Judicial Conference of Australia Colloquium

Sydney

Sunday 13 October 2013

Sentencing Indigenous Offenders[1]

Not enough 'judicial notice'?

Judge Stephen Norrish QC
District Court of New South Wales

Introduction

The criminal justice system has been "accurately described"[2] as a "hopelessly blunt instrument of social policy and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities"[3].

This encapsulates to a large extent the daily challenge for judicial officers required to sentence Aboriginal people convicted of criminal offences or dealing with appeals from sentences imposed. Too often judicial officers bear the responsibility in the public view, particularly the media's gaze, for forces and events beyond their control when sentencing offenders, Indigenous or otherwise.

The many achievements of Aboriginal people in politics, the law, medicine, the arts, sport and elsewhere are rightly a matter for considerable pride for all Australians. The wider community's recognition of them and of the debilitating and corrosive effects of racism have also increased enormously over the past decades. On the other hand, the fact that government policies in health, education, employment and housing have focused on the slogan, 'Closing the Gap,' has shown how considerable is the extent of disadvantage for Aboriginal people across Australia at the present time, not just in remote areas.

---

[1] In this paper I interchangeably refer to Indigenous Australians and 'Aboriginal' Australians. The reference to 'Aboriginal' peoples is intended to refer to both Aboriginal and Torres Strait Islander peoples.No disrespect is intended in the use of these terms in this manner.
[2] **R v Fernando** [2002] NSWCCA 28 per Spigelman CJ (at [68])
[3] **R v Daniel** (1998) 1 QdR 499 (at 530 per Fitzgerald P).

Apart from the disastrous mortality and health outcomes for Aboriginal people, and demonstrable lack of employment and economic opportunity, one of the most telling indicators of the impact of disadvantage is in the extent of contact of Aboriginal people with the criminal law (as victims and defendants) and the consequences of current sentencing law and policy. The Standing Committee of Attorneys General in 2009 identified that 'closing the gap' on Indigenous over-representation was a priority in the National Indigenous Law and Justice Framework.

"Justice if not individual is nothing"[4], yet to a considerable extent current judicial attitudes to sentencing of Aboriginal people, in practice and principle, fail to properly recognise, or fully appreciate, the extent and causes of disadvantage and its relevance in individual cases. These are matters that persist as significant underlying, or direct, contributing factors to individual offending across a range of offenders and offences, from the most serious to the seemingly most trivial, as inquiries, studies, statistical data and other research regularly demonstrate.

In a decision handed down on 2 October 2013 the High Court **(Bugmy v The Queen)** [5] rejected a submission of the appellant that "…courts should take judicial notice of the systemic background of Aboriginal offenders ..." as it was "antithetical to individualised justice." However, whilst the individual character of the sentencing discretion was emphasised in the majority judgment, those Judges also stated:

> "Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background".[6]

The words "in mitigation of sentence" I take to refer to consideration of matters that may mitigate the otherwise appropriate sentence, all other matters considered.

These observations do not deny the capacity of judicial officers to take judicial notice of facts relevant to the individual case. Their Honours in fact did so to some extent

[4] **Kable v DPP** (1995) 36 NSWLR 374 per Mahony JA (at 394)
[5] **Bugmy v The Queen** [2013] HCA 37
[6] **Bugmy** at [41]

in the passage earlier quoted. The majority in that judgment approved observations in a number of decisions where judicial notice was taken of facts relevant to the matter to be decided, as also occurred in **Munda v Western Australia**,[7] which was decided on the same date. Those earlier decisions included decisions at first instance (such as **R v Fernando** [8]) and on appeal (such as **Fuller–Cust** [9]), as well as the decisions the subject of appeal [10].Both High Court decisions demonstrate the importance of taking judicial notice of relevant facts in individual sentencing exercises.

Many significant, widespread and surprisingly common underlying issues to offending by Aboriginal people across Australia were identified by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and in many important subsequent inquiries and studies subsequently. The evidence available of the impact on offending behaviour of contextual socio-economic circumstances and other historical factors beyond the control of individual offenders is readily available and, I suggest undeniable. Further, notwithstanding the High Court's admonition of judicial notice of "the systemic background of deprivation of Aboriginal offenders (as) it is antithetical to individualised justice", I suggest that systemic disadvantage can be shown without any imagination to have direct relevance to individual offending, as some of the facts in **Bugmy** and **Munda** demonstrate, as with the authorities therein cited.

This paper argues that within current legislative constraints and legitimate sentencing discretion:

1) More extensive use of judicial notice is required to be taken of these matters to properly assess both the objective and subjective circumstances of offending and offenders and this will enhance 'individualised justice'.

2) Such action by judicial officers would have a substantial impact upon the length of sentences imposed, the structure of sentences of

[7] **Munda v Western Australia** [2013] HCA 38
[8] (1992) 76 A Crim R 58
[9] (2002) 6 VR 496
[10] **Western Australia v Munda** [2012] WASCA 164

imprisonment or whether terms of imprisonment are imposed at all, particularly where competing considerations of personal deterrence and protection of society are not present or not as prominent as in **Munda** .[11]

3) Recognition of the reality of aspects of individual Aboriginal offending requires consideration be given to 'equal justice', which is already reflected in sentencing and discrimination case law. This is consistent with fundamental and widely accepted sentencing principles fixed by the High Court and superior courts in Australia.

The disproportionate rate of incarceration of Aboriginal people is not a basis, of itself, for distinguishing Aboriginal offenders from non–Aboriginal offenders.[12] It remains a legitimate matter of concern for the community, including those involved in the criminal justice system. This has been acknowledged by senior judicial figures in a number of judgments and speeches. Chief Justice Martin of Western Australia observed in 2009 that: "(t)he gross over representation of Aboriginal people within the criminal justice system of Western Australia was one of the biggest issues confronting (that system)". He noted that there was: "no sign of … progress (in relation to this issue) at the moment" and that the statistical "indicators", related to the over representation of Aboriginal people in the justice system, "continue to get steadily worse". He pointed out that in the United States, within the adult prison population, one in fifteen were African American males. The rate of incarceration of adult Aboriginal men in Western Australia in June 2008 was also one in fifteen. His Honour noted that this was "equivalent to the highest incarceration rate within the country having the highest incarceration rate in the (western) world". He observed that this rate of imprisonment of Aboriginal women, "may well be the highest in the world"[13]. He also pointed out at the time that the proportion of Aboriginal juveniles in custody in 'recent years' in WA had varied between 75%-80%. This is a grim omen for the future. These figures for the proportion of Aboriginal youth in custody are reflected largely across jurisdictions, with the exception of Victoria and Tasmania. As

[11] **Munda** at [58]
[12] **Bugmy** at [36]
[13] 'Corrective Services for Indigenous Offenders-Stopping the revolving door' –The Hon Wayne Martin CJ, 17 September 2009 (pp2-4)

at 31 March 2013, in New South Wales, 159 out of 289 'children' in custody at that date (55%) were Indigenous, of whom 50% were bail refused[14].

Ultimately, responsibility for the imposition of sentences of imprisonment falls at the feet of judicial officers. They perform this within the legal framework that constrains or structures sentencing discretions.

The relevance of 'systemic deprivation' to the circumstances of individual Aboriginal offenders and, on occasions individual offending, was refected in the Final Report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Addressing the issue of the reasons for the overrepresentation of Aboriginal people in custody, in the context of the acknowledged rates of offending, the Chief Commissioner Hon Elliott Johnson QC concluded[15].

> "It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society. In this way, it is one of the most important underlying issues that assists us to understand the disproportionate detention rates of Aboriginal people".

There has been some recent criticism that the Commission's approach failed to address what were more proximate rather than 'distal' factors leading to the over-representation of Aboriginal people in custody[16]. This criticism has been met by a vigorous rebuttal by The Hon. Geoff Eames QC. He noted that the claimed failure to take into account the relevance of what were described as more proximate causes, such as alcohol abuse, was illusory[17].

In that particular regard the Chief Commissioner had noted in respect of the issue of alcohol abuse and its relevance to offending, after extensive review within the Final Report of the evidence available:

---

[14] New South Wales Custody Statistics-Quarterly Update (March 2013) New South Wales Bureau of Crime Statistics

[15] RCIADIC – Final Report (April 1991) Vol 2 – Part C.

[16] 'Rethinking Indigenous overrepresentation in prison': D Weatherburn and J Holmes, Australian Journal of Social Issues - (Summer 2010).

[17] The Royal Commission into Aboriginal Deaths in Custody - 20 Years on -The Hon Geoff Eames QC - Exchanging Ideas II - A conference sponsored by the Ngara Yura Committee-Judicial Commission of NSW -September 2011

> "Alcohol is having a devastating effect on the Aboriginal people of Australia. From the urban areas of South-eastern Australia, where the greatest concentration of Aboriginal people are found, through the country towns and into the more remote areas of Australia, my fellow Commissioners and I have observed its impact at first hand. Sickness and death, violence and despair, exclusion from education and meaningful employment, families and communities in disarray; we have observed all of this and heard many Aboriginal people, those most affected, attributing this tragic state to alcohol. On the other hand, throughout our travels and inquiries into the underlying issues, all of us have been impressed with the way that some individuals, families and communities have been able to confront the problems attributed elsewhere to alcohol, and how many others are attempting to do so. Nevertheless, the negative side of the balance sheet is considerable"[18].

The Royal Commission was also well aware of the devastating effect on family life, precipitating domestic violence and sexual abuse, of substance abuse and the need for individuals to take personal responsibility for their conduct. The Chief Commissioner observed:

> "(T)his in no way validates or justifies dangerous drinking, alcohol-related violence, sexual abuse, or similar behaviour, either in the eyes of concerned Aboriginal people or in the perceptions of the broader community. I fully agree with those Aboriginal people who insist that Aboriginal people, both as individuals and in groups and organisations, have a deep responsibility to accept that they are accountable for their own actions and to work to overcome abuses. It is not valid to totally externalise responsibility to the broader non-Aboriginal society. On the other hand, whatever view one takes as to the model of causation, the background to dangerous drinking in the Aboriginal community is the history of 200 years. The non-Aboriginal community is under a strong obligation to provide the utmost assistance to those Aboriginal people who are struggling to overcome the problem".[19]

[18] Final Report, Vol 2, p.299
[19] Final Report, Vol 2, Chapter 15, par 15.2.52

Following the Royal Commission's findings and recommendations, the spirit of its conclusions has found its way into some judicial sentencing pronouncements. On occasions in those decisions the regard to issues of disadvantage as 'mitigating factors,' which may be displaced by 'punishment' purposes of sentencing has reflected a failure to recognise socio-economic and other contextual issues in the assessment of the objective aspects of sentencing, or consider them when addressing the significance of the various purposes of sentencing[20], proportionality and moral culpability fn see pp25-6, fn90-92 herein.[21]

Legislatures and government agencies have not acted to provide protection from the worst effects of the "blunt instrument" of the law upon this unique section of our community. Presently, sentencing options that offer alternatives to imprisonment across jurisdictions remain limited. Rehabilitation programs in and out of custody are sporadically available and inadequate for the demand. Policing policies on occasions reflect continuing failures to exercise discretions. Complaints of victimisation and racial targeting persist[22]. However, all these matters fall outside the scope of this paper.

The RCIADIC's findings are still as relevant now as they were when released 22 years ago. It is appreciated that much has changed directly as a result of the recommendations of the RCIADIC, particularly as to police education, practices in handling Aboriginal people in custody and in the practices and programs within "corrections" and the education of corrections officers. There can be no doubt that the spirit, at least, of the Royal Commission's recommendations influence continuing policy and practice where relevant recommendations have been acted upon.[23]

Since the Royal Commission's findings and recommendations, a number of National and Parliamentary reports, to which I later refer, have also identified the extent of

[20] **Veen (No 2) v The Queen** (1988) 164 CLR 465, at 476, also see s 3A **Crimes (Sentencing Procedure) Act** 1999.
[21] See pp 28 herein, fn 92-94
[22] 'Drive whilst disqualified-Sentencing in the Dubbo region of NSW' (2006-2012) ALS NSW/ACT 9 October 2012
[23] The work of Superintendent Freudenstein, the Local Area Commander of Redfern Local Area Command, in conjunction with Shane Phillips and the Tribal Warrior Association is an example of programs which honour the spirit of the Royal Commission's work, as does the work of Assistant Commissioner Luke Grant of NSW Corrections.

endemic Aboriginal disadvantage and its relationship to the contact of Aboriginal people with the criminal justice system.

