The leniency debate: a non sequitur

In recent weeks there has been debate regarding leniency in the sentencing of Aboriginal offenders. This issue is not new.

Certainly in recent years commentators, politicians and women's groups have made the point that in view of the gross criminal rates in Aboriginal communities, in particular regarding domestic violence, the sentences handed out to male Aboriginal offenders are inadequate and non-deterrent.

It is also argued they are unfair in that they are less than what non Aboriginal offenders would receive for similar crimes. Further argument is that such leniency means offenders are released earlier and thus endanger their victims to further abuse, assaults, etc. The general thesis, it would appear, is **that by treating Aboriginal offenders leniently the Courts are aiding the perpetuation of gross levels of violence, especially against women.** (writer's emphasis)

This emerged recently following the publication of the journalist, Rosemary Neill's book *White Out - How politics is killing Black Australia.*

Ms Neill makes the point there is in Australian society, for various unsatisfactory reasons, a code of silence in operation regarding certain Aboriginal issues. She calls it "Politically Correct Neglect".

Sentences regarding Aboriginal domestic violence and crimes of violence generally is one such issue. If anything, figures indicate increases in Aboriginal crime including domestic and sexual crimes of violence. This deterioration in Aboriginal communities has been described by one commentator, Sydney based academic Colin Tatz, as a "crisis of violence to self and kin".

This issue is a very difficult and complex one. It carries with it highly emotive and political connotations and it necessarily bears strict analysis.

As regards neglect through political correctness, Ms Neill undoubtedly has a valid point. It has also been exposed by her colleague, Paul Toohey, in the same newspaper.

Both sides of politics have been exposed as wanting on these matters.

New ideas are at last being suggested and indeed acted upon. (Refer the Queensland Government's Response to the Fitzgerald Cape York Justice Study Report's Recommendations into substance abuse in Cape York, much of which is based on Noel Pearson's new ideological and practical approach).

However, having conceded that, the way this debate on sentencing Aboriginal offenders has been presented is very much putting the cart before the horse. In fact, it's questionable whether in reality the two are actually harnessed!

To posit the thesis that Judges' sentences are aiding such a violent malaise is really missing the point.

Nevertheless the point has been made and it's incumbent upon legal commentators and the profession generally to contribute. A strict and proper analysis of the sentencing of Aboriginal offenders in its historical perspective is, therefore, required.

If it's to be further conceded at the beginning that leniency has played its part in the sentencing of Aboriginal offenders the question begged is, "why so?"

The answer should begin firstly with the judicial oath:

> *"... I will do right to all manner of people according to law without fear or favour, affection or ill will. So help me God!"* The judicial oath of Northern Territory Supreme Court Judge: Schedule to the Northern Territory Supreme Court Act.

The application and observance of that oath has to be seen within the application of general and specific sentencing principles.

The next relevant general sentencing principle is to be found in the famous Aboriginal High Court case of *Neal v The Queen* (1982) 149 CLR 305 at 326 when Justice Brennan stated:

> *"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, 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."*** (Writer's emphasis)

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This approach has led, where appropriate, to reduction in sentences due to the Aboriginality of the offender and/or offence. Aboriginality *per se* can be relevant for various differing reasons including, for example, the taking into account of customary law.

If you've already been effectively punished under customary law or you will be in the future then that can reduce your sentence from the court.

Other aspects of Aboriginality *per se* have been included to reduce a sentence; the imprisonment of some traditional Aboriginal offenders involving taking them away from land, kin and language has been considered harsher than for non Aboriginal offenders and, therefore, to some degree lessened. Aspects such as these are outlined in the recent NSW case of *R v Fernando* (1992) 76 A Crim R 58 where Wood J at 62 lays down eight propositions.

Space prevents detailing all of them.

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However, here are parts of some to give a general flavour.

As regards the problems of alcohol abuse and their potential effect on sentencing:

> (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 their cure requires more subtle remedies than the criminal law can provide by way of imprisonment."
>
> (E) " ... 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 worse effects."

Lest it be said all aspects are mitigatory, Justice Woods states this on deterrence:

> (d) "... 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."

