The *Fernando* principles: the sentencing of Indigenous offenders in NSW

Discussion paper prepared for the NSW Sentencing Council
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Synopsis

In *R v Fernando* (1992) 76 A Crim R 58, Wood J identified the common law principles relating to the sentencing of Indigenous offenders. Since Fernando, these principles have been applied unevenly in the appellate courts; it may be that the principles have been more frequently applied in courts of first instance although there is little research to support this. Between 1992 and 2009, the proportion of Indigenous offenders in custody in NSW relative to non-Indigenous offenders increased from 9% to 22.2%, an overrepresentation by a factor of nearly 10. Currently 29.4% of all women in custody in NSW are Indigenous. The proportion of (sentenced) Indigenous juveniles in custody in NSW has increased from 45.1% in 2002-2003 to 56.3% in 2007-2008. Statistical analysis shows that all of these percentages are steadily increasing. The Council of Australian Governments has identified the overrepresentation of Indigenous prisoners in Australian prisons as an area that requires urgent attention because of the interrelationship between offending behaviours and imprisonment, and other key indicators of Indigenous disadvantage. For example, Indigenous women are 35.1 times more likely than non-Indigenous women to be hospitalised as a result of spousal or partner violence. There is a significant social cost in the breakdown of Indigenous families, and the consequent intergenerational cycle of Indigenous offending. There is also a very significant financial cost associated with the disproportionate imprisonment rates of Indigenous people. In 2002 the Circle Sentencing model was introduced in NSW in an attempt to address Indigenous recidivism rates but recent BOCSAR research concluded that Circle Sentencing has not achieved any reduction at all in recidivism rates. If the overrepresentation of Indigenous offenders in prison is to be addressed in NSW, sentencing alternatives need to be implemented. From the Canadian experience, it appears that a reformulation of the common law principles and/or an amendment to *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23A(3) would not reduce disproportionate Indigenous imprisonment rates. By contrast, the

success of the Victorian Koori Courts and Canadian Aboriginal Justice Program models suggests that the adoption of these models in NSW, in the Children's, Local and District Courts, would result in a reduction of Indigenous recidivism rates by about 50%.

Explanatory Notes

The term "Indigenous" is used in this paper to describe the Aboriginal and Torres Strait Islander population.

The statistics in relation to the total Indigenous population in Australia are estimates calculated by the Australian Bureau of Statistics ('ABS'). It is thought that the census data undercounts Australia's Indigenous population, for reasons including an unwillingness on the part of some people to identify their racial or ethnic group in census completion, and the non-completion of census forms by a disproportionate part of the Indigenous population. For this reason, the ABS uses composite data sources to obtain its 'experimental estimates' of Australia's Indigenous population.

There is no one single source of statistics relating to the rates of the Indigenous imprisonment in Australia; the statistics used in this paper have come from a variety of sources (as footnoted) so, occasionally, there are inconsistencies in the data. It has been difficult at times to find statistics for correlating years, given the different data collection methods used.

Some of the available statistics relate to 'age-standardised data' whereas others (for example, those published by the Departments of Corrective Services and Juvenile Justice) do not.[1] The ABS explains that the Australian Indigenous population has a younger age structure than Australia's non-Indigenous population, as a result of the higher mortality rates within the Indigenous population. As at 30 June 2006, the median age of the Australian Indigenous

1 SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, (2009), ('the OID report'), Glossary: 'Age standardised rates enable comparisons to be made rates between populations that have different age structures. Age standardisation is often used when comparing the Indigenous and non-Indigenous populations because the Indigenous population is younger than the non-Indigenous population. Outcomes for some indicators are influenced by age, therefore, it is appropriate to age standardise the data when comparing the results. When comparisons are not being made between the two populations, the data are not age standardised'.

population was 21.0 years, compared to a median age of 37.0 years for the non-Indigenous population, statistically a very significant difference of 16 years.[2] It is preferable to use age-standardised data because of the relative youth of the Indigenous population to the general Australian population but it has not been possible to consistently obtain that data for the purposes of this paper.[3],[4]

The Canadian statistics have been drawn from the Canadian government's statistics bureau, Statistics Canada. There are limitations in some of these statistics because the data is, in some instances, incomplete.

I am grateful for the assistance of Kath McFarlane, other Sentencing Council staff (particularly for the preparation of Appendix 1) and Chris Ronalds SC (for advice on anti-discrimination laws in NSW). I also thank Judge Martin Sides QC and Eric Wilson for their willingness to discuss these issues generally with me, and the late George "Bandit" Rose for his many years of wise counsel.

The opinions expressed in this paper are my own and do not necessarily reflect the views of my employer, The Department of Justice and Attorney General.

2 Australian Bureau of Statistics, *3238.0.55.001 - Experimental Estimates of Aboriginal and Torres Strait Islander Australians, June 2006* available at: http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3238.0.55.001Main%20Features1Jun%202006?opendocument&tabname=Summary&prodno=3238.0.55.001&issue=Jun%202006&num=&view=.

3 Australian Bureau of Statistics ('ABS'), *4517.0 – Prisoners in Australia*, *2008* (2008) http://www.abs.gov.au/Ausstats/abs@.nsf/Latestproducts/4517.0Main%20Features22008?opendocument&tabname=Summary&prodno=4517.0&issue=2008&num=&view= .

4 The OID report draws on very diverse sets of statistics, necessarily so because of the lack of common indicators across the different departments of the Commonwealth, state and territory governments. The inconsistencies in data collection render reliable statistical analysis more difficult. This is an area which is currently receiving increased funding: OID report, Chapter 2.6 and Appendix 4.

Introduction

1. As at June 2006, the Indigenous population in NSW was approximately 2.29% of the total population (male: 2.31%, female: 2.27%).[1]

2. In NSW correctional centres as at 30 June 2009:

   (a) The Indigenous population of full-time custody inmates was 22.2%.[2] This is an overrepresentation of Indigenous prisoners to non-Indigenous prisoners by a factor of 9.69;

   (b) Indigenous males comprised 21.6% of all full-time custody male inmates.[3] This is an overrepresentation of Indigenous male prisoners to non-Indigenous male prisoners by a factor of 9.35; and

   (c) Indigenous females comprised 29.4% of full-time custody female inmates.[4] This is an overrepresentation of Indigenous female prisoners to non-Indigenous female prisoners by a factor of 12.95.

3. In NSW, between 30 June 2000 and 30 June 2009:

   (a) The proportion of Indigenous offenders to the total prison population increased from 15.9% to 22.2%;

   (b) There was a steady increase in the proportion of Indigenous males incarcerated, from 15.5% to 21.6%; and

   (c) There was an increase in the proportion of Indigenous females incarcerated, from 21.1% to 29.4%.

4. On the basis of the total NSW Indigenous population statistics as at June 2006 (2.29%), the NSW Department of Juvenile Justice's figures as at 30 June 2008 show that Indigenous juveniles overrepresent non-Indigenous juveniles by factors of 17.29 for remandees and 24.59 for detainees.[5]

5. In Australia, on an age-standardised basis:

   (a) Indigenous people were 13 times more likely than non-Indigenous people to be imprisoned in 2008;

   (b) The imprisonment rate increased by 46% for Indigenous women and by 27% for Indigenous men between 2000 and 2008; and

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1. Australian Bureau of Statistics, *Report 3238.0.55.001-Experimental Estimates of Aboriginal and Torres Strait Islander Australians, June 2006* (issued 19 August 2008).
2. Information provided by NSW Department of Corrective Services, 16 December 2009.
3. ibid.
4. ibid.
5. NSW Department of Juvenile Justice, *Annual Report*, (2008).

(c) Indigenous juveniles were 28 times more likely to be detained than non-Indigenous juveniles at 30 June 2007. The Indigenous juvenile detention rate increased by 27% between 2001 and 2007.[6]

6. The rate of imprisonment of Indigenous prisoners varies considerably across Australian states and territories. In 2008, Indigenous prisoners represented 24.3% of the total Australian prison population, an increase from a total of 18.8% in 1998.[7]

7. A comparison of the statistics in relation to the imprisonment rates of Indigenous offenders in each Australian state and territory is as follows:[8]

State	Indigenous population (percentage of total population, 2006)[9]	Indigenous prisoners as a percentage of total prisoners (as at 30 June 2009)[10],[11]	Overrepresentation of Indigenous prisoners to non-Indigenous prisoners (by factor)
NSW	2.29%	22.2%	9.69
Victoria	0.6%	5.8%	9.67
Queensland	3.6%	27.0%	7.5
South Australia	1.7%	20.6%	12.12
Western Australia	3.8%	41.2%	10.84
Tasmania	3.4%	12.6%	3.71

6. SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, (2009) 28: ('the OID report').
7. See generally: Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2008* (released 11 December 2008) http://www.abs.gov.au/Ausstats/abs@.nsf/Latestproducts/4517.0Main%20Features22008?opendocument&tabname=Summary&prodno=4517.0&issue=2008&num=&view= .
8. ibid.
9. Australian Bureau of Statistics, *4705.0 – Population, Distribution, Aboriginal and Torres Strait Islander Australians, 2006*.
10. Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2008*, Data cube, 'Crude imprisonment rates, states and territories by Indigenous status, 1998-2008' at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02008?OpenDocument.
11. These statistics are not age-standardised.

Northern Territory	31.6%	83.2%	2.63
ACT	1.2%	10.4%	8.67

8. Much has been written about the reasons for the disproportionate rates of Indigenous imprisonment in Australia; it is clear there are multiple contributing factors.[12] Factors contributing to the disadvantage suffered by the Indigenous population have been identified to include family breakdown, alcohol and substance abuse, low educational levels, unemployment, poverty, low home ownership rates, poor health and high mortality rates.[13]

9. Considerable concern has been expressed, within Australia[14] and internationally[15], at the disproportionate rates of Indigenous imprisonment in Australia.

10. This paper will consider what steps could be taken, if any, by the NSW legislature and/or the NSW courts in an effort to reduce the rates of Indigenous imprisonment in NSW. Consideration will also be given to the approaches taken by Tasmania, Victoria and Canada to the sentencing of Indigenous offenders.

11. The scope of this subject matter is vast and this paper seeks only to outline the relevant issues. Some further reading is footnoted but the Australian Productivity Commission's report, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, is particularly recommended.

The Australian Productivity Commission's report – *Overcoming Indigenous Disadvantage: Key Indicators 2009*

12. In 2002 the Australian Productivity Commission was commissioned by the Council of Australian Governments ('COAG') to provide governments with biennial reporting against key indicators of Indigenous disadvantage. The Productivity

12. See for example, Snowball, L. and Weatherburn, D., 'Indigenous Over-Representation in Prison – The Role of Offender Characteristics', (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No. 99, NSW BOCSAR, 2006) (and the extensive reference notes).

13. Australian Bureau of Statistics, *4704.0 - The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2008* (latest issue, 29 April 2008). http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/366EED9FF642DD67CA2570B3007DEA93?OpenDocument.

14. For instance, COAG's reference to the Productivity Commission on the rate of Indigenous imprisonment in Australia and the request for biennial reporting on key indicators of Indigenous disadvantage (the OID Report).

15. For example, clause 21 of the report by the UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by states parties under Article 9 of the convention,* 66th session, UN Doc CERD/C/AUS/CO/14 (2005) states:
'The Committee remains concerned about the striking overrepresentation of Indigenous peoples in prisons as well as the percentage of Indigenous deaths in custody. It has also been reported that Indigenous women constitute the fastest-growing prison population. The Committee recommends that the State Party [Australia] increase its efforts to remedy this situation. It wishes to receive more information about the implementation of the recommendations of the Royal Commission on Aboriginal Deaths in Custody.'