The accumulated understanding of contemporaneous Aboriginal society and its relationship to the over-representation of Aboriginal people in custody should more readily be taken into account by courts by greater application of 'judicial notice', whether permitted by statute or the ' common law', to the individual cases to be decided. The 'systemic' matters adverted to by the High Court on many occasions require no imagination to be understood as relevant to individual sentencing exercises. The RCIADIC findings make that clear, as do the findings of subsequent inquiries.

Judicial Notice

The "Uniform Evidence Act", first enacted in 1995 and now operative in relation to Commonwealth proceedings and jurisdictions, as well as in New South Wales, Victoria, Australian Capital Territory, Northern Territory, and to a large extent in Tasmania, permits courts to take judicial notice of "matters of law" and "matters of common knowledge". In this latter respect s.144 of the Act provides that "proof is not required about knowledge that is not reasonably open to question and is … common knowledge in the locality in which the proceeding is being held or generally, or … capable of verification by reference to a document the authority of which cannot reasonably be questioned." Further it provides that "[t]he judge may acquire knowledge of that kind in any way the judge thinks fit…. [provided] the judge give[s] a party such opportunity to make submissions and to refer to relevant information…as is necessary to ensure a party is not unfairly prejudiced".

The provision has been the subject of judicial discussion over the last 18 years of its operation, primarily in NSW and under Commonwealth law. It has been thought in that consideration that it may be greater in scope than the common law, but the issue of whether it covers the field in relation to judicial notice of facts is not resolved.[24] In any event, strict rules of proof and admissibility set out in the Act in the various jurisdictions generally "only [apply in sentencing proceedings] if the court

[24] cf **ICI Australia Operations Pty Ltd v WorkCover Authority** (NSW) (2004) 60 NSWLR 18 (at [219]-[232]):**Crown Glass & Aluminium Pty Ltd v Ibrahim** [2005] NSWCCA 195 (at [125] per McColl JA – "Uniform Evidence Law" Odgers (10th Ed) – Thomson Reuters (at p885-886).

directs that the law of evidence applies in the proceeding…[or] in relation to specified matters"[25]. A court "must make a direction….if a party applies for such a direction in relation to the proof of a fact and that fact is or will be significant in determining a sentence"[26], or is appropriate "in the interests of justice".[27]

At common law the doctrine of judicial notice of facts is an exception to the rule that 'facts in issue' must be proved by admissible evidence. A court may take judicial notice of a fact whenever it is "so generally known that every ordinary person may be reasonably presumed to be aware of it".[28] The facts that may be judicially noticed are facts, sometimes described as "notorious", that are either noticed 'without inquiry' or those judicially noticed 'after inquiry'.[29] McHugh J approved the analysis in 'Cross on Evidence' that such facts may be either 'adjudicative facts', that is facts in issue (as would arise in sentencing proceedings) or 'legislative facts', that is, those required to determine the content of 'law and policy and to exercise discretion and judgment (on such matters)'.[30]

Subject to procedural fairness issues that can arise from judicial notice being taken of 'facts' relevant to the adjudicative exercise, there remains some conflict as to the extent to which the judicial officer may take judicial notice of 'historical facts'. Dixon J (as he then was) in the 'Australian Communist Party Case' had observed that courts may use the general facts of history ascertainable from the "accepted writings of serious historians".[31] Callinan J's concern was that "rarely is there universal acceptance of what is true history, politics and social ethics".[32] I suggest that whatever be the better view of this aspect of judicial notice, matters germane to understanding the contact of Aboriginal people with the criminal justice system were beyond sensible and informed dispute. These matters are not simply matters for agreement by historians, but matters comprehensibly adjudicated upon by inquiries of integrity, experience and learning.

---

[25] s.4(2) **Evidence Act** (Cth, NSW, Vic, Tas), **Evidence (National Uniform Legislation) Act** (NT) 2013
[26] s.4(3) **Uniform Evidence Act**
[27] s.4(4) **Uniform Evidence Act**
[28] **Holland v James** (1917) 23 CLR 149 (at 153, per Isaacs J.) See generally p. 145 ff "Cross on Evidence" (9th Ed) J D Heydon LexisNexis Butterworths (2013)
[29] **Woods v Multi-Sport Holdings Pty Ltd** (2002) 208 CLR 460 (at 478-499, per McHugh J).
[30] Ibid
[31] **Australian Communist Party v The Commonwealth** (1951) 83 CLR 1 (at 196)
[32] **Woods v Multi-Sport Holdings Pty Ltd** (at 511-512)

Further, specialist tribunals have been permitted to use "general knowledge" acquired in hearing many cases not only "for the purpose of supplying gaps in the evidence … but also for the purpose of weighing and testing any evidence that may actually be tendered"[33]. Most sentencing courts of Australia are well entitled to regard themselves as "specialist tribunals" in the field of sentencing Aboriginal Australians. Then there is the accumulated experience of judicial officers reflected in judgments of experienced judges such as Justices Wood and Eames whose statements of principle have received authoritative approval by peers and the High Court.

Should there be limited or non existent resources or capacity for the parties in an individual case to address the court on these issues, this should not stop courts at all levels taking into account in a relevant manner what is widely known and recognised within the wider community. Greater application is required of the judiciary to understanding the truth of the situation that compels or explains the contact of Aboriginal people with the criminal justice system. The means are readily at hand, through judicial education and/or the findings of many inquiries conducted over the last 25 years. Chief Justice French, when officially 'launching' the Queensland information resource about individual Aboriginal communities for judicial officers and others in that State, referred to later in this paper, recognised its potential value as material of which judicial notice may be taken.[34]

The current situation of disproportionate incarceration of Aboriginal people - 'The awful truth'

Notwithstanding the findings and recommendations of the RCIADIC, the rates of Aboriginal imprisonment across Australia have risen sharply since 1991 and are properly a cause for national embarrassment. The latest figures released by the Australian Bureau of Statistics (ABS) earlier this year, for the year 2012 up to 30 June[35], confirm this trend.

The "indigenous" population of Australia represents 2.5% of the Australian population. There were 7,979 prisoners who identified as Aboriginal and Torres

[33] **Bryer v Metropolitan Water Sewerage & Drainage Board** (1939) 39 SR (NSW) 31 (at 330 per Jordan CJ): ICI Australia (at [232]).
[34] See fn 144 and p 49 herein.
[35] ABS 2012 Survey: "Prisoners in Australia" (June 2013).

Strait Islander at 30 June 2012. This represented just over **one quarter** (27%) of the total prisoner population. Aboriginal and Torres Strait Islander prisoner numbers increased by 4% between 2011 and 2012.

The Aboriginal and Torres Strait Islander prisoner population in the Northern Territory comprised 84% of the total prisoner population, while Victoria had the lowest proportion of Aboriginal and Torres Strait Islander prisoners (7.6%). However, the Aboriginal population in Victoria is 0.7% of the total population.

The age standardised imprisonment rate[36] for Aboriginal and Torres Strait Islander prisoners at 30 June 2012 was 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 of the adult Aboriginal and Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 129 non-Indigenous prisoners per 100,000 of the non-Indigenous adult population.

The rate of imprisonment of Aboriginal and Torres Strait Islander prisoners was **15 times higher** than the rate for non-Indigenous prisoners at 30 June 2012. This is an increase upon the ratio for 2011 (14 times higher). The **highest** ratio of Aboriginal and Torres Strait Islander to non-Indigenous imprisonment rates in Australia was in Western Australia (**20 times higher** for Aboriginal and Torres Strait Islander prisoners). Tasmania had the **lowest** ratio (**four times** higher for Aboriginal and Torres Strait Islander prisoners).

Between 2002 and 2012, imprisonment rates for Aboriginal and Torres Strait Islander Australians **increased** from 1,262 to 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 of the adult Aboriginal and Torres Strait Islander population, on an age standardized basis. By comparison, the rate for non-Indigenous prisoners increased from 123 to 129 per 100,000 of the adult non-Indigenous population.

Aboriginal and Torres Strait Islander males comprised 91% (7,233) of the Aboriginal and Torres Strait Islander prisoner population at 30 June 2012. This is similar to the proportion of non-Indigenous males who accounted for 93% of the non-Indigenous prisoner population. The number of Aboriginal and Torres Strait Islander male

[36] Age Standardisation is a statistical method that adjusts 'crude rates' to account for age differences between study populations (see 'Explanatory Notes' nos 33-38 - 'ABS: Prisoners in Australia (2012)'

prisoners increased by 3% while the number of non-Indigenous male prisoners decreased by 1% from 30 June 2011. There were 746 Aboriginal and Torres Strait Islander female prisoners, comprising 9% of the prisoner population. **There was an increase of 20% in Aboriginal and Torres Strait Islander female prisoners from 30 June 2011**. This compares with a 3% increase in the non-Indigenous female prisoner population.

Just over one third (34% or 2,673) of all Aboriginal and Torres Strait Islander prisoners were sentenced or charged for acts intended to cause injury, and a further 15% (1,231) for unlawful entry with intent. Illicit drug offences were the offences that accounted for the highest proportion of non-Indigenous prisoners (15%), followed by acts intended to cause injury (14%) and sexual assault (13%).

There were **proportionally more** Aboriginal and Torres Strait Islander prisoners than non-Indigenous prisoners with prior imprisonment. Nearly three-quarters (74%) of Aboriginal and Torres Strait Islander prisoners had prior adult imprisonment, compared with just under half (48%) of non-Indigenous prisoners.

ABS statistics for 2012 show that, as at 30 June 2012, of the "most serious" offence/charge brought against individual offenders then in custody, 34% of Aboriginal offenders were convicted or charged with "acts intending to cause injury", 6% with homicide, 9% with sexual assault, 8% with "robbery and extortion", 15% with "unlawful entry with intent" and 3% in relation to illicit drug offences. The remaining percentage is made up of "public order" and miscellaneous offences. This is not conclusive of offending patterns but perhaps suggests that the majority of people in custody have not committed crimes of violence.

A distressing consequence of imprisonment bearing upon the community is the continuation of significant rates of Aboriginal deaths in custody reflecting the disproportionate ratio of imprisonment, as the Australia Institute of Criminology (AIC) has recently reported.[37] According to the latest AIC report, between 1 January 1980 and 30 June 2011, there have been 2325 deaths in custody in total of which 450 are Aboriginal/Torres Strait Islander peoples (19% of the total). Of these 1397 have been in 'prison' custody, (17% of which were Aboriginal/Torres Strait Islander), with

[37] "Deaths in Custody June 2011" – Australian Institute of Criminology (May 2013).

18 deaths in 'juvenile justice' custody, of which 8 were indigenous youth (44% of the total).

Current judicial recognition of the relevance of disadvantage

Munda v Western Australia and **Bugmy v The Queen** confirmed the continuing fundamental importance of Brennan J's observations in **Neal v The Queen**:[38]

> "The same sentencing principles are to be applied … in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

In 1992, the year after the release of the RCIADIC final recommendations, Justice Wood of the NSW Supreme Court (as he then was), in **R v Fernando**[39] made a number of observations, some general in character but pertinent to the individual case, when sentencing a man from 'remote' New South Wales for a serious act of violence against another man from his community. This authority has been applied in other States and Territories[40]. Its reasoning and application in subsequent decisions culminating in **Bugmy** was very much at the heart of that decision, and to a lesser extent in **Munda**.[41]

In summary his Honour stated that general sentencing principles apply in all cases, irrespective of the racial identity of an offender, but a Court cannot ignore those facts which exist only by reason of the offender's membership of a particular 'ethnic group'. He observed that 'aboriginality' may throw light on the particular offence or the circumstances of the offender. Problems of alcohol abuse and violence within

[38] (1982) 149 CLR 305 (at 326)
[39] **R v Fernando** (1992) 76 A Crim R 58
[40] eg **R v Smith** [2003] SASC 263 (at [60]); **Crawford v Laverty** [2008] ACTSC 107
[41] **Munda** at [51].

communities that contribute to offending, require “more subtle remedies than the criminal law can provide by way of imprisonment”, and a lengthy period of imprisonment may be “unduly harsh” when served in a foreign environment. His Honour set out a number of ‘principles’ to be considered in particular cases involving Aboriginal offenders, particularly from disadvantaged or remote communities charged with acts of alcohol related violence.

