

Sentencing Indigenous offenders

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Introduction

When sentencing Indigenous offenders, courts in Australia and New Zealand do their work in the knowledge that the rates of Indigenous imprisonment are much higher than the rates for the community as a whole. This brief seeks to provide an evidence base for the development of law and policy by highlighting some key issues concerning the sentencing of Indigenous offenders. It first outlines the statutory frameworks that are in place in Australia and New Zealand. Second, it discusses the development of common law principles relating to the sentencing of Indigenous offenders, focusing on the relevance of Indigenous status and Indigenous laws (often called customary law) and cultural practices. Finally, it reports on the results of statistical studies of sentencing of Indigenous offenders.

While the brief only examines the sentencing stage of the criminal justice process, it is important to note that this stage is the culmination of a number of earlier procedures and decisions. Decisions are made by legislators about the criminalisation of certain behaviours, maximum penalties and whether sentencing is to be discretionary, subject to guidelines, or mandatory. Decisions are made about the deployment of police in certain places, and about the exercise of police discretion to impose on the spot fines, to charge or not

charge, to divert or issue a warning. Prosecutors must also make choices about whether to proceed. Judicial officers make decisions about bail, the admissibility of evidence and, in the lower courts, guilt or innocence. Certain sentencing options, such as home detention, periodic detention, and community service, are available in some geographic locations but not others (see RCIADIC 1991, Snowball 2008). All of these decisions affect the position of a person who is to be sentenced. It is beyond the scope of this brief to discuss how the Indigenous offender might be particularly affected by the exercise of these many discretions. Discussion of some of these can be found in Edney and Bagaric (2007). The brief is specifically focused on the sentencing variables of Indigenous status, cultural practice and Indigenous laws.

The statutory framework

Sentencing in Australia and New Zealand operates within statutory frameworks: *Crimes Act 1914* (Cth), *Crimes (Sentencing) Act 2005* (ACT), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1992* (Qld), *Criminal Law (Sentencing Act) 1988* (SA), *Sentencing Act 1997* (Tas), *Sentencing Act 1991* (Vic), *Sentencing Act 1994* (WA), *Sentencing Act 2002* (NZ). The purposes of sentencing include

deterrence, the protection of the community, the rehabilitation of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community: Cth s16A, ACT s7, NSW s3A, NT s5(1), Qld s9(1), SA s10, Tas s3, Vic s5, NZ s7.

Sentencing statutes set out some of the matters that must be taken into account by judicial officers in the sentencing process. The statutes vary, but most include the maximum penalty for the offence, the nature of and harm caused by the offence, the identity and age of the victim, the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, and remorse (Cth s16A, ACT s33, NSW s21A, NT s6A, Qld s9(2), SA s10, Tas s9, WA ss7, 8, NZ ss8, 9). Courts have discretion to take into account a wide range of aggravating and mitigating factors relevant to the offender and the offence. These increase or reduce a sentence respectively.

In three Australian jurisdictions and New Zealand, legislation refers specifically to the offender's cultural background. The ACT legislation specifies that the court must consider whether the cultural background of the offender is relevant (s33(m)). Courts in Queensland, when sentencing an Aboriginal or Torres Strait Islander person, must have regard to submissions made by a representative

of the community justice group in the offender's community, including 'any cultural considerations' (s9(2)(p)). In the Northern Territory, a sentencing court may receive information about an aspect of Indigenous customary law, or the views of members of an Indigenous community, but only where certain procedural requirements have been fulfilled (s104A). In New Zealand, the court 'must take into account the offender's personal, family, *whanau* [Māori extended family], community, and cultural background in imposing a sentence' (s8(i) and s27). More recently, in 2006 and 2007 the Australian Government passed the *Crimes Act 1914* (Cth) s16A(2A) and the *Northern Territory National Emergency Response Act 2007* ('NTNERA') (Cth) s91, which limit the use of 'customary law or cultural practice' in sentencing and bail considerations.

Law reform commissions have pointed to the need for sentencing principles to accommodate the unique circumstances of Indigenous offenders. The Australian Law Reform Commission (1986: [517]) and the Law Reform Commission of Western Australia (2006: 183) recommended that the cultural background of the offender should be included as a relevant sentencing factor in legislation. This recommendation has not been acted upon in Western Australia and has been rejected at a Commonwealth level. In New South Wales, the Law Reform Commission concluded that it was unnecessary for legislation to refer specifically to the sentencing of Indigenous offenders because it is covered by the common law (New South Wales Law Reform Commission 2000: [2.47], [3.88]).

