

Sentencing Aboriginal Offenders – “Striving for equality before the law”

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“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.” (Wong v The Queen (2001) 207 CLR 584

INTRODUCTION

This presentation is primarily concerned to reveal to its audience the issues relevant to sentencing of Aboriginal people from a judicial perspective and how you and other lawyers can assist.. Not necessarily the perspective of appellate courts. But many of the points to be made are influenced by ‘high authority’, particularly the High Court.

What I seek to do, ultimately, is to demonstrate the way in which advocates can assist judicial officers sentencing at first instance to impose sentences to provide some quality of ‘equal justice’ and ‘individualised justice’ for Indigenous Australians and hopefully lessen the intervention of appellate courts to the detriment, in the short to long term, for the client.

I appreciate I am speaking to an audience of Legal Aid Commission Lawyers who in most sentencing exercises will be acting for the offender. But not always. I am mindful that many ‘victims’ of offences committed by Indigenous Australians are themselves Indigenous. Advocates are required in the proper conduct of matters to be respectful and mindful of the interests of victims and the communities from which they come. Further, not all Aboriginal offenders or offending are the same. But that acknowledged, as Justice ‘Tony’ Fitzgerald said in 1998 (‘quite accurately’ in the later view of Spigelman CJ):

“The criminal law is a hopelessly blunt instrument of social

policy". He went on to say, "Its implementation by the courts is a totally inadequate substitute for properly resourced and planned policies for Aboriginal communities..."¹

SOME PRACTICAL ISSUES

Sentencing of Aboriginal people does not occur in a vacuum isolated from general sentencing principles. It is to be considered in the context of wider sentencing policy and principles, either under relevant State and/or Commonwealth legislation and wider sentencing principles that address topics as varied as "intuitive" synthesis will permit (*Markarian v The Queen* – 2005 HCA). These include the conflicting purposes of sentencing (*Veen (No.2) v The Queen* – 1988 HCA) – parity of sentencing (*Postiglione v The Queen* – 1998 HCA) – proportionality (*Hoare* – 1999 HCA), mental abnormality and/or disability of offenders (*Muldock v The Queen* – 2011 HCA), the purpose of non-parole periods – *Power v The Queen* – 1975 HCA, *Bugmy v The Queen (No.1)* 1990 HCA , ' totality'- Pearce-1998 HCA,(amongst many others), not to mention 'guideline judgments' and 'policy' judgments', such as for substantial drug trafficking, child sexual assault, the possession of child abuse material, drug importation etc.

There will be cases where either nothing, or little, in mitigation can be found, or nothing can be identified to reduce the weight to general and/or personal deterrence, or lessen the moral culpability of the offender.

I would argue that, generally speaking the vast majority of Indigenous offenders present challenging and, in many instances, unique or special features for the justice system to consider and address.

A context for the issue I am speaking about is the current scandalous situation of gross overrepresentation of Aboriginal Australians in the justice system and incarceration rates of them.

In summary, across Australia Aboriginal people represent 28% of the 'prison' population. The national rates of imprisonment has almost doubled since the

¹ R v Daniel (1998) 1 QdR 499 (at 530)..His Honour was in the minority in the disposal of the appeal!

release of the RCIADIC Final Report in 1991. In New South Wales the percentage across all inmates is slightly higher, but for female inmates considerably higher.

In some states and territories the percentage is greater than the national average (such as NT and WA). A PWC paper, “Indigenous Incarceration: Unlock the Facts” (May 2017), summarised ABS data at a national level to conclude that Indigenous men are “imprisoned” at 11 times the rate of the general male population, women at 15 times the rate for women generally, youth at 25 times the rate of the general youth population. Many people in custody are awaiting trial or hearings and may never be sentenced as they will be found ‘not guilty’.

Although judicial officers have the final say in each individual case, there are many contributing factors to the above situation beyond the control of the Courts, lawyers and judicial officers.

The capacity of judicial officers to meet the individual needs of offenders and the expectations of the community are 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 “underlying” issues (as described by the RCIADIC) are rarely addressed by conventional sentencing mechanisms or options.