Commission's *Overcoming Indigenous Disadvantage: Key Indicators 2009* report is a comprehensive study of current Indigenous disadvantage in Australia (the 'OID Report').[16]

13. The Foreword to the 2009 Report reads, in part:

> In March this year, the terms of reference were updated in a letter from the Prime Minister. The new terms of reference reaffirm governments' commitment to being accountable for improved outcomes for Indigenous Australians, with the OID [Overcoming Indigenous Disadvantage] serving as a public report card on progress against the COAG targets and other significant indicators.
>
> The new terms of reference align the OID framework with COAG's six high level targets for Closing the Gap in Indigenous outcomes. The structure of the aligned framework remains very similar to that of previous reports, but highlights the COAG targets and priority areas for reform, as well as including additional indicators. The Steering Committee will be consulting further on the new framework.
>
> The OID aims to help governments address the disadvantage that limits the opportunities and choices of many Indigenous people. However, it is important to recognise that most Indigenous people live constructive and rewarding lives, contributing to their families and wider communities. That said, across nearly all the indicators in the OID, there are wide gaps in outcomes between Indigenous and non-Indigenous Australians. While the gaps are narrowing in some areas, in too many cases outcomes are not improving, or are even deteriorating. We still have a long way to go to fulfil COAG's commitment to close the gap in Indigenous disadvantage.
>
> Data from the past two Censuses show that Indigenous people have shared in the general economic prosperity of the past decade, with increases in employment, incomes and home ownership. A key challenge will be preserving and building on these gains and closing the gaps in a more difficult economic climate. In areas such as criminal justice, outcomes for Indigenous people have been deteriorating. Indigenous people and governments are grappling with ways to identify and address the underlying drivers of these outcomes. [emphasis added][17]

14. Various references to the OID Report are made throughout this paper.

Development of the current common law principles applicable in NSW to the sentencing of Indigenous offenders

15. In *Neal v The Queen* (1982) 149 CLR 305, an Indigenous man appealed to the High Court against a sentence imposed on him by the Queensland Court of Criminal Appeal, on the ground that the Court had erred in imposing a sentence higher than the sentence imposed at first instance, in the absence of a Crown appeal and in the absence from the Court of the appellant. In expressing what has become known as the 'substantial equality principle', Brennan J observed *obiter* (at 326):

16. SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission, Canberra ('the OID report').
17. OID Report, Foreword, iii.

> 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. 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.

16. In *R v Fernando* (1992) 76 A Crim R 58, Wood J considered various reports, papers and authorities to distil sentencing principles relevant to Indigenous offenders. His Honour said (at 62-63):

> As I read those papers and decisions they support the following propositions:
>
> (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
>
> (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
>
> (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
>
> (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
>
> (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
>
> (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess

realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

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

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

17. The principles formulated by Wood J in *Fernando* have been frequently considered by the NSW Court of Criminal Appeal. In *R v Hickey* (unreported, NSWCCA, 27 September 1994: BC9403050) Simpson J said (at 3-4):

> [The respondent to the Crown appeal] is an Aboriginal man, whose history displays too many features that courts have come to recognise as common to too many Australian citizens of Aboriginal descent. [The sentencing judge] put it in a nutshell when he said: 'It is perfectly clear that you have not had any advantage in life. You have been at a serious disadvantage most of time, and you sought solace in alcohol and you began your criminal career at a very early age.'
>
> These disadvantages were fully spelled out in the [evidence given on behalf of the respondent]. They include alcohol abuse by his family, consequent lack of structure and discipline in the home environment, educational deprivation, and the failure to enter and maintain strong and supportive relationships. In the case of this respondent, as is becoming more frequent, to alcohol abuse can be added abuse of prohibited drugs, in this case heroin.
>
> It is a tragic truth well known to members of this court, that aboriginality is frequently accompanied by this very litany of disadvantage. So unfortunately common is it, that in *The Queen v Fernando* (unreported 14 March 1992), Wood J distilled from authoritative papers, precedents and reports, a series of propositions relating to the sentencing of Aboriginal offenders.
>
> The first of these propositions is that sentencing principles are non-discriminatory, in that they apply to all cases without differentiation by reason of the offender's membership of a particular racial or ethnic group. But this general proposition is followed by a recognition that those factors which constitute the disadvantage already described, and which may arise by reason of membership of that particular group, may have a role to play in the sentencing determination. Wood J in particular made mention of the need for 'realistic recognition' of the fact of alcohol abuse, and its impact on Aboriginals and their communities. So much can readily be accepted, and it seems clear that this must have been the factor which led [the sentencing judge] to impose the very lenient sentence he did.

18. In *R v Powell* [2000] NSWCCA 108, Simpson J further said (at [23]-[24]):

> [On] behalf of the applicant in this Court considerable reliance was placed on the remarks on sentence reported in *Fernando*, 76 A Crim R 58. It is, in my opinion, a mistake to rely on *Fernando* as authority for a proposition that aboriginal heritage of itself is a mitigating circumstance. What I understood Wood J to have been saying in *Fernando* was that the well known social and economic problems that frequently attend aboriginal communities warrant a degree of leniency but it is the disadvantage associated too often with aboriginality that warrants that degree of leniency and not the fact of aboriginality, *per se*.
>
> Care must also be taken to ensure that recognition of those problems and the principles stated in *Fernando* do not have the unintended consequence of apparently devaluing the effect of offences on victims, including circumstances where the victims are already themselves subject to the same pattern of disadvantage. That is the tight rope that the sentencing Judge was walking in this case. In these cases sentencing Judges have to perform an extremely difficult balancing exercise. In her remarks on sentence [the sentencing judge] did not refer to the extensive and very compelling medical material, including evidence of the attempted suicide that was before her. The attention paid by her to the applicant's 'troubled upbringing' suggests that insufficient appreciation was given to the extent of the disadvantage and dislocation evidenced by the whole of the material in this case.

19. In *R v Ceissman* (2001) 119 A Crim R 535, Wood CJ at CL referred to his judgment in *Fernando* and said (at 539-540):

> [It] appears to me that his Honour was at risk of misapplying the decision in *Fernando* (1992) 76 A Crim R 58, referred to with approval in *Stone* (1995) 84 A Crim R 218. As I endeavoured to explain in *Fernando*, the eight propositions there enunciated were not intended to mitigate the punishment of persons of Aboriginal descent, but rather to highlight those circumstances that may explain or throw light upon the particular offence, or upon the circumstances of the particular offender which are, referable to their aboriginality, particularly in the context of offences arising from the abuse of alcohol.
>
> The present is not such a case, nor is it one which needs to be understood as having occurred in a particular local or rural setting, or one involving an offender from a remote community for whom imprisonment would be unduly harsh because it was to be served in an environment that was foreign to him or her.
>
> That *Fernando* is not to be regarded as a decision justifying special leniency merely because of the aboriginality of the offender, was recognised in *Hickey* (unreported, Court of Criminal Appeal, NSW, No 60410 of 1994, 27 September 1994) where Simpson J noted that the first of the propositions stated by me in that decision 'is that sentencing principles are non-discriminatory in that they apply to all accused without differentiating by reason of the offender's membership of a particular racial or ethnic group'. This proposition is, however, varied by the recognition that those factors which constitute the disadvantage, and which may arise by reason of membership of the particular group, may have a role to play in the sentencing determination.

> The principles stated should not be elevated so as to create a special class of persons for whom leniency is inevitably to be extended, irrespective of the objective and special circumstances of the case. To do so would itself be discriminatory of others.
>
> In the instant case, I am unable to see the existence of any factor arising from the fact that the respondent's grandfather was part Aboriginal that would, in accordance with *Fernando*, attract special consideration. That does not mean that his subjective circumstances were to be ignored or diminished. It simply means that *Fernando* did not require the application of any consideration additional to those applicable in every case of an offender with a deprived background.

20. In *R v Pitt* [2001] NSWCCA 156, Wood CJ at CL also said (at [19]-[21]):

> As I pointed out in *Ceissman* (2001) NSWCCA 73, there is a danger of misinterpreting *Fernando* (1992) 76 A Crim R 58 as a decision justifying special leniency on account of an offender's aboriginality. The error in that approach was recognised in *Hickey* (NSWCCA, 27 September 1994), where Simpson J noted that the first of the eight propositions stated by me in *Fernando*, was 'that sentencing principles are not discriminatory in that they apply to all accused without differentiating by reason of the offender's membership of a particular racial or ethnic group.'
>
> In *Powell*, Simpson J similarly noted that it is a mistake to rely on *Fernando* as authority for a proposition that aboriginal heritage of itself is a mitigating circumstance, and warned that care must be taken to ensure that recognition of the social and economic problems that frequently attend aboriginal communities, and the principles stated in *Fernando*, do not have the unintended consequence of devaluing the effect of offences on victims.
>
> What *Fernando* sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.

21. A summary of 102 (mostly NSW) cases involving an Indigenous offender and decided after *Fernando* is attached: Appendix 1. An analysis of this summary reveals that the *Fernando* principles were considered in 27 of those cases, cited in 24, applied in 29, distinguished in 6, not followed in 10 and not mentioned in 6.

22. Various reasons have been given by the NSW Court of Criminal Appeal for not applying the *Fernando* principles in the sentencing of Indigenous offenders:

(a) The offender's membership of, or identification with, an Indigenous community was not accepted by the Court:

- *R v Ceissman* (*supra*);

- *R v Newman and Simpson* (2004) 145 A Crim R 361 (per Howie J at [59]-[68], McColl JA agreeing and Shaw J dissenting);

(b) The degree of social disadvantage suffered by the particular Indigenous offender was not such as to attract the application of the principles:

- *R v Pitt* (*supra*);
- *Anderson v R* (2008) NSWCCA 211 (per McClellan CJ at CL, at [24], Hislop and Hoeben JJ agreeing);
- *R v Smith* [2001] NSWCCA 420 (per Bell J at [27]-[28], Grove J agreeing); and
- *R v Knight* [2005] NSWCCA 241 (per Howie J at [80]-[82], Grove and Rothman JJ agreeing);

(c) The *Fernando* principles take 'into account a history and pattern of deprivation' that were not relevantly applicable:

- *R v Dennis* [2003] NSWCCA 137 (per Simpson J at [36], Hulme J agreeing);

(d) The offender's alcohol and/or substance abuse was the reason for offending, rather than any particular disadvantage arising from the offender's Indigenous status:

- *R v Trindall* [2005] NSWCCA 446 (per Hall J at [24]-[27], Hodgson JA and McClellan CJ at CL agreeing);
- *R v Vincent* [2005] NSWCCA 135 (per Spigelman CJ at [11], Studdert and Greg James JJ agreeing);
- *R v Walter and Thompson* [2004] NSWCCA 304 (per Grove, Sully and Kirby JJ at [57]-[58]); and
- *R v RLS* [2000] NSWCCA 175 (per Hulme J at [11]-[15], Carruthers AJ agreeing);

(e) Defence counsel submitted that the principles were not applicable (despite what appears to have been a possible argument to the contrary):

- *R v Price* [2004] NSWSC 868 (per Barr J at [28]); and

(f) The offender had a prior criminal history and, therefore, prior contact with the criminal justice system, and the offender was not from a remote community:

- *R v Morgan* (2003) 57 NSWLR 533 (per Wood CJ at CL, at [22], Simpson and Adams JJ agreeing); and
- *R v Mason* [2005] NSWCCA 403 (per McClellan CJ at CL, at [45]-[46], Adams and Johnson JJ agreeing).

