

HOW CAN WE BE JUST IN ALL WE DO?

A presentation by his Honour Judge Richard Cogswell SC
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INTRODUCTION

1. Bathurst is a lovely regional city about 200 km inland from Sydney. I spent a couple of weeks sitting there on circuit in May. Bathurst was founded by Governor Lachlan Macquarie in 1815. It was named after the then British Colonial Secretary, Lord Bathurst.
2. Like many regional centres in New South Wales, a noticeable component of its population are indigenous Australians or Aborigines. I'll come back to the colonisers and the Aborigines but let me say two things about Bathurst first.
3. The courthouse where I sit is a magnificent edifice. It was built in 1880 and is described as neoclassical with an octagonal renaissance dome. It is set well back from the street and has a broad frontage and a pair of magnificent two-storey wings which sweep out to the footpath like embracing arms. There is a popular and no doubt apocryphal local anecdote that the courthouse was designed in the Colonial Office for a much bigger city in one of the other colonies but the plans were mistakenly sent to New South Wales where they were enthusiastically embraced and the project undertaken. The clock tower in the Court house has been restored over the last few years and there is a carillon in the park over the road. Beyond the carillon there is a cathedral. So when I am sitting there in the mornings, proceedings are delightfully interrupted at 11 and noon by the mixed chiming and tolling of many bells.
4. The second thing about Bathurst is this. It was sitting in my apartment there that I started thinking about the topic of this presentation. I looked at the then draft brochure for this seminar [see accompanying document] and found that it posed a series of rhetorical questions. Those questions provided me with food for thought and a structure for my presentation.
5. So my presentation will grapple with the following questions
 - How do we deal with people who do "wrong" things?

- How can we be just in all we do?
- Are we dependent on legislation to define our values and run institutions?
- What is happening to justice?
- How do we know what is the right thing to do?

6. I approach this task as a practising Christian and a practising judge. I have been assisted in the research for this talk by my legal associate, Sarah D'Arcy.

HOW DO WE DEAL WITH PEOPLE WHO DO “WRONG” THINGS?

7. I want to explore this question from 3 perspectives. The first is as a sentencing judge. Secondly I want to say something about my authority to punish others. Finally I want to say something about the serious wrongdoer and the victim, drawing on a particular process of restorative justice.

A sentencing judge

8. First, people who do wrong things are often punished. Our instinct is to punish because we are personally hurt or we are outraged by another's behaviour. But when I perform the public task of punishing an offender for a crime then that instinct must be measured and part only of the response. Legally sanctioned punishment must have a purpose and be principled. One purpose is deterrence. Not all agree - and its basis may be questionable - but it is a value or principle and a moderating influence. It must be observed and respected. Other purposes are protection of the community, accountability, denunciation and rehabilitation. A more recently acknowledged purpose is recognition of the harm done to the victim and the community.

9. Allow me to delve a little further into this question as a sentencing judge who also meditates in the Christian tradition. First let me say something about the practice of meditation. It is a much more grounded and ordinary process than non-meditators think. Finding time to commit to it twice a day confronts us with our humanity and our capacity to deceive ourselves. We become aware of our place in the human race with other humans who struggle to do what they set out to do, fail and continue to struggle. What does meditation bring us? Amongst many other things it helps us to see what is and to be aware of our own limitations. Our limitations are apparent within seconds of attempting to focus exclusively on the mantra. But meditation also

opens us to listen and to receive. This is particularly valuable in dialogue. It brings calmness and patience as well as focus and an appreciation of what is ultimately important and what is not.

