It is trite law that in South Australia a sentencing court must take into account the seriousness of the offence and the circumstances of the offender. Subject to protection of the public, the courts should lean towards mercy.\(^1\) The separation of sentencing principles into subjective and objective elements is by no means clear in cases involving Aboriginal people and this manifests in the case law. South Australian courts have historically followed the two tiered approach to sentencing rather than intuitive synthesis.\(^2\) The substance of this paper, recent developments in the law, will consider the policy questions involved specifically in the sentencing of Aboriginal people and survey the ways they have been dealt with by the Commonwealth and Northern Territory legislatures but mostly it will consider the responses of the judiciary. This paper will survey mostly South Australian law, but excursions will also be made into the law which applies in other states and territories. This paper will argue that Aboriginal identity arises in a multitude of contexts, some of which are purely personal to the Defendant, but there are many contexts which reflect broader issues of social and cultural dislocation, and very frequently disadvantage, as well as the functional recognition of Aboriginal customary law.

The usual description of the purposes of punishment include the following: The seriousness of the offending and adequate punishment, community protection, general and personal deterrence and rehabilitation of the offender.

Rehabilitation of offenders is considered to be an important matter of sentencing policy, not least because rehabilitation is considered to be relevant to prevention of future crimes. In the case of Aboriginal offenders rehabilitation assumes particular importance, because cultural and social circumstances indicate that different kinds of rehabilitation programs and indeed expectations are needed. Similarly assumptions about the effectiveness and applicability of principles of deterrence are also called into question in Aboriginal cases.
The first important reported case in South Australia on sentencing Aboriginal people is *Wanganeen v Smith*. The late Justice Wells said:

A tribal Aboriginal native may have to be dealt with in a very special way if he is brought before one of the ordinary courts for an offence allegedly committed by him against the criminal law; but where an Aboriginal native has established himself in the more general community and intends to remain there and to work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow citizens. If he drinks intoxicated liquor, he must expect that all laws that control the orderliness of those who consume liquor, whether in a hotel or outside it, shall be applied to him without any distinction by reason of his race. If he inhabits and uses the cities and towns of our country, then it is expected to abide by the ordinary rules by which law and order are maintained. He cannot expect that special exceptions are made for him. No doubt his personal characteristics and background and history will be taken into account by a court in the ordinary way; but he cannot expect special treatment just because he is an Aboriginal native, any more than he would expect that he should, on that account, receive any worse treatment if he comes before a court. In such a case he becomes a citizen of Australia and must be treated just like any other citizen who lives in a town or a city.

In an article published in the Adelaide Law Review in 1991, the author criticised that decision, and those which followed it, on three bases; they were: the outmoded use of language applied by the Judge to refer to Aboriginal people; creation of the categories of tribal, semi-tribal and urban Aboriginal persons. Such categories are both misleading and liable to muddy the conceptual waters involved with the sentencing discretion. Finally it is criticised because of its silent acceptance of assimilation as the policy basis for the sentencing principles to be applied to Aboriginal people.

A more appropriate approach to sentencing principles to be applied to Aboriginal people was enunciated as obiter dicta in the High Court by Brennan J in *Neal v R*. 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 imposing a sentence courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.

These dicta have set the basis for sentencing Aboriginal people ever since they were pronounced in 1982. What is immediately significant is that they take questions of Aboriginal identity well beyond the confines of matters personal to the offender, as matters of aggravation or of mitigation, going as they do, to all material facts which exist because of Aboriginal identity. What one might call the “Neal Formula” is essential to achieving equality before the law because it recognises the recognition of cultural difference is necessary to achieve actual equality. As such it is consistent with the principles, enunciated in the Racial Discrimination Act and the Convention on the Elimination of all forms of Racial Discrimination (CERD).

In a submission to the Senate Standing Committee on Constitutional Legal Affairs, of 26 September 2006, the Aboriginal Legal Rights Movement spoke of the Neal formula in these terms;

Firstly, consideration of cultural background as relevant to sentencing acknowledges the fact that Australia is not a mono cultural society. The fact that cultural diversity exists in Australia implies that a sentencing court, in carrying out its obligation to consider all factors relevant to the person to be sentenced, must consider the subjective disposition and circumstances of that person in any particular criminal matter – which must include in appropriate cases the cultural factors relevant to that very understanding. That is the principle of equality and equal treatment to which Brennan J had referred...

