THE RELEVANCE OF ABORIGINALITY IN SENTENCING: 'SENTENCING A PERSON FOR WHO THEY ARE'

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> To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself.[1]

I Introduction

Indigenous Australians are grossly overrepresented in prisons across Australia. Though the Indigenous population is less than three per cent of the Australian population,[2] on 30 June 2011 Indigenous prisoners made up 26 per cent of the custodial population.[3] The rate of imprisonment of Indigenous Australians on 30 June 2011 was 14 times higher than the general population.[4] These statistics are appalling; all the more so because, since the release of the final report of the Royal Commission into Aboriginal Deaths in Custody in 1991,[5] they have become depressingly familiar and are trending upwards rather than down.[6] The causes of this overrepresentation are various, deep-seated and debated. But without doubt they are inextricably linked to postcolonial Indigenous experience. For too many Indigenous Australians, 'Aboriginality' has become associated with imprisonment. Unsurprisingly then, much judicial consideration has been given to the relevance of Aboriginality in sentencing. This consideration has not focused on custodial overrepresentation directly, or the desirability or reducing this overrepresentation.[7] Rather, it has been concerned with equal justice.

Neal v The Queen,[8] decided by the High Court in 1982, and in particular the judgment of Brennan J, stands for the principle that to achieve equal justice sentencing courts must take into account relevant facts that exist by reason only of an offender's Aboriginality. References to the 'principle' in *Neal* will be used here in the sense of foundational principle rather than binding ratio or authority. Nevertheless, it is contended that Justice Brennan's statement of sentencing principle has never been seriously questioned.[9] What is in question is how that principle is to be applied.

Since the decision in *Neal*, significant differences in judicial approach have emerged. These differences exist with respect to both *when* the Aboriginality of an Indigenous offender will be relevant in sentencing, and *how* Aboriginality will be relevant. It will be argued that following the 1992 decision in *R v Fernando*,[10] the New South Wales Court of Criminal Appeal has misunderstood the breadth of the principle in *Neal*, thereby restricting its application to a particular class of Indigenous Australians: principally those committing offences of violence whilst intoxicated within defined rural or remote communities in which alcohol abuse is endemic. In doing so, that Court, and those accepting its line of authority, have failed to appreciate the full complexity of postcolonial Indigenous experience and the relevance of this to achieving equal justice in sentencing. In contrast, the approach adopted by the Victorian Court of Criminal Appeal, the Court of Criminal Appeal in South Australia, and elsewhere, requires sentencing courts to take a more nuanced and holistic approach to the relevance of Aboriginality – an approach that can, for example, embrace the relevance of the Aboriginality of an offender who is a member of the Stolen Generations.

In support of this alternate line of authority, the principal argument here is that sentencing courts are required to take Aboriginality and Indigenous experience seriously for all Indigenous Australians, not just for a particular class of Indigenous Australians. It is argued that this is required by the principle in *Neal*, and the necessity to tailor a sentence of best fit to the circumstances of the offence and the offender and thereby promote equal justice.

However, acceptance of the relevance of Aboriginality as a matter of principle is not enough to promote equal justice. It is apparent that more needs to be done to inform sentencing courts of the real relevance of an offender's Aboriginality to the sentencing process, to ensure the unique nature of this experience is considered. To this end, the Canadian experience is instructive, and this article concludes by considering the way in which sentencing courts in Canada are informed about the relevance of Aboriginality in sentencing.

It is equally important to state here what is not being argued. This article does not claim that Aboriginality equates to disadvantage. Nor does it claim that the fact that an offender is Aboriginal should necessarily result in a reduced sentence. These claims would rest upon an assumption that disproportionately high levels of disadvantage experienced within the Indigenous population of Australia are necessarily reflected in the life experience of each and every Indigenous Australian. This is simply not the case. The term 'Indigenous Australian' includes, *at least*, all persons of Aboriginal and Torres Strait Islander descent who identify themselves as such, and who are recognised as Indigenous by other Aboriginal and Torres Strait Islander people.[11] Accordingly, the backgrounds and life experiences of Indigenous Australians will be as varied as the membership of this group. Moreover, equating Aboriginality with disadvantage is akin to viewing Aboriginality as a deficit, thereby denying the advantages that may exist for an individual as a consequence of their group membership. Finally, this article does not claim that Indigenous disadvantage is more deserving of close consideration by the courts than disadvantage occurring elsewhere within our society. What this article does claim is that an offender's Aboriginality and experience of Aboriginality will often be critically relevant to sentencing in myriad different ways. Shining a light on this experience is to do no more or less than ensure that the particular circumstances of the offender and the offence are taken into account.

Whilst this article is focused on equal justice in sentencing and how Aboriginality is and can be taken into account, it will be argued that taking Indigenous experience seriously in sentencing will often result in a rehabilitative focus, better calculated to reduce the prospects of recidivism. Engaging with the unique experiences of Indigenous Australians can both shed light on the reasons for an offence, and on pathways to end offending. Accordingly, taking Aboriginality seriously in sentencing may indeed reduce Indigenous custodial overrepresentation.

II Sentencing Principles, Equality before the Law and the Relevance of Aboriginality

Judges and magistrates undertake a complex task when they sentence an offender. They must take into account all of the circumstances of the offence and of the offender and structure a sentence that achieves a balance of competing purposes. Whilst staunch and entrenched debate continues about justifications for punishment, and whether punishment can and is achieving its purposes,[12] as a matter of sentencing practice the justification and purposes of criminal sanction are well accepted:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[13]

Indeed, these core purposes – concerned with ensuring that an offender receives a 'just' sentence or adequate punishment, in the case of retribution, or with producing good consequences for the offender and society, in the case of incapacitation, deterrence and rehabilitation – are explicitly recognised in sentencing legislation across the country.[14] Denunciation, or the need to denounce the offender and their offending, is a further accepted purpose relating both to 'just' punishment, and to the promotion of good consequences for the offender and the community.[15] Ultimately, it is for the sentencing judge or magistrate to weigh up these competing purposes and see that they are reflected in the sentence, whether this be custodial or non-custodial.[16]

Except in cases where mandatory minimum sentences are required, the sentencing process is an individualised one, tailored to the particular offence and the particular offender. The principle of equality before the law requires this as a necessary consequence of treating all individuals with equal respect:

> The principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal … To treat

> unequal matters differently according to their inequality is not only permitted but required.[17]

Accordingly, in the case of sentencing, '[e]qual justice requires that like should be treated alike but that, if there are *relevant differences*, due allowance should be made for them'.[18] Seeing as every offence and every offender will necessarily be different, a sentencing judge or magistrate must focus their attention on what they take to be relevant differences – differences that in some way alter the appropriateness of a particular punishment.

