Customary Law and the Recognition of Systemic Disadvantage in the Sentencing of First Nations Persons[1]

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It was a little less than 30 years ago that the High Court declared the legal notion of *terra nullius* was inapplicable to the continent of Australia.[2] Before the decision in *Mabo No. 2* on 3 June 1992, the common law of Australia, in the face of overwhelming evidence to the contrary, presumed that before European settlement Australia was 'nobody's land'.[3] A necessary corollary of this presumption was that the common law of Australia could not recognise any of the laws and customs of this land's First Peoples – an uninhabited land could hardly have produced a set of rules and laws. It can be no surprise that the fiction of *terra nullius* survived for 200 years after the first European colonisers arrived. Without it, a polity that professed to follow the 'rule of law' would not have been able to dispossess the First Peoples of their land.

The recognition of a form of native title by the High Court in 1992 may properly be described as a watershed moment. For the first time an important aspect of customary law was accepted as part of the common law of Australia.[4] As the preamble to the *Native Title Act 1993* (Cth) recorded (emphasis added):

> The High Court has … held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, <u>in accordance with their laws and customs</u>, to their traditional lands.

Of course, what the law called 'native title' is but a small part of a complex web of customary law that existed for thousands of years prior to colonisation. The First Peoples followed customs relating to diverse topics, such as marriage,[5] distribution of property upon the death of a person,[6] the shared care of children,[7] and the resolution of disputes.[8] This paper is concerned with one aspect of customary law: that concerning

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* Judge of the District Court of Queensland. I acknowledge the assistance provided by my associate, Jordan Lee, in researching and preparing this paper.

1 I have adopted the terms First Peoples or First Nations to refer to all those who continuously inhabited this land from a time many thousands of years before colonisation. I acknowledge that these peoples, including Aboriginal and Torres Strait Islander peoples, are diverse groups, each with their own stories, culture and history.

2 (1992) 175 CLR 1.

3 *Mabo No. 2*, [28].

4 Though it is to be noted that a subsequent, and somewhat desultory, attempt to invoke the reasoning in *Mabo* to support recognition of customary criminal law was rejected by Mason CJ in *Walker v New South Wales* (1994) 182 CLR 45.

5 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Law' (Report No 31, June 1986) (ALRC Report), [223].

6 Ibid, [331].

7 Ibid, [344].

8 Ibid, Chapter 28.

crime and punishment. In it I will discuss four broad topics. First, I will say something of the approach of Australian Courts to criminal sentencing practice in the decades preceding *Mabo No. 2*, including the limited extent to which customary law had been acknowledged. Next, I will consider how this changed to an extent during the 1990s with recognition by Courts that the disadvantage suffered by a First Peoples offender was a persistent mitigating circumstance. Thirdly, I will discuss more recent statutory reform which, while not seeking to incorporate customary law, emphasises the important role that community and culture plays in criminal sentencing when the offender identifies as a First Nations person. Finally, I wish to attempt to draw some of these threads together to identify ways that we, as lawyers, might make better use of the powerful resource that exists in the diverse cultures of First Nations peoples.

The early approach to customary law in criminal sentencing

It would be possible to select any one of many starting points when considering the intersection of customary law and criminal sentencing under European notions of justice. Arguments could be made in favour of commencing in 1788 at Botany Bay and Port Jackson, or 1823 with the establishment of the Supreme Court of New South Wales, or 1856 when Samuel Milford was appointed Resident Judge in Moreton Bay.[9] I have chosen to commence in the 1970s. This was immediately after the 1967 referendum in which Australians voted overwhelmingly in favour of amendments to the Commonwealth Constitution to allow the Commonwealth to legislate for the benefit of First Peoples.[10] It coincided with a growing appreciation of the discriminatory practices endemic in the treatment of First Peoples and growing activism to combat its effects. It was also a period of increasing refinement in jurisprudence concerning criminal sentence and nascent statutory intervention. These factors make the 1970s a suitable place to begin a survey of the relevant cases.

Any such discussion must begin with *R v Sydney Williams*.[11] In its day, the sentencing of Williams caused considerable controversy. He was a Pitjantjatjara man living near the southwest coast of South Australia. He beat a woman to death in circumstances where he claimed she had taunted him with her knowledge of tribal secrets that women were not supposed to know. A plea to manslaughter was accepted, seemingly on the basis of this provocation. During counsels' submissions on sentence there was reference to the possibility of traditional punishment being meted out to Williams separately to any sentence imposed by the Court. I have not been able to discover the nature of the

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9 Milford did not travel to Moreton Bay immediately. He was sworn in on 15 April 1857 and served for two years before being replaced by Alfred Lutwyche QC in 1859. Milford was the grandfather of Adolph and Arthur Feez. After separation, Lutwyche went on to serve as the first Justice of the Supreme Court of Queensland.

