SENTENCING DISPARITY AND THE ETHNICITY OF JUVENILE OFFENDERS

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Sentencing Disparity and the Ethnicity of Juvenile Offenders

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Disclaimer

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EXECUTIVE SUMMARY

The juvenile sentencing project was initiated in response to the government's 1993 Green Paper on Future Directions for Juvenile Justice†, which identified issues of concern in the juvenile justice system in New South Wales. One recommendation was that the Judicial Commission of New South Wales examine inconsistencies in the sentencing of juvenile offenders, giving special attention to the sentencing of children from Aboriginal and non-English speaking backgrounds.

A system for collection of ethnicity data was developed and implemented in 1995. After the collection system was established, data for the 1996 calendar year were used to examine outcomes for young Aboriginal persons and for young persons of various ethnic backgrounds, to determine whether there was evidence of disparity.

Samples of Aboriginal and Torres Strait Islander juveniles and juveniles from four non-English speaking ethnic groups — Pacific Islander, South East European, Middle Eastern and East Asian — were carefully matched with juveniles from an Anglo-Australian background and compared in terms of the severity of the sentences they received. The youths were matched on factors known to influence sentencing: type of offence, criminal history, age, plea, number of counts and police bail status amongst others.

The study found —

- There were statistically significant differences in the penalties received by the Aboriginal and Torres Strait Islander group and their Anglo-Australian counterparts, with the former receiving harsher penalties.
- Aboriginal and Torres Strait Islander offenders received more community service orders and more supervised orders than their Anglo-Australian matches. Both these penalties are at the more severe end of the penalty hierarchy.
- There were statistically significant differences in the penalties received by the Pacific Islander group and their Anglo-Australian counterparts, the former receiving harsher penalties.
- Pacific Islander offenders received twice as many control orders than their Anglo-Australian matches.
- There were no statistically significant differences for the other ethnic groups examined (South East European, Middle Eastern and East Asian), however, the direction of the difference was consistently in favour of the Anglo-Australian group.

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† Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, 1993, New South Wales Government, Sydney.

This study illustrates the importance of and need for comprehensive and accurate data on ethnicity and Aboriginality. This study also demonstrates the need for, and importance of, data capable of monitoring the impact of sentencing policies upon Aboriginal and ethnic minorities. Other criminal justice agencies may also wish to adopt a similar approach with their data systems, so that comparable studies may be undertaken and thereby provide a basis for future policy development and implementation.

It is recommended that the results of this study be taken into consideration by judicial officers and relevant government agencies in order to promote the equitable treatment of indigenous and ethnic people who come before the courts.

Ivan Potas
Director, Research and Publishing

March 1998

1 INTRODUCTION

THE CENTRAL ISSUE

The main aim of this study was to examine sentencing outcomes for juveniles for evidence of disparity. More particularly, the aim was to determine whether juvenile offenders from indigenous Australian[1] backgrounds or from non-English speaking backgrounds were sentenced differently to comparable offenders from the predominant culture — defined as Anglo-Australian.

The study is confined to examining possible inconsistencies in the sentencing of juveniles. Obviously, the final sentence received by a juvenile offender reflects a culmination of all of the decisions made at preceding stages. A finding of no disparity in the sentencing process does not mean certain groups are not disadvantaged earlier in the criminal justice system. Conversely, a finding of disparity at the sentencing stage means that some groups are disadvantaged in addition to any unfair treatment which may have occurred at previous stages.

BACKGROUND TO THE PROJECT

This project, among others, was initiated in response to the government's Green Paper entitled *Future Directions for Juvenile Justice in New South Wales*.[2] This paper identified issues of concern in the juvenile justice system in New South Wales and made recommendations to improve its operation.

The project is specifically relevant to Recommendation 95 of the Green Paper which proposed that —

1 This term includes Australians from an Aboriginal or a Torres Strait Islander background. The terms used throughout this report to refer to indigenous Australians and Australians from an ethno-linguistic minority background are those designated as culturally appropriate and acceptable by the *Style Manual for Authors and Editors*, 5th ed, 1994, Australian Government Publishing Service, Canberra.

2 Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, 1993, New South Wales Government, Sydney.

> "The Judicial Commission of New South Wales should give emphasis to examining inconsistencies in the sentencing of juveniles and give priority to the development of intervention strategies to address these inconsistencies, with special attention to the sentencing of children from Aboriginal and non-English speaking backgrounds."[3]

The ensuing White Paper[4] on juvenile justice was part of a broader, coordinated and consultative approach to the implementation of new policy initiatives which included a commitment to monitor juvenile justice processes and outcomes. Obviously, a prerequisite for accurately monitoring the criminal justice system with regard to specific groups of juveniles is to have a data collection system which reliably identifies membership of these groups. A particular requirement in undertaking the present study was to improve the accuracy of information collected on Aboriginal and Torres Strait Islander young people and juveniles from non-English speaking backgrounds. It is vital that juveniles from these backgrounds be identified so that services can be appropriately directed, and to make possible an accurate investigation of allegations of disparity in their treatment before the courts.

The importance of improving the sources of information about Aboriginal offenders in particular was emphasised in Recommendation 115 of the Royal Commission into Aboriginal Deaths in Custody —

> "That for the purpose of assessing the efficacy of sentencing options and for devising strategies for the rehabilitation of offenders it is important that governments ensure that statistical and other information is recorded to enable an understanding of Aboriginal rates of recidivism and the effectiveness of various non-custodial sentencing orders and parole."[5]

Historically, ethnicity information was found on police charge sheets but the validity and reliability of this data source was debatable. A closer examination of this collection system indicated that the information was not consistently collected and often represented the police officer's own opinion of the person's background rather than being based on self identification.

The implementation of an ethnicity data collection system will involve not only problems of a technical or logistical nature but also the politically sensitive issue of the possible abuse of this information by the media. It is unfortunately quite common for the ethnicity of an offender, or even an alleged offender, to

3 Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, 1993, New South Wales Government, Sydney at 27.

4 New South Wales Government, *Breaking the Crime Cycle — New Directions for Juvenile Justice in New South Wales*, White Paper, 1994, New South Wales Government, Sydney.

5 Royal Commission into Aboriginal Deaths in Custody, *Commissioner Elliott Johnston*, 1991, Australian Government Public Service, Canberra, Volume 5 at 94.

be reported in the media when it is not relevant. This tends to occur when the offender is not of an Anglo-Australian background, and can give the impression that specific ethnic groups are responsible for a large proportion of serious ((ie) news worthy) crime.

It is understandable then that there was some opposition to the concept of collecting ethnicity data. Considerable effort was required to convince key stakeholders of the advantages associated with accurate ethnicity data and the measures implemented for retaining confidentiality. The issue of privacy in the collection of data on juveniles in the justice system has been addressed by the Race Commissioner. This report, which dealt with juvenile justice and young people of non-English speaking background, concluded that the risks of not collecting information include designing culturally inappropriate programmes, and leaving discriminatory treatment unaddressed. It also pointed out that empirical data can "illuminate the issues of equity and access".[6]

Previous Studies

It is difficult to differentiate race bias from structural and social inequalities which contribute to the over representation of particular groups of juveniles in the criminal justice system. A Human Rights and Equal Opportunity Commission Report[7] indicated that given the same socio-economic status, Anglo-Australian youth were probably just as likely to either offend, or come to the attention of juvenile justice agencies, as non-Anglo-Australian youths. Unemployment, poverty, homelessness and truancy are factors which are associated with criminal lifestyles regardless of race. It is possible however, that a lack of English skills, alienation at school and discrimination could result in youths from non-English speaking backgrounds being over represented in their contact with juvenile justice agencies.

Discrimination may be at least partly due to the intensification of the effect of initial social disadvantage over time.[8] It may also be a function of the prevailing definition of crime, certain classes of offence being more easily counted, detected and processed than others. In turn, this situation may be exacerbated by political responses to crime which is perceived to be attributable to distinct groups, for example, the stereotype of Asian "gangs" and drug crime.[9]

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6 Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background*, Discussion Paper, 1994, Sydney at 27.

7 Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background*, Discussion Paper, 1994, Sydney.

8 C Cunneen, "Ethnic Minority Youth and Juvenile Justice — Beyond the Stereotype of Ethnic Gangs" (1995) (6) 3 *Current Issues in Criminal Justice* 387-394.

9 E Lyons, "New Clients, Old Problems — Vietnamese Young People's Experiences with Police" in C Guerra and R White (eds), *Ethnic Minority Youth in Australia — Challenges and Myths*, 1995, National Clearinghouse for Youth Studies, Hobart at 163-177.

Where direct discrimination does occur, it may be intentional or unintentional, conscious or unconscious. Most judicial officers in New South Wales are aware of the special needs of people from diverse cultural backgrounds, but there may be some inconsistency in how these needs are met, and the degree of sensitivity demonstrated. Former magistrate Irene Moss has provided an overview of the issues relevant to judicial officers.[10] She points out that apart from the obvious language difficulties which can ensue if an interpreter is not used, or only used for certain periods of the court process, there are cultural differences in non-verbal communication, such as demeanour and perceived attitude.

One example she cites is that in the Australian legal paradigm credence is given to those who stand straight and look directly at a person, as it is perceived as an indication of honesty. In many cultures, however, looking a person of authority in the eye is completely unacceptable as it may be perceived as confrontational. The averted gaze employed by people from such cultures can be misconstrued in Australian courts as evasion. Furthermore, some people may appear "Anglicised", they may be fluent or speak non-accented English and be familiar with western culture but may nevertheless hold culturally specific values.

