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Sentencing: taking Aboriginal customary law sanctions and community attitudes into account

a Northern Territory perspective

Presented by
Justice Kearney
at the "Sentencing" session of the
Fifth International Criminal Law Congress
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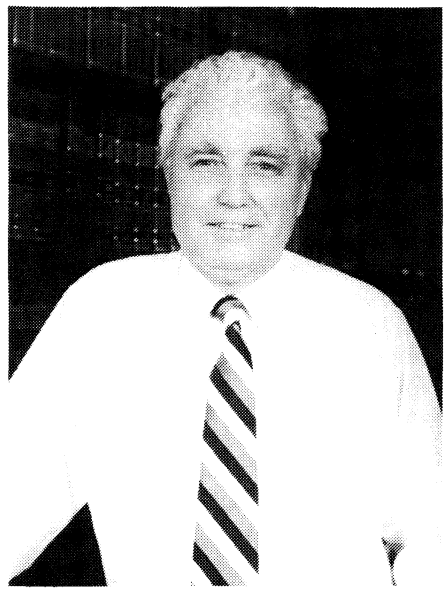

His Honour Justice Kearney

1. ***A proposal to codify sentencing law***

In March this year the Northern Territory Government introduced a package of legislation into the Legislative Assembly, designed in general to promote "truth in sentencing" and to improve the level of community protection by providing for greater consistency and certainty in sentencing and by implementing reforms in sentencing for sexual offences. The following is a "birds-eye" view of the package.

The central Bill was the Sentencing Bill, extending to some 62 pages and 124 clauses. It was to provide a "logical framework" for sentencing and would reform and consolidate the law on sentencing presently found in the Criminal Code, the parole of Prisoners Act, the Criminal Law (Conditional Release of Offenders) Act and elsewhere in the statute book. It sought to promote consistency in sentencing for similar offences, and to that end set out general sentencing principles. The package was seen as "an important part of the - - fight against crime", and as a central element in "the reform of the criminal justice system", by setting out sentencing options and procedures comprehensively. The central Bill was complemented by "tougher bail laws" and re-vamped for sex offences. As part of the "truth in sentencing" approach a separate Bill abolished the one-third "good conduct" remission of sentence presently routinely applied to prisoners sentenced to more than 28 days imprisonment; the result was said to be that "what [prisoners] get is what they will serve". The adverse effect of abolition of remission on prisoners serving less than 12 months imprisonment, who do not have a minimum non-parole period, was met by a provision that they would be automatically released on conditional liberty after serving 50% of their sentence; this was considered to be a "great deterrent to re-offending".

The Bill provided for the effect of crime on the victim to be taken into account when sentencing. The existing laws relating to home detention orders and community service orders were largely reproduced, although the existing provision whereby a person who had been fined could choose to "work it off" under a community service order was discontinued; this was expected to increase the revenue. The concept of suspended sentences was retained, but limited to 2 years. To ensure that serious sex offenders spent longer in prison, the non-parole period for certain such offences was fixed at 70% of the head sentence, unless "exceptional circumstances" were found.

There was provision for an "indefinite sentence" for serious violent offenders, as part of a "get tough" strategy for dealing with offenders who were a "serious danger" to the community. This would replace the existing provisions for habitual offenders" and sex offenders deemed incapable of controlling their sexual instincts.

Provision was made that a guilty plea as such would mitigate in sentencing, thus abolishing the rule in *R v Jabaltjari* (1989) 64 NTR 1 that the plea mitigated only where it expressed some step in contrition or remorse.

The existing sentencing limits of Courts of Summary Jurisdiction in dealing with such crimes as can be heard summarily - 2 years imprisonment, $5000 fine - were considered to be "artificial and unrealistic"; a "moderate increase" in these limits was made to 5 years imprisonment, $25,000 fine.

These are some of the major features of the legislative package. It can be seen that it follows the trend in recent years in Australia to codify the law on sentencing. The Sentencing bill followed fairly closely the general objectives and format of the Sentencing Act 1991 (Vic) and to some extent the Penalties and Sentences Act

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1992 (Q'land). Similar general objectives can be discerned in the Criminal law (Sentencing) Act 1988 (SA), and the Sentencing Act 1989 (NSW).

The Government had not sought public comment prior to introducing the Bills into the Legislative Assembly. They therefore attracted considerable public attention, comment and detailed examination. In the result, it is understood that redrafted legislation which takes into account some of the comments made, may be introduced in October 1994.

