

JCA COLLOQUIUM 5 OCTOBER 2007
CUSTOMARY LAW – NORTHERN TERRITORY
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Commonwealth Intervention

In recent times events with respect to Aboriginal affairs across the country, and particularly the Northern Territory, have leapt into National prominence and dramatic Commonwealth intervention in Territory affairs of a type not possible in the States has occurred. Violence by Aboriginal men against Aboriginal women and children, particularly in remote communities, has long been a problem with which the courts in the north of Australia have been battling with minimal success. Increased penalties in the Northern Territory have had no discernable impact upon the unacceptably high rate of alcohol fuelled violence.

In recent years, while punishment of an offender said to be administered pursuant to Aboriginal customary law has not infrequently been advanced in sentencing proceedings as a mitigating factor, only on rare occasions has customary law been presented as lessening the moral culpability of the Aboriginal offender. Even less frequently has the sentencing court accepted the submission as of significance.

In 2006 the Commonwealth enacted the Crimes Amendment (Bail and Sentencing) Act 2006 which introduced s 16A(2A) to the Crimes Act 1914 (Cth) qualifying the matters to which the court must have regard when passing sentence for offences against Commonwealth law. Section 16A(2A) directs that the Court must not take into account any form of customary law or cultural practice as a reason for “excusing, justifying, authorising, requiring or lessening” or “aggravating” the seriousness of the criminal behaviour. An amendment in identical terms was also made to s 19B which relates to the circumstances in which offenders may be discharged without conviction. In addition, the same qualification was made in relation to matters to which the Court may have regard in determining questions of bail in connection with Commonwealth offences. Section 15AB now provides that in determining whether to grant bail, the Bail Authority “must not take into consideration any form of customary law or cultural practice as a reason for excusing ... [etc] or aggravating the seriousness of the alleged criminal behaviour.”

On 17 August 2007 as part of the Northern Territory National Emergency Response Act 2007, the Commonwealth extended the prohibition against taking into account customary law or cultural practice in respect of sentence or bail to offences against the law of the Northern Territory. The relevant provisions are found in Part 6 in the following terms:

“Part 6 – Bail and sentencing

90 Matters to be considered in certain bail applications

- (1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority:
 - (a) must take into consideration the potential impact of granting bail on:
 - (i) any person against whom the offence is, or was, alleged to have been committed; and
 - (ii) any witness, or potential witness, in proceedings relating to the alleged offence, or offence; and
 - (b) must not take into consideration any form of customary law or cultural practice as a reason for:
 - (i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or
 - (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.
- (2) If a person referred to in subparagraph (1)(a)(i) or (ii) is living in, or otherwise located in, a remote community, the bail authority must also take into consideration that fact in considering the potential impact of granting bail on that person.
- (3) To avoid doubt, except as provided by subsections (1) and (2), this section does not affect any other matters that a bail authority must, must not or may take into consideration in determining whether to grant bail or in determining conditions to which bail should be subject.

91 Matters to which court is to have regard when passing sentence etc.

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.”

Amendments to the Commonwealth Crimes Act were also made to provisions concerned with forensic procedures undertaken by investigators. These amendments

have received little public attention and are not replicated in the Emergency Response Act. Section 23WI governs those matters which an officer must consider in determining whether to ask a suspect to undergo a forensic procedure. Reference to “cultural background and (where appropriate) religious beliefs” and the requirement to have regard to the customary beliefs of a suspect who is an Aboriginal person or a Torres Strait Islander were removed. By way of amelioration, subs (4) was added to s 23WI to provide that in considering whether there is a less intrusive, but reasonably practicable way of obtaining the evidence, consideration must be given to the religious beliefs of the suspect. Similar amendments were made to s 23WO in connection with matters to be considered before ordering a forensic procedure.

In the Second Reading Speech, introducing the Bill amending the Commonwealth Crimes Act, the Attorney-General stated that the amending Bill “ensures that all Australians are treated equally under the law and that criminal behaviour cannot be excused or justified by customary practice or customary law”. The Attorney referred to the serious concern of the Australian Government “about the high level of violence and abuse in Indigenous communities”.

The Explanatory Memorandum accompanying the Emergency Response Bill identified the decision of the Council of Australian Governments (COAG) on 14 July 2006 as the basis for the intervention with respect to sentencing and bail:

“On 14 July 2006, the Council of Australian Governments (COAG) agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agreed that their laws would reflect this, if necessary by future amendment. COAG also agreed to improve the effectiveness of bail provisions in providing support and protection for victims and witnesses of violence and sexual abuse.

...

The Government wishes to ensure that the decisions of COAG, as implemented by the Bail and Sentencing Act, apply in relation to bail and sentencing discretion for Northern Territory offences.”

Similar remarks were made by the Minister for Families, Community Services and Indigenous Affairs in the Second Reading Speech on 7 August 2007.

The amendments to which I have referred do not reflect any recommendation by a Law Reform Commission. To the contrary, every Law Reform Commission recommendation has supported the continuing role of customary law in the administration of the general criminal law across the country. Professor Larissa Behrendt, Professor of Law and Indigenous Studies at the University of Technology, Sydney and Director of Ngiya, the National Institute of Indigenous Law, Policy and Practice commented:

“Nowhere, in the calls from Aboriginal women for the judiciary to reject so-called customary defences that seek to imply that mistreatment of women and children is culture or to value the rights of victims more highly than cultural practice that breach human rights, was there a call for the blanket exclusion of customary law from the judicial decision-making process when determining a sentence. Those calls came from politicians.

The proposal to legislate to exclude customary law from the factors that can be considered in sentencing is dangerous. Like any attempt to restrict a judicial officer’s capacity to weigh up all the relevant factors when sentencing, the inability to consider customary law at all will impede the capacity to ensure that a just sentence is given in each particular circumstance before the court. It is also a serious infringement on the judicial process by the legislature and as such has implications for the principle for the separation of powers.

But pointing the finger at the judiciary is an easy way for politicians to grand-stand and score quick political sound-bites. Judges who hear criminal cases where violence has been committed against Aboriginal women and children are dealing with symptoms of a far more complex social problem. And it is politicians, not the judiciary, who have the most power to profoundly influence the root causes of cyclical violence and the breakdown of the social fabric in Aboriginal communities.”

What is Customary Law

What is “customary law”? It would be a mistake to believe that there is a single law which clans of Aboriginal people regard as their law. The researches of my Associate, Ms Melanie Warbrooke, led to the following summary:

“Customary law could be described as systems for ensuring community stability and determining disputes. It has also been described as a system of rights and duties which are followed due to threat of punishment or social ostracism. These rights and duties are associated closely with kinship relationships and connections to land, and one must perform these rights and duties to remain accepted by the community. The notion of rights in this context refers to collective rather than individual rights, with the objective of the law being community harmony. The concept of punishment in customary law incorporates direct retribution, spiritual and health issues- an offender could expect not only to be punished in a formal sense, but to become ill as well. It has been said that as customary law includes beliefs and traditions more commonly viewed as spiritual ideas, it is difficult to view these traditions as ‘law’.

It is problematic to outline a range of offences for which one would be likely to be punished under customary law. The concept of offence and punishment and the role law plays in indigenous society means that punishment may be inflicted not for committing a wrong, but for acting in a manner requiring a response from the affected group. As such it differs greatly from the broader Australian legal system which requires punishments to be measured and objective.

Customary law achieves its goal of harmony via a complex system of rights and responsibilities associated with relationships, which may be defined by blood, clan, marriage, seniority or dreamings. Ceremony is a means of safeguarding the country

and the community. There is no distinction between civil or criminal law within Aboriginal society. Issues are normally viewed according to degrees of severity. There is an expectation that the offender will raise the matter publicly, and assume liability for the trouble. The facts of the disruptive incident are determined by mutual agreement rather than a system of direct questions and answers.