10 Overall, 90.77% of voters were in favour. The statement that the amendment permitted the Commonwealth parliament to legislate for the benefit of First Peoples is something of a gloss. First, the words removed from the Constitution referred only to the 'aboriginal race' and 'aboriginal natives'. There was no mention of Torres Strait Islander peoples. Secondly, the power to legislate was not so circumscribed. It could support legislation even if it was arguably not for the benefit of First Peoples – see *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361-362.

11 SA Supreme Court (Wells J), 14 May 1976.

punishment discussed, but it seems likely it involved ritual spearing. Justice Wells sentenced Williams to imprisonment for two years (taking into account three months in pre-sentence custody), but suspended the sentence immediately on condition that Williams

> return forthwith to his tribe, the Kokota tribe, and shall there submit himself to the Tribal Elders and shall, for a period of at least one year from this date, be ruled and governed by the Tribal Elders and shall in all things obey their lawful orders and directions.
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> In particular, he shall, while he is under the control of the Tribal Elders – and that means for at least that one year referred to – abstain from intoxicating liquor unless he is permitted to drink intoxicating liquor by the Tribal Elders and then only to the extent of any permission granted.

Wells J made no mention in sentencing Williams to any kind of traditional punishment. Nevertheless, the case was widely misreported as involving an Aboriginal man being given a suspended sentence for a killing because he would be subjected to traditional punishment. For some this was an abrogation of proper process – a concession that different rules applied to Williams as compared to the European population of Australia. For others it was an abhorrent sentence that seemingly condoned outdated notions of revenge and retribution. The decision garnered sufficient attention that the Australian Law Journal obtained a copy of the sentencing remarks and in a note[12] set out some passages, observing

> It is to be hoped that the publication in the ALJ of the remarks actually made by his Honour will serve to dispel misapprehensions concerning his order, as well as the concern engendered by such misapprehensions.

Coincidentally, not long after the decision, the Commonwealth Attorney-General referred the very large question of 'whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines' to the Australian Law Reform Commission (ALRC).[13] As part of the Commission's inquiry, they received correspondence from Wells J in which he explained that, as he recalled the proceeding, the idea of traditional punishment was 'barely alluded to' and no mention at all was made of what the Tribal Elders had in mind to do.[14] The ALRC noted as well that after the local community heard the (mis)reporting of the sentence, the 'elders were perplexed by the defence counsel's aggressive intrusion into tribal matters' and the community felt 'the whole matter had become a white-fellow exercise'. A few days after Williams returned to Yalata he was ritually speared in the leg by an Elder. The spear was thin and not barbed. Williams needed only minor medical attention. The local Superintendent thought the spearing had nothing to do with punishment, but rather was a necessary step to Williams being accepted back into the local community.

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12 (1976) 50 ALJ 381, 386.

13 Reference of Robert Ellicott QC, 9 February 1977.

14 ALRC, [492].

The *Williams* case leaves the impression that it was the result of white European men, men with little real understanding of Pitjantjatjara customary law, imposing upon a First Nations offender their own notion of justice. It was justice being done to an Aboriginal man, rather that justice working collaboratively. It was not received well by the local community and apparently had little reformatory effect on Williams, who committed further assaults in 1978 and 1980.

There were subsequent attempts by others to rely upon the *Williams* case as if it established a principle that the prospect of ritual punishment was a factor that should result in a reduction of penalty. When the issue presented itself for consideration in appellate courts, it was deftly avoided; for example, *R v Joseph Murphy Jungarai* [1982] FCA (Unreported, 4 June 1982). Jungarai stabbed and killed another man at Tennant Creek. He was charged with murder and released on bail (in part because Chief Justice Forster accepted Jungarai wished to be subjected to ritual punishment to avoid his family being the subject of 'pay back'). After his release on bail, Jungarai returned to his community and was beaten with nulla-nullas and boomerangs until he was unconscious.[15] When he came to be sentenced for manslaughter Jungarai submitted that this extra-curial punishment should result in a reduction of sentence. The sentencing judge took this matter into account but did not accede to Jungarai's submission that he be released on a suspended sentence.