These "truth in sentencing" codes have been fairly exhaustively discussed in recent years in the literature. They are still in the course of being worked out in practice in the courts.

For the purposes of this paper the package's spotlight on all aspects of sentencing highlights the present lack of any legislated sentencing provision framed with the customary law of the Aboriginal members of the Territory community specifically in mind. This question had not escaped the attention of the Committee whose fundamental and path-breaking work led to the sentencing Act 1991 (Vic) on which the Bill is closely modelled. It had an "overwhelming response" from members of the Aboriginal community in Victoria that any such recognition of customary law would not be appropriate in that State, the fundamental reason being that Aboriginals in Victoria are not associated with tight-knit Aboriginal community groups "such as exist in Queensland and the Northern Territory and Western Australia in particular, where Aboriginal customary law is prominent." On this basis, the Committee considered that a Victorian Sentencing Act should not endorse "Aboriginal customary laws as part of the sentencing process in Victoria". As the committee rightly observed, the position is radically different in the Territory. I now indicate why.

2. ***The Aboriginal people of the Northern Territory; a thumbnail sketch***

Australian Bureau of Statistics estimates show that the resident population of the Territory increased from 154,421 persons in 1986 to 175,891 in 1991. In 1986 22% of the population (34,740 persons) were Aboriginal and Torres Strait Islanders; by 1991 the number had increased to 22.7% (39,910). This number

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39,910 represented 15% of the Aboriginal and Torres Strait Islanders in Australia (265,459), who in turn represented 1.6% of the total population of Australia. Of the 39,910 persons, 15.5% (6179) lived in Darwin; over 26% live in small and often remote communities.

Aboriginal people comprise the vast majority of persons at any given time serving sentences in Territory prisons, as the statistical data and graph at Appendix 1 indicate (on page 8). This shows prisoners sentenced between 1990 and 1993, the breakdowns showing sentence lengths from some 17 categories of offences. The figures in brackets show the Aboriginal component. Thus of the 516 persons sentenced to various terms for assault over that period, 461 were Aboriginals; the 516 represented 16.25% of all persons sentenced for all offences in that period (3174), and the 461 represented 14.25% of that number. And so on. It can be seen that of the 3174 persons sentenced over that period, 2544 (80.15%) were Aboriginals. The graph shows that over the 5 year period 1989-1993, the percentage of persons in custody who were Aboriginal was fairly steady, varying between 77.91% and 81.97%. It will be recalled that Aboriginals represented some 22% - 23% of the Territory population about this time. Their gross over-representation and numerical dominance in prison is obvious. This still obtains; a census of prisoners on the night of 30 June 1994 shows 72.8% were Aboriginals.

The question of taking customary law sanctions and Aboriginal community attitudes into account in sentencing is not new; I turn to the various enquiries where the relevant issues have been explored.

3. ***The Australian Law Reform Commission Investigation***

The Australian Law Reform Commission in its 1986 report examined whether Courts should be able to apply Aboriginal customary laws when sentencing Aboriginals. It considered that those laws could be applied in several ways: for example, in mitigation of sentence when the offence was constituted by an act which accorded with customary law, or when the offender was also subjected for what he had done to punishment under customary law.

The Commission examined in detail the practice of criminal courts in Australia in this regard. This revealed a number of common features, including the willingness of courts to take Aboriginal customary laws (including what are referred to as "traditional punishments") into account when sentencing. It noted that these "traditional punishments" could take a variety of forms depending on various factors. The Commission expressed the view that:-

"The more drastic forms of punishment or response are certainly illegal under the general law, even if the "victim" consents or accepts them (as is often the case) as part of a local process of dispute resolution.

Whether that view is correct in the Territory is open to doubt; see the discussion 'spearing in the thigh' by Mildren J in *R v Minor* (1991 - 1992) 79 NTR1 at 13-14.

The survey showed that the courts in Australia distinguished between taking Aboriginal laws into account in sentencing, and incorporating aspects of Aboriginal customary laws in sentencing orders. The Commission considered that this distinction was "fundamental". Amongst other matters, the courts treated Aboriginal customary laws as a relevant factor in mitigation both where the customary law processes had already occurred and where they were likely to occur in the future. Within limits, the views of the local Aboriginal community about the seriousness of the offence, and about the offender, were also treated as relevant. As noted above, the courts considered they could not incorporate in their sentencing orders customary law penalties or sanctions which were contrary to the general law; they could not require traditional punishment to be imposed as a condition of release or in mitigation of sentence. However, the fact that the courts might disapprove of some traditional punishments did not mean that they could not be taken into account.