The judicial officer in every sentencing exercise, particularly when considering, or required to impose, a term of imprisonment for an offence, has a number of difficult decisions to make. Not just as to the outcome, but during the various stages of fact finding applying those facts to the legal principles to be applied. The individual approaches of judicial officers will vary as will their respective views of factual and legal matters, usually within a band or range or reasonableness, or fixed by other judicial officers who have the responsibility of laying down sentencing principles or standards, such as in decisions of the Court of Criminal Appeal and the High Court. The expression ‘reasonable minds may differ’ has particular salience in sentencing for particular offences. Not just as to principles to be applied, but also as to what constitutes a proper or adequate sentence. As earlier mentioned, sentencing will usually involve the exercise of the considerable skill of ‘instinctive’ or ‘intuitive

synthesis', endorsed in the High Court judgments of **Markarian (2005)**² and **Muldrock(2011)**³. This is a vexing exercise for even the most 'reasonable' minds and experienced judicial officers. One can never be satisfied that one is correct in determining any sentencing outcome. Unless one is not amenable to appeal.

Underlying each sentencing exercise are a number of practical factors, considerations or objectives for the judicial officer. The judicial officer will have limited time and resources on many occasions to fully consider the matter at hand, is constrained to some extent by the adversarial character of the proceedings and legislative dictates, must always protect and maintain 'judicial independence', will need to balance the interests of offender, victim and the community, must exercise judicial discretion on a principled basis(eg. take into account all relevant considerations but ignore irrelevant considerations) and endeavour to do justice to the case at hand. Some of these and other such matters are more practical than legal. The last matter is on many occasions the most difficult objective to achieve, sometimes because of the other considerations I have identified. All these matters are considered in a context of considerable under resourcing of courts, the parties, where publicly funded, and the 'support services' vital to address the causes of offending behaviour and the needs of offenders and victims.

The underlying causes of offending are many, multi-dimensional and multigenerational. Where 'mental health' is an issue, the causes are many including social, environmental and familial, mostly beyond the control of the sufferer/offender. Foetal Alcohol Spectrum Disorder (**FASD**), for example, is not simply the manifestation of a pregnant mother drinking alcohol or ingesting drugs during pregnancy, but can often be the consequence of social and historical forces of dispossession, physical and sexual abuse, lack of economic and educational opportunity and/or lack of access to supporting or professional services that middle class people take for granted. The criminal law sometimes operates as a form of social control or 'policy' as Justice Fitzgerald observed (the High Court majority

² [2005] HCA 25 at [51] per McHugh J

³ [2011] HCA 39

thought somewhat differently in *Munda*⁴ in 2013) and has arguably operated that way historically in its treatment of Indigenous Australians. The criminal law, as ‘a hopelessly blunt instrument of social policy’, usually lacks the discernment, resources and sometimes the commitment, to bring about change in individuals, let alone the social circumstances of the offender’s community.

Because judicial officers operate within a legislative and administrative framework over which they have little influence, the role of a judicial officer is not necessarily pivotal to sentencing outcomes. The parties have their important role to play and judicial officers are captive largely in their conduct of individual matters to the attitude and skill of the parties.

In a practical way, ‘equal treatment’ of offenders and ‘individualised justice’ are not served at present by considerable ‘inequality’ in the distribution or availability of sentencing options and rehabilitation programs and resources across Australia, particularly impacting on Indigenous Australians. Geographical and service restrictions restrict options for the judicial officer more than many sentencing principles, legislative or otherwise, to be applied.

Other realities in sentencing for judicial officers and parties include; 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 deleterious effect of incarceration.

It is true there are characteristics of offenders (whatever their background), or offending, that will require attention to solutions that require as a priority protection of the victim, or the community. Particular crimes will require greater weight in sentencing to be given to punishment, deterrence, denunciation, the more “punitive” purposes of sentencing. The more serious the offending the greater the weight that

⁴ *Munda v The Queen* [2013] HCA 38, at [53]

will be given to deterrence/denunciation/retribution as opposed to rehabilitation. The case of *Veen No.2*⁵ (1988 - HCA) is one such example. But as the majority in that case observed, purposes of sentencing are “guideposts” that sometimes point in “opposite directions”.

