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## *Sentencing in Customary Australia: An overview of the issues*

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Indigenous people are far more likely than non-Indigenous people to be drawn to the attention of police and taken into custody. The presence of Indigenous peoples in the criminal courts is disproportionately high. Indigenous people are vastly over-represented in prisons. That these facts have major implications for the numbers of Aboriginal deaths in custody, as well as broader implications for Australian social, economic, welfare and health policies, is not in dispute. What is a matter of some conjecture is the remedy for the malaise. There is a need for research that would examine, and perhaps implicate as a cause of the problem, current patterns of sentencing of Indigenous Australians. This paper reviews one idea alone: the potential for differential sentencing — along “customary” lines — to act as a means of addressing the current concerns.

In 1991 the Report of the Royal Commission into Aboriginal Deaths in Custody was published. One of the findings of the Report was simple and unequivocal. “The first strategy to reducing the number of deaths in custody”, wrote Royal Commissioner Elliott Johnston QC, “is to reduce the number of Aboriginal people coming into custody in the first place” (Royal Commission 1991, p. 133). Sadly, the position described by the Royal Commission Report has hardly changed in the six years since it

was published.<sup>1</sup> The Final Report made 339 recommendations concentrating principally on the underlying reasons that brought Aboriginal Australians to the attention of police. The Report sought reforms regarding, amongst other things, police training, court and prison practices, government facilities and counselling services. In relation to sentencing practices, little was said, other than that imprisonment ought to be the consideration of last resort (recommendation 92). Yet, despite a commitment of governments to endorse and implement the recommendations of the Royal Commission, little has changed in relation to the interface of Aboriginal Australians and the justice system. Little has changed specifically in relation to

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<sup>1</sup> The number of Indigenous people in prison continues to increase in Australian communities. Indigenous Australians are still approximately 14 times more likely than non-Indigenous Australians to be in prison Australia-wide (Walker 1994, p. 13). There would appear to be no significant difference between adult and juvenile figures (Wundersitz et al. 1990). In South Australia as at June 30 1997 there were 151 Aboriginal men and 19 Aboriginal women in SA prisons, being 10.7% of the male prison population and 20.6% of the female prison population. When reviewing the daily average for the first half of 1997 these percentages climb to 16.9% and 28% respectively.

sentencing practices, and, as a corollary, the rate of custodial deaths has not fallen.<sup>2</sup>

The issue under discussion in this paper is the role of sentencing and in particular the persistence of the custodial sentence for Indigenous offenders in Australian courts today. Can a solution to the problems identified in the Royal Commission Report be found in reforming sentencing practices? Could these reforms target custodial sentences as anathema to Indigenous offenders? Probably not. Simple solutions are invariably laced with difficulties. What criteria does one use in order to sentence justly, for example, an Aboriginal defendant who has pleaded guilty or been found guilty of a serious crime? On the one hand, recognition needs to be given to the problems faced by Aboriginal Australians caught in a culture clash between ancient mores and colonial laws (Behrendt 1998). On the other hand, considerations of community safety (and the victim's suffering) ought to be given importance too. Then again, there are arguments that there is an obligation under international law to recognise customary rights (Cassidy 1993). By the same token one might argue that there ought to be formal equality before the law.<sup>3</sup> In the end, it is very difficult for one sentence to meet multiple expectations.

The choice, for the purpose of this paper, is between custodial and non-custodial

sentences. The argument often put to policy-makers is that there ought to be a renewed affirmation, on the part of sentencing authorities, to avoid custodial sentences as a matter of policy. But there are problems with such an approach. For while it appears that there is little evidence that simply applying non-custodial options would make any difference to offence rates and recidivism rates,<sup>4</sup> there may be a community backlash (Indigenous as well as non-Indigenous) if there were to be any perception that Aboriginal offenders were on the receiving end of legally mandated leniency. What, then, is the answer for policy-makers who wish to take seriously the opportunity to bring about reform in this area?