Jungarai appealed to the Federal Court. An important issue was the extent to which the extra-curial punishment could or should mitigate the sentence. Toohey J (speaking for the Court) dealt with the matter this way

> The question whether courts may and should have regard to forms of punishment imposed or likely to be imposed against Aboriginal people by their own communities is a difficult one. But in the present case the Crown made no submission that the learned trial Judge should not have regard to the actions of the community. Nothing that his Honour said suggests that he gave any question of tribal punishment insufficient weight.

In other cases where the issue was raised it was dealt with under the rubric of extra-curial punishment generally.[16] Attempts to establish a separate, and wider, principle that recognised not only the punishment inflicted but also the (apparent) acceptance of a local community that the punishment was a sufficient penalty, did not find favour.

When the ALRC reported on the issue in 1986 they found widespread support for incorporating various approaches that had been worked out by courts dealing with First Nations offenders.[17] The Commission included among these principles:[18]

- Customary law practices, both where they have occurred or are likely to occur, are a relevant factor in mitigation;

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15 The reports do not make clear the extent to which this was 'ritual' punishment or simply revenge. It appears to have been a contested matter at the sentence.

16 *R v Moses Mamarika* (1982) 42 ALR 94, 99.

17 ALRC, [516].

18 ALRC, [542].

- The views of local communities about the seriousness of the offence, and the offender, are relevant to sentencing, within 'certain limits';
- Courts cannot disregard the values and views of the wider Australian community;
- Nor can the Court incorporate in sentencing orders customary law penalties or sanctions that are contrary to the general law.

The Commission recommended that these principles be formally recognised under Australian sentencing law. The extent to which this has occurred may be debated, and aspects are considered later in this paper.

Before leaving the 1980s it is necessary to consider one more case. Percy Neal was the chairman of the Yarrabah Council near Cairns. Yarrabah was at the time a Reserve. It had been established on the lands of the Gunggandji people and saw the forced relocation of Aboriginal, Torres Strait Islander and South Sea Islander peoples from other areas.[19] Mr Neal was himself an Aboriginal man. One night in June 1981 he went with others to the house of Mr Collins, the State government representative who managed the local store. He abused and spat upon Mr Collins. While Mr Collins had done nothing personally to provoke the assault, it is clear that Neal was motivated by a general discontent with the management of the Reserve. He was sentenced by a Magistrate to imprisonment for two months. Neal applied to the Court of Criminal Appeal for leave to appeal against the severity of the sentence imposed. There was no appeal by the prosecution. Nevertheless, the Court of Criminal Appeal found it had the power to increase the sentence and did so, ordering Neal be imprisoned for six months.

Neal applied for special leave to appeal to the High Court.[20] He was successful, and the orders of the Court of Criminal Appeal were quashed. The case is known for the principle that if a court on appeal proposes to pass a more severe sentence than that passed below the prisoner must be advised and given an opportunity to withdraw the appeal. The error in not doing so was sufficient for Gibbs CJ and Wilson J who otherwise did not consider it necessary to remit Mr Neal's appeal to the Court of Criminal Appeal to be decided according to law. Brennan J agreed there had been error in the Court of Criminal Appeal but thought the matter should have been remitted for reconsideration. The principal reason for remitter was that it appeared neither the Magistrate nor the Court of Criminal Appeal had properly considered the background to Mr Neal's offending. As Brennan J put it[21]

> Specifically, the question was whether the explanation for Mr Neal's conduct was some emotional stress arising from what he called in his evidence 'the paternalistic system' of life on the reserve.

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19 https://www.qld.gov.au/firstnations/cultural-awareness-heritage-arts/community-histories/community-histories-u-y/community-histories-yarrabah

20 *Neal v The Queen* [1982] 149 CLR 305.

21 Ibid, 324.

His Honour considered a sentencing court was entitled to have regard to such emotional stress when evaluating the moral culpability of an offender, citing *Veen v The Queen* (1979) 143 CLR 458. Given there were indications of 'special problems' that might have explained Mr Neal's conduct, Brennan J thought the matter should go back to the Court of Criminal Appeal to consider whether the original claim that the sentence was manifestly excessive could be made good.

It is interesting that Brennan J approached the issue through the lens of 'emotional stress'. The relevance of any special disadvantage experienced by an offender such as Mr Neal was that it may explain, and thereby reduce their moral culpability for, a crime. It was not seen as a separate circumstance warranting a reduction of sentence regardless of its connection to the offending. The ALRC considered, and endorsed,[22] what Brennan J stated in Neal, noting that while his Honour was in dissent as to the result, Gibbs CJ and Wilson J did not disagree with his remarks.