Secondly it is clear from the dicta of Justice Brennan that these cultural factors are not necessarily factors of mitigation, indeed in certain circumstances, as understood within the person’s cultural setting, they may be matters of aggravation.6

The Neal Formula and Customary Law
Australian courts have, since at least the 1930s, been willing to accept the relevance of customary law punishments in sentencing and since the 1980s to apply the Neal formula to allow for a kind of recognition of Aboriginal customary law and of “pay back” in the context of sentencing Aboriginal people. The Australian Law Reform Commission had, in its 1986 Report No 31 on the Recognition of Aboriginal Customary Laws, referred to ‘functional recognition’ and the need to maintain existing practices. Customary law has never been, except in the earliest days of the colony of NSW a complete defence to a criminal charge, but its importance was to be acknowledged in the sentencing discretion. What follows, from that Report is a summary of the Commission’s conclusions.

516. Endorsement of Basic Principles Elaborated by Courts. The Commission endorses the principles articulated in para 505-515, which have been worked out by Australian courts in cases involving traditional Aborigines, and which are set out in summary form in para 542. These principles, in the Commission’s view, strike the right balance between what are, to some extent, conflicting requirements. On the one hand, for the reasons already given, the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or of the mitigation of punishment. On the other hand, there would be no point in acknowledging the right of traditionally oriented Aborigines, ‘to retain their racial identity and traditional life-style’ if no allowance were to be made for traditional forms of dispute-settlement. These do now exist in fact, and are now taken account of by police, prosecuting authorities and courts in a variety of ways. As has already been demonstrated, the law’s continuing disapproval of some traditional punishments does not mean that these cannot be taken into account. Especially where the Aborigines, concerned accept such punishments as an aspect of their traditional life-style, it is appropriate that account be taken of them in ways such as:

- non-prosecution
- sentencing
- procedural decisions such as on bail applications.
In *Jadurin v R*², the Full Federal Court consisting of St John, Toohey & Fisher JJ applied the Neal formula in a sentencing case involving recognition of payback:

In the context of Aboriginal customary law or tribal law questions will arise as to the likelihood of punishment of offenders own community and the nature and extent of that punishment. It is sometimes said that the court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender’s own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender’s membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regarded such facts or as the evidence that should be presented if it is to be asked to take those facts into account.

Again this is consistent with functional recognition by treating customary law as a factor to be taken into account in mitigation of penalty. It recognises that the infliction of traditional punishment, whilst not condoned, reduces and mitigates penalty to the extent that the Court, in its discretion makes a reduction that acknowledges double punishment.

Northern Territory cases that involved mitigation of penalty in sexual assault cases on account of reduction of moral culpability through customary law marriage, gave rise to considerable political controversy and successful Crown appeals.¹⁰ It may have been this very approach to recognition of customary law that was the subject of criticism by the Federal Government in 2005 and 2006 and led to the passing of the *Crimes Act (Bail and Sentencing)* Amendments in 2006. Those amendments and their Northern Territory counterparts have the effect of limiting the recognition of Aboriginal customary laws. The amendments to Section 16A (m) removed ‘cultural background’ from the list of factors requiring to be taken into account in exercising the sentencing discretion and section 16A(2A) prohibit a court from taking into account, as part of the sentencing discretion in Commonwealth matters, “any form of customary law or cultural practice as a reason for excusing, justifying, authorising requiring or rendering less serious the criminal behaviour to which the offence
relates”. Notwithstanding extensive criticisms, the amendments they were duly enacted in 2006 and at the time of writing are still in force.

In the case of *R v Wunungmurra* Southwood J held that the effect of similar provisions under the Northern Territory Emergency Response legislation was to limit the use to which the affidavit of a community member, tendered by the offender could be used for offences of domestic violence. The tender of the affidavit was sought to give a context and explanation of the offences, establish their objective seriousness, and to establish the Defendant’s character and that he did not have a predisposition to domestic violence and had good prospects of rehabilitation.

Southwood J held that under the legislation, the affidavit could not be used for the purposes of determining the objective seriousness of the offences or the offender’s moral culpability. Otherwise the legislation was read down so as not to exclude consideration of customary law and cultural practice but purely from the subjective aspects of the case. At paragraph 25 of the judgment His Honour was broadly critical of section 91 of the *Emergency Response Act*.

The fact that legislation might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or her case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts the well established principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences, provides no sufficient basis for not interpreting section 91 of the *Emergency Response Act* in accordance with its clear and express terms. The Court’s duty is to give effect to the provision.

No such legislation, equivalent to section 91 of the *Emergency Response Act* has been enacted in South Australia. What is clear, however, is that matters arising from customary law can be regarded as being important facts going to the objective factors, the gravity of the offence itself and the moral culpability of the offender. They are not merely part of the personal circumstances of the offender, though, ironically the effect
of the judgement is to interpret the legislation so as to allow consideration only of subjective factors. Clearly the Northern Territory Supreme Court understood that customary law and cultural practices affect the proportionality of punishment, as being facts which necessarily arise from the offender’s membership of and participation in a cultural group.