10. One of the attributes of the justice system is legal representation. A wrongdoer has a spokesperson who speaks for and on behalf of that person and generally no other and who knows what is important to say; that is, they know their way around the courts and the law. This forces the sentencer to look at both sides, to consider the interests of the offender as well as of the community and other interests. It injects balance into the process.
11. One of the stimulating aspects of being a judge is the experience of having one's mind changed and view expanded. That is usually the result of a well-presented argument in favour of what at first seems an unattractive proposition. On a busy circuit one reads the papers overnight and can form a quite unfavourable view about an offender with an extensive criminal record who has yet again breached the community's peace that we are entitled to enjoy and I am duty bound to protect. They have glassed someone in a drunken rage at the pub, sold heroin from the home they occupy with their partner and children or sexually assaulted a cognitively impaired victim. That was a shocking crime, one thinks putting down the papers. Not only that, but the offender already had a record and was on a good behaviour bond at the time. This should be an open and shut case and a straightforward sentencing exercise. But then one hears evidence the next day from the offender and reads additional material about their past and environment. The plea from a hopefully competent lawyer follows. Comparisons are made with more serious offences to put this one in context. The significance of the guilty plea is emphasised. The factors from the offender's past which have driven or lead them to the chaotic present are highlighted. Perhaps the offender has a loving and committed partner and, for the first time in their life, will undertake a residential drug rehabilitation program.
12. So the picture is widened or even completed. An integrity or wholeness in approach is called for. This is not just an offence which calls for retribution but an offender – a man, woman or child - who must be dealt with. The response must be influenced by multifaceted considerations.

13. This is one area where a spiritual dimension can contribute. As a Christian I embraced – seriously as an adult - a change or turning in a different direction: a conversion of mind and heart. For me it was not a road to Damascus blinding light followed by a productive and driven life of travelling, preaching and correspondence. It is a daily recommitment. I am daily challenged to see things differently from the way I first see them or want to see them. I am called to see through the eyes of Christ. That is not easy because I am not Christ, I am Richard Cogswell and I like to see things my way. Christ's vision is all-encompassing, just and compassionate. Mine starts off as narrow, self-interested and judgmental.
14. The point is this. The processes involved in my spiritual life of constant need for and call to conversion - a different outlook - trains me in openness. I become aware that there is another way of looking at a person or a situation. I become attuned to looking beyond my first instinctive reaction.
15. Meditation helps in this process too. I want to be preoccupied and busy and to drive my own agenda. I do most of the time. But sitting twice a day and focusing away from that agenda teaches me the value of detaching from it for a time, of seeing what else can emerge if I invest in another process than drivenness. I stand up from meditation not only aware of my own frailty and a weakness as a human being but aware of another dimension, another orbit than the one I revolve in. This exposure is an experience, not just an insight. For a few minutes or perhaps only seconds in each meditation, I experience a difference, another perspective. I can feel it reducing my anxiety. I become familiar with the change or conversion. So the process of being persuaded by argument to seeing a wider perspective is a familiar one.

My authority to punish

16. Let me move to my second perspective: my authority to punish others.
17. Who am I to judge others' behaviour and inflict punishment on them? Jesus said "Let the one among you who is guiltless be the first to throw a stone at her." (John 8:2-11). Of course no one did because all were guilty in their own ways. Jesus then said "Has no one condemned you?...Neither do I condemn you. Go away and from this moment sin no more." Jesus can let people off lightly like that. I can't. He's not doing my job. He's not subject to appeal. I do condemn people (at least, I convict

them) and it's my job to sentence them. Am I without sin? Certainly not. So how can I go about my job in all conscience?

