THECOMPLEXITY OF SENTENCING KOORI OFFENDERS

by Justice Stephen Kaye

1 The task of sentencing an offender is in most cases particularly difficult and complex. The basic principles of sentencing are reasonably well established. However, it is the application of those principles which gives rise to difficulty.

2 The source of that difficulty is the irreconcilable tension between some of the basic purposes of sentencing, and in particular the purposes of general deterrence and rehabilitation respectively. That tension is particularly problematic in cases where an assessment of the circumstances of the offending, and particularly the objective gravity of the offending, points in a different direction to the personal circumstances affecting the offender. Ultimately, the competing and conflicting functions and purposes of sentencing are resolved by the process of "instinctive synthesis", by which a judge, in the exercise of a judicial discretion, balances and weighs all relevant factors, including the circumstances of the offence, and the circumstances of the offender.[1] In any case, an exercise of that discretion may, legitimately, lead to quite different conclusions. Such is the complexity of the process involved.

3 Much of the difficulty in sentencing stems from factors personal to the offender, which have played a role, whether directly or indirectly, in that person's offending. The intricate interplay of socio-economic factors, substance abuse, and mental health issues, individually and, on many occasions, collectively, magnify the tension between the sentencing functions of general deterrence, denunciation, specific deterrence, and rehabilitation. They play an important role in the proper characterisation of the offender's culpability, and, commonly, in explaining past reoffending by that person. They are also important in assessing the desirability of a rehabilitative approach to sentencing, and in determining whether a sentence might bear heavily on an offender.

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1 *Makarian v R* (2005) 228 CLR 357, 375 [39], per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Wong v R* (2001) 207 CLR 584,611 [74]-[75], per Cauchon, Gummow and Hayne JJ.

4 Those three factors are most common in offenders who come before the Magistrates' Court and (to a lesser extent) the County Court. They are particularly recurrent in cases involving random, unpremeditated non-lethal violence, in cases of unsophisticated dishonesty (home burglary and the like), and in cases involving public order offences. The exponential increase in mental health issues, and substance abuse, in our society over recent decades, has rendered the function of rehabilitation more important, yet less susceptible of successful achievement.

Indigenous disadvantage and rates of offending

5 Each of those three factors - socio-economic disadvantage, substance abuse and mental health issues - are substantially more prominent in our Indigenous communities than in our non-Indigenous communities. Each of those factors have been identified, in successive reports, as the primary causes of the over representation of members of our Indigenous communities in the criminal justice system.

6 It is beyond the scope of this paper to consider, at length, the causes of the high level of socio-economic disadvantage, substance abuse and mental health issues in our Indigenous communities. It is now well accepted that, historically, they stem from European settlement in this country, which has had an ongoing catastrophic impact on our Indigenous people. It disrupted the relationship of our Indigenous people to their land, and destroyed the traditional way of life through which they had developed and maintained cohesive communities. The massacres, introduced diseases, cruelty and racial prejudice which followed devastated the Indigenous population, and obliterated much of their traditional learning. It destroyed the cohesive fabric of their communities, and the intricate kinship ties that were critical to their way of life. Legislation in each of the colonies, and later states, which established "protection boards" with almost absolute powers, entrenched the oppression of, and prejudice against, Indigenous people, treating them as less than second class people in their own land. It was not until 1967 that the Constitution was amended by referendum to enable Aboriginal persons and Torres Strait

Islanders to be lawfully counted in the National Census. The forcible removal of Aboriginal children from their parents only ceased in the last four decades. It was not until 2008 that the Prime Minister apologised, on behalf of the Nation, for the wrongs occasioned to the Stolen Generation and to our Aboriginal and Torres Strait Islander people.

7 During the last two decades there have been a number of publications which set out, in detail, the nature and extent of Indigenous disadvantage, the causes of that disadvantage, and the inextricable relationship between that disadvantage and the high rate of Indigenous offending and Indigenous incarceration.[2] For the purposes of the present discussion, it is convenient to refer to three of them.

8 The historical and socio-economic factors which lie at the heart of Indigenous disadvantage, and which play an essential role in offending by Indigenous people, were exposed by the groundbreaking report of the Royal Commission into Aboriginal Deaths in Custody in 1991. The Royal Commission made two key findings. First, it found that the Aboriginality of the deceased prisoners had played a central role in their being in custody. In particular, it found that the proportion of Aboriginal persons in custody was significantly greater than the proportion of non-Indigenous prisoners. The Commission found that the disproportionate over-representation of Aboriginal persons in custody, and the high rate of Aboriginal deaths in custody, was directly related to the underlying factors of poor health and housing, low employment and education levels, dysfunctional families and communities, and dispossession and past government policies. Secondly, the Commission found that the criminal justice system, by being culturally ignorant of, and insensitive to, the needs of Indigenous persons and communities, had materially contributed to the disproportionate numbers of Indigenous persons in custody.

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2 See for example "Bringing them home: the Stolen Children Report" (1997) Human Rights Commission of Australia; "Bridges and Barriers", National Indigenous Drug and Alcohol Committee (June 2009); "Doing Time - Time for Doing" - House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011), "Value of Justice Re-Investment" The Senate Legal and Constitutional Affairs References Committee (June 2003).

9 On 6 February last, the Prime Minister presented the fifth annual Prime Ministerial Statement to the House of Representatives on Closing the Gap for our Indigenous Citizens. In that address, the Prime Minister outlined the progress made on five of the six key targets which had been set for addressing Indigenous disadvantage. The Prime Minister reported that there had been good progress in two of the targets. In particular the first target - the delivery of access to early childhood education for all four year old children in remote communities by 2013 - was "on track" and that it would be met on schedule. In addition, the Prime Minister reported that there was "real progress" in meeting a second target, namely, halving the gap in infant mortality rates for Indigenous children under the age of 5 years by 2018.