Murphy J also considered Mr Neal's circumstances and the reasons behind his offence. His Honour was, however, much more direct about its relevance. Murphy J stated that conditions on reserves and race relations constituted a special mitigating factor.[23] Citing some remarks of the Magistrate, Murphy J described them as 'patronising and insulting', saying that they 'also made clear that anyone who agitated for change … in Aboriginal communities, would be under a disadvantage in that Magistrate's Court.[24] In a statement that was to become the title of a documentary about Lionel Murphy's life, he said

> Mr Neal is entitled to be an agitator.

Having regard to the deep sense of grievance held by Mr Neal which explained the commission of the offence, and the history of the treatment of First Nations people in the criminal justice system, Murphy J would have fined Mr Neal $130, which was one week's wages.

Sir Gerard's judgment in *Neal* falls into a rare category. He disagreed as to the order and no other judge in the case expressed support for his judgment. But over time his Honour's judgment was accepted as standing for the proposition that a sentencing court can have regard to the effects of social deprivation in an offender's background as a matter in mitigation. While the decision in *Neal* did not find a majority of the Court supporting a principle that systemic disadvantage was a persistent mitigating factor, the seeds of change had been sown.

Developments in case law during the 1990s

By the early 1990s the Commonwealth government had received the ALRC report on customary law and, in 1991, the report of the Royal Commission into Aboriginal Deaths

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22 ALRC, [532].
23 *Neal*, 315.
24 *Neal*, 316.

in Custody.[25] The *Mabo* case had been progressing through the courts and in 1990 Moynihan J of the Queensland Supreme Court delivered his findings of fact upon which the decision in *Mabo No. 2* would be based. Cathy Freeman, then 16 years old, won gold in the relay at the Auckland Commonwealth Games that same year. She won individual gold in the 200m and 400m in Canada in 1994. Also in the mid-1990s, the Human Rights and Equal Opportunities Commission (HREOC) inquired into the issue of stolen generations. The commission, headed by Sir Ronald Wilson (who had sat on the High Court in *Neal*), reported in 1997. The position of First Peoples within the broader Australian community was in public consciousness as it never had been before.

On 13 February 1991, Stanley Fernando was at a house at Walgett, a small town about half-way between Moree and Bourke. The night before there had been a party and substantial quantities of beer and port were consumed. At about 6.00 am, Mr Fernando's sometime partner came into the room where he had been sleeping. For reasons known only to Mr Fernando, he said, 'I'm going to kill you,' and chased his partner from the room. Taking up a butchers knife he followed her into another room and stabbed her several times around the head and neck. Her injuries were serious, but not life-threatening – a deep laceration to the right knee and a laceration to the left side of her neck were the worst injuries. When interviewed by police Mr Fernando said he had been very drunk and had no recollection of the stabbing.

A little over a year later, in March 1992, Mr Fernando appeared before Wood J in the New South Wales Supreme Court and was sentenced for an offence of malicious wounding.[26] Wood J set out Mr Fernando's background. He was an Aboriginal man in his late 40s. He had several prior convictions, most of which stemmed from the abuse of alcohol. Mr Fernando's family was large, and his parents drank to excess. When only 14 years old he was sent by government authorities to an outback station, but at 16 moved to Queensland where he came to abuse alcohol himself. In his late teens Mr Fernando travelled with a boxing troupe. Conditions were poor and he was knocked out several times (a psychometric assessment indicated signs of organic brain damage). Returning to Walgett, he worked a variety of temporary labouring jobs but continued to drink heavily. In short, Mr Fernando had little education and fewer prospects.

Having identified these features, Wood J went on to distil eight principles from earlier decided cases. These have become known as the *Fernando* principles. It is helpful to set these out in full.[27]

> (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 offenders' membership of such a group.

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[25] James Muirhead QC was appointed Commissioner. Muirhead had been a Justice of the Northern Territory Supreme Court and the Federal Court. He was the sentencing judge in Jungarai, Mamarika, and several other decisions considered by the ALRC report on customary law.

[26] *R v Fernando* (1992) 76 A Crim R 58.

[27] *Fernando*, 62-63.

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

(G) That in sentencing an Aborigine 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 and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

It is to be remembered this was a sentencing decision delivered over 30 years ago. Some of the language has aged poorly, but the principles (largely) remain of enduring relevance. One statement of Wood J in particular bears attention; the 'recognition by the court … of the grave social difficulties' faced in some communities as explaining

resort to alcohol and resultant offending. The problems are complex, and I do not pretend to have solutions, but it is surely an indictment on our society that 30 years after *Fernando* (and 40 after *Neal*) there remain in Queensland, and Australia, communities for whom this principle remains depressingly relevant.

