JUSTICE HEALTH AND FORENSIC MENTAL HEALTH NETWORK

Aboriginal health beyond the bars- does anyone care enough?

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CHALLENGES FOR THE JUDICIARY-SOME SOLUTIONS?

Challenges

The judicial officer in every sentencing exercise, particularly when considering, or required to impose, a term of imprisonment for an offence, has a number of difficult decisions to make.Not just as to the outcome, but during the various stages of fact finding then applying those facts to the legal principles to be applied.The individual approaches of judicial officers will vary as will their respective views of factual and legal matters, usually within a band or range fixed by other judicial officers who have the responsibility of laying down sentencing principles or standards in decisions of the Court of Criminal Appeal and the High Court.. The expression ' reasonable minds may differ' has particular salience in sentencing for particular offences and can often emerge between judicial officers in the same jurisdiction.As it is, sentencing will usually involve the exercise of the considerable skill of 'instinctive' or 'intuitive synthesis', endorsed in the High Court judgments of **Markarian (2005)** and **Muldrock(2011)**. A vexing exercise for even the most 'reasonable' minds and experienced judicial officers.One can never be satisfied that one is correct in determining any sentencing outcome.Unless one is not amenable to appeal.

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

The gross and grotesque over representation of Indigenous Australians in the criminal justice ' system' is a fact that needs no detailed reiteration. The underlying causes of offending are multitudinal, multi-dimensional and multigenerational. Where 'mental health' is an issue, the causes are many including social,

environmental and familial, mostly beyond the control of the sufferer/offender. Foetal Alcohol Spectrum Disorder (**FASD**), for example, is not simply the manifestation of a pregnant mother drinking alcohol or ingesting drugs during pregnancy, but can often be the consequence of social and historical forces of dispossession, physical and sexual abuse, lack of economic and educational opportunity and/or lack of access to supporting or professional services that middle class people take for granted. The criminal law sometimes operates as a form of social control or policy and has certainly operated that way historically in its treatment of Indigenous Australians. However, the criminal law is a 'a hopelessly blunt instrument of social policy'. It usually lacks the discernment, resources and sometimes the commitment, to bring about change in individuals, let alone the social circumstances of the offender's community.

Because judicial officers operate within a legislative and administrative framework over which they have little influence, the role of a judicial officer is not necessarily pivotal to sentencing outcomes. The cause and effect of much crime is beyond the capacity of the justice system to address. These wider "underlying" issues are rarely addressed by conventional sentencing mechanisms or options.The parties have their important role to play.

Incapacitation, in any event, rarely addresses the underlying causes of criminal conduct. The High Court decision of **Munda (2013)** from WA stated that there was "special force" in the argument that general deterrence had 'little rational claim' upon the sentencing discretion for unpremeditated crime, "where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals to be controlled by the rational consequences of misconduct".

The High Court decision in **Bugmy (2013)** from NSW, delivered the same day as **Munda**, made a number of observations that might be seen as restricting the capacity of Judges to take 'judicial notice' of matters that may be seen to be self evidently true.

In **Bugmy** it was held that "broad judicial notice of systemic issues" was "antithetical to individualised justice". There was not a "warrant" for judicial officers to take into account the high rate of incarceration.

The majority of the Court observed:

> "Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background".

The majority of Judges acknowledged:

- "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 to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending."

- "Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest … that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment."

- "An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced."

The better informed the judicial officer the more able he or she will be to render justice to the case when making an assessment of the 'moral culpability' of individual offenders. Yet, the capacity or resources of the prosecution and/or the defence to obtain relevant information on many occasions will be limited or non- existent. Judicial officers are captive largely in their conduct of individual matters to the attitude and skill of the parties.

Equal treatment and 'individualised justice' are not served at present by considerable 'inequity' in the distribution or availability of sentencing options and rehabilitation programs and resources across Australia, particularly impacting on Indigenous Australians. Legislative, administrative, geographical and service restrictions limit options for the judicial officer more than any sentencing principles to be applied.

