Meaningful Sentencing of Aboriginal Offenders in the Wake of *Bugmy*

Justice Tom Gray
Supreme Court of South Australia
Darwin 2013

1991 Royal Commission Report into Aboriginal Deaths in Custody

1991 Royal Commission Report into Aboriginal Deaths in Custody

"The consequence of [Australia's history since colonisation] is the partial destruction of Aboriginal culture and a large part of the Aboriginal population and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non-Aboriginal people."

– Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations* (1991) 11, [1.4.19]

Recommendation 104

- Recommendation 104 provided the impetus for the establishment of Aboriginal sentencing courts in the States and Territories of Australia.

Recommendation 104

That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.

Two Comments

- The Royal Commission followed within a decade of the High Court decision in *Neal v The Queen* (1982) 149 CLR 305.
- It might be suggested that the dissenting judgment of Murphy J had a part to play in the establishment of the Commission.

Comparing Jurisdictions

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Jurisdiction	Court Name (Jurisdiction)
Northern Territory	Community Court (Magistrates Court) – presently not operating
Western Australia	Kalgoorlie Community Court (Magistrates Court)
Queensland	None; Murri Court (Magistrates Court) recently abolished
South Australia	Nunga Court (Magistrates Courts) Section 9C Conferencing (all Courts)
Tasmania	None
Victoria	Koori Court (Magistrates Court, County Court)
Australian Capital Territory	Galambany Circle Sentencing (Magistrates Court)
New South Wales	Circle Sentencing (Local Court)

Nunga Court

South Australian Magistrates Court

Nunga Court – South Australia

- First sat in Port Adelaide June 1999.
- Port Adelaide Nunga Court in South Australia first Aboriginal sentencing court in Australia.
- The Nunga Court is a sentencing court that is available to Aboriginal persons who have pleaded guilty.
- Informal structure: Magistrate sits at associate's bench with clerk and Elders or Respected Persons. Defendant sits opposite next to defence counsel. Prosecution sits next to counsel. Members of the community who are involved in support services and correctional programs are granted permission to attend and sit in the public gallery.

Nunga Court – South Australia

- Port Adelaide: one day in every fortnight.
- Port Augusta Magistrates Court: every month.
- Murray Bridge Magistrates Court: every second month.

Section 9C Aboriginal Sentencing Conference

Section 9C of the *Criminal Law (Sentencing) Act 1988* (SA)

Section 9C – Some Facts

- *Criminal Law (Sentencing) Act 1988* (SA) amended in 2005 to include section 9C Aboriginal Sentencing Conferences.
- First section 9C Conference held in District Court on 12 April 2006 before Tilmouth DCJ – first Aboriginal Sentencing Conference in Australia in a Higher Court.
- Magistrates Court section 9C Conferences are generally convened in Magistrates Courts that do not have a regular Nunga Court sitting, and are steadily increasing in number.

Section 9C Second Reading Speech

This is a bill to provide a formal statutory backing for two practices that have developed in the courts. … The other [practice] is the use of sentencing conferences in sentencing Aboriginal defendants.

Second Reading Speech continued

… The Magistrate's Court has for some time used culturally appropriate conferencing techniques when sentencing Aboriginal offenders. These techniques are designed to promote understanding of the consequences of criminal behaviour in the accused and an understanding of cultural and societal influences in the court and thereby make the punishment more effective. The bill formalises this process. It allows any criminal court, not just the Magistrates Court, with the defendant's consent, to convene a sentencing conference and to take into consideration the views expressed at the conference. …

Second Reading Speech continued

An Aboriginal justice officer, employed by the Courts Administration Authority, helps the court convene the conference and advises it about Aboriginal society and culture. …

Second Reading Speech continued

… Using a sentencing conference procedure does not change the matters to which a court must have regard when determining sentence … It is just a way of informing the court and the defendant, and his or her community, about matters relevant to sentence in a more comprehensive and understandable way than is possible using standard procedures.