There is a qualification to the continuing relevance of *Fernando*. In New South Wales there have been decisions seeking to narrow its application by drawing a distinction between First Peoples who live in remote communities and those raised in urban environments. Another distinction has been made for offenders considered to be less than fully a First Nations person. For a time this produced uncertainty as to the application of *Fernando* in New South Wales. Two cases, which I will briefly mention, serve to illustrate this potential narrowing of *Fernando*.

The first is *R v Ceissman*[28]. This was a Crown appeal by the Commonwealth Director of Public Prosecutions against what was said to be an impermissibly lenient sentence. The Court of Criminal Appeal was composed of Justice Wood, who was by then Chief Judge at Common Law, Ipp AJA who agreed with Wood CJ at CL, and Simpson J who was in dissent. Wood CJ at CL explained that his decision in *Fernando* did not provide for the mitigation of punishment of all persons of First Nations descent but were intended to highlight circumstances that might explain offending by such a person.[29] His Honour did not think the fact that Ceissman's grandfather was 'part aboriginal' (this is the term used in the decision) itself attracted the application of the *Fernando* principles. Simpson J disagreed as to the result but may not have disagreed with Wood CJ at CL as to *Fernando*. The difference appears to be that Simpson J thought there was sufficient evidence of specific disadvantage connected to the offending. His Honour said of Ceissman[30]

> He grew up in extreme poverty. He was the eldest child of drug-addicted parents. The relatives with whom he was placed were his grandparents. His grandmother died when he was 10 years old. Within the next year, in separate events but within a couple of weeks of one another, both parents died of drug overdoses. He witnessed both of these deaths. Prior to their deaths, he had witnessed a number of overdoses and, on two occasions, had called ambulances for his parents. On another occasion, he witnessed his grandfather using CPR to revive his father. When he was 14, his grandfather died.
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> Both parents were imprisoned on a few occasions because of their drug addictions, and his mother worked as a prostitute. He witnessed serious physical violence between his parents. Unsurprisingly, these circumstances impacted upon his emotional wellbeing and on his behaviour as a child. His education suffered. This combination of circumstances is available to be taken into account in mitigation of the respondent's criminal culpability not because he is Aboriginal, but because, in the manner outlined by Wood J, as he then was, in *R v Fernando* (1992) 76 ACrimR 58, of the combination of circumstances of deprivation.

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28 [2001] NSWCCA 73; (2001) 119 A Crim R 535.
29 *Ceissman*, [29]-[32].
30 *Ceissman*, [55]-[56].

A couple of years later the issue arose again, in *R v Morgan*.[31] Here Wood CJ at CL again seemed to limit the relevance of Fernando to First Nations offenders from remote communities.[32] This time Simpson J agreed, without elaborating.[33] But in 2005 Wood CJ at CL retired and in 2010 the Court of Criminal Appeal heard an application for leave to appeal by Trevor Kennedy.[34] Simpson J gave the decision of the Court (Fullerton and R A Hulme JJ agreeing). His Honour highlighted Kennedy's background. He was one of eight children, born to First Nations parents in Mildura. He never knew his father and he was removed from the care of his mother when about seven years old. She was an alcoholic. He left school before completing year eight and fell into drug and alcohol abuse. By 23 he had kidney damage. His prospects of rehabilitation were not promising. Referring to *Fernando*, Simpson J said the principles have 'too often been taken to have been designed specifically for Aboriginal offenders.'[35] His Honour went on

> Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of the crime. Particularly relevant, in the circumstances of that case (and this) is the impact of alcohol addiction or dependence.

It can be seen how these decisions 'thread the needle'. Equal justice requires that no group of Australians, absent legislative remit, be singled out for special treatment. But by recognising the relevance to sentence of social and systemic disadvantage, which disproportionately affects First Nations peoples, the Court of Criminal Appeal provided a mechanism by which this factor could be taken into account.

The last significant case to consider is that of William Bugmy. He was a remand prisoner at Broken Hill. One day he was expecting visitors. As the end of visiting hours approached, they had still not arrived. Mr Bugmy asked a correctional officer if the hours might be extended and, unsatisfied with the response he received, he threatened the officer. Two other officers attended, and Mr Bugmy threatened them before throwing several pool balls from a nearby table at them. One struck an officer in the eye and caused him serious injury, including a loss of sight in the eye. Mr Bugmy pleaded guilty to two offences of assaulting a correctional officer and one of causing grievous bodily harm with intent to cause grievous bodily harm. He was sentenced in the New South Wales District Court to a maximum term of just over six years' imprisonment, with a non-parole period of four years and three months.