In Australia much of the literature is concerned with discrimination against Aboriginals and Torres Strait Islanders.[11] The study by Luke and Cunneen examined the issuing of cautions and court appearances for Aboriginal and Torres Strait Islander youths and non-Aboriginal juveniles during 1990. The authors found that young Aboriginal people are more likely to receive harsher outcomes from police decisions and have a greater chance of going to court than receiving a caution. They acknowledge that this over representation may be a result of a complex interaction of a range of factors such as higher levels of offending; higher police staffing levels in areas in which larger Aboriginal populations reside; discrimination by police and courts, and greater use of minor good order and street offences to arrest young Aboriginal people.

In addition, Aboriginal offenders were much younger and tended to have their first formal contact with juvenile justice agencies at an earlier age than non-Aboriginals. Consequently, they were more likely to accumulate a more extensive prior record, a factor which would influence subsequent discretionary decisions by police and courts. These decisions are made at a number of points in the criminal justice process such as police decisions to caution, arrest and charge; whether to proceed by way of summons or grant bail; and court decisions on bail and type of sentence.

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10 I Moss, "Multi-culturalism and the Law" (1995) 2 (2) *The Judicial Review* 153-161.

11 G Luke and C Cuneen, *Aboriginal Over Representation and Discretionary Decisions in the New South Wales Juvenile Justice System*, 1995, Juvenile Justice Advisory Council of New South Wales, Sydney; Justice D Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 *Criminal Law Journal* 7-22.

The over representation of young Aboriginal people is progressively higher with each successive point of discretion: the highest level of over representation occuring at sentencing, with more Aboriginals receiving detention orders. The question remains, however, whether the more frequent imposition of detention orders is due to sentencing disparity, or whether it is the only possible outcome given the accumulation of the preceding sequence of decisions. The authors found support for the notion that the disparity was the result of earlier decision making because when criminal history was taken into account there was no difference in treatment by the courts.

In a case study of Aboriginal young people in South Australia, Gale, Bailey-Harris and Wundersitz[12] assert that the justice system is unfair to visible minorities who are already socially and economically disadvantaged. In addition, Aboriginal and Torres Strait Islander youth in particular receive harsher outcomes, even when compared with other visible and culturally distinctive minority groups. Aboriginals and Torres Strait Islanders were over represented at the harshest ((ie) detention) and the most lenient ((ie) discharge), end of the penalty scale, across all offences. The authors suggest the latter finding is a function of court recognition that the juveniles should not have been sent to court in the first place.

Recently there has been some focus on other juveniles from non-English speaking backgrounds, both in general terms, and with respect to specific identifiable groups.[13] In a 1994 Discussion Paper,[14] the Federal Race Discrimination Commissioner commented that a recurring theme in the literature is the problem of access to accurate data which describe the extent and nature of the relationship between young people of non-English speaking background and the juvenile justice system. This information was considered critical in examining and monitoring this group in regard to discrimination issues.

The Commissioner noted that youths from non-English speaking backgrounds frequently have problems other than discrimination. For example, there may be language difficulties (particularly where plain English is not used) and cultural differences in regard to body language and appropriate responses to authority. This also applies to those from distinguishable cultures who nevertheless have an English speaking background. For example a reluctance to discuss subjects considered inappropriate in Aboriginal culture, may be misconstrued as evasiveness.

12 F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge.

13 I Moss, "Multi-culturalism and the Law" (1995) 2 (2) *The Judicial Review* 153-161; R White, "Racism, Policing and Ethnic Youth Gangs" (1996) 7 (3) *Current Issues in Criminal Justice* 302-313.

14 Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background*, Discussion Paper, 1994, Sydney.

Cunneen[15] reviews several significant reports[16] which document the problems of racism and stereotyping of minorities such as Pacific Islanders, Indo-Chinese and Lebanese people by police and juvenile justice agencies. He suggests that while police responses, poverty and the processes of marginalisation are salient in the criminalisation of these groups, rather than ethnicity per se, there may also be questions of access and equity with regard to juvenile justice agencies, including problems with the availability and use of interpreters.

According to Cunneen, a recurring theme in the literature is the problem of access to accurate data on young people from an ethnic minority and the juvenile justice system. Data have been available for those in detention centres, but this cannot indicate whether police practices were equitably applied prior to detention or whether there was equity in sentencing.

While it may not be considered directly relevant, overseas research is useful in exploring possible outcomes and identifying research problems. Sampson and Lauritsen[17] provide a comprehensive review of the research on racial and ethnic disparity at all stages of the criminal justice system in the United States, including juvenile justice, although the race issue is largely limited to the black-white divide. In acknowledging the complexities of criminological research, Sampson and Lauritsen propose a "life course" approach to link juvenile and adult experiences, and to clarify the interactions between cumulative disadvantage, race and membership of minority ethnic groups.

Another substantial American study by Daly and Tonry[18] examined theories of race and gender disparity in sentencing. Their summary of the literature suggests that the most consistent predictors of outcome are severity of offence and criminal history of the accused, with attributes such as race, gender or age failing to exert strong or consistent effects.

Theoretically, the article points out that when race is being examined with respect to sentencing disparity, masculinity is presumed. In contrast, studies on gender do not differentiate by race or ethnicity. The study points out that it is important to take both into account, as interactive effects could be masking

15 C Cunneen, "Ethnic Minority Youth and Juvenile Justice — Beyond the Stereotype of Ethnic Gangs" (1995) 6 (3) *Current Issues in Criminal Justice* 387-394.

16 Including the Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background*, Discussion Paper, 1994, Sydney; Youth Justice Coalition of New South Wales, *Nobody Listens — The Experience of Contact Between Young People and Police*, 1994, Youth Justice Coalition of New South Wales, Western Sydney Juvenile Justice Interest Group and Youth Action and Policy Association (New South Wales), Sydney; Office of the New South Wales Ombudsman, *Race Relations and Our Police*, 1994, Sydney at 3; Ethnic Affairs Commission of New South Wales, *Not a Single Problem — Not a Single Solution*, 1986, Report to the Premier and Minister for Ethnic Affairs, Sydney at 3.

17 R Sampson and J Lauritsen, "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States" in M Tonry (ed), *Ethnicity, Crime and Immigration — Comparative and Cross-National Perspectives*, 1997, University of Chicago Press, Chicago.

18 K Daly and M Tonry, "Gender, Race and Sentencing" in M Tonry (ed), *Crime and Justice — A Review of Research*, 1997, University of Chicago Press, Chicago at 22.

patterns. For example males from a particular group may be treated relatively harshly, but if females from the same group are treated favourably, the race effect could be diminished.

A uniform approach does not necessarily result in an equitable outcome. There is an argument that rather than ignoring the race or ethnicity factor in sentencing, it may be that it should be taken into account in arriving at an equitable outcome. Waters[19] cites a study[20] which suggests that more favourable court outcomes for racial minorities are occurring in the United States of America to compensate for differential treatment by police. The possibility of positive discrimination raises issues of fairness. Although it is not the role of courts to be social engineers, if this article has correctly identified a real trend, it appears that cultural awareness is creating a climate of change in the United States of America.

The justification for discrimination which favours minority groups stems from the opinion that fairness in administering the law does not mean the laws are fair themselves. For example "loitering" offences may be a form of institutionalised racism in that certain groups may be more likely to assemble in public. While racism may not originate in the courtroom, it may be amplified and perpetuated there. If unfavourable outcomes result for an ethnic minority, then the system can be characterised as racist, regardless of whether the outcomes were produced by overt prejudice, class or economic discrimination or institutional racism.

Measuring Sentencing Disparity

During the course of a criminal matter many decisions are made by a variety of parties and agencies which affect the outcome. When an offence has been committed, some decision points are —

- *Policing*

Do police charge or summons? Do police use any available diversionary procedures or exercise their discretion not to proceed? Do police grant bail? What are the charges?

- *Court appearance(s)*

Is the offender legally represented, and is the representation private or public? Does the offender have a support system? Is bail refused, granted or varied by the court? Does the young person plead guilty? Does the matter progress further? Does the magistrate decide to deal with the matter or send it to the District Court? What sentencing options, if any, are selected by the magistrate?

19 R Waters, *Ethnic Minorities and the Criminal Justice System*, 1990, Ashgate Publishing Ltd, Avebury.

20 D Dannefer and RK Schutt, "Race and Juvenile Justice Processing in Court and Police Agencies" (1982) 87 (5) *American Journal of Sociology* 1113-1132 at 1129.

• *Corrections — if detention is the outcome*
In which centre is the offender to be placed? What is the quality of the centre and the response of the staff? Are rehabilitation programmes available?

Many studies comparing outcomes between groups focus on differences at the sentencing stage, but take a broad view, acknowledging that discrimination may have occurred at any one of the preceding stages.[21] This makes it difficult to assess the contribution, if any, of disparity in sentencing alone. To deal with the question appropriately, each stage must be examined independently of the effects of other stages.

A powerful method for achieving this is to match subjects according to certain factors in an attempt to neutralise the effect of the different decisions that have been taken before the sentence is imposed. Pairs of subjects can be selected for comparison who have committed the same offence, with a similar criminal background and age, and with equivalent circumstances as regards the court process such as the plea entered, the number of counts, the type of case and bail status. Parity is reflected by similarity of sentencing outcome, within a certain range, for similar cases. This was the approach adopted in the present study.

21 M Cain, *Juveniles in Detention — Issues of Over Representation*, 1995, Department of Juvenile Justice, Sydney; F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge; G Luke and C Cunneen, *Aboriginal Over Representation and Discretionary Decisions in the New South Wales Juvenile Justice System*, 1995, Juvenile Justice Advisory Council of New South Wales, Sydney.