Features of the Aboriginal Sentencing Conference

a section 9C sentencing conference allows the defendant an opportunity to speak directly to the court and have his or her say

Features of the Aboriginal Sentencing Conference

it allows the victim to contribute in the sentencing process

Features of the Aboriginal Sentencing Conference

it provides the opportunity for restorative justice

Features of the Aboriginal Sentencing Conference

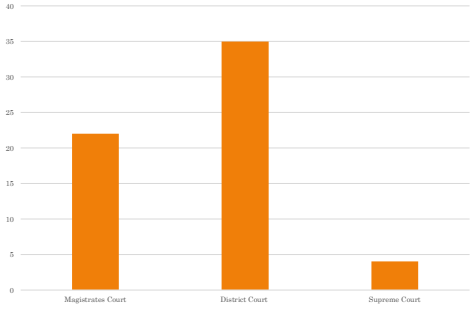
it enables the court to better understand the cultural and societal influences relevant to the defendant's offending

Section 9C Aboriginal Sentencing Conference

the involvement of an Aboriginal Elder, family members and the wider community may assist the defendant in desisting from further offending

Section 9C – Some Facts	
Enactment of Section 9C	19 December 2005
First section 9C Conference, District Court	12 April 2006, Tilmouth DCJ
First section 9C Conference, Magistrates Court	24 October 2008, Magistrate Fahey
First section 9C Conference, Supreme Court	18 December 2008, Justice Anderson
Total number of section 9C Conferences since 2006	61
Number of presently pending section 9C Conferences	4

Number of Section 9C Conferences in each Jurisdiction



SECTION 9C(1)

9C—Sentencing of Aboriginal defendants

(1) Before sentencing an Aboriginal defendant, the court may, with the defendant's consent, and with the assistance of an Aboriginal Justice Officer—

(a) convene a sentencing conference; and

(b) take into consideration views expressed at the conference.

COMPARISON: *MAGISTRATES COURT ACT 1989* (VIC) SECTION 4G

4G Sentencing procedure in Koori Court Division

…

(2) The Koori Court Division **may consider** any oral statement made to it by an Aboriginal elder or respected person.

…

[Emphasis added.]

COMPARISON: *MAGISTRATES COURT ACT 1989* (VIC) SECTION 4G(3)

(3) The Koori Court Division **may inform itself** in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by—

(a) **a Koori Court officer employed as an Aboriginal justice worker**; or

(b) a community corrections officer appointed under Part 4 of the Corrections Act 1986; or

(c) a health service provider; or

(d) a victim of the offence; or

(e) a family member of the accused; or

(f) **anyone else whom the Koori Court Division considers appropriate**.

[Emphasis added.]

Neal v The Queen (1982) 149 CLR 305

24 September 1982

Neal v The Queen, 316

"[The Magistrate's] remarks disclosed, if it were not already apparent, that this was a race relations case, intimately related to the politics of Aboriginal communities and the system under which Aboriginals live in the communities. …"

Murphy J (diss)

Neal v The Queen, 319

"… The sentence of imprisonment imposed upon Mr. Neal will not improve race relations but will tend to embitter them. Taking into account the racial relations aspect of this case, the fact that Mr. Neal was placed in a position of inferiority to the whites managing the Reserve should have been a special mitigating factor in determining sentence."

Murphy J (diss)

Bugmy v The Queen [2013] HCA 37

2 October 2013

Bugmy v The Queen [2013] HCA 37, [37]

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 Court, affirming Simpson J's explanation of *Fernando* (1992) 76 A Crim R 58 in *Kennedy v The Queen* [2010] NSWCCA 260, [53].

Bugmy, [39] referencing Brennan J in *Neal*, [63]

"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. 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 of first instance or for the Court of Criminal Appeal."

R v Gladue [1999] 1 SCR 688 (Canada)

- Landmark Supreme Court of Canada decision on the application of section 718.2(e) of the Criminal Code.

Section 718.2(e) of the Canadian *Criminal Code*

718.2 A court that imposes a sentence **shall also** take into consideration the following principles:

…

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Bugmy v The Queen [2013] HCA 37, [36] – Distinguishing Canada

One evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that s 5(1) of the Sentencing Act does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a direction of that kind does not arise for consideration in this appeal[55]. …

[36] – Distinguishing Canada continued ….