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. But 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 for offending or incarceration across different categories of offenders and 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. In particular Aboriginal Communities, widespread incidence of FASD has received particular attention by appellate courts, especially in Western Australia and Queensland. I will refer later to the Western Australian decision of *LCM*⁶ on this issue which has not received the attention it deserves in this State, but not in my view through any fault of the courts as the issue does not get enough attention in this State outside the court system.

CENTRAL ISSUES OF PRINCIPLE-NEAL, BUGMY AND MUNDA

Returning to particular principle, the ‘touchstone’ of Sentencing principles concerning Indigenous offenders is to be found in the 1982 decision of the High Court in *Neal v The Queen*⁷, in the judgment of (then) Brennan J.

⁵ *Veen(No 2) v The Queen* (1998) 164 CLR 465

⁶ *LCM v Western Australia* [2016] WASCA 164

⁷ *Neal v The Queen* (1982) 149 CLR 305, at 326

“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 these 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 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...”

This fundamental proposition was adopted in both *Bugmy*⁸ and *Munda* by the High Court in 2013 but in my view, begged the real question of the unique social and historical circumstances of indigenous society and its relationship to the objective circumstances after. However, both decisions reflected upon particular aspects of Indigenous offending and/or offending that require consideration.

In *Munda* the majority of the Court approved what Justice Geoff Eames had said in *Fuller-Cust* (in the Victorian Court of Appeal), that *proper* regard to Aboriginality serves to ensure that a factor relevant to sentencing in that respect is;

“not overlooked by a simplistic assumption that regard to *equal treatment* of offenders requires differences in individual circumstances relating to the offender’s cultural context be ignored.” (emphasis added)⁹

Further, the Court in *Munda* pointed out that personal disadvantages may be so deep and so broad as to be capable of explaining the offender’s recidivism, thus requiring less weight for personal deterrence.

I would suggest, as a corollary, also requiring closer attention to proactive measures to address rehabilitation at the expense of simple punishment and/or denunciation. In *Munda* (notwithstanding the dismissal of the appeal by Mr *Munda* against the

⁸ *Bugmy v The Queen* [2013] HCA 37

⁹ *Munda* at [53] – [57]

decision of the WA Court of Appeal) it was acknowledged that the contemporaneous social circumstances of an offender (and particular types of offending) may require less emphasis on general deterrence.

In Munda¹⁰ it was said by the majority:

“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 as 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.”

This dicta was subject to qualifications:

“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.”

“The second point to be made... is that, as McLure P noted:

“Addictions 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.”

¹⁰ Munda at [53] – [57]

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

“The 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.”

It may be fairly said that the measure of moral culpability “feeds” into the weight to be given to general and personal deterrence, and hence punishment, denunciation and accountability (cf s.3A *Crimes (Sentencing Procedure) Act 1999*)

In *Bugmy*¹¹ the majority observed amongst other matters that:

1. The social experience of individuals may leave a mark upon the individual for life and remained relevant notwithstanding a past long history of offending.
2. The effects of deprivations and disadvantage do not diminish with the passage of time and repeated offending (although their effect upon purposes of punishment will vary from case to case).
3. Life experiences may be relevant to assessment of moral culpability with the qualification that those leading to permanent danger to others may require greater weight to the protection of the community.

The High Court in *Bugmy*, however, rejected a submission of the appellant that “... courts should take judicial notice of the systemic background of Aboriginal offenders...” as it was “antithetical to individual justice.”

“Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender”.

Their Honours then observed:

“Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this

¹¹ *Bugmy* at [43] – [44]

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.*" (emphasis added)

It might be thought that the majority swallowed a healthy dose of judicial notice to make them. But their Honours would not have to look far to find support for the general propositions they advanced.

As examples I briefly quote overarching observations of people that have digested the empirical data:

"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".

The Hon. Elliott Johnston QC – Chief Royal Commissioner RCIADIC

"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 break the cycle of offending, recidivism and incarceration... This is a shameful state of affairs..."

Chairperson, House of Representatives Standing Committee on Aboriginal Affairs – "Doing Time – Time for Doing" (2011) 'Closing the Gap' strategies in health, employment, education and justice.'

