

Chapter 8 additional questions

The incorporation of Indigenous practices, customs and laws into the criminal sentencing process raises many contentious issues. Consider the following:

1. Should sentencing be harsher where the offence is more serious under Indigenous law?

What about where there is a violation of a sacred site which can be a very serious breach of Indigenous law? Should judges award a harsher sentence than what is provided in the legislation? The courts have criticised this approach.¹

2. Should the sentence be reduced where traditional punishment will be inflicted?

Traditional punishment can include banishment or temporary exile, spearing and shaming. Would it be “double jeopardy”² for the Indigenous offender to be punished by both Indigenous law and the criminal law?

In the Northern Territory reductions in sentences have been reduced where traditional punishment will also be inflicted. In *Minor* (1992) 79 NTR 1, Justice Mildren reduced an Indigenous offender’s prison sentence to 10 years imprisonment because he had consented to being speared in the thigh by his community (according to tribal punishment) upon his release from prison. One material consideration was that the “tribal way” of payback would help to settle down the community. His Honour also took into account the need to avoid double punishment.

However, the courts have not clarified what impact traditional punishment should have on sentencing.

3. What about where a non-Indigenous person knowingly violates Indigenous law?

In 2008, a female police officer interfered with male initiation in the Lajamanu community in the Northern Territory – which renewed calls for the recognition of customary law. One community elder noted, ‘We recognise the parliament of Australia, why won’t the police officers respect our law?’ See the report on youtube: <http://www.youtube.com/watch?v=aU4m3bRyRqU>

Recall that in a very general sense, the High Court of Australia in *Mabo No.2* opened up the possibility of a treaty, by recognising that Australia was not *terra nullius* prior to 1788. However, this window of possibility was quickly shut. The High Court made it clear in *Mabo*, and its subsequent decision of *Walker* (1994), that it would not address the issue of sovereignty. But are there other means for recognising Indigenous laws that are not as contentious as in the criminal realm – eg marriage and inheritance.

¹ See: *R v Minor* (1992) 79 NTR 1 at 14; *Munungurr v The Queen* (1994) 4 NTLR 63 at 71. Also see: Australian Law Reform Commission (1986) *Recognition of Aboriginal customary laws* Report #31 at [509].

² Double jeopardy is more than one prosecution for the same crime.