How then is Aboriginality considered? In what way or ways might it be relevant? There are many possibilities. A recognition that rates of Indigenous offending are a consequence of the impact of colonisation, with all the social, economic and psychological dysfunction that it has wrought, provides a strong argument for a claim that an Indigenous offender is less deserving of punishment.[19] In other words, understanding the individual offender's history, and that of the group to which he or she belongs, gives weight to a claim that it is principally the offender's circumstances that have produced the offending, rather than his or her individual choice. However, this same consideration may demonstrate a greater need to protect the community from the offender, deter them or promote their rehabilitation. An offender's Aboriginality might impact on his or her motive to offend, providing an explanation. It might provide clues about the likelihood of future offending and the circumstances that contribute to this potential. Or, it may tell upon the appropriateness of certain punishment, presenting options where strength of community, reintegration and pride can be harnessed to achieve individual reform and deterrence. These are but examples. The point is that an offender's Aboriginality, and his or her experience of Aboriginality, might conceivably bear upon the appropriateness of a particular sentence in myriad different ways.

The relevance of Aboriginality in sentencing was first given attention by the High Court in *Neal*. In that case, Percy Neal was sentenced by a magistrate to two months' imprisonment with hard labour for spitting at the manager of the store at the Yarrabah Aboriginal Community Reserve, south of Cairns. On appeal against the severity of the sentence, the Queensland Court of Criminal Appeal increased the duration of imprisonment to six months. In setting aside this order for an increased sentence, for reasons relating to the process by which the increase had been imposed, the High Court had cause to consider the relevance of Aboriginality in sentencing. In an oft-cited statement of principle, Brennan J made clear that, in the sentencing of Indigenous Australians, courts are bound to take into account material facts that exist by virtue only of the offender's Aboriginality and experience as a member of that group:

> 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.[20]

This is a statement of general principle consistent with the requirement that each offender's individual circumstances be taken into account in the sentencing process to enable true equality of treatment. It simply recognises that individual circumstances cannot be neatly separated from the circumstances of the group or community to which the individual belongs. That is, the experience and circumstances of Indigenous Australians as a group may be manifested in various ways in each individual who is a member of that group. This may be an obvious sociological point. However, that does not detract from the importance of its recognition in the context of sentencing Indigenous Australians. Such recognition opens the door to a full consideration of the person under judgment, as they are constituted by their historical, cultural, socioeconomic and psychological experience of Aboriginality. Taken to its logical conclusion, *Neal* requires sentencing judges and magistrates to engage with and understand this experience in all its complexity.

Justice Brennan made no attempt to circumscribe judicial consideration of Aboriginality in sentencing. He left open what 'all material facts' might be, and he left open how these facts might be material to the sentencing discretion. He did, however, make reference to the importance of considering 'emotional stress arising from problems existing in Aboriginal communities'.[21] Notwithstanding this, *Neal* is not a guide for how to go about considering Aboriginality in determining an appropriate sentence. Moreover, it is critical to understand that Brennan J makes no attempt to restrict claims to group identity. There is nothing in his judgment to suggest that consideration of Aboriginality in sentencing is restricted to 'tribal', 'traditional', 'authentic'

or 'real' Indigenous Australians. It cannot therefore be read so as to require the categorisation of Indigenous Australians into those for whom Aboriginality is a relevant consideration in sentencing and those for whom it is not. It is an invitation to judges to throw off the yoke of their own experience and consider the particular circumstances of the Indigenous person before them through the lens of Aboriginal experience.

The judgment of Murphy J in *Neal* does not contain any statement of general principle. It does, however, provide an instructive example of judicial engagement with Aboriginal experience.[22] By famously holding that 'Mr Neal is entitled to be an agitator', Murphy J places the conduct of the offender in the context of colonial history, exploring both a personal and general 'sense of grievance … developed over the two hundred years of white settlement in Australia'.[23] He considers colonisation, dispossession, powerlessness, paternalism, thwarted desires for self-determination, gross overrepresentation of Indigenous persons in custody,[24] and race relations, all as they bear upon the offender before the Court. Each of these considerations is seen to exist in the lived experience of Percy Neal, constituting a part of him that is fundamentally relevant to the proper exercise of the sentencing discretion. The judgment was delivered nearly 10 years before the report of the Royal Commission into Aboriginal Deaths in Custody. It is therefore all the more notable for its recognition of the inseparability of the individual experience of Percy Neal from the group experience of Indigenous Australians.

There are two features of principle stated by Brennan J in *Neal* that warrant further consideration. First, the application of the principle in *Neal* does not *require* a reduced sentence,[25] though in many cases this may be the practical reality. Instead, the decision can be understood to mandate consideration of an offender's Aboriginality and how it might impact on the exercise of the sentencing discretion. Secondly, whilst the particular factual considerations in the case relate to historical, socioeconomic and psychological disadvantage, the principle emerging is not simply an edict to consider the 'shattering effects'[26] of a shared history of colonisation. In other words, Aboriginality does not necessarily equate to victimhood. Justice Murphy's characterisation of Percy Neal as an 'agitator' demonstrates that consideration of Aboriginality in sentencing does not require a denial of agency. Neal is an actor in his own history just as much as he is a victim of it. His identity and experience as an Aboriginal person is a strength, even though it may be affected by the 'terrible burden' of history and racism.[27] Accordingly, the principle in *Neal* is a requirement to consider the unique experience of Indigenous Australians, for better or worse. Indeed, it has the potential to empower, for there is great strength in the history of Indigenous survival. Where harnessed, group membership with its connection to land, kin and custom has the potential to heal, restore and rehabilitate.[28]

The High Court has not sought to reconsider or disturb Justice Brennan's statement of general principle in *Neal*. Nor has it sought to provide guidance on its application. This, despite what can only be described as clear judicial failures to consider 'all material facts' that exist by reason of a person's Aboriginality. Indeed, in denying special leave to appeal in the case of *Fuller-Cust v The Queen*,[29] the High Court affirmed Justice Brennan's statement in *Neal* as the 'governing principle',[30] holding that the appeal amounted to 'a complaint about the individual sentencing of this applicant, rather than a point of general application or general principle'.[31] This characterisation has been questioned[32] and strong arguments exist for the High Court to at least explain the application of the principle in *Neal*.[33] However, there is a real risk that any attempt to do so may in fact restrict its application. So much is evident from the attempts of various state and territory supreme courts to provide effective guidance on the application of *Neal*. As will be apparent from the following discussion, some judicial efforts to provide guidance have wittingly or unwittingly closed off consideration of facts that may be material by virtue of a person's Aboriginality. More disturbingly, some decisions have had the effect of restricting the application of the principle to a subset of Indigenous Australians, leading to the divisive and intolerable situation in which an Indigenous person may not be deemed 'Aboriginal enough' for the application of the principle in *Neal*.[34] Thankfully, there is an emerging line of authority in which judges have sought to give full import to principle in *Neal*, bringing the relevance of Aboriginality into focus in all its complexity.

III Fernando and the Aftermath of Exclusion: The Relevance of Aboriginality Misunderstood

The judgment of Wood J in *Fernando*[35] is perhaps the best-known attempt to provide guidance to sentencing courts on the application of *Neal*. Stanley Edward Fernando was sentenced for maliciously wounding his de facto partner

with a knife while he was heavily intoxicated. The offence was committed at Walgett, in rural New South Wales. Stanley, who was ordinarily a resident of Namoi Reserve at Walgett, was described as having a 'deprived background' and a history of alcohol abuse.