18. We are all sinners to a greater or lesser extent. That is why no one was left to cast a stone. In fact we are a community of sinners, a society of flawed individuals. None of us is perfect. If lawfulness or perfection was the pre-requisite for holding office or exercising authority, there would be no office-bearers or authorities. We all know that one of the ways of gaining wisdom is through our mistakes. But usually somebody else pays for our mistakes. The mistakes we make acquiring knowledge and experience as professionals, trades persons or just human beings will often show up in someone else's bank balance, physical or mental health or stress levels.
19. I don't sit on the bench claiming to be flawless. Some of my wisdom and insight comes from my past professional and personal mistakes. They make me wince when I think of them. But they have contributed to who and what I am.
20. I sit on the bench because the community - through its duly elected government - invited me to administer justice on its behalf. It is not my faultlessness that got me chosen but mainly my experience in the administration of justice. Society expects me to know about the law and how to administer it. The community trusts me because I have knowledge and experience in practising the law. I know how to go about determining who is at fault in a civil case, what are the damages for an injured back or the tariff for an aggravated burglary. I am expected to do the job with honesty and integrity. If I have been convicted of fraud or sexual assault or violence, the community will rightfully have reservations about my judgement and personal integrity. My marital status, religion and sexuality are no longer an issue.
21. I can do my job in conscience because I am entrusted by the community as one of them to administer justice in order to keep the peace. I was asked, not because I was faultless but because I have learned the law and because I have learned how to learn from my mistakes. I can be trusted not to take a bribe or to be intellectually dishonest, not to be swayed by prejudice or emotion but to be fair and fearless.

Restorative justice

22. My third perspective on this topic of dealing with people who do "wrong things" touches on the serious wrongdoer and the victim and restorative justice.

23. Forgiveness is a quality of God. Without God's forgiveness we would be helplessly enmeshed in our own shortcomings and failures to live fully human lives. Jesus teaches us to forgive. In the prayer he taught when asked how to pray, we ask for God's forgiveness and in the same breath acknowledge that we forgive those who have wronged us. Forgiveness can be more or less manageable in our daily lives and relationships. But what if the other, by their offence, has thrown our whole life off course? Can we forgive or be expected to forgive? Where do we start? Let me suggest that a process of restorative justice undertaken by Corrective Services NSW provides a very good start.

24. Jane Bolitho in her chapter 'Restorative Justice for Adults: Should We Do More?' in *Restorative Justice, Adults and Emerging Practice* (J Bolitho & J Bruce (eds.), 2012, Institute of Criminology Press, Sydney) says –

"No single definition exists, although there *are* easily identifiable components of the approach. These comprise a focus on relationships, the importance of acknowledgement and accountability following harm, and the rights and obligations of citizens in civil society in relation to victims, offenders and communities following conflict."

In the following observations I am drawing on and quote from another contributor to that publication, Kate Milner, and her chapter 'Restorative Justice and Adult Offending: Twelve Years of Post-sentence Practice'.

25. Restorative justice is a process which often accompanies or precedes sentencing and involves young offenders who have not been to jail. They are usually for less serious offences.

26. A restorative justice unit was established by Corrective Services NSW (the State of NSW department responsible for prisons) in 1999. By contrast, the practice of that unit "is very much at the deep end of the criminal justice system." In keeping with research, "CSNSW restorative justice is *a/ways* practised after sentencing, *a/ways* involves an adult offender and *a/ways* includes primary or secondary victims of the actual offence. Our restorative justice interventions also primary concern crimes of severe violence."

27. Kate Milner goes on to say that in "November 2000, a victim-offender conference was facilitated concerning a murder. Reflecting on aspects of the experience in a 2002 conference presentation, the father of the deceased observed:

"I open a letter after I get home from work. It's from the NSW Department of Corrective Services. A nicely written letter but the contents sent me into a wild anger that I had NEVER felt before or since. The offender wanted to have a *conference with us!!!!!! AFTER 10 YEARS!!!!!! You must be joking!!*

...

It wasn't easy agreeing to the conference. It was the hardest decision I have ever had to make, or will ever make in my life, and I now realise that strengthened me. Today I am FREE. I will be free forever. Today I feel better than I have ever done in my life. I am jumping out of my socks, and it's nearly two years since the conference."

28. It has been noted that victims of serious crimes "often start the conference in the belief that there is nothing the offender could do that could be of any assistance. Part of the transformational power of a well-facilitated process is the shift that takes place from focus on the past (the offence) to the present (the effect) and finally to the future (previously unimagined possibilities)."