These limitations may include: alternatives to sentences of "full time imprisonment"; availability of 'therapeutic court' alternatives to conventional sentencing exercises; lack of flexibility and options for making sentencing orders in most jurisdictions and restrictions upon the availability, or a complete absence, of rehabilitation and/or counselling facilities in or out of custody. The more remote or isolated the offender's community the more pronounced these limitations will be, as will be the effect of incarceration.

There are characteristics of offenders, or offending, that will require attention to solutions that require, as a priority, protection of the victim or the community. Most victims of violent offending are Indigenous people themselves, entitled to the full protection of the law.

There are no uniform or simple solutions for offenders as there are not for the wider social, health and historical contexts and causes of offending. Not all Indigenous people in Australia have the same background or contemporary experience of disadvantage, discrimination or social isolation. Not all Indigenous communities or groups have the same social circumstances and contributing issues to offending, although all reputable studies and inquiry findings produce a considerable number of common causes for offending across different categories of Indigenous communities. Not all Indigenous offending is of the same type and, where the same

type, has the same causes or explanations. There are Indigenous offenders who have psychiatric, psychological or other health factors which contribute to offending arising from their social context or their family/community circumstances beyond the control of the offender. The link between these health issues and offending in many instances is irrefutable, yet within the criminal justice sphere they are are frequently unrecognised, overlooked or wrongly discounted.FASD is not the only such example.The impact of hearing disability and mental health issues is frequently not full appreciated by health professionals, law enforcement agencies and/or lawyers.

There are a number of authorative decisions that consider the relevance in sentencing of mental disability, disorder or illness. In **DPP V De La Rosa (2010)** McClellan CJ at CL sitting in the Court of Criminal Appeal summarised the principles as :

1) where a person's mental health contributes materially to the offending the offender's moral culpability may be reduced

2) such an offender may be an 'inappropriate vehicle for general deterrence'

3) a custodial sentence may wear more heavily on such a person

4) the condition may reduce or remove the significance of specific deterrence

5) if the condition makes the offender a danger to others, considerations of specific deterrence (ie. public protection) may result in an increased sentence

6) the "mental health problems" need not amount to a "serious psychiatric illness".

The incidence of FASD and other neurological conditions acquired before and after birth is not yet fully understood, appreciated and/or assessed, if at all. Chief Justice Martin of the WA Supreme Court recently (on 22 September 2016) considered in a judgment the relevance of FASD in the criminal law, particularly in sentencing, addressing the failure of government services, the legal profession and courts to appreciate the issues that arise (***LCM V WA* [2016] WASCA 164**, at [1]-[25]). The same may be said in particular matters of the incidence and effect of Post Traumatic Stress Disorder (**PTSD**), particularly for children and women currently exposed to, or suffering from, physical or sexual abuse, as well as other adult survivors. Then there are long term effects of discrimination, dispossession, family dislocation or removal, forced settlement and loss of cultural identity language and kinship ties, past injustices, government policy mistakes or ineptitude and other external tribulations, that may appear to be 'historical' in character but which still impact upon contemporary society in a range of ways.These matters were subject to considerable discussion in the Final and Regional Reports of the Royal Commission into Aboriginal Deaths in Custody**(RCIADIC).**

SOME SOLUTIONS?

Legislation/Innovation

No offender sentenced to a term of six months or less be committed to gaol custody: unless presence in his or her community presents as a real danger to another person or the community and no other viable option can protect those persons. The sentence to be served by suspension and/or community work or attendance upon rehabilitation programs.

Identify "**equal justice**" **as an "objective" or "purpose" of sentencing**

Enact a similar mandate as exists in Canada for courts: "All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with the particular attention to the circumstances of Indigenous offenders".

The Supreme Court of Canada has held of this legislation:

- "Not reverse discrimination … but necessary to achieve real equality" (**Gladue, in 1999**).

- "relevant to the moral blame worthiness of the individual and as an aspect of proportionality in sentencing" (**Ipeelee in 2012**).

Release to rehabilitation centres, 'half- way' houses or work and training in the community before sentence expiration.