II METHOD

DEFINITIONS

To ensure maximum compliance with the data collection system and acceptable levels of validity and reliability, it was considered critical that definitions of ethnicity be specific, inclusive, and culturally sensitive. The Federal Race Discrimination Commissioner emphasised the importance of this issue in a discussion paper on juvenile justice and young people of non-English speaking backgrounds —

> "The operational definitions of 'migrant', 'ethnic' or 'young people of non-English speaking background' used by juvenile justice agencies will impact upon both the nature of data collection and the development of specific policy. ... The extent to which ethnicity is defined by generation, language, visibility and other factors will clearly affect the knowledge produced by the agency."[22]

There was consensus amongst the stakeholders that as far as possible the definition of Aboriginality and ethnicity should involve the person's own assessment of their racial, cultural or ethnic identification. Racial identifiers traditionally used by the police (such as Caucasian, Mediterranean, Latin American, black African) have evolved for operational purposes, and are based on a perception of a suspect's appearance and encompass no elements of self identification. While questions regarding extrinsic characteristics such as birthplace and language were incorporated into the instrument for determining ethnicity, the self ascription item was accorded most importance.

It is acknowledged that with respect to ethnic groupings, there is often as much variation within groups as between groups. However, in order to pursue a quantitative approach, fairly broad groupings are required. To this end a classification system used by the Australian Bureau of Statistics[23] was adapted for use in the present study.

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22 Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background,* Discussion Paper, 1994, Sydney at 3.

23 Australian Bureau of Statistics, *Australian Standard Classification of Countries for Social Statistics,* 1995, Australian Bureau of Statistics, Canberra.

Development of the Data Collection Instrument

The first stage of the project was to design a data collection system for ethnicity information. Agencies including the Australian Bureau of Statistics, Office of Multicultural Affairs, the New South Wales Ethnic Affairs Commission and the Office of Aboriginal Affairs were consulted to identify the most appropriate method to collect data on the ethnicity of defendants in the Children's Court. There was also consultation with magistrates, court staff, the New South Wales Attorney General's Department and the New South Wales Department of Juvenile Justice. The aim was to develop a system which would ensure ease of maintenance and which would ultimately be sustainable as a long term data collection tool.

A pilot study was conducted at Bidura Children's Court in early 1995 to test different methods of collecting the desired data. The results of this pilot were used to refine the process, then further pilots were implemented at Lidcombe, Port Kembla and Nowra courts. Next, a procedure was implemented in which juveniles with finalised matters were asked a series of brief questions about their ethnic background by the front desk staff before they left court.[24] Juveniles sentenced to a control order were asked the same questions at the point of admission to a juvenile justice centre.

A question indicating self ascription to an ethnic group was included in addition to questions regarding language spoken and place of birth. (See Appendix A for the ethnicity data collection form). A coding system was developed for this new ethnicity data and the statistical report form used by the Department of Juvenile Justice was amended to accommodate this new data. In addition, a procedure was devised to ensure the regular delivery from the Department of Juvenile Justice to the Judicial Commission of New South Wales of the ethnicity data together with other statistical material.

It was critical to the study that the data being used to match juveniles was accurate. For this reason all court files were audited and matching information was confirmed or corrected. This exercise also presented an opportunity for simultaneously evaluating the routine statistical data collection and processing procedures conducted by the Department of Juvenile Justice. A review of the coding system revealed some ambiguities and confusion in the transcription of outcomes and penalty data. Problems with specific items were documented, and the Department of Juvenile Justice was then able to implement long term improvements to their procedures.

24 Questions reflected those suggested in the Office of Multicultural Affairs publication *Diversity Counts — A Handbook on Ethnicity Data*, 1994, Australian Government Publishing Service, Canberra.

Specialist Children's Court Magistrates were consulted, and participated in the design of a uniform Master Bench Sheet[25] thus ensuring a high level of accuracy in the statistical data collected. The system used by court staff to code offences and outcomes was enhanced. Training exercises and instruction manuals were developed and distributed to all relevant court staff. Appendix B contains a summary of the audit.

The Gender Study

During September 1995, in addition to the routine statistical data collection, Local Court staff began collecting ethnicity information for all juvenile defendants appearing in courts throughout New South Wales. Initially, the ethnicity data was treated separately, after the routine data had been processed. There was therefore a period of time when routine data was available, but ethnicity information was not. It was decided to use this time to pilot the design of the present study, using gender (a routine data item) as a grouping variable instead of ethnicity. This study was published by the Judicial Commission of New South Wales in 1997.[26]

When factors thought to influence sentencing were taken into account, the study found no statistically significant differences in outcome for male and female juveniles. Further, the small differences in favour of females which were found may have been due to the fact that females were significantly less likely to have had a principal role in the offence. They were more likely to have been assisting, or simply present, when an offence was committed. This was a factor which had not been initially controlled for, but which was taken into account during the matching process for the current ethnicity study.

Methodology of the Analysis

The relationship between a characteristic of an offender and the penalty imposed is confounded by many factors, for example the type of offence, prior record and age of the offender. These factors must be taken into account when examining disparity. If offenders who identify as Anglo-Australian are matched with those who identify as having a non-Anglo ethnic background, and they

25 A Master Bench Sheet is completed by the presiding magistrate who records relevant details about the offender (for example name and age); the offences(s) (for example type and quantity); court proceedings (for example representation, plea, bail and requests for reports); and outcome details when the matter has been finalised (for example whether the offence was proven and if so whether a conviction was recorded and the type of sentence imposed).

26 P Gallagher, P Poletti and I MacKinnell, *Sentencing Disparity and the Gender of Juvenile Offenders*, 1997, Judicial Commission of New South Wales, Sydney.

are equated on the factors which are thought to influence sentencing, then any differences in sentencing outcome between the groups can be attributed either to less obvious influencing factors or to disparity based on ethnicity.

Ethnic groupings

The allocation of persons to particular ethnic groups was made on the basis of Australian Bureau of Statistics codes[27] which are at the level of specific countries. On examining the data, five broadly identifiable groups emerged as being present in sufficient numbers to allow comparisons. The groups were —

- Aboriginal and Torres Strait Islanders (hereafter referred to as ATSI);
- Pacific Islanders (hereafter referred to as Pacific);
- Southern Europeans (hereafter referred to as Europe);
- Middle Easterners (hereafter referred to as Mideast);
- East Asians (hereafter referred to as Asian).

The specific countries included in each ethnic grouping are listed in Appendix C.

Source of data

The data for the present study were derived from a total of 18,070 appearances (including unproven cases) before Local Courts (including Children's Courts) in New South Wales during the period January to December 1996. Juveniles were matched according to the electronic data available on the following factors —

- offence type for the principal offence[28] (Act and Section number);
- prior record (none, priors, priors with detention);
- plea group (guilty or other);
- count group (one or multiple counts of the principal offence);
- police bail (granted or refused);
- age group (10-13 years, 14-15 years, 16 years and over);
- type of case (charge, summons, court attendance notice); and
- court location (specialist Children's Courts and Local Courts)

Probably the most important matching variable was offence type because of its substantial relationship with sentencing outcome. The electronic data collected by the Department of Juvenile Justice contains only general categories of offence type which may have led to misleading pairings, for example, administer drug

27 Australian Bureau of Statistics, *Australian Standard Classification of Countries for Social Statistics*, 1995, Australian Bureau of Statistics, Canberra.

28 The principal offence is defined as the offence receiving the most severe penalty in the group of offences committed by an individual, dealt with at one appearance.

matched with the more serious cultivate drug. Consequently, in the present study, juveniles were matched on offence type down to the level of Act and section number thus ensuring that like cases were being compared.

From the pilot study conducted on gender and disparity, it was ascertained that firstly, some of the electronically recorded data for these matching variables were not wholly reliable. Secondly, it was apparent that another factor which may influence sentencing is the role of the offender in committing the offence.

Court files were accessed to verify the electronic data and also to collect additional information concerning the offender's role. Records were then re-matched according to the corrected data and taking into account the offender's role in the offence.

After the matching process was completed and all the electronic information verified by auditing the relevant files, the final sample consisted of 1,302 proven appearances constituting 651 matched pairs of juveniles. The number of pairs in each group (on which the main statistical tests were carried out) were —

- ATSI 171
- Pacific 113
- Europe 131
- Mideast 117
- Asian 119

The matching variables consisted of core items known from the literature to influence sentencing. However, data was also collected from the files on supplementary variables which it was thought *might* have an influence on sentencing. These included —

- whether the case was heard by a specialist Children's Court Magistrate or a Local Court Magistrate authorised to sit as a Children's Court Magistrate;
- whether the juvenile appeared in person and who, if anyone, accompanied him/her;
- number and type of other matters dealt with at finalisation;
- bail status immediately prior to final court appearance;
- whether a background report was requested and what was the sentencing recommendation;
- whether a conviction was recorded;
- gender;
- level of education (number of school years);
- living arrangements;
- wardship (if referred to in the file);
- employment status: and
- number of prior proven appearances (applicable only to juveniles with prior record).

Penalty hierarchy

To compare the matched samples a hierarchy of penalties had to be devised. This hierarchy would allow direct comparisons between juveniles sentenced to different dispositions. The intention in devising such a penalty structure is to provide a quantative measure of the difference between qualitatively different penalties. In order to achieve such a structure certain assumptions have been made. For example, a dismissal following referral to a Community Aid Panel (CAP) is ranked just above a dismissal because the former is dependent on satisfactory completion of the CAP initiative. Further, a supervised order has been placed slightly higher in the hierarchy than an unsupervised recognizance with a fine.