29. The "CSNSW practice of restorative justice requires that the offender acknowledges full responsibility, demonstrates empathy for the victims of the offence and insight into their offending behaviour."

30. Sex offences can present particular problems. Referrals "will only be accepted from the victim of a sex offence or a treating psychologist upon the offender's successful completion of the appropriate treatment program. For such offences, the script on the day is often varied to avoid re-traumatising the victim of the offence, excluding a detailed account from the offender of what happened during the commission of the offence. The victim of a sex offence describes how this aspect of the process was addressed:

"... I wanted to do the conference because I wanted to hurl so much abuse at my attacker. I even pictured taking to him with a baseball bat I'm now not as scared as I was, I'm more settled and I rarely think about him any more (which is great). I'm not 'back to normal' but I'm a hell of a lot closer than I was. I can honestly say that the conference was a good thing for me."

31. "The goal of restorative justice at this end of the restorative practice spectrum is quite distinct from related practice. It is about healing psychological harm suffered by people affected by crime. It is not so much about restoring relationships between

people; rather it is about severing the involuntary victim-offender trauma bond. It is about restoring the victims of an offence, as closely as possible, to the point where they would have found themselves had the offence never occurred."

HOW CAN WE BE JUST IN ALL WE DO?

32. Well we can't, at least in the developed world. Let me support that. What we take for granted in everyday life - comforts, facilities, services - are provided to us at the expense of others. Roads are paved, buses and trains are heated or air-conditioned and lights go on all because we have elected to use that energy for our own good and spend that money for our own comfort. We enjoy high standards of health, education and security because we spend money on them.
33. But our spending is elective, discretionary. We have come to regard most of these services and facilities as essential to our well-being, as indeed they are. If roads weren't repaired there would be more accidents; if hospitals weren't maintained there would be more deaths; if energy wasn't reliable we would experience far less day-to-day comfort.
34. On one view, someone else is paying for all this. What we choose to spend on our own standard of living, we are not spending on lifting our neighbours out off a far lower standard of living. We are uncomfortably close to 2015, the year which the 8 Millennium Development Goals are to be achieved. By another measure, Australia is only half way to spending the targeted 0.7% of gross national income on official development assistance. Great Britain is much closer to that target and the USA is behind us both. Yes, there are very hard questions about how to implement such sharing but we are standing at a safe distance from those questions.
35. We can try to be just in daily transactions. Justice is not the same as charity. We don't have to give to every beggar who asks ... or do we, if we possess and consume far more than the beggar? Giving or not giving will usually involve a snap judgement about the beggar and/or the application of a policy we have worked out over time. But we're also expected to be generous, loving and aware of others' needs. So what is the perspective we try to develop if we want to be just in our daily transactions? One perspective I've learned over my professional life is that there are usually two or more sides to every story. Another perspective we're all familiar

with is that the closer we get to someone, the more we know of their story, the harder it is to pass judgement on them or to act harshly towards them.

36. Let me develop an example. I get easily and quickly annoyed when speaking to people in call centres who are dealing with my attempt to contact my bank or insurance company or telecom. An interesting reaction occurs the longer I am on the line. I'm wanting to maintain my rage, reiterate my complaint. But the longer I speak, the more I am connecting with the call centre operator. I am becoming familiar with their voice and, by necessity, working on understanding their accent. I am becoming defensive about the arguments they are putting forward. Rationality and reasonableness struggle inside me with rage and rant. I don't want to see their point of view. There is a real tussle going on, not just between the operator and me but also inside me.