WHAT CAN BE DONE BY COURTS AND COURT SERVICES

Bringing the matters above back to the issues I am now addressing, I suggest there are four mechanisms by which judges could better achieve equal treatment for indigenous offenders.

1. Ensuring that they implement equal justice in sentencing decisions as required in, for example, parity of sentencing.

‘Equal justice’ was described by Justice Rothman in *Jimmy*¹² (a 2010 judgment of the Court of Criminal Appeal) as an aspect of Aristotelian principle of equality. **‘Alike shall be treated alike and the unlike will be treated unlike to the extent of their unalikehood on rational and reasonable grounds’**, to paraphrase his Honours words.

This would require in most sentencing exercises giving full recognition to the individual’s social circumstances in the proper contemporaneous and historical context. Interestingly, in a less sophisticated way judicial officers are doing this all the time in sentencing individuals from social backgrounds with which they are familiar.

In **Hili and Jones v The Queen**¹³ the majority of the High Court referred to what Gleeson CJ had observed in **Wong v The Queen**¹⁴:

“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 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,

¹² *Jimmy v R* [2010] NSWCCA 60 ([255]-[257])

¹³ [2010] HCA 45

¹⁴ [2001] HCA 64 – at [6]

“... consistency is not demonstrated by, and does not require, numerical equivalence” “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)”

‘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.”¹⁵

‘Equal justice’ was recognised in the Western Australian ‘Aboriginal Bench Book’ 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.

2. More detailed reporting to Courts by government agencies or private organisations and services in the style of ‘Gladue’ type reports as now mandated by Canadian legislation and courts. Copies of a booklet from Canada setting out the purpose and format for these reports will be distributed to participants, explaining their fundamental rationale.

3. In the appropriate case receiving directly and indirectly from Aboriginal Elders or community members information about the individual, the community life of the offender and any relevant social or family context of the offending.

4. Properly funding and promoting judicial education, not just about cultural matters but about the legal, cultural and social circumstances of Aboriginal communities,

¹⁵ Waters v Public Transport Corporation (1991) 173 CLR 349, at 402

particularly from the evidence and recommendations provided to Royal Commissions, Human Rights Commission inquiries and Parliamentary enquiries.

Accepting the general proposition that judicial notice cannot be taken of matters historical, social etc. without regard to the facts of the individual case for resolution, judicial officers should be encouraged to make intelligent, constructive use of judicial notice of what has gone before, whether it be of the findings and evidence of previous inquiries or the factual conclusions in decisions of prior cases, whether at first instance or on appeal. An outstanding example of this that stands out still over 20 years later is Kirby P's judgment in *R v Russell*.¹⁶ Another example is Martin CJ's judgment in *LCM v WA* (at [1] – [25]), to which I earlier referred, in relation to FASD, its role in the sentencing process and what the justice system may do about it.

As a result, in my view, there would be more effective sentence orders for addressing the various purposes of sentencing, better long term outcomes for offenders, victims, affected third parties (usually families of offenders and victims) and their communities with more effective consideration of some of the causes of offending.

In respect of these matters the parties have the most important roles in the absence of legislative direction. This brings the matter of achieving 'equal treatment' not just within the responsibility of judicial officers, but more also within that of lawyers, particularly those representing accused persons.

WHAT YOU CAN DO

May I suggest these matters:

1. Understand the principles set down by superior courts. One means of doing that is collecting the relevant authorities (or the principles applicable) in a readily accessible folder, electronic or hard copy with the relevant "purple passages" readily found. A particularly handy guide in this regard is the Western Australian 'Aboriginal Sentencing Bench book'.

¹⁶ (1995) 84 A Crim R 356 (at 361-2)

2. Take the trouble to read the leading reports from the RICADIC, the Senate on Justice Re-investment, the House of Representatives “Doing Time – Time for Doing” Report, the “Bringing them Home” report of the Human Rights Commission and reports of the National Indigenous Drug and Alcohol Committee , amongst others,¹⁷ as well as monographs and papers written by the Bureau of Crime Statistics, particularly *Weatherburn and Snowball*. Then collating the information that you believe can have relevance to individual case for presentation in Court.
3. Seeking out information from Elders and communities to better understand your client and his/her community, the support structures and community organisations that are available. In this regard it should be part of the task of the Legal Aid Commission and/or The Law Society in education programs and publications to assist. The Judicial Commission “Equality Before the Law Bench Book” can also provide assistance.
4. Speak to your client. Don’t leave it to the psychologist or psychiatrist to develop the ‘history’ as it is relevant to the offender and/or the offending. Find out what makes your client ‘tick’ so to speak.
5. Educate yourself, or be educated as to what can be offered in and out of custody by ‘Corrective Services’ and non-governmental services.
6. Constructively help the judicial officer to understand relevant material and identity how it is relevant to the case at Bar.