Decisions regarding punishment are made collectively, and in accordance with rules. Depending on the nature of the trouble, there may be a negotiation and mediation process involving the relevant families, informal discussion involving the whole community or Elders may lead the negotiation process. While the Elders are generally involved in negotiating punishments relating to more serious issues and in circumstances where families cannot agree, the role of senior women as negotiators should not be overlooked. Overall, decisions regarding punishment under customary law could be described as being by consensus, rather than under a hierarchical system.

Traditionally, punishments ranged from compensation to banishment, physical punishment or death. The objective was to deal with the issue and have it finalised, to allow the community and people involved to move on. The underlying concept of punishment under customary law is reciprocity- the offender acknowledging that he or she has hurt others and consenting to be hurt in response. The negotiated punishment has to be agreed to by the offender, or the matter is not considered resolved. Until this has occurred community harmony is not restored.

It needs to be acknowledged that customary law is developing and adapting to the modern world. There appears to be consensus that these belief systems continue to exist, and play a central role in Aboriginal society. It should be noted that there are many Aboriginal groups residing in the Northern Territory, and that the customary law of each group may differ. The laws of the Yolngu of North East Arnhem Land and the Indigenous people of Central Australia have been the subject of most of the research relied on. The laws of other Indigenous people in the Northern Territory may differ in some ways from that which is described in this paper.

Due to these issues it has been found more useful not to define customary law with any precision. Despite this, Aboriginal customary law has been recognised by the court as a legal system in a number of contexts, most notably in relation to land claims. In *Milirrpum v Nabalco Pty. Ltd.*, when discussing evidence relating to whether customary law existed amongst the Gumatj people of North East Arnhem land, Blackburn J found that:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a 'government of laws, and not of men' it is that shown in the evidence before me."

Historical Consideration of Customary Law

As Mildren J notes the Territory was first settled in 1869 and, until the period commencing with World War II, the majority of the Territory population comprised Aboriginal persons. Today, in a Territory population of approximately 200,000, those Australians comprise approximately 32% and, for many of them, English is their

second language and their education and understanding of English is extremely limited. By way of contrast, Aboriginal persons comprise approximately 2.5% of the national population and the highest percentage of Aboriginal persons in any State or Territory other than the Northern Territory is 3.8% in Western Australia.

The issue of recognition of Aboriginal customary law has been part of legal and political debate in the Territory since at least the 1930's. In the late 19th Century it was common for white people to administer summary justice to Aboriginal persons, sometimes with the assistance of punitive raiding parties organised by police. Initial Government policy in Australia with respect to Aboriginal people was developed in response to situations of encounter and conflict, where European settlements and pastoralists, miners and others were competing for land occupied by various Aboriginal communities. This led to a policy by which many Aboriginal people were displaced from their traditional lands and encouraged or forced to move to lands set aside for them. In the belief that European culture was superior, it was the general approach of Australian and other western governments from the 1880's on to adopt policies that were specifically meant to replace Aboriginal culture and to encourage or coerce Aboriginal people to adopt "western sensibilities".

In considering the approach of the criminal justice system to the relevance of customary law from the late 19th Century and into the 20th Century, it is also worth reflecting upon the way in which the system treated Aboriginal people who came into contact with it. Mildren J provides a very helpful summary:

"In the 19th and early to mid 20th centuries, the criminal justice system was employed, at times, harshly and unevenly at every stage of the process.

- Whilst the Northern Territory remained part of South Australia Aboriginal prisoners were chained together and marched overland from Alice Springs to the railhead at Oodnadatta to be dealt with by the Court at Port Augusta and then brought back again. The same applied if they were to be tried in Darwin.
- Well into the late 1920s and early 1930s, Aboriginal witnesses were often treated in the same way as prisoners and indeed held in police custody until they had given evidence. Despite criticism of this undoubtedly illegal practice by the Ewing Royal Commission in 1920 it continued until the early 1930s.
- Aboriginals suspected of having committed offences were often not given any caution that they need not answer any questions and even if the caution were administered, it was often unintelligible to them. In 1928 Justice Mallam rejected the confessions of the two Aboriginal accused tried for the murder of Fred Brooks (whose death had led to the infamous Coniston massacre earlier in 1928). Neither accused had been administered a caution, but the Judge went further and indicated that in his view they should not have been interviewed without the consent of the Protector of Aborigines.
- Aboriginal accused were usually represented by legal counsel, but were not usually permitted to have an interpreter in Court to interpret the proceedings to them with the result that some observers commented that the trial might just as well have been conducted in the accused's absence.

- Aboriginal witnesses usually gave evidence in pidgin-English which was not necessarily well understood by juries.
- Aboriginal witnesses were not capable of being sworn.
- There were no trained interpreters in Aboriginal languages and there was no interpreter service.
- Aboriginal witnesses or accused who gave evidence in English were sometimes misunderstood because the form of English used was Aboriginal English.
- Aboriginal accused rarely gave evidence in their own defence.
- At times juries showed little interest in convicting Aboriginals accused of committing offences against other Aboriginals and acquitted in the teeth of the evidence.”

(footnotes omitted)

In 1892 Charles Dashwood was appointed as Territory Government Resident and Judge. In his first sittings as a Judge, which occupied three days, ten Aboriginal men were convicted of murder and sentenced to death. Concerns were expressed in the press that the defendants did not comprehend the proceedings, but those concerns were accompanied by urging that the sentences be carried out to teach Aboriginal people “right from wrong”. As Government Resident, it was the duty of Dashwood J to advise the Government whether and how the sentences should be carried out or whether a reprieve should be granted. He recommended that sentences be carried out on two of the ten men, but the others were reprieved. The decision depended on the view taken as to the extent to which the accused had experience of and understanding of white man’s ways, their understanding of English and, therefore, their understanding of the consequences of their actions.

Dashwood J’s views towards Aboriginal people and his ways of dealing with them modified gradually. After 1894, interpreters were made available to interpret the whole of proceedings to an Aboriginal accused of serious offences.

In 1900 an Aboriginal man, Peter Long, was charged with the tribal murder of another Aboriginal person as a result of carrying out tribal punishment. He was acquitted of murder, but convicted of manslaughter. Dashwood J left provocation to the jury. The report suggests that evidence of custom was relevant to the question of intent and to sentence.

In 1931 the Hon A Blakely, Commonwealth Minister for Home Affairs (Interior), advocated that Territory Aboriginal persons should be tried by a tribunal comprised of people with a thorough knowledge of Aboriginal custom who could “sift through native evidence”. The following year, Blakely’s successor, Archdale Parkhill, was advised by the Lieutenant Governor of Papua, Sir Hubert Murray, against legislation abrogating the general law to allow for the operation of “native law”. It was considered that customary law was sufficiently taken into account in the Territory Magistrates and Supreme Courts by way of “substantive defence as negating

criminal intent or more frequently in mitigation of sentence". Murray suggested changes in the Territory, including machinery to ensure that evidence of custom could properly come before the court in mitigation of sentence, greater emphasis on Aboriginal customary law in determining criminal intent and regular sittings of the Supreme Court in Arnhem Land, the Roper and McArthur River districts, the Daly and Victoria River districts, Tennant Creek, Darwin and Alice Springs. Murray also urged the abolition of the jury system for offences between Aboriginal persons and the use of assessors or special juries in cases where both Aboriginal and non Aboriginal persons were involved.