Courts are required to give 'careful attention' to maximum penalties (*Markarian v R* 2005: [31]). Where maximum penalties have increased, courts are expected to give effect to the legislature's intention that penalties should increase (*R v Way* 2004: [52]). For example, penalties in New South Wales have increased in recent times (Indyk & Donnelly 2007), and it is likely that these increases have contributed to the increased imprisonment rates of Indigenous people.

Mandatory penalties are part of the statutory framework in the Northern Territory and Western Australia. In Western Australia, a person convicted of home burglary who is a repeat offender must be sentenced to at least 12 months imprisonment and that sentence must not be suspended (WA s401(4)). In the Northern Territory, offenders convicted of aggravated property offences, certain violent offences and sexual offences must be sentenced to imprisonment (NT ss78B-BB).

Nevertheless, there is a common law principle that imprisonment is a sanction of last resort (*Parker v DPP* 1992). This principle has been enacted in legislation in the Commonwealth (s17A), NSW (s5(1), Qld (s9(2)(a)), SA (s 11), Vic (s5(4)), WA (s6(4)) and NZ (s8(g)).

Sentencing principles and Indigenous offenders

Justice Brennan of the High Court of Australia stated in *Neal v R* (1982: 326) that:

The same sentencing principles are to be applied, of course, 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, ... , 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.

This point was reiterated by Justice Eames in *R v Fuller-Cust* (2002: [80]) who cautioned against 'a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored'. He stated that:

to ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself (2002: [79]).

The 'material facts' that have been found to be relevant in sentencing Indigenous offenders can be grouped into three categories:

- the severe social and economic disadvantage, accompanied by endemic alcohol abuse, that exists in some Indigenous communities
- the existence of Indigenous laws and cultural practices which explain the offender's motivation for committing the offence
- the dispensation of punishment by community members pursuant to Indigenous laws.

Each of these is discussed further below.

Indigenous disadvantage as a mitigating factor

There has been a long history of taking the disadvantage experienced by Indigenous people into account in Australian courts. In *Juli v R* (1990), the Western Australian Court of Criminal Appeal cited cases on the issue going back to 1957. In *Juli* the court found that while drunkenness is not normally an excuse or mitigating factor, where the alcohol abuse reflects the offender's socio-economic circumstances and environment, it may be relevant as a mitigating factor. In *Rogers & Murray v R* (1989), the same court referred to the grave social problems caused by the use of alcohol in Aboriginal communities. Justice Malcolm noted that the mitigating factor is not 'the mere fact that the offenders concerned were aboriginals' but 'the social, economic and other disadvantages which may be associated with ... a particular offender's membership of the Aboriginal race' (1989: 307).

In Queensland, the Court of Criminal Appeal in both *R v Friday* (1984) and *R v Bulmer* (1986) referred to the court's practice of imposing more lenient sentences on Aboriginal defendants, but noted that concern for the victim and deterrence must not be neglected. More recently, the courts have held that while the personal disadvantages experienced by an

offender are relevant, the mere fact that an Aboriginal offender comes from a disadvantaged community does not lead to a lower sentence: *R v Daniel* (1998), *R v KU* (2008).

In *R v Fernando* (1992), Justice Wood of the New South Wales Supreme Court set out eight principles relevant to sentencing disadvantaged Indigenous offenders (1992: 62). He drew on precedent from *R v Yougie* (1987: 304) in which the Queensland Court of Criminal Appeal stated that 'it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals' that have 'placed heavy stresses on them leading to alcohol abuse and consequential violence'.

In *Fernando* (1992), Justice Wood held that the equal treatment of Indigenous offenders required, where relevant, consideration of their subjective circumstances, including their Indigenous background where it threw 'light on the particular offence and the circumstances of the offender' (1992: 62). He stated that where alcohol abuse reflected 'the socio-economic circumstances and environment in which the offender has grown up' it should be taken into account as a mitigating factor (1992: 60). He accepted that problems of alcohol and violence 'go hand-in-hand' in Indigenous communities (1992: 62). Justice Wood pointed to the need to consider rehabilitation orders because recognition of the relationship between alcohol abuse and violence in Indigenous communities requires 'more subtle remedies' than imprisonment (1992: 62, 63). These principles were later adopted by the New South Wales Court of Criminal Appeal in *R v Stone* (1995: 224). The *Fernando* principles continue to be applied by the contemporary New South Wales Supreme Court: *R v Bashford* 2007: [45]-[46]; *R v F.A.P.* 2007: [39]; *Waters v Regina* 2007: [39].