10 On the other hand there had only been modest progress in meeting the third target, of halving the gap in Year 12 attainment by 2020. In the 2011 Census, only 54 percent of Aboriginal and Torres Strait Islanders aged between 20 and 24 years had a Year 12 or equivalent qualification; by contrast, 86 percent of the non-Indigenous population in that age group had a Year 12 or equivalent qualification. The Prime Minister noted that "substantial further improvements will be needed if our target is to be met by 2020". Further, there was only minor progress demonstrated in respect of the fourth target, namely halving the gap in employment rates between non-Indigenous Australians aged 15 to 64 years and Indigenous Australians. According to the 2011 Census the number of Indigenous Australians in mainstream employment had risen from 42.4 percent to 44.7 percent (compared with the non-Indigenous employment rate of 72 percent). The Prime Minister realistically noted that a "massive and unacceptable gap remains". Finally, the Prime Minister reported that there had been "mixed" progress in respect of the fifth target, namely, halving the gap in reading, writing and numeracy achievements for children by 2018.

11 Notably, the Prime Minister did not report on the sixth target, namely, closing the life expectancy gap within a generation, by 2031. In her report in February 2012, the Prime Minister had euphemistically described that as "the most challenging target of all". In 2011, the gap in life expectancy for Indigenous persons as compared with

non-Indigenous persons was 17 years. The World Health Organisation had found that that gap was then the widest life expectancy gap for an Indigenous population in the developed world.

12 In April 2013, the Victorian Sentencing Advisory Council produced an important report entitled "Comparing Sentencing Outcomes for Koori and non-Koori Adult Offenders in the Magistrates' Court of Victoria". For any judicial officer sentencing a Koori offender, the report is a most important (if not compulsory) source of information. It repays reading in its entirety. An incomplete summary of some of its conclusions is attached as an appendix to this paper.

13 In brief some of the key findings by the report were as follows:

- As at 30 June 2012, the rate of imprisonment of Indigenous people in Victoria was 13.4 times that of the rate of imprisonment of non-Indigenous people. The Indigenous imprisonment rate for Victoria had increased by 105 percent between 2002 and 2012; by contrast, the non-Indigenous imprisonment rate, during that period, increased by 20 percent.

- At June 2012, the rate of detention for Indigenous youths was 20 times the rate of detention of non-Indigenous youths.

- The proportion of young offenders in the 18-24 age group was far higher for Koori offenders than for non-Koori offenders.

- A statistically significant higher proportion of Koori offenders (36.7 percent) were sentenced to imprisonment as contrasted with non-Koori offenders (28.5 percent). A statistically significant lower proportion of Koori offenders received an intensive correction order than non-Koori offenders.

- A comparison of statistics on the alcohol treatment scales, the drug harm scales, and the drug treatment scales, demonstrated that Koori prisoners were substantially more likely to be found in the high need group, than non-Koori prisoners, for each of those three measures. The study noted the impact of

foetal alcohol syndrome disorder among Koori communities, and the difficulties of sentencing people whose ongoing alcohol abuse had led to cognitive impairment, a lack of executive functioning, and an absence of consequential thinking.

- Koori offenders are twice as likely as non-Koori offenders to be classified as having high education and employment needs, and substantially less likely to be classified as having low needs in those two areas.

- (As noted in the Prime Minister s Closing the Gap report), only 53 percent of Indigenous people, aged 15 to 64 years, were employed, compared with 76 percent of non-Indigenous people in that age group.

- Forty four percent of Koori prisoners had previously been sentenced to detention in a youth training centre, as compared with 21 percent of non-Koori prisoners. Further, Koori prisoners were more than twice as likely to be found among those who had the most extensive history of previous detention (five or more previous detention sentences).

- Non-Koori prisoners were more likely to report no previous breaches of adult parole than Koori prisoners. Similarly, Koori offenders were more likely to report instances of breaching a community order than non-Koori prisoners.

- The report noted:

"In addition to a younger age profile (and therefore higher rates of crime) among the Koori population, Koori -people are also more likely to have a complex constellation of factors that, of themselves, are associated with an increased risk of crime. These factors - in particular, a prevalence of child abuse and neglect, poor school performance, unemployment and widespread substance abuse - have been shown to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. And it is these four factors that are associated with the broader historical disadvantage experienced by Indigenous peoples around Australia." (p 57).

14 The matters to which I have just referred are of primary importance in the sentencing of prisoners of Aboriginal and of Torres Strait Islander heritage. First, of course, the plain fact remains that there is a disproportionately high level of disadvantage, in our Indigenous communities, on every index, namely, health, life expectancy, housing, employment and education. Secondly, the report of the Royal Commission into Aboriginal Deaths in Custody, and the report of the Sentencing Advisory Council, demonstrate the clear, direct causal connection between that disadvantage and the disproportionately high number of Indigenous persons in the criminal justice system. It also demonstrates the clear link between that disadvantage and the disproportionately high level of re-offending among Indigenous offenders.

15 Less apparent, yet just as important, is the intergenerational effect of Indigenous disadvantage. As the Sentencing Advisory Council report makes clear, it is now well accepted that the chronic disadvantage, which has affected our Indigenous communities since European settlement, has embedded in them high rates of chronic substance abuse, family violence, and dysfunction, each of which are predisposing socio-economic causes of offending. Each of those factors also have mediated a high level of mental illness which, again, plays a prominent role in anti-social behaviour and offending.

Sentencing principles

16 As a matter of ordinary sentencing principles, the law recognises the relevance of each of those factors in determining a just and proper sentence in a particular case. Plainly, they are relevant to an informed assessment of the questions of culpability, rehabilitation, specific deterrence, and, on occasion, the need to protect the community from the offender. It is well recognised, in general sentencing principles, that mental health issues affecting an offender also may be relevant to the application of the principles of general deterrence.[3]

3 *R v Verdins* (2003) 16 VR 269.

17 During the last four or so decades, the courts have, somewhat belatedly, recognised that, in sentencing Indigenous offenders, it is relevant to take into account that that offender belongs to a particular ethnic group, and, in particular, to take into account the impact of socio-economic, historic and cultural circumstances, which affect that offender as a member of that group.

18 The first expression of that principle is to be found in the dissenting judgment of Brennan J in *Neal v R*[4]. The stark circumstances of that case, which culminated in it coming before the High Court, are testament to the need for the courts to ensure that those factors are given due weight and consideration in sentencing an Indigenous offender.