An interesting event occurred in 1933. A panel of 60 jurors presented a petition to Sharwood AJ sitting in Darwin calling for Aboriginal persons to be tried in accordance with customary law in circumstances where the offence was known to be of a tribal nature. The jurors pointed out that often tribal elders were charged with an offence for inflicting punishment on another Aboriginal person in accordance with customary law. They sought the establishment of a "tribal court", created for the specific purpose of dealing with cases of this type, which would function under "milder laws of punishment" than those provided by the criminal system. The jurors stated:

"It is known that if one Aboriginal unlawfully and violently injures another, his tribe will see to his proper punishment, irrespective of what the white man does to him. It is strongly urged that the whole question should be investigated and reported to the Government by men who have lived amongst the natives and have knowledge of their codes, and by men who have studied their laws and customs from a scientific point of view, and by men who are genuinely and sympathetically interested in the Aborigines. Such men are the likeliest to point out the best manner in which to achieve the desired result. Leaving the matter in the hands of those who have no knowledge of the Aboriginal would only result in a remedy worse than the disease."

In the same year the Aboriginal Friends Association argued:

"In all cases of breaches of law in which Aborigines are concerned, full consideration should be given to tribal traditions and customs, in order that full justice may be done. It would be the duty of the field officers not only to be familiar with tribal language, laws, traditions and customs, but to explain to the Aboriginal so much of the white man's law as he is expected to obey. Many cases could very well be dealt with in the locality in which they arise, whereby many complications and much expense and inconvenience would be avoided."

In addition, the press and missionary and other bodies made representations on the need for a positive policy on Aborigines to the Commonwealth.

Following public pressure, and acting on the advice of Murray, the Commonwealth Government introduced significant reforms. In 1933 Ordinance No 2 of 1933 abolished juries in the Northern Territory for all trials on indictment except those punishable by death. This amendment applied to all accused persons and was not repealed until 1961. The court was given discretion not to apply the death penalty to an Aboriginal person convicted of murder, but could impose such penalty as was just

and proper in the circumstances. In determining the appropriate sentence the court was able to take into account any relevant native law and custom and any evidence in mitigation. According to anthropologist Professor Peter Elkin (writing in 1945), the potential of this provision was not fully realised because personnel with an adequate knowledge of customary law, anthropology and psychology were not available. There were also other difficulties with the legislation. Some judges were reluctant to take native custom into account in cases involving a white victim. Justice Thomas Wells, who was appointed the Territory Judge in August 1933, was reported to have described the Crimes Ordinance 1934 (NT) as 'ill-considered legislation hampering both judge and counsel'.

The comment by Wells J was apparently made in the context of the trial of an Aboriginal man for murder. The man was referred to as Tuckiar, but his proper name was Dhakiyara Wirrpanda.

It is worth reflecting upon Tuckiar's case. The events occurred against a background of considerable tensions within Aboriginal communities in Arnhem Land, due in part to increased mission activities and to the operations of Japanese pearlers.

In September 1932 five Japanese fishermen were killed at Caledon Bay in eastern Arnhem Land by a group of Aboriginal men. Constable McColl was one of a group of police officers sent to enquire into the killings. During the expedition McColl was fatally speared. A summary of the evidence led at trial appears in the judgment of the High Court on appeal following conviction.

The High Court quashed Tuckiar's conviction and entered a judgment of acquittal. Shortly after Tuckiar was set free, he disappeared. Suspicions linger as to the cause of that disappearance.

The facts reported on appeal make interesting reading and, in themselves, provide a commentary on the way in which the criminal justice system was administered at that time. A far more detailed examination of the events and the course of the trial is provided by the current Administrator of the Northern Territory, his Honour Ted Egan, in his book: "Justice All Their Own". His Honour also provides an insightful view of life in the Territory at that time.

Wells J presided over the trial of Tuckiar and sentenced him to death. Despite recent legislation, his Honour refused to have regard to Tuckiar's background and cultural circumstances. This refusal in a case where a white man had been killed, and the fact that similar difficulties had arisen in at least four other cases, led to significant public reaction in the South including a large public meeting at Kings Hill in Sydney in 1934. The Prime Minister and the Australian High Commissioner in London became involved. Public pressure ultimately led to the appeal to the High Court.

With public feeling running high about the perceived injustice of a strict application of British laws to Aboriginal persons, a number of steps were taken or proposed by

the Commonwealth Government for the Northern Territory, and by several States, to make the criminal law more responsive to the needs of Aboriginal persons. This was done by reforms at both the substantive and sentencing levels.

In 1937, following a conference of State and Federal Ministers, a policy of “assimilation” was officially adopted. Although the word “assimilation” only became common in the 1930’s, the philosophy of assimilation had pervaded the work of various Aboriginal protection boards established in the 1880’s.

Justice Martin Kriewaldt was appointed to the Supreme Court of the Northern Territory in 1951. He was supportive of the Government policy of assimilation and the ideal that the same laws should be applied whether the accused was Aboriginal or white. Writing in 1960, Kriewaldt J had the following to say about what assimilation meant in the context of the criminal law:

“... policy of assimilation whereby it is hoped to make the Aborigine a useful member of the community. As part of that process it is essential that he be taught that the criminal law will inflict punishment on him for crimes such as murder, assault and theft. It is equally essential that he be taught the law will protect him and thus remove the temptation to take the law into his own hands ...”.

In 1939 the Evidence Ordinance (NT) removed the requirement for Aboriginal witnesses to take an oath before giving evidence in civil and criminal matters and enabled such testimony to be taken through an interpreter, reduced to writing and used in evidence in later proceedings without further appearance by the witness. In the same year, EWP Chinnery, the Director of Native Affairs in the Northern Territory and Commonwealth Advisor on Native Affairs, announced plans for the introduction of courts for native matters. The Native Administration Ordinance 1940 (NT) enabled the establishment of such courts with jurisdiction limited to matters arising between Aboriginal persons and between the administration and Aboriginal persons. Draft regulations were prepared, similar to those applying to the village courts in Papua New Guinea at that time. Patrol Officers were sent to Sydney University for training in anthropology, native administration and law. However, the war years and post-war difficulties effectively put an end to the proposal. The Native Administration Ordinance 1940 (NT) was never proclaimed and was repealed by Ordinance No 16 of 1964.

In 1946, a Judge hearing a case involving a tribal killing at Milingimbi was reported to have told the jury that “the idea prevalent in the community that native-wrongdoers should not be punished by the white man’s law is sloppy sentimentality and should be discouraged”.

As mentioned, Kriewaldt J was a supportive of assimilation and the ideal that the same law should be applied to Aboriginal and white persons. Throughout the 1950’s Kriewaldt J consistently adopted the view that an Aboriginal person should never

receive a more severe sentence than would be given to a non-Aboriginal person convicted of a similar crime. Although his Honour recognised that cultural factors, including customary law, were relevant to the assessment by juries of factual issues such as intent, his Honour was not in favour of self-determination or recognition of customary law. His approach to sentencing and to the recognition of customary law where relevant to an existing legal category was not dissimilar to the current approach taken by the Supreme Court of the Northern Territory.

Kriewaldt J died in 1960. In an article which was published posthumously in the same year, Kriewaldt J raised a number of issues that may be summarised as follows:

- His Honour believed that in many cases involving both Aboriginal offenders and victims, a more thorough investigation into the circumstances of the incident needed to be undertaken. He was of the view that in many cases this would reveal that the offender was also a victim. His Honour noted it was rare for charges to be brought against the person whose actions caused the offender to commit the crime.
- His Honour acknowledged that the failure to extend the full protection of the criminal law to Aboriginal people arose partly because the offending act was not one which fitted into categories of crime adopted by the legal system and partly because the criminal law was set in motion by “persons insufficiently acquainted with its ramifications”. His Honour believed that officers of the Welfare Department should not confine their activities to defending Aboriginal persons accused of crime, but should in proper cases initiate prosecutions and in some cases take preventative action. He suggested that to cover cases not readily classified as breaches of ordinary law, there should be more frequent use of the powers of banishment conferred on the Director of Welfare by the Welfare Ordinance, but this power should be subject to review by the courts. His Honour was of the view that every order of banishment should be reported to and examined by an independent authority. That view was advanced in the light of his Honour’s belief that to give a “ward” a formal right of appeal would be illusory.
- His Honour was of the view that the task of making Aboriginal persons realise that the criminal law is sufficient to provide an aggrieved person with a measure of protection against other Aboriginal persons, with the consequence that retaliation could be safely abandoned, was one of the major problems of the policy of assimilation.
- As to knowledge of breaches of “white law” and the influence of “tribal law”, his Honour made the following points:
 - (i) A substantial proportion of the crimes brought before his Honour were committed by Aboriginal persons who had little prior contact with white civilisation. The majority had experienced contact with non-Aboriginal society, but had lived mainly an “Aboriginal” life.
 - (ii) Crimes due to “causes which could be referred to tribal laws or

customs” were few. A few crimes were comprised of “violence permitted by Aboriginal custom”, but in nearly all cases the degree of permitted violence was exceeded.