Whether customary law questions will continue to assume great importance in South Australian cases remains to be seen, regrettably the vast number of actual sentencing cases are more likely to raise questions of intoxication, mental illness, brain injury or other incapacity. The rate of over representation of Aboriginal people in the courts and in the prisons of South Australia remains a constant and distressing feature of the criminal justice system in this state. It is reported that in South Australia the rate of Aboriginal imprisonment is the second highest in the Commonwealth at over 2500 per 100,000. \(^{12}\) In 2009, there were 449 Aboriginal prisoners from a total of 1960 for the state or 23%. Significantly, the numbers involved with community corrections were 988 of a total of 6050 or 16% - much less than the imprisonment rate \(^{13}\) To those topics and their relationship to disadvantage that we now turn.

**The broad brush approach to Aboriginal disadvantage – the Fernando case.**

A broader application of the Neal formula was that taken by Justice Wood of the New South Wales Supreme Court in the case of *R v Fernando*. \(^{14}\) In that case Wood J reanalysed case law and an academic article before adapting the Neal formula and applying it to consideration of Aboriginal people living in distressed circumstances where alcohol abuse is endemic and occurs across generations. As such he was dealing with the broader question of aboriginal disadvantage, and the degree to which Courts should take that into account in mitigation of penalty. This raises the whole gamut of underlying issues investigated by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and moves from the area of judicial, to general public policy. Wood J summarised his conclusions by making generalised dicta in numbered paragraphs as follows;

Wood J said;

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing
court should ignore those facts which exist only by reason of the offenders’ membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a significant degree go hand in hand within Aboriginal communities are a very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed that 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 courts as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor where the abuse of alcohol by the person standing for sentence reflects the socioeconomics circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This is involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and that grave social difficulties faced by those communities where poor self image, absence of education and working opportunity and other demoralising factors have placed heavy stresses on them, re-enforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of Aboriginal descent the court must avoid any inter-racism, paternalism or collective guilt must yet nevertheless assess realistically the objective seriousness of the crime within its
local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience in European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officials of European background with little understanding of his culture and society or of his personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest for rehabilitation of the offender and the avoidance of recidivism on his part.

It is noteworthy that Paragraph A appears to be a diluted version of the Neal formula, whereby facts which under Neal were bound to be taken into account, now should ‘not be ignored’. Nevertheless we can see from Wood J that a more sophisticated legal policy approach is now applied by courts to problems of alcohol abuse in Aboriginal communities. Paragraphs C,D,&E of the Fernando formula in particular acknowledge that the blunt instrument of deterrent penalties will not solve Aboriginal alcohol abuse and related violence and that in circumstances of severe Aboriginal disadvantage alcohol abuse may itself be regarded as a factor of mitigation, not of aggravation. Paragraphs D and G acknowledge that the use of imprisonment for the purposes of personal and general deterrence may be an exercise in futility, and in the case of Aboriginal people from remote communities, “a lengthy term of imprisonment may be particularly, even unduly, harsh…”

This latter point is very significant in South Australia. At the time of writing there are 78 Anangu prisoners in South Australian prisons, whose first language is Pitjantjatjara and 63 of these are housed in Pt Augusta prison. Recognising that distance from homelands and cultural disadvantage were a major problem for Anangu in the South Australian prison system, the State Coroner made a specific recommendation, number 10, for the creation of a correctional facility on or near the Anangu

10. The Premier, in consultation with the Minister for Correctional Services, the Aboriginal Lands Task Force and the Central Australian Cross Border Reference Group, should consider as a matter of urgency how the development of a culturally appropriate correctional facility, on or near the Anangu Pitjantjatjara Lands, or as part of a tri-state development at some other reasonably proximate location, might be accelerated;\(^{16}\)

At the time of writing, this recommendation has not been implemented. The 2009 Annual Report of the Department for Correctional Services contains the following:

The feasibility of establishing a remand/correctional facility in the APY Lands has been investigated by the Department for Correctional Services over a number of years. As part of its inquiries, the Department has assessed the demand for such a facility and has sought the views of community representatives and other Government agencies, in particular, Justice Portfolio agencies.

The Department has also assessed the logistics involved with the operation of a remand facility in, or close to, an Aboriginal community. The investigation identified a range of logistical and organisational issues that make such a proposal not feasible.

Amongst other concerns, the difficulty in attracting suitably qualified medical and program professionals as well as permanent officers to ensure the security of the facility and the safety of the prisoners, was seen to be a significant issue that would be prohibitively difficult to overcome.

More recently, the State Government also considered the issue as part of a response to recommendations of the Commission of Inquiry Report (Children on APY Lands) Report 2008.

