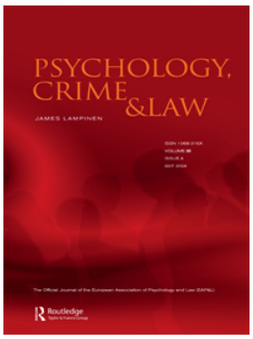

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Cultural context and sentencing: content analysis of sentencing remarks for Indigenous defendants of domestic violence in the Northern Territory, Australia

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ABSTRACT

The focal concerns perspective was developed to understand differential sentencing outcomes for minority defendants in the United States. Although the focal concerns perspective dominates empirical sentencing research, its application in Australia has limitations in understanding sentencing disparities of Indigenous defendants, especially around cultural and customary contexts. In Australia, this limitation is exasperated by jurisdictional nuances and that certain sentencing – like for domestic violence – requires consideration of cultural factors. Using content analysis, we examined the extent to which cultural and customary contexts were acknowledged within the sentencing remarks of 72 Indigenous spousal domestic violence defendants sentenced in the Northern Territory Supreme Court between April 2015 to April 2016. We found limited acknowledgement of culture and customary practices for Indigenous defendants. Around a third of transcripts referred to Indigenous cultural factors. When cultural factors were identified, the impacts on sentencing were absent, superficial, or applied in a way to remove cultural meaning. Consequently, there was little evidence that sentencing courts adequately accounted for the unique experiences of Indigenous people. This can further marginalise Indigenous people, decrease the capacity for healing and rehabilitation at sentencing, and increase sentencing disparities. We consider plausible strategies for judicial decision-making processes that ensure cultural and customary contexts.

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Introduction

In Australia, the 1991 Royal Commission into Aboriginal Deaths in Custody propelled the hyper-incarceration of Indigenous people[1] to a leading social policy issue (Deloitte Access Economics, 2018; RCIADIC, 1991). Despite significant attention, hyper-incarceration

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remains. Although Indigenous Australians make up 3.2% of the adult population, just over 30% of adult prisoners are Indigenous (Australian Bureau of Statistics, 2022a; 2021). The Northern Territory accounts for the largest proportion of Indigenous prisoners of any Australian state or territory, comprising just over 26% of the NT population (ABS, 2022a), yet accounting for almost 86% of the adult prisoner population (ABS, 2021).

These outcomes have led to research investigating how sentencing practices impact imprisonment disparities. In Australia, sentencing research has drawn from focal concerns theory, imported from the United States (see Steffensmeier et al., 1998). However, there are questions about how well it accounts for judicial responses to Indigenous experiences. This is important because in Australia, cultural factors can be considered in judicial sentencing. Cultural factors can have a particularly significant role in certain offences. For example, domestic and family violence is highly contextual and raises unique cultural concerns such as the recognition of spiritual and cultural harms to victims (Cripps & Adams, 2014). Subsequently, domestic and family violence cases may highlight the extent to which the Anglo-Australian legal system fails to adequately ground cultural and customary considerations in the sentencing process of Indigenous defendants. In consequence, undermining opportunities for rehabilitation and healing of Indigenous offenders at the point of sentencing. Therefore, underlining the need to strengthen the conceptualisation of cultural contexts within our understanding of criminal sentencing.

There is little research on how cultural factors are considered in day-to-day judicial sentencing. This study explores how customary law and cultural evidence is referred to by judicial officers during the sentencing of Indigenous spousal domestic violence offenders in the NT Supreme Court by analysing judicial sentencing transcripts.

Analysing sentencing disparities in Australian criminal courts

Australian research on Indigenous disparities in sentencing outcomes in mainstream courts saw considerable growth between 2007 and 2015. Overall, research on disparities due to Indigenous status for the decision to imprison has shown mixed results. Qualitative examinations suggest that Indigenous defendants may face systemic negative bias in mainstream court processes (Anthony et al., 2015; Baldry & Cunneen, 2014). Quantitative multivariate studies have been mixed, finding little evidence that Indigenous offenders were sentenced more harshly than non-Indigenous offenders by mainstream courts (Bond & Jeffries, 2010; Bond & Jeffries, 2011a; Jeffries & Bond, 2009; Snowball & Weatherburn, 2007; Thorburn & Weatherburn, 2018). Bond and Jeffries' work suggest sentencing practices may have been more lenient (i.e. less likely to be imprisoned). Reinforcing the mixed findings, Lockwood et al. (2015) found evidence of both lenient and harsher sentencing outcomes for Indigenous defendants, depending on the nature of the offender and case characteristics.

Although sparser, there has been consistency in research findings examining sentencing disparities for Indigenous and non-Indigenous offenders convicted of domestic and family violence offences. Donnelly and Poynton (2015), Jeffries and Bond (2015) and Fitzgerald et al. (2021) all found Indigenous offenders of domestic and family violence were sentenced more harshly than non-Indigenous offenders, at least for the decision to imprison.

While this research recognises the unique context of Indigenous defendants (and in some cases customary practices in explaining these findings), these studies do not focus on how customary law and cultural practices are referred to, or used by, judges

in their sentencing decisions. In part, this may be due to the difficulty in obtaining sentencing transcripts and the theoretical frameworks adopted in empirical sentencing research.