- (iii) The major of cases of violence arose from anger, lust or revenge and the actions of the offender were considered wrong by the Aboriginal community. This was demonstrated by the number of cases in which tribal punishment was inflicted on the offender, or would have been inflicted if the offender had not fled or the authorities had not intervened.
- (iv) His Honour said:

“In a substantial proportion of cases I tried the accused acted in accordance with the customs of his tribe, but would have realised that his actions would lead to punishment if he had stopped to think about this aspect.”
- (v) His Honour reported that there had been a Ministerial Direction “that no action is to be taken with regard to offences committed by one Aborigine against another Aborigine until the facts have been placed before the Chief Protector of Aborigines and his authority procured for such action”. A later direction confined this to “relatively uncivilised natives ... who are not under any form of permanent European control.”
- (vi) His Honour recommended that two assessors sit with the Judge in all cases where an Aboriginal person was charged with murder and in any other case where the Judge, having read the depositions, thought it advisable that such assessors sit. The assessors should be drawn from a panel of persons who possessed substantial experience with Aboriginal persons, but should not be past and present police officers or officers of the Welfare Department.
- (vii) His Honour advocated that the Judge of the Northern Territory be given facilities to make frequent visits to Aboriginal settlements and that the Supreme Court library be provided with material relevant to anthropology.

The mid to late 60’s saw a significant change of attitude. The general approach of Australian Governments shifted to a recognition of and respect for the traditional culture of Aboriginal people. It is often said that the 1967 Constitutional Referendum marked the commencement of this change, together with the beginning of the land rights movement at Wave Hill in 1966 when Aboriginal stockmen and women walked off the job in protest at their working conditions and wages and sought the return of some of their traditional land. It can be said that this change in policy was part of a more general recognition that colonial notions were no longer appropriate.

On numerous occasions during the 70’s and 80’s sentencing courts took into account cultural influences, traditional punishments and wishes of communities. A selection

of those cases is footnoted. However, sentencing Judges repeatedly observed that the extent to which those factors could mitigate a sentence was limited. Gallop J observed in *Lane*:

“The punishment which I impose must be seen to be a well-deserved punishment according to white man’s community standards and also according to Aboriginal standards.”

In *Jungarai*, Muirhead J emphasised that “the Australian law is designed to protect all Australians ...”.

The position was well explained by Brennan J in an oft quoted passage from his Honour’s judgment in *Neal v The Queen* (1982):

“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.”

In 1984 the Northern Territory Criminal Code came into effect. At that time the Code included a provision whereby it was not unlawful for an Aboriginal person to enter into a tribal marriage with a child under 16, or to have sexual intercourse with a child under 16 to whom he was married in accordance with customary law. This provision was repealed in 2004.

In December 1985 the Australian Law Reform Commission delivered its report: “The Recognition of Aboriginal Customary Laws, Report No 31 (1986).” It was a comprehensive report. Included in its findings were the following:

- “ Even when traditionally orientated Aboriginal persons are involved in criminal offences, the case will involve non-traditional elements (especially alcohol) or a non-traditional offence.
- Even for traditionally orientated Aboriginal persons, it is more common that the act which resulted in the offence cannot readily be identified as related to Aboriginal customary laws.
- The characteristics of traditionally orientated Aboriginal offenders do not differ markedly from the characteristics of other Aboriginal offenders.”

The ALRC made the following recommendations regarding the interaction between customary law, criminal law and sentencing:

- “ There is no special justification for changing the criminal law defences which contain an objective element (eg provocation, duress, self-defence) so as to eliminate the objective test, provided the courts can take Aboriginal customary laws into account in determining what the response of a ‘reasonable’ person would have been in the circumstances.
- Duress, coercion, mistake and honest claim of right are not generally applicable defences which would exonerate Aborigines who commit offences in accord with customary law.
- The fact a defendant was intoxicated should not exclude the application of other provisions for the recognition of Aboriginal customary law in determining criminal liability.
- Legislations should provide that customary law and traditions should be able to be taken into account, so far as they are relevant, in determining whether the defendant had a particular state of mind and in determining the reasonableness of any act or omission or belief of the defendant.
- A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should provide that where the defendant is found to have done the act that caused the death in the well-founded belief that the customary law of the Aboriginal community to which the defendant belonged required the act to be done, the defendant should be convicted of manslaughter rather than murder. The onus should lie on the defendant on the balance of probabilities.
- In particular cases the ‘incorporation’ of Aboriginal customary law as the basis for a particular offence may be desirable, especially to protect traditions, rules or sites from outside invasion or violation.
- Attention should be given by prosecuting authorities to the appropriateness of declining to proceed in certain cases involving customary law. Prosecutorial discretions may be relevant in those cases where Aboriginal customary law, without necessarily justifying or excusing criminal conduct, is a significant factor and where the Aboriginal community in question has through its own processes resolved the matter and reconciled those involved. Relevant factors in such a case would include:
 - That the offence was committed against the general law where there is no doubt the offence has a customary law basis;
 - Whether the offender was aware that the offender was breaking the law;
 - The matter has been resolved locally in a satisfactory way in accord with customary law processes;
 - The victim does not wish the matter to proceed;
 - The relevant Aboriginal community’s expectations is that the matter has been resolved and should not be pursued further;
 - Alternatives to prosecution are available (diversionary procedures);
 - The broader public interest would not be served by prosecution.
- Although the consent of the defendant or victim to traditional dispute resolving processes is relevant in relation to bail, sentencing and prosecution policy, the recognition of this aspect of Aboriginal customary law is not to be achieved through

the existing law relating to consensual assault or through changes to that law.

- Courts have recognised a distinction between taking Aboriginal customary law into account in sentencing and incorporating aspects of Aboriginal customary law in sentencing orders. In doing so, courts have recognised the following propositions:
 - A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to ‘protect’ the defendant from the application of customary law.
 - Similar principles apply to discretions as to bail. A court should not prevent a defendant from returning to the defendant’s community (with the possibility the defendant will face some form of traditional punishment) if the defendant applies for bail and if the other conditions for release are met.
 - Aboriginal customary law is a relevant factor in mitigation of sentence;
 - Aboriginal customary law may also be relevant in aggravation of penalty, but only within the generally applicable sentencing limits applicable to the offence.
 - Within certain limits the views of the local Aboriginal community about the seriousness of the offence and the offender are also relevant in sentencing;
 - Courts cannot disregard the views and values of the wider Australian community.
 - Courts cannot incorporate Aboriginal customary law penalties or sanctions which are contrary to general law;
 - Where the form of traditional settlement involved would not be illegal a court may incorporate such a proposal in its sentencing order provided that it is possible under the principles of the general law governing sentence. Care is needed to ensure the appropriate local consultation in making such orders.
 - An offender’s opportunity to attend a ceremony which is important to him and his community may be a relevant factor to take into account on sentencing, particularly where there is evidence the ceremony may have a rehabilitative effect.
- A general legislative endorsement of the practice of taking Aboriginal customary law into account is appropriate. It should be provided in legislation that where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters to which the court shall have regard in determining the sentence include, so far as they are relevant, the customary law of that Aboriginal community and the customary law of any other Aboriginal community of which some other person involved in the offence (including the victim) was a member at the relevant time. In addition it should be provided that in determining whether to grant bail and in setting the conditions of bail, account shall be taken of the customary law of any Aboriginal community to which the accused or the victim of the offence belonged.
- A sentencing discretion to take Aboriginal customary law into account should exist even where a mandatory sentence would otherwise have to be imposed.
- Existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used, including, in particular, the prosecution’s power to call evidence and make submissions on sentence and the use of pre-sentence reports.
- Defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary law

contrary to the interests of or otherwise than as instructed by the accused.

