban, ‘Torres Strait Justice Project Report to the Law and Justice Chief Executive Officers Committee’ (2006) (unpublished, copy on file with authors); D M O’Connor, Department of Justice and Attorney-General (Qld), *Improving Cape York Justice Services* (2008); Queensland, Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland’s Indigenous Communities* (2009) (‘*Restoring Order*’).

39 Cunneen, Collings and Ralph, above n 38, 104.

40 O’Connor, above n 38; Fitzgerald, above n 38; *Restoring Order*, above n 38, 76.

41 Queensland Government, *Evaluation of the Aboriginal and Torres Strait Islander Justice Agreement: Government Response* (2005), 29, 39. See also, eg, Department of Justice and Attorney-General (Qld), *Indigenous Justice Strategy* (2008) and earlier strategies.

42 *Restoring Order*, above n 38, 305, 309.

43 Queensland Government, *Response to the Crime and Misconduct Report: ‘Restoring Order: Crime Prevention, Policing and Local Justice in Queensland’s Indigenous Communities’* (2010).

44 Cunneen et al, ‘Evaluation of the Remote JP Magistrates Court Program’ (Final Report, Cairns Institute, James Cook University, October 2010).

45 Other factors applied to the selection of communities due to their potential relevance to assessment of the program’s effectiveness included their proximity to geographic centres and/or their access to a permanent court registry.

46 The DJAG also suggested a small number of individuals for interview who had been working with the JP Magistrates Court Program on communities other than those selected as focus sites (QPS staff, JPs, registrars and DJAG staff in Lockhardt River, Palm Island and Woorabinda), as well as Family Responsibilities Commission staff working with the community of Aurukun. Overall, 31 JPs fairly evenly distributed across the seven nominated communities were consulted (of which six were non-Indigenous). Further, 35 community members (CJG members, council representatives or elders) were also interviewed (seven of these were interviewed, simultaneously, as JP magistrates as they had a dual role on their communities). There were also 12 QPS staff interviewed across the nominated communities. Further detail relating to stakeholder interviewees is located in the Appendix to the evaluation report: Cunneen et al above n 44.

47 Attempts were also made to observe JP magistrates courts in operation on two communities as part of the evaluation. However, although a JP magistrates court was convened in one community at the expected time, all matters were at that particular sitting adjourned as no defendants appeared. The Court could not be observed, for this reason. In the other instance, no matters had been listed by police for the JP magistrates court at the sitting attended. Due to the short timeframe within which the research needed to be completed, it was not possible to schedule additional visits in order to increase the likelihood of observing a JP magistrates court in operation.

48 The 10 courts covered in the data are Aurukun, Bamaga, Cherbourg, Kowanyama, Lockhart River, Mornington Island, Pormpuraaw, Thursday Island, Woorabinda and Yarrabah. A three-year period for review of the data was deliberately selected so as to overcome problems with variations in sittings, or other anomalies that might affect the short-term operation of the courts.

49 Further detail with respect to qualitative data can be found in the final evaluation report: Cunneen et al, above n 44.

50 *Criminal Code* ss 408A, 419, 421 (inter alia).

51 *Liquor Act* s 168B.

52 *Summary Offences Act* ss 6, 10.

53 Australian Bureau of Statistics, *Criminal Courts 2010–11* (ABS Catalogue No 4513.0, 2011) 60.

54 *Police Powers and Responsibilities Act 2000* (Qld) s 790.

55 A similar disproportionate impact upon women and mothers is evident in child-protection-related matters: see Brigid Daniel and Julie Taylor, *Engaging with Fathers: Practice Issues for Health and Social Care* (Jessica Kingsley Publishers, 2001).

56 *Criminal Courts 2010–11*, above n 53.

57 Ibid 55.

58 Ibid 61.

59 The evaluation did not provide statistical evidence indicating whether truancy reduced specifically a result of the orders made in JP magistrates courts, but further research might indicate whether those communities where these by-laws were used had better school retention rates, or not, than other remote communities.

60 Convictions for by-laws, importantly, are not recorded as prior convictions on an individual's criminal record.

61 *Criminal Code* s 245.

62 *Criminal Code* s 408A.

63 *Criminal Code* s 469.

64 *Domestic and Family Violence Protection Act 1989* (Qld) s 80.

65 Conflict may be dealt with where there are no Indigenous JP magistrates to assist, by calling upon non-Indigenous JP magistrates or referring the matter in question to a magistrates court.

66 *JP Act* s 17. Note that s 17(5) provides that those applying for appointment as commissioner for declaration may be exempted by the Minister from disqualification where 'special circumstances' exist.

67 *Criminal Law (Rehabilitation of Criminal Offenders) Act 1986* (Qld) ss 6, 3.

68 *Criminal Law (Rehabilitation of Criminal Offenders) Act 1986* (Qld) s 3.

69 There is no legislative scope for JPs to refer matters to the Program: see *Bail Act 1980* (Qld) s 11(9).

70 JP magistrates who convene court on a 'community area' are paid a nominal 'sitting fee' per court sitting: see *JP Act* s 35(2).

71 Only in Aurukun and Mornington Island were there sentencing matters under the *Domestic Violence Act*, and these matters in both instances constituted less than one per cent of all sentencing matters. Only 1.6 per cent of all matters heard by two JP magistrates fell under this particular Act.

72 See further discussion relating to responding to partner violence in Indigenous sentencing courts in Elena Marchetti, 'Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43 *Australian & New Zealand Journal of Criminology* 263.

73 Nancy Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Australian Institute of Aboriginal Studies Press, 1987).

74 Although not for by-law convictions, as noted above.

75 See Steering Committee for the Review of Government Service Provision, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009).

76 Mary Spiers-Williams and Robyn Gilbert, 'Reducing the Unintended Impact of Fines' (Current Initiatives Paper No 2, Indigenous Justice Clearinghouse, 2011) 1. See, eg, *Penalties and Sentences Act 1992* (Qld) s 48.

77 Spiers-Williams and Gilbert above n 76, 4.

78 See Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Third Report* (2009) 77–8. However, it is clear that JP magistrates courts are often less connected than magistrates courts with services such as community corrections, as noted above, and with available programs.

79 *Restoring Order*, above n 38, 289.

80 As set out in *Penalties and Sentences Act (1992)* (Qld).

81 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415, 437.