At the very least it is arguable that policy-makers ought to consider the challenge offered by the Australian Law Reform Commission (ALRC) over a decade ago and explore the opportunities for "customary" sentencing in certain jurisdictions and forums. It is possible that there would be a greater likelihood of more appropriate and just outcomes for all Australians, Indigenous and non-Indigenous, if customary law were to be embraced in greater measure in Australia (Sarre 1997a, pp. 61-2; 1997b, p. 546). This is certainly not the first time this suggestion has been explored (for example, McCorquodale, 1984: 254ff; McRae et al. 1997, pp. 376 ff), nor is it a suggestion without its vehement opponents (for example, Raffaele 1994). But the Royal Commission Report made strong reference to the notion<sup>5</sup> and it is the author's view that it is an idea worth pursuing, given the abject failure of the implementation of other recommendations of the Royal Commission to stem the tide of custodial deaths and recidivism rates identified by them. The Royal Commission made this recommendation:

*That in the case of discrete or remote communities sentencing authorities consult*

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<sup>2</sup> There are an average of 10.5 Aboriginal deaths in custody annually, the same as the average during the period covered by the Royal Commission (Howlett & McDonald 1994, p. 13). While Indigenous people account for approximately 1.2% of the Australian population, they still make up more than 8% of custodial deaths. From June 1996 to June 1997, however, there were no Aboriginal deaths in custody in SA (source: Royal Commission News: ALRM and AJAC RCIADC Independent Monitoring Newsletter, July/August 1997 # 43/44).

<sup>3</sup> It must be said in relation to this argument that it stands on shaky grounds. This is because there is no guarantee that equality talk in theory brings equality in fact. As the High Court has stated: "[F]ormal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life" (per Brennan J in *Gerhardy v Brown* (1985) 57 ALR 472 at 516). Merely calling for "equality" ignores the fact that not all people start from the same bases. For example, is it "equal" to apply vagrancy laws "equally" knowing that only the poor will be affected?

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<sup>4</sup> Roeger (1994) found that there is no difference in recidivism rates of those imprisoned with those given non-custodial community service orders.

<sup>5</sup> Recommendations 104 and 219. Refer South Australia (1994, p. 107).

*with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should, in appropriate circumstances, relate to sentences in individual cases* (Royal Commission 1991, Recommendation 104).

The South Australian response has been to state that “these are matters of government policy on sentencing guidelines” (South Australia 1994, p.107) and thus recommendation 104 has been implemented satisfactorily, according to the government.

In February 1977, the ALRC was appointed to determine whether it would be desirable to apply Aboriginal customary law to Australian Aboriginal people, either generally or in particular areas. Its report entitled *The Recognition of Aboriginal Customary Laws* was released no fewer than nine years later<sup>6</sup> (ALRC 1986). The ALRC recommended that the recognition of traditional Aboriginal laws regarding punishment, “would be a contribution towards making the legal system more relevant, accessible and understandable to Aboriginal people” (ALRC 1986, pp. 42-8).

In 1992, the Commonwealth, in seeking to implement the Royal Commission Report, requested preparation of a further report which outlined the Commonwealth government’s progress on the recognition of customary law, a task undertaken by the

States as well. The Commonwealth report (Office of Indigenous Affairs 1994) concluded that there had been no implementation of comprehensive customary law legislation due to the complexity of the issues and the fragmented nature of government in Australia. Two more years passed. Then on 3 November 1994, the matter was reviewed by the Ministers whose portfolios covered this area. Federal and State Attorneys-General and Ministers for Aboriginal Affairs met (separately) in Melbourne on that day to lay the groundwork for further work in each jurisdiction towards formal or informal recognition of customary law. Little, however, has been achieved since that time.