19 Percy Neal was a resident of the Yarrabah Aboriginal Community Reserve in North Queensland, and a chairman of the council of that reserve. On an evening in June 1981, he attended at the home of the manager of the local store, Collins, and told him to leave the reserve, because of the management by him of his store. The discussion reached an impasse, during which Neal swore at Collins, and twice spat at him. For those actions, he was charged with unlawful assault. He was convicted by a magistrate at Cairns, and sentenced to imprisonment of two months with hard labour. Mr Neal made application to the Queensland Court of Appeal for leave to appeal against that sentence on the ground that it was manifestly excessive. The Crown did not appeal the sentence. The Queensland Court of Criminal Appeal dismissed Neal's application. He concluded that the sentence was manifestly inadequate, and, of its own motion, increased the sentence to six months hard labour.

20 On appeal, the High Court allowed Neal's application for special leave to appeal. Gibbs CJ and Wilson J held that Neal had not been accorded procedural fairness. Their Honours held that the Queensland Court of Criminal Appeal should have granted Neal leave to appeal, and given him the opportunity to abandon that appeal. Their Honours therefore set aside the decision of the Queensland Court of Appeal,

4 (1982} 149 CLR 305.

but left the magistrate's sentence standing. Brennan J considered that the court should remit the case back *to* the Queensland Court of Appeal, to consider if a lower sentence should be imposed. In a dissenting judgment, which well merits careful consideration, Murphy J methodically criticised the reasons for sentence of the magistrate, and concluded that the original was manifestly excessive. His Honour held that the sentence imposed by the Queensland Court of Criminal Appeal, and the sentence originally imposed by the magistrate, should be set aside, and that Neal should be fined one week's wages ($130).

21 In the course of his dissenting judgment, Brennan J expressed the relevant principles, for sentencing Indigenous prisoners, in terms which have been adopted and elaborated in subsequent cases, as follows:

> "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."[5]

22 During the next two decades, the principles so stated by Brennan J were amplified, and applied, in a number of cases. One of the clearest articulations of them was in the judgment of Eames JA in *R v Fuller-·Cust.*[6] In that case, the applicant was born of an Aboriginal mother and an Irish father. His parents' relationship failed when he was young. As a result, he and his sister were admitted to the care of the social welfare department The applicant had a disturbed childhood, during which he had been sexually abused by a relative of his foster parents. The sentencing judge accepted that the applicant had, during his younger years, been subjected to a high degree of dysfunction and disadvantage in his formative years, which accounted for the nature and frequency of his reoffending. In the instant case, the applicant was convicted of five counts of rape, two counts of indecent assault, false imprisonment and causing injury recklessly. He had prior convictions for similar rapes. He was

5 Above 326.
6 (2002) 6 VR 496.

sentenced to a total effective term of 20 years' imprisonment, with a minimum non-parole period of 17 years.

23 The Court of Appeal allowed the applicant for leave to appeal against sentence, on the grounds that the sentencing judge had erred in treating each count on the presentment as a "relevant offence" for the purposes of ss 6D and 6E of the *Sentencing Act*. The Court set aside the sentence imposed on the applicant. Batt JA (with whom O'Bryan AJA agreed) held that the applicant should be resentenced to 17 years 3 months with a 14 year minimum term. In a separate judgment, Eames JA also concluded that the sentence imposed by the sentencing judge was manifestly excessive. Accordingly, Eames JA stated that he would have imposed a lower sentence than the majority of the court. His Honour stated the principles, relevant to sentencing Indigenous prisoners, in the following terms:

> "[78] Sentencing principles are the same for all Victorians. Race is not a basis for discrimination in the sentencing process. Nothing I say in these reasons should be taken as suggesting that Aboriginal offenders should be sentenced more leniently than non-Aboriginal persons on account of their race. The offences committed by the applicant, and admitted by him, are extremely serious - as I shall discuss. That is not to say, however, that considerations and factors of race may not be taken into account on sentencing, where they are relevant.
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> [79] To ignore matters 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. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not reoffend and, in turn, to ensure the long term safety of the public.
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> [80] To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified, and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the

> offender's race or history would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored."

24 The principles so stated by Eames JA have been adopted and applied in a number of subsequent decisions in Victoria, including *R v Wordie*[7], *DPP v Taylor*[8], and *DPP v Terrick*[9]. In particular, they have been applied to most of the considerations which are relevant to sentencing, for example:

(a) The offender's Aboriginality and background are relevant to understanding an offender's offending and an offender's repeated previous offending.[10] In that way they may be important to a proper assessment of the offender's culpability.

(b) They are relevant to general and specific deterrence.[11]

(c) They are relevant to the issue of rehabilitation - particularly where the offender seeks reconciliation with his or her culture.[12]

25 In addition, in sentencing an Aboriginal person, it may be relevant to take into account any process of shaming, which the offender has undergone, and in particular, any attempt by that offender to reconnect with his or her culture. In *R v Morgan*[13], the Court of Appeal held that the participation by the offender, in a Koori court process, was a factor which could be taken into account as a mitigating circumstance. In particular, the court held that it was relevant that the offender had voluntarily participated in a shaming process, in which he had engaged with Elders in court. The court also held that it was relevant that the offender had taken a step in his rehabilitation by voluntarily participating in the process of reconnecting with his culture.

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7 [2003] VSCA 107 [27], [31] (Cummins AJA).
8 [2005] VSCA 222, [14] (Nettle JA).
9 [2009] VSCA 220 [49] and following (Maxwell P, Redlich JA, Robson AJA).
10 *R v Norris & Ors* [2006] VSC 75, [79] (Eames JA); *DPP v Terrick* [2009] VSCA 220, [48].
11 *DPP v Terrick,* 152]; *R v Youngie* (1987) 33 A Crim R 301, 304 (Derrington J).
12 *R v Norris,* above, [86].
13 (2010) 24 VR 230, 236-8 [33]-[41].