37. This is one of the transactions we all engage in: how can we be just in that transaction? If I was just in all I do, including that transaction, how would that come about? What would it look like? I speak as someone who usually fails. We would engage in a conversation with the operator. We would listen and consider what they are saying, the points they are making. We might even see the transaction in a broader context. It is we who have the bank account, insurance policy, travel plan or mobile phone. Perhaps - like me - we have a good and interesting and even remunerative job too. The operator too may love their job. But perhaps they don't. Perhaps they don't like being cooped up in a noisy call centre doing shift work at low rates offshore because the large corporation I have an interest in finds it much cheaper than employing their own local staff to field my calls. (It also means I pay lower premiums or rates.) Where is the call centre? Most of the ones we are put through to from Australia are in India or the Philippines. Perhaps for them it is very stressful dealing with impatient callers in a language they are struggling with. Perhaps they are regularly abused over the phone. If you're like me, you don't want these considerations intruding on your rage. You don't want your resentment at not getting your own way being diluted by these aspects of the transaction.

38. Let me suggest that trying to be just in all we do would involve more conversations, more listening, more openness. It would involve vulnerability on our part. We are at risk of being knocked off our pedestal, of losing the argument, being proved wrong. I say "risk" because it wouldn't always be realised. Having heard the argument, the

other point of view, we may be consolidated in our position, comfortably maintaining the wrongness of the other point of view but now more articulately.

ARE WE DEPENDENT ON LEGISLATION TO DEFINE VALUES AND RUN INSTITUTIONS?

39. The question was obviously designed to bait a lawyer. I have taken the bait. Allow me to challenge for a few minutes the undesirability implied by the question of the legislature defining values.
40. There are two aspects I would like to explore. One is legislated values as such. The other is legislating for justice in particular circumstances.
41. What do I mean by legislating for values as such? Legislation authorises, facilitates, prohibits and regulates. It authorises governments to take our income and to redistribute part of that income through agencies that educate, defend and support us. Legislation facilitates a reliable system of landholding. Legislation prohibits violence and fraud. Legislation regulates the behaviour and standards of those to whom we entrust our lives, health and money: doctors, dentists and lawyers. Professional readers of legislation are used to terms such as “commencement provisions”; “definitions” (or, more recently, “dictionaries”); “transitional provisions”; “schedules” and “interpretation provisions”. Sometimes there would be some stated objects of a piece of legislation. But in my professional lifetime other terms have emerged. Examples are “principles relating to exercise of functions under the Act”; “purposes of sentencing”; “guiding principles for courts” and “principles for care and treatment”. That is what I mean by legislating for values.
42. Think about the kinds of institutions that are governed by legislation. They include prisons, children's detention centres, psychiatric wards housing compulsory patients and schools. All these institutions hold vulnerable people who can be coerced. Adding those two ingredients together - vulnerability and coercion - can result in abuse by the enforcer and injury to the inmate. The combination can develop into a pattern or habit of abuse accompanied by injury which is regarded as necessary and therefore acceptable. Throw in unruly or illegal behaviour by the vulnerable child or prisoner and the pattern becomes systemic and the abuse institutionalised.

43. Let me give you a handful of examples of what I mean by legislating for values:

s 68 of the *Mental Health Act 2007* (NSW)

It is the intention of Parliament that the following principles are, as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder:

- (a) people with a mental illness or mental disorder should receive the best possible care ...
- ...
- (d) the prescription of medicine to a person with a mental illness or mental disorder should meet the health needs of the person and should be given only for therapeutic or diagnostic needs and not as a punishment
- ...
- (e) people with a mental illness or mental disorder should be provided with appropriate information ...
- (f) any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances,
- ...
- (i) people with a mental illness or mental disorder should be informed of their legal rights

s 4 of the *Children (Detention Centres) Act 1987* (NSW)

- (1) The objects of this Act are to ensure that:
 - (a) persons on remand or subject to control take their places in the community as soon as possible as persons who will observe the law,
 - ...
 - (c) satisfactory relationships are preserved or developed between persons on remand or subject to control and their families.
- (2) In the administration of this Act:
 - (a) the welfare and interests of persons on remand or subject to control shall be given paramount consideration

s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists the purposes of sentencing.

s 2A(1)(a) of the *Crimes (Administration of Sentences) Act* (NSW) requires

“that those offenders who are required to be held in custody are removed from the general community and placed in a safe, secure and humane environment”.

