

NATIONAL JUDICIAL COLLEGE OF AUSTRALIA

Current issues in Sentencing

**Sentencing Indigenous Australians- Judicial challenges and possible
'solutions'** **6 February 2016**

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CHALLENGES FOR THE JUDICIARY

Many of the challenges in sentencing, like the “purposes” of sentencing, point in “opposing directions”:

- **Courts must balance the interests of the offender, the community and, where applicable, the victim(s)**
- **be sufficiently informed to make a reasonable judgment despite insufficient resources and limited time in the context of adversarial proceedings**
- **exercise reasonable judicial discretion and not compromise judicial and court independence.**

Although the criminal law was once described by then Justice ‘Tony’ Fitzgerald as ‘a hopelessly blunt instrument of social policy’ it is on many occasions a form of social engineering for which the ‘engineers’ should be appropriately qualified, skilled, informed and resourced for the task they are expected to perform by the community. The capacity of judicial officers to meet the individual needs of offenders and the expectations of the community is constrained considerably by circumstances beyond their control. The role of judicial officer is not necessarily pivotal to sentencing outcomes and the cause and effect of much crime is beyond the capacity of the justice system to address. These wider issues are rarely addressed by conventional sentencing mechanisms or options.

Incapacitation rarely addresses the underlying causes of criminal conduct, nor usually provides a pathway to reform of the offender but is inevitable on occasions, sometimes for lengthy periods, such as in the circumstances discussed in the High Court decision in **Munda (2013)**. However, in that decision it was also pointed out that there was ‘special force’ in the argument that general deterrence had ‘little rational claim’ upon the sentencing discretion for unpremeditated crime, ‘where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals to be controlled by the rational consequences of misconduct’.

Judicial independence must be maintained, as must respect for individual judicial discretion and the fact that in judicial decision making reasonable minds will differ as to appropriate outcomes. Paternalism is to be avoided. However, the better informed the judicial officer the more able he or she will be to justice to the case when making an assessment of the 'moral culpability' of individual offenders. Yet, the capacity or resources of the prosecution and/or the defence to obtain relevant information on many occasions will be limited or non-existent. The current sentencing 'system' is essentially adversarial and judicial officers are captive largely in their conduct of individual matters to the attitude and skill of the parties. The majority of the High Court in **Bugmy v The Queen (2013)** rejected the proposition 'that courts should take judicial notice of the systematic background of deprivation of individual offenders'. Their Honours said (that) 'was antithetical to individualised justice'.

However, equal treatment and 'individualised justice' are not served at present by considerable 'inequity' in the distribution or availability of sentencing options and rehabilitation programs and resources across Australia, particularly impacting on Indigenous Australians, legislative, administrative, geographical and service restrictions restrict options for the judicial officer more than any sentencing principles to be applied.

Other realities in sentencing are; limitations on non-custodial alternatives to sentences of "full time imprisonment", limitations upon the availability of 'therapeutic court' alternatives to conventional sentencing exercises, lack of flexibility and options for making sentencing orders in most jurisdictions, restrictions upon the availability, or a complete absence, of rehabilitation and/or counselling facilities in or out of custody. The more remote or isolated the offender's community, the more pronounced these limitations will be, as will be the effect of incarceration.

There are characteristics of offenders, or offending, that will require attention to solutions that require as a priority protection of the victim, or the community. Most victims of violent offending are Indigenous people themselves, entitled to the full protection of the law. Particular crimes that will require greater weight in sentencing to be given to punishment, deterrence, denunciation and those more "punitive" purposes of sentencing. The more serious the offending the greater the weight that will be given to deterrence/denunciation/retribution as opposed to rehabilitation.

There are no uniform or simple solutions for offenders as there are not for the wider social, health and historical contexts and causes of offending. Not all Indigenous people in Australia have the same background or contemporary experience of disadvantage, discrimination or social isolation. Not all Indigenous communities or groups have the same social circumstances and contributing issues to offending, although all reputable studies and inquiry findings produce a considerable number of common causes across different categories of Indigenous communities. Not all Indigenous offending is of the same type, and, where the same type, has the same causes or explanations. There are Indigenous offenders who have psychiatric, psychological or other health factors which contribute to offending arising from a social context beyond the control of the offender. The link between the health issues beyond the control of offenders and offending in many instances is irrefutable.

SOME SOLUTIONS?

Legislation

No offender sentenced to a term of six months or less be committed to gaol custody unless presence in his or her community presents as a real danger to another person or the community and no other viable option can protect those persons. The sentence to be served by suspension and/or community work or attendance upon rehabilitation programs.

Identify the object of “Equal Justice” in “objectives” or “purposes” of sentencing in all jurisdictions.

Enact a similar mandate as exists in Canada for courts such that: “All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with the particular attention to the circumstances of Indigenous offenders”.

Release to rehabilitation centres, ‘half- way’ houses or work and training in the community before sentence expiration.

Provisions in all jurisdictions of the character of s 9C Criminal Law (Sentencing) Act (South Australia), permitting “case conferencing” in sentencing proceedings with a court employed Indigenous Justice Officer marshalling the participation of all parties.

Eliminating any form of incarceration for fine default, minor ‘street’ and public order and driving offences as well as any mandatory penalty of imprisonment or driving licence disqualification.