The hierarchy adopted, in descending order of severity, was as follows —

- Control orders;
- Community service orders;
- Supervised recognizance and a fine;
- Supervised orders (recognizances/probation);
- Unsupervised recognizance and a fine;
- Unsupervised orders (recognizances/probation);
- Fine only;
- Dismissals following a CAP programme;
- Dismissals;

Obviously, within each sentencing option there are degrees of severity so that the penalty ranking must also take into account the duration (or amount in the case of fines) of the penalty. For example, a 24 month control order would be placed higher in the hierarchy than a 12 month control order. Ultimately the penalty ranking system assigns a number to each and every penalty taking into account the length of the penalty. This number represents the severity of the penalty in the hierarchy and can be used to compare qualitatively different penalties. The method used to calculate the entire penalty ranking hierarchy is detailed in Appendix D.

III RESULTS

THE STATISTICAL TEST

The proper use of parametric statistical tests includes certain assumptions about the data being tested, for example, that the underlying distribution is normal. Data studied in the criminal justice system often does not meet the assumptions required for parametric tests. As a result non-parametric statistics, which generally have less stringent requirements, are often used.

To test whether there is a statistically significant difference on a continuous variable for two groups of matched pairs, the appropriate parametric test would be a paired t-test.[29] The non-parametric equivalent of this test is the Wilcoxon matched-pairs signed-ranks test, which can be used on ordinal data. Ordinal data is data which can be ranked but where the size of the difference between respective ranks is not known. This test, like the paired t-test, examines the differences between the two sets of values for the variable of interest. If the distribution of differences are random, then positive and negative differences between matched pairs should be randomly distributed, and the mean difference should be close to zero. The test takes into account the magnitude as well as the direction of the difference for each pair.[30]

The variable of interest in this study is a ranked score which represents the severity of the penalty for each case, taking into account firstly the type of penalty and secondly its duration or amount (in the case of fines). The lower the score, the harsher the penalty. A significant result on a Wilcoxon matched-pairs signed-ranks test with these data indicate that the scores for severity of penalty differ significantly between the paired groups.[31]

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29 S Huck, W Cormier and W Bounds, *Reading Statistics and Research*, 1974, Harper and Row, New York.

30 For a fuller explanation of these statistical concepts, see for example G Snedecor and W Cochrane, *Statistical Methods*, 1989, Iowa State University Press, Ames, Iowa.

31 For theory and practice of this test, see W Conover, *Practical Non-Parametric Statistics*, 2nd Ed, 1980, John Wiley and Sons, Brisbane at 278.

Disparity Results

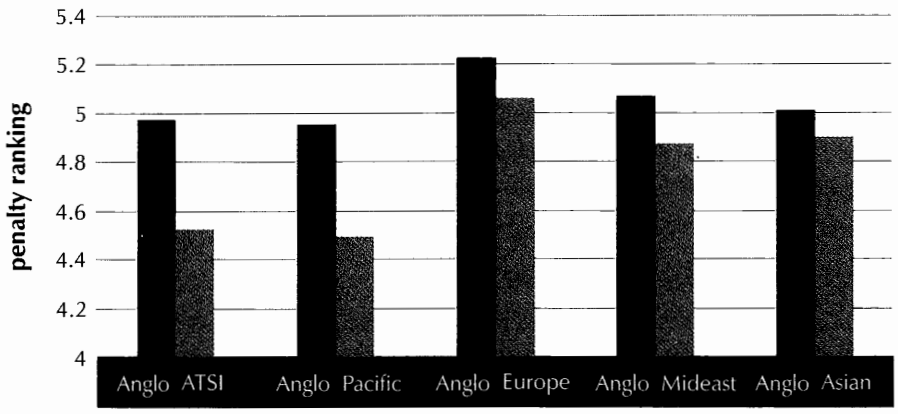
In this study Aboriginal and Torres Strait Islander juveniles, and juveniles from four non-English speaking ethnic groups (Pacific Islanders, Southern Europeans, Middle Easterners and East Asians) were matched with juveniles from an Anglo-Australian background, and compared on the severity of the sentences they received. Having been carefully matched for factors known to influence sentencing, the juveniles forming the pairs should not have differed in the severity of penalty they received.

Figure 1 shows the mean penalty scores for each of the ethnic groups compared with their matched Anglo-Australian group. The lower the mean score for a group the more severe are the penalties.

It should be noted that a sample of Anglo-Australian juveniles was matched to each ethnic group.[32] Also, because the samples were produced independently, each of the groups had a different profile. For these reasons it is not meaningful to compare the means from one matched group with those of others. The appropriate comparison is between the Anglo-Australian group and its matched ATSI or ethnic group.

— Figure 1 —
Mean Severity of Penalty by Ethnic Group

(Note: Lower score = harsher penalty)



There were statistically significant differences between the penalties received by the ATSI group and their Anglo-Australian counterparts,[33] and also by the Pacific group and their Anglo-Australian counterparts.[34] Both the ATSI and the

32 Some Anglo-Australian juveniles were selected as matches for more than one ethnic group.

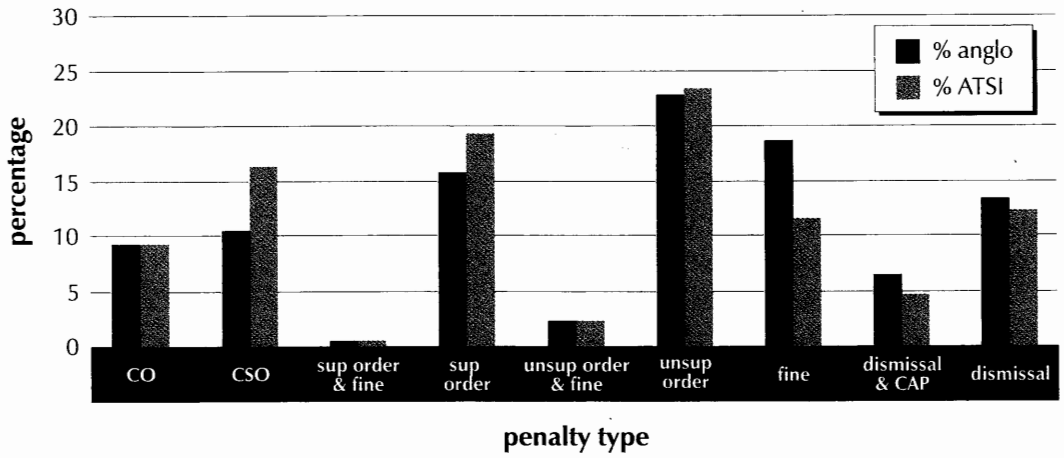
33 Wilcoxon matched pairs signed ranks test, Sgn rank = - 884, p = 0.049.

34 Wilcoxon matched pairs signed ranks test, Sgn rank = - 564, p = 0.042.

Pacific groups received significantly harsher penalties. There were no statistically significant differences for the other ethnic groups, however, the direction of the difference was consistently in favour of Anglo-Australians.

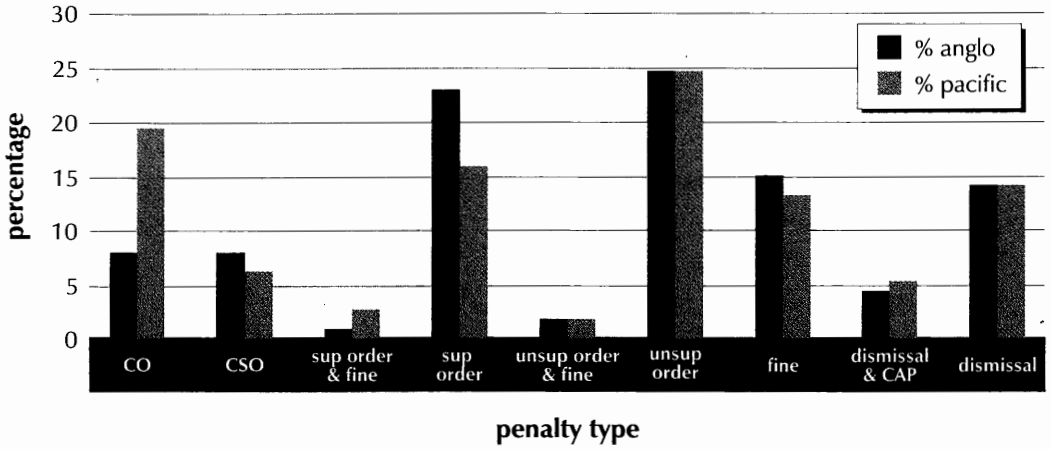
The relative proportion of the various penalty types imposed for the five groups compared with their matched Anglo-Australian group is detailed in Figures 2–6: absolute frequencies are presented in tabular form in Appendix E. It should be noted that this breakdown does not take into account the duration of the penalty imposed, which is only relevant to the overall severity ranking. The penalties appear in order of severity, control orders being the most severe and dismissals the least severe. Probationary orders and recognizances are grouped together, and differentiated according to whether or not they were supervised, an order with supervision being considered more severe than one without.

— FIGURE 2 —
ATSI Group by Type of Penalty



As Figure 2 shows the ATSI group did not differ in the number and length of control orders they received when compared with their Anglo-Australian match. They were, however, more likely to receive community service orders and supervised orders than their Anglo-Australian counterparts. Both these penalties are at the more severe end of the scale and represent a significant contribution to the overall sentencing disparity. Conversely, the Anglo-Australian group received more fines, which being at the less severe end of the penalty scale also contributed to the overall sentencing disparity.