Justice Wood's judgment contains a set of eight propositions of 'apparent' general application to the sentencing of Aboriginal Australians. These propositions, known as the '*Fernando* principles', have had an enduring influence on the way in which the Aboriginality has been considered relevant to sentencing. And indeed, whether, in the case of a given Aboriginal offender, Aboriginality warrants particular consideration at all. To understand why this is so, it is necessary to consider the origin of the principles and to examine their content.

The *Fernando* principles were distilled from existing case law in which Aboriginality had been taken into account in sentencing.[36] Common to all of these cases, with the exception of *Neal*, is a particular set of intersecting factual circumstances that are reflected in the emergent principles; the same set of factual circumstances as are present in the case of *Fernando* itself. All cases involved offences of violence or sexual violence, committed in rural or remote Aboriginal communities by intoxicated offenders, generally with histories of alcohol abuse. The experience of these offenders is all too common, and certainly warrants particular consideration. However, as will be shown, principles tailored to their circumstances, where accorded the status of general applicability, have tended to exclude the experiences of other Indigenous offenders.

The first two propositions enunciated by Wood J are in effect a restatement of the broad principle stated by Brennan J in *Neal*:

> (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.
>
> (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.[37]

Thus, all facts that exist by reason of an offender's Aboriginality, which are relevant to the exercise of the sentencing discretion, are to be considered. Further, consideration of these facts will not necessarily result in a reduced sentence. Throwing light on the circumstances of the offence and of the offender might, for example, result in the passage of an increased sentence emphasising the need for deterrence or protection of the community.

The first two propositions are plainly of general application to all Indigenous offenders. This character is shared by the final proposition, which draws attention to the need to pass a sentence of best fit to the subjective and objective circumstances of the offender and the offence, but one that pays close regard to the public interest in rehabilitation and the reduction of recidivism:

> (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.[38]

The remaining five propositions – (C), (D) and (E) – contain principles of both general and specific application. They demonstrate a clear focus on alcohol abuse, violence and Aboriginal communities, emerging from facts material to Fernando, and the foregoing cases under consideration;

> (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*.[39]

Whilst it is essential to recognise 'the endemic presence of alcohol within Aboriginal communities' and acknowledge the historical reasons for alcohol abuse, the elevation of these propositions to the status of general principle on par with (A) and (B) is problematic. It can cloud the fact that propositions (C), (D) and (E) are critical but case-specific *applications* of the general principle contained in *Neal.* It is not suggested that Wood J was seeking to establish the proposition that alcohol abuse is a relevant consideration, but not the abuse or drugs such as heroin, resort to which can be equally and inextricably tied to an offender's experience of Aboriginality. Nor that Aboriginality is only a relevant consideration in relation to crimes of violence. Yet, *Fernando* has been interpreted as requiring such an exclusionary approach.

Moreover, whilst the word 'community' does not receive definition by Wood J, it seems likely, given the wording used in the principles and the cases from which they were distilled, that his Honour had in mind defined rural or remote communities. Thus, the potential exists to exclude Indigenous Australians in urban settings whose existence within Aboriginal community or communities is more nuanced from particular sentencing consideration. Equally troubling is the potential to exclude members of the Stolen Generations and the dispossessed, whose historical removal from land, community and culture is integral to their offending. This risk becomes more apparent by reference to the remaining propositions (F) and (G):

(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*.[40]

Depending on how the concept of a 'local setting' is defined, it tends to confirm the potential to exclude Aboriginal offenders who live in urban settings. This is reinforced by the reference to offenders with little experience of European ways, and the foreign harshness of custodial settings. Again, whilst Wood J may not have been suggesting that consideration of Aboriginality is relevant only to those Indigenous persons from rural and remote communities, the potential for exclusion is there. Indeed, this potential has been realised in subsequent cases where there has been a failure to appreciate the difference between the general principle expressed in *Neal* and its case specific application.

To make this point clearer, it is argued that the principle in *Neal* applies to *all* Indigenous Australians, such that, in sentencing, all Indigenous Australians are entitled to have their Aboriginality and experience Aboriginality considered in all its postcolonial complexity. For an Indigenous offender, then, the relevant question is: what material facts, if any, exist by reason of his or her Aboriginality? In other words, the issue is not whether the principle in *Neal* applies, but *how* it can be said to impact on the particular sentencing consideration for any given Indigenous offender. The *how* is dependent on the capacity of the sentencing judge or magistrate to engage with contemporary Indigenous experience and identity in its historical context. It is dependent on the evidence of this experience and identity being placed before the court. *Neal* leaves the way open for this engagement. By contrast, the *Fernando* principles have been held to be inapplicable, *in their entirety*, to various Indigenous offenders before the court. On this approach, unless an Indigenous offender's experience of

Aboriginality can be brought within the supposed ambit of the principles, his or her Aboriginality is irrelevant.[41]

In *R v Ceissman*,[42] Wood CJ at CL, sitting on the Court of Criminal Appeal, had cause to further explain his view of the application of the *Fernando* principles. Seemingly out of a desire to dispel the belief that it was a 'decision justifying special leniency merely because of the aboriginality of the offender',[43] his Honour held:

> the eight propositions there enunciated were not intended to mitigate the punishment of person of Aboriginal descent, but rather to highlight those circumstances … of the particular offender which are, referable to their aboriginality, particularly in the context of offences arising from the abuse of alcohol.
>
> The present is not such a case, nor is it one which needs to be understood as having occurred in a particular local or rural setting, or one involving an offender from a remote community for whom imprisonment would be unduly harsh because it was to be served in an environment that was foreign to him or her.[44]

What is concerning here is that the general principle – taking into account circumstances referable to Aboriginality – is qualified by the chosen particular circumstances, namely alcohol abuse, local or rural setting and foreignness of penal experience. None of these were present in Ceissman's case, and this, when combined with the fact that the offence concerned was importation of cocaine, led inexorably to Chief Judge Wood's conclusion that: 'In the instant case, I am unable to see the existence of any factor arising from the fact that the respondent's grandfather was part aboriginal that would, in accordance with *Fernando,* attract special consideration'.[45]

It may well be that there was limited evidence on the appeal record of the way the offender's Aboriginality had shaped his life, identity and offending such that no facts relevant to his cultural membership emerged as material to the sentencing discretion. Notwithstanding this, the implication is that Ceissman was 'not Aboriginal enough'[46] for particular consideration. This conclusion is reinforced in the subsequent case of *R v Pitt.*[47] Despite the offender growing up on a mission in Moree, suffering at the hands of a 'drunken and violent father', leaving school after repeating year eight, having a 'verified history of self harm and of suicide attempts' and an extensive criminal record,[48] Wood CJ at CL stated:

> so far as I can see there was nothing of an exceptional kind, in the aboriginality or upbringing of the applicant, that called for any particular mitigation of sentence. Regrettably, his childhood experiences have been shared by many persons across a wide range of ethnic, social and racial backgrounds, and the present was not a case of an offender having been brought up within a wholly dysfunctional community that was dominated by substance abuse.[49]

Again it is unclear how directly the evidence, including that provided in two psychiatric reports, related Pitt's childhood and life experience to his Aboriginality. However, it seems fair to conclude, as Edney does, that *Pitt* stands as authority for the 'need for a degree of "exceptionality" in the history of the Indigenous offender for it to attract the operation of the *Fernando* principles'.[50]