Mr Bugmy was an Aboriginal man raised in Wilcannia in the far west of New South Wales. Alcohol abuse and violence were common in his childhood home. He had little education and could not read or write. Mr Bugmy had himself abused alcohol and drugs from a young age. He had many prior convictions and by the time he was sentenced at

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31 [2003] NSWCCA 230; (2003) 57 NSWLR 533.
32 *Morgan*, [21]-[22].
33 *Morgan*, [46].
34 *Kennedy v R* [2010] NSWCCA 260.
35 *Kennedy*, [50].

age 29 had spent much of his adult life in custody. A psychiatrist who saw Mr Bugmy in jail thought he had symptoms of psychosis, including auditory hallucinations, which were probably of primary psychotic origin.

The sentencing judge referred to both *Fernando* and *Kennedy*. He said issues of the kind identified in those two cases were present and took Mr Bugmy's specific difficulties into account. The Director of Public Prosecutions appealed to the Court of Criminal on the basis that the sentence was inadequate. Matters were advanced as demonstrating that the sentence was inadequate, but it was not said the sentencing judge had erred in law or in fact. The Director's appeal was allowed, and the sentence increased. Mr Bugmy then sought and obtained special to appeal to the High Court. The plurality (French CJ, Hayne Crennan, Kiefel, Bell and Keane JJ) allowed the appeal on the basis that at no point had the Court of Criminal Appeal concluded the sentence was manifestly inadequate.[36] Because no specific error had been alleged, it was not enough that the Court of Criminal Appeal thought the sentencing judge had given too little, or too much, weight to relevant factors.[37]

The plurality went on to consider Mr Bugmy's submissions concerning the proper relevance of his severely disadvantaged background. He relied upon Canadian authority as supporting the proposition that it was unnecessary to establish a link between systemic disadvantage and the offence or offences for which sentence is to be passed.[38] The plurality rejected this approach, stating[39]

> There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.
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> An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.

The plurality acknowledged the reality that many First Peoples are subject to social and economic disadvantage. But they found[40]

> the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted … 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.

That is, the High Court declined the invitation to assume systemic disadvantage and treat it as a mitigating circumstance in every sentence involving a First Nations offender.

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36 *Bugmy v The Queen*, (2013) 249 CLR 571, 589 [24].
37 *Bugmy*, 588 [24].
38 *R v Ipeelee* [2012] 1 SCR 433.
39 *Bugmy*, 592 [36]-[37].
40 *Bugmy*, 594 [41].

This is not the place, and I am not the person, to venture an opinion about whether this is a good thing or a bad thing. It is sufficient to observe that views will differ, probably significantly. Some would say the opinion of the plurality reflects and essential component of our law – equal justice. To the extent an offender is to be treated differently it is because of that offender's individual circumstances, not because they identify as a member of a social or cultural group. On the other hand, some might criticise the opinion as failing to grapple with the real effects of generations of disadvantage. That debate is left to others.[41]

The plurality in *Bugmy* did clear up one other concern. In the Court of Criminal Appeal, the DPP had pressed that relevance of Bugmy's deprived background lost much of its force when viewed against the background of his previous offences. In the High Court the DPP did not seek to maintain this position. The plurality agreed that the effects of profound deprivation do not diminish with time and stated[42]

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and learn from experience. It is a feature of the person's makeup and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

Bugmy remains the last word from the High Court in this area.[43] Sentencing courts around Australia continue to have regard to the *Fernando* principles and the circumstances of the offender. In Queensland, they do so guided and assisted by statutory provisions. It is to this topic I will next turn.

Some relevant legislation

Despite what may occasionally be written in opinion columns, our courts do not usually make law. While a sentencing judge may refine or discern a principle said to be found in earlier decided cases, and appellate courts may correct or confirm this principle, it is almost exclusively for the legislative branch to provide the parameters within which courts operate. In the last 30 years sentencing principles and procedure, once left largely in the discretion of the courts, have been encapsulated in legislation. In Queensland, this is found in the *Penalties and Sentences Act 1992* (Qld) and the *Youth Justice Act 1992* (Qld). Of present relevance are section 9(2) of former and section 150(1) of latter. The

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41 I note the legal approach of the High Court to the Canadian authorities has been criticised by the Hon. Justice Stephen Rothman (*Disadvantage and Crime: The Impact of Bugmy and Munda on Sentencing Aboriginal and Other Offenders*, speech to the Public Defenders Criminal Law Conference, 18 March 2018, accessed at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Rothman_20180318.pdf)

42 *Bugmy*, 594 [43].