A number of New South Wales decisions since the late 1990s have narrowed the application of the *Fernando* principles. A distinction has been made between 'full' and 'part' Indigenous people, and between people in remote and urban Indigenous communities, to exclude the latter categories from the benefit

of *Fernando* (*R v Ceissman* 2001; *R v Morgan* 2003: [22]; *R v Newman, R v Simpson* 2004). Edney (2006a: 8) argues that these cases attempt 'to confine the reach of *Fernando* by fundamentally misapprehending the nature of Indigenous identity in a post-colonial society'. In *R v Smith* (2003: [53]-[54]), Justice Lander pointed to anthropological evidence that 'urban Aboriginal' people face a 'social predicament' in which there are 'complex rules of kinship which determine, govern and influence an individual's fundamental roles in their society'.

In *R v Pitt* (2001) and *R v Walter & Thompson* (2004), the New South Wales Supreme Court and Court of Criminal Appeal respectively held that the requisite disadvantage for an Indigenous person must be exceptional. For example, where offenders had achieved a reasonable level of schooling (such as completed Year 10), courts do not afford leniency: *Anderson v R* (2008: [24]-[25]); *Croaker v R* (2008: [6]-[7]); *R v Knight* (2004: [14]).

The South Australian courts have relied on *Fernando* in *Ingomar v Police* (1998), *Police v Abdulla* (1999) and *R v Tjami* (2000). In *Abdulla*, the South Australian Supreme Court held that the *Fernando* principles should receive 'broad application' beyond 'Aborigines living in the more remote communities' ([34]-[35]), and the Court of Criminal Appeal has noted that these principles were 'not restricted to traditional aboriginals' (*R v Smith* 2003: [60]).

Some decisions of the Northern Territory courts focused on the despair arising from cultural breakdown that leads to alcohol abuse (*R v Benny Lee* 1974; *R v Herbert & Ors* 1983; *Robertson v Flood* 1992). Part of the judicial rationale was that in these circumstances, imprisonment was unlikely to be an effective deterrent (*R v Davey* 1980). However more recently, courts have placed greater emphasis on the adverse impact that a disadvantaged community has on victims of crime. This has meant that disadvantage is no longer relied on as a significant mitigating factor. Courts seek to send a deterrent

message to the community and focus on the seriousness of the offence, especially in terms of its harm on the victim: *Amagula v White* (1998); *Wurramara v R* (1999). The Northern Territory Supreme Court has noted that 'generally speaking, penalties for violent crimes have increased since *Wurramara* was decided in 1999' (*Massie v R* 2006: [24]; *R v Bara* 2006: [23]).

In Victoria, the Court of Appeal has indicated that 'the social and economic disadvantages often found in indigenous communities are powerful considerations': *DPP v Terrick* (2009: [50]). The courts have also taken into account disadvantage arising from membership of the stolen generations: *R v Mustey* (2001; [13]); *Fuller-Cust* (2002: 520), see further Edney 2003 and 2006. However, where the offender has prior convictions, the weight that can be given to a deprived and dysfunctional background is reduced: *DPP v Terrick* (2009: at [61]).

The ACT Supreme Court recently held that the *Fernando* principles are relevant to violent, alcohol-related offences committed within Indigenous communities, and not to property offences committed to fund a heroin addiction: *Crawford v Laverty* (2008).

New Zealand courts, while required by statute to take into account the offender's personal, family, *whanau*, community, and cultural background (see for example *R v Broderson* 2009), have not made specific reference to the disadvantage faced by Māori offenders.

The courts must determine whether Indigenous sentencing considerations apply to the *individual* Indigenous offender, and how these considerations will affect the penalty. It is not sufficient to show that an offender lives in a deprived and dysfunctional community: *R v Daniel* (1998), *R v KU* (2008). Courts have acknowledged that Indigenous people are not homogenous and the individual characteristics of each offender must always be considered: *R v Woodley, Boogna & Charles* (1994); *Russell v R* (1995).

Cultural explanations for offending

Indigenous law and culture are relevant to a sentence where they explain an offender's motive: *R v Davey* (1980). Where an offender believed, based on 'the old people's ways' that setting fire to a house was the only way to set a dead friend's spirit at peace, the South Australian Supreme Court showed leniency: *Goldsmith v R* (1995). Similarly, in *R v Shannon* (1991) the offender's fear of *kadaitcha* men explained some of his offending behaviour and the penalty was reduced on appeal. The New Zealand High Court took a similar approach in *R v Rawiri* (2009) where a Māori offender committed manslaughter out of a belief that the victim was possessed by spirits. In *R v Rawiri* (2009: [2], [14]-[15]) the court viewed the 'context' of the defendants' belief that the victim was cursed by *makutu* – an evil spirit that Māori people had feared for centuries – as relevant to mitigation. The response of drowning the victim had been informed by Māori culture and concern for the victim, rather than 'warped ideology with no regard for others' (2009: [88]). Nonetheless, the court cautioned against over-emphasising culture: 'whilst the offenders' culture provided a context, it would [be] wrong for the offenders to hide behind it' (2009: [100]).