- Separate community representation is not appropriate in most cases.
- In cases where Aboriginal customary law or community opinions are relevant, legislation should specifically provide that where a member of an Aboriginal community has been convicted of an offence, the court may on application made by some other member of the community or a member of the victim's community give leave to the applicant to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms."

The ALRC Report received support from the Royal Commission into Aboriginal Deaths in Custody. In recommendation 219, the Royal Commission referred to the Report as a "significant, well-researched study" and urged the Government to report as to the progress in dealing with the Report.

In 1992 Wood J sentenced an Aboriginal offender for offending committed in circumstances distressingly familiar to Judges and Magistrates in the Territory. The offender pleaded guilty to maliciously wounding with a knife. He stabbed his sometime de facto partner with a butcher's knife a number of times around the neck and leg causing very severe injuries. The head-note to the report summarises the offender in the following terms:

"He had been drinking heavily and claimed to have no recollection of his actions. He had a history of alcohol abuse and a relatively extensive criminal history. He was described as semi-educated from a deprived background. There were signs of organic brain damage consistent with alcohol abuse, together with indications of an unstable personality."

After a review of relevant authorities, including *Neal*, Wood J identified the relevant principles and factors in remarks which have been consistently adopted throughout Australia:

"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.”

In response to the recommendations of the Royal Commission, in 1995 the Northern Territory Government initiated a strategy called the Aboriginal Law and Justice Strategy (ALJS). Included in the objective of the ALJS were the following:

- “ Increasing community accountability and responsibility.
- Establishing a community justice framework at a community level.
- Maximising community participation in the administration of justice.
- Reducing the over-representation of Aboriginal people in the criminal justice system.
- Establishing a structure that could interface with Government and coordinate services.”

The 2007 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (“the Inquiry”) was told that in practical terms the ALJS commenced in 1995 in the community of Ali Curung. In 2000 it was introduced in Lajamanu and then in 2002 into Yuendumu. These are all Warlpiri communities. The practical operation of the ALJS involved a Government employed facilitator, known as “cultural broker” or “external planner”, who would work on the ground assisting the communities to achieve the objectives. The Inquiry was told that the ALJS was instrumental in:

- “ Establishing men’s and women’s night patrols, safe houses, dispute resolution practices, role and peer modelling programs, diversionary programs and protocol agreements between the relevant communities and Government and non-Government agencies and organisations.
- Conducting research into Aboriginal views, understandings and perspectives of Government structures, policies and actions.”

Significantly, the Inquiry was told that the ALJS was responsible for breaking down many of the barriers that existed in relation to the effective delivery of services and in relation to the interaction of Aboriginal people with the dominant culture. This included:

- “ Greater community understanding and confidence in the administration of justice.
- Greater rapport and relationships with Government agencies.
- A greater voice for women’s issues.”

In 1998, in response to the push for Statehood which was undertaken by the Territory Government of the day, at the Kalkaringi Constitutional Convention the combined Aboriginal Nations of Central Australia developed the Kalkaringi Statement. The Statement set out the aspirations and concerns expressed by delegates at the Convention regarding issues of Statehood, constitutional development, land rights, sacred sites and significant areas, political participation, essential services and infrastructure, human rights and governance. It also made recommendations about customary law and justice which included:

“That there must be direct Commonwealth funding of Aboriginal communities and organisations. . . .

That a Northern Territory Constitution must recognise Aboriginal law through Aboriginal law makers, and Aboriginal structures of law and governance.

Justice Issues

1. That the Northern Territory Government must negotiate in good faith with Aboriginal communities regarding: (a) the administration and resourcing of community justice

mechanisms; and (b) the effective participation of Aboriginal people in the justice mechanisms of the Northern Territory.

2. That a Northern Territory Constitution must recognise the right of Aboriginal people to understand and be understood in legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
3. That the Northern Territory mandatory sentencing legislation is contrary to Australia's obligations under the International Covenant on Civil and Political Rights and other international human rights instruments, and must be repealed."

In 2002 the Northern Territory Attorney-General requested the Northern Territory Law Reform Commission to enquire "into the strength of Aboriginal Customary Law in the Northern Territory" and to report and make recommendations "on the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social wellbeing, law and justice, economic independence, wildlife conservation, land management and scientific knowledge." The Committee reported in 2003 with the following recommendations relevant to the topic of the criminal justice system and Aboriginal customary law:

"Recommendations:

1. **Cross cultural training:** That Judges, Magistrates Court officials and other appropriate persons should receive cross cultural training in Aboriginal affairs.
2. **Video conferencing:** It is recommended that Communities have access to video conferencing facilities to avoid the need of Community elders and witnesses travelling often to court hearings.
3. **A whole of government approach:** That government take into account the relevance of Aboriginal customary law in the delivery of services to Aboriginal communities and any strategy to recognise traditional law should not cut across other government services or programs on Aboriginal communities.
4. **Law & Justice plans:** Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.
5. **Responding to promised marriages:** That so far as the concept of 'promised brides' exists in Aboriginal communities, the government sets up a system of consultation and communication with such communities to explain and clarify government policy in this area.
6. **Inquiry into the issue of payback:** Establish an inquiry into the extent to which the traditional law punishment of payback is a fact of life on Aboriginal communities, and develop policy options for government to respond to this issue.
7. **A community sentencing model:** A model for allowing community input into the sentencing of offenders, for adoption by Aboriginal communities and the courts.
8. **A pilot project:** the government proceed to assist Aboriginal communities to

implement law and justice plans, by making resources available for several pilot programs.

9. **Increased participation of Aboriginal people in the justice system:** That government develop strategies to increase Aboriginal participation in the criminal justice system.
10. **Law reform strategy:** That government adopt a policy of ensuring the application of the general law of the Northern Territory does not work injustice in situations where Aboriginal people are subject to rights and responsibilities under traditional law, and that statute law should on appropriate occasions recognise this.
11. **Aboriginal customary law as a source of law:** The Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a 'source of law' should be implemented.
12. **Transfer to Aboriginal members:** That such of the present Aboriginal members of this Committee who consent to do so, should remain as a Consultative Committee to the Attorney General about the operation of these recommendations with the Attorney General having the discretion to appoint further Aboriginal members."

On 17 March 2004 the Northern Territory Criminal Code was amended by the Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003. Although it is not unlawful to be married to a child younger than 16 years, it is now unlawful to have sexual intercourse or maintain a sexual relationship with a child under the age of 16. Maximum penalties were increased.

Effective on 16 February 2005, the Territory Sentencing Act was amended by the insertion of s 104A to govern the manner in which a court may receive information about customary law or the views of an Aboriginal community concerning an offender or an offence. The court is directed to receive the information only from a party to the proceedings and in the form of evidence on oath, an affidavit or a statutory declaration after notice has been given to other parties. The amendment to the Sentencing Act reflects the decision of the Court of Criminal Appeal in *Munungurr* and implicitly recognises that issues based in customary law may be relevant to the exercise of the sentencing discretion. The Attorney-General of the day stated that as Aboriginal law is held collectively, it is important to ensure that aspects of customary law put before the court accurately reflect that law in its wider context within the relevant community.