23. In *R v Gordon* (1994) 71 A Crim R 459, the Crown appealed against a sentence imposed on a 19 year old Indigenous offender for 6 counts of armed robbery, 2 counts of aggravated sexual assault, 3 counts of kidnapping, break and enter with intent to commit a felony of detaining the victim and indecent assault. Hunt CJ at CL did not refer to the *Fernando* principles in his judgment, despite evidence of the offender's family breakdown, his exposure to racism and his alcohol abuse from an early age. His Honour said (at 470):

> It was also submitted on appeal that the community would not expect a young Aboriginal to be made an example of. That submission, with all due respect to its author, is a positively mischievous one; it completely misstates the obligation of the courts to give effect to the need for public deterrence whoever the offender may be. I accept that much of the respondent's deprivation as a child can be laid at the door of society's neglect in relation to the welfare of Aboriginals, but these were not the crimes which have unfortunately become common for young Aboriginals in some parts of the State - of offensive behaviour (through drunkenness), of assaulting police and of resisting arrest. These were, as counsel ultimately conceded, crimes which were completely remote from that troublesome and embarrassing area - they were what he described as white, middle-class crimes.

24. The application of the *Fernando* principles in the NSW Court of Criminal Appeal has been uneven; this may simply be a reflection of the protean nature of the objective and subjective circumstances of each case and/or the availability (or otherwise) of evidence as to the subjective circumstances of particular Indigenous offenders on sentence. However, some academics have criticised the way in which the NSW Court of Criminal Appeal has considered the *Fernando* principles; for instance, Flynn argues that the Court has, at times, seemed to assess whether an offender is 'aboriginal enough' before determining whether the *Fernando* principles apply. Flynn refers particularly to the decisions in *Newman and Simpson*, *Ceissman* and *Morgan*, questioning the criteria used by the courts to determine the Indigeneity of the offenders. Flynn notes that the evidence of the offenders' subjective circumstances in *Newman and Simpson* was scant and acknowledges the 'lesson' that relevant evidence of particular disadvantage suffered by a particular Indigenous offender should always be adduced on sentence. However, Flynn observes that the findings in *Newman and Simpson*, *Ceissman* and *Morgan* seemed to place undue emphasis on the urban environments in which the offenders lived, and gave little weight to the disadvantages frequently suffered by Indigenous people whether they lived in urban, country or remote Australia. This, Flynn argues, is counter to the 'substantial equality principle' expressed by Brennan J in *Neal v The Queen* when his Honour said that, '… 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'.[18]

Purpose of the Fernando principles

25. The *Fernando* principles were not formulated with the express intention of reducing the number of Indigenous offenders in custody. Rather, the intention was to provide a framework for consideration of the issues of disadvantage often attending the subjective circumstances of individual Indigenous offenders. As Spigelman CJ said in *R v (Stanley) Fernando* [2002] NSWCCA 28 (at [67]):

> Aborigines who commit crimes of violence are not accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to all of the relevant considerations, including the subjective features of a particular case. An offender is not entitled to any special leniency by reason of his or her Aboriginality. The principle of equality before the law requires sentencing to occur without differentiation by reason of the offender's membership of any

18. Flynn, M., 'Fernando and Sentencing of Indigenous Offenders', (2004) 16(9) *Judicial Officers Bulletin*. See also Edney, R., 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing', (2006) 6(17) ILB 11, 8.

> particular racial or ethnic group. Nevertheless, particular mitigating factors may feature more frequently in some such groups than they do in others.

26. It is apparent that one of the reasons why the *Fernando* principles have proved uneven in their application is that the principles are statements of the common law to be applied in the context of the very different objective and subjective circumstances of each offender. But many questions, from the general to the specific, are raised as to how the *Fernando* principles translate, in practical terms, to the sentencing process. What does it mean to be an Indigenous person in NSW? How is the well-documented disadvantage of Australia's Indigenous population relevant in the context of NSW criminal law? Does that disadvantage differ depending on whether the offender grew up in urban, regional or remote areas of NSW? Has the particular Indigenous offender been relevantly disadvantaged by his or her Indigenous status? If so, how? How can this disadvantage be established forensically? Should a detailed report be tendered to the sentencing court summarising, for instance, the general effect of the findings of the OID Report, and analysing whether those findings are relevant to the disadvantaged Indigenous offender? Should a report of this type be tendered on behalf of every Indigenous offender who asserts disadvantage? If so, how can the tangible and intangible effects of all such disadvantages be meaningfully detailed in such a report for the sentencing court? Who will prepare such reports? Who will pay for them?

27. Two case law examples are illustrative of the current forensic difficulty in establishing that an offender has suffered disadvantages arising from his or her Indigenous status. In *R v Pitt* [2001] NSWCCA 156, although the evidence established that the offender was raised on an aboriginal mission outside Moree in a large family, was regularly subjected to violence throughout his childhood at the hands of his alcoholic father, frequently witnessed other violence in the community, had been employed only irregularly, had been frequently imprisoned since the age of 18 and had a drug addiction, Wood CJ at CL said (at [22]):

> While the applicant's background and the unsatisfactory aspects of his bringing up were relevant to an understanding of his current situation, I am not persuaded that there were here present, to the requisite degree, the factors of the kind identified in *Fernando* that required mitigation of sentence, or that were not appropriately addressed by the reduction of the non-parole period.

28. In *R v Trindall* [2005] NSWCCA 446, although the evidence established that the offender was raised in Coonamble by a relative from the age of four (following the breakdown of her parents' relationship in Sydney), was reportedly sexually abused as a child by another relative, came to Sydney as a young teen where she lived without family support (but within the Indigenous community) and quickly became pregnant, developed a drug addiction and engaged in offending behaviour, Hall J said (at [26]-[27]):

> Having considered this matter, I am of the view that the *Fernando* principles do not apply to the applicant. …
>
> The applicant's family and social factors are, beyond question, tragic but are not referable to the applicant's membership of the Aboriginal society as such but are unfortunately more generally associated with the destructive effects of drug addiction. In other words, I do not consider that the applicant's Aboriginality is

> relevant to explain or throw light on the particular offences and the circumstances of the applicant. It is but one factor in an otherwise complex set of negative factors.

29. If the *Fernando* principles have no application in cases such as *Pitt* and *Trindall*, a question is raised as to when those principles can or should be applied, given the number of Indigenous people who live in either NSW country towns or large urban areas (as opposed to 'remote' areas),[19] the number of Indigenous recidivists who are well-familiar with the criminal justice system, the disproportionate rates of violence, abuse and breakdown in Indigenous families, and the disproportionate rate of drug and alcohol addiction in Indigenous communities.

30. Although there is an observable unevenness in the application of the *Fernando* principles in the NSW Court of Criminal Appeal, it may be that those principles are applied more evenly in the lower courts, especially in remote and regional areas of NSW where there are proportionately greater Indigenous populations; BOCSAR's research seems to indicate that this is the case.[20] It is also possible that in the absence of the *Fernando* principles, the disproportionate rate of Indigenous imprisonment in NSW would be higher than it is. However, whatever view one takes of the current applicability of the *Fernando* principles, it is apparent from the increasingly high disproportionate rates of Indigenous imprisonment in NSW that common law principles are a very blunt tool to use against increasing Indigenous imprisonment rates.

Rates of imprisonment of Indigenous offenders in NSW

31. Since the formulation of the *Fernando* principles, the imprisonment rates of Indigenous offenders relative to non-Indigenous offenders have continued to increase in NSW. In 1992, the year *Fernando* was decided, 9% of all prisoners in NSW were Indigenous.[21] That figure had risen to 17% by 2002,[22] and had reached 22.2% by 30 June 2009.[23]

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19. The Productivity Commission estimates that 32% of Australia's Indigenous population lives in major cities, 21% in inner regional areas, 22% in outer regional areas and 24% in remote or very remote areas: OID Report, Overview, 2. The number of Indigenous people in 'remote or very remote areas' in NSW is probably much fewer than this figure because the Australian statistics include the Indigenous populations in the Northern Territory, Western Australia and Queensland.
20. Snowball, L., 'Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No. 111, NSW BOCSAR, 2008). In her article, Snowball examined the Indigenous offender imprisonment rates in NSW; 97% of all such offenders were sentenced in the Local Courts. The imprisonment rate of Indigenous offenders is *lower* in remote and regional areas of NSW where there is a proportionately higher Indigenous population (eg. Dubbo, Bourke, Brewarrina and Walgett) than in inner metropolitan areas. The author comments that the reasons for this need further research but it would appear that the Indigenous status of offenders coming before the Local Court, at least in the far north west of the state, is considered a relevant factor on sentence.
21. Statistics for NSW Indigenous imprisonment rates in 1992 and 2002: Australian Bureau of Statistics, *Report 1301.0 – Year Book Australia, 2004* (2004) at: http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/E606FEF744E32C96CA2571030034B28A?opendocument.
22. ibid.
23. Information provided by NSW Department of Corrective Services, 16 December 2009. Note figure of 22.2% refers to the percentage of Indigenous offenders in full-time custody.

32. The following graph of the NSW Department of Corrective Service's statistics between June 2004 and August 2009 suggests that the relative rate of Indigenous imprisonment in NSW is still on an upward path.[24]

Date (week ending)	Indigenous prisoners (total number)	Indigenous offenders (as a percentage of total prisoners	Indigenous male prisoners (total number)	Indigenous male prisoners (as a percentage of total male prisoners)	Indigenous female prisoners (total number)	Indigenous female prisoners (as a percentage of total female prisoners)
30 June 2004	1,529	17.8%	1,377	17.2%	152	25.4%
30 June 2005	1,640	18.2%	1,472	17.6%	168	27.1%
30 June 2006	1,915	21.0%	1,705	20.2%	210	30.9%
30 June 2007	1,993	20.9%	1,779	20.1%	214	30.4%
30 June 2008	2,080	21.1%	1,866	20.4%	214	29.6%
30 June 2009	2,301	22.2%	2,071	21.6%	230	29.4%

33. The relative rate of Indigenous juvenile detention in NSW is also increasing.[25]

24. ibid
25. NSW Department of Juvenile Justice, *Annual Report 2007-2008* (2008) 23. This data is not age-standardised.

Year	Proportion of Indigenous juveniles to total juveniles remanded in custody (by percentage)	Proportion of Indigenous juveniles to total juveniles sentenced to detention (by percentage)
2002-2003	38.4	45.1
2003-2004	39.6	48.8
2004-2005	37.8	47.4
2005-2006	37.3	47.5
2006-2007	37.8	54.7
2007-2008	39.6	56.3

34. It is evident from these statistics that the number of Indigenous adult prisoners and juvenile detainees has grown steadily in NSW in the years since the formulation of the *Fernando* principles.

35. If the common law principles expressed in *Fernando* cannot stem the disproportionate rates of Indigenous imprisonment in NSW (whether that was the intention or not), and if it is considered that the rates should be stemmed, the question must be asked: What can be done to decrease these rates?