The High Court in **Munda** [42]noted that the statement by Brennan J in **Neal** has consistently been applied in this country by intermediate appellate courts, as observed by Wood J (although sentencing at first instance):

> "[I]n sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender."[43]

Of course, their Honours were not the first, or the last, to grapple with the wider issues that arise in sentencing Aboriginal offenders. Elsewhere, across the Commonwealth courts of superior jurisdiction have observed general principles of application to the sentencing of Aboriginal people. For example, in Western Australia **Juli v R**[44] cited decisions over the previous 30 odd years on the relevance of disadvantage to consideration of drunkenness in offending, as a potential mitigation factor. In Queensland, decisions such as **R v Friday**[45] and **R v Bulmer**[46] discussed sentencing principles in relation to Aboriginal offenders, as did Fitzgerald P in **R v Daniel**[47].

Features of Aboriginal life in Australia held by superior courts to be mitigating factors, or otherwise relevant, have been emotional stress from interracial relations[48], difficulties arising from adjustment to urban life[49], forced or arbitrary removal from

---

[42] at [51]. See also, **Western Australia v Richards** [2008] WASCA 134 at [6], [44].
[43] **Fernando** (1992) at 63.
[44] **Juli v R** (1990) 50 A Crim R 31
[45] **R v Friday** (1985) 14 A Crim R 471
[46] **R v Bulmer** (1987) 25 A Crim R 155
[47] See generally ‘Sentencing Indigenous Offenders’, Thalia Anthony: Indigenous Justice Clearing House Brief 7, March 2010. **Daniel(1998)**op. cit at 502-533 , although Fitzgerald P was in minority
[48] **Neal v The Queen** (1982) 149 CLR 305, particularly at 324-325 per Brennan J
[49] **Harradine v R** (1992) 61 A Crim R 201

family at a young age[50], socio-economic disadvantage[51], the impact of imprisonment upon an Aboriginal person in the context of cultural and social background[52], amongst other matters. There are many Northern Territory decisions focussing upon the consequences of breakdown in culture[53] and that imprisonment was unlikely to be an effective deterrent[54]. The Northern Territory Supreme Court has, for example, given emphasis in sentencing people from disadvantaged communities on the impact of violent crimes upon victims from those communities[55], resulting in an increase in sentences imposed on Aboriginal people for violence against Aboriginal victims[56].

No doubt there are many other decisions across jurisdictions recognising aspects of indigenous disadvantage contributing to offending behaviour. But many of these judgments are generally concerned with treating these issues as relevant only to the assessment of the relevant subjective factors. The relationship of these "background matters" to the assessment of the objective character of the offending and the particular offender's moral culpability, and proper consideration of 'proportionality' has, with respect, often been neglected or overlooked.

Their Honours noted in **Munda** [57]that:

> "In **R v Fuller-Cust**, Eames JA observed that, in the application of the principle stated by Brennan J, regard to an offender's Aboriginality serves to ensure that a factor relevant to sentencing which arises from the offender's Aboriginality is not "overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored." Moreover, the personal disadvantages affecting an individual offender may be, because of the circumstances in which they were engendered, so deep and so broad that they serve to shed light on matters such as, for example, an offender's recidivism."

[50] **R v Fuller-Cust** (2002) 6 VR 496
[51] **R v E:** (1993) 66 A Crim R 14
[52] **WA v Rogers** [2008] WASCA 34
[53] **Robertson v Flood** (1992) 111 FLR 177
[54] **R v Davey** (1980) 2 A Crim R 254
[55] **Wurramarra v R** (1990) 109 A Crim R 512
[56] **Massie v R** [2006] NTCCA 15
[57] at [51]-[59]

“Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in ***Neal*** to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.”

“It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. **That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion.** That having been said, there are three points to be made in response. **First**, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical

functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community."

"A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law."

"The **second** point to be made here is that, as McLure P noted:

> "[A]ddictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending."

… The circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree."

"The **third** point to be made here is related to the first two. As Gleeson CJ said in **Engert**:

> "[T]he interplay of the considerations relevant to sentencing may be complex … In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. …" (emphasis added)

I have quoted those passages of the judgment to do justice to their Honours' important observations. It should be noted that the 'countervailing' considerations spoken of by the Court had particular pertinence in that matter given that it was a homicide case involving "the killing of a defenceless Aboriginal woman by her drunken partner in a sustained brutal assault requiring a sentence with a significant deterrent component". There can be no doubt that it was objectively serious offending in any context. Ironically, one of the unsuccessful complaints by the prisoner in his appeal to the High Court was that the Western Australian Court of Appeal took judicial notice of the 'offences' of this type' to justify, in part, increasing the sentence imposed at first instance.[58]

Two matters arise from that aspect of the judgment are relevant to the contentions that introduced this paper. **Firstly**, the High Court's analysis in the first paragraph quoted has taken judicial notice of the reality of aspects of Aboriginal communal life highly relevant to sentencing across a range of offences. **Secondly**, a substantial number of offences for which Aboriginal people serve sentences will not require consideration or will require little consideration of the countervailing factors identified by their Honours.

In **Bugmy v The Queen**, the High Court considered a finding that the weight of Fernando 'principles' set out by Wood J diminish over time particularly when the offender has acquired a substantial and/or serious criminal history. The Court stated:

> "The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.

[58] **Munda** at [99]: **Western Australia v Munda** [2012] WASCA 164, at [64].

> However, this is not to suggest … that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender." (citing Gleeson CJ in **Engert v The Queen**).

The Court there has undertaken a succinct analysis of the immediate relevance of contextual issues to sentencing exercise by some use of judicial notice of factual matters relevant to the individual case. The countervailing consideration of "protecting the community" may, in such circumstances, not always arise. As well, inability to control 'impulse' may be amenable to rehabilitation by counselling or medical treatment.[59]

In that appeal the Court was also asked to consider the adoption of Canadian jurisprudence relating to the sentencing of offenders and the fact that "the unique systemic factors applying to the sentencing of Aboriginal offenders have equal application to the sentencing of Aboriginal offenders in New South Wales."

The Canadian jurisprudence included the recent decision of the Supreme Court of Canada in **R v Ipeelee**[60]. That majority judgment invoked Canadian courts to take into account "the unique circumstances of Aboriginal offenders, that bear (up)on the sentencing process, as relevant to the moral blame worthiness of the individual, as an aspect of the principle of proportionality in sentencing."

Pursuant to statutory obligations in Canada requiring special attention to 'aboriginality' in sentencing,[61] in **Ipeelee** the majority held that "… a just sanction is one that reflects both perspectives (the gravity of the offence and the moral blame worthiness of the individual) of proportionality and does not elevate one at the

[59] As discussed in **Engert**, **De La Rosa** – see p 27, fn 89
[60] [2012] 1 SCR 433
[61] pp 54-55 herein.

expense of the other"[62]. That case, and that of **Gladue** from 1998[63], urged consideration of the unique circumstances of the backgrounds of Aboriginal offenders and that sentencing of Aboriginal Canadians required "more creative and innovative solutions"[64]. In Canada this has been held to be not "reverse discrimination", but was necessary to achieve "real equality"[65].

In **Ipeelee** the majority of the Court stated that courts **must** take judicial notice of such matters as: "…. the history of colonialism, displacement (social and family dislocation) and how that history translates into lower incomes, higher unemployment, higher rates of substance abuse and suicide and, **of course**, higher rates of incarceration of Aboriginal offenders … [the] parity principle requires that any disparity be justified." .

Gladue had earlier held that the relevant provisions of the **Canadian Criminal Code**, concerned with the special attention required to be given to 'aboriginality', **mandatorily** required sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of 'aboriginal offenders'. As the provision was "remedial" in nature and its purpose is to "ameliorate" the serious problem of "over representation of aboriginal people in prisons", and "to encourage sentencing judges to have recourse to a restorative approach to sentencing, there was a judicial duty to give the provision's remedial purpose **real force**[66] (emphasis added)". These Canadian decisions specifically address the need for ' equal justice' in the treatment of Aboriginal offenders.

Their Honours in **Bugmy** noted[67]:

> "One evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that s 5(1) (**Crimes (Sentencing Procedure) Act** 1999) does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a

[62] **Ipalee** at [37]
[63] **Gladue v The Queen** [1999] 1 SCR 688
[64] at [62]
[65] at [71] – [77]
[66] at [93]
[67] **Bugmy** at [36]

direction of that kind does not arise for consideration in this appeal. Another point of distinction is the differing statements of the purposes of punishment under the Canadian and New South Wales statutes. There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence."

Their Honours also said:[68]

"The propositions stated in **Fernando** are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor. To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and:

"the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects." "

[68] **Bugmy** at [38], [40]

> "Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."

Their Honours added however, as briefly cited in the Introduction to this paper:[69]

> " … Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background."

They noted the point that was made by Gleeson CJ in **Engert** in the context of explaining the significance of an offender's mental condition in sentencing:[70]

> " In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of **Veen (No 2)**. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender."

[69] **Bugmy** at [41]
[70] **Engert** at 68

Equal Justice

Notwithstanding the reasons in **Bugmy** for not applying the Canadian jurisprudence, given its different legislative context to that in New South Wales, equal justice as understood in Canada is also recognised in Australian case law as a mechanism for providing fairness to litigants. It has been invoked to distil features of fairness in areas of sentencing such as 'parity' and as to consistency of sentencing. It is recognised in other areas of the law. It is a 'tenet' in the identification of 'discrimination' in employment and other areas.

Equal justice reflects the importance of the need to ensure that 'individual justice' is provided on a case by case basis as discussed by Mahoney JA in **Kable.**[71]

The "parity principle" has been described by Dawson and Gaudron JJ as an aspect of "equal justice" which "requires that like be treated alike but that, if there are relevant differences, due allowance should be made for them".[72]

In **R v Jimmy**[73], Rothman J referred to this as the 'Aristotelian principle' of 'formal equality' namely, that "things that are alike shall be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness".[74] He observed that the High Court has considered the doctrine of equal justice "fundamental to the exercise of judicial power".

In **Hili and Jones v The Queen**[75] the majority of the High Court referred to what Gleeson CJ had observed in **Wong v The Queen**[76]:

> "All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal

[71] (1995) 36 NSWLR 374 (at 394)
[72] **Postiglione v The Queen** (1997) 189 CLR 295 at 301, **Lowe v The Queen** (1984) 154 CLR 606 at 610-11 per Mason J
[73] [2010] NSWCCA 60
[74] at [255] - [257]
[75] **Hili and Jones** [2010] HCA 45, (2010) 242 CLR 520.
[76] [2001] HCA 64 (at [6])

> justice works as a system; not merely as a multiplicity of unconnected single instances. **It should be systematically fair, and that involves, amongst other things, reasonable consistency"** (emphasis added),

In **Hili**, however, their Honours went on to point out,

> "… consistency is not demonstrated by, and does not require, numerical equivalence"[77]…… "The consistency that is sought is consistency in the application of relevant legal principles. When the search is for 'reasonable consistency', what is sought is the treatment of "**like cases alike and different cases differently** (emphasis added)"[78].

'Unequal justice' is a form of discrimination, as McHugh J explained in 1991:

> "… discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different."[79]

'Equal justice' was recognised in the Western Australian 'Aboriginal Bench Book'[80] which states that principles of 'substantive equality' may support a 'special approach' to the sentencing of Aboriginal offenders that is not discriminatory. There it is invoked to require judicial officers to give full recognition to it, not just as relevant to mitigation, but as to the assessment of wider issues in sentencing. The wider, or more fundamental, principles of sentencing that are applied across the nation accommodate this contention.