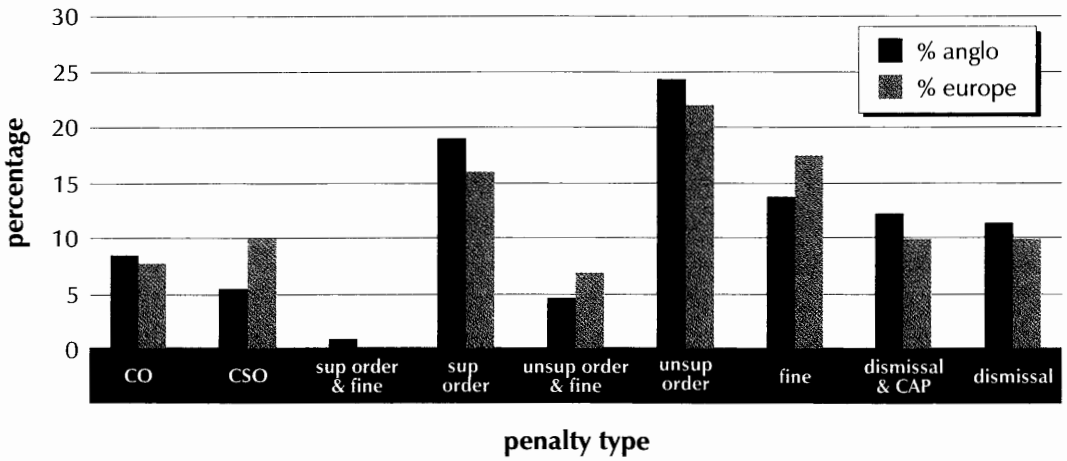
— FIGURE 3 —
Pacific Group by Type of Penalty



As Figure 3 shows, the sentencing disparity found between the Pacific group and their Anglo-Australian counterparts is due for the most part to the much higher rate of imposition of control orders. The Pacific group received more than twice as many control orders (20 offenders) than their Anglo-Australian match (nine offenders).

In the main, control orders were also longer for the Pacific group (median length of minimum or fixed term equalled four and a half months) compared with their Anglo-Australian counterparts (two months). This difference was not statistically significant.

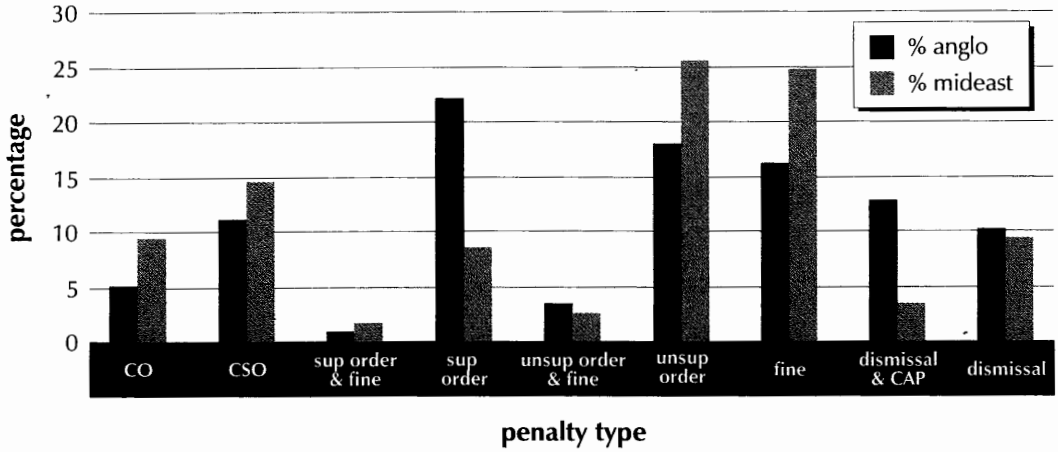
— FIGURE 4 —
Europe Group by Type of Penalty



As Figure 4 shows, the higher rate of imposition of community service orders and fines for the European group is balanced by the more frequent use of custody orders and supervised and unsupervised orders for the Anglo-Australian group, resulting in a net non-significant difference between groups.[35]

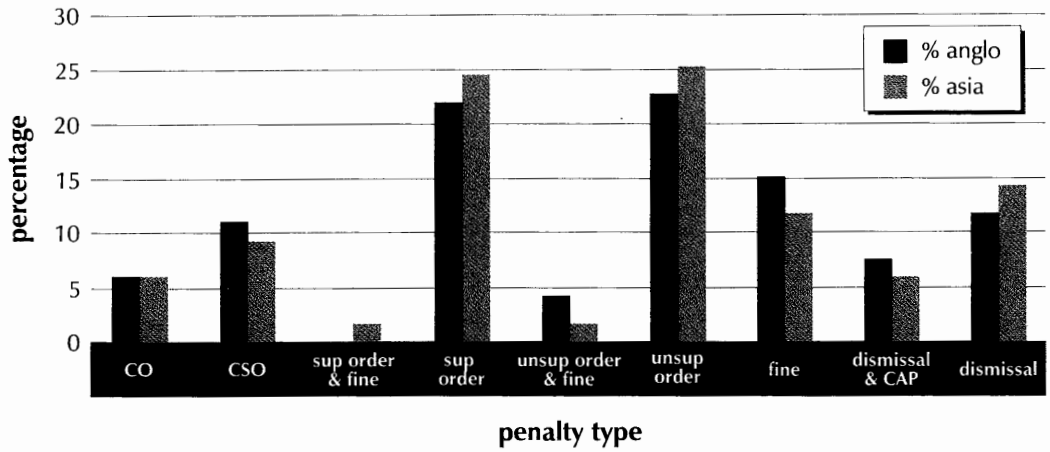
35 Wilcoxon matched pairs signed-ranks test, Sgn rank = - 235, p = 0.530.

— FIGURE 5 —
Mideast Group by Type of Penalty



As Figure 5 shows, the Mideast group received more sentences at the severe end of the penalty hierarchy (custody orders and community service orders) but this was balanced by receiving far more unsupervised orders and fines (less severe penalties) than their Anglo-Australian counterparts. The higher rate of use of supervised orders in the Anglo-Australian group also contributed to the overall equity between groups.[36]

— FIGURE 6 —
East Asian Group by Type of Penalty



As Figure 6 shows, the sentencing profile for the East Asian group is very similar to their Anglo-Australian counterparts.[37]

36 Wilcoxon matched pairs signed-ranks test, Sgn rank = - 321.5, p = 0.327.

37 Wilcoxon matched pairs signed-ranks test, Sgn rank = - 149, p = 0.631.

Factors Associated with Disparity

To ensure that the sentencing disparity found for the ATSI and Pacific groups was not a product of other factors, the data were examined in more detail. With the ATSI group, the disparity was most evident among those offenders with prior proven appearances, not including prior proven appearances resulting in detention. The Aboriginals and Torres Strait Islanders with these priors had significantly more previous proven appearances[38] than their Anglo-Australian counterparts (mean = 2.69 versus 2.21 respectively).[39]

It might be inferred therefore that the actual number of previous proven appearances may be contributing to sentencing disparity. However, if this was the case then a difference in favour of the Asian group would have been expected because the comparison Anglo-Australian group with priors (excluding priors resulting in detention) had a significantly higher number of prior proven appearances (mean = 2.90 versus 1.85 for Asians).[40] They also had significantly more serious previous outcomes[41] suggesting that the priors were of a more serious nature and yet no disparity was found in this group.

Furthermore, there were no differences in either the number of previous proven appearances, or the seriousness of previous outcomes, which might explain the disparity for the Pacific group. The actual number of previous proven appearances therefore does not have a consistently predictable effect on sentencing, thus the disparity cannot be explained by differences in prior proven appearances.

Non-Matching Variables

There were no statistically significant differences between the Anglo-Australians in each group and their matches on any of the non-matching variables, such as whether a conviction was recorded, the number of other matters dealt with at the appearance, and whether the juvenile was accompanied at court. The entire list of non-matching variables is set out on page 13.

There are a number of factors mentioned in the literature which are relevant to the sentencing outcome. Where possible these were investigated with the following results.

38 The term "previous proven appearances" is used in preference to "prior convictions" because often a conviction is not recorded for a proven offence in the Children's Courts.

39 Kruskal-Wallis, Chi-square = 4.37, p = 0.036.

40 Kruskal-Wallis, Chi-square = 9.94, p = 0.002.

41 Kruskal-Wallis, Chi-square = 7.76, p = 0.005.

Regional variation

Dannefer and Schutt[42] suggest that where racially discriminatory practices operate in only a few geographical areas, the process of aggregating data across jurisdictions is likely to mask disparity. Factors such as community race composition and the suspect's race can have an effect which is only evident at the local or micro level. It is important therefore to examine the outcomes regionally, where sample size allows.

It was not possible to examine the data regionally for the non-English speaking background groups, as very few of those groups were dealt with outside of Sydney. Aboriginals and Torres Strait Islanders, however, are concentrated in various regions of New South Wales, and the data were re-examined for this group, taking into account the court location. Surprisingly, sentencing in the country courts was less polarised than for the city courts, with the latter showing more disparity.[43] For example, the number of community service orders imposed in country courts was nine for Anglo-Australian juveniles and eight for Aboriginal and Torres Strait Islander juveniles, but in the city courts the numbers were nine and 20 respectively.

Background reports

It has been suggested[44] that background reports may be a source of indirect and normally undetectable bias, depending on who instigates them, who completes them, and how much weight their recommendations carry. The significance accorded to the issue of race or ethnicity in a report may be negligible, marginal or central. Comments alluding to race or culture contained in such reports can be positive or negative and may influence the sentencing of the offender accordingly.