The Commission concluded that the various principles which had been built up by the courts over the years should be enshrined in legislation to the extent that a sentence would be required to have regard, as far as relevant, to customary laws of the offender's (and victim's) Aboriginal communities. It also considered that the court practice of taking into account Aboriginal community attitudes to some degree in sentencing a member of the community was desirable, it made suggestions as to how proper information relating to those attitudes could be obtained. I turn very briefly to the other significant investigation, in recent times.

4. ***The Report of the Royal Commission into Aboriginal Deaths in Custody***

Recommendation 104 of the Report of 1991 states:-

"104. That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases."

I turn next to consider how the courts in the Northern Territory have taken community attitudes into account when sentencing.

5. ***Taking Community Attitudes into Account, in Sentencing***

The approach these days of the courts to this matter may be illustrated by two recent decisions. The first is a decision of the Court of Criminal Appeal (NT) in *Munungurr v The Queen* (unreported, 11 February 1994). The appellant had pleaded guilty to causing grievous harm, and other offences. He had received an effective head sentence of 4½ years imprisonment

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with a non-parole period of 12 months. He was traditional Aboriginal man from Yirrkala in eastern Arnhemland, who had an important role in traditional ceremonies and was of good character and well respected. In company with about 40 - 50 other Yolngu men and women he was at a meeting near the Gove Hotel the day following a killing nearby, to discuss the deceased's death. A drunken man came up and yelled abuse, insulting the clan. In the ensuing fracas the appellant lost his temper, armed with a machete, and inflicted grievous harm. He had an earlier conviction for grievous harm some 6 years before for which he had received a fully suspended 3 year sentence. A letter was tendered in evidence to the sentencing judge from a Community Association, asking that the appellant be returned to the community to be dealt with in a traditional manner. The judge invited submissions as to the weight to be given to the letter, but none were made. The Court of Criminal Appeal considered that the effect on the appellant's community if he were imprisoned had not been given any weight. Further, the expression of the community's wishes as to disposition should have been given considerable weight. It stressed that much more information should have been supplied to the sentencing judge, in a manner which ensured its reliability. It considered that his Honour should have reminded counsel that he needed to make submissions on the Association's letter. For this and other errors the court upheld the appeal and re-sentenced, after receiving further evidence which indicated that there would be a "sealing of the peace", with mutual obligations thereby arising between victim and appellant, although no actual punishment would be visited on the appellant. The Court imposed the same head sentence but released the appellant on a bond containing, inter alia, a condition that he attend a meeting to "seal the peace"; he had already served 3 months. The Court requested the Director of Correctional Services to report when he was satisfied the "sealing of the peace" meeting had been held, and as to its result; it reminded him that he could apply to vary the conditions of the bond at any time. This was a novel request, clearly made so that the Court could be kept better informed generally, in this area of sentencing. In the particular circumstances of the case, it may well have proved necessary to vary the conditions of the bond, to meet changed meeting arrangements.

Mununguri was a case where the community had sought leniency. It is not always so. *Joshua v Thomson* (unreported, 24 May 1994) was an appeal against sentences totalling 8 months imprisonment imposed by a Magistrate with great knowledge of the appellant's remote community of Numbulwar. One ground of appeal was that too much emphasis had been placed on apparent community attitudes in Numbulwar, without a proper evidential basis for those attitudes being laid. His worship believed that the community considered the appellant should be imprisoned, and gave paramount weight to that belief when sentencing. It was held that too much weight had been given to that factor and there had been a denial of justice in that he had not informed counsel of this appreciation of the community's views before relying on them as a major factor in sentencing. The Court referred to Recommendation 104 (p8) and commented on the issues to which it gave rise, as follows:-