An expression of this, in a practical sense, is the observation of Justice Hidden of the NSW Supreme Court in the sentencing of an Aboriginal man from Gilgandra in Western New South Wales.[81]

> "Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture. The high incidence of imprisonment of

[77] **Hili and Jones** (at [48])
[78] **Hili and Jones** (at [49])
[79] **Waters v Public Transport Corporation** (1991) 173 CLR 349 (at 402).
[80] Aboriginal Bench book – Western Australia Courts – S Fryer-Smith - 2nd Edition AIJA (2008)
[81] **R v Welsh** (unrep, 14/11/97).

> Aboriginal people, and the often deleterious and sometimes tragic effects it has upon them, are of justifiable concern to the community …. To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic."

It is consistent with recognised principles to achieve 'equal justice' for Aboriginal people by proper recognition of the existence and consequences of discrimination, dysfunction, dislocation and other social and legal disadvantages of Aboriginal people, both historical and contemporary, and their contact with the justice system, factoring such relevant matters to the offending when assessing the purposes of sentencing that presently otherwise militate in favour of punishment and incarceration.

Judicial officers must make the effort to play a role, in conformity with binding legislation and sentencing principle, to ensure that equal justice is achieved in each matter dealt with by them involving Aboriginal people by taking greater judicial notice of the reality of the circumstances of individual offenders and offending, in the context of contemporary Aboriginal society.

Wider sentencing principles

The matters discussed above are consistent with general and fundamental sentencing principles which are applicable to all sentencing discretions.

In **The Queen v Olbrich**[82] the majority of the High Court observed:

> "The process by which a court arrives at the sentence to be imposed on an offender has just as much significance for the offender as the process by which guilt or innocence is determined. Unless the legislature has limited sentencing discretion, a judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important."

[82] (1999) 199 CLR 270 (at [1])

Judicial officers exercise discretions when sentencing pursuant to various legislative constraints and are informed in that exercise by principles laid down by superior courts. Whether sentencing under Commonwealth law[83], or the various States and Territory laws[84], judicial officers are obliged (putting aside technical and mandatory requisites for fixing sentences and making orders) to take into account some legislative direction as to the exercise of individual sentencing discretions particularly as to the purposes of sentencing, such as deterrence, the protection of the community, the rehabilitation of the offender, making the offender accountable, recognition of harm to the victim and the community etc.[85]

Despite various constraints and directions that apply at first instance upon legitimate sentencing discretions, the High Court over time has made it clear that sentencing, notwithstanding its mind-numbing technicality, is still in the context of statutory maximum penalties an exercise in 'intuition', instinctive or otherwise, based upon cumulative judicial experience and wisdom.[86] The decision of the High Court in **Markarian,** with its affirmation of the existence of a wide arc of sentencing discretion requiring "instinctive synthesis" of all relevant features, was invoked in **Munda** to explain that the balancing of the competing considerations in sentence is not to "cloak the task of the sentencer in some mystery, but to make plain that the sentencer is … to reach one sentence (that) balances different and conflicting features".[87]

When dealing with the power of NSW Courts to fix guideline judgments in Commonwealth sentencing, it was observed by the High Court:

> "The core of the difficulty (when sentencing) lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations.

[83] Pt1B **Commonwealth Crimes Act** 1914.
[84] eg Part 2 **Criminal Law (Sentencing) Act** 1988 (SA): Part 2 **Crimes (Sentencing Procedure) Act** 1999 (NSW), **Crimes (Sentence) Act** 2005 (ACT), **Sentencing Act** 1997 (Tas), **Sentencing Act** 1994 (WA), **Penalties and Sentencing Act** 1992 (Qld), **Sentencing Act** 1991(Vic): Part 2 **Sentencing Act** (NT).
[85] s 16A (Cth), s 7 (ACT), s 3A (NSW), s 5(1) (NT), s 9(1) (Qld), s 10 (SA), s 3 (Tas), s 5 (Vic).
[86] **Markarian v The Queen** [2005] HCA 25; **Muldrock v The Queen** [2011] HCA 39.
[87] **Markarian** at [37]

> What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment."[88]

From these cases it can be seen that the most significant prescription or explanation for sentencing offenders to full time imprisonment, rather than other options, is the need to give greater weight to general and/or personal deterrence and to emphasise the need for punishment.

Yet, in individual cases there exist circumstances where the personal characteristics of the offender, or the social or subjective context in which offending occurs, will cause the courts to hesitate before giving full vent to the weight of deterrence and the need for punishment. Some are found in the common law, such as offenders with mental disability relevant to the offending[89], some in the common law of sentencing and in legislative prescription, such as in the sentencing of young offenders[90]. The Court in **Munda** made the point, by reference to a sentencing decision of the NSW Court of Criminal Appeal in respect of an offender with a mental illness or disability, that because of the tension between general and personal deterrence or protection of society, the existence of particular characteristics does not lead to "automatic consequences."

Even in the absence of a specific legislative provision requiring special attention in the instance of Aboriginal offenders, such as available in Canada, current sentencing law permits inherent characteristics of offenders to be taken into account to diminish, or eliminate, the impact of deterrence, punishment and retribution if the offender is not a suitable vehicle.

The social context of a particular offender or particular offending may be considered relevant to the assessment of the 'proportionality principle' in sentencing. This has

[88] **Wong v The Queen** (2001) 207 CLR 584 at [77]
[89] eg **R v Hemsley** [2004] NSWCCA 228 (at [33]-[36]): **R v DeLaRosa** [2010] NSWCCA 194 (at [177]).
[90] In NSW, for example, **Children (Criminal Proceedings) Act** 1986, s.6 – the 'functions' when sentencing a child.

been described as a 'fundamental principle' of sentencing[91]. A sentence of imprisonment should never exceed that which can be justified or proportionate to the gravity of the crime considered in light of its objective circumstances. Understanding the background of an offender in these circumstances is not simply an assessment of the subjective circumstances. It may be intimately connected to an assessment of the objective circumstances of the offending and the weight, if any, to be given to general and specific, personal, deterrence.[92] The social background of an offender may be relevant to assessing the 'moral culpability' of the offender[93], that is the assessment of the offender's moral responsibility for the offence. The High Court in **Munda** stated that:

> "The circumstance that the appellant has been affected by an environment in which abuse of alcohol is common **must** be taken into account in assessing his personal moral culpability … but that consideration must be balanced with the seriousness of (his) offending. … it is not to be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a serious degree".[94]

Some aspects of the evidence of Aboriginal 'disadvantage'relevant to sentencing

Over the last 25 years overwhelming evidence of disadvantage, damage and/or disability amongst the vast majority of Aboriginal offenders has emerged from a number of national reports and inquiries. These speak as one voice on this issue. There is also very strong evidence of the relationship of the contemporary situation of Aboriginal people to historical events, past government policies, discrimination, destruction and disablement of culture, familles and communities. Indigenous Australians are still living with the 'errors' of others, particularly non-indigenous Australia. This is not confined to remote or semi-remote communities.

Since the Final Report of the Royal Commission in 1991, a number of reports from Government authorities, Parliamentary inquiries and Commissions has been

[91] **Ryan v The Queen** [2001] HCA 21 (at [48]): **Muldrock v The Queen** [2011] HCA 39 (at [60]): **Veen No 2 v The Queen** (1998) 164 CLR 465 (at 472), **Hoare v The Queen** [1989] HCA 33.
[92] cf **R v Dodd** (1991) 57 A Crim R 349 (at 354).
[93] **R v KR** [2012] NSWCCA 32 (at [22]) per Latham J. – see **Bugmy**
[94] **Munda v WA** at [57]

published which have extensively chronicled and surveyed, when examining aspects of the criminal justice system, historical and socio-economic issues that are intrinsically and intimately connected to the criminal justice system and its impact upon Aboriginal people generally and in individual instances.[95]

The evidence from these sources provide compelling evidence of the fact that the vast majority of Aboriginal people coming before the courts are **individually** the "product" of policies, social and economic forces, social attitudes, physical and mental disabilities and/or other conditions, usually **beyond their control,** that have either contributed to the offending directly or indirectly or provide a **proper** context for understanding why crimes are committed and even (on occasions) how they can be prevented from occurring in the future.

The Chairperson of the House of Representatives Committee's recent "Doing Time – Time for Doing" report, noting the current "shameful state of affairs", observed: "Indigenous social and economic disadvantage have contributed to the high levels of Indigenous contact with the criminal justice system. Sadly, … intergenerational dysfunction in some Indigenous communities presents a significant challenge to breaking the cycle of offending, recidivism and incarceration."[96]

Further, there is the evidence of the link between multi generational disadvantage and discrimination that has contributed to 'disease, substance abuse and incarceration' identified in the NIDAC report "Bridges and Barriers". Health issues are shown in that report to be intricately connected to substance abuse, socio-economic disadvantage and offending, with offenders themselves often the victims of violent crime. NIDAC highlighted the barriers for Aboriginal people to 'diversion access', either by reason of unreasonable eligibility criteria, geographic isolation, mistrust of the legal system or 'health access (issues)', that is the lack of opportunity to receive adequate or relevant health services.

[95] (eg) 'Bringing them home: The Stolen Children Report'(1997) Human Rights Commission of Australia; 'Bridges and Barriers', National Indigenous Drug and Alcohol Committee(June 2009); 'Doing Time-Time for Doing'-House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs(June 2011), 'Value of Justice Re-investment' The Senate Legal and Constitutional Affairs References Committee(June 2013)
[96] "Doing Time - Time for Doing"-Foreword p1- Shane Neumann MP

For example, there are two specific health issues arising from the multifaceted character of Aboriginal disadvantage that have a significant relationship to, and, on occasions, an explanation for, some contact Aboriginal people have with the criminal justice system.

These are "fetal alcohol spectrum disorders" (FASD)[97] and hearing disabilities. The relationship to offending, or the conduct of offenders, is not widely understood or acknowledged in sentencing but recognised by authoritative sources.

The Senate Legal and Constitutional Affairs Report on "Justice Reinvestment"[98], in the context of an examination of "drivers of incarceration" and causes of disadvantage and offending, referred to drug and alcohol abuse and its intergenerational effects, especially to individuals exposed to alcohol whilst "in the womb". It noted that in a report on "Prisoner Health" in 2010, 65% of prisoners admitted use of "prohibited drugs" in the 12 months prior to incarceration and 73% of Aboriginal people had alcohol dependency issues[99].

FASD are conditions,

> "unique to an individual who has been exposed to alcohol during pregnancy characterised by … conditions which are unique to an individual and which may be physical and/or neuro-behavioural … frequently undetected (it) is referred to as the "invisible disability" (with) the current lack of comprehensive understanding of FASD among health professionals and service providers"[100].

The Royal Australian and New Zealand College of Psychiatrists submitted to the Committee that characteristics of FASD that contribute to criminal activity arising are: lack of impulse control, difficulty planning and thinking through consequences, difficulties with empathising, delaying gratification and making 'good' judgment, tendency to explosive episodes and vulnerability to social and peer influences[101]. In North America, 60% of individuals diagnosed with FASD had criminal legal difficulties, 50% had been in some form of confinement, 61% had disrupted school

[97] **Bridges and Barriers** (NIDAC) 2009
[98] "Value of a Justice Reinvestment approach to criminal justice in Australia" – The Senate – Legal and Constitutional Affairs References Committee (June 23 2013) – pp32-41
[99] op. cit.p35.
[100] op. cit at p36
[101] op. cit.at p36-37

experience, 35% had drug and alcohol "problems" and 49% displayed "inappropriate sexual behaviours on multiple occasions"[102]. The Committee concluded that this condition was of "high incidence" in Indigenous communities. It is an issue with arguably as much importance in explaining offending conduct as what are seen at the present time as 'mental health' issues. It requires little imagination to appreciate the condition's relationship to conduct and behaviour sanctioned by the criminal law.