Explaining sentencing disparities: focal concerns perspective

Internationally, the focal concerns perspective has become the dominant theoretical framework used to explain disparities in judges' sentencing decisions (Hartley et al., 2007). Steffensmeier and colleagues (Steffensmeier et al., 1993; Steffensmeier et al., 1998) developed the focal concerns perspective to analyse racial and ethnic sentencing disparities in the United States. The approach argues that judges reflect upon three primary considerations in sentencing decisions; *blameworthiness*, *protection of the community*, and *practical constraints and consequences* (Steffensmeier et al., 1993; Steffensmeier et al., 1998). Such considerations accentuate the capability or 'blameworthiness of the offender'; the judge's desire to 'protect the community' (by deterring potential offenders and incapacitation of dangerous offenders); and judicial concerns specific to 'practical constraints' (Hartley et al., 2007), such as jail and prison space (Freiburger et al., 2010).

The focal concerns perspective assumes judges receive limited information about the defendant's character and background due to the limited time judges preside over cases within courtrooms (Bond & Jeffries, 2011b; Ulmer & Bradley, 2017). Judges develop perceptual shorthands that can be promptly applied to each case, resulting in judicial decisions based upon stereotypes linked to offender characteristics (Steffensmeier et al., 1998). These mental shortcuts may differ across race and gender (Holmes et al., 2020), and thus, allow disparities in the judicial decision-making process to potentially occur.

This perspective has been applied in the Australian context, starting with Jeffries and Bond (2009), who argue that 'practical constraints' (included the broader expectations emerging from political and historical factors), amplify Indigenous disadvantage. However, as this perspective was developed to explain sentencing disparities in a different national context, application of the focal concerns perspective is limited in understanding the Australian perspective, especially Indigenous experiences. This is important to address as sentencing in Australian criminal courts may not have a marked impact on reducing imprisonment rates of Indigenous Australians if Indigenous law, values, and experiences remain marginalised in judicial decision-making (Anthony, 2013; Calma, 2007; Cunneen, 2018).

Recognising cultural contexts in sentencing

Socio-legal researchers have studied how sentencing decisions have endeavoured to incorporate cultural contexts, with specialist Indigenous sentencing courts seen as a key strategy.[2] These courts are well-established in most jurisdictions (Marchetti, 2019), but eligibility requirements and limited workloads result in most cases involving Indigenous defendants being sentenced in mainstream courts.[3] Although embedding Indigenous experiences in mainstream sentencing is a larger, more difficult task, it is an important way of promoting the Anglo-Australian principle of individualised justice (Anthony et al., 2015). Adequate recognition and framing of Indigenous cultural contexts in mainstream sentencing processes, provides for an enriched understanding of the causes of

offending behaviour and the improved framing of sentencing outcomes, thereby enhancing Indigenous offenders' prospects of rehabilitation (Bugmy Bar Book Committee, 2018). Edwige and Gray (2021) detail, at length, the significant role of culture in effective rehabilitation for Aboriginal and Torres Strait Islander people.

In Australian judicial sentencing, the need to consider Indigenous customary law, culture, and experiences has been recognised in numerous ways. For example, international human rights conventions necessitate the recognition of customary law within the Australian legal system (Calma, 2007). Further, at common law, systemic issues unique to Indigenous defendants have been considered, such as considering Indigenous disadvantage as a mitigating factor, assessing the impact of cultural factors, and accounting for traditional punishment (Anthony, 2013). In *Bugmy v The Queen* (2013), the High Court of Australia determined that not considering Indigenous experiences was 'antithetical to individualised justice.'[4] Numerous policies, reports, and inquiries have also noted the importance of considering culture in sentencing. For example, in the Australian Law Reform Commission [ALRC] (2017) report, *Pathways to Justice*, three (out of 35) recommendations supported formal implementations of sentencing reform to recognise the unique systemic and background factors that impact Indigenous peoples.

Moreover, sentencing laws inform how cultural factors are considered, and in Australia differ between state and territory jurisdictions. In the Northern Territory, with the enactment of s 91 of the *Northern Territory Emergency Response Act 2007 (Cth)* and replacement of s 16AA of the *Crimes Act 1914 (Cth),* the *Sentencing Act 1995* (NT) prohibits NT Courts from considering any form of customary law or cultural practice as a mitigating or aggravating factor in sentencing or in considering bail. Notwithstanding, the Northern Territory Law Reform Commission [NTLRC] (2020a, p.15) affirms that aspects of sentencing which are distinct from seriousness (and which therefore could be influenced by cultural information), can be brought forth by s104A. This includes the ability to provide context and explanation for an offender's actions and to provide information about their role in the community, predisposition to offend, rehabilitation prospects and the impact of their offending on the community so that the court can assess the offender's particular circumstances. Yet there is little research that identifies how cultural and customary provisions are applied in such legislative context.

There has been limited success of formalising cultural considerations in sentencing in Australia. Mainstream sentencing hearings are highly reliant on pre-sentence reports – which details a defendant's background – to provide information to judges about customary law and culture. However, pre-sentence reports are often marred by coverage and limitation issues, thereby failing to provide relevant facts for Indigneous defendants such as cultural background, socioeconomic disadvantage, trauma from institutionalsation and an individual's roles or strengths in their community (Anthony et al., 2017).