In similar vein from our Supreme Court Justice Muirhead had this to say as regards domestic violence:

> *"Sitting as a Judge of this Court I am just not prepared to regard assaults of Aboriginal women as a lesser evil to assaults committed on other Australian women, because of customary practices or lifestyles, because of what at times appears to be the almost hopeless tolerance or acceptance by some Aboriginal people to drunken assaults of this nature." R v Edwards Unreported 16 October 1988.*

These propositions merely posit a classic application of sentencing discretion with each case being decided upon its own particular facts and circumstances. That approach to sentencing is sound, proper and principled.

Of course, that explanation, in 2002, provides little comfort to the critics of such sentences. Their argument is that less worth is given to the Aboriginal victims. That interpretation may be open but it's not the rationale for the development of the sentencing approach. Apart from anything else for sentences which are *"grossly inadequate"* the Crown can appeal as of right. Likewise if there are any legal errors in the sentencing judge's approach. Remedies are, therefore, available in law.

Much as there is substance in the observation that lenient sentences reflect less value given to Aboriginal victims of crime, it doesn't follow that increasing such sentences will reduce those types of crime. That is where this issue tends to be misleading. Sentencing isn't the cure or even part of the cure to treat the huge dysfunctional problems which give rise to these gross crimes and their prevalence.

Only this year Chief Justice Martin in *R v Gavin Yunupingu*, in a sentence for dangerous act causing death said:

> *Courts see the offender at the end of a long road inevitably leading to the tragic event. Courts cannot provide the whole answer.*

Of course it is the cause and effect debate which is the *real* issue. A very large component in that debate is substance abuse which continues to dominate communities where these crimes occur. Nevertheless, the critics reasonably state that, if anything, such crimes are on the increase and the present sentencing practices, however they have evolved, are now "inadequate".

Throughout the years Territory Judges and Magistrates, including all the present ones, have, in their remarks on passing sentence on Aboriginal offenders, consistently bemoaned this all important feature (cause) and cried out to the Executive as well as the communities themselves for action.

Muirhead J in the case of *R v Mungkuri and Roger* (1985) 12 ALB 11:

> *As is usual in this depressing frequent type of offence* (manslaughter) *the root cause was alcohol. For over 10 years sitting in this Territory, having endeavoured to draw attention to the need for something to be done about the marketing, the regulation and supply of alcohol, particularly to our Aboriginal community, the need for detoxification units, more treatment and rehabilitation centres. I have not been alone in this exercise but it has been entirely fruitless. The Courts can achieve little, if nothing. The Aboriginal Councils appear to recognise the problem and it is the Aboriginal people who almost entirely suffer its consequences. One can only keep hoping that at national level there will be recognition of the seriousness and complexity of the problems coupled, I hope, with some action.* (Refer Martin CJ's remarks above.)

If the proposition that current sentences perpetuate the gross levels of crime then what follows is that increased sentences would stop that and, indeed, act to reduce those crime rates.

The efficacy of deterrence via high jail sentences is highly questionable. The rationale does, of course, have logic. Lock everybody up forever and they won't offend again. Also their victims are forever safe. People in the community will get the message. Nevertheless Justice Muirhead of our Court has called it "fanciful " and Magistrate McGregor in his retirement remarks given at the Supreme Court on 6 August 2002 pointed out that the rationale behind general deterrence just doesn't hold water.

Thankfully our sentencing jurisprudence does not operate like that: many other aspects as outlined earlier play their respective roles.

To suggest that increasing the length of sentences for such offenders is going to reduce such crimes in Aboriginal communities is largely a non sequitur. As it happens sentences nowadays across the board are being increased. This includes sentences of Aboriginal offenders.

Australian jails still teem with Aboriginal prisoners and their disproportion has not been reduced at all since the Royal Commission into Aboriginal Deaths in Custody reported about 20 years ago. The theory that more jail and longer jail for Aboriginal offenders is of superficial worth and little efficacy. The real issue is the cause and effect debate. The present NT Parliamentary Committee examining substance abuse in Aboriginal communities may be able to produce relevant recommendations from which Government can then effectively address the real issue. ①