Provisions in all jurisdictions of the character of s 9C *Criminal Law (Sentencing) Act* 1988 (South Australia), permitting "case conferencing" in sentencing proceedings with a court employed Indigenous Justice Officer marshalling the participation of all parties.

Eliminating any form of incarceration for fine default, minor 'street' and public order and driving offences as well as any mandatory penalty of imprisonment or driving licence disqualification.

Greater 'variety' in the forms of imprisonment to be served - with training facilities and cultural focus given emphasis (such as Balund-a, Yetta Dhinnakkal in NSW)

Detention closer to 'Country' and family

Neuropsychological, psychological and/or psychiatric reports for all Indigenous offenders, whether in custody or not, if potentially facing imprisonment - in the same way that Courts cannot sentence a child offender for particular offences without a Juvenile Justice Report.

Implementation of Justice Reinvestment strategies to divert resources to particular targeted communities from custodial correctional programs to locally based

programs to provide support for individuals and communities, thereby providing more and better options for sentencing, rehabilitation programs and community renewal.

Greater flexibility for making sentencing orders and more alternatives to 'full' time imprisonment. – such as:

a) where terms of imprisonment are imposed diversion of offenders from remote and semi remote communities from "gaol" custody to "custodial settings" within or near communities, such as group residences under Corrective Services supervision ie gaols without bars for suitable inmates.

b) community service/community employment orders as conditions of other community based supervision – such as good behaviour bonds.

c) power to order particular types of community work.

d) periods or residential rehabilitation in lieu of periods of imprisonment.

e) limited imposition of fines, with default provisions, for people on any form of welfare benefit or "social security" benefit.

f) elimination of "mandatory periods" of motor vehicle licence disqualification particularly for people without access to public transport.

Expansion in specialist and 'therapeutic' courts, with sufficient support services across Australia for domestic and other violent offences, as well as drug and alcohol related crime.

In appropriate cases, waiving licence disqualification on service of a term of imprisonment of a particular length, subject to the offender obtaining his or her drivers licence and completing specific driver education programs - while in custody ie. properly preparing people for release…not for failure.

Judicial education bodies providing courts with specialist sentencing checklists and Bench Books, such as the Western Australian 'Aboriginal Bench Book' or the NSW Judicial Commission's 'Equality before the Law' Bench Book (and its Queensland equivalent).

Establish properly resourced bail and/or 'safe' houses or hostels, to accommodate people either pending the completion of litigation, or as a condition of community based orders. A substantial reduction of the' remand' population would result if defendants had appropriate accommodation pending court appearances and victims had adequate places of refuge.

Engage Indigenous organisations in bail and probation/parole supervision- such as occurs sometimes in NSW with the Tribal Warrior organisation, 'Clean the Slate' program in Redfern.

Expand the operation of "Indigenous Courts" (Circle Sentencing/ Murri/ Koori/ Nunga Courts) within Local Courts and other 'intermediate' sentencing courts and greater resources to support courts to conduct these proceedings.

Greater consultation with and involvement of Elders and communities in 'conventional' sentencing exercises, particularly with consultation by government service providers and legal representatives of the parties.

Information

Production of 'evidence' in every sentencing exercise where a term of imprisonment is available by 'presentence' report in the style of Canadian "Gladue Reports", including a 'profile' of the particular community from which the individual comes, with historical and contemporary information relating to the availability of services, language or tribal groupings within the community, trends or levels of offending, local Indigenous organisations, available government services and the identity of elders, or others in a position to provide assistance to the offender and victims.

All governments should provide information about Indigenous communities and available services for offenders and victims for all participants in the justice system and the general public, such as "community profiles" available in Queensland (its creation partly funded by the NJCA).

Education

The 'Royal Commission into Aboriginal Deaths in Custody' in its recommendations recognised the importance of improving the knowledge of all justice system participants of Indigenous culture and contemporary social issues. Much good work has been done in most jurisdictions but more is required, particularly at a national level. Proper funding by Government at a State/Territory and Commonwealth level is a key issue. This not just about 'formal' education but also the promotion of informal self-education and then recognising this learning in the practical application of the law. Particularly there is a need for judicial officers to recognise and apply the scholarship of the judgments of the superior courts, particularly the High Court on these matters.