You cannot expect judicial officers to do the work required by themselves, particularly when the conditions in which they work may conspire upon their capacity to consider and reflect, such in busy ‘list courts’ that the Local Courts face on a regular basis.

¹⁷ (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)

I recently spoke on this topic, in a limited way, to a conference of Judges in Perth. The 'sting in the tail' was that I suggested that if judges were not prepared to be educated about matters that were necessary for them to perform their judicial tasks when sentencing Aboriginal Australians, then they should not do the job. Perhaps you should consider that issue yourself.

OTHER SENTENCING PRINCIPLES

On a more conventional note I point out some basic 'principles' primarily laid down in New South Wales.

The High Court adopted in *Bugmy* the principles laid out in *R v Fernando* (Wood J from 1992) with principle 'E' now subject to s.21A(5AA) Crimes (Sentencing Procedure) Act 1999, which abolishes intoxication at the time of the offence as a mitigating factor.

Those "principles" are as follows:

- A. 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 that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.
- B. The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but, rather, to explain or throw light on the particular offence and the circumstances of the offender.
- C. It is proper for the court to recognise that the problems of alcohol abuse and violence, which to a very significant degree go hand in hand within Aboriginal communities, are very real ones and require more subtle remedies than the criminal law can provide by way of imprisonment.
- D. Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not

thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

E. While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within 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.

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

G. In sentencing an Aboriginal person who has come from a deprived background, or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him or her and which is dominated by inmates and prison officers of European background, who possess little understanding of Aboriginal culture and society or of the offender's own personality."

These observations need to be understood in the context of the facts of the case his Honour determined at first instance. Some qualifications and explanations have emerged from subsequent decisions of the Court of Criminal Appeal such as *Ceismann* , but a number of judgments have held that there is no 'sunset clause' for the principles, a point confirmed in *Bugmy*.

In *Bugmy*, approving his Honour's observations, the majority of the High Court noted that these principles were largely directed at the significance of the circumstance that

the offender was intoxicated at the time of the offence, however they have proper application in other factual situations.

The judgments of *Munda* and *Bugmy* have received some attention from the Court of Criminal Appeal. Relying upon the commentary in the Judicial Commission's "Sentencing" Bench Book, quoting from it for the purposes of this paper and accepting the accuracy of the learned authors' analysis.

"In *Ingrey v R* [2016] NSWCCA 31, the offender's particular disadvantage was not the circumstances of his immediate upbringing by his mother and father, but his association with peers and extended family who were part of the criminal milieu. They regularly exposed the offender from a young age to criminal activity: *Ingrey v R* at [27]. Such circumstances would have compromised the offender's capacity to mature and learn from experience and amounted to social disadvantage of the kind envisaged in *Bugmy v The Queen*: *Ingrey v R* at [35]–[39]."

"In *Kentwell v R (No 2)* [2015] NSWCCA 96, the offender succeeded in establishing that he had a deprived background. He was removed from his Aboriginal parents at 12 months of age and adopted out to a non-Aboriginal family, where he grew up deprived of knowledge about his family and culture. The court applied *Bugmy v The Queen* and held that the offender's moral culpability was reduced, as the social exclusion he experienced was capable of constituting a background of deprivation explaining recourse to violence: *Kentwell v R (No 2)* at [90]–[93]. **This was supported by a body of evidence demonstrating that social exclusion could cause high levels of aggression and anti-social behaviours.**"(emphasis added).