26 In the recent decision of the High Court in *Munda v Western Australia,*[14] the Court referred, with approval, to the principles stated by Brennan J in *Neal v R* and by Eames JA in *R v Fuller-Cust.* In doing so, the Court sounded the following note of caution:

> "Mitigating factors must be given due weight, but they must not be allowed 'to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence'. It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by a persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide."[15]

27 In similar terms, in its decision delivered on the same day in *Bugmy v* R[16] the plurality of the High Court stated:

> "... the appellant's submission that a court should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. 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 Aboriginal 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."

28 The Aboriginality of an offender may be relevant in considering the involvement of alcohol in the offending. This is particularly so in offences involving violence and alcohol, where the offender has an established record of committing violent acts while intoxicated. In such a case, ordinarily, the intoxication of the offender may be

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14 [2013] HCA 38.
15 Above, [53].
16 [2013] HCA 37, [41].

taken into account as an aggravating circumstance[17] However, in considering whether that principle is applicable in a particular case, it is relevant to take into account the socio-economic circumstances and environment in which the offender has grown up and lived. In *R v Fernando*[18], Wood J stated the relevant principles in sentencing Aboriginal persons who have repeatedly committed offences when intoxicated. His Honour stated:

> "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.
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> 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.
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> E While drunkenness is not normally an excuse or a 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 very heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects."[19]

29 Subsequent decisions have made it clear that the principles stated in *R v Fernando* are not confined to those Indigenous offenders who reside in remote communities. In particular, it is recognised that the same propositions may be equally applicable to

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17 See, for example, *R v Hay* [2007] VSCA 147, [32] (Maxwell P); *DPP v Dawie* [2009] VSCA 154, [19] (Coghlan AJA); *R v Martin* (2007) 20 VR 14, [53] (Maxwell P, Nettle and Redlich JJA).

18 (1992) 76 A Crim R 58, 62.

19 Cf *DPP v Terrick* (above) [53], [62].

Indigenous offenders who live in an urban environment. In *Bugmy v* R,[20] the plurality noted in respect of *R v Fernando:*.

> "Mr Fernando was a resident of an Aboriginal community located near Walgett in far-western New South Wales. The propositions stated in his case are particularly directed to the circumstances of offenders living in Aboriginal communities. Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando."*[21]

30 On the other hand, the courts have made it clear that it is not sufficient, for the purposes of the application of the principles stated by Wood J in *Fernando,* that the offender is Aboriginal, and that the offence was connected with the consumption by the offender of an excessive amount of alcohol. In particular, it has been emphasised that those principles only apply where the offender has been raised in a community in which alcohol abuse and violence are endemic. In *Bugmy v R,* the plurality observed:

> "*Of* course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been married in that way."[22]

31 The principles, which have been evolved with respect to sentencing Indigenous offenders, and to which I have just referred, are of critical importance in ensuring that justice is properly done to indigenous offenders. Nevertheless, the deep seated socioeconomic disadvantage and communal dysfunction which lie at the heart of Indigenous offending, serve to complicate the appropriate application of those principles in individual cases.

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20 [2013] HCA 37, [41].

21 See also *Kennedy v R* [2010] NSWCCA 260, [55]-[57] (Simpson J, with whom Fullerton J and Hulme J agreed); *R v Fuller-Cust,* [91] (Eames JA).

22 Above, [40]; see also *Kennedy v* R, [55] - [56].

32 The complexity of the application of those principles was demonstrated in *R v Ku & Ors*.[23] That case was known as the "Aurukun case". Nine Indigenous offenders from Aurukun pleaded guilty to a number of offences involving sex with a ten year old Aboriginal girl over a two month period in 2006. The oldest offender, who was 25 years of age, had an intellectual disability. Two other offenders were 18 years and 17 years old respectively. The other six offenders were children under Queensland law - one was 15 years old, three were 14 years old, and two were 13 years old. In each case, the prosecutor told the District Court judge that he was instructed not to seek an immediate custodial sentence in respect of any of the nine offenders. The District Court judge - an experienced and respected judge - sentenced the three adult offenders to six months' imprisonment each, which her Honour suspended for twelve months. The judge sentenced the six juvenile offenders to 12 months' probation without conviction.

33 The sentences in that case prompted an outcry in the media, in the course of which the judge was cruelly and unfairly pilloried. The Queensland Attorney-General appealed to the Court of Criminal Appeal out of time. The Court of Criminal Appeal extended time for the appeal, and upheld the appeal in each case. It resentenced the three adult offenders each to six years' imprisonment, with a two year minimum; it sentenced two of the juveniles to detention, one for three years, and one for two years; and it sentenced the remaining four juvenile offenders to three years' probation.

34 The Court of Criminal Appeal was influenced in its decision by two main factors. First, because of the dysfunctional nature of the Aurukun community, the Court of Appeal considered that it could not rely on the existence of the usual domestic and social structures to keep order, and thus to prevent the offenders from reoffending. Secondly, and allied to that, the Court of Appeal considered that only a term of custody, for five of the offenders, would be effective in order to break up the peer group in the context of which the offending had occurred.

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23 [2008] QCA 154.

35 On any view, the sentencing dilemma faced by the sentencing judge, and later by the Court of Criminal Appeal, was extraordinarily difficult. Certainly, in light of the gravity of the offending, the sentences imposed by the Court of Criminal Appeal might be considered to be appropriate. An insightful analysis (and critique) of the decision of the Court of Criminal Appeal was undertaken by the Honourable Geoff Eames QC AM in his paper "Questions from Aurukun".[24] For our purposes, the relevance of the decision, in *Ku,* is that it demonstrates the extraordinary complexity involved in sentencing Indigenous offenders, which is compounded when the offending occurs within the community to which the particular offender belongs.

36 A second issue has arisen in New South Wales, concerning the application of the principles, stated by Wood J in *Fernando,* and by Eames JA in *Fuller-Cust,* in sentencing an Indigenous person who has a lengthy history of repeat offending.