'**Individualised justice' would be enhanced by more extensive use of judicial notice of irrefutable truths.** Notwithstanding the limitations upon the role of judicial notice suggested by the majority decision of the High Court from 2013 in **Bugmy,** that judgment and that of **Munda** each recognised principles in other judgments concerning the sentencing of Indigenous Australians (**Fuller-Cust** (Vic), **Fernando** (NSW) and others) reflecting considerable judicial notice taken when making observations about the wider social and historical contexts of Indigenous offending.

There is ample material in a vast body of unimpeachable sources to assist judicial officers in their task, such as the Final Report of the **Royal Commission into Aboriginal Deaths in Custody (1991)**, the Human Rights Commission's **Bringing them Home (1997)** report,the Senate Legal and Constitutional Affairs References Committee's **Value of Justice Reinvestment (2013),** House of Representatives

Committee on Aboriginal Affairs' report **Doing Time-Time for Doing (2011)** and the National Indigenous Drug and Alcohol Committee **(NIDAC)** report: **'Bridges and Barriers'(2009).** Proper regard to the evidence and findings from those inquiries will enhance individualised justice not undermine it.

The very existence of '**Close the Gap'** strategies emphasises the reality of widespread and endemic contemporaneous disadvantage throughout Australia across a range of areas many linked to the causes of offending behaviour.

Co-operation

Greater or better cooperation between Government departments operating within and outside the 'justice system' to provide equal opportunities for offenders - for access to government services and sentencing alternatives to full term imprisonment. No person should be imprisoned simply because another alternative is not geographically available. Likewise governments at State and Commonwealth levels should end geographic restrictions on 'non-custodial' sentencing alternatives within and across jurisdictions.

Greater cooperation be encouraged between Indigenous communities, their elders and governmental 'instruments of justice' and other service providers, particularly involving genuine consultation. A regular issue arising in the Judicial Commission's (NSW) Ngara Yura (Cultural Awareness) Committee 'community' consultations is complaint that Indigenous communities are not given genuine involvement in government decision making and policing strategies, addressing the cause and effect of criminal behaviour, availability of services , the efficacy of service delivery etc.

Mentoring: formal and coordinated arrangements for professional groups, government agencies, trade and other vocational associations, courts and others(including police and correctional organisations) and others to mentor aboriginal people within and outside their communities.

Conclusion

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

Although some of the suggestions above, in part at least ,may be seen to provide Indigenous Australians with special or preferential treatment, it is in the national interest for positive ,affirmative measures to be taken to truly provide 'equal treatment or justice' for them.Developments in Canada, with analogous issues to be addressed by the courts, have shown that such measures directed towards the

interests of Indigenous offenders are not “reverse discrimination” but are “**necessary to achieve real equality”**under the law.

Up until now the use of the criminal law as a ‘ blunt instrument of social policy’ has more egregiously and consistently failed Indigenous Australians in a range of ways than the non Indigenous population.The circumstances of Indigenous Australians are unique within our nation both historically and contemporaneously.

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

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

With the exception of those who, because of the seriousness of their offending, cannot rejoin society, the ultimate aim in sentencing should be ,once other ‘purposes of sentencing’ are addressed ,to return offenders to their communities and/or families better equipped to cope, improve their health , attitude or material welfare and avoid reoffending.. This is not just in the interests of the offender, but in the interests of the wider community, including relevant victims.

I would encourage professionals dealing with Indigenous Australians to truly listen to their ‘stories’ of their life experiences in an endeavour to understand the patients’ and/or offenders’ viewpoint better.This was what the RCIADIC sought to do in its inquiries and which led to the indentification of the ‘underlying issues’ so important in its conclusions.Developing a real appreciation of the person and assessing the individual in the context of their social milieu will lead to more accurate and more insightful understanding of matters not readily understood or recognised in the non-Indigenous community and more accurate and realistic reporting to courts to assist them to provide the ‘justice’ that every case requires.