In response to *Pathways to Justice* inquiry (ALRC, 2017), the NT Government (2017) admitted that pre-sentence reports may omit cultural and historical information that addresses complex issues unique to Aboriginal offenders that could assist judges determine appropriate sentences. The Western Australian Court of Appeal has also referred to the risk assumptions embedded in pre-sentence reports, which can promote punitive outcomes beyond those the court would otherwise order (Anthony et al., 2017, p. 124). To date, the NT Government has failed to adequately address these shortcomings in mainstream sentencing hearings.

Cultural factors in sentencing for domestic and family violence

The consideration of cultural factors can be amplified for certain offences. For example, domestic and family violence is highly contextual, with justice responses having significantly differential impacts across groups (Carlson et al., 2021). This is particularly acute for Indigenous people, who are 32 times more likely to be hospitalised for family violence than non-Indigenous people (Australian Institute of Health and Welfare, 2019). Although contemporary governmental policy and responses to domestic and family violence recognise the broader conceptualisation of family violence that incorporates extended family and kinship networks, these responses prioritise gender in ways that marginalise Indigenous women's experience of violence (Blagg et al., 2018; Carlson et al., 2021), including recognising spiritual and cultural harms as well as injuries to communal well-being (Cripps & Adams, 2014). These are experiences of harm that are magnified by the social and intergenerational disadvantage within Indigenous communities created by 200 years of dispossession. Correspondingly, the sentencing of domestic and family violence cases may highlight the extent to which the Anglo-Australian legal system contextualises customary and cultural concerns of Indigenous offenders in a way that empowers communal healing and contact with the criminal justice system, which is regarded as essential to addressing Indigenous domestic and family violence (Calma, 2007; Dodson, 2007).

Current study

Overall, although statutory provisions that allow the consideration of cultural factors to exist, how they are used within an *adversarial* Anglo-legal system is largely unexplored. Although appellate decisions have been explored (Anthony, 2013), there has been little examination of how *sentencing* judges at sentencing hearings in mainstream criminal courts rely on cultural and customary factors. An empirical understanding of current practice has implications for addressing overrepresentation of Indigenous defendants in the criminal justice system. Thus, in using NT Supreme Court sentencing remarks for a sample of Indigenous defendants convicted of physical spousal domestic violence, the current study explores *how and to what extent do judges acknowledge cultural and customary practices in their sentencing of Indigenous offenders?*

The NT has a two-tier court system: Local Courts and the Supreme Court (Northern Territory Government [NT Government], 2020a). The Local Court hears less serious civil and summary offences, and certain minor indictable offences (NT Government, 2024b). The Supreme Court, as the superior court of NT, has unlimited jurisdiction, hearing civil matters and serious criminal matters. Criminal sentencing is guided by the *Sentencing Act 1995* (NT). Section 5(1) of the *Sentencing Act 1995* (NT) sets out the purposes of sentencing as: retribution, rehabilitation, deterrence (both special and general), and community protection.

The NT has moved from allowing Aboriginal customary law to be adduced at sentencing to a legislative framework which does not explicitly require the courts to pay specific attention to the circumstances of Aboriginal offenders. There does remain, however, provisions in the *Sentencing Act 1995* (NT) to provide the court with broad discretion to allow for Indigenous cultural background, procedure for the admission of Indigenous cultural evidence, and Indigenous community input in sentencing (NT Government, 2017).

Douglas (2005, p. 141) has characterised this as a 'weak legal pluralism', emphasising the informal recognition of Aboriginal customary law within sentencing but with conditions. Respectively, the Australian Capital Territory (which is in the same legal position as the Northern Territory), has been free to develop its own legislation and recognises an offender's cultural background as relevant to the sentencing process (NTLRC, 2020a). From a normative standpoint, the NTLRC (2020a) highlights the 'paternalistic' nature of section 16AA in the *Crimes Act 1914* (Cth), in which (as far as the Law Society of the Northern Territory and the Law Council know), no other state or territory has received substantial political pressure on this issue from the Commonwealth (NTLRC, 2020a, pp. 14–15).

Method

Data and sample

Transcripts of judges' sentencing remarks were obtained from the publicly accessible NT Supreme Court database.[5] Sentencing remarks are verbatim transcripts ranging in length from 1,000–4,000 words detailing what judges say at sentencing hearings.[6] This includes the judge's explanation of the sentence, and why such behaviour deserves punishment. Sentencing remarks are intended to assist offenders understand their sentence (Sentencing Advisory Council, 2021).

The current study consists of sentencing remarks for all cases of Indigenous defendants convicted of physical spousal domestic violence offences over a 13-month period (April 2015 to April 2016). We focus on the sentencing of domestic and family violence offenders, as these are cases in which cultural issues are more likely to be highlighted. We narrowed our sample to physical *spousal* domestic violence offences, as it was not possible to feasibly identify the transcripts of other types of domestic and family violence offences.

Initially, 222 possible cases were identified. Each case was manually checked for offence type. Overall, 72 transcripts fit the study criterion. Each transcript was labelled with a unique numeric identifier.

Of the 72 cases, 86.1% involved male offenders, and 13.9% female offenders. The most common age group of the offenders was 25–29 years old (20.8%), followed by 30–34 years old (19.4%). There was insufficient information to provide similar demographic characteristics for the victims. About 69% of the offenders (69.4%) and 51.4% of victims were identified by the judge as being *intoxicated* at the time of the offending. Almost a third of offenders (31%) were in breach of a Domestic Violence Order (DVO) at the time of committing the offence(s), and just over 8% were in breach of a suspended sentence. Most offenders (61.1%) were convicted of 'unlawfully causing serious harm' as the most serious (or principal) offence. All offenders received a prison sentence, ranging from 9–192 months.