44. Other examples relate to behaviour rather than institutional relationships. Let me give a couple of examples. Once again the relationships are marked by a coincidence of vulnerability and power.

45. Obviously if you confess to a crime that will be powerful evidence against you when you are prosecuted. In Australia - and no doubt other countries - the police quickly realised the cogency of confessional evidence and came up with the verbal admission or "verbal". Many times the police were undoubtedly right in pinning the crime on their suspect. They had access to a lot of inadmissible intelligence - including the suspect's criminal record and quaintly named "antecedents" - which pointed to the culprit. But they were just short of the admissible evidence. Hence the verbal - often in the back of the police car on the way from the scene of arrest to the police station. Another inappropriate source was illegally obtained evidence: unauthorised phone taps or searches without a warrant.
46. The courts were of course on to these practices first. The evidence was being challenged and the judges and magistrates had to rule on its admissibility. Guidelines and principles were developed. Now the legislature has stepped in. Confessions are not admissible unless recorded. Illegally obtained evidence is not admissible unless it passes a high threshold test of public interest.
47. So there is a place for the legislature to fix values by which institutions housing the vulnerable or behaviour towards vulnerable people in the community are conducted.
48. I will now turn to legislating for justice in particular circumstances. Legislation often provides for the circumstances of the individual and wider circumstances to be taken into account in decision-making by administrators and judicial officers. In the United Kingdom the *Criminal Justice Act 2003* deals with the question of whether an acquittal can be set aside. The Act provides that the question is to be determined having regard in particular to whether existing circumstances make a fair trial unlikely and whether it is in the interests of justice for the court to make the order. So legislation is enacted but then holds back and places the decision into the hands of the decision-maker by reference to considerations of fairness, reasonableness and justice.

SO WHAT IS HAPPENING TO JUSTICE?

49. It is not put aside but put in place; not replaced but reinstated. Specific provision is made for the discretion of decision-makers - especially judges - and lawmakers want those decisions to be guided by justice.

50. Modern legislation is complex but it also serves to protect those who are most vulnerable to abuse, for example children and prisoners. Values are contained in legislation but they are to protect and guide in the administration of the legislation. So it is society - the community - which articulates the values by reference to which people who lack control over their lives and are subject to direction and coercion by others are to be regarded and dealt with. That is the importance of legislative values.
51. It is right that those values are injected into processes by legislators. Otherwise the integrity of those being dealt with and the fact that they have rights can be overlooked. Often the circumstances to which legislation applies include blameworthy and highly culpable behaviour, high emotions, coercion and protection of the weak. People are exercising control over other people when emotions on both sides are running high. There needs to be a framework of generally accepted values to enlighten those dealings. That explains in part why legislation defines values. It must enlighten the exercise of power; make it more transparent by exposing the values by which it is to be exercised.
52. Justice is very much part of the system. It is not lost but enshrined. It has not been stripped away but has become part of the fabric. People make fun of mission statements and values of institutions and they can be honoured more in the breach than the observance. But where they are allowed to drive behaviour they can bring fairness and justice into challenging circumstances. The legislative defining of values is a good thing for many reasons but one of those is the instilling of society's public expectation of justice into the exercise of coercion over individuals.

HOW DO WE KNOW WHAT IS THE RIGHT THING TO DO?

53. We should know what is the right thing to do by our own upbringing and education. There should have been instilled into us by teaching and example the right, proper, decent thing to do in situations which confront us. But none of us has a perfect upbringing or education. Our families and schools will overlook some areas that need to be taught. Worse still, they can be a source of emotional and physical abuse - from mild to severe - which send us into the world with skewed values, compromised values, neglected values, inadequate values and incomplete values.