In its response to the Commission's recommendations, the South Australian Government indicated it could not support a recommendation to establish a corrections facility on the Lands for prisoners on remand. The Government did not believe that, given the significant competing priorities for resources on the Lands, the significant capital and operational costs of establishing a remand correctional facility on APY Lands for prisoners on remand was the best use of those resources in addressing community safety. The same concerns exist in relation to establishing such a facility at Yalata.\(^{17}\)

Fernando also emphasised factors of equal protection for vulnerable members of Aboriginal communities. If the Fernando principles are applied rigorously, they
contradict each other and leave a policy dilemma. On the one hand candid acknowledgement of the futility of deterrence and the harshness of the prison experience for traditional Aboriginals point towards mitigation and the urgent need for alternatives to prison; on the other hand community protection may only be achieved by longer prison sentences, unless effective alternatives to imprisonment can be found, which will have the effect of providing both effective deterrence and rehabilitation of offenders. That, it is submitted is the real policy dilemma, and is one for the legislature and for governments. RCIADIC had recommended a greater emphasis on community service orders (Recommendation 94, 116 and 117) and advocated for a greater range of non custodial sentencing options (Recommendation 101, 104, and 109 to 115). RCIADIC recommendation 92 that imprisonment be a sanction of last resort has been legislated in South Australia, as has the availability of home detention on traditional lands.

The Royal Commission recommendations in relation to sentencing were considered in great detail by Gray J, is his extended sentencing remarks in the matter of John Scobie. His Honour discussed the problems that have occurred in implementation of RCIADIC recommendations, particularly in improving non custodial sentencing options in remote areas and access by Aboriginal people to appropriate mental health and other services. Mr Scobie fell to be sentenced for sexual offences in the context of concerns that he might be incapable of controlling his sexual impulses and Justice Gray’s sentencing remarks cover in detail the steps that had to be taken by the Supreme Court to get anything like proper implementation of RCIADIC in his case. The sentencing remarks have received strong endorsement in the Criminal Law Journal and for that reason it is not intended to discuss them in detail here. Nevertheless this author endorses the comment of Mr Hinton QC that:

This case, however, is of great importance to the sentencing of Aboriginal people by the judiciary and to the care of Aboriginal offenders entrusted to the Executive government as a consequence of the imposition of sentences. It is of great importance because it demonstrates that, despite a commitment by the judiciary to applying principles in sentencing that are sensitive to the impact of history and the consequent plight of Aboriginal people in Australian society and that, generally speaking, reflect the findings of the Royal Commission into Aboriginal Deaths in Custody (hereafter the RCIADIC), those principles
ring hollow if the Executive Government does not implement the recommendations of the RCIADIC in a manner that will effectively complement the task and intentions of the judiciary. 22

For sentencing practice, Fernando contains countervailing policy considerations, which may operate against each other. In addition, the weighing of these contradictory considerations could create unresolvable dilemmas in proportionality of punishment. 23 If a person is to be imprisoned for the sake of community safety; unless they are rehabilitated in prison, the prospects for their community upon release are potentially not improved by the prison experience. 24 In this context Aboriginal specific programs in prisons assume enormous importance. Until recently the Nganampa Health Council sent a twice yearly delegation to Pt Augusta prison, with traditional healers attending with Health workers and senior men. The program was about maintaining links with positive aspects of traditional culture for imprisoned men. All Anangu prisoners from what ever part of the prison had been invited to attend meetings which included traditional cooking and cultural practices. Academic research discloses that very specifically targeted programs are required for effective and useful assistance to Aboriginal prisoners. 25

Broader Policy considerations – Alcohol Abuse

There has been a considerable amount of literature written on the topic of alcohol abuse in Aboriginal communities. It is beyond the scope of this paper to consider in detail, public policy responses which may be “more subtle remedies than the criminal law can provide by way of imprisonment” however the final report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) is still relevant. Recommendations 272 to 288 refer to the need to restrict access to alcohol in some communities and to assist Aboriginal communities in using legal means to do so, as by improving their access to licensing courts. Other incremental changes to licensing law including strengthening of provisions to eliminate sly grogging and stringent control of community beer canteens were also recommended.

Amongst the anthropological literature, “Alcohol in The Outback Two Studies of Drinking” 26, written in 1984, is relevant to South Australia, describing as it does the effects of fortified wine purchased for takeaway from the nearby Nundroo roadhouse by residents of Yalata community on the far west coast of South Australia. The
authors’ analysis is important because it specifies very clearly that the excessive drinking of the Aboriginal people at Yalata and the way it was carried out in group drinking and gambling sessions, was understandable in terms of their reaction to having been dispossessed of their country, moved to Yalata, placed under a severe regime of superintendence, and also been subjected to the exploitative availability of cheap alcohol. Drunken comportment is a key concept of the monograph. The authors refer to Pitjantjatjara understandings of drunkenness, as follows