The Senate Committee also referred to the significant number of people involved in the criminal justice system suffering hearing loss. This was observed to directly affect literacy and linguistic skill, particularly in childhood, and thus poor literacy and communication skills with poor education outcomes and restricted employment opportunities. It was submitted to the Committee that these matters affect linguistic contact with police and other representatives of authority, as well as affecting understanding conditions of bail, bonds and parole. Breach of these conditions constantly occurs amongst Aboriginal offenders. Half of Aboriginal children suffer some form of hearing loss and 11% suffer chronic otitis media[103]. It is understood that there is "10 times" the rate of hearing loss amongst Aboriginal people compared to "non Indigenous people". The National Aboriginal and Torres Strait Islander Legal Services submission claimed "90% of Aboriginal inmates had significant hearing loss"[104].

The Committee cited the findings of the earlier, and separate, 'Senate Community Affairs References Committee' report, "Hear Us: Inquiry into Hearing Health in Australia", that stated:[105]

> "The committee is gravely concerned about the potential implications of hearing impairment on Indigenous Australian's engagement with the criminal justice system. Those most vulnerable are Indigenous people from remote areas who do not have English as their first language, or indeed who, due to early onset untreated hearing loss, have little means of communication at all".

[102] Op. cit.at p37
[103] Inflammation of the "middle ear bone".
[104] Op. cit.at p41
[105] May 2010 (at p147)

Not that the implications of this significant problem have remained ignored by judicial officers. The Honourable Michael Kirby, when President of the Court of Appeal, discussed the implications for Aboriginal offenders and offending in 1995 in his minority judgment in **R v Russell** [106], as had the Northern Territory Supreme Court in **R v AT**, a judgment of Thomas J, unreported, of October 1992. Kirby's judgment in **Russell** is an example of proper use of 'judicial notice' of facts to assist in determining sentencing issues in the context of application of proper principle. Michael Kirby's observations in that matter anticipate the findings of the Parliamentary committee's report published 15 years later.

The "**Doing Time-Time for Doing**" report saw these issues as being so intimately connected to the Aboriginal youth offending that at least five of the recommendations were concerned with them for attention by Government, including a particular recommendation that Police receive specialised training to identify and better respond to hearing loss[107].

Associated with these matters are cultural differences that impact upon Aboriginal contact with, and understanding of, the justice system in its various forms. One such matter is the almost unique character of 'Aboriginal English'[108] and the disadvantages for Aboriginal people in communication. Not that this is unrecognised. The Queensland Attorney General published a number of years ago a 'handbook', 'Aboriginal English in the Courts', to help address this pressing issue in the daily contact of courts with Aboriginal people in all capacities.

These and other issues contributing to offending are not confined to remote or semi remote communities. The majority of Aboriginal people are not to be found there in any event.

In the Australian Bureau of Statistics survey for 2009, it was noted that New South Wales has (and has had since at least before the Royal Commission into Aboriginal Deaths in Custody) the largest Indigenous Australian population of all the States and Territories (29.4% of the total indigenous population). Queensland was next

[106] (1995) 84 A Crim R 388 (at 392-4). See also Howard (and others) – "Aboriginal Hearing Loss and the Criminal Justice System" (1993) 3 Aboriginal Law Bulletin 65
[107] Recommendations 9, 11, 12, 13, 14
[108] 'Aboriginal Ways of Using English' (2013): Dr Diana Eades – Aboriginal Studies Press

(28.4%), followed by Western Australia (13.6%), the Northern Territory (12.2%), Victoria (6.5%), South Australia (5.4%), Tasmania (3.6%) and the ACT (0.8%).

Further, according to the Australian Bureau of Statistics in its 2009 analysis, 32% of Indigenous Australians live in major cities, 21% in "inner regional areas", 22% in "outer regional areas", 10% in remote areas and 16% in "very remote areas". That means over 50% of the Aboriginal population live in urban areas, usually transplanted from other areas. Many would have family or language connection with more remote areas. 37% of the Indigenous Australian population is 15 years of age or less (compared to 19% for non-indigenous Australians) and 3% are aged over 65 (13% of non-indigenous Australians) thus reflecting a very different demographic from the rest of the Australian population.

The **'Summary of Australian Indigenous Health'** released by the Australian Department of Health and Aging in 2009, identified the major causes of death amongst Indigenous Australians to be, in descending order, cardio vascular disease (including heart disease and strokes), accidents and self harm, followed by cancer.

Diabetes is disproportionately represented, being three and a half times more common amongst Indigenous Australians than the general Australian population, with death as a result of complications from diabetes being 23 times more common for indigenous males than non-indigenous males and 37 times more common for indigenous females than non-indigenous females. Kidney disease is 31 times more common for indigenous males over non-indigenous males and 51 times more common for indigenous females over non-indigenous females. The 'Summary' reported that males were 5.8 times more likely, and females 3.1 times more likely, within Indigenous Australian communities, to die from mental health disorders in the period 2001 to 2005 than non-indigenous people.

An analysis of death and injury from accident or intentional harm shows that of indigenous males suffering death and injury in 2008, 35% did so from intentional self-harm, 27% from traffic accidents and 8% from assaults. Amongst Indigenous females suffering injury or death from accidental or intentional harm, 30% were caused by transport accidents, 18% from self-harm, 16% from assault. The 'Summary' also reported upon disproportionately elevated incidence of eye disease,

hearing loss, oral disease and infectious diseases such as tuberculosis, hepatitis-B and meningococcus. Health problems and outcomes across the nation for Aboriginal people are manifestly disastrous for lifestyle and have significant implications for the socio-economic context in which much offending occurs.

Causes of Aboriginal offending resulting in incarceration

Given the diverse character or offending leading to incarceration and the 'infinite' number of characteristics of individual offenders, generalising as to the causes of offending is replete with difficulty and risks oversimplifying and stereotyping complex issues and dynamics at play. A great deal of evidence demonstrates across jurisdictions and communities, remote, semi- remote and urban, a number of common features. This is not surprising given common historical experiences of Aboriginal people across the nation, upon which the RCIADIC extensively reported.

Numerous reports and studies over the last 10 years speak of many common features of Aboriginal offenders, particularly those incarcerated, which reflect the cycle of circumstances that demonstrate the relationship between individuals' socio-economic circumstances, inherent characteristics (including health and related issues) and contemporary and historical experiences which influence, impact, or cause offending behaviours.[109]

Following upon a national 'Social Survey of Aboriginal and Torres Strait Islander Populations' conducted in 2002, which collected data on a wide range of socio-economic, health, welfare and other characteristics and their correlation with arrest and imprisonment, was analysed by Dr Weatherburn, Lucy Snowball and Boyd Hunter, in 2006. Their study concluded that the strongest predicators of 'self reported' contact with the justice system were, being male (between the ages of 18-24) and substance abuse, with other risk factors being unemployment, incomplete education, welfare dependence, or financial stress, inadequate or overcrowded housing, forced removal from family, lack of social involvement, residing within a sole parent family, amongst other matters.[110] Whilst the risk factors of Indigenous

[109] A concise summary of relevant aspects may be conveniently found in the 'Indigenous Justice Clearing House Brief No 9' – "Understanding and preventing Indigenous offending" – December 2010.
[110] Weatherburn Dr D., Snowball L, and Hunter B. – "The Economic and Social Factors underpinning Indigenous contact with the Justice System" – Crime and Justice Bulletin No. 104 – Bureau of Crime Statistics (NSW) – 2006.

offenders were found to be similar to the wider population, the considerably higher incidence of many of the socio-economic risk factors amongst Aboriginal people in part reflected their disproportionate contact with the criminal justice system.

The Senate Legal and Constitutional References Committee's recent report on the "value" of "Justice reinvestment" concluded that links to overrepresentation of people in custody included "high levels of poverty … poor education outcomes … high rates of unemployment … lack of adequate housing … homelessness … family dysfunction, loss of connection to community and culture, lack of access to services and health and schooling and drug and alcohol abuse"[111]. The parallels with the Canadian situation are significant, perhaps remarkable.

In relation to offences against 'justice procedures', in the Northern Territory mandatory sentencing laws disproportionately affect Aboriginal people for breaching monitoring conditions and, according to the Committee, they failed to recognise "unstable living arrangements, lack of financial means, language difficulties and remote or regional community ties".

It is recognised that in some communities imprisonment is regarded as "normal". The Chief Executive Officer of the Youth Affairs Council of Western Australia stated in his evidence before the Committee that imprisonment for many Aboriginal people in regional and remote Australia was a "rite of passage" and that offending was seen as a means, given the vast distances between home and places of detention, "to be with friends".[112]

There is the ever present relevance of mental illness and disability in offending. The National Prisoner Health Census for 2010 found that 31% of prisoners came into custody claiming a history of mental health disorder, with women more likely than men to report such a history[113]. In the case of Aboriginal people the proportional incidence of "mental health disorder" is greater. A study of the National Congress of Australia's First Peoples reported to the committee that in Queensland, in recent years, 72.0% of Aboriginal men and 86.1% of Aboriginal women in custody had at

[111] Op. cit.p32
[112] Craig Comrie – Committee Hansard 17 April 2013, p29.
[113] Australian Institute of Health and Welfare "Mental Health of Prison entrants in Australia" – Bulletin 104, June 2013 p6.

least one mental health disorder. These disorders have significant flow on impacts on families and Aboriginal communities when these prisoners transition back to their communities, usually without adequate treatment facilities.[114]

This results in more Indigenous victims on many occasions. The proportion of Aboriginal victims of Aboriginal offending may increase the weight the courts need to give to protection of the individual victims given the proximity of relationship. However, 'incapacitation' still leads inevitably to the return of the offender to the same environment and relationships in which the offending occurred. The high incidence of recidivism shows that for many offenders imprisonment does not act as a deterrent and does not provide the long-term protection that reformed or changed behaviour can achieve.

Amongst the general prison population in NSW 2003, 38% of all sentenced inmates had at least one ' mental disorder' in the year prior to review[115]. Whilst the Law Reform Commission of NSW estimated that 20% of inmates had an 'intellectual disability', a study it had earlier conducted (in 1996) of people (practically all Aboriginal) appearing at Bourke and Brewarrina courts showed 36% had an 'intellectual disability', with a further 20% displaying a 'borderline disability'[116].

A 2010 study of Aboriginal communities at Bourke and Lightning Ridge[117] identified the primary causes of 'adult crimes' as use in dependency on alcohol and drugs, unemployment and lack of purposeful activity, inter-communal conflict, the impact of historical welfare policies, lack of adequate housing and overcrowding, police/community relationships and over policing. Youth crime was impacted by "boredom", neglect and family violence, alcohol and drug abuse, educational opportunity and policies, particularly in relation to discipline, intergenerational offending, community belief that authority to discipline had been removed, lack of adequate accommodation and sureties for bail, breach of curfews and the like. These communities have not been well served by the decline in rural economies, the

[114] "Justice Reinvestment" Report – p35.
[115] 'Mental Illness among NSW Prisoners (2003), T Butler and S Allnutt - NSW Corrective Services, p17)
[116] 'People with Cognitive and Mental Impairments in the Criminal Justice System' NSW Law Reform Commission, p.15 (January 2010)
[117]' Factors affecting crime rates in Indigenous Communities in NSW: a pilot study in Bourke and Lightning Ridge': Vivian, A, Schnierer, E. Jumbunna Indigenous House of Learning (Nov 2010)

absence of adequate support systems and services, and the lack of connection between Aboriginal and non-Aboriginal communities. It is no coincidence that the first pilot "justice reinvestment" project is to be set up in Bourke.

Common features referred to by Dr Weatherburn and Debra Snowball[118] in their important study from 2006, that elevate the risk of recidivism, include childhood neglect and abuse, parental mental health issues, family dysfunction and domestic violence, school performance, early school leaving, unemployment and drug and alcohol dependency.