Analytic approach

A content analysis was conducted to identify themes concerning cultural and customary practices (Hsieh & Shannon, 2005, p. 1278) Both deductive and inductive approaches were used to identify themes (Hatta et al., 2020) Deductively, findings and theoretical concepts from past sentencing research were identified to establish the initial coding themes (Proudfoot, 2023, p. 308) Inductively, these themes were refined iteratively during coding

and data analysis (Proudfoot, 2023, p. 311). Although the sentencing occurred in open court and the transcripts are publicly available, in reporting the findings, cases are identified using the numeric study identifier, and references to names and places removed.

Results

In total, 35 of the 72 transcripts (48.6%) referred to cultural and customary practices, and as sentencing remarks can contain more than one cultural reference, there were 75 individual references. From these 75 individual references, five themes were identified. Most common themes were references that could be classified as ceremonial practices (n = 24, 32% or references) followed by references to jealousy (n = 22, 29.3% of references), and then other cultural/customary aspects (n = 17, 22.6% of references).

Theme 1: ceremonial aspects

Aboriginal Australian communities engage in a variety of ceremonies, in which the lore's and practices of each Aboriginal group (inclusive of their spiritual, cultural, and religious beliefs), are passed down from generation to generation (Queensland Studies Authority, 2008). Judges referred to ceremonial aspects specific to offenders' circumstances in 24 of the 72 sentencing remarks (33.3%). These references situated offenders within their cultural community. In these remarks, there was no further contextualisation of this role from a community perspective. This is particularly interesting considering the prominent role of Elders in Indigenous communities (Busija et al., 2020).

Only one sentencing remark (1.38%) referenced traditional punishment or customary law.

> [Punishment name] is one of the most important punishment ceremonies in the offender's culture. It involves the whole of the offender's community. It is like a prison. It starts with a ceremony at an outstation during which [Country] Elders decide the punishment and [punishment name] is put on the person who has breached [Country] law … [an Elder], has told the court that the offender is willing to undergo [punishment name] (*#28*).

Further, this was the *only* case in which a judge's remarks suggested support of traditional punishment, and by implication, customary law practices:

> Given that domestic violence is a very serious issue which affects all communities, it seems to me that it is important that the offender's community is involved in disciplining him according to their traditional law for such an offence. This will assist in achieving the sentencing objects of denunciation, deterrence, and rehabilitation. It will show the offender that his community strongly disapproves of his behaviour and will help him to rehabilitate himself. It will make it clear to the offender that his community and family do not accept what he has done (*#28).*

Theme 2: jealousy vs jealousing

The predominant issue identified in the transcripts related to jealousy, with 22 references across the 72 sentencing remarks (30.5%). Jealousy issues were generally identified by judges as part of the offence context. For example:

> The victim then had an argument with [female defendant] and the offender over jealousy issues. The victim and [female defendant] then began to fight each other … (*#48*).

The presence of jealousy in domestic and family violence cases is so common that one judge described the male's offending to be out-of-the-ordinary, because it was absent:

> The offending in this case is slightly out of the ordinary in the sense that neither alcohol or drugs were involved, and the argument was not about a jealousy issue (*#42).*

However, as the word 'jealousy' has been adapted by Indigenous communities into the term 'jealousing', these references must be understood within the broader cultural context, particularly distinguishing 'jealousy' and 'jealousing'. 'Jealousing' – being identified as common in intimate relationships within Indigenous communities (Blagg et al., 2018) – is a form of conflict within relationships that does not have a non-Indigenous equivalent (Turner-Walker, 2012). As described by Senior and colleagues (2016, p.205), public displays of violence related to relationship conflict had become 'normalised' in ways that could be monitored by cultural protocols and broader kinship networks.[7] Therefore, 'jealousing' or actions that can be interpreted as 'jealousy' from a Western perspective, are embedded within culturally dependent interpersonal and social capital (Blagg et al., 2018; Turner-Walker, 2012).

In these transcripts, when judges acknowledged 'jealousing', they typically did not suggest an understanding of the cultural meaning underlying the behaviour. For instance, although recognising the word 'jealousing', the following description described 'jealousy' from a Western perspective.

> You gave as your reason **a term this court often hears, I think, called 'jealousing'**. This court and other courts have emphasised that being jealous is no excuse for responding by acts of violence … jealousy is often a reason given for domestic violence, including in Aboriginal communities. The court said that jealousy could not be regarded as a feature of mitigation. (#22, emphasis added)

Although the judge in the above quote considers 'jealousing', in other transcripts the judges' distinctions between jealousy and jealousing is not as explicit. This comparison demonstrates how embedding Indigenous perspectives into sentencing practices may be difficult without strategies to provide 'insider' knowledge to the court. In the absence of judicial recognition of 'jealousing' within an Indigenous context, the sentencing goal of general deterrence may be futile without an adequate judicial narrative that addresses the significant cultural component surrounding 'jealousing' (Blagg et al., 2018). As an example of such inadequate contextualisation, in the following sentencing remark, the judge rationalises a prison sentence based on deterrence for a behaviour, without acknowledging this broader significance:

> There is also what we lawyers refer to as principles of general deterrence. These require significant sentences to be given to stop other people from engaging in violence as a response to their jealousy if they think that their partner has been playing up and doing what they should not be doing … Other people must realise that if they get jealous of their domestic partner and respond by being violent towards that person, they are very likely to go to gaol (*#22*).