Identifying the reasons for the overrepresentation of Indigenous offenders in NSW prisons and detention centres

Social disadvantages

36. The Australian Productivity Commission found that Australia's Indigenous population continues to suffer chronic and disproportionate social disadvantage in the areas of health (including mental health)[26], drug abuse and addiction[27], child abuse[28], family violence[29], education[30], employment[31], housing[32] and mortality rates[33]. The

26. ibid, chapter 7.
27. ibid, chapters 10.3 & 10.4.
28. ibid, chapter 4.10.
29. ibid, chapter 4.11.
30. ibid, chapter 6.

number of Indigenous children receiving out-of-home care is significantly disproportionate to non-Indigenous children[34] and the number of children removed from their families by the NSW Department of Community Services increased by 15% between 2008 and 2009.[35] Many of these disadvantages translate into poverty and the Indigenous community's sense of disconnection from the non-Indigenous population.

Court practices

37. Against the background of these social disadvantages, the reasons for the overrepresentation of Indigenous offenders in NSW prisons and detention centres may include:

(a) A lack of understanding on the part of judges, magistrates, prosecutors and defence lawyers as to the multiplicity and depth of the disadvantages facing Indigenous communities;

(b) An intention on the part of the judiciary not to breach anti-discrimination laws or to be seen to be 'favouring' Indigenous offenders;

(c) The continued under-funding of specialist Indigenous legal services, which frequently results in the employment of inexperienced, under-resourced and/or overworked lawyers;

(d) The sense of alienation experienced by Indigenous offenders from a court system perceived as delivering 'white man's justice';

(e) Inadequate awareness of Indigenous cultures on the part of Probation and Parole, and Juvenile Justice officers;

(f) The limited availability of early intervention or diversionary programs tailored for Indigenous offenders, both adult and juvenile;

(g) Limited sentencing options (often dictated by the lack of resources to provide very intensive supervision for offenders, and the limited availability of community work, periodic detention, mental health resources, drug and alcohol counselling, and placements in culturally appropriate rehabilitation programs, particularly in country and regional NSW);[36] and

(h) Failure of the courts, lawyers and social services to recognise that the particular disadvantages facing Indigenous juvenile offenders (such as high rates of child abuse,

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31. ibid, chapter 8.
32. ibid, chapter 9.
33. ibid, chapter 7.3.
34. Wood, The Hon. J., *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, (November 2008) 736. It appears that about 30% of NSW children in out-of-home care are Indigenous (although Indigenous children constitute only about 4% of the child population in NSW). This statistic does not include Indigenous children who have been placed either temporarily or permanently outside their homes without the knowledge of DoCS.
35. NSW Department of Community Services, *NSW State Budget 2009-2010*, 2: http://www.community.nsw.gov.au/DOCSWR/_assets/main/documents/BUDGET09.PDF.
36 Note, however, the comments at paragraph 30.

family and community violence, the breakdown of family relationships bringing the loss of cultural identity, education failure, unemployment, youth pregnancy, first consciousness of racism and high levels of exposure to substance abuse within the community) are overlaid on the usual social adjustment difficulties facing even the best supported, most advantaged young people.

38. It is probable that all of these factors play a role, to a greater or lesser extent, in the overrepresentation of Indigenous offenders in Australian prisons.

Recidivism

39. In the OID Report it is noted that:

> A greater proportion of Indigenous prisoners (73.0%) than non-Indigenous prisoners (49.6%) had prior adult imprisonment in 2008. There was no significant change at the national level in the proportion of Indigenous prisoners with prior adult imprisonment from 2000 to 2008.
>
> Studies on juvenile offenders carried out in NSW, Queensland, WA and SA show that Indigenous juveniles experienced a higher number of court reappearances and higher rates of repeat offending than non-Indigenous juveniles.
>
> Repeat offending, sometimes called recidivism, is a significant issue. Research has shown that once Indigenous offenders come into contact with the criminal justice system, they are more likely than non-Indigenous offenders to have further contact with it. Furthermore, Indigenous offenders are more likely to begin offending regularly at younger ages.
>
> Indigenous children are more likely to have a parent imprisoned at some point in their lives than non-Indigenous children. Incarceration of one generation affects later generations through the breakdown of family structures, and has ramifications for the rehabilitation and employment prospects of individuals, and the socio-economic capacity of families to function (Standing Committee on Law and Justice 1999). Children of prisoners are more likely than children in the general community to commit offences that result in their own imprisonment (Standing Committee on Law and Justice 1999, 2000; Woodward 2003).
>
> Several factors contribute to recidivism and, in many cases, these are the same as those that resulted in the initial incarceration (Standing Committee on Social Issues 2008; Willis and Moore 2008).
>
> Given the extent of Indigenous imprisonment, it is important that people who have contact with the criminal justice system have the opportunity to integrate back into the community and lead positive and productive lives, which may also break the intergenerational offending cycle. Many social barriers faced by Indigenous offenders can be overcome to some extent through intervention programs aimed at addressing those barriers (Willis and Moore 2008). The Standing Committee on Social Issues (2008) found that a major factor leading to recidivism was the lack of suitable support to ex-offenders integrating back to society. Borzycki and Baldry (2003) found that there were only a small number of programs in Australia to help Indigenous and non-Indigenous people make the transition from prison to society and to break the cycle of re-offending.

> Services that aim to support Indigenous offenders with the experience of imprisonment can also help lower the rate of re-offending. These services can enhance rehabilitative outcomes and the reintegration process by helping Indigenous offenders remain in contact and involved with the community. These services can include: visits by elders, contact with community liaison officers, official Indigenous visitors and access to chaplains (including specified Indigenous chaplains) (Willis and Moore 2008).[37] [some references omitted]

40. It is clear that if the disproportionate rate of the imprisonment of Indigenous offenders is to be reduced, then measures additional to those already being taken need to be implemented to reduce the recidivism rate amongst such offenders.

Reasons why the reform of the laws and practices in NSW relating to the sentencing of Indigenous offenders is necessary

41. COAG has identified the urgent need to reduce the rate of Indigenous recidivism and imprisonment throughout Australia. There are many reasons why fundamental reform to the sentencing laws and practices relating to Indigenous offenders in Australia is needed; not least because high rates of Indigenous offending and imprisonment bring with them the further breakdown of Indigenous communities and cultures, and intergenerational offending behaviours. There are also significant (and growing) financial costs incurred by Australian taxpayers in the form of prisons, juvenile detention centres and other corrective services, hospitals and other medical services, social support agencies and child welfare services.

42. The OID Report highlights the necessity of reform in the sentencing of Indigenous offenders: if the whole of the COAG targets are to be met, NSW and the other states and territories must reduce their overrepresentation of Indigenous prisoners; if the disproportionate number of Indigenous victims of crime is to be reduced, the recidivism rates of Indigenous offenders must be reduced and juvenile offenders must be diverted; if the rate of family breakdown within Indigenous communities is to lessen, Indigenous offenders must be treated within their communities by way of multiple early interventions (diversionary sentencing programs, drug and alcohol rehabilitation, counselling and employment).

43. It is clear from the OID Report and the vast amount of other material written about the multiple disadvantages suffered by Indigenous people in Australia, that any reforms to the sentencing laws and practices relating to Indigenous offenders in NSW can only be a small part of wider social, legal and political reform in Australia. Before any real improvements can be made to the problem of Indigenous overrepresentation in NSW prisons, reforms must be interlinked with initiatives being undertaken by other NSW Government Departments, with the broader COAG targets kept firmly in mind.

Overrepresentation of Indigenous victims of crime

44. One consideration that complicates this question of reform is the frequency with which Indigenous people are the victims of offences committed by Indigenous offenders. The OID Report found:

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37. OID Report, 10.42-10.43.

(a) Indigenous people were hospitalised as a result of spouse or partner violence at 33.9 times the rate of non-Indigenous people. Indigenous females and males were 35.1 and 21.4 times as likely to be hospitalised due to family violence related assaults as non-Indigenous females and males;

(b) Indigenous females sought Supported Accommodation Assistance Program assistance in 2006-2007 to escape family violence at the rate of 45.0 per 1,000 population compared with 3.3 per 1,000 population for non-Indigenous females; and

(c) Nationally, the Indigenous homicide death rate (5.9 per 100,000 population) was 7.4 times the non-Indigenous homicide death rate (0.8 per 100,000 population) between 2003 and 2007.[38]

45. Although not all of these offences would have been committed by Indigenous offenders, since there is a family element in these statistics (at least in respect of the spousal and domestic violence offences),[39] it is likely that a substantial proportion of the offenders responsible for these offences would themselves be Indigenous.

46. Simpson J considered the plight of Indigenous victims of crime in *R v Powell* (at [24]), saying:

> Care must also be taken to ensure that recognition of those problems and the principles stated in *Fernando* do not have the unintended consequence of apparently devaluing the effect of offences on victims, including circumstances where the victims are already themselves subject to the same pattern of disadvantage.

47. The disproportionate rate at which Indigenous people, and particularly women, are victims of crime is alarming. The rate is all the more alarming when it is considered that only the worst injuries suffered by Indigenous victims would have resulted in hospitalisation; it cannot be doubted that the statistics relating to Indigenous victims of violent crime must represent only the 'tip of the iceberg'.

48. It is not only the effect of crimes committed disproportionately by Indigenous offenders on Indigenous victims that is cause for very serious concern. The effect of domestic violence on children has been well-documented; it can lead to their lifelong dysfunction within the community, substance abuse and intergenerational offending behaviours, all of which in turn lead to high imprisonment rates. Domestic violence also leads to the breakdown of the family unit and intervention by other government departments: in NSW as at 20 June 2008, the ratio of Indigenous children on care and protection orders was 9.3 times greater than non-Indigenous children.[40]

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38. OID Report, Overview, 26.
39. In relation to domestic violence offences, the OID Report noted (at Overview, 27):
'There is no nationally agreed definition of domestic violence or family violence. To many people, domestic violence implies violence by a partner, and may also be known as intimate partner violence, spousal violence, spousal abuse, wife abuse and personal violence or battering. Family violence is often regarded as a broader category, including violence by extended family or household members. The lack of a common definition means that accurately reporting and comparing data on family and community violence is difficult.'
40. OID Report, 4.123.

49. What can be done to reduce the greatly disproportionate numbers of Indigenous victims? The increasing rate of imprisonment of Indigenous offenders does not appear to be stemming the rate of offences committed against Indigenous victims. More fundamentally however, the increasing rate of imprisonment does not appear to be addressing the underlying problem of domestic violence happening at a disproportionate rate in the first place.

50. A dilemma with sentencing reform in respect of Indigenous offenders who commit offences upon Indigenous victims is therefore this: differential sentencing of Indigenous offenders has the potential to convey to Indigenous victims that they are also being treated differentially, but the message needs to be clearly conveyed to all in the community that the protection of Indigenous victims is as important as the protection of non-Indigenous victims. On the other hand, it needs to be recognised that Indigenous offenders have often themselves been the victims of (or at least witnesses to) domestic violence, and also that the removal of Indigenous offenders from their families and homes following offences committed upon Indigenous victims often leads to a breakdown of the family structure, which often in turn leads to disproportionate offending rates within the next generation of that family.

51. In whatever way this dilemma is considered, it is clear from the very high (and increasing) rates of Indigenous victims and the very high (and increasing) rates of Indigenous imprisonment that the current round-robin model of offending, imprisonment, recidivism and then intergenerational offending is not working. It is difficult to argue that the current regime of sentencing Indigenous offenders in respect of domestic violence offences is, in any way, mitigating the negative effect of domestic violence in Indigenous communities.

52. If COAG targets are to be met, urgent action is required to address the disproportionate rate of domestic violence with Indigenous communities in NSW.