Weatherburn and Snowball observed that the only ways to have a significant impact to reduce indigenous imprisonment, given that recidivism for Aboriginal people was markedly higher than the general prison population (74% of Aboriginal people in custody at the time of study had previously been imprisoned compared to just over 40% of the non-indigenous prison population), was by the use of "appropriately targeted rehabilitation programs" and giving particular attention "to measures that increase indigenous compliance with community based sanctions on orders", particularly first-time offenders, Indigenous adult offenders on bail and those on parole.

The authors concluded,

> "It is to be hoped that this recognition prompts State and Territory Governments to recognise that in the long term, the solution to indigenous overrepresentation in prison lies not in changes to law and order policy but in changes to policies that affect the economic and social wellbeing of indigenous families and communities".

The recently released Victorian Sentencing Council Report, "Comparing Sentencing Outcomes for Koori and Non Koori Adult Offenders", discussed the "impact of disadvantage" arising from a "history of differential treatment" in part "based on racially discriminatory policies". This has been reflected in the common factors identified in other reports contributing to Aboriginal over-representation[119].

[118] 'Indigenous over-representation in prison: the role of offender characteristics' - Weatherburn, D, Snowball, L. - Crime and Justice Bulletin No. 96 NSW Bureau of Crime Statistics and Research
[119] Victorian Sentencing Advisory Council (April 2013) – at p3-4.

The social consequences of imprisonment for individuals and their communities likewise fall beyond the scope of this paper but should be a concern for courts, given the potential for recidivism (rather than deterrence) from imprisonment and the export from prisons to communities of attitudes and conduct inimical to their welfare and peace.

A criticism that Dr Weatherburn (the Director of the NSW Bureau of Crime Statistics) has recently made of some of the Royal Commission's findings and recommendations was the 'economic and social disadvantage' explanation of over incarceration (although conceded to be an "important contributing factor" at a later time[120]) was a "symptom theory of indigenous incarceration"[121]. Such criticism has been levelled by Noel Pearson[122].

Weatherburn and Holmes had identified four factors that were " critical influences" on Aboriginal offending. They were child neglect and abuse, drug and alcohol abuse, poor school performance and incomplete eduction and unemployment. They expressed the view that RCIADIC did not give sufficient attention to those matters. This opinion has been strongly criticised by the Hon. Geoff Eames QC[123], Senior Counsel assisting the National Commissioner in the preparation of the Final Report.

Weatherburn and Holmes had stated:

> "The simplest explanation for the fact that Indigenous Australians are overrepresented among those charged with a serious criminal offence is that they are over-represented among those who commit serious offences"[124].

This is 'simply' correct, if one does not examine policing practices, exercise of prosecutorial discretions and the integrity of findings of guilt after contested hearings.

They further observed:

---

[120] Weatherburn and J Holmes – "Rethinking Indigenous over-representation in prison" Australian Journal of Social Issues, Vol 45, No 4, pp 559-576 (Summer 2010)
[121] Weatherburn – "Disadvantage, Drugs and Alcohol: Rethinking Indigenous over-representation in Prison" – Keynote address "Australasian Society on Alcohol and other Drugs" – Cairns – 5 November 2006.
[122] Pearson N "On the Human Right to Misery, Mass Incarceration and Early Death" - The Charles Perkins Oration 25 October 2001 – Sydney University
[123] Royal Commission into Aboriginal Deaths in Custody: 20 years After – The Hon Geoff Eames QC "Exchanging Ideas II Conference Sydney (Sept 2011).
[124] Weatherburn and Holmes (2010), op. cit (at 563)

> "The Royal Commission believed that Indigenous over-representation in crime was ultimately attributable to Indigenous cultural, social and economic disadvantage. The tacit assumption was that Indigenous drug and alcohol abuse, child neglect and abuse, poor schooling performance and unemployment were all products of economic and social disadvantage. A more plausible conjecture might have been that Indigenous economic and social disadvantage are products of drug and alcohol abuse, child neglect and abuse, poor school performance and unemployment."[125]

On this Eames commented:

> "The "more plausible conjecture", that commends itself to the authors, would have Indigenous offenders committing crime without any of the historical, social and economic factors (as identified by the Commission, and by the authors themselves) having contributed to their conduct at all. Instead, the social and economic disadvantages in the Aboriginal community were the creation of the Aboriginal offenders themselves! The fact that 43 of the 99 victims who died in custody had been separated from their family under welfare policies must therefore have been an irrelevant co-incidence, rather than suggesting one factor that might have played a part in their history of offending. Likewise, the characteristic circumstances of so many of the deceased - unemployment, poor education and health, and so forth, would be of little significance"[126].

As to the criticism that the "legacy of history" is "distal" to the causes of offending, Eames observed:

> "The Commissioners saw the explanations for the rate of imprisonment as being much broader than the four factors identified (by Weatherburn and Holmes). The legacy of history, the imperative of self-determination, the fragility of relations with police and the broader community, for example, were all connected to the imprisonment rates. Likewise, inadequate housing and

[125] Weatherburn and Holmes (2010), op. cit (at 569-570)
[126] Eames (2011) – at p 14

infrastructure and poor health were directly relevant to the rates of imprisonment and recidivism.

These and other underlying factors were not regarded as being "distal" explanations, either by Commissioners or by the Aboriginal people with whom they consulted, and who were thereby encouraged to participate fully in the Commission's investigations into the underlying issues. The families of the deceased, and other Indigenous people consulted by the Commission, invariably acknowledged the powerful impact on offenders of the underlying issues identified by the Commission, even when demanding that offenders take responsibility for their conduct.

The links between a disadvantaged background and imprisonment were by no means difficult to find. As noted earlier, it is a remarkable statistic that 43 of the 99 deaths in custody involved a person who had been separated from family by welfare policies when young. (Commissioner) Wootten's report into the death of Malcolm Smith, for example, provides a very clear illustration of the impact of welfare policies and practice on the subsequent criminal history and death in custody of that young man. In one way or another, the individual histories invariably disclosed similar links. To fail to identify those factors as also being relevant to the deaths would have been to produce a shallow and incomplete analysis".[127]

He noted that a disadvantaged background does not, of course, 'excuse criminal behaviour', and that Commissioner Johnston and the Royal Commission did not suggest otherwise.

Some realities of sentencing and restrictions upon judicial discretion

Some jurisdictions make it clear that imprisonment is supposed to be the sentencing option of last resort[128]. Of course, the fact that people are sentenced reflects findings of guilt, by judicial officers sitting alone or by juries.

Beforehand, discretions have been exercised by policing authorities, prosecutors (and defence representatives), which all play their part in framing relevant charges,

[127] Eames – at pp 16-17
[128] eg s 5 **Crimes (Sentencing Procedure) Act** 1999.

electing particular jurisdictions and determining outcomes. Many of these matters cannot be commented upon being outside this paper's scope.

The effect of imprisonment is, by definition, to incapacitate and isolate the prisoner from the community but usually, not from other offenders. For many Aboriginal people across Australia, in many cases, the isolation of the individual will be many kilometres, sometimes thousands, from family and community.

There are practicalities for judicial officers of sentencing in all courts when dealing with Aboriginal people, as with all offenders. The more serious the offending, the greater weight that will generally be given to deterrence and denunciation/retribution and usually the less likely that the interests of the offender will be addressed or met in the sentencing process. The passages earlier quoted from **Munda** emphasise the purposes of sentencing require balancing competing interests. General deterrence in a particular instance may be diminished, but the need to emphasise the protection of victims and/or the community because of the inherent characteristics of the offender may be increased. Notwithstanding the reflections of the Court on that topic, there remains for consideration the observations of King CJ in **Yardley v Betts:** [129]

> "The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence had the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced. To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm."

Further, the capacity of judicial officers to meet the individual needs of offenders is constrained considerably by circumstances beyond their control. The role of the

[129] **Yardley v Betts** (1979) 22 SASR 110 at 112-3 – See also **R v Kovacevic** (2000) 111 A Crim R 131 (at 139) **Blackman and Walters** [2001] NSWCCA 121 (at [44]) per Wood CJ. at CL.

judicial officer is not necessarily central or pivotal to sentencing outcomes that promote rehabilitation. Legislative, administrative, geographical and service restrictions may 'straight-jacket' the judicial officer more than any sentencing principles to be applied. Courts have limited time to deal with each case.

On the other hand many offenders have subjective features (ie mental health alcohol, drug addiction, homelessness, histories of sexual or physical abuse), only able to be adequately met outside sentencing processes or the custodial setting, that may never be met by the sentencing process and will contribute to further offending. Of course, the better informed the sentencer, the more able she, or he, will be to satisfy those purposes of sentencing that address the underlying causes of offending. The capacity or resources of the prosecution and/or the defence to obtain relevant information will be, on many occasions, limited, even non-existent. There are characteristics of offenders, or the offending, that will require attention to solutions that put as a priority protection of the victim, or the community, in the short to long term.

Outside of courts, there exist other imperatives and restrictions which impact upon what they can or cannot do. These limitations exist unevenly across the States and Territories dictated by regional or local circumstances. Greater resources for custodial and supervision agencies and greater flexibility of sentencing options will enhance the capacity for courts to meet the need for rehabilitation of offenders where that is relevant. Punishment is well resourced; programs for rehabilitation and reform are usually not, both within the custodial setting and outside. Under New South Wales law (applied also to the imposition of Commonwealth sentences) options (both custodial and non custodial) are limited on occasions by availability of resources, geography or characteristics (including age) of the offender.

It is acknowledged as the High Court emphasised in **Bugmy** [130] that not all Indigenous people in Australia have the same background or contemporary experience of disadvantage, discrimination, dislocation, and not all separate Indigenous communities or groups have the same social circumstances, problems and disadvantages. Further, not all Indigenous offending is of the same type, and, where the same type, has the same causes or explanations. Not all Indigenous

[130] **Bugmy** at [40]

offending is a reflection of the social, economic, community or historical circumstances of the individual and/or his community. Indigenous offenders may commit crimes outside their own 'social context', as participants of the wider criminal milieu. There are Aboriginal offenders who have psychiatric, psychological or other disabilities which contribute to offending that may not necessarily have any relationship to, or origin in, their cultural or social context.

In conjunction with these matters, of particular concern are a number of matters that need to be acknowledged that make decision-making in sentencing for Aboriginal people very difficult in particular cases. Indigenous Australians are more likely, on a pro rata basis, to be victims of crime. A 2007 study by Dr Weatherburn of Police records of convicted people in NSW, from before 2001, showed that Indigenous people were "three times more likely to be the victims of assault and five times more likely to be victims of family violence assaults." Where the victim was Aboriginal, the offender was also Aboriginal in 85% of assaults, 73% of sexual assaults of adults and 72 % of sexual assaults of children[131].

In some areas of Australia the issues of family violence and sexual assault within families and communities are endemic and of such seriousness that options for the criminal law are limited to incarceration, or incapacitation, if only to give effective weight to the protection of the relevant victim. For particular crimes it may be appropriate in a particular case to impose exemplary sentences to emphasise general deterrence. In these cases the conflict between the need to give weight to these matters and the protection of the victim and evidence of historical dispossession and disadvantage that are contributing causes to violence in the individual case may create a significant dilemma for the sentencing officer[132]. These matters were specifically noted by the High Court in **Munda** in the passages earlier cited.[133]

This was reflected in the course of the Northern Territory 'Intervention', which followed upon the release of the "Little Children are Sacred" Report[134]. In the

[131] Cited in the Report of the Victoria Sentencing Advisory Council: "Koori sentencing in Magistrates Courts" (2013) at p. 3
[132] **The Queen v Alwyn Peter** (unreported Supreme Court Queensland 19/09/1981)
[133] See pp 15-17 of this paper.
[134] P Anderson and R Wild QC (2007)

Northern Territory, statutory prohibition was enacted preventing judges considering customary law in all sentencing or bail matters as a reason for excusing "justifying, authorising, requiring a lessening of the seriousness of the alleged behaviour to which the alleged offence relates" or "the criminal behaviour to which the offence relates or aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates …"[135]

The role of "customary law" in the resolution of some of the issues relevant to current sentencing practices cannot be commented upon in a paper for this topic. However, Noel Pearson has made the point that when he has referred to "Aboriginal law" he was referring not to the laws of "pre-colonial classical culture." He noted that the "old [customary] law" did not have to deal with "grog, drugs, gambling … ". He said that aboriginal communities need to develop "an Aboriginal law that deals effectively with these new challenges … "[136].