In a number of cases in the Northern Territory Court of Criminal Appeal involving statutory rape of the defendants' promised (or actual) wife in Indigenous law, the courts have considered submissions that the fact that the defendant was acting in accordance with Indigenous law is a relevant mitigating circumstance: *Hales v Jamilmira* (2003); *R v GJ* (2005). In these decisions the court held that while culture is relevant, the principles of deterrence and the protection of the victim are paramount. These cases have been criticised for paying too little attention to the rights of the child victims and for ignoring the views of Aboriginal women who say that their culture does not condone violence against women and children (McGlade 2006, Howe 2009).

As noted above, the Australian Government has legislated to prevent the courts from taking into account customary law or cultural practice as a reason for excusing criminal behaviour, or lessening or aggravating the seriousness of criminal behaviour (*Crimes Act 1914* s16A(2A) and *NTNERA 2007* s91). The purpose of the legislation, as stated in the explanatory memorandum (Australia. Parliament 2006) to the *Crimes Act* amendments, was to 'ensure that proper sentences are given to offenders' and particularly that the law covering crimes of family violence and child abuse in Indigenous communities 'reflects their seriousness'. Concerns have been raised that the legislative restrictions would prevent courts from considering relevant facts, and thereby produce 'yet another way Aboriginal people do not stand substantively equal before the law' (Southwood 2007). In the case of *R v Wunungmurra* (2009), where the defendant sought to introduce evidence about cultural law and practice, the NT Supreme Court held that the evidence could not be introduced for the purpose of establishing the objective seriousness of the crimes committed by the defendant. However no objection was raised by the prosecution to hearing the evidence for the purposes of providing a context and explanation for the crimes, to establish that the offender did not have a predisposition to engage in domestic violence and was unlikely to reoffend, to establish the offender had good prospects of being rehabilitated, and to establish the defendant's character.

Taking traditional punishment into account

For most of the 1980s and 1990s, courts regarded the dispensation, or prospective dispensation, of punishment under Indigenous law (referred to as 'traditional punishment') as a mitigating factor. Northern Territory courts in particular have discounted sentences where the offender has undergone or will undergo traditional punishment involving shaming, exile, compensation and spearing.

Judges discounted sentences on the basis of double jeopardy, the function of traditional punishment in restoring communities and offenders, and because traditional punishment was a material fact of the defendant's community circumstances: *R v Mamarika* (1982); *Jadurin v R* (1982); *R v Minor* (1992); *Munugurr v R* (1994); *R v Miyatatawuy* (1996); *R v Poulson* (2001). Taking traditional punishment into account also recognises the collective responsibility that Indigenous communities accept for offences, and the need to atone to the Indigenous communities (see Fryer-Smith 2002: 5). Courts have noted that there should be evidence that assaults are in fact the implementation of Indigenous law rather than retaliation: *R v Mamarika* (1982: 357). Courts have also stressed that 'the views, wishes and needs of the community ... cannot prevail over what is a proper sentence': *Munugurr v R* (1994: 71); *R v Minor* (1992).

Courts in some cases went further by structuring sentences to facilitate traditional punishment (*R v Mamarika* 1982; *Munugurr v R* 1994), or directing elders to integrate young offenders into Indigenous practices (*Jabaltjari v Hammersley* 1977). Courts have made attending a meeting between clans a condition of a bond: *Munugurr* (1994 at 77). The courts have also asked corrections officers to report to the court on whether traditional punishment occurred: *R v Walker* (1994).

In New Zealand, there has not been equivalent recognition of Māori community punishment. However, New Zealand courts have imposed non-custodial sentences where the offender's community would invoke the offender's Māori culture and enforce 'a more stable and more responsible lifestyle' (*R v Nathan* 1989). In *R v Huata & Huata* (2005: [138]), the Auckland District Court noted that the defendant 'will suffer under the Māori criminal institution of whakamaa or shame, and will have to carry that for the rest of her life'. However, because the defendant was supported by others, the effect of shame was not a significant consideration for sentencing.