Financial cost to the community

53. Many of the financial costs arising specifically out of the high rate of Indigenous offending are hidden; for instance, although we know that Indigenous females are 35.1 times more likely than non-Indigenous females to be hospitalised following domestic assaults, there are no statistics readily available as to the actual cost of these hospitalisations. Similarly, there are definite but incalculable costs arising from the disproportionate need to provide, for example, other health services, emergency refuge accommodation, police services and care facilities.

54. The cost of imprisonment in NSW is however more readily identifiable. The annual cost of correctional services in NSW in 2007-2008 (recurrent and capital expenditure) was $1,046 million.[41] In the same financial year, the average recurrent expenditure per inmate per day was $210.48, an increase of five percent from the previous year and above the national average of $187.10 for the previous year.[42] NSW taxpayers therefore spent more than $76,000 on each prisoner and detainee in 2007-

[41] NSW Department of Corrective Services, *Facts and Figures: Corporate Research, Evaluation and Statistics* (May 2009):
[42] NSW Department of Corrective Services, Annual report 2007-08, 34.

2008 (by comparison, the daily cost of supervision of a 'community based offender' was $12.40, an annual cost of just over $4,500).[43]

Alternative sentencing models

NSW

55. The NSW Circle Sentencing program currently operates under *Criminal Procedure Regulation 2005* Reg. 19, Schedule 4. Clause 7, Part 4 of Schedule 4 provides:

> The objectives of the program are as follows:
>
> (a) to include members of Aboriginal communities in the sentencing process,
>
> (b) to increase the confidence of Aboriginal communities in the sentencing process,
>
> (c) to reduce barriers between Aboriginal communities and the courts,
>
> (d) to provide more appropriate sentencing options for Aboriginal offenders,
>
> (e) to provide effective support to victims of offences by Aboriginal offenders,
>
> (f) to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process,
>
> (g) to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong,
>
> (h) to reduce recidivism in Aboriginal communities.

56. The program commenced operation in Nowra in 2002 and as at May 2008 Circle Sentencing was operating in Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Mt Druitt and Nowra. Nearly half of all Circle Sentences involve an offence of common assault, with the next most prevalent offences being unlicensed driving and breaches of apprehended violence orders.

57. The program was recently evaluated by BOCSAR at the request of the NSW Attorney-General's Department. In a paper entitled, 'Does Circle Sentencing Reduce Aboriginal Offending?', Fitzgerald considered whether Circle Sentencing had achieved any effect on the following outcomes:

(a) A reduction in the frequency of participants' offending;

(b) An extended period between participants' re-offending; and

(c) A reduction in the seriousness of participants' [re-]offending.

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43. ibid.

58. After comparing the data available in respect of the Circle Sentencing program with data obtained from control groups (offenders charged with similar offences but dealt with by the Local Court), Fitzgerald found that there was no difference in any of the identified outcomes.

59. Fitzgerald argues that it 'should not be concluded that Circle Sentencing has no value simply because it does not appear to have any short-term impact on re-offending'. She says that the program may be strengthening informal social controls within Indigenous communities because of the involvement of Indigenous elders in the sentencing process. However, Fitzgerald argues that, by itself, Circle Sentencing is not enough to have any impact on re-offending rates and that further measures should be adopted in conjunction with the program, such as cognitive behavioural therapy, drug and alcohol treatment, and remedial education.[44]

Northern Territory and Tasmania

60. The Northern Territory has the lowest rate of overrepresentation of Indigenous prisoners in Australia; its Indigenous population is 31.6% and its Indigenous prison population is 83.2%, resulting in overrepresentation by a factor of 2.63. With the Northern Territory's significantly higher Indigenous population than NSW, a comparison between Northern Territory and NSW practices is not instructive.

61. Although Tasmania has the second lowest rate of overrepresentation of Indigenous prisoners of any Australian state or territory (with a factor of 3.71), it does not make any special provision for the sentencing or imprisonment of Indigenous offenders.[45]

62. An Austlii search of Tasmanian Supreme Court decisions since 1987 using the (separate) search criteria 'aboriginal', 'Indigenous' and 'Fernando' does not produce any relevant results, which suggests that the Tasmanian courts have not had to grapple with the problems presented by the overrepresentation of Indigenous offenders.

63. Although Tasmania's low rates of overrepresentation of Indigenous people in imprisonment are noteworthy when compared to the rates in other Australian states and territories, very little research appears to have been done to explain the reasons for this. It may be that social disadvantage amongst the Indigenous population in Tasmania is not as stark as it is elsewhere in Australia, but further examination of relative social advantage as a reason for lower Indigenous imprisonment rates is beyond the scope of this paper.

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44. Fitzgerald, J., 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No.115. NSW BOCSAR, 2008).

45. There are very minor exceptions: for instance, *Youth Justice Act 1997 (Tas)* ss 11, 14, 30 provide for participation of Indigenous elders in the administration of cautions to Indigenous children and in Community Conferences ordered by the court and s 129 provides that an Indigenous child in detention has a right to have his or her cultural needs met.

Victoria

64. The statistics relating to the imprisonment of Indigenous offenders in Victoria between 2003 and 2008 are:[46]

Year	Total prisoners	Total Indigenous prisoners	Percentage of Indigenous prisoners to total prisoners	Over-representation of Indigenous prisoners (by factor)[47]
2003-2004	3,009	149	4.95%	8.25
2004-2005	3,043	170	5.59%	9.32
2005-2006	3,168	165	5.20%	8.67
2006-2007	3,375	181	5.36%	8.93
2007-2008	3,413	195	5.71%	9.52

65. Although these statistics suggest an increasing rate of overrepresentation of Indigenous offenders in Victorian prisons between 2003 and 2008, a breakdown of the statistics shows that there was a *decrease* in the number of sentences of less than 1 year that were imposed on Indigenous offenders; it is only the number of sentences greater than 1 year, and specifically those between 1 to 10 years, that increased significantly in this period. The statistics relating to sentences imposed, by length, on Indigenous offenders in Victoria are:[48]

Year	Less than	1-5 years	5-10 years	10 years and over (including	Total

46. Sentencing Advisory Council, Victoria, *Imprisonment rate per 100,000 adults and 100,000 Indigenous Adults in Victoria* (2008).
http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/Home/Sentencing+Statistics/Adult+Prisoners/Indigenous+Rates/SENTENCING+-+Imprisonment+rate+per+100,000+adults+and+Indigenous+adults .
47. The Indigenous population of Victoria is 0.6% of the total Victorian population, see FN 9.
48. Ibid.

	1 year			indeterminate)	
2003-2004	61	66	13	9	149
2004-2005	73	74	14	9	170
2005-2006	60	77	16	12	165
2006-2007	61	93	15	12	181
2007-2008	59	103	22	11	195

66. The question is raised as to why the number of Indigenous offenders sentenced to terms of imprisonment of less than 1 year marginally decreased, when the number of Indigenous offenders sentenced to terms of between 1-5 years and 5-10 years increased by about 56% and 69% respectively. The answer might lie in the reforms made by the Victorian government in 2002.

67. In Victoria, the first Aboriginal Justice Agreement was signed in 2000 ('AJA Phase 1').[49] In 2006, Phase 2 of the Agreement was signed ('AJA Phase 2').[50] AJA Phase 1 was signed following the Royal Commission into Aboriginal Deaths in Custody; its stated purpose was 'to reduce the high level of disadvantage and inequity suffered by Aboriginal people'. The Attorney-General made prefatory observations to AJA Phase 1 as to the rates of overrepresentation of Indigenous offenders in the custody of police, prisons and juvenile detention centres: in this respect, the Attorney-General said the AJA was to provide a framework for 'justice agencies and the Aboriginal community to work together to address the complex issues that underpin overrepresentation'. The signatories to the AJA were the Attorney-General, government Ministers (Police and Emergency Services, Corrections, Aboriginal Affairs and Community Services), ATSIC, the Victorian Aboriginal Justice Advisory Committee and two Indigenous Regional Councils.

68. As part of the AJA Phase 1 initiative, so-called 'Koori Courts' were set up in Victoria in June 2002: *Magistrates' Court (Koori Court) Act 2002* (Vic). *Magistrates' Court Act 1989* (Vic) s 4D provides:

> Establishment of Koori Court Division

49. Victorian Department of Justice, *Victorian Aboriginal Justice Agreement 2000: Phase 1* (2004) available at: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb0d4b0ad85e729/Vic_Aboriginal_Justice_Agreement_2004.pdf.

50. Victorian Department of Justice, *Victorian Aboriginal Justice Agreement: Phase 2* (2006) available at: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebd27a0309d4a1b/Aboriginal%20Justice%20Agreement%20(Phase%202).pdf.

4D. Establishment of Koori Court Division

(1) The Court has a Koori Court Division.

(2) The Koori Court Division has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(3) Despite anything to the contrary in this Act, the Koori Court Division may only sit and act at a venue of the Court specified by the Chief Magistrate by notice published in the Government Gazette.

(4) The Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the Sentencing Act 1991 and the proper consideration of the matters before the Court permit.

(5) The Koori Court Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to-

(a) the defendant; and

(b) a family member of the defendant; and

(c) any member of the Aboriginal community who is present in court .

(6) Subject to this Act, the regulations and the rules, the Koori Court Division may regulate its own procedure.

69. The Magistrates' Koori Court program has expanded since 2002 to include Shepparton, Broadmeadows, Warrnambool, Mildura, Latrobe Valley and Bairnsdale (which are all country courts except Broadmeadows), as well as Children's Koori Courts in Melbourne and Mildura.

70. In a 2-year evaluation of the Magistrates' Koori Courts at Shepparton and Broadmeadows by Dr Mark Harris, the rate of participants' re-offending was noted to have decreased from about 30% in both courts to 12.5% (Shepparton) and 15.5% (Broadmeadows).[51]

71. Since the Magistrates' Koori Court exercises summary jurisdiction over Indigenous offenders, it seems likely that it is the operation of the program that has resulted in the (marginal but against trend) decrease of sentences of less than 1 year being imposed on Indigenous offenders.

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51. Victorian Department of Justice, 'Joint push to help Koories have their say', *Koori Justice* (August 2007) 5. Report by Harris, Dr M., *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002 - October 2004*, (2006) 8. The report can be found at: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebb369085925f87/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf.