Whatever be the merits of the 'Intervention', the "Little Children are Sacred" report noted the intergenerational character of sexual abuse, where victims became offenders. That report emphasised what has been emphasised time and time again, that the role of the breakdown of Aboriginal culture, excessive alcohol and drug consumption, poverty, unemployment, lack of housing and education, as well as boredom in leading to the sexual abuse of children, which was a significant problem throughout the Northern Territory[137].

In **R v Wunungmurra**[138] the sentencing judge reflecting upon the prohibition upon the use of customary law by the 'post Intervention' legislation, allowed evidence of a statement of the elder of the accused's community as evidence of "context", not to excuse or lessen the seriousness of the criminal behaviour, nor aggravate it. The sentencing Judge noted subsequently that the legislation, "precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender. [It also] precludes an Aboriginal offender … from having his case considered individually on the basis of all

[135] Northern Territory National Emergency Act 2007 (ss 90-91) (repealed 2012)
[136] 'Politics aside: An end to tears is our priority': Noel Pearson, The Australian, 23 June 2007
[137] Indigenous Crime and Settler Law - Douglas and Finnane – Palgrane McMillan 2012 (pages 207 – 208)
[138] [2009] NTSC 24

relevant facts … distorts the well-established sentencing principle of proportionality, and results in the imposition of what may be considered to be disproportionate sentences."[139].

For all offenders across Australia there are other realities relating to availability of resources such as:

(i) limitations on "custodial" alternatives to sentences of "full time imprisonment"[140].

(ii) limitations upon the availability of therapeutic Court alternatives to conventional sentencing exercises[141].

(iii) sentencing orders usually cannot be "fused", or "mixed and matched", in most jurisdictions,

(iv) in some areas there are severe restrictions upon, or a complete absence of, non-correctional rehabilitation, and even counselling facilities for drug and alcohol dependency, anger management, financial management and domestic violence.

The more remote or isolated the offender's community, the more pronounced these limitations are likely to be. For some offenders the alternatives are either gaol or conditional release with little, or no, supervision of any type.

WHAT IS BEING DONE, OR CAN BE DONE, TO ASSIST JUDICIAL OFFICERS?

There are a number of resources, or steps that could be taken, to better inform judicial officers, or assist in the process of developing 'judicial notice' of matters relevant to the sentencing process.

[139] 'Equality of the Law and the Sentencing of Aboriginal Offenders under the Sentencing Act (NT)', 31 August 2007:Southwood J. Law Council of Australia Conference 'Rule of Law….'
[140] In NSW sentencing law a sentence of imprisonment **over** 2 years must be sentenced to full time custody (at least for the term of the minimum term): period imprisonment ("weekend detention") has been abolished.
[141] For example, "Drug Courts" are available at limited geographic centres in NSW. Whilst there are 'Koori Courts' in the County Court, no equivalent jurisdiction in Australia has a similar scheme. "Circle Sentencing", Koori and Nunga Courts are not available across the States: Murri Courts in Queensland are diminishing in number.

Judicial education

One mechanism for judicial officers to be appropriately informed is formal judicial education provided by existing sources, whether by conferences, community visits, seminars or publications. The Royal Commission Final Report recommendations have had a substantial impact upon judicial education. Recommendation 96 provided that:

> "… judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding."

This has led to specific committees across each of the Australian jurisdictions, such as the Ngara Yura Committee in NSW providing education programs in various ways. National 'Indigenous Justice Committees' of the National Judicial College of Australia and the Australian Institute of Judicial Administration are funding and/or conducting education programs such as "community visits", conferences and education and source material for judicial officers and the wider community[142].

In the aftermath of the Royal Commission recommendations a number of "Cultural Awareness" or "Indigenous Justice" committees have been created across the Commonwealth in the various jurisdictions or at a national level. Their work is noble and much has been done both at a national level and within the States and

[142] The New South Wales Judicial Commission 'Judicial Officers Bulletin' has a large number of reports on community visits, conferences and seminars conducted by it under the auspices of the Ngara Yura Committee (eg "Lighting the Way Forward (Exchanging Ideas Conference (May 2009) JOB Vol 21 No 5 (June 2009) – "Connecting with Far South Coast Aboriginal Communities" – JOB Vol 21 No 17 (December 2009) "Exchanging Ideas about Aboriginal contact with the Criminal Justice System" JOB Vol 123 No 10 (November 2011).

Territories to educate judicial officers in accordance with the recommendations of the Royal Commission.

Across the jurisdictions and nationally a large number of publications have also been disseminated to judicial officers dealing with issues relevant to 'Indigenous Justice', informing judicial officers about Aboriginal cultural matters, providing information about individual communities and related issues.

But from these activities, much important information has been made available to judicial officers which has not been acted upon by many of them. Although some jurisdictions have a publication which seeks to draw together the information available in relation to Indigenous Australians, such as the excellent Western Australian Aboriginal Bench Book, earlier cited, and the 'Equal Treatment' or 'Equality Before the Law' Bench Books in, for example, Queensland and New South Wales, the voluntary character of judicial education, whether it be attending conferences, seminars and/or community visits does not permit the majority of judicial officers the opportunity, or the incentive, to participate and benefit from these exercises, even when the relevant judicial officers have a number of Aboriginal people appearing before them.

From my experience as a member and chairperson of the New South Wales Judicial Commission's Ngara Yura (Aboriginal Cultural Awareness) Committee, acknowledging the challenges for the Committee of devising seminars and conferences and community visits that offer sufficient interest to judicial officers to attract them on their own time to the Committee's activities, a particular challenge is to attract judicial officers beyond "the usual suspects" who are regular attendees at such conferences, seminars and community visits, who usually are well aware of the issues confronting Aboriginal people. Not all State and Territory courts have the resources of organisations such as the Judicial Commission or the Judicial College(Vic) to organise activities and publish Bench Books , information bulletins and the like. The burden on individual judicial officers to make necessary arrangements in these circumstances is great and time is precious.

One thing I have observed is that those who attend such activities for the first time almost unanimously make comments about how challenging, informative, interesting and/or even revelatory the experience has been.

A recently released DVD of a visit by South Australian judicial officers to remote areas of South Australia, referred to locally as 'APY Lands', showed the visiting judicial officers stating that they had come to the exercise with low expectations, or with no expectations. Yet they had discovered that the experience of meeting with Aboriginal people, seeing their living conditions, hearing them speak about their community life and their experience of contact with government authorities, including police and courts, to be not only an eye opening experience, but, in some cases, a 'life changing' experience[143]. Even after 40 years of contact in various ways with Aboriginal communities and people, mainly in New South Wales, I found a Judicial Commission seminar on 'Aboriginal Kinship' revelatory to understanding the significance of the break up of families, clans and skin groups by the loss of access to traditional lands and forced removals or movements for contemporary Aboriginal communities and people.

Education is only one means of providing judicial officers with the insights that are essential to undertaking the task of sentencing Aboriginal people. Every jurisdiction that has dealings with Aboriginal people should have a **compulsory** component of both orientation programs and annual conferences dedicated to subject matter directly concerned with contemporaneous Aboriginal community life, cultural awareness and/or historical issues that continue to impact upon Aboriginal people and their communities. It is to be remembered that these issues are relevant in understanding Aboriginal witnesses, victims, other litigants, support people, as well as defendants.

Every jurisdiction should have an Aboriginal Sentencing Bench Book that provides the information to which I earlier referred, about the historical forces that have impacted upon modern Aboriginal society, in all of its different forms across the nation, and the issues that are relevant to contemporary Aboriginal people and their communities.

[143] 'The Ripple Effect': produced by Courts Administration Authority-SA (2012)

Particular judicial officers will state that Aboriginal people should be treated no differently than the wider community because to do otherwise is a new form of paternalism, discrimination, or apartheid. For the reasons set out earlier and as the Canadians have concluded, to provide the education and other means to achieve 'equal justice' is not paternalism, nor reverse discrimination. The way this may be achieved on a regular basis is by each judicial officer educating him or herself about matters of which they are ignorant to have a better understanding of the circumstances of Aboriginal people.

Every judicial officer dealing with Aboriginal people at first instance should have access to a checklist of issues particular to the jurisdiction that permit consideration of the context in which the individual offender comes forward, the character of the individual's community and the issues that confront the community, the resources within the community, or nearby the community that may be of assistance to both the offender, and if needs be, the victim. Courts across all jurisdictions should have access to written material that provides information about the various Aboriginal communities, their history, the current profile and other details, such as currently being developed in Queensland [144]. This information resource, still developing, which is proposed to eventually provide profiles in relation to up to 47 separate Queensland Aboriginal and Torres Strait Islander communities, was launched by Chief Justice French on 2 August, 2013, with his Honour noting that, with its provenance, information in the 'Resource' will serve many purposes, including, importantly, that the Resource can be the subject of 'judicial notice' when relevant to issues in the particular case.

Indigenous Courts

'Indigenous Courts' have existed in Australia since 1999 as a means of the conventional court system applying criminal laws to sentencing Aboriginal offenders, but allowing elders to participate in the process in various ways, regulated by legislation or local practice. The courts do not apply customary law. They operate in

[144] Queensland courts have developed, under the auspices of a committee of State and Commonwealth Judges with funding from the NJCA, a profile of Queensland Aboriginal communities with details relating to history and contemporary circumstances of many of the distinct Qld Indigenous Communities programs and services available. This is to be a resource of which judicial notice may be taken "when relevant to issues in a particular case" - "Aboriginal and Torres Strait Islander Community Profiles – A resource for the Courts", accessed through Queensland Courts websites.

relation to indigenous people who consent to participate (as usually must victims), with the presiding judicial officer having the final say on appropriate orders.

New South Wales has "Circle Sentencing" Courts, regulated under the **Criminal Procedure Regulation** 2005. The program commenced in 2002 at Nowra and now operates in a range of locations across the State, but only in the jurisdiction of the Local Court and the Children's Court. Its aims are to include members of the Aboriginal community in the sentencing process, increase confidence in that process, reduce barriers between Aboriginal communities and the courts, provide appropriate sentencing options for Aboriginal offenders and effective support for victims of offences and provide greater participation of both offenders and victims in the sentencing process, as well as reducing recidivism. The process is labour intensive (much more than conventional court processes) and involves referral from the Local Court to the Circle, which comprises the Magistrate, police prosecutor, defence counsel, offender, victim, victim and offender support persons and usually four elders of the local community. The Judicial Commission has produced a DVD on Circle Sentencing, providing guidance for the conduct of Circle Courts in New South Wales, but also illuminating the attitudes of the participants and the lessons learned[145]. Whilst it can be fairly said that the potential of Circle Sentencing to empower Aboriginal communities, offenders and victims is arguable, queries have been raised as to a number of matters, including the effect upon recidivism rates, particularly compared to recidivism rates of offenders treated in the conventional way.

Other States have other types of "Indigenous Courts", such as the 'Koori Court' in Victoria, which operates at various Magistrates Courts and also in the County Court sitting at Morwell and in Melbourne, the 'Nunga Courts' in South Australia, where Indigenous Courts started, and Murri Courts in Queensland (apparently similar to the Nunga Courts). There are about 50 such courts across nearly all the States and Territories, except Tasmania. The Koori Court system has operated since 2002 in the Local Court and in the County Court since 2008. The Courts in other States and Territories operate in similar ways though the involvement of elders; their number and the participation of the parties varies from State to State and even court to court.