In 2005 the Aboriginal Law and Justice Strategy was discontinued. The Inquiry was informed that the Strategy was discontinued without consultation or independent valuation of its success or otherwise causing further disempowerment and disillusionment for the communities involved.

2006 and 2007

So to 2006 and 2007 in the Territory prior to the Emergency Response Act. Customary law had the potential to impact upon criminal proceedings for offences against the laws of the Territory in a number of ways relevant to both sentence and conviction.

As to sentence, s 5(2)(c) of the Sentencing Act (NT) requires the court to have regard to “the extent to which the offender is to blame for the offence”. Under Territory legislation, in assessing the culpability of an Aboriginal offender customary law may be relevant, but the weight to be given to the impact of customary law varies significantly according to the circumstances, including the seriousness of the offending. As Mildren J explained in *Hales v Jamilmira*:

“It should be made clear that wherever there is a direct conflict between the law of the land and Aboriginal customary law, the law of the land must prevail. ... However that does not deny that social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs are not relevant to moral blame and therefore to sentencing. The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives.”

The relevance of customary law to the culpability of an Aboriginal offender was confirmed by the Territory Court of Criminal Appeal in *R v GJ*. The offender, a 55 year old traditional Aboriginal man, pleaded guilty to aggravated assault and unlawful sexual intercourse with a child aged 14 years. The offender had been brought up in the traditional way in a remote Aboriginal community and when the child was aged about four years the child’s family promised her as a wife to the offender in accordance with traditional Aboriginal law. The child formed a friendship with a young male and stayed in the home of a mutual friend with whom the boy also stayed. The child’s grandmother removed the child from the house and both the grandmother and the offender struck the child over her shoulders and back. The child was taken to the grandmother’s house where the grandmother told the offender to take the child and told the child that she had to go with the offender. The sexual offence occurred at an outstation to which the offender took the child.

The sentencing Judge heard evidence from tribal elders as to the relevant customary law and found that the offender did not know he was committing an offence against Territory law. His Honour accepted that the offender believed that assaulting the child and having sexual intercourse with her was justified and acceptable because she had been promised to him and had turned 14. The Crown accepted that the offender held that belief and also accepted that based on the offender’s understanding and upbringing in traditional law, he believed the child was consenting to sexual intercourse. The sentencing Judge also found that there was nothing in the traditional law which required the offender to have sexual intercourse with the child.

On a Crown appeal against the adequacy of the sentence, Mildren J, with whom Riley and Southwood JJ agreed, observed that “there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact” [30]. Southwood J added the following observations [71]:

“The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities.” (citation omitted)

Independently of the question of moral culpability, customary law may be indirectly relevant to sentence through the past or prospective infliction of punishment pursuant to customary law. The infliction of such punishment may affect the attitude to penalty of the victim, the victim’s family and the relevant Aboriginal community. In particular, if traditional punishment has or will be carried out to the satisfaction of those persons and the community, indirectly customary law has had an influence.

More commonly, the infliction of punishment under customary law is relevant to sentence in accord with the principle that a sentencing court should have regard to all relevant facts which include detriments suffered by an offender as a consequence of committing the offence.

In *R v Minor*, the sentencing Judge had taken into account that upon release the offender would receive a traditional punishment of being speared in the leg. Mildren J, with whom Martin J agreed, said:

“The Director of Public Prosecutions did not suggest that his Honour erred in taking the possibility of future payback punishment into account. There is ample authority for that proposition. Indeed the Northern Territory has had a long history of taking into account tribal law when sentencing a tribal Aboriginal

...

The reason why payback punishment, either passed or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to ‘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’ (per Brennan J in *Neal* . . .). The Australian Law Reform Commission pointed out that another reason for this attitude ‘derives from an important principle of the common law, that a person should not be punished twice for the same offence’, noting that ‘in practice it appears that some balancing of punishments is done within both systems’: ALRC Report, par 508.

Malcolm CJ, in *Rogers v The Queen* (1989) 44 A Crim R 301 at 307, explains the rationale in terms of the Court's general power to take into account mitigating factors ...”

In *Minor*, Asche CJ drew a distinction between “payback” and a “vendetta”:

“... Payback is not a vendetta. There must be clear evidence of the difference. ... Payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process, vendetta never. It will be a serious and impermissible abrogation of the court's duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If ... it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the court could countenance any really serious bodily harm.”

Taking into account traditional punishment pursuant to customary law is, in principle, no different from taking into account the fact that an offender received retribution at the hands of friends or family of a victim. The issue was considered by the New South Wales Court of Criminal Appeal in *R v Daetz* where the offender had been seriously assaulted by friends of a victim as a consequence of which the offender sustained severe injuries. In a judgment with which Tobias AJ and Hulme J agreed, James J considered a number of authorities, including *Minor*, and reached the following conclusion with which I respectfully agree:

“[62] I have concluded from this examination of the authorities ... that, while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retributive revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no significant weight.”

Much of the discussion about traditional punishment tends to assume that all traditional punishment is unlawful. This is not the case. Many Aboriginal clans have modified their traditional punishments. In *R v Gondarra* Southwood J of the Territory Supreme Court dealt with an offender who set fire to clothing and bed linen in a dwelling house at Galiwinku which burnt down. The community became involved.

The leaders of the relevant clans imposed punishment in various lawful forms to which the offender consented. The offender was subjected to “territorial asylum” and prohibited from drinking and smoking. He was required to spend time on his clan’s homeland for the purposes of appreciating the law of his country and reflecting upon the seriousness of his offending. The offender attended a “Chamber of Law” or “Ngarra” established by the leaders of the relevant clans at which he was required to attend for approximately four hours each day over a period of three months. He received lessons in how to properly observe traditional law and was taught the ways in which traditional law is “fair, rigorous and impartial”. The offender successfully undertook these punishments, but at the time of sentencing had not yet completed the third and final stage of the Ngarra.

Southwood J took into account the fact that the offender had undergone traditional punishment and structured a sentence which required the offender to complete the third stage of the Ngarra. His Honour also regarded the offender’s acceptance of punishment determined by the leaders of the clans as relevant to remorse and prospects of rehabilitation.

By way of a different example not strictly part of customary law, but relating rather to cultural beliefs, in 2002 Angel J dealt with an offender for a number of offences including a form of arson and causing grievous harm. Everyone concerned believed that the offender had been placed under a spell to act through the Kadaitcha man as an agent for payback owing to two of the victims. Those victims believed that the spell was operative on the offender when he committed the offending and that the influence of the Kadaitcha man would continue until the offender was released from prison and the matter was able to be resolved in the Aboriginal way by removing the spell. Angel J took these matters into account in determining that the sentence would be suspended. The circumstances of that case could be seen as a rather unique example of restorative justice working within a particular community.

Against that background, what is the impact of the Emergency Response Act? Section 91 applies only to considerations affecting sentence. What is the meaning of “any form of customary law or cultural practice”? What is the reach of a prohibition against taking into account customary law or cultural practice “as a reason for” excusing or lessening the seriousness of the criminal behaviour “to which the offence relates”? Does the expression “criminal behaviour to which the offence relates” concern only objective features of the offending or does it extend to the mental state of the offender, including moral culpability? Is it appropriate to regard the infliction of traditional punishment as a separate issue of no relevance to the “seriousness of the criminal behaviour to which the offence relates”?

Whatever be the answers to these questions, the amendments have no impact upon the relevance of customary law, practice or beliefs to the commission of substantive offences. Issues such as duress and sudden and extraordinary emergency have the potential to involve questions of customary law, practices and belief because they involve the “ordinary person similarly circumstanced”. To what extent that ordinary

person is a person possessing the offender's cultural beliefs and practices remains uncertain. Similar potential existed for customary law to be relevant to the defence of provocation which reduces murder to manslaughter because it is relevant to an assessment of the gravity of the provocative conduct or words..