A clear statement of the principle of 'exceptionality' emerging in the aftermath of *Fernando* is contained in the judgment of Penfold J in *Crawford v Laverty.*[51] That case involved an Aboriginal offender removed from his mother at the age of three, who lived on the streets, used heroin from his early teens and committed property crimes to support his heroin addiction.[52] In the course of her judgment, Penfold J held:

> It is apparent that the Fernando principles are of primary relevance to offences committed by Aboriginal offenders within Aboriginal Communities, and in particular where the offences are associated with alcohol abuse and resulting violence within those communities.[53]

This reading of the Fernando Principles restricts the relevance of Aboriginality in sentencing to cases involving alcohol but not other drugs, violence but not property crime, offences committed within 'Aboriginal Communities' but not elsewhere and, as Penfold J further states, where the prison environment would be harsh because of its foreignness.[54]

Necessarily then, if this reasoning is accepted, the *Fernando* principles in their entirety can be said to apply to some Indigenous offenders but not to others, with the court entrusted with task of determining which offenders are Aboriginal enough for particular consideration.[55] Unless an Indigenous offender can be brought within the categories, as described, their Aboriginality becomes irrelevant. The

question becomes: is this Indigenous offender inside or outside the category to whom the Fernando principles apply? This inquiry is far removed from that originally set down in *Neal*, which is: what material facts exist by reason of this offender's Aboriginality?

The divisiveness of this position is brought into stark relief by a consideration of *R v Kelly*,[56] a case concerning two young Aboriginal co-offenders sentenced for the same offence by different judges. An appeal against disparity in sentences was brought in part upon the basis that the *Fernando* principles were found to apply to one offender but not to the other. On appeal this finding was upheld.[57]

The primary reason for this differential approach appears to have been that, in sentencing proceedings at first instance, the Aboriginal Legal Service lawyer representing Kelly 'did not apparently think that the [*Fernando*] decision was sufficiently relevant to refer to it'.[58] This failure to explicitly refer to *Fernando*, or to make submissions and provide evidence clearly establishing the importance of Aboriginality to the circumstances of the offence and the offender, is a recurrent theme in judgments disavowing the importance of Aboriginality in the sentencing of particular Indigenous offenders.[59] Reference to *Fernando* or *Neal* aside, it is apparent that it is incumbent upon legal representatives to demonstrate, through evidence and submissions, that material facts exist by reason only of the offender's Aboriginality which are relevant to the sentencing discretion.[60] This is a critical issue discussed further below.

Be that as it may, acceptance of a position whereby Aboriginality may be worthy of particular consideration in sentencing of one Indigenous offender but not another bears the taint of colonial categorisation. Inherent in this position is the risk of creating a category of 'part-Aboriginal' or 'half-caste' and thereby dismissing the relevance of Aboriginality and experience as an Indigenous Australian for those persons within that group. Such a sub-categorisation bears unfortunate parallels with the protectionist era of Australian history. Under various Aborigines Protection Acts, the question to be asked was whether a person was Aboriginal enough for the application of draconian regimes of control. The answer would depend on racist and pseudo-scientific categories, or even the stroke of the protection board pen.[61] The point here is that whilst the propounding of sentencing principle specific to Indigenous Australians involves drawing a distinction between those who are Indigenous and those who are not, it does not necessarily require sub-classification. There is a critical difference between a sentencing inquiry focused on *whether* the Aboriginality of an Indigenous offender warrants particular consideration and an inquiry focused on *how*, if at all, this Aboriginality can be said to impact on the sentencing discretion. The former requires sub-categorisation. The latter invites exploration of individual and group history.

Thankfully, an alternative line of authority has emerged demonstrating a better judicial understanding of the full complexity of postcolonial Indigenous experience. Such judgments can be read as a reassertion of the general principle expressed in *Neal.* They can be read as endeavours to engage with the central question; namely, what material facts exist by reason of the offender's Aboriginality, no matter how the offender's Aboriginality is constituted.

IV The Re-emergence of General Principle and Inclusive Application

The Court of Criminal Appeal in South Australia has demonstrated a clear willingness to give close consideration to the Aboriginality of offenders even where their circumstances are significantly removed from those present in *Fernando* or like cases. In *R v Smith*,[62] the Court considered an appeal against the severity of a sentence of a 22-year-old Aboriginal man, raised in Adelaide. Smith had pleaded guilty to three counts of armed robbery and a number of other associated offences, including causing grievous bodily harm with a firearm. He had a history of having committed like offences as a juvenile. Smith was raised in an urban setting and had no history of drug or alcohol abuse. However, according to an anthropological report before the Court, his offending was closely entwined with his experience of Aboriginality. Smith had been raised by his Aboriginal father, originally from a more remote Aboriginal community, who himself had a long criminal record, including for armed robbery, and a history of drug abuse. His father was accorded respect within the Aboriginal community in Adelaide for his criminal history and his capacity to survive incarceration. Through his own offending, the younger Smith sought to emulate his father in pursuit of the respect he believed he would be accorded by kin and community.

By majority, the sentence of 30 years, with a non-parole period of 18 years, was upheld. Notwithstanding this, two members of the Court made clear that consideration of

Smith's Aboriginality and experience of Aboriginality were fundamental to the appropriate exercise of the sentencing discretion, regardless of his urban circumstances. In particular Lander J stated:

> The heritage of Aboriginal people raised in urban settings is relevant in explaining matters personal to the offender. Insofar as that heritage throws light on such matters, and on the circumstances of the offending, there is no rigid distinction to be made between the approach to be taken to urban Aboriginal people and those Aboriginal people often described as 'tribal'.[63]

Justice Gray went further, citing *R v E*[64] to make the point that Smith was the direct product of a history of oppressive socioeconomic circumstances and conflict between the Indigenous and non-Indigenous communities. These circumstances and history were evident in his father's life situation and evident in his father's criminal responses to that life situation. The template was set:

> The appellant's father came to Adelaide from a traditional indigenous community. The social and economic conditions in which he lived were poor. He was gravely disadvantaged. He gained respect in his community through criminal offending. The appellant observed the way in which his father gained respect amongst his community and attempted to follow his example. His father was his role model. In a very direct way the appellant was disadvantaged.[65]

Indeed, in accord with this approach, the New South Wales Court of Criminal Appeal has stated that it does not consider 'the approach to sentencing Aboriginal offenders outlined in Fernando as being limited to Aborigines who live in isolated communities'.[66]

Leaving *Fernando* to one side, perhaps the most insightful and inclusive application of the principle in *Neal* is contained in the dissenting judgment of Eames JA, sitting on the Victorian Court of Criminal Appeal, in *R v Fuller-Cust*.[67] That case involved consideration of the relevance of Aboriginality in the sentencing of an offender who was removed from his natural parents as a young child; where removal from community and the aftermath of that removal constitutes an Aboriginal identity far different from that under consideration in *Fernando* or *Neal*, but an identity that is no less uniquely Indigenous.