"In *IS v R* [2017] NSWCCA 116, evidence established that the offender had been exposed to parental substance abuse and familial violence before being placed under the care of the Minister at the age of seven, after which time he moved around considerably. The sentencing judge accepted that the principle in *Bugmy v The Queen* was engaged and also found that the offender had favourable rehabilitation prospects. However, it was implicit in the conclusions of the judge, concerning general deterrence and the need for community protection, that the judge failed to give any weight to the reduction in moral culpability made explicit in the earlier findings: *IS v R* at [58]. Campbell J said "... the weight that would ordinarily be given

in offending of this serious nature to personal and general deterrence and the protection of society ‘to be moderated in favour of other purposes of punishment’ and, in particular, his ‘rehabilitation’: *Bugmy* at 596 [46]”: *IS v R* at [65].”

“The court in *Kiernan v R* [2016] NSWCCA 12 held that the sentencing judge did not err in dealing with the offender’s criminal history and subjective case notwithstanding the deprived and depraved circumstances of the latter’s upbringing. Hoeben CJ at CL said at [60]: “the applicant’s criminal history, together with the effect on him of his deprived and abusive childhood, meant that his Honour had to take into account the protection of the community ...”

“The plurality in *Bugmy v The Queen* did not talk in terms of general deterrence having no effect, but referred to that factor being “moderated in favour of other purposes of punishment” depending upon the particular facts of the case: *Kiernan v R* at [63]. The CCA in *Kiernan v R* concluded (at [64]) the judge understood and applied *Bugmy* ...”

“In *Drew v R* [2016] NSWCCA 310, it was accepted that the offender suffered economic and social deprivation during childhood, both while residing with his family on an Aboriginal reserve until the age of 14 and then after being placed in a boys’ home to learn a trade. However, limited weight could only be given to any allowance for the offender’s deprived background under the principles in *Bugmy v The Queen* per Fagan J at [18] (Gleeson JA agreeing at [1]). Even having regard to his background of social disadvantage, the fact remained that the offender was a recidivist violent offender with convictions for matters of violence stretching over 35 years, committed against 13 separate victims, including domestic partners and the offender’s son. The needs of specific deterrence and community protection loomed large: *Drew v R* at [1], [17], [125]”

The issue of “social exclusion” referred to above in *Kentwell* was first taken up, at least in New South Wales, by Justice Rothman in *R v Lewis* [2014] NSWSC 1127. In essence his Honour observed that studies in Australia and the United States had shown that “social exclusion”, for example as a result of racism, can have cognitive and other psychological impacts, leading to impairment in thought processes,

particularly in respect of “self-regulation”. Where a person has suffered from racism the effects of this type of social exclusion might include “high aggression, self-defeating behaviours, reduced pro-social contributions to society and impaired self-regulation.” His Honour concluded “In the way that ‘Fernando principles’ had been taken into account... the matters, identified by Professor Baumeister and his colleagues (leading academic authorities) may be used to mitigate or fashion an appropriate sentence, but not so as to impose a sentence that does not reflect the seriousness of the offence.” (*Lewis* at [41]-[43]).

SOME OTHER MEASURES ?

1. 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.
2. Identify “equal justice” as an “objective” or “purpose” of sentencing
3. Enact a similar mandate as exists in Canada for courts: “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”.

The Supreme Court of Canada has held of this legislation:

- “Not reverse discrimination ... but necessary to achieve real equality” (*Gladue*¹⁸, in 1999).
- “relevant to the moral blame worthiness of the individual and as an aspect of proportionality in sentencing” (*Ipeelee* in 2012)¹⁹.

¹⁸ [1999] 1 SCR (Canada) 688

¹⁹ [2012] 15CR (Canada) 433

4. Release to rehabilitation centres, 'half- way' houses or work and training in the community before sentence expiration.
5. Provisions in all jurisdictions of the character of s 9C *Criminal Law (Sentencing) Act* 1988 (South Australia), permitting "case conferencing" in sentencing proceedings with a court employed Indigenous Justice Officer marshalling the participation of all parties.
6. 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.
7. Greater 'variety' in the forms of imprisonment to be served - with training facilities and cultural focus given emphasis (such as Balund-a, Yetta Dhinnakkal in NSW)
8. Neuropsychological, psychological and/or psychiatric reports for all Indigenous offenders, whether in custody or not, if potentially facing imprisonment - in the same way that Courts cannot sentence a child offender for particular offences without a Juvenile Justice Report.
9. 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.
10. Greater flexibility for making sentencing orders and more alternatives to 'full' time imprisonment. – such as:
 - a) where terms of imprisonment are imposed diversion of offenders from remote and semi remote communities from "gaol" custody to "custodial settings" within or near communities, such as group residences under Corrective Services supervision i.e. gaols without bars for suitable inmates.