43 In *Perkins v The Queen* [2018] HCATrans 267 the High Court refused a grant of special leave to argue that it is not necessary to establish a causal connection between disadvantage suffered by an offender and the offending.

provisions, while not precisely identical, are functional equivalents. For convenience I will set out only the relevant part of section 9(2)

> **9 Sentencing principles**
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> …
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> (2) In sentencing an offender, a court must have regard to—
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> …
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> (p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—
>
> (i) the offender's relationship to the offender's community;
>
> (ii) any cultural considerations; or
>
> (iii) any considerations relating to programs and services established for offenders in which the community justice group participates;
> …

According to section 4, a community justice group is

> (a) a community justice group established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*, part 4, division 1, for the offender's community; or
>
> (b) a group of persons within the offender's community, other than a department of government, that is involved in the provision of any of the following—
>
> (i) information to a court about Aboriginal or Torres Strait Islander offenders;
>
> (ii) diversionary, interventionist or rehabilitation activities relating to Aboriginal or Torres Strait Islander offenders;
>
> (iii) other activities relating to local justice issues; or
>
> (c) a group of persons made up of elders or other respected persons of the offender's community.

These provisions, and their equivalents in the *Youth Justice Act 1992* (Qld), were only inserted in 2000.[44] The explanatory notes accompanying the legislation set out that it was intended to draw upon the resources of existing community justice groups to make submissions to sentencing courts. The failing of the custodial system to 'break the cycle of offending' was noted, and it was hoped that the involvement of community justice groups would provide alternative sentencing options that could lead to more effective rehabilitation. When the bill was read for the second time, the Hon M J Foley (Attorney-General and Minister for Justice and Minister for The Arts) said

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44 *Penalties and Sentences and Other Acts Amendment Act 2000* (Qld). There is also a similar provision in section 15 of the *Bail Act 1980* (Qld).

> The effect of this amendment will be that community justice groups will be able to make submissions on sentence of their own volition. The court will be required to consider their views on sentence, but, as with any other submissions made on sentence, the community justice groups will not be able to direct the court as to what the sentence should be.

It was also thought that community justice groups could advise the court of local sentencing options. In order to achieve these purposes, the words of the section were appropriately unconstrained. The requirement that the court have regard to 'any cultural considerations' is comfortably wide enough to allow a sentencing court in Queensland to apply the *Fernando* principles. A very important, and to my mind an underutilised, part of the provision is the requirement to have regard to community programs and services of offenders. Where such programs exist, they will have an important part to play in the rehabilitation of offenders.

Community justice groups operate throughout Queensland, but in my experience not all are active in providing submissions. This seems particularly the case when a First Nations offender is being sentenced in the District Court, at least in the regions I visit. There could be many reasons why this is so, but presumably funding and resourcing issues loom large. The Maroochydore Community Justice Group is, I know, active in the Magistrates Court but I have not in three years heard from them in the District Court.

The receipt of such submissions in the Magistrates Court is facilitated by a dedicated structure – at least in the 14 places where 'Murri Court' operates.[45] The Murri Court is not a true court, but rather a stream within the Magistrates Court. Offenders are referred to the program and, if considered suitable, will be offered the chance to engage with a community justice group who will meet with the offender. The expectation is that a program for the offender will be developed and executed, with the Magistrates Court monitoring progress through mentions. Ultimately a Magistrate will receive a report from the community justice to consider along with other sentence submissions when deciding what penalty to impose.[46] Monitoring of the kind employed in the Magistrates Court may not be practical in the District Court, especially in regional centres which the District Court visits less frequently. But aspects of the procedure could be usefully adapted to practice in the District Court.

It is, I think, up to practitioners in this area to identify clients who would benefit from involvement with community justice groups and to actively pursue this option. Funding will undoubtedly always be an issue, but practitioners of criminal law are nothing if not resourceful. And there can be little doubt that wider use of submissions made by community justice groups will assist courts and produce better results for offenders and their communities.

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45 Unfortunately, only six locations provide submission in relation to young offenders.

46 A helpful primer may be found in the *Murri Court Procedures Manual*, accessed at https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/493893/cip-mc-procedures-manual.pdf.