That same year, at a conference in Darwin, the issue was raised in a keynote address:

*Recognition must be given ... to the existence (and survival) of customary law. As indigenous cultures are organic (rather than static), customary law may exist (albeit in an evolved/evolving format) in contemporary communities, as well as in their more traditionally orientated counterparts. As Australian society examines socially just ways of dealing with its Indigenous peoples, and as Aboriginal and Torres Strait Islander peoples continue to demand the right of more culturally appropriate responses, the importance of customary law cannot be underestimated* (Social Justice Commissioner 1995, p. 31).

In order to examine the strength of that claim, it is necessary to re-visit briefly the history of the recognition of customary law in Australia generally.

### ***A Brief History of Customary Law in Australia: Official denial***

It is appropriate to remind ourselves of the legal landscape upon which the customary law issue is debated today. The official position is premised upon the reception of English law into the Australian colonies post-1788. One can conclude unequivocally that colonisers of the Australian continent had little regard for Indigenous systems of law (Sarre 1996a, p. 195; 1996b). To speak of Indigenous

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<sup>6</sup> It was 900 pages long, and the nine year period was the longest in the Commission’s history. Similarly the Northern Territory Legislative Assembly Committee on Constitutional Development (Northern Territory, 1992) has undertaken a similar exercise in order to shape the laws of the Northern Territory as it approaches statehood. In the final analysis, both the ALRC 1986: 42-48, and the CCD remained cautious about any wholesale embracing of customary systems, recommending a careful and incremental approach to any such recognition (see Evatt 1988: 9). The ALRC Report did commend courts in the NT for judicial notice of customary law as a substantive defence and, as happens more frequently, for acknowledging it in mitigation of penalty (see also McLaughlin 1996, p. 6).

systems of law at all would have challenged the view of the social anthropologists and international jurists of the day that Antipodean “natives” had no system of law of their own and, indeed, should have been grateful for the “superior” and “noble” colonists who brought with them civilised legal systems.<sup>7</sup> Colonisation was, on this theory, the preferred option for civilisation.

Thus the issue of customary law did not occupy the minds of legal theorists in the first two hundred years of Australian colonial history. Indeed, it was not possible, said the Supreme Court of New South Wales in *R v Wedge* [1976] 1 NSWLR 355, for example, for Australia to have two sets of criminal laws. Aboriginal defendants, the court confirmed, were subject to the law of New South Wales whether or not both victim and offender were Aboriginal people and whether or not they were to be subject to traditional law as well. The *Wedge* case confirmed some older legal precedents. In *R v Neddy Monkey* [1861] VLR (L) 40 the court determined, in a matter that turned on the marital status of the defendant and the chief prosecution witness, that it would not compromise the general rules of evidence in order to take judicial notice of “vague rites and ceremonies” (at 41). Furthermore, in *R v Cobby* (1883) 4 NSWLR 355, the Supreme Court of New South Wales determined that they would not and could not recognise a marriage of “these aborigines, who have no laws of which we can have cognisance” (at 356). For almost two hundred years, then, the Australian courts did not recognise any form of customary law at all. If there were calls for it to be implemented into the Australian criminal (or civil) justice system, they were ignored, forgotten or

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<sup>7</sup>The international European jurist, Vattel, wrote thirty years before the First Fleet arrived in the colony of New South Wales: “But now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion [as hunters and gatherers]. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labor, and they may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands’ ... [W]hen the Nations of Europe ... come upon lands which the savages have no special need of, and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them ... (Vattel 1758, pp. 38, 85).

denied because a declaration of its existence would have frustrated the establishment and development of an Anglo-Australian legal system.

### *Shifts in attitudes to the recognition of customary law*

By 1971, however, there began to appear signs that things could change. A number of court decisions began to cast doubt on the accepted approach to “native” law. In one such case, the landmark land rights decision, *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141, Justice Blackburn of the Northern Territory Supreme Court noted, *obiter*, that there had been a system of law in existence in Australian Aboriginal societies in 1788. The evidence showed, he asserted,

*... a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws and not of men” it is that shown in the evidence before me (at 267).*