Sentencing statistics

In both Australia and New Zealand, Indigenous people are imprisoned at much higher rates than non-Indigenous people. In New Zealand, the rate of Indigenous imprisonment is stable with Māori making up approximately 50% of all those sentenced to imprisonment in both 2000 (Spier 2001) and 2006 (Morrison et al 2008), yet only 14.6% of the population is Māori. In Australia the Indigenous adult imprisonment rate is thirteen times higher than the non-Indigenous imprisonment rate. The Indigenous imprisonment rate rose 37% between 2001 and 2008 while the non-Indigenous imprisonment rate rose by only 8% (Fitzgerald 2009). There is considerable discussion as to whether these imprisonment rates are due to different offending rates or direct and indirect discrimination within the criminal justice system, or a combination of the two (see further Morrison 2009, Blagg et al 2005). This research brief will not explore this debate, but will review the studies which attempt to determine whether bias in sentencing contributes to high imprisonment rates.

In New Zealand, studies that control for the seriousness of the offence and prior offending have produced mixed results. Lovell and Norris (1990) studied male offenders aged 10-24 and found that Māori offenders were more likely than non-Māori offenders to receive a custodial sentence, after controlling for the nature of the offence and the age and prior offending of the defendant. However Deane's study of 362 people sentenced in 1989 in one District Court found no evidence of discrimination between Māori and non-Māori (Deane 1995). A study of 300 000 cases involving imprisonable offences in 1983, 1987, 1991 and 1995 found that, after controlling for relevant legal variables, the use of imprisonment did not differ between ethnic groups, but Māori were more likely to be sentenced to periodic detention and community programs, and less likely to be fined (Triggs 2009).

A number of Australian studies have compared Indigenous and non-Indigenous sentencing outcomes.

Taking into account the seriousness of the offence and the offender's criminal history, Luke and Cunneen (1998: 80) found that in the Northern Territory imprisonment was used as a sentencing option twice as much for Indigenous offenders as for non-Indigenous offenders. Indigenous offenders were also sentenced to prison at an earlier stage of their offending history (1998: 58). A subsequent study by Snowball and Weatherburn (2007: 286) on sentencing Indigenous offenders in New South Wales, found that there was 'some residual effect of race on sentencing', which meant that 'racial bias may influence the sentencing process even if its effects are only small'. Jeffries and Bond's study of sentencing in South Australia from 2005 to 2006 reveals that, after controlling for offender, case and court processing characteristics, Indigenous people were much *less* likely to receive prison sentences. However those who were sentenced to prison were likely to receive *longer* sentences than non-Indigenous people (2009). The same authors examined the sentencing of Indigenous and non-Indigenous women in Western Australia and found that, after controlling for offending behaviour and history, Indigenous women were less likely than non-Indigenous women to be sentenced to imprisonment (Bond & Jeffries 2009). All of these studies used different methods, examined different time periods and different jurisdictions, and further research would be required to reconcile their results.

The NSW Bureau of Crime Statistics and Research 2009 report on New South Wales Indigenous offenders revealed that between 2001 and 2008 its Indigenous prison population increased by 56.4% (Fitzgerald 2009: 4). The author attributed the growth to an increase in the proportion of Indigenous offenders given a prison sentence and the length of the prison terms imposed, rather than an increase in the conviction rates (Fitzgerald 2009: 5). Therefore, the results suggested 'that the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending', with

a 'greater impact on the Indigenous prison population than on the non-Indigenous prison population'. Furthermore, sentence lengths have increased for the same types of offences.

Significant differences also emerge with juvenile offenders. A study by the Judicial Commission of New South Wales of juveniles before local courts found that Indigenous juveniles were no more likely to be subject to a control order (detention) but were more likely to receive community service orders and supervised orders than their Anglo-Australian matched counterparts, and less likely to be fined (Gallagher & Poletti 1998). An Australian Institute of Criminology report found that in Western Australian Children's Courts, 25% of Indigenous male offenders and 13% of Indigenous female offenders were sentenced to custody, compared with 9% and 4% for their non-Indigenous counterparts (Richards 2009: 93). However, there remains a need for longer-term studies across all jurisdictions, particularly Western Australia, which has the highest rate of Indigenous incarceration (ABS 2008), and in the Northern Territory, which has the fastest rate of growth in Indigenous incarceration.

In 1991, the RCIADIC noted that the availability of sentencing statistics which distinguished between Indigenous and non-Indigenous offenders was "quite unsatisfactory", particularly in relation to people sentenced to non-custodial options. It remains the case that information about offenders sentenced to non-custodial options is not available.

Conclusion

This brief has summarised the main issues arising in relation to sentencing Indigenous offenders in Australia and New Zealand. For a more detailed analysis of the complex matters relating to the relationship between the general Australian law and Indigenous law, the reports of the Australian, New South Wales and Western Australian law reform commissions are recommended. For discussion of the innovations taking place in Indigenous sentencing courts, see Marchetti's 2009 research brief for the Clearinghouse.

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