"In general, it is fundamental that the Court should not pay any attention to public pressure when considering what sentence to impose. To do so is an abdication of the judicial function and gives rise to the possibility of injustice; the basis of sentencing should be the facts and circumstances of the offence and offender, as disclosed in Court. It is fundamental to sentencing that a prisoner be given a sentence appropriate to his offence, and no more; see *Veen v The Queen* (1979) 143 CLR 458. The Court must preserve its independence from public clamour on sentencing, not because of an insensitivity to public opinion but because of the possibility of injustice if it pays attention to anything other than the record of the particular case. The magistracy and judiciary are required to administer and apply the law "without fear or favour, affection or illwill" and without being influenced by public outcry. Further, it is a cornerstone of our system of administering criminal justice that all persons are equal before and under the law; it follows that they have the right to the equal protection and benefit of the law, irrespective of their race, religion, colour, status, or anything else. It is for the Court alone to evaluate the seriousness of the offence and whether imprisonment is required, and to do so on evidence relevant to the offence and the offender, and not by reference to the views of others.

At the same time, the traditional orientation of the lives of Aboriginal people living in remote settlements like Numbulwar is a background fact of fundamental importance. In those communities, the continued unity and coherence of the group of which the particular accused is a member is essential, and must be recognised in the administration of criminal justice by a process of sentencing which takes due account of it, and the impact of a member's criminal behaviour upon it. The difficulties for the sentence are manifest."

I now turn to the other aspect of this paper, the question of traditional sanctions.

6. ***Taking Aboriginal Customary Law Sanctions into Account; a New Departure in 1994?***

There is no statutory provision requiring courts in the Territory to take Aboriginal customary law into account, when appropriate, in sentencing. In *R v Minor* (supra) Mildren J indicated that the Court had done so, for a long time. At pp10-12 his Honour traced this history, in detail. Many other case where traditional punishment has been taken in account in Northern Territory courts over the years are set out in ALRC Research Paper 6A "Cases on Traditional Punishments and Sentencing", September 1982.

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Against that long established decisional background the sentencing orders earlier this year in *R v Wilson Jagamara Walker* (unreported, Martin CJ, 10 February 1994) received extraordinary publicity. The facts were as follows. There had been disputes and fighting between two Warlpiri family groups of drinkers at the Todd River in Alice Springs. The accused's group was chased by the victim's group, who were drunk, aggressive and bent on revenge. One of the accused's group was caught and was beaten by fists and sticks in quite a violent way. He called out for help; the accused and others in his group ran back to rescue and defend him. The accused held a knife, as did another of his group, and probably a member of the victim's group. In the ensuing fracas, the accused stabbed the victim with his knife, killing him. During his trial for murder the accused changed his plea to one of guilty to manslaughter.

Amongst other matters it was put by defence counsel in mitigation that there would certainly be a payback. His Honour required that "some firm foundation" be established that a payback would occur, enquired as to the evidence in that respect and of the nature of the payback, and referred to the decision in *Munungurr* (supra) as supporting the need for a proper evidential basis to be laid. Defence counsel then called on Grant Granites, the accused's uncle, who testified that two of the others in the accused's group had already received payback. He said that the accused would probably be speared by a hunting spear to the extent of a few punctures which would hurt for a couple of weeks. He would be speared by a brother of the victim, Kevin Fry, probably at the oval at Yuendumu, and in the presence of the respective families. He said that the payback would have to be arranged between the families; he would make the arrangements with the Fry family, and his own family had been waiting for the accused's release to have the payback completed. He said that if the accused stayed away for a long time, there would still be a payback.

His Honour referred again to *Munungurr* (supra) noting that the condition of the bond in that case - that the accused attend at a certain meeting - did not involve violence; he stressed that no such bond condition would be appropriate here. His Honour said that the court needed to be satisfied that what was proposed to be done, would be done, so that the Court was not hoodwinked. He clearly considered that the approach in *Munungurr* (supra) should be adopted, for the purpose of resolving the animosity between the groups, but stressed that the Court did not condone payback.

His Honour then proceeded to sentence. In the course of doing so he observed that it was likely that the accused

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would suffer a form of payback when he became available. He stressed that while that fact would be taken into account in sentencing, the Court did not condone the use of violence and, in particular, it did not condone payback. It treated payback as a fact of life. His Honour then recapitulated the evidence of Mr Granites to the effect that the accused would be called on to face tribal punishment, probably by spearing, by Kevin Fry. He noted Mr Granties' assurance that this would resolve the deep ill-feeling between the groups, and considered that this was in the interests of the Yuendumu community. Later, his Honour returned again to the question of payback, and said at transcript pp8-9:

"[The prisoner] is to be subject to the supervision of the Director of Correctional Services, or his nominee, and obey all the reasonable directions of the person. I note what I have been told about the payback proposal and I have said I have taken it into account in setting this sentence. I should give credence and credit to the evidence that has been given by Mr Ganites and assume that he is not intending to mislead the court and that what he says will happen, will in all likelihood happen in the way that he has described it.