In the worst cases they can send us into the world as very damaged individuals overwhelmed by our own neediness and driven by hatred of ourselves. Sometimes we don't know what is the right thing to do because the problems are unprecedented - either generally or to ourselves. So there is a need for binding and publicly stated values that we are all expected to adhere to. Many of us have already embraced such values and practice them.

54. Where should they come from? I have already noted that they may not come from the family. They can no longer come from the Church. A large part of the populations of Western countries are not Christian. Many of them who are, do not practise the faith they identify with. But even more, the Church's credibility as a teacher of values has been significantly eroded. It is seen to have failed to practise what it preaches. It cannot be trusted. It tries to cover up the truth to protect itself. The State has had to step in.
55. So there is an important role for the secular authority to proclaim and enforce values. Not that the State is more perfect than the Church. It has its share of incompetent and corrupt officials. But it has the legitimacy of being elected by a free vote and the power to enforce its decisions.
56. I think it is right that the State speaks not only in terms of prohibition and facilitation, of rights and duties but of values and principles. It articulates in a binding fashion those values and principles. Although the sanctions are less draconian - a prison sentence sounds mild compared with eternity in hellfire - they are more immediate and therefore effective in their application: the parking fine will have to be dealt with before The Last Judgment.

JUSTICE FOR INDIGENOUS PEOPLE IN AUSTRALIA

57. Those of us who participate in the Westminster justice system are rightly proud of that system. We are administering justice fairly and in accordance with well-established principles. I tell juries regularly that they are playing a role in a justice system which has been in place in Australia for nearly 200 years and in other countries - such as this one - for centuries longer.

58. But what if my pride is misplaced? I'm not referring to court hearings which can go wrong but to something more radical. Australia of course was started as a colonised country. Its states are former colonies of this country. People like me are white descendants of the colonisers or those who - let me say - involuntarily accompanied the colonisers. Over the years millions of others have chosen to come to my country as immigrants or refugees.
59. But my country was not uninhabited when it became part of the British Empire. Others had embraced it as home for some 40 million years. Those are the aboriginal or indigenous Australians who had to be subjected by the colonisers. I say "subjected" because they were given no choice about this wonderful justice system that I am now proudly part of. Indeed many or most Indigenous Australians and others regard Australia as having been "invaded" rather than colonised.
60. So what if this justice system - this white justice system established by the invaders two centuries ago - is not recognised by the original inhabitants? How do we deal with such a problem: non-acceptance at such a radical level?
61. In one sense there is no choice. Aboriginal Australians like all Australians are subject to the same laws. If they break these laws, they must be dealt with in the same way. They must face the same courts and the same penalties.
62. But let me tell you about some accommodation that is made in three areas. There are others but I will highlight three. The first has to do with sentencing Aboriginal offenders. The second has to do with court procedures. The third has to do with landholding.
63. My court is not only a metropolitan but a circuit Court. It sits in many country towns and cities around New South Wales. Sittings are usually two or three weeks' duration once or twice a year-sometimes more depending on the size of the centre. We have a choice as to whether we sit on circuit or not. I like to go on circuit about four times a year. I have sat in outback centres such as Broken Hill, Bourke and Moree. In those and other regional centres a large percentage of the offenders I have to sentence will be Aboriginal. These offenders' lives are blighted by unemployment, substance abuse, domestic violence and usually dysfunctional upbringings. Unfortunately my colleagues and I are very familiar with this

overrepresentation before us of an ethnically definable section of our Australian community. I have heard and read the narrative many times: left school in early high school; commenced cannabis use at 12; commenced alcohol at around the same time; one or both parents addicted and domestic violence between them; heroin at 15; then a series of other drugs depending on their availability and price; never had a job; appearances in Children's Court for shoplifting, car theft and malicious damage to property; appearances as an adult before magistrates for drug possession or supply then break enter and steal to support the drug habit; street crimes then perhaps a serious assault or break and enter which has brought them before me.