The drunken state is absolute. A mark of a drunk is that he is physically incapable, often unable to stand and his speech is slurred. Drinkers adopt this state as a mark of their transformation regardless of the absolute amount of liquor consumed…..The drunk is not himself and becomes an altered persona. He often speaks in English, not in his own language and is permitted all sorts of licence otherwise unthinkable. A drunk who injures himself or others does so because he is drunk. He cannot be held responsible for his actions in his liminal state. Drunks are separated from the rest of society…27

Nevertheless the authors fully comprehend the cost of drinking to the community; …the sociological and physiological effects of drinking are generally negative and sometimes fatal. The injuries treated in the clinic constitute a substantial part of the nurses’ daily workload. Drinkers disturb non drinkers, terrify wives or non drinking kin, make unreasonable demands, are violent and often disruptive. Drinking can shatter the peace of the community, rendering daily tasks impossible to fulfil…28

The Community’s subsequent dealings with the Licensing Court indicated that easy availability of cheap and harmful alcohol in vast quantities was never really their wish. A later paper “Which Bloke Would Stand up For Yalata?; the struggle of an Aboriginal Community the control the availability of alcohol” discloses that notwithstanding failings of process under the Liquor Licencing Act, Yalata Community was able to get some control over takeaway sales getting into the community and some long term reductions in morbidity and alcohol related violence. Still the heavy drinkers persisted or moved to places of easier access to alcohol. In short the policy response has been a mixed success, and whilst “Which Bloke Would Stand up For Yalata?” is an engaging and distressing narrative, on its own, it is of limited relevance to a sentencing court. Further, “Alcohol in the Outback” was written
in 1984, and it must be remembered that the dispossession from country occurred in the 1950s, the mission Superintendents left in the 1970s, the country was restored by the Maralinga Tjarutja Land Rights Act 1984, and the Community was successful in getting restrictions on some local takeaway licence conditions in 1991. Comparative social, economic and other disadvantage for Yalata people compared to other communities is still accepted in the courts, still it may be observed that Anthropological Reports on alcohol abuse in Aboriginal communities need to be contextualised to history in order to justify a sentencing discretion toward mitigation. Apart from the endemic effects of alcohol abuse on Aboriginal communities, other forms of substance abuse which are endemic to communities are taken into account in sentencing practice. In July 2000, Duggan J of the Supreme Court of South Australia, presented a paper to a seminar hosted by the Law Society of South Australia on the effects of petrol sniffing. In his paper Duggan J said that the Fernando principles relevant to the sentencing of Aboriginal people could be and should be applied in appropriate cases through the circumstances of an offender who was afflicted by the consequences of sniffing petrol. Duggan J said:

I cannot see any difference in principle between recognising the effects of alcohol on the socioeconomic circumstances & environment in which an offender has grown up and the role which petrol sniffing, particularly amongst young Aborigines might have in shaping such an environment. The Judge urged that expert evidence and reports be produced in appropriate cases.

The Responses to Fernando

Inevitably, cases involving serious violence against other Aboriginal people particularly women have invoked the principle of equal protection. Thus in R v Wurrarama the Full Court of the Supreme Court of the Northern Territory Mildren, Thomas & Reilly JJ laid down a ‘guideline’ judgment. This was a Judgement which was intended to lay down guidelines within which sentencing discretions must be exercised by Judges and Magistrates at first instance.

It is, of course, important to ensure that the punishment fits the crime and in the sentencing process the objective seriousness of the offence is a vital matter for consideration. Whilst proper recognition of claims to mitigation of sentence must be accorded due weight in cases such as the present, the court
must be influenced by the need to protect the weaker members of the community, particularly women and children from excessive violence…

This change of emphasis is consistent however with the exercise of the general sentencing discretion in a way which reflects community protection, and was of course among the factors expressed by Wood J in paragraph D of the Fernando principles. Given that offenders from communities to which the Wurramara guideline judgment applies are likely to be those who would experience imprisonment harshly and be unaffected by personal deterrent penalties, one must be concerned by the proposition that imprisonment is become a general rite of passage for young Aboriginal men in the Northern Territory and indeed a new form of assimilation of itself.33

Inevitably, the application of the general Neal formula to particular circumstances of Aboriginal disadvantage has resulted in movements in judicial policy and retreats forthright positions. New South Wales Judges, including Wood J himself have to some degree resiled from Fernando in later cases. The NSW cases and the academic criticism of them are discussed at length by McRae and Nettheim 34 wherein the learned authors summarise the cases of R v Walter and Thompson35, R v Newman and R v Simpson36 and R v Ceissman37. The authors quote with justified approval academic critics who criticize the judgments for their misapprehension of Aboriginal identity and the false urban /remote distinction made in these judgments. The author Edney is quoted in his criticism of Wood CJ in Ceissman for drawing a distinction between “full” and “part” Aboriginal people and R v Newman and R v Simpson are criticized by the same author because of the suggestion that Aboriginal people in urban communities are beyond the scope of Fernando.38