I ask the Director of Correctional Services to report to the court as to whether that event occurs. If so, when and as to what happened. It may take a little time for arrangements to be made, but will allow, say, 6 months from this date where if nothing has happened as was envisaged within that period, I would ask the Director to inform the court accordingly and to provide any information which he can obtain from the community or others concerning that issue of payback.

I bear in mind the Director may come before the court and seek a variation of conditions attaching to a bond such as I have just order."

The sentence was one of 3 years imprisonment, backdated 9 months to take account of the time spent in custody, and suspended forthwith on a 2 year good behaviour bond. The "conditions attaching to a bond" were that the prisoner be of good behaviour for 2 years, return to Yuendumu forthwith, and subject himself to the Director's supervision and obey his reasonable directions. His Honour continued:-

" As to payback, I take it into account as something which I'm told by Mr Granites will happen. The problem is, as far as the court is concerned in determining its sentence: how should it approach the prospect that it won't happen?

Well, I think the first thing the court has to do in this case, and maybe others, is to try and work out a regime whereby it can be informed as to whether what is expected has happened or not and to bear in mind the powers of the Director of Correctional Services who might be asked to supervise people and report to the court his power to bring matters back before the court with a view to changing the terms and conditions of a good behaviour bond."

I interpose here to observe, with respect, that his Honour here clearly had in mind the *Mununguri*-type bond conditions, and not the particular bond before him. His Honour continued:-

"Now, it may or may not be the circumstances of every case to simply have a person brought back to have some additional or other conditions imposed. But it will at least enable the court to keep a tab on what is happening. If ultimately there is sufficient indication that although people with the best of intentions propose that these tribal ways be adopted with a view to settling community fights, [they] do not happen, then the court may very reluctant to take them into account in the future."

Again, it is clear his Honour was speaking generally of "tribal ways" and did not have in mind the present type of payback.

As I say, this decision has attracted considerable public attention. It has been construed as a request by the Court to the Department of Correctional Services to supervise the spearing and to report back on it to the Court, thus directly involving government officers in the process of payback, which may well be criminal activity. It has also been construed as accepting payback as a substitute for custodial sentence. Both constructions assume that the "fundamental" distinction referred to at p7 has ceased to exist in Northern Territory law. That is not so. A fair reading of his Honour's words does not warrant either construction. Government officers were not asked to be present at or to observe any payback. The likelihood of payback was treated as a factor mitigating the length of the period required to be spent in custody; that is a completely orthodox approach to that factor. The fact of a likely payback was treated as a mitigating factor, but the sentence, once given, stood, and was intended to stand. It was clearly not intended to be varied thereafter.

The Court was also clearly concerned to ascertain in due course whether what it had been told would happen, had in fact happened. The request to the Director to report back as to what in fact happened followed the same approach as was delineated in *Mununguri* (supra) at p10, was not intended or directed to be a condition of the bond, and was obviously made for the purpose of increasing the Court's reservoir of knowledge of customary affairs, and increasing its capacity to assess the validity of submissions of the type which had been put before it.

Conclusions

The recognition of Aboriginal customary law by way of taking into account on sentencing Aboriginal community attitudes and customary law sanctions has a long history in Northern Territory jurisprudence. There is nothing novel about it. It is well-established wholly judge-made law, soundly based on practical social realities.

The introduction of comprehensive sentencing legislation by way of a code now provides an opportunity to legislate on this topic, bearing mind the "fundamental" distinction referred to at p7. The relevant legislation might well take the form of principles to guide the exercise of the sentencing discretion in this area; see, for example, the principles set out in ALRC Report No 31, vol 1, pars 504-22.