Requests for background reports and their recommendations were examined in the present study. A report was prepared for 33.5% of cases overall. In most of these cases (53.6%) the sentence recommended in the report was equivalent to that actually imposed. In 38.8% of cases the sentence recommended in the report was less severe, and in 7.5% of cases a more severe penalty had been recommended. No differences were found between any of the groups and their Anglo-Australian counterparts for this variable.[45]

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42 D Dannefer and RK Schutt, "Race and Juvenile Justice Processing in Court and Police Agencies" (1982) 87 (5) *American Journal of Sociology* 1113-1132 at 1129.

43 A Wilcoxon matched pairs signed ranks test carried out on country cases was insignificant, while one carried out on Sydney cases approached significance, $p = .053$.

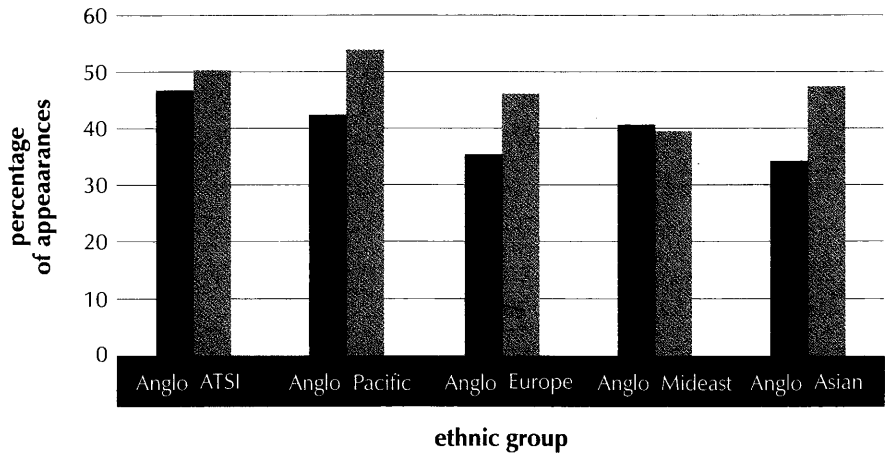
44 D Dannefer and RK Schutt, "Race and Juvenile Justice Processing in Court and Police Agencies" (1982) 87 (5) *American Journal of Sociology* 1113-1132 at 1129.

45 Chi-square tests — ATSI $p < 0.278$; Pacific $p < 0.667$; Europe $p < 0.691$; Mideast $p < 0.293$; Asian $p < 0.853$.

Conviction recorded

A conviction cannot be recorded if the juvenile offender is under 16 years of age. For those over 16 years, convictions were recorded in 44% of cases overall. There were no statistically significant differences between the proportion of convictions recorded for the ATSI and ethnic groups compared with their Anglo-Australian counterparts.[46] However, as Figure 7 indicates, the Anglo-Australian groups consistently had a slightly lower proportion of cases where a conviction was recorded, with the exception of the Mideast group.

— FIGURE 7 —
Recorded Convictions by Ethnic Group — Over 16 Years



Unproven outcomes

As stated in the Introduction, Gale et al[47] found that Aboriginals and Torres Strait Islanders were over represented at both extremes of the penalty scale, that is for detention and dismissal. They suggest that the over representation at the lower end of the penalty scale is an indication that the courts are compensating for the inappropriateness of some charges. Daly and Tonry[48] also point out that equitable sentencing outcomes may not take into account processes immediately prior to sentencing, such as a higher rate of not proceeding with charges for some groups, or reduction of charges. In this situation the final set of charges for such "favoured" groups would actually reflect more serious cases than the charges for other groups.

46 Chi-square tests — ATSI $p < 0.661$; Pacific $p < 0.438$; Europe $p < 0.288$; Mideast $p < 0.993$; Asian $p < 0.119$.

47 F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge.

48 K Daly and M Tonry, "Gender, Race and Sentencing" in M Tonry (ed), *Crime and Justice — A Review of Research*, 1997, University of Chicago Press, Chicago.

Unproven offences, that is acquittals and cases not proceeded with for whatever reason, were not included in the present analysis because there are no penalties associated with these outcomes. However, the numbers of such cases was recorded and upon examination it was found that there were no significant differences based on ethnicity in the numbers of unproven offences.[49]

Dismissals following a Community Youth Conference

Community Youth Conferencing (CYC) has been piloted recently in New South Wales and a few cases appeared in the 1996 data. For the purposes of this study, a juvenile who had attended a CYC prior to sentencing was given a penalty ranking equal to one who had attended a Community Aid Panel (CAP). Both schemes involve the juvenile taking responsibility for the offence and engaging in some restorative action.

Of eight juveniles referred to CYCs, six were Anglo-Australian, one was from the Pacific group, and one from the Mideast group. The small sample size precludes any meaningful discussion of this result. However, the introduction of the *Young Offenders Act* 1997 (NSW), means that conferencing is set to become a widely used strategy for diverting young people from court. As such it must be made available to *all* young offenders, otherwise there is the risk that juveniles from minority groups will be further over represented in the juvenile court process.

49 Chi-square test, $p < .924$.

IV CONCLUSION AND RECOMMENDATIONS

It has been demonstrated in previous studies[50] that Aboriginal and Torres Strait Islanders and young people from non-English speaking backgrounds are over represented in the New South Wales criminal justice system. It is, however, important to identify at which stage of the criminal justice process disparity occurs.

The main aim of the present study was to examine the sentencing process in isolation from other stages of the criminal justice system. Consequently, juveniles were carefully matched on factors identifiable prior to sentencing, so that any disparity could only be attributed to decisions by the court. After controlling for factors known independently to affect sentencing and after establishing that other factors were randomly distributed between the groups, it was found that Aboriginal and Torres Strait Islanders and Pacific Islanders received significantly harsher penalties than their Anglo-Australian counterparts. There were no statistically significant differences for the other ethnic groups examined, although the direction of the differences was consistently in favour of the Anglo-Australian groups.

Specifically, the Pacific Islanders received more control orders than their Anglo-Australian counterparts. Although the Aboriginal and Torres Strait Islanders had a similar outcome pattern to their Anglo-Australian counterparts for control orders, the former group received more community service orders. As a community service order can only be imposed if a control order is being considered, Aboriginals and Torres Strait Islanders, as well as Pacific Islanders, were more likely than their equivalent Anglo-Australian peers to be considered deserving of the most severe penalty.

These results support the thesis of Gale, Bailey-Harris and Wundersitz[51] that Aboriginal and Torres Strait Islander youth suffer even more discrimination than other visible minority groups.

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50 Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background*, Discussion Paper, 1994, Sydney; F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge.

51 F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge.

It may be that the decision to detain a young person is influenced by factors extraneous to the sentencing process. An unemployed young person without a "stable" home environment is likely to be viewed as a poor risk in being able to comply with community based orders. As Gale et al[52] point out, while these factors are not race specific, they are features far more common to Aboriginals, who often tend to live in many homes belonging to various levels of kin, much like an extended family network. Pacific Islanders share similar kinship traits.[53]

Generally, the use of socio-economic criteria in the sentencing decision is inappropriate, as it bears no relationship to the offending behaviour, and requires value judgments to be made about people on the basis of social and cultural factors over which the persons concerned have little control. It appears that the very factors which disadvantage some groups may be used by the criminal justice system to compound that disadvantage.

Dannefer and Schutt[54] suggest that disparity may be context specific, for example, in relation to certain types of offence. The cases in this study were matched very specifically on offence, and offence type is therefore not relevant to any differences found between the pairs. However, it could be that one group is consistently penalised more harshly for certain offences but that this is balanced by the same group being consistently penalised leniently for other offences, thereby neutralising the disparity. Examining the data by the type of offence should reveal any irregular offence specific patterns, although the interactions can become complex at this level.

The analysis of the data by offence group (see Appendix F) indicated that the disparity in the Aboriginal and Torres Strait Islander group was more strongly associated with property damage offences. The disparity in the Pacific Islander group was more strongly associated with offences against the person, and break and enter offences. This might explain the higher use of custody orders for the Pacific Islanders but because the offenders were carefully matched on offence it does not explain the disparity with the paired Anglo-Australian group.

Having established that unexplained sentencing disparity is occurring in a sphere which has a serious impact on a young person's life, it is incumbent upon each member of the judiciary to examine their practices when sentencing juveniles from a non-Anglo-Australian background, and to be aware of conscious or unconscious prejudices and of any tendency to stereotype such offenders.

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52 F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System — The Injustice of Justice?*, 1990, Cambridge University Press, Cambridge.

53 S Francis, "Pacific Islander Young People — Issues of Juvenile Justice and Cultural Dislocation" in C Guerra and R White (eds), *Ethnic Minority Youth in Australia — Challenges and Myths*, 1995, National Clearinghouse for Youth Studies, Hobart at 179-192.

54 D Dannefer and RK Schutt, "Race and Juvenile Justice Processing in Court and Police Agencies" (1982) 87 (5) *American Journal of Sociology* 113-1132 at 1129.

Stereotyped perceptions may be challenged through education and training, involving exposure to people from various cultural backgrounds, in a variety of roles and situations. It is generally a combination of poverty, disadvantage and lack of education which sees young people begin offending, rather than their race or background per se, so the focus should be upon the similarities between people rather than the differences.