64. But of course there are non-indigenous offenders with similar backgrounds. So can I treat the aboriginal offenders differently? One of my State's senior judges boldly embraced this problem in 1992 and set out some principles by which a judge may approach the sentencing of an Aboriginal offender. The case was *R v Fernando* (1992) 76 A Crim R 58. At 62-63 Justice Wood said:

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

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment 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.

65. There have been established in almost all states and territories of Australia indigenous sentencing courts over the last 10 to 15 years. They are described by Elena Marchetti in her contribution called "Australian Indigenous Sentencing Courts: Restoring Culture in the Sentencing Court Process" to the book *Restorative Justice, Adults and Emerging Practice* as using "Australian criminal laws and procedures when sentencing Indigenous adult offenders, but they include the involvement and input of Indigenous Elders and Community Representatives." She goes on to say that "the 'restorativeness' of the processes goes deeper than that since the establishment of the courts reflect an attempt and desire to correct the harmful and disadvantageous impact the Anglo-Saxon criminal court process has had on indigenous Australians." She points out that since colonisation, "Australia's courtrooms have reflected British and non-Indigenous Australian cultural and political emblems." (Indeed despite s 4 of the *State Arms, Symbols and Emblems Act* 2004 (NSW) requiring a courthouse to use the NSW State arms and not the Royal arms of the United Kingdom, in some of the courts that I sit in there remains the coat of arms bearing the motto 'Honi soit qui mai y pense' – that is the Royal coat of arms of the United Kingdom. To an Aboriginal Australian that may represent a very significant emblem of the colonisers.) In addition, Elana Marchetti says that since "European invasion in 1788, there have been several government policy

phases that have had a devastating impact on Indigenous people and culture, including protectionism and assimilation." Protectionism included the enforced removal of infant children from their Aboriginal families and parents producing what has come to be known in Australia as "the lost generation". Assimilation included non-acknowledgement or rejection of the cultural dimension to aboriginal life.

66. The last example I'll touch on is the 1993 High Court decision of *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). The High Court upheld Eddie Mabo's claim that Murray Islanders held native title to land in the Torres Strait. The Australian Parliament then stepped in and provided legislation protecting native title (*Native Title Act 1993 (Cth)*). In a joint judgment by Deane and Gaudron JJ, their Honours said at 105 ([51]):

"As political power in relation to domestic matters was transferred from the Imperial Government in England to the European Colonists on the other side of the world, the Aborigines were increasingly treated as trespassers to be driven, by force if necessary, from their traditional homelands."

Earlier in the judgment at 93 ([29]) their Honours had said:

"In practice, there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing."

67. By that judgment and subsequent legislation there was a looking back and owning up to what had occurred 200 years before and in some instances a setting right of what had occurred.

CONCLUSIONS

68. Let me attempt to encapsulate the points I have made in this presentation in the following six propositions.
69. Legally and publicly punishing people who do wrong things must be a principled process calling for an integrity or wholeness in approach punishing a human offender for an offence rather than lashing out in pain and outrage.

70. The ongoing process of conversion that is part of my life as a Christian challenges me to see things differently, from another perspective. This assists me in the wholeness of approach in sentencing an offender that I have just referred to.
71. Meditation is accompanied by awareness of one's distractions and limitations. It is a very grounding and humanising practice. I too, like the offender, am a limited and flawed human being. As well, meditation opens me to another dimension than my own.
72. The governing representatives of the community chose me to administer justice not because of flawlessness but because I have learned the law and have learned to learn from my mistakes.
73. Before claiming to be just in all I do, I should look backwards to see who has suffered to put me where I am now; look around me to see those I am choosing not to support so that I can be comfortable; look at my ordinary and annoying daily transactions.
74. The legislative defining of values is a good thing for many reasons but one of those is the instilling of society's public expectation of justice in to the exercise of coercion over individuals. It is particularly needed because the Church's role as a respected teacher of values has been compromised and legislated values - at least in democracies - will more likely represent shared and commonly accepted values.

RC

6.9.13