37 In *R v Ah-See*[25], the applicant was convicted by a jury of an offence equivalent to aggravated burglary. He was sentenced to a term of four years' imprisonment. The applicant was an Aboriginal man, then 40 years of age. He had an extensive criminal record since the age of 18 years, including crimes of violence and dishonesty. In dismissing the applicant's appeal to the New South Wales Court of Criminal Appeal, Hislop J (with whom Bell J and Howie J agreed) stated:

> "In my opinion, the applicant's subjective case is not advanced in reliance upon *Fernando's* case and the applicant's aboriginality.
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> In any event, it is not every case of deprivation and disadvantage suffered by an offender of aboriginal race or ancestry that calls for the special approach adopted in *Fernando* ... and the mitigating effect of being an aboriginal person loses much of its force where the offender has committed similar serious offences in the past.....[26]

38 That reasoning was applied by the New South Wales Court of Criminal Appeal in its subsequent decision in *R v Bugmy*[27]. In that case, the respondent was an Aboriginal man who was raised in Wilcannia, a town in the far west of New South Wales. He

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24 In Australian Indigenous Law Review 12 (2) (2008), 22-40.
25 [2004] NSWCCA 202.
26 Footnote above [20]-[21].
27 [2012] NSWCCA 223.

grew up in a large family, in a household in which alcohol abuse and violence were commonplace. He had little formal education, and was, for practical purposes, illiterate. He had commenced drinking alcohol and consuming prohibited drugs when he was 13 years of age. He had witnessed his father stabbing his mother on multiple occasions. The respondent and each of his siblings had records for offences of violence. The respondent's record of juvenile offending commenced when he was 12 years of age, and he had spent much of his adult life in prison. The respondent had pleaded guilty to two charges of assaulting a corrective services officer while in the execution of his duty, and one charge of intentionally causing grievous bodily harm to another person. He was sentenced to a total effective term of 6 years and 3 months, with a non-parole period of 4 years and 3 months. The Court of Criminal Appeal upheld the Crown appeal, and re-sentenced the respondent to a term of imprisonment of 7 years and 6 months, with a minimum non-parole period of 5 years.

39 In reaching that conclusion, Hoeben JA (with whom Johnson J and Schmidt J agreed) referred to the passage from the judgment of Hislop J in *R v Ah-See,* to which I have just referred, and stated:

> "I agree that with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish. This is particularly so when the passage of time has included substantial offending. Nevertheless, it is still a matter of relevance which can properly be taken into account in the sentencing process. Here, for the reasons set out in *R v Ah-See,* the extent to which his Honour could take those matters into account was limited. They were, however, matters which were relevant to sentencing and it was not an error on his Honour's part to have regard to thein."[28]

40 The respondent was granted leave to appeal against the decision of the Court of Criminal Appeal. In support of the application for leave, it was submitted that the New South Wales Court of Criminal Appeal was in error in the passage to which I have just referred. It was contended that the foreseeable consequence of that error

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28 Above, [50].

was the mandatory diminution of factors relevant to the subjective case of the individual offender. In particular, it was argued that, in many cases, social .deprivation and its consequences may in fact become exacerbated by the passage of time.

41 On 2 October last, the High Court delivered judgment on the appeal.[29] It set aside the decision of the Court of Criminal Appeal in New South Wales, and remitted the case to that court, on the ground that the Court of Criminal Appeal had not properly addressed the one ground upon which the Crown had appealed, namely, that the sentence was manifest inadequate.

42 In its judgment in *Bugmy,* the High Court took the opportunity to consider the principles stated by *Fernando*. In doing so, it noted that, on the hearing of the appeal in the High Court, the New South Wales Director of Public Prosecutions did not maintain the submission, which it had made to the New South Wales Court of Criminal Appeal, that the evidence of the appellant's deprived background lost much of its force when viewed against the background of his previous offences. The plurality stated:

> [11] ... on the hearing of the appeal in this court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.
>
> The Director's submission should be accepted. 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, as the

29 *Bugmy v R* [2013] HCA 37.

appellant's submissions are apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. 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. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."[30]

Conclusions

43 It is clear, from the foregoing discussion, that the degree of difficulty, which normally attends any exercise of the sentencing discretion, is significantly increased where the offender, standing for sentence, is Indigenous. Nevertheless, it is that complexity which makes it so important that, in the case of an Indigenous offender, the sentencing discretion be exercised in a just, humane and appropriate manner, with a proper application of the principles which I have discussed. For far too long, the legal system has been an instrument of oppression and injustice to our Indigenous people. It is of the utmost importance that it now be part of the solution, rather than a contributor to the ongoing problem.

44 Notwithstanding the complex considerations to which I have referred, I would suggest that the following conclusions may provide some guide to the exercise of the sentencing discretion in respect of an Indigenous offender.

45 First, where the offender standing for sentence is Indigenous, the court must ensure that it is properly informed as to the background, upbringing, education, health, and current circumstances of the offender. It is most important that the court be provided with sufficient information upon which it may form an accurate assessment as to the connection, if any, between the offender's Aboriginality, and the offence. The statistics compiled by the Sentencing Advisory Council in its recent report make it abundantly plain that if adequate inquiry is made, there is a high

30 Above, I42]-I44].

likelihood that the Indigenous offender standing for sentence would be entitled to the application of the- principles developed in *Fuller-Cust* and *Fernando.*

46 Secondly, it is important to bear in mind the admonition by the High Court, in *R v Bugmy* and *R v Munda,* that, in order that the Aboriginality of the offender be taken into account as a relevant circumstance, there must be demonstrated to be an appropriate link between the offender's background and his or her offending. Nevertheless I would suggest that that inquiry must be informed by a proper knowledge, and acknowledgment by the sentencing judge or magistrate, of the long standing historical causes of dysfunction, alcohol and drug abuse, mental ill health, and offending, among our Aboriginal citizens. There is a proven connection between the high rates of socio-economic disadvantage suffered by our Indigenous peoples and their high rates of representation in the criminal justice system. Any inquiry, in an individual case, as to the existence of the requisite link between an offender's Aboriginality and the commission of the offence, must be informed by a proper knowledge of, and acknowledgment of, those factors. The information compiled in the reports to which I have referred - including the report of the Sentencing Advisory Council - is important relevant material to a proper determination of the question whether, in an individual case, there is a sufficient established connection between the offender's Aboriginality and the commission by that person of the particular offence.