Another aspect of equity that judicial officers and government agencies with responsibilities in this area may wish to keep in mind is the provision and use of interpreters. This can be an issue with persons from a background where English, although widely spoken, is not the original language of that culture. As Justice Dean Mildren points out,[55] even when Aboriginals speak English, there are liable to be misunderstandings, due to conflicting usage of common words and grammar, different ways of framing questions, and the fact that many English words and concepts do not have an equivalent in Aboriginal culture and language. The same could be said of Pacific Islanders. Other communication issues alluded to by Justice Mildren involve cultural considerations, such as a reluctance to discuss subjects considered inappropriate in the culture of origin and differences in non-verbal communication.

Ms Irene Moss, a former magistrate, has stated that recognition of cultural difference is becoming more widespread, for example, with regard to customary law for Aboriginal offenders.[56] She points out, however, that it is not always appropriate to allow cultural considerations to influence sentencing. Some cultures may regard some offences, for example domestic violence, as trivial and not within the ambit of the law. Ignoring this does not imply a lack of cultural awareness on the part of the judiciary, instead it reflects opposition to its relevance in the Australian legal system.

Strategies are required to "sentence fairly within the framework of Australian law but also with some degree of cultural sensitivity."[57] Moss suggests that cultural diversity and communication issues should become part of the curriculum for law courses, and in-service training courses provided, not only for the judiciary, but also for court support staff such as social workers and probation officers.

Echoing these sentiments in relation to ethnic minorities, in a submission to the New South Wales Law Reform Commission[58], the Ethnic Affairs Commission details issues for cross cultural awareness education for the judiciary. These include —

55 Justice D Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) *Criminal Law Journal* 7-22.

56 I Moss, "Multi-culturalism and the Law" (1995) 2 (2) *The Judicial Review* 153-161.

57 I Moss, "Multi-culturalism and the Law" (1995) 2 (2) *The Judicial Review* 153-161 at 159.

58 Ethnic Affairs Commission of New South Wales, "Multiculturalism and Criminal Law", Submission to the Australian Law Reform Commission, 1992, Ethnic Affairs Commission of New South Wales, Sydney.

Communication issues
The importance of using interpreters; provision of multilingual information; and developing an understanding of possible differences in cultural demeanour between cultural groups.

Judicial discretion
Training and resources are required to assist the judiciary in exercising their discretion in the context of a multicultural society.

Cultural values
Awareness of when divergent cultural values become an issue for the law.

It is hoped that this study demonstrates the feasibility and value of collecting and using ethnicity data. The next step is to have the data available for other organisations in the criminal justice system. Extension of the data collection to adult court appearances, Corrective Services and the Police Service, would allow a comprehensive description of the process whereby such concentrated over representation of disadvantaged groups occurs at the final stages of the criminal justice system.

APPENDIX A

Ethnicity of Juveniles with Matters Finalised in the New South Wales Children's Court

Date _____ **Name/List No** _____

☐ Declined to answer
☐ Was not asked

1. In which country were you born?

☐ Australia
☐ UK/Ireland
☐ New Zealand
☐ Vietnam
☐ Cambodia
☐ China
☐ Croatia
☐ Serbia
☐ Turkey
☐ Italy
☐ Greece
☐ Lebanon
☐ Fiji
☐ Samoa
☐ Tonga
☐ Don't Know

☐ OTHER [*specify*] _____

2. In which country was your mother born?

☐ Australia
☐ UK/Ireland
☐ New Zealand
☐ Vietnam
☐ Cambodia
☐ China
☐ Croatia
☐ Serbia
☐ Turkey
☐ Italy
☐ Greece
☐ Lebanon
☐ Fiji
☐ Samoa
☐ Tonga
☐ Don't Know

☐ OTHER [*specify*] _____

3. In which country was your father born?

☐ Australia
☐ UK/Ireland
☐ New Zealand
☐ Vietnam
☐ Cambodia
☐ China
☐ Croatia
☐ Serbia
☐ Turkey
☐ Italy
☐ Greece
☐ Lebanon
☐ Fiji
☐ Samoa
☐ Tonga
☐ Dont Know

☐ OTHER [*specify*] _____

4. What language do you speak at home? [*Tick two boxes if appropriate*]

☐ English
☐ Vietnamese
☐ Cambodian
☐ Croatian
☐ Serbian
☐ Cantonese
☐ Arabic
☐ Italian
☐ Greek
☐ Turkish
☐ Spanish
☐ Mandarin

☐ OTHER [*specify*] _____

5. Are you an Aboriginal or Torres Strait Islander person?

☐ Aboriginal ☐ Torres Strait Islander ☐ Both ☐ No
☐ Declined to Answer

6. What is your ethnic origin? [*Tick more than one box if appropriate*]

☐ Anglo/Irish
☐ Aboriginal
☐ Torres Strait Islander
☐ Aboriginal & Torres Strait Islander
☐ Maori
☐ Tongan
☐ Samoan
☐ Fijian
☐ Chinese
☐ Vietnamese
☐ Cambodian
☐ Lebanese
☐ Italian
☐ Greek
☐ Turkish
☐ Croatian
☐ Serbian

☐ OTHER [*specify*] _____

PLEASE TURN OVER FOR INSTRUCTIONS

DEPARTMENT OF JUVENILE JUSTICE

ETHNICITY OF JUVENILES WITH MATTERS FINALISED IN THE NEW SOUTH WALES CHILDREN'S COURT

INSTRUCTIONS FOR COURT STAFF

Each time a criminal matter has been finalised in the Children's Court (acquitted, dismissed or sentenced), the court officer is to direct the juvenile to go to the front desk of the court on their way out, in order to answer some quick questions. Those sentenced to a control order are to be excluded — their details will be collected later.

The court officer should explain that the questions are not a survey, but an attempt to ensure that sentences given to juveniles are consistent across all ethnic groups.

Juveniles should not be asked to fill out the form themselves. The questions on the reverse side of this page should be asked by court staff of each juvenile who approaches the front desk, following an explanation that the information is for statistical purposes only, and will not impact on their record.

The juvenile's name and court list number should be recorded, with the date of court appearance, at the top of the form, to enable later linking of each person with the correct court papers.

If the juvenile refuses to answer any questions, tick the box at the top of the form "declined to answer."

If the juvenile was not asked any questions, tick the box at the top of the form "was not asked."

If the juvenile does not know their parents' or their own country of birth, tick the "don't know" box.

If the juvenile does not know their ethnic origin, staff should try to explain the question further, using examples of other terms such as "descent" or "background." *"Australian" should not be accepted as an answer to the final question about ethnic origin.* If the juvenile only knows that his or her ancestors were white, and their family has lived in Australia for generations, the juvenile should be asked whether a choice as "Anglo/Irish" would be appropriate.

Please be careful not to guess the juvenile's answers, such as describing a person as "Aboriginal" without asking them the fifth question.

Once a juvenile has responded to the questions, the form should be placed with the other court papers relating to that person, so that it ends up on the juvenile's file.

Whoever then normally fills in the statistical form (Report on Matters Finalised in the New South Wales Children's Court) should transcribe this information as text onto the statistical form.

Enquiries should be directed to —

Department of Juvenile Justice, Juvenile Court Index
telephone (02) 9289 3333
[*Please ring this number to reorder more forms*]

APPENDIX B

AUDIT OF STATISTICAL DATA COLLECTED FROM CHILDREN'S COURTS

This publication forms part of a project aimed at improving data collection for juvenile offenders, particularly information on their ethnicity. A certain amount of error is unavoidable with any data collection, and the criminal justice system suffers from some inconsistencies across jurisdictions, as well as historical difficulties with the collection of certain variables.

A number of initiatives are presently underway to improve the accuracy and validity of information collected in Children's Courts. Problems with Children's Court data found in the course of this project have been brought to the attention of the Department of Juvenile Justice. These problems are now in the process of being addressed by means of an updated data collection system and enhanced coding and auditing processes.

A total of 1870 records were selected to be part of the study. However, 315 records were "duplicates" in that they appeared more than once in the sample (mostly "Anglos" who were paired with several juveniles across the ATSI and ethnic groups). A further 11 records were not audited because the court files could not be found (probably due to a data entry error in either the finalisation date or court location). Therefore, the final audit sample consisted of 1544 records. Details are as follows.

Court bail

This variable had the largest error rate. There seemed to be some confusion regarding the bail status of juveniles immediately prior to their final court appearance. Errors occurred in 323 records (20.9%). In 82 cases bail was coded "unknown" when in fact it was known — usually conditional bail. However, most errors involved conditional bail being mistakenly coded as unconditional bail (119 records).

Outcome

A total of 262 records (17%) had errors on outcome. In 55 cases, errors occurred because coders wrongly identified the organisation responsible for supervising community based orders or additional terms of control orders. Of more concern was the failure to include juveniles who were dismissed with a caution following a Community Aid Panel initiative (31 records) or a Community Youth Conference (10 records), instead usually coding them as straightforward dismissals. Another penalty not included under s 33(1)(d) of the *Children (Criminal Proceedings) Act* 1987 (NSW) is the combination of a recognizance and a fine. In 49 cases this outcome was wrongly coded as just a fine and in 11 cases it was incorrectly coded as just a recognizance.

A total of 111 records which were originally selected to be part of the study, turned out to have unproven outcomes. The project officers decided to audit these files even though they were excluded from the final analysis. In 37 cases an incorrect unproven outcome code was entered and in 33 cases a proven outcome was coded unproven.

Offence type

There were 235 errors on offence type (15.2%). In 61 records the juvenile had another matter finalised at the same court appearance which should have been selected as the principal offence. The other 174 records involved errors which did not change offence type groupings. The most common were —

- Common assault (s 61 of the *Crimes Act* 1900) incorrectly coded as the more serious form of assault occasioning actual bodily harm (55 records);
- Break and Enter *Other* when in fact it was a dwelling (26 records), shop (21 records) or building (six records);
- *Other* Larceny when in fact it was shoplifting (40 records).