Fuller-Cust pleaded guilty in the County Court to five counts of rape, two counts of indecent assault, one count of false imprisonment and one count of recklessly causing injury. The offences were committed against two separate victims. Fuller-Cust had a significant history of past offending, including for rape, indecent assault and assault. At the sentencing hearing, witnesses were called and evidence adduced to demonstrate the material link between his Aboriginality and his offending. The facts established by this evidence bear repeating insofar as they ground the various judicial approaches taken, at first instance and on appeal, to the relevance of Aboriginality in sentencing.

Clem Fuller-Cust was born on 11 May 1963. He was removed from his Aboriginal mother and non-Aboriginal father in the second year of his life by the Social Welfare Department. His sister was also removed. Requests for his return made by his father were denied by the Department, as were requests for access made by both parents. These attempts continued for years without success. At the age of two, after spending time in a children's home, Fuller-Cust and his sister were placed with a non-Aboriginal foster family. Five months after the placement commenced, his foster parents told the Department they were not interested in fostering part-Aboriginal children.[68] Notwithstanding this, he remained with the family. His reported experience of Aboriginality during this time amounted to schoolyard fights over his colour, in which he defended his Aboriginal identity so far as he was able.[69] At the age of 12, Fuller-Cust was finally rejected by his foster parents and admitted to the Ballarat Children's Home. The signs of this rejection were evident in the three years prior, with the Department receiving reports of the shame felt by his foster parents about their association with him, and of his deprivation and physical disciplining at their hands.[70] The County Court also heard evidence that whilst in the care of his foster parents he was sexually abused by a foster uncle.[71] At the age of 15, at his request, Fuller-Cust's mother was located and he travelled to Queensland to reunite with her. Their reconciliation was brief and unsuccessful, leaving Fuller-Cust deeply disillusioned.[72] The ultimate impact of this childhood experience was a deep emotional insecurity, confusion over his identity, and an intense vulnerability 'to feelings or suggestions of rejection'.[73] Indeed, the only security he experienced was in institutional and correctional settings.

A consulting forensic psychiatrist gave evidence to explain, amongst other things, the causal link between

this dysfunctional and disadvantaged background and the offending for which he was to be sentenced. Earlier reports of other forensic psychiatrists and psychologists were also before the court. According to Batt JA on appeal:

> To judge from the expert evidence, the offending sprang from the applicant's anger and resentment in reaction to perceived personal rejection, betrayal and lifetime disadvantage which, as he knew from past experience, he was not able to control after over-indulgence in alcohol.[74]

Such evidence was relevant insofar as it threw light upon the application of sentencing principles. In particular, it bore upon how deserving Fuller-Cust was of punishment and also on the social and psychological issues requiring resolution to enable rehabilitation.

Having heard this evidence, the judge sentenced Fuller-Cust to 20 years' imprisonment with a non-parole period of 17 years. In doing so, he accepted that Fuller-Cust had had a 'disadvantaged upbringing', but dismissed the relevance of the offender's Aboriginality as a feature of this disadvantage, observing that '[a]nybody who went into care and custody was disadvantaged'.[75]

On appeal against the severity of the sentence imposed, Batt JA affirmed this approach, finding that the offender's Aboriginality was not independently relevant, over and above the fact of his removal from his natural parents and his subsequent care and custody. By reference to the cases of *Neal*, *R v Rogers and Murray*[76] and *Fernando*, Batt JA held that in sentencing Aboriginal offenders, account must be taken of 'disadvantages associated with the offender's membership of the Aboriginal race'.[77] However, he dismissed the relevance of this proposition in the case of Fuller-Cust with a parenthetical aside: 'The way of life of the offenders in those cases was far different from that of the applicant in Geelong and elsewhere in Victoria'.

By contrast, in a powerful rejoinder to the dismissal of Fuller-Cust's Aboriginality as a relevant sentencing consideration and a reassertion of the principle of individualised justice, Eames JA held that 'to ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself'.[78] His Honour continued:

> The assumption that the experience of the applicant in going into care and protection, and the subsequent events in his life, were the same as that of anybody else who suffered those events entirely ignored the question whether the Aboriginality of the applicant was a factor both in the circumstances that he came to be separated from his natural parents and in his own response to that event in his later life. That, in turn, was relevant both in understanding the cause of his offending and in considering what issues might be required to be addressed so as to ensure that it was not repeated.[79]

With explicit reference to the principle in *Neal*,[80] Eames JA accepted the invitation, and the responsibility, to consider the particular circumstances of Fuller-Cust through the lens of Aboriginal experience. To ask and answer the question of what material facts existed by reason of the offender's Aboriginality, Eames JA turned to insights drawn from the Royal Commission into Aboriginal Deaths in Custody[81] and the *Bringing Them Home* report.[82] He sought and found partial explanation for the offender's circumstances and behaviour in the common and documented experience of Indigenous Australians as a group.

> the history of the applicant has remarkable similarities to many of the cases reported upon by the Royal Commission into Aboriginal Deaths in Custody. The impact of a person being separated from family, endeavoring to regain contacts with that family, being rebuffed in those efforts, and thereupon suffering anxiety about being denied the opportunity to fully embrace his or her Aboriginality, was often addressed in individual reports and in the findings of the final report of the Royal Commission. The commissioners recognised the impact of a person, in those circumstances, being socialised not into the family and kin network which would otherwise be the experience of an Aboriginal person living in urban circumstances but being socialised, instead, by the need to survive in institutional communities, including juvenile detention facilities and homes.[83]

He continued, reciting the tragic fact that '[o]f the 99 deaths in custody investigated by the Royal Commission, 43 of those who died experienced childhood separation from their natural families, through intervention by State authorities or by missions or other institutions.[84] This was supported by a finding of the National Aboriginal and Torres Strait Islander Survey of 1994 that 'Aboriginal people surveyed who had been taken away from their natural families as children

were twice as likely to have been arrested on more than one occasion than were Aboriginal people who did not have that background'.[85]

Through his consideration of the historical and contemporary experience of Indigenous Australians, Eames JA was able to do justice to the principle in *Neal*. He identified facts material to the offender's life existing by virtue of his membership of the group of Indigenous Australians separated from their families, brought up without connection to kin and community. He was able to understand Fuller-Cust as a product of historical and social forces bearing uniquely on Indigenous Australians; as an Aboriginal person severed from and unable to embrace his Aboriginality.

It is apparent that consideration of the offender's Aboriginality would have caused Eames JA to impose a sentence lower than that ultimately imposed by his fellow justices of appeal,[86] though he did not quantify the extent of the reduction he would have afforded if he had not been in dissent. However, whilst Eames JA was in dissent in terms of the result, and in conflict in terms of reasoning with Batt JA, O'Bryan AJA indicated an appreciation of the 'careful consideration' given by his Honour to the offender's Aboriginality and childhood experience.[87]

Special leave to appeal to the High Court was sought and rejected on the basis that the appeal amounted to 'a complaint about the individual sentencing of this applicant, rather than a point of general application or general principle'.[88] However, the careful approach and observations of Eames JA were approved in the subsequent judgment of the Victorian Court of Appeal in *DPP v Terrick*.[89] In that case, Maxwell P, Redlich JA and Robson AJA set out what they understood to be the established propositions relevant to the sentencing of Indigenous Australians:

1. The individual circumstances of an offender are always relevant to sentencing.

2. Circumstances of disadvantage, deprivation or (sexual) violence may be explanatory, if not causative, of the offending or (if relevant) of the offender's alcohol or drug addiction.