47 In this respect, there is sound authority for the proposition that a sentencing judge is entitled to take "judicial notice" of the established fact of Indigenous disadvantage, and of the established and accepted intimate interconnection between that disadvantage, and the disproportionate rate of representation of Indigenous offenders in our criminal justice system. For example, in the passage from the judgment in *R v Fernando* to which I have earlier referred (at paragraph 27), Wood J stated that the court should recognise the problems of prevalent alcohol abuse and violence within Aboriginal communities. In *Bugmy v The Queen*[31], the High Court

31 [2013] HCA 37 [38]-[41].

accepted that such acknowledgement of the endemic presence of alcohol in our Aboriginal communities conformed with the statement of sentencing principle by Brennan J in *R v Neal.* In doing so, the plurality referred (as a footnote) to the report of the Steering Committee for the Review of Government Service Provision, "Overcoming Indigenous Disadvantage" (2011). In *R v Fuller-Cust,* Eames JA referred to the final report of the Royal Commission into Aboriginal Deaths in Custody in considering the impact of the removal of the applicant, in that case, from his family at an early age.

48 Thirdly, it is important to bear in mind that the connection between an offender's Aboriginality, and the offending, may not always be immediately apparent. In such a case, it is important to bear in mind the acknowledged intergenerational effect of the long standing disadvantage of our Indigenous people, and of the consequent high levels of communal dysfunction and offending which are a direct consequence of that disadvantage. I would suggest that that factor is an important starting point for determining whether the court should infer, on the balance of probabilities, that there is a sufficient connection between an offender's Aboriginality and the commission of the offence, for the purposes of the principle stated by the High Court *in Bugmy v R.*

49 Fourthly, where the offender has a long history of previous convictions, the High Court has now made it clear that the effects and relevance of an offender's background, including childhood deprivation and abuse, are not diminished with the passage of time and with repeat offending. It is important to bear in mind that the re-offending itself is commonly a function of such background factors. Also, it is important to bear in mind that, not uncommonly, it may not be until a person has re-offended on a number of occasions, that that person "sees the light", and gains sufficient maturity and insight, to be able to turn his or her life around.

50 Fifthly, and in this connection, the function and purpose of rehabilitation must be understood and given due weight. In this connection, the classic statement by Starke J in *Williscroft & Ors v* R[32] has real application:

> "It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the benefit to the community.[11]

51 Sixthly, and on the other hand, there is no doubt that cases involving serious offending within a dysfunctional Aboriginal community, such as the *Aurukun* case, pose particular difficulties. In such a case, the court must take into account the need for community protection, as well as the importance of appropriate denunciation of the offending, and vindication of the victim. On the other hand, and particularly in such cases, care must be taken to ensure that the shrill cries of the "law and order" syndrome, often advanced by the less intelligent segments of the media, do not distract the courts from the proper application of the principles stated in cases such as *Neal* and *Fuller-Cust.*

52 Finally, and in light of those conclusions, it is clear that, as judicial officers, we can only properly perform our function by being fully informed about, and appreciative of, the background and history of our Indigenous people, and their current circumstances. Equally, it is most important in each case that we ensure that we are provided with a full and accurate account of the offender's upbringing and circumstances. Where a judicial officer is posted to a regional court, it is most important that that judicial officer should become properly acquainted with the functions, problems and attributes of the local Indigenous community. Where in a particular case the court is not properly informed about the offender's background, it may be appropriate for the court to engage directly with the offender. Such a process has the advantage of enabling the offender to become actively involved in

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32 [1975] VR 292,303; see also *Yardley v Betts* (1979) 22 SASR 110, 112-3 (King CJ); *R v Blackman and Waters* [2001] NSWCCA 121, [44]-[45] (Wood J).

the court proceeding, rather than by being a passive bystander to the proceeding. It is most important that the court, in each case, be informed of the appropriate sentencing alternatives, and in particular of any rehabilitative programs which may be appropriate for the particular offender.

JUSTICE STEPHEN KAYE

October 2013

SUMMARY OF REPORT BY SENTENCING ADVISORY COUNCIL (APRIL 2013): "COMPARING SENTENCING OUTCOMES FOR KOORI AND NON-KOORI ADULT OFFENDERS IN THE MAGISTRATES' COURT OF VICTORIA"

Executive Summary

53 In 2011, Aboriginal and Torres Strait Islander peoples comprised 0.7 percent of the population of Victoria. As at June 2012, Aboriginal and Torres Strait Islander peoples comprised 7.6 percent of the Victorian prison population. At that date, the rate of imprisonment of Indigenous people in Victoria was 13.4 times higher than the rate of imprisonment of non-Indigenous people.

54 The report stated:

> "A body of recent Australian research supports the position that the differential sentencing outcomes of Indigenous offenders are the result of differential involvement in criminality, rather than the result of any identifiable racial discrimination on the part of judicial officers.
>
> Nonetheless, while sentencing outcomes may not be directly attributable to racial discrimination, racially discriminatory policies historically - particularly with regard to dispossession of land, removal of children and denial of Indigenous culture - are unquestionably a contributing cause of the chronic disadvantage that is associated with Indigenous involvement in criminality in the first place.
>
> This Indigenous disadvantage is a result of a history of differential treatment - from colonialism and through successive governments - that was, in large part, based on racially discriminatory policies. Indigenous disadvantage is therefore an intergenerational legacy of racial discrimination, the effects of which persist over time and reach into the present day and include the over-representation of Indigenous people in Australian prisons." (p vii).

Key findings

55 The Indigenous imprisonment rate has increased by 105 percent between 2002 and 2012. By contrast the non-Indigenous imprisonment rate has increased, over the

same period, by 20 percent. Thus the Indigenous imprisonment rate has increased more than five times as much as the imprisonment rate for the non-Indigenous population in Victoria.

56 The over-representation of Indigenous youth in juvenile detention facilities is even more pronounced than it is for Indigenous adults. Indigenous youth are more than twenty times more likely than in non-Indigenous youth to be in a Victorian detention facility.

57 The most common offence for all offenders in the Magistrates' Courts comprised acts intended to cause injury. There was a substantially higher prevalence of that offence amongst Koori offenders than for non-Koori offenders. Burglary is also more prevalent among Koori offenders than among non-Koori offenders.