- b) community service/community employment orders as conditions of other community based supervision – such as good behaviour bonds.
 - c) power to order particular types of community work.
 - d) periods or residential rehabilitation in lieu of periods of imprisonment.
 - e) limited imposition of fines, with default provisions, for people on any form of welfare benefit or “social security” benefit.
 - f) elimination of “mandatory periods” of motor vehicle licence disqualification particularly for people without access to public transport.
11. Expansion in specialist and ‘therapeutic’ courts, with sufficient support services across Australia for domestic and other violent offences, as well as drug and alcohol related crime.
 12. In appropriate cases for unlicensed driving offences, waiving licence disqualification subject to the offender obtaining his or her drivers licence and completing specific driver education programs.
 13. Judicial education bodies providing courts with specialist sentencing checklists.
 14. Establish 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.
 15. Engage Indigenous organisations in bail and probation/parole supervision- such as occurs sometimes in NSW with the Tribal Warrior organisation, ‘Clean the Slate’ program in Redfern.
 16. Expand 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.

17. 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.
18. 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, with 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.
19. Government website or resource materials 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).

CONCLUSION

Many of the matters addressed above can be understood to have relevance and benefits not just for Indigenous offenders but to some non-indigenous offenders. There are common features and causes of offending across cultures. More should be done to address causes of offending outside the operation of the 'criminal justice system'.

Although some of the suggestions above, in part at least, may be seen to provide Indigenous Australians with special or preferential treatment, it is in the national interest for positive, affirmative measures to be taken to truly provide 'equal treatment or justice' for them. Developments in Canada, with analogous issues to be addressed by the courts, have shown that such measures directed towards the interests of Indigenous offenders are not "reverse discrimination" but are "necessary to achieve real equality" under the law.

The causes of, and solutions to, alcohol and drug abuse, family violence, sexual abuse, mental and general health issues, dispossession, dislocation and marginalisation, discrimination etc. cannot be addressed in isolation from economic and educational disadvantage, lack of employment and training opportunity, inadequate housing and homelessness, isolation from and /or absence of necessary services about which courts can do little.

The courts have limited impact addressing the life circumstances of offenders, but still have an important role to play in individual cases, as well as drawing attention to the relationship of offending to the wider socio-economic context in the appropriate case. Delivering the elusive ideal of 'justice' is of paramount importance. The operation of the criminal law and its sanctions has contributed substantially on occasions to catastrophic consequences for offenders, victims and the community following failure to rehabilitate offenders such to enable them to adjust to community living. We have a situation where many Indigenous Australians are on a treadmill of despair leading to desperation and failure from which increasing numbers cannot escape. The figures for incarceration rates and offending frequencies tell us this more clearly and eloquently than words.

In relation to some of the proposals I have set out above, that the Royal Commission into Aboriginal Deaths in Custody recommended inter alia that; "imprisonment (be) a sentence of last resort" (Rec. 92), "adequate and appropriate range of non-custodial sentencing options should be available for Aboriginal offenders" (Rec. 93) and that "Aboriginal communities should be involved in the sentencing of Aboriginal offenders to a greater extent (Rec 104:110). This was 26 years ago last April yet there has been little progress in addressing the spirit of these recommendations.

In the Canadian Supreme Court decision of *Gladue* to which earlier reference was made it was pointed out that "...sentencing innovation cannot of itself remove the causes of (A)original offending and the greater problem of alienation from the criminal justice system" ... "Sentencing judges are among those decision makers who have the powers to influence the treatment of Aboriginal offenders in the justice system. They determine most directly whether an Aboriginal offender will go to gaol or whether other sentencing options may be employed which will play perhaps a

stronger role in restoring a sense of balance to the offender, victim and community and in preventing further crime.”

Stephen Norrish QC