3. The (relative) weight to be given to circumstances of disadvantage or deprivation is a matter for the sentencing judge, and will depend on:
   (a) the nature and extent of the disadvantage;
   (b) the nexus (if any) with the offending; and
   (c) the (relative) importance in the particular case of sentencing considerations such as rehabilitation, deterrence (specific and general), community protection and social rehabilitation.

4. The same sentencing principles apply irrespective of the offender's race. Thus, Aboriginal offenders are not to be sentenced more leniently than non-Aboriginal persons on account of their race.

5. In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt. At the same time, the sentencing court is bound to take into account 'facts which exist only by reason of the offender's membership of an ethnic or other group'.

6. When applying sentencing principles, which are common to all Victorians, a different outcome may result for an Aboriginal offender if it is shown that 'mitigating factors in the background of the offender, or [in the] circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender'.

7. Such considerations require a careful examination of the history of the offender. The relevance of Aboriginality to an offender's disadvantaged background must be established by appropriate evidence.

8. Where the offender has prior convictions, such that considerations of specific and general deterrence and community protection become increasingly important sentencing factors, the significance of personal circumstances will correspondingly decrease.[90]

With this decision, the Victorian Court of Appeal marked a clear return to the general principle propounded by Brennan J in *Neal.* There is no hint of restriction to cases involving alcohol abuse; no restriction by offence type, offence setting, the remoteness of the offender's community of origin or the foreignness of penal experience. The approach embraces the complexity of postcolonial Aboriginal identity, requiring a 'careful examination of the history of the offender'. And where the evidence establishes facts relevant to the exercise of the sentencing discretion, which exist by reason of the

offender's Aboriginality, the sentencing court is bound to take these into account.

There is little doubt that the propositions will provide useful guidance to judges and magistrates who are required to sentence Indigenous offenders.[91] The only cautionary note is that the propositions set out in *Terrick* largely equate Aboriginality with disadvantage. This is understandable given the Victorian Court of Appeal's explicit concern to ensure that sentencing courts not lose sight of the fact that 'membership of a community where disadvantage is widespread might compound the difficulties suffered by a particular individual'.[92] However, to focus exclusively on Aboriginality as disadvantage obscures the fact that there is strength in a shared history of survival and continuing connection to land, kin and custom. Indeed, it is this strength that offers the potential for Indigenous developed programs of rehabilitation and healing which 'seek individual change within collective context'.[93] According to Cunneen, such programs start with 'an understanding of the collective harms and outcomes of colonisation' and pursue healing as 'quintessentially and simultaneously an individual and collective experience'.[94] Whilst decisions such as *Terrick* recognise that collective experience is reflected in the offending of the individual, they do not acknowledge the opposite; namely, the potential inherent in collective experience for the uplift and reform of the individual.

To the extent that sentencing judges and magistrates are in a position to fashion sentences that enable realisation of the potential inherent in an offender's Aboriginality, this should be done. Indeed, so far as a rehabilitative pathway is available for an Indigenous offender by virtue of his or her Aboriginality, this too is a fact that exists 'only by reason of the offender's membership of an ethnic or other group'.[95] Accordingly, the potential offered by such a pathway is a material fact the sentencing court is bound to take into account.

V The Relevance of Aboriginality: Uncovering the Material Facts

It is one thing to say that sentencing courts are bound to take into account material facts existing by virtue only of an offender's Aboriginality. It is another thing entirely to identify these facts and ensure that evidence is presented to establish their existence and import. Courts of appeal have made clear that the burden generally falls upon lawyers acting for Indigenous offenders to do this.[96] Thus, whether or not the relevance of an offender's Aboriginality will be explored largely depends on the resources available to the lawyer and his or her capacity to identify and establish material facts existing by reason of a client's Aboriginality. Ultimately, if these facts are not the subject of evidence or submission, sentencing courts cannot be expected to give full application to the principle in *Neal,* or the propositions contained in *Terrick.*

In this regard, the Canadian experience in the years following the 1999 decision of its Supreme Court in *R v Gladue*[97] is instructive. Justices Cory and Iacobucci delivered the judgment of the seven-member Court interpreting the operation of section 718.2(e) of the *Criminal Code*.[98] Section 718.2(e) requires a Canadian court imposing a sentence to have regard to the principle that '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'. The Court held that these words 'do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender'.[99] Rather, the subsection is a legislative direction 'that sentencing judges should pay particular attention to the circumstances of aboriginal offenders *because those circumstances are unique*, and different from those of non-aboriginal offenders'.[100] And further, that the direction to pay particular attention is applicable in sentencing 'all aboriginal offenders'.[101]

The Court held that section 718.2(e) requires sentencing courts to adopt a different 'process' for the sentencing of Aboriginal offenders in order to achieve a 'truly fit and proper sentence in the particular case'.[102] The sentencing process remains individualised,[103] but the individual offender before the court is understood to exist within the context of the collective experience of Aboriginal Canadians. This requires explicit recognition of 'unique background and systemic factors which may have played a part in bringing the particular offender before the courts'.[104] These include dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse and community fragmentation that all too often lead to incarceration at grossly disproportionate rates.[105] The Court recognised that collective experience may provide an explanation for the individual's offending behaviour. And, critically, the Court also recognised that the same collective experience offers the potential for innovation in sentencing process and uniquely Aboriginal pathways for punishment, healing and reform.[106]

However, according to Jonathan Rudin, Program Director of the Aboriginal Legal Services of Toronto Legal Clinic, 'in the weeks, months and years that passed following the *Gladue* decision, little changed in the Canadian legal landscape'.[107] Material facts which existed by reason only of the Aboriginality of offenders remained unidentified and were not acted upon. To remedy this, *Gladue* courts were established, specifically charged with the task of giving full effect to the decision. Aboriginal caseworkers were appointed to provide Gladue reports to these courts, setting out the systemic and background issues affecting the lives of Aboriginal offenders, together with available culturally relevant sentencing options.[108] The reports explain offending behaviour within the collective history of Aboriginal Canadians, highlighting the link between individual and collective experience. And further, they explore options for healing and reform from the vantage point of this collective experience.[109]

Gladue reports are distinct from pre-sentence reports in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality. And, critically, *Gladue* reports are written by Aboriginal Canadians employed by Aboriginal organisations.[110] Accordingly, the authors of the reports exist within the same collective experience as the offender before the court. But like pre-sentence reports, *Gladue* reports provide an independent source of evidence from which facts material to sentencing can be established and acted upon. As a consequence, identification of the relevance and importance of an offender's Aboriginality is not left solely to the defence lawyer. Nor does it depend on the resources that lawyer has available to them. In a mark of extent to which the Canadian judiciary values these reports, they are now accepted in, and sought by, *Gladue* and non-*Gladue* courts alike, faced with the task of sentencing Aboriginal Canadians.[111]