There is also the possibility that beliefs based in cultural law and practices can be applied to a defence of honest claim of right under s 30(2) of the Criminal Code.

An interesting question could arise under s 31 of the Criminal Code which states that a person is excused from criminal responsibility "for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct." Subsection (2) of s 31 provides that a person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, "is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct". Whether cultural beliefs have a role to play will depend on whether the ordinary person similarly circumstanced for the purposes of s 31 is a person of the offender's cultural beliefs.

The role of customary law in relation to Aboriginal offenders is also recognised in the guidelines issued by the Territory Director of Public Prosecutions concerning the role and duties of the prosecutor and the conduct of prosecutions. The following paragraphs from that Policy specifically reflect that recognition:

“20. ABORIGINAL CUSTOMARY LAW

20.1 Aboriginal people account for 29% of the total Northern Territory population yet 78% of the Territory's prison population are Aboriginal. Aboriginal people reside in both urban areas and remote communities. From time to time, Aboriginal customary law issues arise in cases involving Aboriginal offenders and Aboriginal victims.

20.2 The Guidelines regarding Aboriginal customary law must be understood within a broader context which takes into account the following three factors:

- (1) Aboriginal customary law is an everyday part of the lives of Indigenous people in the Northern Territory
- (2) Aboriginal women's individual human rights to live free of violence must prevail over the minority rights of Indigenous people to retain and enjoy their culture; and
- (3) violence by Aboriginal males against Aboriginal females is prevalent in the Northern Territory.

Everyday part of Indigenous lives

20.3 Aboriginal customary law is an everyday part of the lives of Indigenous people in the Northern Territory. It is an important source of obligations and rights and is the outcome of many historical, social and cultural influences. It is not a code and may vary from one community to another. Additionally, there may be disagreement within communities or groups on aspects of customary law and their application to particular circumstances. Aboriginal men and women may also interpret customary laws differently; they may

have competing views regarding what should prevail in those particular circumstances.

Individual human rights

- 20.4 Aboriginal women's individual human rights must prevail over the minority rights of Indigenous people to retain and enjoy their culture. Any recognition of Aboriginal customary law must be consistent with universal human rights and freedoms. . . .

...

A prosecutor must ensure as far as possible that Aboriginal customary law is not used to curtail an Aboriginal woman's or child's right to individual safety and freedom from violence. Aboriginal women and children are Australian citizens and, as such, are entitled to the protection of the law.

Prevalence of violence

- 20.5 Violence by Aboriginal men against their Aboriginal female partners or ex-partners is very prevalent in the Northern Territory. High rates of homicide are paralleled by high rates of assault among Aboriginal people in the Northern Territory.
- 20.6 Violence should not be condoned.
- 20.7 In many Aboriginal communities, fighting behaviour exists. Some of that fighting behaviour is accepted as a method of redressing wrongs and restoring social harmony. This is often referred to as payback. Payback events are generally distinguishable from other violence because they are confined by limits and rules. They demonstrate a level of constraint; there is supervision and an involvement of many Aboriginal people, including the families of the offender and the victim. There is also an absence of alcohol. Such violence is also referred to as traditional violence.
- 20.8 The importance of distinguishing between traditional and non-traditional violence must not be overlooked:

When discussing violence against Aboriginal women, it should be noted that while it is important to distinguish between traditional and non-traditional violence, in practice it is often difficult to do so. Strictly speaking traditional violence refers to clearly defined and controlled punishments which were applied in cases where Aboriginal Law was broken, many of which are still in use in communities where traditional Law is followed. However, it may sometimes be used to describe violence which is not prescribed by Aboriginal law but which is condoned as a response to socially disapproved behaviour

...

One result of [Aboriginal women's changed role today compared with pre-contact times] is that they are now subject to violence from their own men of a kind which would not have been countenanced in traditional society. As one woman remarked; 'There are now three kinds of violence in Aboriginal society – alcoholic violence, traditional violence, and bullshit traditional violence'. Women are the victims of all three. By 'bullshit traditional violence' is meant the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right (A Bolger Aboriginal Women and Violence Australian National University, North Australian Research Unit, Darwin NT 1991:4, 50).

- 20.9 Further non-traditional aspects that are major contributing factors to contemporary violence are alcohol consumption, cannabis consumption and petrol sniffing.

- 20.10 There are other types of violence that should be classified outside of the defined boundaries of traditional violence – for example, domestic violence, child abuse, adult sexual assault and child sexual assault. There is a perception that Aboriginal people culturally condone sexual activity involving young Aboriginal girls; these young girls are entitled to the same protection afforded by the criminal law as any other young girls in the wider community.

...

Aboriginal customary law and the courts

- 20.12 There is a lengthy history in the Northern Territory of Aboriginal customary law being taken into account by the courts on sentencing issues. Less often, pleas to lesser charges have been accepted because of the manner in which Aboriginal customary law has been seen to impinge on substantive trial defences such as provocation.
- 20.13 Evidence sought to be led by the prosecution or the defence should be put before the courts in a proper manner. Submissions from the bar table concerning Aboriginal law and cultural practices are not appropriate – *Munungnurr* (1994) 4 NTLR 63.
- 20.14 Whenever there is a direct conflict between the law of the land and Aboriginal customary law, the law of the land must prevail – *Hales v Jalmilmira* (2003) 13 NTLR 14.
- ...
- 20.17 Aboriginal customary law is not a specific factor a Northern Territory court must have regard to on sentencing issues in the *Sentencing Act* (section 5(2)). However it is regularly regarded as falling within the category of ‘any other relevant circumstance’ (section 5(2)(s) *Sentencing Act*.)”

How Often

As to the number of occasions in which issues of customary law or cultural practice have been raised by a defendant, in her research paper Melanie Warbrooke reports as follows:

“Since 1994 [to 16 September 2006], there have been 3679 persons convicted of criminal offences in the Court, 1798 (48.87 per cent) of which have involved indigenous defendants. There have been 36 decisions handed down by the Court where customary law has been raised by a defendant – an average of three a year (less than one per cent of all cases before the Court). This equates to two per cent of indigenous offenders who have raised customary law as a mitigating factor in criminal matters. A further six cases involving customary law and criminal matters were heard on appeal from decisions of the Magistrates Court from 1994 to 16 September 2006, with one case of the Court which was heard in 1993, but went to the Court of Criminal Appeal in February 1994” (footnotes omitted)

In connection with sentence and the infliction of some form of traditional punishment upon the offender, being punishment inflicted either before or after sentence by the Supreme Court, for the period 1994 to 16 September 2006 the issue was raised in 27

cases. The existence of such punishment was accepted by the Supreme Court as a mitigating factor on twenty occasions.

As to relevance to moral culpability, of the 1,798 Aboriginal offenders before the Supreme Court in the period 1994 to 16 September 2006, in only 13 cases was it submitted to the Court that the offending behaviour was related to customary law. Warbrooke categorised the claims that the offending was related to customary law as follows:

- “(i) The offence was committed as punishment or payback for a breach of customary law: five cases;
- (ii) The offender was provoked by a breach of customary law: four cases;
- (iii) The complainant was the offender’s promised bride: two cases;
- (iv) The offender was acting in accord with customary law: two cases.”

Warbrooke reports the results as follows:

“The Court has accepted fully that the defendant committed the offence whilst acting in accord with customary law on four occasions. The four cases where evidence that the offence was committed whilst acting in accord with customary law were the two cases relating to promised brides, and two where the defendant was provoked by a breach of traditional law.

In addition there are a further two cases where the claim the offending behaviour was in accord with customary law was initially accepted by the presiding Judge or Magistrate, but then either not accepted by a jury or later disagreed with.”