Theme 3: other cultural and customary aspects

In 17 cases (23.6%), judges discussed other cultural and customary aspects specific to offenders' background. These references include traditional marriage, Sorry Business,

Country or the offenders' remote upbringing, kinship (or skin), retribution and traditional beliefs. Most judicial cultural references were to traditional marriage (7), Sorry Business (3), and remote upbringing (3).

Traditional marriage. Traditional marriage was the most common cultural aspect referenced within this theme. In seven (9.7%) transcripts, judges commented on the custom of Indigenous traditional marriage, recognising the relationship within which the violence occurred. In one of these cases, the judge commented on an offender's 'wrong way' marriage (which can also be termed a 'wrong-skin' marriage) (Central Land Council, 2023, para.2), referring to a marriage that fell outside cultural rules tended to attract disapproval from family members and communities, and can lead to censure and physical punishment (Bell, 1984; Blagg et al., 2020):

> … she's from a different language group. You speak [language group 1] and she is probably a [language group 2] lady, so you speak different languages. Apparently, you may have a wrong-way marriage and that is causing some problems within your families (*#1*).

However, in these seven cases, there was no reference to traditional marriage contributing to current offending, only a recognition of the relationship.

Sorry Business. The cultural practice of 'Sorry Business' refers to a time of mourning following the death of an Aboriginal person or other event such as illness, loss of cultural connection to land or imprisonment (Remote Area Health Corps [RAHC], 2013, p. 37). 'Sorry Business' was recognised in three (4.2%) references in the sentencing remarks. Typically, these references to 'Sorry Business' were about the offender's circumstances:

> You were about 24 when your father passed away and you moved into [regional town] with your mother as culturally you could no stay at [community] for a period after your father died (*#68*).

Country or remote upbringing. Aboriginal and Torres Strait Islander people have strong cultural and customary connections to their 'Country', with 'Country' also being considered a place of healing (Schultz & Cairney, 2017). However, Blagg et al. (2018) express that the significance of 'Country' (and its role in violence prevention and in repairing damaged relationships across Indigenous families), is yet to be fully appreciated by mainstream society. This assertion appears well-founded in relevance to the undertakings of the NT Supreme Court, considering that there were *rarely* any explicit references to 'Country' in the sentencing remarks, occurring in only one sentencing transcript where the judge referred to the significance of the offender's 'Country':

> It appears that your tribal country is out between Bulman and Gove that is the country of your father and grandfather *(#60)*.

However, in two further cases, judges explicitly mentioned the *remote upbringing* of each of the male offenders:

> He [the offender] primarily lived in [Country 1], brought up in [Country 2], a community that when he was growing up would have been largely isolated from the general community. It was not subjected to modern influences evident in such places as [Country 3]. I accept the submission that he was brought up in what could be regarded as a traditional Aboriginal setting and lifestyle … (*#35).*

> … I appreciate he is from a very remote area and certainly is subject to the difficulties that people who grow up in very remote areas are subject to … (*#39).*

Other cultural practices. Other cultural practices referenced by judges in their remarks included retribution and traditional beliefs (the mentioning by a judge that a defendant believed himself to be 'cursed' by a traditional witch doctor). Judges also referenced kinship (or skin):[8]

> You said that you met [female] when you were about 18 and the two of you were the right skin for each other and you got married … You went on to say that she is the mother of your two children and right skin for you … *(#22)*.

> You are a [Country] man, and I am told your skin name is [name] (*#3*).

Theme four: indigenous languages

The small number of references to Indigenous languages as the first language of defendants was particularly striking. In the NT, over 100 Indigenous dialects and languages are spoken (NT Government, 2020b). In 2016, at the time of the study's transcripts, more than 60% of Indigenous people living within the NT reported speaking an Australian Indigenous language, which is 5 times higher than the next highest state of Western Australia (13%) (Australian Bureau of Statistics, 2018). About one in eight people living in very remote Australia, who spoke an Australian Indigenous language as their main language at home, reported that they spoke English 'not well' or 'not at all' (ABS, 2018).

Despite the various Indigenous languages spoken in NT, there were few explicit references in the sentencing remarks about an offenders ability to understand and participate in the proceedings.[9] As the High Court observed in *Ebatarinja v Deland* (1998), the courts have a duty to ensure that an offender understands what is being said in court and that the necessary arrangements are made to provide a translating service (Hinton et al., 2008, p.125). The use of an *interpreter* during the court process was noted in six references (8.3%), such as:

> He speaks [language] as his first language and he has been assisted by an interpreter during the plea proceedings *(#30)*.

In two of these cases, the judge specifically mentions the need to ensure that the offender's accessed an interpreter to go through the sentencing order after the hearing. However, there appeared no formal mechanism to ensure offenders received such support. Further, in these cases, the judges noted their uncertainty about whether the offender had a clear understanding of the court process and subsequent charges at the time of the hearing. For example:

> Ms[name], I am not sure how much of that she would have taken in and I would ask that you go through it with her again, with the assistance of the interpreter *(#55)*.

> I sentence today with assurance from Mr [name] that an interpreter will take [the offender] through the sentencing matters *(#35)*.