But the judge was restricted to following the precedent that Australia at “settlement” was *terra nullius*, and thus the claim ultimately failed. The *Milirrpum* decision, however, was overturned when the *Mabo* case (1992) 107 ALR 1, which recognised that a system of “native title” to land existed in Australia, came before the High Court. There followed some speculation that the High Court judges were signalling the start of a broader recognition of Indigenous legal systems (Sarre 1994, p. 99). The momentum stalled somewhat following a High Court hearing<sup>8</sup> in December 1994 when Chief Justice Mason dismissed one Denis Walker’s appeal against his conviction on assault and resisting arrest charges (*Walker v New South Wales* (1994) 69 ALJR 111). Walker had claimed that he could not be guilty of a crime of assault

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<sup>8</sup> Albeit a chamber application rather than a court decision.

because he was not accountable under Commonwealth or State criminal law. A member of the Noonucal people, Walker claimed that Australian parliaments did not have the power to make laws for Aboriginal Australians without their consent. Chief Justice Mason disagreed, maintaining that the concept of justice demanded that the same conduct receive the same legal response regardless of the race of the person charged with an offence.

*The rule extends not only to all persons ordinarily resident within the country, but also to foreigners temporarily visiting. And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose (at 113).*

Customary criminal law, said the former Chief Justice, had been extinguished by general criminal statutes.

Moreover, in *R v Warren* [1996] ACL Rep 130 SA 53, three Dieri men appealed against their convictions for assault in a case arising out of a “pay-back”-style attack on another man. They maintained that the payback assault was required by customary law. They claimed duress as a defence. Their appeal was dismissed. Duress, said the court, was only available in circumstances where their view of customary law meant that their wills had been overborne by its threat of serious harm against them. In the circumstances, the court was not satisfied that the assaults were motivated by the threats associated with refusing to carry out the payback.

These cases are not authorities, however, for the proposition that no court will recognise customary criminal law. The position is simply that recognition must, of legal necessity, be piecemeal and on a case by case basis.

### *The idea of customary sentencing*

The impetus provided by the case of an Aboriginal man, Sydney Williams, in South Australia begins the story of the potential recognition of customary sentencing in this State.<sup>9</sup> Williams (reported in *R v Williams* (1976) 14 SASR 1) came before Justice Wells in the

Supreme Court of South Australia in 1976. The court heard evidence that a taunt (in relation to customary secrets) by a woman with whom Williams (a Pitjantjatjara man) had been drinking had led to her death at the hands of the accused. Williams was convicted of manslaughter. The provocation of the woman was sufficient to reduce murder to the lesser crime, said the court. Wells J decided not to sentence Williams to imprisonment if he agreed to submit himself to the customary penalties meted out by Aboriginal elders or those acting at their behest. Wells J thus “suspended” a two-year custodial sentence on the proviso that the prisoner return to his tribal lands for customary punishment. The sentencing judge later gave his reasons in correspondence with the Law Reform Commission published a decade later.

*The fact was that he had very little English; it would have been impossible for him to have communicated with the staff of the prison or with any fellow prisoners, or to have related to them in any way ... To condemn a tribal Aborigine to such a fate was something which I wished, if possible, to avoid. The question of punishment by the tribe was barely alluded to, as I recall it, in the Court and certainly no mention was made of what it was the tribal elders had in mind to do (quoted in Cunneen & Libesman 1995, p. 79).*

Williams was later speared through the thighs as required by the elders.

That case was decided in 1976. The advances on that position in the last two decades have been slow and piecemeal. A review of the cases (most of them unreported) since the publication of the ALRC Report provides little scope for optimism. In the Supreme Court of the Northern Territory in

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<sup>9</sup>There is another case in 1974 but its reference to race in sentencing is oblique. In *R v Kiltie* (1974) 9 SASR 452 the South Australian Supreme Court (Bray CJ dissenting) inferred that the possibility of a customary punishment *cannot* be a mitigating feature in sentencing. Furthermore, McCorquodale (1984, p. 271) discusses the humanitarian nature of some judges in sentencing, concluding that there is “some judicial endeavour to accommodate ... differences”, whereupon he discusses the flexible approach especially in the NT from the 1950s.