South Australian Responses to Fernando

Apart from the extra curial approval and extension of Fernando principles to petrol sniffing cases, the late Justice Perry of the Supreme Court of South Australia has given specific and strong endorsement to Fernando principles in the case of Abdulla. 39 and in Tjami40 the Court of Criminal Appeal specifically endorsed and quoted from Perry J in Abdulla, as well as an earlier judgment in Ingomar v Police.41

Abdulla was a case where a young Aboriginal woman, who while unrepresented, was the subject of a prosecution appeal on sentence. Perry J confirmed that a tariff fixed
by the Court of Criminal Appeal should not be regarded as a statutory minimum or maximum penalty and that atypical cases could receive extraordinary leniency. He went on to specifically endorse the dicta of Wood J in *Fernando*. He specifically refuted suggestions that the Fernando propositions should be restricted in application to Aboriginal people from remote communities. Reference was also made to the principle of imprisonment being used as a last resort in sentencing and to the Indigenous and Tribal Peoples Convention of the United Nations International Labour Organisation Convention No 169 concerning indigenous and tribal peoples. His Honour noted in particular Article 10(2) of the Convention which states that “preference should be given to methods of punishment other than confinement in prison.” In the result, Perry J did not interfere with the lenient penalty imposed by the Magistrate.

In *R v Tjami* the Court of Criminal Appeal specifically acknowledged social disadvantage, and noted the fact that Port Augusta prison is 1000 kilometres from the Pitjantjatjara homelands and that imprisonment would be harshly felt by a traditional man who had had little education and spoke little English. Also the fact that the alcohol abuse which gave rise to the crime occurred off the Pitjantjatjara homelands, but was to be regarded as a matter of mitigation in this case. These were regarded as subjective factors which gave rise to significant mitigation and ultimately a reduction of the sentence.

In the case of *R v Smith*. The Court of Criminal Appeal was considering an appeal against the severity of a sentence of 30 years, with a non parole period of 18 years for a string of armed robberies. The appeal was dismissed by majority of Lander and Debelle JJ, (Gray J dissenting). Lander J, in his leading majority judgment, explicitly refuted any suggestion that a distinction should be drawn in sentencing policy between Aboriginal people from an urban or a remote community. The Aboriginal identity of the offender arose in the context of an anthropological report which raised questions of kinship and kin obligations for an Aboriginal person living in the city. Lander J stated that “Evidence explaining Aboriginal heritage is objective evidence in support of those personal matters which are put forward as mitigating factors particular to the person being sentenced.” Further, such evidence “may establish particular influences on the offender which explain the offending and
the circumstances surrounding it.”

This is quite consistent with the reasoning in Fernando. In a rather quixotic twist, His Honour went on to say that it was those factors, rather than Aboriginal identity itself which were relevant to mitigation. The importance of Aboriginal identity and its broader implications for effective rehabilitation were discussed by Eames JA in his dissenting judgement in *R v FullerCust* where His Honour said:

Para 79 To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. 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 re-offend and, in turn, to ensure the long-term safety of the public.

The dissent of Gray J in *R v Smith* emphasised an instinctive process of taking into account all relevant factors to effect a just sentence. His Honour pointed to factors of disadvantage and the way that contributed to his offending. The observation is made that:

The appellant’s Aboriginality provides an explanation for his conduct. This factor is mitigatory. If, as the expert reports indicate the Appellant has come to realise the inappropriateness of his former attitudes then his prospects for rehabilitation are improved.

In *R v Clarke* the Full Court of the Supreme Court again considered Aboriginal sentencing issues. *Neal, Wanganeen v Smith, Fernando, and R v Smith* were all cited with approval and a generalised statement was made to the effect that Aboriginal offenders cannot expect special treatment, because of their Aboriginal identity. However it was acknowledged that:

Many Aboriginal people are marginalised by society and lack opportunities that are more available to others. For many realisation of legitimate expectations is unlikely. In many cases there is an inability to fit in with the non Aboriginal community which contributes to isolation and dissatisfaction.
However those general and other similar observations may not be applied as a matter of course.

These dicta have been cited with approval in the subsequent case of Gray v Police. In her sentencing remarks in the matter of KullaKulla, King J of the Victorian Supreme Court expressed herself very strongly on the question of neglect of an Aboriginal woman falling to be sentenced for manslaughter and the responsibility of society as a whole for that neglect, which she had suffered. King J said at para 51:

As a country and a society, we should be thoroughly ashamed of ourselves, that you have been neglected and abused in the manner that you have been, it is exceedingly distressing that in this country, where we pride ourselves on quality, tolerance and fairness, you could be so neglected, so abused and yet we, as a society, did nothing to stop it. When you were living with a 40 year old man in a park at the age of 12, we as a society did not stop that, we did not come in and protect you, which clearly we should have done. As a community, we should hang our heads in shame. This is not about your Aboriginality, this is about your childhood, which was taken from you, while we, as a society, did not make any of the difficult decisions that may have prevented this terrible harm, that was done to you.