Innovation

Implementation of Justice Reinvestment strategies to divert resources to particular targeted communities from custodial correctional programs to locally based programs to provide support for individuals and communities, thereby providing more and better options for sentencing, rehabilitation programs and community renewal.

Greater flexibility for making sentencing orders and more alternatives to ‘ full ‘ time imprisonment. Where terms of imprisonment are imposed diversion of Indigenous offenders from remote and semi remote communities from “gaol” custody to “custodial settings” within or near communities.

Expansion in the creation of and access to specialist and ‘therapeutic’ courts, with sufficient support services across Australia for domestic and other violent offences , as well as drug and alcohol related crime .

Judicial education bodies or courts providing courts with specialist sentencing checklists and Bench Books, such as the Western Australian ‘Aboriginal Bench Book’ or the NSW Judicial Commission’s ‘Equality before the Law’ Bench Book (and its Queensland equivalent).

Setting up properly resourced bail and/or 'safe' houses or hostels, to accommodate people either pending the completion of litigation or as a condition of community based orders. A substantial reduction of the 'remand' population would result if defendants had appropriate accommodation pending court appearances and victims had adequate places of refuge..

Expansion of the operation of "Indigenous Courts" (Circle Sentencing/Murri/Koori/ Nunga Courts) within Local Courts and other 'intermediate' sentencing courts and greater resources to support courts to conduct these proceedings.

Greater consultation with and involvement of Elders and communities in 'conventional' sentencing exercises, particularly with consultation by government service providers and legal representatives of the parties.

Information

Production of 'evidence' in every sentencing exercise where a term of imprisonment is available by 'presentence' report in the style of Canadian "Gladue Reports", including a 'profile' of the particular community from which the individual comes, including historical and contemporary information relating to the availability of services, language or tribal groupings within the community, trends or levels of offending, local Indigenous organisations, available government services and the identity of elders, or others in a position to provide assistance to the offender and victims.

All governments should provide information about Indigenous communities and available services for offenders and victims for all participants in the justice system and the general public, such as "community profiles" available in Queensland (its creation partly funded by the NJCA).

Education

The 'Royal Commission into Aboriginal Deaths in Custody' in its recommendations recognised the importance of improving the knowledge of all justice system participants of Indigenous culture and contemporary social issues. Much good work has been done in most jurisdictions but more is required, particularly at a national level. Proper funding by Government at a State/Territory and Commonwealth level is a key issue. This not just about 'formal' education but also the promotion of informal self-education and then recognising this learning in the practical application of the law. Particularly there is a need for judicial officers to recognise and apply the scholarship of the judgments of the superior courts, particularly the High Court on these matters

'Individualised justice' would be enhanced by more extensive use of judicial notice of irrefutable truths, notwithstanding the limitations upon the role of judicial notice suggested by the majority decision of the High Court from 2013 in **Bugmy** (NSW). That judgment (and that of **Munda** (W A) of the same date) each adopted other judgments (**Fuller-Cust** (Vic), **Fernando** (NSW) and others) reflecting considerable judicial notice being taken to make general observations about the

wider social and historical contexts of Indigenous offending. Of course, many judicial officers are not as experienced or as knowledgeable as those various judicial officers. On the other hand judicial appointment is no guarantee of wisdom or relevant knowledge. Hence, the importance of the education of judicial officers about matters of which they may be ignorant.

The majorities in **Bugmy** and **Munda** that ..”regard to the offender’s Aboriginality serves to ensure that factor relevant to sentencing is not overlooked by a simplistic assumption that equal treatment of offenders means differences in their individual circumstances related to (Aboriginality) should be ignored (**Munda**)” and “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 rely on an offender’s background of deprivation it is necessary to point to some material tending to establish that background (**Bugmy**)”. There is ample ‘material’ in a vast body of unimpeachable sources to assist judicial officers in their task, such as the Final Report of the **Royal Commission into Aboriginal Deaths in Custody (1991)**, the Human Rights Commission’s **Bringing them Home (1997)**, the Senate Legal and Constitutional Affairs References Committee’s **Value of Justice Reinvestment (2013)**, House of Representatives Committee on Aboriginal Affairs’ report **-Doing Time-Time for Doing (2011)**. Proper regard to the evidence and findings from those inquiries will enhance individualised justice not undermine it.

The very existence of ‘**Close the Gap**’ strategies emphasises the reality of widespread and endemic contemporaneous disadvantage throughout Australia across a range areas many linked to the causes of offending behaviour.

Co-operation

There must be greater cooperation between Government departments operating within and outside in the ‘justice system to provide equal opportunities for offenders to have access to government services and sentencing alternatives to full term imprisonment. No person should be imprisoned simply because another alternative is not geographically available. Likewise governments at State and Commonwealth levels should end geographic restrictions on ‘non-custodial’ sentencing alternatives within and across jurisdictions.

Greater cooperation should be encouraged between Indigenous communities, their elders and governmental ‘instruments of justice’ and other service providers, particularly involving genuine consultation. A constant theme arising in the Judicial Commission’s (NSW) Ngarra Yura Committee ‘community’ consultations is complaint that Indigenous communities are not given genuine involvement in decision making in government and policing strategies addressing the cause and effect of criminal behaviour.