72. In November 2008 the *County Court Act 1959* (Vic) was amended to establish a Koori Court division, known as the County Koori Court. In his Second Reading Speech, the Victorian Attorney-General said that the establishment of the County Koori Court followed on from the success of the Magistrates' Koori Courts. The Attorney-General set out the proposed model as follows:

> The key emphasis is on creating an informal and accessible atmosphere. The model allows greater participation in the court and sentencing process by the Indigenous community through the Aboriginal elder or respected person, Koori court officer, Indigenous defendant and their extended families or connected kin and if desired, victims. Additionally a corrections officer or juvenile justice officer, the defendant's legal representative and prosecutor will be involved in the plea discussion to explore the offenders' sentencing needs. The model is designed to break down the disengagement that many Indigenous people have experienced with the criminal justice system.
>
> …
>
> The Aboriginal elder or respected person will assist the court by providing information on the background of the defendant and possible reasons for the offending behaviour. They may also explain relevant kinship connection, how a particular crime has affected the Indigenous community as well as advice on cultural practices, protocols and perspectives relevant to sentencing. The judge may confer with the Aboriginal elder or respected person and discuss the most appropriate sentence including the conditions placed on a sentence.
>
> …
>
> Following the conclusion of the plea discussion, the judge may ask the [County] Koori Court officer about the availability of appropriate local services and programs. This is consistent with the case management approach which will be adopted by the division to address the individual sentencing needs of the Indigenous offender. … This partnership approach aims to maximise the rehabilitation prospects of the defendant and incorporate locally based support services to meet the needs of an individual defendant. The sentencing stage in the [County] Koori Court division will follow the same procedure as the general County Court. The court has the same sentencing dispositions available to it and the judge will sit alone at the bench to deliver the sentencing order. This reinforces to observers that the judge is the ultimate decision maker.
>
> The County Court criminal division hears more serious criminal offences than those heard in the Magistrates' Court, with a greater likelihood of a custodial sentence being imposed. Aboriginal elders or respected persons will therefore be trained accordingly to address the needs of higher criminal jurisdiction.
>
> …

> The [County] Koori Court division will be supported by a range of significant local support services which will complement sentencing orders. These include a Koori drug and alcohol worker based in the Latrobe Valley Magistrates Court, a mentoring program and a learning place, located in nearby Yarram, which is a culturally appropriate residential learning place for up to 20 men undertaking community-based orders.[52]

73. The County Koori Court model is almost identical to the Magistrates' Koori Court model: *County Court Act 1959* (Vic) s 4A. The County Koori Court has the same sentencing jurisdiction as the Victorian County Court, except in respect of certain sexual offences and contraventions of family violence intervention orders or family violence safety notices: s 4E. It also has jurisdiction to determine sentence (but not conviction) appeals from the Magistrates', Children's, and Magistrates' and Children's Koori Courts.[53]

74. The first County Koori Court was established in Morwell, in the Latrobe Valley, on 19 November 2008. Clearly it is too early yet to determine its efficacy. However, in a press release issued by the Victorian Attorney-General on the opening of the County Koori Court, it was stated that, 'offenders who face their Elders in the Koori (Magistrates' or Children's) Court are 50 per cent less likely to re-offend than those who have gone through the mainstream court system'.[54] The expectation of the Victorian government appears to be that the recidivism and imprisonment rates of Indigenous offenders will fall in the County Koori Court in the same manner as they have done in Magistrates' and Children's Koori Courts.

Canada

75. The adult Indigenous population of Canada was 3.1% in 2001. Indigenous prisoners currently overrepresent non-Indigenous prisoners in Canada by a factor of about 6.[55]

76. In a paper recently published in Statistics Canada's journal *Juristat*[56], Perreault identifies the areas of disadvantage which are predictors of Indigenous incarceration in Canada: age, low educational levels, unemployment and greater rehabilitation needs[57].

77. Revised sentencing provisions came into effect in Canada on 3 September 1996: Part XXIII of the Canadian *Criminal Code*. Enactment of the new provisions was:

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52. *County Court Amendment (Koori Court) Bill:* Victoria, *Parliamentary Debates,* Legislative Assembly, 31 July 2008, 2883-6 (Rob Hulls, Attorney General). A copy can be found at: http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Jul-Dec%202008/Assembly%20Extract%2031%20July%202008%20from%20Book%2010.pdf.

53. That is, appeals to the County Koori Court are not restricted to first instance decisions from the Magistrates' and Children's Koori courts.

54. The Hon. R. Hulls, 'Australia's First County Koori Court Opened in Morwell' (Press Release, 19 November 2008): http://www.premier.vic.gov.au/attorney-general/australias-first-county-koori-court-opened-in-morwell.html.

55. Perreault, S., 'The Incarceration of Aboriginal people in adult correctional services', (2009) 29(3) *Juristat*.
This paper can be found at: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.htm#a5.

56. Ibid.

57. The term 'greater rehabilitation needs' covers prisoners' needs for housing and employment assistance, relationships counselling, and drug and alcohol counselling.

> … in large part a response to the problem of overincarceration in Canada. … Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies.[58]

78. Part XXIII of the *Criminal Code* included the new s 718.2, a provision which echoes *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23A.

79. Unlike *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23A, the Canadian *Criminal Code* gives statutory recognition to Indigenous offenders. Specifically, s 718.2(e) of the Code provides:

> A court that imposes a sentence shall also take into account the following principles:
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. [emphasis added]

80. The Canadian Supreme Court considered the operation of s 718.2(e) as it applied to the sentencing of Indigenous offenders in *R v Gladue* [1999] 1 S.C.R. 688.[59] Essentially, the common law principles and social issues considered by the Court in *Gladue* were the same as those considered by Wood J in *Fernando*, in the additional context of the 'affirmative action' statutory framework provided by s 718.2(e).[60]

81. In their judgment, Cory and Iacobucci JJ (with the agreement of the Court) said (at [93]):

> Let us see if a general summary can be made of what has been discussed in these reasons.
>
> 1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.
>
> 2. Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.
>
> 3. Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.
>
> 4. Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All

58. *R v Proulx* [2000] 1. S.C.R. 61 per Lamer CJ at [16].
59. The judgment in *R v Gladue* [1999] 1 S.C.R. 688 can found at: http://www.canlii.org/en/ca/scc/doc/1999/1999canlii679/1999canlii679.html.
60. The constitutional validity of *Criminal Code* s 718.2(e) was not in argument.

principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6. Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

82. Canadian Indigenous imprisonment rates following the introduction of *Criminal Code* s 718.2(e), and before and after the decision in *Gladue* are:[61]

61. These statistics are taken from Statistics Canada's website at: http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903/tbl/t3-eng.htm. It is noted that statistics were not available in relation to Indigenous imprisonment rates in some of the Canadian provinces.

Year	Federal Indigenous prisoners (as a percentage of total Federal prisoners)	Provincial Indigenous prisoners (as a percentage of total provincial prisoners)	Provincial male Indigenous prisoners (as a percentage of total male provincial prisoners)	Provincial female Indigenous prisoners (as a percentage of total female provincial prisoners)
1998-1999	18	13	13	17
1999-2000	17	14	14	18
2000-2001	18	15	15	18
2001-2002	18	15	15	20
2002-2003	18	16	16	21
2003-2004	18	17	17	21
2004-2005	18	17	17	21
2005-2006	19	18	18	22
2006-2007	19	18	18	23
2007-2008	18	18	17	24

83. It is apparent from these statistics that the proportional rates of Indigenous imprisonment have not decreased in Canada since the enactment of *Criminal Code* s 718.2(e) and the judgment in *Gladue*. Notably however, although the Federal rates of Indigenous imprisonment remained stable between 1998 and 2008, the provincial rates of imprisonment increased significantly for both Indigenous males and females (increases of 30.77% and 41.18% respectively).

The Canadian government's response to Gladue

84. In response to the *Gladue* judgment, a system of community-based justice programs, known as the Aboriginal Justice Strategy ('AJS'), has been established in every Canadian state and province. Perhaps the best known of these programs is the Toronto Aboriginal (*Gladue*) Court. This Court operates in a very similar manner to the model outlined by the Victorian Attorney-General in his Second Reading Speech on the introduction of the *County Court Amendment (Koori Court) Bill*, with the significant exception that it does not accept any violent offenders into its programs.[62] Given that Fitzgerald (BOCSAR) found that about half of the participants in the NSW Circle Sentencing program had pleaded guilty to assault, and given the disproportionate rates of Indigenous victims of domestic violence identified in the OID Report, the Canadian prohibition on such offenders in AJS programs must necessarily considerably reduce the number of otherwise eligible Indigenous participants.

85. The success of the AJS programs has been reviewed by the Canadian Department of Justice in a series of 'Summative Evaluations'.[63] The Department recently compared recidivism rates between AJS participants and non-participants, with the results as follows:[64]

Percentage who re-offended after…	**AJS participants**	**Non-participants**
6 months	6%	13%
4 years	27%	49%
8 years	32%	59%

86. Significantly, these comparative recidivism rates are very similar to those found by Harris in his evaluation of the Magistrates' Koori Courts in Victoria.

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62. For further reading, there is a considerable amount of material about the Toronto Aboriginal (*Gladue*) Court available on the internet, including a report entitled, *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Oct 2005-Sept 2006* (2006) (prepared by Campbell Research Associates) at: http://aboriginallegal.ca/docs/Year_2.pdf.

63. http://www.justice.gc.ca/eng/sch-rch/sch-rch.asp?SearchIn=general&SearchTerms=evaluation+aboriginal+justice+strategy+&search=Search.

64. Department of Justice (Canada), *Aboriginal Justice Strategy, Summative Evaluation* (last updated 31 July 2009): http://www.justice.gc.ca/eng/pi/eval/rep-rap/07/ajs-sja/p4.html.

87. Despite the use of the AJS model in Canada, the rates of overrepresentation of provincial Indigenous prisoners have increased. One of the reasons given by the Department of Justice for this is that the program is limited in its reach: only about 21% of Indigenous offenders are placed on an AJS program.[65]

88. It has been argued by Canadian commentators that the sentencing reforms as they relate to Indigenous offenders are not succeeding in reducing the overrepresentation of Indigenous prisoners because of an increased number of remand prisoners[66] and because of the differential focus in *Gladue* on violent and non-violent offences (with the consequent non-availability of AJS programs to violent offenders). It is also argued that a systemic human rights approach is needed to facilitate further reform.[67]

Comparisons between the NSW, Victorian and Canadian models of sentencing reform

89. By comparison with the Victorian and Canadian models, it is clear from Fitzgerald's BOCSAR research that the current NSW model of Circle Sentencing is an inadequate mechanism to reduce Indigenous recidivism rates. Unlike the Victorian and Canadian models of reform, the rate of Indigenous recidivism remained unchanged after two years of Circle Sentencing in NSW. It is unclear why Circle Sentencing has not worked to decrease recidivism rates while the Victorian and Canadian models have; in addition to the possible reasons outlined by Fitzgerald, it may also be that the process of 'shaming' Indigenous offenders in Circle Sentencing is counter-productive.

90. Unlike the NSW and Victorian models, Canada legislated to introduce an amendment to its sentencing laws so that 'particular attention to the circumstances of aboriginal offenders' could be paid. This, of itself, does not appear to have had any impact. Despite all Canadian courts (and not just the Indigenous courts and programs) being required to apply *Criminal Code* s 718.2(e) to the sentencing of Indigenous offenders and also being bound by the common law authority of *Gladue*, it is only those participants in the AJS programs whose rates of recidivism have been reduced. It seems that the legislative amendments and the application of the *Gladue* principles only have a remedial effect on the overrepresentation of Indigenous offenders if they are applied in the context of a specialist sentencing court program.

91. The decreases in the rates of Indigenous offenders' recidivism rates following participation in either the Magistrates' Koori Court or an AJS program are consistently around 50%. In light of the OID Report's finding that, 'A greater proportion of Indigenous prisoners (73.0%) than non-Indigenous prisoners (49.6%) had prior adult imprisonment in 2008', any reduction in Indigenous recidivism rates would be expected to assist in reducing the overrepresentation of Indigenous offenders in custody.

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65. ibid, at 4.1.5.
66. Although the percentage of Canadian male Indigenous prisoners who were on remand between 1998 and 2008 remained stable at 16%, the percentage of female Indigenous prisoners on remand in that same period increased steadily from 17% to 22%.
67. See for instance: Hughes, J., 'Sentencing Reform in Canada: The Impact on Aboriginal Prisoners', (Paper presented at the annual meeting of The Law and Society Association, Berlin, Germany, 25 July 2007); Gandhi, U., 'Aboriginal People Overrepresented in Saskatchewan Jails', *Globe and Mail* (online) 3 June 2005 (at http://www.prisonjustice.ca/starkravenarticles/overrep_sask_0605.html).