the cases of *Mamarika v Svikart* (unreported, Martin CJ, 23 December 1993) and *Lloyd Joshua v Thomson and Svikart* (unreported, Kearney J, 27 May 1994), the court acknowledged the special Groote Eylandt sentencing regime with its emphasis on community service orders and self-imposed ceilings on sentencing in communities with strong local customary structures. Yet in *Wanambi v Thompson* (unreported, Kearney J, 29 July 1994), the court applied a narrow and strict interpretation of the people for whom such guidelines applied.

In *Ashley v Materna* (unreported, Bailey J, 21 August 1997) the Northern Territory Supreme Court rejected the idea that a sentence for an aggravated assault be reduced on the basis that the assailant was acting in accordance with the customary principle that a brother must punish a sister whose husband swore in her presence. Recognition of an entitlement to assault a blameless person would necessarily be rejected by both general society and all reasonable persons, said the court, whether or not they were from traditional Aboriginal backgrounds.<sup>10</sup> In *R v Stephen Jungarrayi Barnes* (unreported, Bailey J, 3 October 1997), the court refused an application by the offender to be released on bail to be subjected to “pay-back” on the basis that the judge was not satisfied that traditional punishment practice would be lawful.<sup>11</sup> Barnes, who had been found guilty of the manslaughter of his nephew during a fight in March 1996, was later released upon a sentence of “spearing and beating” by Mildren J who explained that he was not approving of the practice, but rather “because it is not right that a person should be punished twice, both by his own community and by the courts.”<sup>12</sup>

The possibilities for customary sentencing remain alive, but in practice there is little found in mainstream judicial practice.

The courts continue to struggle with the idea of customary sentencing in the absence of clear policy and judicial guidelines.<sup>13</sup> The ALRC recommended that, where possible, customary law and practice should be recognised where it does not offend general law and where justice is best served thereby. But there has been little evidence of widespread acceptance of that principle, essentially, one suspects, because it usually raises more questions than it solves.

Certainly there have been a number of reasons advanced for the recognition of some customary law, specifically in the sentencing process. The most significant of those is to bring about safer and less violent communities, given anecdotal evidence that many “customary” communities employ what might be described as “restorative” models of justice, and have very low levels of violence and criminality generally (Sarre 1998).

There are, however, a number of reasons put forward to suggest that policy-makers should move cautiously in this area and not be too hasty to advance this process without serious thought and widespread consultation (Sarre 1997a, pp. 61-2). Indeed, the Commonwealth Attorney-General’s Department has serious reservations about the specific recognition of customary laws or practices (Office of Indigenous Affairs 1994,

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<sup>13</sup> An exception is in Queensland where the *Penalties and Sentences Act 1992* and the *Aboriginal and Torres Strait Islander and Remote Communities (Justices Initiatives) Amendment Act 1997* provide a regime that is currently under review; refer (1996) 87 ACR 574). A more recent high profile exception was the acquittal of Northern Land Council Chairman, Mr Galarrwuy Yunupingu of assault and damages charges in February 1998 arising out of an altercation he had had with a photographer in Arnhem Land in April 1997. The magistrate found that the defendant had exercised his right as an Aboriginal person on native land to seize the film for fear the photographs would steal the spirits of the children. The Northern Territory Government branded the judgment a “sick joke”, with the Chief Minister Shane Stone threatening to introduce legislation that would have the effect of quashing tribal law. In the days following the acquittal, Garrawurra elders spoke with the Prime Minister John Howard asking that the Federal Government consider legislating to guarantee the coexistence of the two legal codes.

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<sup>10</sup> *Australian Legal Monthly Digest*, 17 September 1997, no. 5143.

<sup>11</sup> Reported in the *Adelaide Advertiser* 4 October 1997, p. 9, “Aborigine wants to be speared”.