So long as social disadvantage remains a feature of Aboriginal identity, it may be expected that these dicta will continue to be influential; they recognise facts which unfortunately, apply and will continue to apply to Aboriginal offenders in the plurality of cases. However it is suggested that a better understanding of the significance of Aboriginal identity lies in the recognition that membership of an Aboriginal or other ethnic group brings with it social, economic, cultural and language differences, not always disadvantage, but which in themselves may transcend the realm of purely personal considerations. It is for that reason that anthropological reports are often more illuminating than psychological reports in these cases. An Aboriginal person’s identity is framed within the matrix of these factors and they require careful consideration by a sentencing court, since after all,

the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance.
Conclusion

South Australian cases on sentencing Aboriginal people have, by and large adopted sensible, humane and appropriate standards. There has been useful cross fertilisation of ideas between the states and territories and South Australian cases have followed, not uncritically interstate precedents. Indeed the judiciary of Australia as a whole have been greatly influenced by the Neal principle of recognising cultural difference and the cases discussed herein have disclosed significant moral engagement by judges with the dilemmas that arise in Aboriginal sentencing cases. That moral engagement has taken various forms, from moral outrage in the case of Kulla Kulla, to charismatic personal engagement of the Judge in the matter of Scobie, to statement of the overwhelming importance of Aboriginal identity in the context of continuing disadvantage in the dissenting judgment of EamesJA in the case of Fuller Cust. The South Australian cases have also pointed to the urgent need for alternatives to imprisonment and these calls have yet to be heeded by government with concerted action.

© C.J.Charles ALRM, Monday 11th July 2011

Appendix 1 from ALRC Report no31.

Relevance of Aboriginal Customary Laws in Sentencing

- Although the defendant’s (or the victim’s) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of this aspect of Aboriginal customary laws is not to be achieved through the existing law relating to consensual assault or through changes to that law (para 503).

- The courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it (para 491-7, 504).

- The courts have recognised a distinction, which in the Commission’s view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other (para 504). In applying that distinction, the following propositions have been recognised:

  • A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to ‘protect’ the defendant from the application of customary laws including ‘traditional punishment’ (even if that punishment would or may be unlawful under the general law) (para 505).

  • Similar principles apply to discretions with respect to bail. A court should not prevent a defendant from returning to the defendant’s community (with the possibility or even likelihood that the defendant...
will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met (para 506).

- Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future (para 507-8).

- Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the ‘tariff’) applicable to the offence (para 509).

- Within certain limits the views of the local Aboriginal community about the seriousness of the offence, and the offender, are also relevant in sentencing (para 510).

- But the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions (para 511).

- Nor can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law (para 512).

- In some circumstances, where the form of traditional settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons in loco parentis, exclusion from land) a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. In particular it is important that anyone into whose care the offender is to be entrusted, is an appropriate person, having regard to any applicable customary laws (eg is in a position of authority over him, and not subject to avoidance relationships), has been consulted and is prepared to undertake the responsibility (para 512).

- An offender’s opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect. However initiation or other ceremonial matters cannot and should not be incorporated in sentencing orders under the general law (para 515).

- The Commission endorses these principles which strike the right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or for the mitigation of punishment, and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws (para 516).

- A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time (para 517).

- In addition it should be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged (para 517).

- A sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases) (para 522).

*Related Evidentiary and Procedural Questions*
• Existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used. These include in particular:

• the prosecution’s power to call evidence and make submissions on sentence (para 526)

• the use of pre-sentence reports (para 529).

• Defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary laws contrary to the interests of or otherwise than as instructed by the accused (para 527).

• Separate community representation is, in most cases, not appropriate (para 528).

• To reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, legislation should specifically provide that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim’s community, give leave to the applicant or applicants to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms (eg as to matters to be dealt with, or not dealt with in the statement) (para 531).

Chapters 9 & 10 of the ALRC Report No 31 dealt in detail with the human rights principles underlying the recognition of customary law. The Report’s conclusions are worthy of note. The Law Reform Commissions said

“Special Measures, (within the meaning of the CERD Convention and the Racial Discrimination Act 1975), for the recognition of Aboriginal Customary Laws will not be racially discriminatory and will not involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions, if these measures:

• Are reasonable responses to the special needs of those Aboriginal People affected by the proposals:

• are generally accepted by them; and

• do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.