92. Between 2002 and 2008, the decreased number of sentences of less than 1 year that were imposed on Indigenous offenders in Victoria is significantly against the trend of sentences imposed on Indigenous offenders for periods of more than 1 year. Probably the most likely explanation for this is that many Indigenous offenders who would otherwise have received a sentence of less than 1 year imprisonment were diverted from gaol by the operation of the Magistrates' Koori Court.[68]

93. An overview of the statistics and evaluative studies from NSW, Victoria and Canada indicates that the most effective means of reducing Indigenous offenders' recidivism rates is the establishment of an Indigenous court program, staffed by judges, prosecutors, defence counsel and Indigenous case workers who have been specially trained in the multiple areas of disadvantage suffered by Indigenous offenders, and complemented by a wide range of non-custodial sentencing options tailored specifically for Indigenous offenders.

Conclusion

94. Overall, the rate of Indigenous overrepresentation in prisons and detention centres is increasing throughout Australia. Despite the formulation of the *Fernando* principles in 1992, the proportion of Indigenous prisoners and detainees in NSW has increased from 8.7% to 22.2% in the 17 years from 1992 to 2009, an overrepresentation of Indigenous to non-Indigenous offenders by a factor of nearly 10.

95. It seems that the formulation of common law principles alone is an inadequate tool to reduce the rate of Indigenous overrepresentation in prisons. Similarly to the NSW experience, the formulation of the *Gladue* principles has not, of itself, reduced the rate of Indigenous overrepresentation in prisons in Canada.

96. It also seems, from the Canadian experience, that an amendment to the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23A(3) along the lines of *Criminal Code* (Canada) s 718.2(e) is unlikely, of itself or in combination with the existing (or modified) common law principles of *Fernando*, to result in any reduction in the overrepresentation rates.

97. BOCSAR's research shows that the NSW initiative of Circle Sentencing has not achieved any demonstrable reduction in Indigenous recidivism rates.

98. It is only in those jurisdictions where a specialist court (or a specialist program within a court) operates that any decreases in the rates of Indigenous imprisonment overrepresentation are evident. Although these decreases appear modest in real terms, when the decreases are compared with the rates of increased imprisonment overrepresentation in other parts of the same jurisdictions, the striking success of the specialist court or program model can be seen.

99. By recently legislating for the extension of the Koori Court model to the County Court jurisdiction and by providing funding for a pilot County Koori Court in the

68. It is possible that at least some of the Indigenous offenders who would otherwise have received a sentence of less than 1 year imprisonment entered the Magistrates' or Children's Koori Court program and failed to avail themselves of the programs offered, and that the Magistrate then took a more negative view of the offender's rehabilitation prospects and imposed a sentence of greater than 1 year imprisonment.

Latrobe Valley, it seems the Victorian government is confident that this model is achieving its goal of reducing Indigenous overrepresentation in prisons.

100. With the equivocal impact of the Sentencing Circle model, and the increasingly disproportionate rates of imprisonment and detention of Indigenous offenders in NSW, it is recommended that consideration be given to the adoption of the Victorian Koori Court model in NSW, in the Children's, Local and District Courts. The establishment of Indigenous sentencing courts in NSW would be permissible under current NSW anti-discrimination laws: *Anti-Discrimination Act 1977* (NSW) ss 21 and 54.

101. The success of such a model in NSW would be dependent upon the co-operation of the interdepartmental agencies of the Departments of Corrective Services, Juvenile Justice, Health, Education, Employment and Community Services. Given the interplay of the various areas of social disadvantage suffered by NSW's Indigenous population identified in the OID Report, if recidivism rates amongst Indigenous offenders in NSW can be reduced in a sustained manner over a number of years then it is likely that there would be a correlating reduction in other areas of Indigenous disadvantage.

102. Given the multiplicity and depth of the social and other disadvantages experienced by Indigenous communities in Australia, as identified in the OID Report, and given the high overrepresentation of Indigenous offenders in NSW, the rates of Indigenous imprisonment overrepresentation in NSW may be slow to decrease. However, if the positive outcomes obtained from the Victorian Koori Court model can be successfully replicated in NSW, there is some cause for some optimism.

APPENDIX 1

1	Andrews v R [2007] NSWCCA 68	Considered
	Appeal against sentence for malicious wounding	
	Affected by alcohol and drugs at the time of offence - special circumstances.	
2	DPP v Taylor [2005] VSCA 222	Cited
	Intentionally causing serious injury	
	Aboriginality a mitigating factor? Sentence inadequate - Appeal dismissed.	
3	DPP v Wilson [2002] VSC 299	Applied
	Manslaughter	
	Mitigating factors - more lenient sentence - alcohol abuse.	
4	Holton v R [2005] NSWCCA 408	Cited
	Appeal against sentence for armed robbery - aggravated kidnapping	
	Cited Fernando in considering whether sentence was excessive.	
5	Ingamar v Police (1998) 72 SASR 232	Considered
	Offences against peace and public order - assault police - resist arrest	
	Disadvantaged circumstances of tribal Aboriginal offender considered.	
6	Munro v R [2006] NSWCCA 350	Cited
	Appeal due to incompetent counsel - infliction of grievous bodily harm	
	Subjective circumstances of offender -significantly disadvantaged background - alcohol problems - Appeal whether miscarriage of justice.	
7	Newcombe v Police (2004) 144 A Crim R 328; [2004] SASC 26	Considered
	Appeal against sentence for property damage	
	Magistrate failed to have sufficient regard to the appellant's personal circumstances - magistrate erred in imposing a conviction - appeal allowed.	
8	Police (SA) v Abdulla (1999) 74 SASR 337	Considered
	Property offences - break and enter	
	General sentence considerations for Aboriginal offenders.	
9	R v Ah-See [2004] NSWCCA 202	Applied
	Break and enter - larceny - aggravated circumstances	
	Fernando principles taken into account, custodial sentence not manifestly excessive.	
10	R v Alh [1995] NSWSC No 70106/94 (unreported)	Applied
11	R v Aslett [2004] NSWSC 868	Distinguished
	Murder - aggravated sexual assault in company - multiple counts of armed robbery - aggravated car jacking - attempting to obtain money by deception - larceny	
	Extensive criminal history - Indigenous Australian in almost continuous custody - no signs of psychiatric illness - substance abuse - limited remorse. Fernando principles do not affect sentence due to extreme nature of crimes.	
12	R v Barker; R v Gibson [2006] NSWCCA 20	Considered
	Crown Appeal against concurrent sentence for unrelated offences- car jacking and previous sentence	
	Respondents re-sentenced - trial Judge recognised Fernando Principles but concluded that they "lose much of their force when the offender has committed serious offences in the past". Nature of offences permits no reduction in sentence.	
13	R v Bell [1999] NSWCCA 423	Applied
	Appeal - property offences	
	Subjective factors taken into account on appeal - reduction in new sentence.	
14	R v Boyd [2004] NSWSC 263	Considered
	Manslaughter - excessive self defence	
	Subjective factors taken into account when sentencing - disadvantaged background.	

15	R v Bugmy [2004] NSWCCA 258	Cited
	Appeal against validity of sentence - assault occasioning actual bodily harm - affray	
	Acknowledged that appropriate for Fernando principles to be taken into account. Reduced sentence on appeal.	
16	R v Burke [2000] NSWSC 356	Considered
	Murder	
	Acknowledged Fernando and applied principles in sentencing.	
17	R v Burns (2003) 137 A Crim R 557; [2003] NSWCCA 30	Cited
	Armed robbery with offensive weapon	
	Fernando principles did not apply to offender, however Court intervened and suggested that they apply to co-offender who may benefit from principles.	
18	R v Ceissman (2001) 119 A Crim R 535	Distinguished
	Crown appeal against manifestly inadequate sentence - drug trafficking	
	Sentencing Judge misapplied Fernando principles. D's grandfather part Aboriginal - not sufficient to attract special consideration.	
19	R v Churchill (2000) WASCA 230 (unreported)	Applied
	Amendment of charge of murder to manslaughter	
	Crown appeal against lenient sentence dismissed - Judge able to observe offender and take subjective factors into account.	
20	R v Clarke (2004) 89 SASR 13; [2004] SASC 181	Cited
	Appeal against sentence for criminal trespass - larceny	
	Aboriginality is relevant in sentencing process. Cites Fernando without expanding.	
21	R v Carr [1999] NSWCCA 200	Applied
22	R v Cohen [2002] NSWCCA 339	Cited
	Appeal against sentence for break and enter	
	Trial Judge made no consideration. Appeal - difficult to see how special circumstances that justified a departure from the statutory calculus were present.	
23	R v Cook [1999] NSWCCA 234	Considered
	Appeal against sentence for robbery and related offences	
	Trial judge did not allow for special circumstances.	
24	R v Croaker [2004] NSWCCA 470	Cited
	Maliciously inflict grievous bodily harm - malicious damage to property	
	Crown appeal against lenient sentence dismissed - Judge able to observe offender and take subjective factors into account.	
25	R v Cutmore [1999] NSWCCA No 60672/98, (unreported)	Applied
26	R v Dalton [2005] NSWCCA 470	Cited
	Crown Appeal - Manslaughter by an unlawful and dangerous act	
	Sentence manifestly inadequate even allowing for subjective circumstances from Fernando.	
27	R v Daniel [1998] 94 A Crim R 46	Considered
	Three counts of aggravated sexual assault	
	Considered Fernando, but stated that it would not necessarily lead to reduced sentence.	
28	R v Dargin [2000] NSWSC 710	Cited
	Murder - intent to cause grievous bodily harm - sexual assault	
	Cited in reference to sentencing offenders while intoxicated - no impact on overall sentence.	
29	R v Dennis [2003] NSWCCA 137	Distinguished
	Appeal against sentence for aggravated sexual assault.	

	Sentencing Judge made no mention of Fernando. Appeal dismissed. Principles do not apply. Offender Aboriginal but not from disadvantaged background.	
30	R v Dixon [1994] NSWSC No 70033/95 (unreported)	Applied
31	R v Donovan [2003] NSWCCA 324	Cited
	Escape - aggravated robbery - larceny motor vehicle - Crown appeal for inadequate sentence for robbery offences	
	Subjective factors taken into account in escape and motor vehicle charges - consistent with a "troubled background of deprivation".	
32	R v Drew [2000] NSWCCA 384	Applied
	Appeal - maliciously wounding with intent to do grievous bodily harm	
	Principles applied, but due to severity of crime and D's criminal record - no reduction in sentence.	
33	R v Duncombe [2001] NSWCCA 483	Considered
	Crown appeal for inadequate sentence for assaulting police - break, enter and steal	
	Appeal allowed – re-sentenced more harshly.	
34	R v Elemes [2000] NSWCCA 235	Distinguished
	Appeal against sentence - property offences - break and enter - larceny	
	Appeal dismissed - Aboriginality not relevant to facts of the crime.	
35	R v Fernando [2002] NSWCCA 28	Considered
	Crown appeal against sentence - multiple accounts of armed robbery - aggravating factors - committed whilst on parole	
	Sentence manifestly inadequate - appeal allowed. Re-sentenced more harshly.	
36	R v Fernando [2004] NSWCCA 147	Considered
	Break and enter - act of indecency	
	No justification for special circumstances.	
37	R v Fuller-Cust [2002] VSCA 168	Applied
	Rape (5 counts) - indecent assault (2 counts) - false imprisonment - causing injury recklessly	
	Subjective factors taken into consideration - reduced sentence on appeal.	
38	R v Grant [2001] NSWSC 552	Not Followed
	Murder - shoot with intent to murder	
	"Although the prisoner is an Aboriginal, his history does not call for the sort of considerations adverted to in Fernando".	
39	R v Hickey [1994] NSWCCA (unreported)	Applied
40	R v Hickling; R v Avery [2004] NSWCCA 168	Applied
	Crown appeal against sentence for attacking police with an offensive weapon	
	Fernando applied in original sentence. Light sentence overturned on appeal.	
41	R v Jancek [1999] NSWSC No 70015/98 (unreported)	Applied
42	R v Johnson [2005] NSWCCA 186	Cited
	Aggravated break and enter - sexual assault	
	Judge said that the present case was not one in which the applicant deserved too much sympathy for subjective factors.	
43	R v Jukes [2006] NSWSC 1065	Cited
	Manslaughter	
	Subjective factors taken into account - suspended entire prison sentence.	
44	R v Kelly [2000] NSWSC 701	Cited
	Manslaughter	
	Mentioned Aboriginality and problems with alcohol abuse in Aboriginal community with reference to Fernando principles.	
45	R v Kelly (2005) 155 A Crim R 499; [2005] NSWCCA 280	Considered

	Appeal against sentence for aggravated robbery	
	Considered, but stated that Aboriginality is not of itself a mitigating factor and doesn't necessarily mean principles should be applied.	