Theme 5: community disapproval, denunciation, and 'shame'

Denunciation is defined by the Northern Territory Law Reform Committee (2020b, p. 5) as involving the court, 'making a public statement that behaviour constituting the offence is not to be tolerated by society either in general, or in the specific instance.' In six

transcripts (8.3%), judges explicitly acknowledged the crucial role of community disapproval within Indigenous cultures. In other words, judges were contextualising denunciation (i.e. behaviour not tolerated) within their offenders' own community:

> The community does not approve of this kind of conduct and I was pleased to hear that as part of what you are taught when you are learning the law that your community does not approve of this conduct … (*#22*).

> The community does not approve of this kind of conduct. That letter that we got [from offenders' uncle and community Elder] indicates that he does not approve of what you did (*#38*).

However, at least in one case, the judge made assumptions about the community's position, rather than based on evidence provided by community at the time of sentencing:

> Other members of the community think it is wrong for people to do what you did. I am sure your own community at [Country] do not approve of people getting drunk and bashing their wives (*#1*).

Like 'jealousing', Indigenous communities have adapted the term 'shame'. Scheff (2000) highlights shame to be a 'slippery' concept, in that the concept has multiple meanings and usages academically, linguistically, and culturally (McKnight et al., 2018).

> 'Shame' is an integral feature of Indigenous thinking about 'individualised' behaviour (Morgan et al.,1997). 'Shame' is felt when an individual carries out an act that does not align with spiritual and social obligations and is not sanctioned by the group/community to which the individual belongs. Invoking 'shame' can be constructive and positive in learning how to belong. Moreover, 'shame' has been applied in Indigenous sentencing courts, with Elders expressing the deep 'shame' felt by an offender in having to confront one's own Elder (Potas et al., 2003, p. 47). Although there are commonalities to denunciation, in this study, the ways judges acknowledged the role of disapproval by Indigenous communities in the offending behaviour typically did not suggest an understanding of the cultural practices of 'shame' or ways that that Anglo-courts can embed ways to adapt these concepts. Again, this demonstrates that the embedding of Indigenous perspectives into mainstream sentencing practices has been limited.

Discussion

The current study addresses the lack of empirical research on how judges refer to and acknowledge culture and customary practices in judicial sentencing in mainstream criminal courts. Informed by the focal concerns perspective, we analysed 72 sentencing remarks for Indigenous defendants convicted of spousal domestic violence in the NT. Notably, at times, there were limitations disaggregating the extent that each element of the focal concerns perspectives on sentencing. For example, there is difficulty assigning cause of the type of engagement with cultural factors when there are multiple contributing factors, such as time limitations or restrictive legislative frameworks. However, through our analysis, we did identify three main findings that could inform sentencing practices of Indigenous peoples:

- there was limited acknowledgment of Indigenous culture and customary practices.

- systemic *practical constraints* impeded justice for Indigenous peoples.
- individualised justice in judicial sentencing failed to incorporate Indigenous ways of knowing, being, and doing for Indigenous defendants.

We discuss these below.

Limited acknowledgement of culture and customary practices

In this study, there was limited acknowledgement or contextualisation of cultural and customary aspects within the sample of sentencing remarks. Two-thirds of transcripts did not reference Indigenous culture and customary practices. The focal concerns perspective considers how judges use limited resources in their decisions; consequently, the absence of cultural references does not mean a judge did not consider these factors, but rather that culture was not as important as other factors that impact sentencing. However, given the public nature of sentencing justifications, the limited acknowledgment of culture and customary practices – which are unique circumstances within the sentencing process – may be evidence of a lack of genuine acknowledgement of, and engagement with, the importance of culture and customary practices in Indigenous peoples' lives.

National and Northern Territory reports and inquires, as well as Aboriginal community groups have also proposed legislative changes to sentencing guidelines to ensure culture is appropriately considered at sentencing (ALRC, 2017; NTLRC, 2020a; NTLRC, 2020b). Indigenous culture's indeterminate role in sentencing guidelines has significant consequences for the application of individualised justice that underpins Anglo-legal systems. As Justice Eames, Victorian Court of Appeal, states:

> … to ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself (*R v Fuller-Cust*, 2002, p. 47).

If the limited application of Indigenous culture and customary practices that we observed is widespread in judicial sentencing, Indigenous defendants may not have their unique community circumstances understood and properly accounted for in sentencing. As has been increasingly recognised, the lack of recognition of culture in the sentencing process has severe consequences for the well-being and rehabilitation of Indigenous defendants (Cunneen, 2018), for it is through cultural praxis, stories, and ceremony that Indigenous people learn cultural systems of morality that shape a sense of obligations, responsibilities, and rights (Poroch et al., 2009). As expressed by Hovane (2015, p. 17),

the opportunities and strengths provided by Aboriginal culture and law in providing a pathway for 'achieving positive environments in which communities and families stand in support of those experiencing DFV, to curb the behaviour of perpetrator's … these important opportunities continue to be ignored as a result of prevailing systemic racial inequalities, and Aboriginal people continue to experience serious harm as a result of violence including DFV.

Moreover, sentencing guidelines that explicitly outline how Indigeneity should be considered in sentencing, or clearer processes to assess how Indigeneity impacted sentencing, would promote individualised justice at sentencing.