In Australia, Indigenous sentencing courts, in a variety of forms, now operate in all jurisdictions other than Tasmania.[112] Such courts operate within the framework of Australian criminal law and sentencing procedure, but expressly aim to achieve culturally appropriate sentencing outcomes through the participation of Aboriginal and Torres Strait Islander communities and perspectives in the sentencing process.[113] According to Marchetti and Daly, through this, 'Indigenous sentencing courts have the potential to empower Indigenous communities, to bend and change the dominant perspective of "white law" through Indigenous knowledge and modes of social control, and to come to terms with a colonial past'.[114]

The various aims and objectives of these courts, together with their potential to achieve change, are well described by the authors and beyond the scope of this article. Suffice it to say that Indigenous sentencing courts are well placed to identify facts material to the sentencing discretion, which exist by reason only of an offender's Aboriginality. However, they do not expressly aim to do so.[115] And, as described by Marchetti and Daly,[116] their processes do not involve the reception of a report, akin to a *Gladue* report, designed to identify these material facts. Moreover, the reach of these courts is limited. According to Marchetti, 'the number of offenders sentenced in these courts in most jurisdictions is still quite low compared with Indigenous offenders processed via mainstream courts'.[117]

For these reasons, it is argued that Australian jurisdictions should adopt a system whereby both Indigenous sentencing courts and mainstream courts could request reports akin to *Gladue* reports. Such reports would better enable account to be taken of the full complexity of postcolonial Indigenous experience. They would enable a more robust application of the principle in *Neal* and the propositions contained in *Terrick* in the sentencing of all Indigenous Australians.

One obvious possibility is that existing pre-sentence reports be augmented to specifically include consideration of unique systemic and background factors existing in the lives of Indigenous offenders, together with any culturally appropriate pathways available for rehabilitation or reform. Calls for Indigenous specific presentence reports in Australia are not new.[118] However, there is a risk that this would simply involve the addition of 'Aboriginality' or 'race' as an addendum to pre-sentence reports as they presently exist. This concern is evident from research undertaken in Canada comparing the consideration given to Aboriginality in pre-sentence reports with that given in *Gladue* reports.[119] In the worst case, Aboriginality might end up being positioned as a risk factor relevant only to actuarial analysis.[120] These concerns may be avoided by ensuring a real measure of Indigenous control over the report writing process, with the ideal being to follow the Canadian example, retaining the separate character and provenance of such reports.

Lastly, whilst the provision of *Gladue*-like reports would significantly improve the capacity of sentencing courts to understand how Indigenous collective experience is reflected in individual offending, this is only part of the picture. As argued previously, the insights of collective experience offer

the potential for individual change. However, in order to realise this potential, culturally appropriate programs for offenders must be fostered where they exist and created where they do not. Indigenous collective experience should not simply be a marker of the pathway to criminality; it should mark the pathway to healing, rehabilitation and reform.

VI Conclusion

As has been argued, the principle of equality before the law requires sentencing courts to give full consideration to the relevance of an offender's Aboriginality in the determination of an appropriate sentence. The fundamental question is whether facts material to the sentencing discretion exist by reason of an offender's Aboriginality. An emerging line of judicial authority establishes that this question is to be asked of the life circumstances and experience of all Indigenous offenders, regardless of how their Aboriginality is constituted. These judicial decisions accept the challenge of considering the full complexity of postcolonial Indigenous experience, and take seriously the impact this collective experience has had on the offender before the court.

That said, a number of challenges remain. First, acceptance of this approach to sentencing Indigenous Australians is yet to be achieved across all Australian jurisdictions. Secondly, acceptance of this approach does not of itself enable the identification of material facts that exist by reason of an offender's Aboriginality. It has been argued that to ensure this, courts should have access to a form of pre-sentence report designed to identify the unique systemic and background factors that exist in the lives of Indigenous offenders. These reports must also recognise the potential inherent in Indigenous collective experience to provide culturally appropriate pathways for healing, rehabilitation and reform. And herein lies the most critical challenge: to understand Aboriginality not simply as a yoke of collective disadvantage, but as offering the collective potential for positive change and upliftment in the lives of Indigenous offenders. However, this collective potential cannot be realised without the existence of Indigenous developed programs of healing rehabilitation and reform. Ultimately, whilst a sentence can be crafted with the aim of rehabilitating an offender and reducing the likelihood of reoffending, it is the pathways open to the offender from the time of sentence that can make this aim a reality.

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1 *R v Fuller-Cust* (2002) 6 VR 496, 520 (Eames JA).

2 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians* (ABS Catalogue No 4705.0, 30 June 2006) 4.

3 Australian Bureau of Statistics, *Prisoners in Australia* (ABS Catalogue No 4517.0, 8 December 2011) 49.

4 *Prisoners in Australia*, above n 3, 50.

5 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) ('*RCIADIC National Report*').

6 *Prisoners in Australia*, above n 3, 50.

7 As a matter of sentencing principle it is impermissible to treat the reduction of general custodial overrepresentation as an objective in the sentencing of an individual: see *Western Australia v Richards* (2008) 185 A Crim R 413, 415–16.

8 (1982) 149 CLR 305 ('*Neal*').

9 Transcript of Proceedings, *Fuller-Cust v The Queen* [2003] HCATrans 394, 3 October 2003) 3 (Hayne J).

10 (1992) 76 A Crim R 58 ('*Fernando*').

11 *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J); *Shaw v Wolf* (1999) 83 FCR 113, 113; see also *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [167]–[190]. Whilst the three-fold test of identity – requiring descent, self-identification and community identification – is generally accepted, some fluidity must remain for particular cases; for example, where a child is too young to self-identify, or where a person comes to learn of their Aboriginality in later life following removal as a child.

12 See, eg, Andrew von Hirsh, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart, 3rd ed, 2009); Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 3; Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge, 2007).

13 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

14 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (NT) s 5(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act 1997* (Tas) s 3; *Crimes Act 1914* (Cth) s 16A.

15 Mackenzie and Stobbs, above n 12, 49.

16 *R v Engert* (1995) 84 A Crim R 67, 68.

17 *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 305–6 (Judge Tanaka).

18 *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) (emphasis added).

19 Richard Edney, 'Just Deserts in Post-Colonial Society: Problems

in the Punishment of Indigenous Offenders' (2005) 9 *Southern Cross University Law Review* 73.

20 *Neal* (1982) 149 CLR 305, 326.

21 Ibid 324.

22 Ibid 317–18.

23 Ibid 317.

24 Ibid 318 (Murphy J), where his Honour states: '[a]lthough Aborigines comprise only 1 per cent of the total population they make up nearly 30 per cent of the prison population, and at times exceed that level'.

25 See, eg, *R v Wurramara* (1999) 105 A Crim R 512, 522.

26 Mary Edmunds, *The Northern Territory Intervention and Human Rights: An Anthropological Perspective* (Whitlam Institute, 2010) 9.

27 Noel Pearson, *Up From the Mission* (Black, 2009) 161.

28 See, eg, Human Rights and Equal Opportunity Commission, *Social Justice Report 2007,* 52–63; Andrew Stojanovski, *Dog Ear Café: How the Mt Theo Program Beat the Curse of Petrol Sniffing* (Hybrid Publishers, 2010). See also the work of the Balanu Foundation in the Northern Territory: David Cole, *Welcome to Balanu*, Balanu <http://www.balunu.org.au/main.html>.