Police bail

Errors occurred in 216 records (14%). In 96 cases police bail was coded "unknown" when in fact it was known. In 56 cases bail was refused by police but was coded as "granted" and in 26 cases police bail had been granted but was coded as "bail refused". Most of the other errors resulted from errors in the type of case, since police bail is not a consideration if the juvenile is summonsed to court or issued with a court attendance notice.

Number of prior proven appearances

There were 205 errors concerning the number of prior proven appearances (13.3%). In most cases, the number was overstated (159 records) — apparently because each appearance until the date of finalisation was counted when only appearances which had been determined at the date of offence should have been included.

Severity of the most serious prior outcome

This variable indicates the duration of the penalty, or the amount in the case of a fine. Most of the 149 errors (9.7%) occurred because the wrong outcome was selected as the most serious prior outcome. However, in 47 cases, the correct outcome was entered but the severity was wrong.

Most serious prior outcome

As with the number of prior proven appearances, in most cases the most serious prior outcome reflected outcomes at the date of finalisation instead of at the date of offence. Overall, 128 records had errors (8.3%).

Plea

The wrong plea was entered in 117 records (7.6%). Most errors involved guilty pleas (62 records of which 30 were incorrectly coded as "unknown"). In 35 cases a plea of guilty should have been entered but wasn't. Instead, most were coded not guilty (24 records).

Severity of outcome

This variable indicates the duration of the penalty, or the amount in the case of a fine. Most of the 114 errors (7.4%) occurred because the wrong outcome was entered. In 15 cases, the correct outcome was entered but the severity was wrong.

Age

The juvenile's date of birth was used to calculate this variable. It was erroneous in 74 records (4.8%).

Case type

Forty four records (2.8%) had errors on case type. In the majority of cases, court attendance notices were mistakenly coded as charges (19 records) or vice versa (15 records).

Counts

Thirty two records (2.1%) had errors on counts. Eighteen of these involved multiple counts of the principal offence being coded as one count.

Ethnicity

Data on ethnicity and Aboriginality were inaccurate in 29 records (1.9%). In 25 cases juveniles were coded "Anglo" when in fact they were from an identifiable ethnic group.

Gender

A total of 18 records (1.2%) had errors on gender.

Finalisation as to date and court

A number of files which at first could not be found, were tracked down and found to have errors on finalisation date (10 records or 0.6%) or court location (three records or 0.2%).

APPENDIX C

GEOGRAPHICAL CLASSIFICATION OF ETHNIC GROUPS IN ANALYSIS

The geographic classifications used to select juveniles on the basis of ethnicity were those developed by the Australian Bureau of Statistics pursuant to the *Australian Standard Classification of Countries for Social Statistics.*[1] Clearly not every country was represented in the samples generated. This is the list of those classifications which emerged in sufficient numbers to be grouped for analysis.

ATSI

Australian Aboriginal
Torres Straight Islander

PACIFIC

Cook Islander
Fijian
Maori
Samoan
Solomon Islander
Tokelauan
Tongan

EUROPE

Croatian
Cypriot
Czech
Greek
Italian
Macedonian

EUROPE – *cont*

Magyar
Maltese
Polish
Portugese
Russian
Serbian
Slavic
Spanish
Ukrainian

MIDEAST

Arabic
Egyptian
Iraqi
Israeli
Lebanese
Mauritanian
Syrian
Turkish

ASIAN

Cambodian
Chinese
East Timorese
Indonesian
Japanese
Korean
Laotian
Philippino
Taiwanese
Thai
Vietnamese

1 Australian Bureau of Statistics, 1995, Canberra.

APPENDIX D

Calculation of Penalty Rankings

The penalties for each offender were ranked in order of severity taking into account firstly, the type of penalty and, secondly, the duration or amount of the penalty.

Following is a list of the penalties imposed in the Children's Court of New South Wales from most to least severe. For each type of penalty a rank score was computed by scaling the duration or the amount of the penalty against the maximum duration or amount of that penalty permissible under law.

Control orders

Penalty rank = 0 - 0.99

Control orders may be made for a period of up to two years. As such, the penalty rank was computed as —

1 - (the term of the control order / 24 months).

In the case of minimum and additional terms a slight weighting for the additional term was added to the minimum to adjust the penalty ranking accordingly. For example, a control order for 12 months was given a rank score of 0.5 while a control order for six months was assigned a rank score of 0.75. A minimum term of six months with an additional term of six months was assigned a rank score of 0.749.

Community service orders

Penalty rank = 1 - 1.99

Before 25 November 1995, the maximum number of hours that could be ordered was 100 hours of community service work. As such the penalty rank was computed by —

2 - (the number of hours ordered / 100 hours).

For example, a CSO for 10 hours was assigned a rank score of 1.9 and a CSO for 100 hours was given a rank score of 1.

After 25 November 1995 the maximum was 250 hours. If a CSO was imposed on or after this date and it was less than or equal to 100 hours, the above formula was used. If it was greater than 100, it was given a score of 1.

Supervised recognizance and a fine

Penalty rank = 2 - 2.99

A recognizance can be imposed for a maximum period of two years and the maximum amount of a fine in the Children's Court is $1000. As such, the penalty rank was computed by —

> taking the midpoint between (3 - (the recognizance duration / 24 months)) and (3 - (the fine amount / $1000)).

For example, a recognizance for six months with a fine of $100 was assigned a rank score of 2.825 ((ie) the midpoint between 2.75 and 2.9). This gives the recognizance and the fine components equal weighting in terms of severity.

Supervised orders

Penalty rank = 3 - 3.99

Supervised recognizance orders and probation orders can be imposed for a maximum period of two years. As such, the penalty rank was computed by —

> 4 - (period ordered / 24 months).

For example, a supervised recognizance or a probation order for 12 months was assigned a rank score of 3.5 and an order for 24 months was given a rank score of 3.

Unsupervised recognizance and a fine

Penalty rank = 4 - 4.99

On a similar basis to supervised recognizances with a fine, the penalty rank was computed by —

> taking the midpoint between 5 - (the recognizance duration / 24 months) and 5 - (the fine amount / $1000).

Unsupervised orders

Penalty rank = 5 - 5.99

On a similar basis to supervised orders the penalty rank for unsupervised orders was computed by —

> 6 - (period ordered / 24 months).

Fine only

Penalty rank = 6 - 6.99

As previously mentioned, the Children's Court can impose a fine up to $1000. Therefore the penalty rank was computed by —

7 - (the fine amount / $1000).

For example, a fine of $200 was assigned a rank score of 6.8 and a fine of $500 was given a rank score of 6.5.

Dismissals following a CAP programme

Penalty rank = 7 - 7.99

At present there is no legislative base for community aid panels. In our sample, the number of hours of community work completed by offenders ranged from 0 to 128 hours. The penalty rank was therefore computed as —

8 - (the number of CAP hours / 128 hours).

For example, 128 hours of CAP was assigned a rank score of seven and 0 hours of CAP was given a rank score of eight ((ie) the same score as someone who was dismissed without a referral to CAP).

Dismissals

Penalty rank = 8

All dismissals without referral to CAP were assigned a rank score of 8.

APPENDIX E

FREQUENCIES OF PENALTIES IMPOSED

	Anglo	*ATSI*	*Anglo*	*Pacific*	*Anglo*	*Europe*	*Anglo*	*Mideast*	*Anglo*	*Asian*
Control orders	16	16	9	22	11	10	6	11	7	7
Community service orders	18	28	9	7	7	13	13	17	13	11
Supervised order and fine	1	1	1	3	1	0	1	2	0	2
Supervised order	27	33	26	18	25	21	26	10	26	29
Unsupervised order and fine	4	4	2	2	6	9	4	3	5	2
Unsupervised order	39	40	28	28	32	29	21	30	27	30
Fine	32	20	17	15	18	23	19	29	18	14
Dismissal with CAP	11	8	5	6	16	13	15	4	9	7
Dismissal	23	21	16	12	15	13	12	11	14	17
TOTAL	**171**	**171**	**113**	**113**	**131**	**131**	**117**	**117**	**119**	**119**

APPENDIX F

Offence Categories Used for Matching

Against the Person

- Malicious wounding
- Assault causing actual bodily harm
- Common or other assault

Robbery/Extortion

- Armed robbery
- Robbery
- Robbery in company
- Assault with intent to rob
- Extortion/demand money with menaces

Break, Enter, Steal

- Break and enter dwelling
- Break and enter shop
- Break and enter building
- Break and enter other

Fraud/Deception

- Fraud/forgery/uttering
- Benefit by deception
- False instruments
- Larceny as a clerk/servant
- Misappropriation

Receiving/Goods in Custody

- Receiving
- Goods in custody

Steal Motor Vehicle

- Steal motor vehicle or cycle
- Take and use/unlawfully use motor vehicle
- Carried in conveyance

Larceny

- Steal from person
- Shoplifting
- Other larceny
- Attempt steal

Property Damage

- Arson (person not injured)
- Malicious damage

Justice Offences

- Escape/abscond
- Hinder police/resist arrest
- Breach recognizance/probation/bail
- Fail to appear

Good Order Offences

- Affront/affray
- Offensive behaviour
- Offensive language
- Possess/use weapons
- Enter/cross enclosed lands
- Evade fare
- Possess house or car breaking implements

Drug Offences

- Possess/use heroin
- Possess/use amphetamines or cocaine
- Possess/use cannabis
- Possess/use non-specific drug
- Grow/cultivate drugs
- Administer drug or possess drug utensils

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