Practical constraints and consequences

This study also identified several practical restraints and consequences noted in the remarks, constraints that significantly impact Indigenous people. *Practical restraints and consequences* are one of the three key considerations in the focal concerns perspective, and includes assessments relating to:

- *organisational concerns* (relationships within the court and available resources).
- *individual consequences* (whether individuals can 'do time').

For *organisational concerns*, the findings suggest courts were unable to provide appropriate language facilities. As a result, the sentencing process itself may not be adequately explained to Indigenous defendants. References to interpreters or limited English occurred in only six (of 72) transcripts. Yet, the location of offending suggests that many defendants first language was not English. The jargonistic and foreign judicial process amplifies this impact (Marchetti, 2019). In this study, the references to interpreters were for their use to explain sentencing orders *after* the hearing. Although a non-mention does not mean that interpreters or other community input was not obtained, this does raise a concern about whether the court process adequately provided services for Indigenous defendants, ensuring that they understood the sentencing processes, let alone contribute a fuller judicial understanding of their unique cultural obligations. There are no structured, formalised, or guaranteed interpreter services in the Northern Territory – there is a reliance on Aboriginal organisations (e.g. North Australian Aboriginal Justice Agency [NAAJA, n.d) that have limited and precarious funding (Mackie-Williams, 2021). Aboriginal language translators, and legal-system interpretation services, are essential for just sentencing processes.

This study also highlighted Indigenous-specific *individual consequences*. Individual consequences have been used to describe how familial obligations can impact sentencing (e.g. being the primary caretaker of children can be a mitigating factor for defendants). Similarly, at sentencing, individual consequences should be extended to incorporate cultural obligations of Indigenous people. In this study, cultural, and customary practices were superficially mentioned, with no explicit mention of the impact or weight given to these factors in the sentencing remarks. There were some (limited) transcripts in which an understanding of cultural practices were evidenced (e.g. one transcript documented explicit judicial acknowledgement of customary law practices). However, overall, sentencing judges may not have adequately *contextualised* the broader obligations of Indigenous defendants to their 'Kin' and 'Country'. Each Aboriginal Country has different social norms, customs, and languages. Previous studies have demonstrated how Elders can assist judicial officers in interpreting local customs and enhanced perceptions of fairness and increased the legitimacy of the court in the eyes of Indigenous people, Elders, defendants and their families and victims (Morgan & Louis, 2010). As the focal concerns perspective acknowledges, where judges face uncertain information and time pressures, the result is a greater reliance on 'perceptual shorthands' in the decision-making process. The involvement of Elders or respected community members could assist judges in providing local context that provides better information to the judge, and thus requiring less reliance on 'perceptual shorthands'.

Judicial sentencing and indigenous ways of knowing, being, and doing

In the Anglo-Australian legal system, individualised justice is an important principle in sentencing. However, Indigenous communities' and the Anglo-Australian legal system have differing ontologies, epistemologies, and axiologies (see Martin & Mirraboopa, 2003). This has significant implications in sentencing practices that focus on individualised justice. Individualised justice means understanding the context of the defendants: as Calma (2007, p. 2) notes 'it is misconceived to believe that justice can be delivered without due consideration being given to cultural factors.' However, our analysis of the sample of sentencing transcripts for Indigenous defendants suggests that cultural factors are not key considerations in their sentencing.

From a theoretical perspective, frameworks used to explain racial and ethnic sentencing disparities need to centre culture and race. Scholars using the focal concerns perspective have placed cultural considerations within 'practical constraints.' This neglects the positive and negative experiences centring on how culture and race interact with regards to Indigenous defendants and may unduly shape judicial assessments of blameworthiness and community protection. For example, of the transcripts in this study that mentioned cultural and customary practices, the results suggest that the cultural meaning may not have always been understood. The references to 'jealousing' generally failed to identify the cultural dimension involved. Instead, 'jealousy' was described as an individualised motivator. Hence, Indigenous ways of being were misrepresented within the sentencing process. This may contribute to the difficulties that scholars have had in using the US derived focal concerns perspective in the Australian and Indigenous context; the blameworthiness of the offender (derived from the focal concerns perspective) was being determined through an Anglo-Australian lens rather than an Indigenous perspective.

Embedding Indigenous ways of being in sentencing also impacts assumptions about 'community protection', a key concept within the focal concerns perspective. For example, this study provided examples of tensions between Indigenous and Anglo-Australian forms of justice. Indigenous forms of justice tend to focus on principles of community-based sanctions and community healing rather than the neo-liberal Anglo-Australian penality, emphasising retribution, deterrence, and individual responsibility (Cunneen, 2018, p. 18). For example, in two sentencing transcripts, judges referred to 'community disapproval' (or denunciation) in terms of the defendant's own community but appear to fail to acknowledge 'shame', which is a form of Indigenous social control that includes processes to support community cohesion. The extent judicial officers consider 'shame' within this framework needs further clarification.