58 Koori offenders are more likely to have prior sentences, and also to have a greater number of prior sentences. Analysis discloses a significantly higher proportion of Koori people being sentenced to imprisonment than non-Koori offenders, and a significantly statistically lower proportion receiving an intensive correction order. Koori offenders are more likely to be sentenced to a short term of imprisonment while non-Koori offenders are more likely to be sentenced to a longer term of imprisonment.

Indigenous over representation in Australia' prisons

59 Indigenous persons make up 2.5 percent of the total Australian population, but the Victorian Koori population is 0.7 percent of Victoria's total population. The Australian (and Victorian) Indigenous population is significantly younger than the non-Indigenous population. That differential potentially plays a role in the analysis of differential criminal justice system outcomes.

60 The average imprisonment rate for Australia is 168 prisoners per 100,000 adults. By contrast, the age standard Indigenous rates for Indigenous adults is 1,913 per 100,000 Indigenous adults. At 30 June 2012 the imprisonment rate for 100,000 adults in

Victoria was 111.7; for Indigenous adults, it was 1443.7 per 100,000 Indigenous adults. The Indigenous imprisonment rate for Victoria has increased by 105 percent between 2002 and 2012. By contrast, the non-Indigenous imprisonment rate, during that period, increased by 20 percent. (It is possible that some of the increase in the Indigenous imprisonment rate is due to an increase in the willingness of Indigenous people to identify as Indigenous upon reception into prison).

61 The over-representation of Indigenous youth in juvenile detention facilities is even more pronounced than it is for Indigenous adults. In Victoria, Indigenous youth were (in 2012) more than 20 times likely than non-Indigenous youth to be in a Victorian detention facility.

Victorian Sentencing Outcomes (period of study: 1 July 2010 to 30 June 2011)

Gender

62 There was a far higher proportion of females among Koori offenders (18.9 percent) than among non-Koori offenders (13.7 percent).

Age

63 The proportion of young people in the 18-24 age group was far higher for Koori offenders (34.2 percent of Koori males, and 29.5 percent of Koori females) than for non-Koori offenders (26.8 percent of non-Koori males, 21.3 percent of non-Koori females).

Offence type

64 For both Koori and non-Koori offenders, the most common offence was "acts intended to cause injury". This offence was substantially more prevalent among Koori offenders (32.7 percent) than for non-Koori offenders (24.3 percent). Studies indicate that the causes emanate from the original violent dispossession and disempowerment of Indigenous communities, "... leading to hopelessness, despair and rage, as well as more situational factors such as alcohol abuse, unemployment, boredom and tolerant attitudes towards violence". (p 32).

65 Burglary was also more prevalent among Koori offenders (12.4 percent) than among non-Koori offenders (9 percent). By contrast, non-Koori offenders were far more likely to be sentenced for a traffic offence than Koori offenders.

66 Explanations for the over-representation of Koori people in the injury offences category include: Koori people having substantial co-morbidity factors (alcohol abuse and cognitive impairment); violence has become part of the daily life and environment for many Koori people, and in particular young Koori .children who are over-represented in child protection resulting from abuse and trauma; and historical and current disadvantage.

Koori people in child protection

67 An important factor in understanding Koori offending is to be found in the over-representation of Koori people in child protection. In 2010 to 2011, Indigenous Victorian children were 9.4 times more likely to be the subject of substantiated notifications than non-Indigenous children. In that period, Indigenous Victorian children were 14.9 times more likely to be placed in out of home care than non-Indigenous children. ·The most common type of abuse or neglect for Victorian Indigenous children was emotional abuse.

68 Victoria does not maintain data from which to draw conclusions about the over-representation of Indigenous youth in the justice system. Nationally, 39 percent of young offenders under juvenile justice supervision were Indigenous. Indigenous young offenders were 14 times more likely to be under community based supervision, and 18 times more likely to be in detention. In addition, Indigenous youth entered the juvenile justice system at a younger age (10-14 years) than non-Indigenous youth. Young offenders in detention (Koori and non-Koori) are some of the most disadvantaged people in the community. Two thirds were the victims of abuse, trauma or neglect before detention, 40 percent had mental health issues, and 92 percent were alcohol users or drug users.

Prior sentence

69 Koor1 offenders were more likely to have prior sentences, and also a greater number of prior sentences, than non-Koori offenders.

Sentence type

70 A statistically significant higher proportion of Koori people (36.7 percent of Koori offenders) were sentenced to imprisonment as contrasted with non-Koori offenders (28.5 percent). A statistically significant lower proportion of Koori offenders (7 percent) received an intensive correction order than non-Koori offenders (17.5 percent). The lower proportion of Koori offenders receiving intensive correction orders reflected an understanding that Koori offenders typically have greater difficulty complying with the strict conditions that often apply to such an order. The higher prevalence of imprisonment terms for Koori offenders was also likely to be a function of the higher prevalence of prior sentencing episodes, especially prior episodes of imprisonment.

71 The study undertook a multivariate analysis to test whether Indigenous status is statistically significantly related to the type of sentence imposed. The analysis involved holding constant all other factors (age, gender, current offence profile, and previous sentencing episode), thus isolating Indigenous status as the one factor in the model. That analysis revealed that Indigenous status is statistically significantly related to the type of sentence imposed: Koori offenders in the data set were .more likely to receive a custodial sentence than non-Koori offenders. The effect of Indigenous status while significant (increasing the likelihood of a custodial sentence by between 30 percent and 92 percent) was not seen to be as strong as the effects of the other factors in the model. (Prior sentencing episode; gender, age). The findings are consistent with two other Australian studies of the relationship between Indigenous status and sentencing in lower courts, which show that Indigenous offenders are more likely to receive a term of imprisonment than non-Indigenous offenders.

Sentence length

72 Koori offenders are more likely to be sentenced to a short term of imprisonment, while non-Koori offenders are more likely to be sentenced to a longer term of imprisonment (particularly two years or more). It was observed that the larger proportion of Koori people in the short terms of imprisonment group may be indicative of differences in remand practices. Koori people are less likely to be bailed. Accordingly the sentence may be a reflection of time already spent in custody. Applying the multivariate. model, there was shown to be no statistically significant relationship between Indigenous status and the length of the imprisonment term (that is, there were no meaningful differences in sentence length between Koori and non-Koori offenders).