… Another point of distinction is the differing statements of the purposes of punishment under the Canadian and New South Wales statutes. 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.

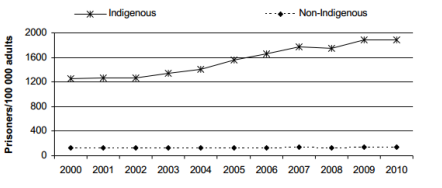
Current Statistics | Australian Bureau of Statistics 2012 Report on Prisoners in Australia

- At 30 June 2012, 7,979 prisoners who identified as Aboriginal and Torres Strait Islander = 27 per cent of total prisoner population.
- Aboriginal and Torres Strait Islander peoples represent only 2.5 per cent of the Australian population.
- Between 2011 and 2012, Aboriginal and Torres Strait Islander prisoner numbers increased by 4 per cent.

– Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2012*
http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0

Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, 5th Report, Productivity Commission

Figure 4.12.1 **Imprisonment rates, age standardised, per 100 000 adult population, Australia[a, b]**

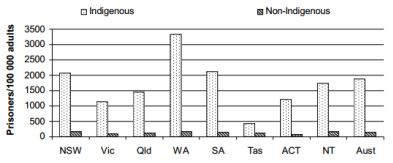


[a] Indigenous imprisonment rates are calculated using low series population projections. [b] Rates are based on prisoner census and population data at 30 June each year.

Source: ABS various years, *Prisoners in Australia*, Cat. no. 4517.0; table 4A.12.4.

STEERING COMMITTEE FOR THE REVIEW OF GOVERNMENT SERVICE PROVISION, *OVERCOMING INDIGENOUS DISADVANTAGE: KEY INDICATORS 2011*, 5TH REPORT, PRODUCTIVITY COMMISSION

Figure 4.12.3 **Imprisonment rates, age standardised, per 100 000 adult population, by state and territory, 2010**[a, b, c, d]

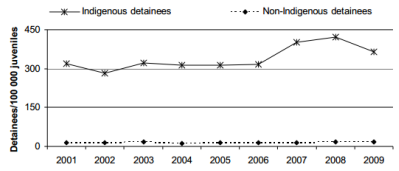


[a] Indigenous imprisonment rates are calculated using low series population projections. [b] Rates are based on prisoner census and population data at 30 June 2010. [c] Data for NSW exclude ACT prisoners held in NSW prisons. [d] Data for the ACT include ACT prisoners held in the ACT as well as ACT prisoners held in NSW.

Source: ABS 2010, *Prisoners in Australia*, Cat. no. 4517.0; table 4A.12.4.

STEERING COMMITTEE FOR THE REVIEW OF GOVERNMENT SERVICE PROVISION, *OVERCOMING INDIGENOUS DISADVANTAGE: KEY INDICATORS 2011*, 5TH REPORT, PRODUCTIVITY COMMISSION

Figure 4.12.5 **Juvenile detention rates, people aged 10–17 years, 30 June, Australia**[a, b]



[a] All data are taken from the census count at 30 June of the relevant year. [b] Indigenous rates were calculated using high series population data (ABS (unpublished) Cat. no. 3238.0). Any variation in derived rates may be due to the assumptions and limitations of the base population data.

Source: Richards and Lyneham (2010); AIC Juveniles in detention (unpublished); table 4A.12.13.

BAIL – INTERVENTION PROGRAMS

Returning to the Second Reading Speech…

This is a bill to provide formal statutory backing for two practices that have developed in the courts. One is the practice of directing defendants to undertake programs of intervention that help them take responsibility for the underlying causes of their criminal behaviour. …

Bail Act 1985 (SA) – section 21B Intervention Programs

(1) When a court releases a person who has been charged with an offence on bail, the court may make it a condition of the bail agreement that the person undertake an intervention program.

…

Conclusion

Australia's federal structure – Comparative jurisprudence.