46	R v Kennedy [2000] NSWSC 109	Not Mentioned
	Manslaughter	
	Both V and D Aboriginal. Fernando principles not mentioned despite taking other subjective factors into account.	
47	R v Kerr [2003] NSWCCA 234	Applied
	Appeal - robbery/aggravating circumstances/corporal violence/maliciously inflicting actual bodily harm	
	Trial judge did not take subjective factors unto account. Appeal applied Fernando principles.	
48	R v King; R v Bugmy; R v CJ [2006] NSWSC 161	Applied
	Manslaughter - joint criminal enterprise involving an unlawful and dangerous act	
	Each offender entitled to consideration of Fernando principles - Slightly reduced sentence.	
49	R v Kirkwood [2000] NSWSC 184	Not Followed
	Manslaughter	
	Judge said that principles had no application in circumstances of this case.	
50	R v Knight [2004] NSWSC 498	Distinguished
	Murder	
	Fernando principles do not apply because offender is not from disadvantaged background - murdered fellow inmate in prison > Disadvantage??	
51	R v Lamb [1997] Court of Criminal Appeal (unreported)	Cited
52	R v Lawrence [2005] NSWCCA 91	Cited
	Appeal against sentence for manslaughter	
	Cited in reference to "almost the typical background" that the Courts have frequently encountered with Aboriginal offenders.	
53	R v Alan Leonard [1996] NSWCCA (unreported)	Not Mentioned
54	R v Cynthia Leonard [1996] NSWCCA (unreported)	Not Mentioned
55	R v Little [1996] NSWSC No 70030/96 (unreported)	Applied
56	R v Lucas [2005] NSWCCA 194	Cited
	Appeal against sentence for attempting to drive vehicle without consent of owner - larceny	
	Cited in reference to subjective factors.	
57	R v Maher [2004] NSWCCA 177	Considered
	Appeal against sentence for break, enter and steal	
	Subjective factors taken into consideration - reduced sentence on appeal.	
58	R v Mason [2005] NSWCCA 403	Applied
	Robbery with offensive weapon and wounding	
	Principles allow for mitigation but with no great emphasis put on them.	
59	R v Melrose [2001] NSWSC 847	Cited
	Manslaughter	
	Cited in reference to difficulties of sentencing Aboriginal offenders.	
60	R v MJM [2004] NSWCCA 194	Considered
	Appeal against sentence for break enter and steal (9), entering land with intent to steal, using a weapon to resist arrest	
	Considered Fernando when allowing appeal against sentence.	
61	R v MLW [2001] NSWCCA 133	Not Followed

	Appeal against sentence for sexual intercourse without consent.	
	Considered, but applicant's Aboriginality provided minimal mitigation.	
62	R v Morgan (2003) 57 NSWLR 533;[2003] NSWCCA 230	Applied
	Robbery in company - break and enter with intent - assault occasioning actual bodily harm	
	Principles could be taken into account but Judge said that they would do nothing to affect the outcome of the sentence.	
63	R v MS [2004] NSWSC 730	Cited
	Murder	
	Young offender, murdered girlfriend - subjective factors taken into account.	
64	R v Newman & Simpson (2004) 145 A Crim R 361	Considered
	Appeal against sentence - aggravated entry of dwelling with intent to commit serious indictable offence	
	Took subjective factors into consideration and readjusted sentences to be slightly more lenient.	
65	R v O'Heir [2003] NSWCCA 126	Distinguished
	Appeal against sentence for ten counts of break, enter and steal	
	Appeal for sentence to take into account the disadvantaged background - distinguished on ground that offender NOT Aboriginal.	
66	R v Peckham [2003] NSWCCA 293	Considered
	Appeal against sentence for robbery whilst being armed with a dangerous weapon.	
	Fernando principles acknowledged and taken into account.	
67	R v Peterson [2000] NSWCCA 47	Considered
	Appeal against sentence for sexual offences.	
	Sentencing Judge wrongly rejected Fernando principles, but when considering sentence on appeal, Judge made no changes.	
68	R v Pheeney [1998] Court of Criminal Appeal (unreported)	Not Mentioned
69	R v Pitt [2001] NSWCCA 156	Not Followed
	Appeal against sentence for malicious damage by fire.	
	Judge stated that it is a mistake to rely on Fernando as authority for the proposition that Aboriginal heritage of itself is a mitigating circumstance.	
70	R v Powell [2000] NSWCCA 108	Considered
	Appeal against sentence for malicious wounding.	
	No reference to Fernando. Took factors into account without explicitly stating the principles.	
71	R v Price [2004] NSWSC 868	Not Followed
	Manslaughter	
	Principles do not apply in this case.	
72	R v Reid [2001] NSWSC 1084	Applied
	Maliciously inflict grievous bodily harm	
	Taken into account - entitled to measure of mitigation in sentence.	
73	R v Ridgeway [1998] Court of Criminal Appeal (unreported)	Applied
74	R v RLS [2000] NSWCCA 175	Not Followed
	Appeal against sentence for robbery whilst armed with an offensive weapon	
	Required attributes of Aboriginal in Fernando principles are absent from this case.	
75	R v Russell (1995) 84 A Crim R 386	Considered
	Appeal against sentence for sexual assault and resist arrest with weapon	
	Aboriginality no direct mitigating effect on sentence.	
76	R v Ryan [2002] NSWCCA 171	Applied
	Appeal against sentence for robbery with an offensive weapon.	
	Appeal allowed - sentencing Judge did not give enough weight to offender's Aboriginality.	

77	R v S [2000] NSWCCA 175	Not Followed
	Armed robbery, larceny from motor vehicle, assault occasioning bodily harm, maliciously inflicting grievous bodily harm and escape lawful custody	
	Not from disadvantaged background. Does not warrant special treatment.	
78	R v Scobie (2003) 85 SASR 77; [2003] SASC 85	Cited
	Sexual offences	
	Fernando cited when considering subjective factors.	
79	R v Shepherd [2003] NSWCCA 9	Considered
	Crown appeal against sentence - sexual assault	
	After considering subjective factors Judge found special circumstances to apply.	
80	R v Shillingsworth [2003] NSWCCA 272	Cited
	Appeal against sentence for break and enter - sexual assault	
	Trial Judge made no reference to Fernando. Appeal against sentence allowed.	
81	R v Simon [2005] NSWCCA 123	Applied
	Attempted murder	
	Subjective factors taken into account - 20% discount in sentence.	
82	R v Simpson (2001) 53 NSWLR 704	Not Followed
	Obtaining money by making false statements (7 counts)	
	Found no reason to find special circumstances in this case.	
83	R v Smith [2000] NSWCCA 148	Cited
	Appeal against sentence for sexual offences.	
	Considered in reference to alcohol abuse of offender. Taken into account in sentencing.	
84	R v Smith [2003] SASC 263	Considered
	Appeal against sentence for grievous bodily harm (2) - illegal use of motor vehicle (2) - unlawfully being on premises	
	Urban Aboriginal - Judge said more important to consider other subjective factors.	
85	R v Stone (1995) 84 A Crim R 218	Applied
	Appeal against sentence for use of offensive weapon and other concurrent offences	
	Sentencing Judge erred in giving only limited effect to Fernando principles. Appeal applied principles and reduced sentence.	
86	R v Toomey [1998] Court of Criminal Appeal (unreported)	Applied
87	R v Trindall [2005] NSWCCA 446	Not followed
	Steal from the person - assault	
	Not followed - Aboriginality not relevant to crime. Offender does not meet all criteria in Principles.	
88	R v Vincent [2005] NSWCCA 135	Considered
	Crown appeal against inadequate sentence for armed robbery	
	Appeal allowed – re-sentenced more harshly. Overruled special circumstances applied in trial judgement.	
89	R v Walford [2001] NSWCCA 200	Not Mentioned
	Appeal against sentence for escape from lawful custody	
	Fernando principles not relevant.	
90	R v Walkington [2003] NSWCCA 285	Cited
	Crown appeal against sentence for manslaughter	
	Reference to Fernando in consideration of whether to allow the appeal.	
91	R v Walkington [2003] NSWSC 517	Not Followed
	Manslaughter	
	Trial Judge rejected Fernando - Does not fit in to category of disadvantage.	
92	R v Walter & Thompson [2004] NSWCCA 280	Considered

	Crown appeal against sentence for robbery in circumstances of aggravation	
	Appeal considered Fernando to have been overvalued by sentencing Judge.	
93	R v Weldon [2002] NSWCCA 308	Considered
	Appeal against sentence for robbery	
	Considered principles when sentencing.	
94	R v White [2005] NSWSC 667	Applied
	Murder	
	Taken into account in judgement but not relevant to sentence due to severity of crime.	
95	R v Williams [2005] NSWCCA 48	Applied
	Aggravated kidnapping - attempted murder by burning - malicious damage to property by fire with intent to endanger life	
	Taken into consideration when sentencing.	
96	R v Williams (2004) 148 A Crim R 325; [2004] NSWCCA 246	Applied
	Appeal against sentence for malicious wounding with intent	
	Appropriate to use Fernando principles when considering sentence.	
97	R v Wilson [2004] NSWCCA 94	Applied
	Appeal against sentence for stealing from the person	
	Accepted Fernando principles and referred to specific problems relating to D's background, but dismissed appeal to re-sentence.	
98	R v Wurramarra (1999) 105 A Crim R 512	Considered
	Unlawfully causing grievous bodily harm.	
	Aboriginal offenders not to be treated differently from other offenders in the wider community.	
99	R v Ponfield (1999) 48 NSWLR 327	Considered
	Property offences - break, enter and stealing	
	Taken into consideration when sentencing.	
100	Spencer v R [2005] NTCCA 3	Cited
	Manslaughter	
	Reference to Fernando as not being automatically applied due to Aboriginality, however, consideration of mitigating factors led to a reduction in sentence.	
101	R v Gladue (1999) 1 SCR 688 (Canada)	Similar
	Mentions subjective factors and outlines similar principles to those in Fernando.	
102	R v Francis (2007) NSSC 184 (Canada)	Applied
	Makes specific mention to application of Fernando principles in Australia.	

Considered	27
Cited	24
Applied	29
Distinguished	6
Not followed	10
Not mentioned	6