I must mention briefly the position concerning offences against Commonwealth laws. The *Crimes Act 1914* (Cth) was amended in 2006 to prohibit 'any form of customary law or cultural practice' being considered when sentencing for a Commonwealth offence.[47] As well, a court is no longer required to consider an offender's cultural background in determining an appropriate sentence. There seems no reason, however, why the *Fernando* principles would not be relevant to a First Nations offender being sentenced for a Commonwealth offence, at least where there is evidence of specific disadvantage that is causally linked to the offending.

Room for improvement?

Where do things stand now? The *Fernando* principles are well established. A First Nations offender who can be shown to have suffered systemic disadvantage in a way that explains or contributes to an understanding of the offending is entitled to have this taken into account as a mitigating factor. Queensland legislation requires a sentencing court to have regard to cultural considerations and programs available in local communities. Tools already exist to help gather and present information that can be of real assistance to a court, and an offender. Of course, there is always room for improvement. I do not intend to suggest in this paper ways in which Government policy might change or to advocate for legislative reform. That is for others. Rather I hope to identify things that can be done within existing framework to better help sentencing courts and improve outcomes for your clients.

First, educate yourselves about what is available. What are the resources that might help your client? Be proactive and inquisitive. There may be room for imaginative applications of section 9(2)(p). The phrase 'any cultural considerations' seems broad. It may be broad enough to accommodate a court recognising, and having regard to, customary law and practice, as it has been or will be applied to a particular offender. That is not to suggest that a court could condone or encourage unlawful retribution, or impose a sentence not permitted by the law.[48] But there may be scope for consideration of non-corporal extra-curial punishment (such as exclusion from community or shaming) or what might be considered forms of alternative dispute resolution.

As a practitioner you must find a way to tell your client's story in a manner that engages the court. It is common for persons standing for sentence to have difficult backgrounds. Parental separation, exposure to violence, alcohol and drug abuse, and possibly being themselves the victim of offending, are difficulties not reserved only for First Nations offenders. It is not enough to merely recite these circumstances. The question to ask, and answer, is how have the events of your client's life, over which they had no control, funnelled them toward the point where they offended? Why should they be thought less culpable, or less deserving of punishment, because of these events?

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47 Other than in relation to a short list of offences identified in section 16A(2AA).

48 Extra-curial punishment, physical or otherwise, may be a relevant factor in the sentencing of any offender: *R v Hannigan* [2009] 2 Qd R 331; QCA 40, (among other cases).

Of course, all of what I have just said may apply to any offender. But as I have noted, there are particular considerations and resources available when dealing with a First Nations offender. Seek out those resources. There is one I must mention. The New South Wales Public Defender's Office has a resource called the 'Bugmy Bar Book'. You can find it at https://www.publicdefenders.nsw.gov.au/barbook. It contains information on diverse topics, including Foetal Alcohol Spectrum Disorders, out-of-home care, exposure to domestic and family violence, and the effects of interrupted school attendance or suspension. The information is drawn from major reports or leading academic research and is vetted by senior practitioners and members of Aboriginal and Torres Strait Islander communities. You will find there as well a detailed paper on the presentation of evidence of disadvantage.[49] It is meticulously researched, well written and, notwithstanding the references to peculiar sentencing practices that occur south of the Tweed River, very helpful. The Bugmy Bar Book is an ongoing project and in due course there will be additional chapters dealing with grief and loss, and child abuse and neglect.

As always, the law in this area will continue to evolve, as will research into the extent and relevance of the systemic disadvantage suffered by First Peoples. No doubt legislation will change as well, according to the policies of the government of the day. But it will always be true that our system of equal, but individualised, justice makes room for these factors to be taken into account.

It is appropriate to end with this reminder. The cases I have discussed emphasise the difficulties and deprivation experienced by so many First Nations peoples. That suffering is real and cannot be ignored. But it is to be remembered, and celebrated, that First Nations peoples represent living, vibrant cultures throughout Australia. Theirs is a long history, one that has endured colonisation and ultimately seen vindication in decisions such as *Mabo No. 2*. It is the obligation of those who work in the criminal justice system to look to this history, culture, and community for opportunities of education, empowerment, and rehabilitation. Justice is more likely to be attained when all involved participate in, and contribute to, an outcome that is decided according to the laws that exist for all Australians.

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49 *The Bar Book Project: Presenting Evidence of Disadvantage*, Sophia Beckett (now Beckett DCJ), paper presented to the Public Defenders Criminal Law Conference 2019; accessed at https://www.publicdefenders.nsw.gov.au/Documents/The%20Bar%20Book%20Project%20Paper.pdf.