<sup>12</sup> Reported in the *Adelaide Advertiser*, 4 December 1997, “Culprit ‘happy’ with payback”.

pp. 13-14).<sup>14</sup> For example, there will be some circumstances where sentencing in accordance with customary law may offend other human rights and the laws based upon those rights (Cox 1994, p. 51). Could not such a punishment be in defiance of the international rules forbidding torture or inhuman punishment as found in Articles 21 and 22 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (in force in Australia since 7 September 1989)? What if customary law allowed men to suffer possible death as a result of "pay-back" punishment? If customary law permits capital punishment or other cruel punishments, it could never be adopted (McLaughlin 1996, p. 8). What if there is opposition to close analysis of customary practices? How can one preserve cultural confidentiality (McRae et al. 1997, p. 133)? What if there is no evidence that the person to be sentenced still observes traditional practices (Nader 1985, p. 16)? The list of problematic issues is a long list indeed.

### Conclusion

While it is, therefore, legally possible that a judge may sentence an offender in accordance with customary practice, if, in all the circumstances, the judge determines that such an outcome serves the administration of justice, for the reasons advanced above it is unlikely that customary sentences will be resurrected as a right, enshrined in the criminal law. Even in 1986, the Australian Law Reform Commission did not advocate a system where customary laws operated to the exclusion of the general law, nor did they suggest codification of customary law.

Perhaps the best approach is to adopt guidelines suggested by the Royal Commission (Recommendation 104) that where there are Indigenous communities which are essentially self-policing, where sentencing options are capable of being formalised along customary lines and where

Australia's obligations internationally are not compromised, policy-makers should allow local jurisdictions to employ customary options. But, as is evident from the foregoing, the road ahead for the adventurous policy maker is not easy to chart. There will be some difficulty in convincing judicial officers that theirs can be a role of social engineer (McCorquodale 1984, p. 274). The real challenge will be to establish a groundswell of creativity to tease out the interplay of "lore" and "law" and the accommodation of two systems underpinned often by dissimilar values and beliefs.

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<sup>14</sup>This is probably in view of the rarity of Commonwealth criminal cases in which customary law is a factor, the adequacy of current provisions and the difficulties of reconciling the recognition with current criminal law policy.

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### COMMENTARY

**Q1:** With the Native Title Decision and the recognition of customary law, will there be a challenge where a person could suggest that customary law did survive *terra nullius*, that Australia upon non-Indigenous settlement, had no law?

**RS:** It would certainly be worth the challenge. The *Walker Case* which I referred to was merely a chamber application before a single High Court judge and thus does not create a precedent. Walker, who was an Aboriginal activist, took part in a demonstration in Sydney and claimed he couldn't be arrested because of customary law. The case was dismissed. Chief Justice Mason indicated that customary law only survives if there is a connection to land. If there is to be a challenge to the applicability of non-land law (for example, criminal law, family law, civil law), it will need to come from an Aboriginal community where there has been little or no outside influence in the last 200 years and where the people are essentially self-governing.

**Q2:** Do you have a response to the Young Offenders Act (SA)?

**RS:** The law was changed in 1994 in South Australia and the idea of family group conferences was introduced in relation to certain juvenile offending. One flaw in the process is that the alleged offender must admit guilt to be dealt with in a conference. That is a major problem for Aboriginal Legal Rights Movement who consistently endeavour to have young Aboriginal people plead *not* guilty if they are in fact innocent or wish to contest the manner of their arrest or mitigating circumstances. The system in respect of young offenders needs to be more flexible in relation to Aboriginal young people, and there needs to be further evaluation of the follow-up to successful group conferences. We need to monitor the consistency of the outcomes too.

(Response from Colin Bourke)

**CB:** There is a difficulty in the use of some words and the values ascribed to them. Consistency, for example, is appropriate for whom? Justice, what is it? These words are used from a non-Aboriginal viewpoint and that is a problem when sentencing Indigenous people. You cannot apply non-Aboriginal values expecting them to be acceptable to Aboriginal people.