In particular, such measures should not confer rights on Aborigines as such, as distinct from those Aborigines who, in the particular context, suffer the disadvantages or problems which justify recognition.67

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1 Webb v O’Sullivan [1952] SASR 65 at 66 per Napier CJ
2 Markarian v R (2004-5) 215 ALR 213 at 244,5 wherein Kirby J discusses R v Shannon (1979) 21 SASR 442 and R v Osenkowski (1982) 30 SASR 212 to arrive at the conclusion that “in South Australia the two tiered approach was well established in the practice of judicial sentencing.”
3 (1977) 73 LSJS 139
4 Sentencing Aboriginal people in South Australia Christopher Charles (1991) 13 Adelaide Law Review at page 90
5 (1982) 149 CLR 305 at 326, per Brennan J
6 ALRM submission to Senate Standing Committee on Constitutional and Legal Affairs; Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006
7 In Walker v NSW [1994] 126 ALR 321 at 323-4, Mason CJ said:
‘Even if it be assumed that that the customary criminal law of Aboriginal People survived British settlement, it was extinguished by the passage of criminal statutes of general application. --- There is nothing in Mabo No2 to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.’

9 (1982) 44 ALR 424 at 429
11 [2009] NTSC24
12 ABS Prisoners in Australia 2009Catalogue 4517.0December 2009
13 ABS Prisoners in Australia 2009Catalogue 4517.0December 2009 and Corrective Services Australia Sept 2009Catalogue 4512.0 It is noted that due to unknown status of some prisoners , totals do not add up to 100%.These ABS figures are discussed at length in The Senate Select Committee on Regional and Remote Indigenous Communities, Discussion paper entitled Indigenous Australians , Incarceration and the Criminal Justice System, pages 2 to 23
14 (1992) 76 Australian Criminal Law Reports 58 @ pages 62 & 63
15 Personal communication to the Author by the Manager of Aboriginal Services DCS , April 2010.
17 Department for Correctional Services Annual Report 2009
18 Criminal Law Sentencing Act section 11.
19 Correctional Services Act 1982 section 37A (6)
20 (2003)85 SASR 77
22 Ibidem page 179, 180.
23 Veen v R (Number 2) (1988) 164CLR 465
24 RCIADIC National Report Volume 3 PartEChapter25 The Prison Experience .Recognition of the unsatisfactory nature of imprisonment for Aboriginal offenders was of course noted in Paragraph G of Fernando..See also Cunneen article in book referenced in footnote 22.
26 Australian National University Northern Australian Research Unit Monograph Darwin 1984 by Maggie Brady and Dr Kingsley Palmer
27 Ibid pages 69-70
28 Ibid page 76
29 Brady, Byrne & Henderson, Australian Aboriginal Studies 2003 Volume 2 page 62
30 See Charles (1991) and the cases referred to therein and also Ingomar v Police (1998)72SASR232
31 The Effects of Petrol Sniffing Seminar Papers Presented by the Aboriginal Issues Committee Law Society of South Australia 3 August 2000 Commentary by the Honourable Justice Duggan on the paper presented by M F Gray QC
32 (1999) 105 Australian Criminal Reports 512 @ paragraphs 36 and 37.
3333 Patrick Dodson; Criminal Lawyers Association Northern Territory, Bali Conference 2009 speech
35 [2004]NSWCCA304
36 [2004]NSWCCA102
37 [2001]NSWCCA73
39 (1999) 74SASR337
40 (2000)77SASR 514 at 516to 518 in the leading judgment of Nyland J Fernando and Abdulla were specifically endorsed by the Court
41 (1998)72SASR232
42 (1999) 74SASR337at342
43 (1999) 74SASR337at342
45 (1999) 74 SASR337at344
46 (2000)77SASR 514
(2000) 77SASR at 520, referring to Ingomar v Police (1998) 72SASR 232 on social disadvantage, alcohol abuse and the effects of imprisonment. Again these dicta highlight the need for the legislature and governments to implement the coronial recommendation for alternative detention facilities on or near the APY Lands.

(2000) 77SASR 521

(2003) 86SASR 132


(2003) 86SASR at 140, 141

(2003) 86SASR at 141

[2002] VSCA 168

(2003) 86SASR at 152

(2003) 86SASR at 153

(2004) 89SASR 13 coram Mullighan, Nyland and Anderson JJ

(2004) 89SASR at 18

(2004) 89SASR at 18-19


R v Melissa Anne Kula Kulla [2010] VSC 60 per King J para 51


Neal v R (1982) 149 CLR at 326 per Brennan J

R v Melissa Anne Kula Kulla [2010] VSC 60 per King J para 51


[2002] VSCA 168 and see endnote 62 above

ALRC Report No31 Vol 1 para 165 page 122