[145] 'Circle Sentencing in NSW': Judicial Commission of NSW (2009)

The most extensive legislative recognition of sentencing conferences for Aboriginal offenders is to be found in South Australia legislation in s.9C **Criminal Law (Sentencing) Act** 1988. It permits a court, in any jurisdiction, 'before sentencing an Aboriginal defendant' to, 'with the assistance of an Aboriginal Justice Officer', convene a sentencing conference which may include, (apart from the compulsory attendance of a defendant, the defence legal representative, the prosecutor, the victim (if he or she chooses) and the victim's support person or representative), elders, persons able to provide 'cultural advice', family members and counsellors or 'any other person'. The statutory provision defines both 'Aboriginal person' and an 'Aboriginal Justice Officer'. From 2006 until July 2013 there have been 57 's.9C' conferences, 33 in the Magistrate's Court, 20 in the District Court and 4 in the Supreme Court. Even in the most serious of cases this provides a forum where a judicial officer can have the opportunity for a proper understanding of the social and cultural context of the offending.

The efficacy of Indigenous Courts and the issues that they throw up, such as an effective mechanism of deterrence and ethical issues for the choice and participation of elders, with clan or family connections to participants, are issues beyond the scope of this paper.

There are concerns about 'power imbalances' at these proceedings where they relate to family violence matters, particularly between partners and related issues. A paper by Dr Elena Marchetti[146] discussed this issue and, in the context of a coverage of other literature on domestic violence and court proceedings involving Indigenous Australians, surveys the results of her research from interviews and case studies from five such courts in Queensland and New South Wales. She concluded that while the courts she surveyed were 'not well equipped to eradicate the imbalances … (they) do attempt to do so by 'shaming' the offender … (providing) a forum more … meaningful … humbling … than mainstream court proceedings. Victims get the chance to open up about the effect on them of the offender's behaviour " … everything (is) out in the open". However, more research is required to determine the impact on victims and offenders[147].

[146] "**Indigenous Sentencing Courts and Partner Violence**". The Australian and New Zealand Journal of Criminology (2010) Vol. 43 No 2 pp 263-81
[147] op. cit.at 278

The Victorian County Court, 'Koori Court', at Morwell, was the subject of an evaluation report published in September 2011.[148] The report noted that of 31 offenders, the subject of analysis, only 1 had reoffended (for a minor offence related to public drunkenness). The program had "some benefits" in promoting deterrence and potential for rehabilitation. The evaluation found that the experience of the Koori accused in the justice system was vastly improved, even where there was a grievance as to the sentence imposed. The involvement of the key stakeholders in the court was a "key strength" of the court. The report concluded:

> "… there is strong evidence that the County Koori Court pilot program is making significant achievements in the program outcome area of providing '*access to fair, culturally relevant and appropriate justice*'. There is also evidence that the Court has some impact on the program outcome area of '*Koori Accused do not have more serious contact with the justice system'*. However, at this stage it is too early to definitively say whether the Court will have a long term impact on reoffending."[149]

Whilst there have been recent discussions about the comparative virtues of different models in different States, particularly concentrating on comparative recidivism rates[150], the statistics there quoted may not necessarily reflect sufficient truths about the comparative systems to suggest one model is better than another for a particular community. There are many factors that affect the prospects of recidivism beyond the outcome of a particular court case. Social and personal factors relevant to recidivism are not capable of analysis in the studies conducted thus far in relation to Indigenous Courts.

One important aspect of these Courts is the engagement of local communities in the administration of justice in a way not possible with the conventional court system. This engagement by participation and part "ownership" of outcomes can only help to overcome the disengagement of Aboriginal people from the justice system through perceived past injustices. The conferences organised in recent years by the Australian Institute of Judicial Administration at Mildura, Rockhampton and Adelaide

[148] "County Koori Court" – Final Evaluation Report – 27/9/2011 – County Court of Victoria and the Department of Justice (Vic)
[149] op cit p.4
[150] New South Wales Sentencing Council 'Discussion Paper', Janet Manuell SC (2010)

over the last 4-5 years have shown positive perception by the Aboriginal community of Indigenous Courts. Indigenous Courts are not a panacea or 'cure all', but one important strategy that can make differences beyond the impact of offending behaviours. Whether they are an appropriate forum for particular offenders and/or particular offences would need to be assessed on a case-by-case basis. A conscientious effort to do this is undertaken most of the time by these courts.

Other Therapeutic Courts

The current state of therapeutic courts in Australia is no doubt the subject of discussion in the following session to that in which this paper is delivered, 'Wither Solution-Focussed Judging?'. The comments I make are general, possibly banal, in the expectation that more in depth comment will occur in that session.

The role of alcohol and drug abuse and the increased levels of offending amongst Aboriginal males, particularly in the areas of domestic violence and infliction of harm are undeniable. As earlier pointed out substance abuse is a very significant contributing factor to many types of offending leading to incarceration. These contributing factors or categories of offending can be addressed and current trends reversed with appropriate resources for counselling, diversion and correction. There are already operating in some States "Drug Courts" and their equivalents, based largely on American models, which provide, albeit in limited circumstances, intensive environments for reform. The Drug Court experience in New South Wales for adults and juveniles, limited though it is, whilst not always successful, has proven long term beneficial outcomes for individuals, albeit by largely implementing the "carrot and stick" approach. In addition to the operation of "Indigenous Courts" in their various forms appropriate to particular communities, there is a need for the expansion of "therapeutic courts" to approach fundamental causes of major areas of offending, drug abuse, alcohol dependence, anger management, domestic violence and 'socialised' behaviour, largely arising from lack of economic and educational opportunity.

The problem with current 'court' directed mechanisms for assistance to offenders, whether it be probation, parole, community service and the like, is that the supervision of these matters is uneven and sporadic in its application. The resources available are uneven and, frankly, neither intensive enough, nor closely

monitored enough, in individual cases, to provide confidence in positive outcomes. In New South Wales, for example, there has recently been an increased emphasis on enforcement of such supervision. The reality is that the availability of resources to assist offenders, which are professionally run, adequately resourced programs, is nowhere near the demand.

It is difficult, sometimes impossible, to find a placement in a residential drug and alcohol rehabilitation centre in western New South Wales. I learnt that the choice in Broken Hill on one occasion was limited to an establishment in Moree (over 600 kilometres away), so far away that the offender would be completely cut off from family and outside support.

The development of therapeutic court systems in relation to the above mentioned areas of concern in offending should be accompanied by the development of either government funded and controlled, or privately run but Government supported programs, residential or otherwise, that actually meet the demand.

Commensurate with this has been the traditional difficulty of equal access to government programs, particularly counselling and supervision services and sentencing options across the States. I am not suggesting that this is deliberate government policy or anything of the type, but the capacity to provide intense supervision to remote and semi-remote districts is inhibited by the 'tyranny of distance'.

Legislative action that may be taken

The legislature has not addressed many of the issues that confront judicial officers who may feel reluctant, or not equipped by the conduct of the parties, to recognise the contextual issues that arise in the individual case. In **Canada**, there is some legislative prescription to assist judicial officers.

Part XXIII of the **Canadian Criminal Code** (1985) codifies the fundamental purposes and principles of sentencing which are required to be taken into account in sentencing offenders across Canada. The purposes and principles reflect in general terms a number of similar 'purposes' of sentencing to those that were identified in **Veen (No 2)** and are also reflected to a large extent in local legislative provisions,

such as in s.3A **Crimes (Sentencing Procedure) Act** 1999 (NSW), and other relevant factors set out in s.21A of that Act, which are also found in various forms in other State, Territory and Commonwealth jurisdictions, such as s.16A **Crimes Act** (Cth) 1914. Although the High Court in **Bugmy** referred to differences between the Canadian and the New South Wales provisions in this regard.[151]

The 'purposes' of sentencing in Canada and its 'objectives' are set out in s.718 of the Act. The fundamental "principle" of "proportionality" is set out in s.718.1. "Other sentencing principles" are set out including at s.718.2, aggravating or mitigating "circumstances" (s.718(2)(a)) and other principles such as 'parity' (2)(b), totality (2)(c), considering alternatives to full time custody (2)(d) and, (at (2)(e)):

> *"All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders,* ***with particular attention to the circumstances of aboriginal offenders***". *(emphasis added).*

The Canadian 'Interpretation Act' provides at s12,

> *"Every enactment is deemed remedial and shall be given such fair large and liberal construction and interpretation as best ensures the attainment of its objects".*

From these provisions flow the earlier quoted decisions of **Gladue** (1998) and **Ipalee** (2012).

In **Bugmy** the High Court noted, without comment, that the power of the New South Wales Parliament to enact a similar provision did not arise for consideration in the appeal, but also noted potential impediment from s 10 **Racial Discrimination Act** 1995 (Cth)[152]. However, statutory amendment to existing 'purposes' and 'factors' relevant to sentencing requiring consideration of the social context of offending applicable in all sentencing exercises may address this issue. The Commonwealth Government by taking the lead may overcome the constitutional impediments alluded to in the Bugmy decision. The facts are that the 'unique' position of

[151] **Bugmy** at [36]
[152] **Bugmy** at [36]

Aboriginal people in our society requires some statutory protection from the 'blunt instrument' of the criminal law, providing it is constitutionally valid.

To this fundamental matter may be added for legislative attention the need to provide greater flexibility in sentencing options, including the capacity to 'mix and match' sentencing orders and widening eligibility criteria for them, the removal of mandatory and minimum sentencing sanctions, the abolition of immediate incarceration for sentences of detention for up to 12 months and stronger legislative protection of children (ie persons under 18 years of age) from detention, particularly in adult facilities.

Conclusion

The lack of resources for Aboriginal Legal Services, individuals and communities that prevent courts being fully informed about the circumstances of individual offenders should not be an excuse for the 'easy' approach of incarceration without thought to the justice of that incarceration for the individual and the consequences of it.

In recent years here have been a number of innovations brought to the sentencing of Aboriginal people, but they are available sporadically within and across jurisdictions. The difficulty for judicial officers is that many of the factors that lead to incarceration of offenders are beyond the control of the courts and judicial officers. Putting aside the obvious obligation of judicial officers to apply the law as set out by relevant legislation and the decisions of superior courts, the many factors that judicial officers at first instance cannot control include the limitations upon non custodial sentencing options within jurisdictions; the absence of proper and adequate rehabilitation facilities outside of custody; the dearth of satisfactory arrangements for accommodation of offenders whilst on bail or at conditional liberty; the inadequacy of medical treatment facilities and assessments, amongst other matters. These matters present judicial officers on a daily basis with what is, in many cases, "Hobson's choice".

Judicial officers at first instance are under extreme pressure of time and resources to be able to pay the attention to detail in court time that would be necessary to assess the individual in a proper context. The ordinary or 'everyday' case does not permit, with all the other matters that have to be dealt with, the time that can be given to an

individual case when it is handled by an 'Indigenous court'. Obviously, it is time consuming to go back and read the Final Report of the RCIADIC and/or all the various other reports referred to in this paper, as well as others not mentioned. It is tiring and time consuming to be involved in the extra-curricular educative activities.

However, for those who are required to impose sentences, or fix sentencing policy, an effort must to be made to address the consequences of our actions. This is as important as understanding the law to be applied. In the appropriate case, this includes approaching the matter with consideration of the personal circumstances of the offender not only as a 'subjective' factor but also as relevant to addressing proportionality and moral culpability. The contextual issues that arise in relation to many of the Aboriginal offenders currently being gaoled that are connected to the character of the offending require the sentencing equation to be recast to give effect to ' equal justice'.

Notwithstanding an ever rising tide of evidence about the circumstances of Aboriginal offending and offenders demonstrating their unique position in the criminal justice system, there has been only sporadic use of "judicial notice" of the current realities for Aboriginal people, their communities and their families in order to understand matters that are germane to proper consideration of the many purposes of sentencing. Greater application of the judiciary to understanding this context could lead to better understanding of individual offenders, and may create a greater appreciation that the purposes of sentencing of deterrence and punishment do not, on many occasions, deter offending or reform offenders. Instead these matters can contribute to the damage done to individuals, their families and their communities.

This understanding at a broader level may move sentencing of offenders presently being imprisoned away from considerations that compel incarceration of the offender, where greater weight is given to purposes of sentencing that direct judicial officers to impose terms of imprisonment, or longer terms of imprisonment, without regard to the promotion of the rehabilitation of offenders and/or restoration of them to their community and/or family.

******