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Circuit Commitments for 1995

The Administrative Appeals Tribunal calendar of Circuit commitments for 1995 for the Northern Territory:

DARWIN

Fortnight commencing Monday 27 February 1995 with the possibility of a third week if need - ***Deputy President Forgie.***

Fortnight commencing Monday 19 June3 1995 - ***Senior Member W Purcell.***

Fortnight commencing Monday 20 November 1995 with the possibility of a third week - if needed - ***Senior Member Beddoe***

Prisoners Sentenced During the Period 1990 to 1993 Inclusive by Most Serious Offence and Remission Period

OFFENCE	LESS THAN 1 MTH	1-2 MTHS	2-3 MTHS	3-6 MTHS	6-12 MTHS	1-2 YRS	2 YRS & OVER	TOTAL	%
Murder							9 (4)	9 (4)	0.28% (0.13%)
Manslaughter							20 (14)	20 (14)	0.63% (0.44%)
Dangerous Act/Against the person			1 (1)	3 (3)	7 (4)	19 (10)	17 (8)	47 (26)	1.48% (0.82%)
Assault	55 (47)	79 (70)	43 (36)	132 (121)	127 (119)	47 (43)	33 (25)	516 (461)	16.25% (14.52%)
Sex Assault & Offences	2 (2)	1 (1)	1 (1)	7 (6)	7 (5)	32 (26)	56 (48)	106 (89)	3.34% (2.80%)
Armed Robbery						1 (0)	12 (4)	13 (4)	0.14% (0.13%)
Robbery			1 (0)		4 (3)	14 (7)	16 (3)	35 (13)	1.10% (0.41%)
Break, Enter &Steal	38 (34)	31 (29)	26 (21)	85 (75)	113 (90)	48 (32)	14 (6)	355 (287)	11.18% (9.04%)
Use Motor Vehicle	41 (36)	37 (33)	33 (28)	69 (61)	37 (33)	17 (15)	3 (2)	237 (208)	7.47% (6.55%)
Damage Property	47 (41)	12 (11)	5 (5)	10 (9)	10 (9)	5 (5)	2 (1)	91 (81)	2.87% (2.55%)
Stealing/ Receiving	46 (32)	18 (13)	17 (10)	33 (16)	25 (14)	9 (3)	9 (4)	157 (92)	4.95% (2.90%)
Utter/Forge/ False Pretence	8 (2)	3 (2)	1 (0)	13 (3)	11 (1)	12 (1)	3 (1)	51 (10)	1.60% (0.31%)
DUI/Exceed 0.08%	112 (94)	116 (106)	55 (50)	128 (119)	51 (44)	8 (7)	1 (1)	471 (421)	14.84% (13.27%)
Drive Whilst Disqualified	49 (45)	81 (74)	42 (35)	80 (79)	36 (32)	9 (8)		297 (273)	9.35% (8.60%)
Other Driving	34 (23)	5 (5)	2 (1)	4 (4)	2 (0)			47 (33)	1.49% (1.04%)
Drugs	25 (5)	7 (3)	6 (0)	3 (1)	16 (4)	23 (2)	18 (0)	98 (15)	3.09% (0.47%)
Justice Proced-ures/Other	282 (235)	43 (38)	33 (25)	107 (92)	90 (74)	52 (37)	17 (12)	624 (513)	19.67% (16.17%)
TOTAL	739 (596)	433 (385)	266 (213)	674 (589)	536 (432)	296 (196)	230 (133)	3174 (2544)	100% (80.15%)
%	23.28% (18.78%)	13.64% (12.13%)	8.38% (6.71%)	21.23% (18.56%)	16.88% (13.61%)	9.35% (6.17%)	7.24% (4.19%)	100% (80.15%)	
	2648 - 83.43% (2215) - (69.79%)		2215 x 100 = 83.65% 2648		524 - 16.57% (329) - (10.36%)		329 x 100 = 62.79% 524		

*Statistics are based on statistical information provided in the Department of Correctional Services Annual Reports
*Aboriginal figures in brackets
*Figures do not include fine defaults

The Australian Bureau of Statistics estimated that the resident population of the NT as of 30 June 1986 was 154,421 and for 30 June 1991 was 175,891. In respect of Aboriginal and Torres Strait Islander People:
1. 1986 Census - 34,740 (ie 22% of the NT Population) Aboriginal and Torres Strait Islander People resided in the NT.
2. 1991 Census - 39,910 (ie 22.7% of the NT Population) Aboriginal and Torres Strait Islander People resided in the NT.
The figure of 39,910 represents 15% of the indigenous population in the whole of Australia:- 265,459 (that is, 1.6% of the total population of Australia).