Social, personal and economic disadvantage (period of assessment July 2010 to June 2011)

Substance use

73 The study compared scores on the alcohol treatment scales and on the drug harm and drug treatment scales for Koori and non-Koori prisoners. For all three measures, Koori prisoners were more likely to be found in the high need group than non-Koori prisoners. In particular, more than double the proportion of Koori offenders than non-Koori offenders are in the high need group for alcohol treatment. In each of the three groups, Koori prisoners were statistically significantly more likely to be in the high need group. The study noted the impact of foetal alcohol syndrome disorder among Koori communities, and the difficulties of sentencing people whose ongoing alcohol abuse has led to cognitive impairment, a lack of executive functioning and an absence of consequential thinking.

74 Other studies have established a higher prevalence of substance abuse among prisoner populations than non-prisoner populations in Australia. Such studies disclose? significantly higher proportion of Indigenous and non-Indigenous people who abuse alcohol. Such harmful drinking behaviour was found to start at an earlier age among the Indigenous population. The phenomenon is particularly problematic among Indigenous women, as it compromises the mother's health and her parenting

capacity, and also causes behavioural and cognitive deficits among children.

75 Recent research has highlighted the over-representation of people, both offenders and victims, with mental health disorders and cognitive disability in the criminal justice system. Studies have found that people with complex cognitive disability (co-morbidity) were significantly more likely to have been clients at juvenile justice, to have had earlier contact with police, to report more police episodes and to have experienced more epi odes in prison. They are more likely to have prior convictions, to have poor educational attainment and to have experienced homelessness. The research noted that 91 percent of the Indigenous group were identified as having mental health disorders and cognitive disability.

76 The high level of substance abuse among Koori prisoners has profound implications for their ongoing involvement in a "marginalised community/ criminal justice place". This is a critical factor in understanding the observed differences in sentencing outcomes for Koori offenders.

Education and employment

77 Koori prisoners are twice as likely as non-Koori prisoners to be classified as having high education and employment needs, and less likely to be classified as having low needs in those areas. The differences among Victorian prisoners reflect differences in Indigenous populations across Australia.

78 Australian census data reveal that Indigenous people are less likely to have completed high school (25 percent) compared with non-Indigenous people (52 percent). Those who did not complete high school, 25 percent of Indigenous peoples reported their highest year of school completed as Year 9 or below, which was double the proportion of non-Indigenous people.

79 Census data show that 51 percent of Indigenous people aged 15 years and over were employed, compared with 64 percent for non-Indigenous people. In particular, 53 percent of Indigenous people, aged 15 to 64 years, were employed, compared

with 76 percent. of non-Indigenous people in that age group. Indigenous people were three times more likely than non-Indigenous people to be unemployed.

80 Census data show that Indigenous people have significantly lower incomes than non-Indigenous people.

Previous contact with the juvenile and justice system

81 In 2010 to 2011, 21.8 percent of non-Koori prisoners had been previously sentenced to detention in a youth training centre, compared with 44.1 percent of Koori prisoners. Further, Koori prisoners were more than twice as likely to be found among those who have the most extensive history of youth detention (5 or more previous detention sentences). Similarly, 37.8 percent of all Koori prisoners had had five or more prior imprisonment sentences, as compared with 29.4 percent of non- Koori prisoners. In contrast, 36.2 percent of non-Koori prisoners had only been sentenced to imprisonment once previously; 22.5 percent of Koori prisoners had only been to prison once before.

82 The difference in those statistics was attributed to two different factors: the relevance of prior criminality to sentencing, and the potentially criminogenic effect of imprisonment.

83 In addition, non-Koori prisoners were more likely to report no previous breaches of adult parole (71.2 percent) in contrast to Koori prisoners (59 percent). The report noted difficulties that Koori people have in complying with conditions of parole orders, in particular reporting, and undertaking educational or training programs. It was likely that a large proportion of the breaches of parole orders, among Koori prisoners, consisted of breaches of conditions rather than further offending.

84 Koori offenders were also more likely to report instances of breaching a community order (10.8 percent of Koori offenders) compared to non-Koori prisoners (6.8 percent).

General risk of reoffending

85 In comparing the general risk of re-offending for non-Koori and Koori offenders, it was concluded that Koori offenders were more likely to be in the high risk group than non-Koori prisoners were more likely to be in the low risk group. The report noted:

> "In addition to a younger age profile (and therefore higher rates of crime) among the Koori population, Koori people are also more likely to have a complex constellation of factors that, of themselves, are associated with an increased risk of crime. These factors - in particular, a prevalence of child abuse and neglect, poor school performance, unemployment and widespread substance abuse - have been shown to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. And it is these four factors that are associated with the broader historical disadvantage experienced by Indigenous peoples around Australia.[11] (p 57).

Discussion

86 The report concluded:

> "The causes of over-representation of Koori people in Victoria's prisons are multifaceted and complex. The findings of this report show that the over-representation of Koori people in prisons is partly influenced by an increased likelihood of being given a custodial sentence. While the analysis cannot definitively identify the reasons for this difference, and hence cannot conclusively rule out the possibility of racial discrimination in sentencing, it is feasible that Koori sentencing outcomes are influenced by Koori over-representation in the youth justice system, which in turn is influenced by Koori over-representation in the child welfare system. This, in turn, may be part of the ongoing consequence of the historical disadvantage that began with colonisation, with the economic and social impacts that followed.
>
> But despite the historical disadvantage that separates Koori Victorians from non-Koori Victorians, the nature of the risk factors that lead to offending behaviour is no different for Koori communities. Risk factors for offending among Koori people are the same as they are the world over: being young and male, being of low socio-economic status, having poor education and being unemployed, abusing drugs and alcohol and experiencing poor parenting, often in the form of abuse and neglect. The risk factors themselves are no different. What is different is that there is a higher prevalence of each of these among Indigenous communities in Australia." (p 59).