Limitations and future directions

In drawing conclusions from this study, limitations must be considered. First, this research relied on a sample of one type of offending (physical spousal domestic violence) in a particular jurisdiction in a higher court. Different patterns of customary and cultural aspects may emerge for different offence types, jurisdictions, and court level. Future studies could incorporate observations of sentencing hearings, particularly in lower courts where sentencing transcripts are unavailable. Such methods would inform of the interactions between the defendant, community representatives (if any), and the judge. Second,

this study used public documents which may not reflect the factors judges considered, although sentencing transcripts do represent factors that judges felt important to note in a public forum. In some cases, cultural factors may not have been presented to judges to consider; for example, factors may not have been put to the judge by legal representatives, evidence of cultural matters may not have been submitted to the court, or submissions may have been contested. Future studies would benefit from interviewing judicial officers to disentangle how judges weigh the circumstances of culture and customary practice in their sentencing decisions. Third, the methods used in this study did not centre Indigenous perspectives of sentencing; future research would benefit from Indigenous perspectives and culturally sensitive methods that highlight the lived perspectives of the sentencing process to articulate the impact of court processes on Indigenous people.

Conclusion

This study sought to understand how and to what extent judges acknowledge Indigenous cultural and customary practices in their sentencing of Indigenous people appearing before the NT Supreme Court. Results indicate that the even although the NT legislative landscape does provide for the capacity for judges to centre Indigenous cultural and customary perspectives that are of relevance to an Indigenous offender's circumstance (that are distinct from offence seriousness) in the sentencing process, there was limited contextualisation of cultural and customary aspects in sentencing decisions for Indigenous offenders (at least for those convicted of spousal domestic violence). In consequence, undermining opportunities for rehabilitation and healing of Indigenous offenders at the point of sentencing. The focal concerns perspective highlighted points of contention in sentencing but does not have the capacity to access the impact of the sentencing processes limitation of incorporating Indigenous perspectives.

The extent Indigenous ways of being are considered at sentencing has significant theoretical and applied implications. Theoretical frameworks of sentencing would benefit from engaging a decolonisation lens which would challenge the logic of coloniality underpinning Westernised methods and theories (Mignolo, 2007). For example, from this lens, sentencing frameworks would need to consider how colonial disruptions to culture, land, family domains, and Indigenous spirituality have resulted in intergenerational grief within Indigenous communities (Atkinson et al., 2014). For systematic change, Justice Kelly of the Northern Territory Supreme Court (Kelly, 2014), recommends Australian law and policy makers sit down and talk with Indigenous people knowledgeable in Indigenous law, and work towards embedding Indigenous customary law within the mainstream legal system.

One reform gaining support is the introduction of 'Indigenous Experience Reports' which is a formal presentence submission by independent Indigenous organisations that outline how systemic and background factors unique to Indigenous people have affected individual offenders (ALRC, 2017). Similar processes are already in practice for Canada's First Nations people, known as 'Gladue Reports', and on a smaller-scale in Australia with Indigenous cultural reports (Anthony et al., 2017). However, it is simply not a matter of bringing relevant information to the process, the limitations of current community report writing infrastructure (i.e inadequate resources to support report writing

processes and post-court support), remains key barriers in embedding cultural contexts in sentencing Indigenous offenders (Anthony et al., 2017; Coulter et al., 2023).

Overall, even taking account of the study's limitations, the findings suggest that Indigenous people continue to be marginalised under the 'white' lens of the Anglo-Australian criminal justice system, which fails to adequately account for Indigenous people's unique cultural and customary experiences and obligations.

The data that support the findings of this study are openly available at the Northern Territory Supreme Court website, at https://supremecourt.nt.gov.au/sentencing-remarks.

Notes

1. In this article, we use the terms Indigenous people, or Aboriginal and Torres Strait Islander people, to respectfully refer to the First Peoples of Australia. We acknowledge Australia's Aboriginal and Torres Strait Islander communities as traditional custodians of the land, and pay respect to Elders past, present and emerging.
2. In May 2023, legislation was passed in the NT parliament paving the way for the revitalisation of community courts. Supreme Court matters, however, cannot be sentenced in community courts (Northern Territory Government, 2024a).
3. 83% of defendants finalised in NT criminal courts, in 2020-2021, identified as Aboriginal and Torres Strait Islander (ABS, 2022b).
4. For further reading on *Bugmy v the Queen*, refer to Anthony (2014) *Indigenising Sentencing? Bugmy v the Queen*; and Beckett (2021) *The Bar Book Project: Presenting Evidence of Disadvantage* and Evidence Concerning the Significance of Culture on Sentence.
5. No Northern Territory Court of Appeal remarks have been included in the analysis.
6. Northern Territory Supreme Court sentencing remarks are transcribed, and then provided to the sentencing Judge's Associate. Judges may either proofread and edit their sentencing remarks personally, or assign the task to their Associate, which they may review after editing. The process is 'entirely a matter for the relevant Judge and there is nothing which could be described as a standard practice' (D. Carr, personal communication, 28 September 2021).
7. Exploring the link between these dispossession, intergenerational trauma, and the normalisation of particular forms of conflict is beyond the scope of this paper.
8. Skin group systems are an integral aspect of Indigenous kinship networks. Receiving a skin name provides one with a place in a kinship network and is offered as a significant mark of respect and will only be offered after much consideration and discussion among Elders (RAHC, 2013). Skin group systems provide clear rules of association in terms of how Indigenous people relate to each other, funeral roles, ceremonial relationships, marriages, and behaviour patterns with other kin (Calma, 2007; Central Land Council, 2023).
9. For Aboriginal Territorians, the level of English proficiency varies substantially (NT Ombudsman, 2019-20, p.23). Moreover, within the NT prison population, there is diversity of first languages within the prison population. Many prisoners, some of whom may be proficient in several languages, are not proficient in English (NT Ombudsman, 2018-19, p. 68).

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