29 Transcript of Proceedings, *Fuller-Cust v The Queen* [2003] HCATrans 394 (3 October 2003).

30 Ibid 6 (Gummow J, Hayne J agreeing).

31 Ibid 3 (Gummow J).

32 Richard Edney, 'Opportunity Lost?: The High Court of Australia and the Sentencing of Indigenous Offenders' (2006) 2 *International Journal of Punishment and Sentencing* 99.

33 Ibid.

34 Martin Flynn, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing?' (2005) 6(9) *Indigenous Law Bulletin* 15.

35 (1992) 76 A Crim R 58, 58–65.

36 *Neal* (1982) 149 CLR 305; *R v Davey* (1980) 2 A Crim R 254; *Friday* (1984) 14 A Crim R 471; *Yougie v The Queen* (1987) 33 A Crim R 301; *Rogers v The Queen* (1989) 44 A Crim R 301; *Juli v The Queen* (1990) 50 A Crim R 31, *Fernando* (1992) 76 A Crim R 58, 58–65.

37 (1992) 76 A Crim R 58, 62.

38 Ibid 63.

39 Ibid 62–3 (emphasis added).

40 Ibid 63.

41 See, generally, Flynn, above n 34; Richard Edney, 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8.

42 (2001) 119 A Crim R 535 (with Ipp JA agreeing).

43 Ibid 540.

44 Ibid.

45 Ibid.

46 Flynn, above n 34.

47 [2001] NSWCCA 156 ('*Pitt*').

48 Ibid [8]–[10].

49 Ibid [18] (Sully J agreeing).

50 Edney, above n 41, 9.

51 [2008] ACTSC 107.

52 Ibid [23].

53 Ibid [32].

54 Ibid [32].

55 See also *R v Newman* (2004) 145 A Crim R 361, 375–9.

56 (2005) 155 A Crim R 499.

57 Ibid 504.

58 Ibid 503.

59 See, eg, *R v Newman* (2004) 145 A Crim R 361, 375, 378; *Pitt* [2001] NSWCCA 156 [15].

60 See *DPP v Terrick* (2009) 24 VR 457, 469.

61 See, eg, *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) <http://www.foundingdocs.gov.au/area.asp?aID=5>; Andrew Markus, 'Under the Act' in Bill Gammage and Peter Spearritt (eds), *Australians 1938* (Fairfax, Syme & Weldon Associates, 1987) 47, 48–53; see generally, Michael Dodson 'The End in the Beginning: Re(de)finding Aboriginality' in Michele Grossman (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003) 25.

62 [2003] SASC 263.

63 Ibid [62].

64 *R v E* (*A Child*) (1993) 66 A Crim R 14, 17.

65 *R v Smith* [2003] SASC 263 [134].

66 *Waters v The Queen* [2007] NSWCCA 219 [39] (James J, with Giles JA and Hislop J agreeing), approved in *TM v Karapanos and Bakes* [2011] ACTSC 74 [112] (Refshauge J).

67 See also Edney, n 20, 102–3; Richard Edney, 'The Stolen Generation and Sentencing of Indigenous Offenders' (2003) 5(23) *Indigenous Law Bulletin* 10.

68 *R v Fuller-Cust* (2002) 6 VR 496, 524.

69 Ibid 526.

70 Ibid 525.

71 Ibid.

72 Ibid 525, 527, 529.

73 Ibid 529.

74 Ibid 513.

75 Ibid 516.

76 (1984) 44 A Crim R 301.

77 *R v Fuller-Cust* (2002) 6 VR 496, 515.

78 Ibid 520.

79 Ibid 519.

80 Ibid 520.

81 *RCIADIC National Report*, above n 5.

82 Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

83 *R v Fuller-Cust* (2002) 6 VR 496, 523–4 [92], citing Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Malcolm Charles Smith* (1989) [4].

84 *R v Fuller-Cust* (2002) 6 VR 496, 532 [137], citing *RCIADIC National Report*, above n 5, vol 1, 5–6 [1.2.17].

85 *R v Fuller-Cust* (2002) 6 VR 496, 533 [140], citing Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994* (ABS Catalogue No 4190.0, 21 February 1995) 58.

86 *R v Fuller-Cust* (2002) 6 VR 496, 535–6; Fuller-Cust succeeded on appeal on a ground unrelated to his Aboriginality, and his sentenced was reduced from 20 years to 17 years, with a non-parole period of 14 years.

87 Ibid.

88 Transcript of Proceedings, *Fuller-Cust v The Queen* [2003] HCATrans 394 (3 October 203) 3.

89 (2009) 24 VR 457 (‘*Terrick*’).

90 Ibid 468–9 (references omitted).

91 *TM v Karapanos and Bakes* [2011] ACTSC 74 [114], in which Refshauge J approved the eight propositions as representing ‘a comprehensive approach which will be helpful to sentencers who must deal with Aboriginal offenders whose deprived background lead them often and too often into the criminal justice system’.

92 *Terrick* (2009) 24 VR 457, 469.

93 Chris Cunneen, ‘Post Colonial Perspectives for Criminology’ [2011] *University of New South Wales Law Research Series* 6. See also *Social Justice Report 2007*, above n 28.

94 Cunneen, above n 93.

95 *Neal* (1982) 149 CLR 305, 326.

96 See, eg, *R v Kelly* (2005) 155 A Crim R 499, 503; *R v Newman* (2004) 145 A Crim R 361, 375, 378; *Pitt* [2001] NSWCCA 156 [15].

97 [1999] 1 SCR 688.

98 RSC 1985, c C-46.

99 Ibid 706 [33].

100 Ibid 708 [37] (emphasis in original).

101 Ibid 735 [91].

102 Ibid 706 [33].

103 Ibid 728 [76].

104 Ibid 725 [69].

105 See especially ibid 719, 724–5 [58], [67]–[68].

106 Ibid [70]–[74].

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108 Campbell Research Associates, *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Three, October 2006–September 2007* (2008) 2, 10 <http://aboriginallegal.ca/docs/Year_3.pdf> (‘*Evaluation of the Gladue Caseworker Program*’).

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112 Elena Marchetti and Kathleen Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model’ (2007) 29 *Sydney Law Review* 415, 416; Elena Marchetti, ‘Indigenous Sentencing Courts’ (Brief No 5, Indigenous Justice Clearinghouse, December 2009).

113 Marchetti and Daly, above n 112, 420, 432–6.

114 Ibid 429.

115 Ibid 432–5, in which the authors set out in tabular form the various aims of existing state and territory Indigenous sentencing courts.

116 Ibid.

117 Marchetti, above n 112, 1.

118 Eddie Ozols, ‘Pre-sentence Reports on Aboriginal and Islander People: Overcoming the Myths and Providing Culturally Appropriate Information’ (Paper presented to the Aboriginal Justice Issues II Conference, Australian Institute of Criminology, Townsville, 14–17 June 1994).

119 Hannah-Moffat and Maurutto, above n 109, 274.

120 Ibid.