In addition to the cases to which I have referred, in the same period 1994 to 16 September 2006 on four occasions an offender has claimed to be under the spell of a Kadaitcha man or sorcerer at the time of committing the offence. In only the matter of *James* discussed earlier in this paper did the sentencing Judge accept the submission as establishing a factor in mitigation.

When the current position is carefully analysed, the justice of the application of customary law, practices and beliefs to the substantive law and sentencing is readily apparent. There is no evidence that these considerations have been abused. The constant stream of violence by Aboriginal men against Aboriginal women and children is fed by alcohol and other drugs. Rarely are these cases connected to customary law, practices or beliefs. Repeatedly the courts in the Northern Territory have emphasised that the general law of the Territory must prevail in all circumstances and that violence by Aboriginal men against women and children will not be tolerated.

Timing of Commonwealth Intervention

The amendments to the Commonwealth Crimes Act do not appear to have been prompted by the decisions in *GJ*. The catalyst appears to have been the prominent attention given by the media to a paper by Dr Nanette Rogers, a Territory Prosecutor working in Alice Springs, delivered at a Conference of the Police Commissioners in October 2005.

Sentence was imposed in *GJ* in the remote community of Yarralin on 11 August 2005. The sentence attracted considerable criticism. The paper delivered by Dr Rogers in October 2005 did not become public knowledge until the broadcast of the Lateline program on 15 May 2006. In the meantime, on 3 November 2005 the Territory Court of Criminal Appeal heard the Crown appeal against the sentence in *GJ* and, on 22 December 2005, allowed the appeal, increased the sentence and delivered reasons which were immediately made available to the media.

Notwithstanding criticism of the original sentence, and some commentary adverse to the decision of the Court of Criminal Appeal, it does not appear that there was any significant push to amend the Commonwealth Crimes Act until the interview with Dr Rogers on the Lateline program was aired on 15 May 2006. It might not be stating it too highly to say that the Lateline interview was followed by a media and political frenzy. By the end of May 2006, the Commonwealth had made it plain that it intended to abolish customary law and practice from sentencing considerations for the purposes of offences against Commonwealth law. The COAG agreement was reached on 14 July 2006.

It is interesting, and sad, to reflect that the information aired by Dr Rogers was well known through past research papers and the experiences of police, medical personnel and others working in the field, and through cases in the criminal courts, yet it took media exposure of Dr Rogers' paper, particularly in relation to sexual abuse of young children, to prompt a legislative reaction. I leave others to judge the adequacy or otherwise of that reaction which was initially limited to amendments to the Commonwealth Crimes Act. Of course, more recent events and legislation have totally changed the legal, political and social landscapes for Aboriginal people in the Northern Territory.

The Inquiry Dispels Myths

In August 2006 the Chief Minister of the Northern Territory commissioned a Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. The 2007 Report of the Inquiry is titled "Little Children are Sacred". The authors went out of their way to endeavour to dispel some of the myths relating to the interaction between customary law and sexual abuse:

“Myth: Aboriginal law is the reason for high levels of sexual abuse

It is a dangerous myth as it reinforces prejudice and ignorance, masks the complex nature of child sexual abuse and provokes a hostile reaction from Aboriginal people that is not conducive to dealing with the problem.

My alarm bell is that sloppy and questionable academic research has the power to influence many people. Prejudice and ignorance may be reinforced. Media representations may then support such misconceptions, and hence feed into and trigger political action that has the capacity to create more problems. We do need education for early childhood; education for life; education for healing. But please not education that is fatally flawed (Atkinson 2006:22)

The Inquiry also believes that it promotes poor responses to a complex problem.

A constant theme from both Aboriginal men and women during consultations was that they felt deeply offended by the way the media and some politicians and commentators had spoken about them and their culture.

The Inquiry believes that the general effect of this misrepresentation of the Northern Territory situation has been that the voices of Aboriginal women and men have been negated by powerful media and political forces. This has hampered the important development of systems, structures and methods that have a genuine chance of reducing violence and child sexual abuse.

The Inquiry rejects this myth and notes that it is rejected by many other authoritative sources (e.g. Gordon et al. 2002; HREOC 2006; LRCWA 2006).

The reasons for the present level of child sexual abuse in Aboriginal communities are many and varied. They include the effects of colonisation and “learnt behaviour”. The Inquiry does not take the view that this absolves Aboriginal people from responsibility in dealing with this issue, but it goes some way to explaining why it exists and provides an insight into how to deal with it more effectively.

Myth: Aboriginal law is used as an excuse to justify abuse

The Inquiry has examined the relevant Northern Territory cases referred to in media reports, political remarks and academic research, as well as Northern Territory cases in general, where Aboriginal law has been an issue. The Inquiry was unable to find any case where Aboriginal law has been used and accepted as a defence (in that it would exonerate an accused from any criminal responsibility) for an offence of violence against a woman or a child.

Similarly, the Gordon Inquiry in Western Australia found no actual criminal cases in that state where legal argument on behalf of men charged with family violence or child sexual abuse has been put to the court to the effect their behaviour was sanctioned under Aboriginal law (Gordon et al. 2002).

The Law Council of Australia has stated that there is “no evidence that [Australian] courts have permitted manipulation of “cultural background” or “customary law” (Law Council of Australia 2006:17).

The following passages from the Report are also worthy of careful consideration:

“20. Community justice

20.1 Dialogue and Aboriginal law

There needs to be a real dialogue between these two systems of law so we can move away from the colonial mud slinging and find some real answers to real problems. Of course this will mean that there needs to be some true communication between these two systems of law. That is the real Aboriginal Traditional Law and the NT legal system... We are ready to live with one foot in both systems of law; can we find others on the other side who are ready to stand and work with us for the good of this country?

Rev. Djiniyini Gondarra – press release 19 May 2006

The Inquiry believes an opportunity exists in the Northern Territory for mainstream law and culture to work together with Aboriginal law and culture to create a unique, prosperous and positive living environment for all Territorians.

The Inquiry is of the view that government and mainstream lawmakers should begin meaningful dialogue with Aboriginal law-men and law-women as soon as possible.

The Inquiry was told that many of the problems that presently exist in Aboriginal communities, including the sexual abuse of children, are a result of a breakdown of law and order. During consultations, it was a regular and consistent complaint and observation that many people were not respecting either Aboriginal law or Australian law.

The Yolngu people want more control in the way that the justice system is delivered. They want more community involvement. At present a lot of people do not take the white fella law seriously. At the same time many people, particularly the young, do not respect the Yolngu law. We have a situation close to anarchy where neither law is followed.

Yolngu Elder

During community consultations, there was an overwhelming request from both men and women, for Aboriginal law and Australian law to work together instead of the present situation of misunderstanding and confusion.

We need to stop looking at the differences in the two laws and look at where they meet one another.

Burarra Elder

We want our Yolngu law to be written alongside the mainstream law so that everyone knows where they stand and it is clear.

Yolngu Elder

As a result of its consultations, the Inquiry is of the view that Aboriginal law is a key component in successfully preventing the sexual abuse of children.

The rationale behind this conclusion is that it is much more likely that Aboriginal people will respond positively to their own law and culture. They will not respond as positively to a law and culture imposed upon them. Most Aboriginal people spoken to by the Inquiry still viewed Aboriginal law as being at the core of their identity (this included urban based Aboriginal people who felt a similar sentiment but in a modified context). They see it as a vital key to restoring law and order within their

communities. There is still extremely strong resistance to a wholesale acceptance of Australian law at the expense of Aboriginal law.

The Yolngu have a law to which every member of that society has assented to. The colonial system is something that is coming at them externally and something that they have never assented to. There is still to this day a very strong resistance to this external law.

Yolngu Elder

The Inquiry was told that, at present, Aboriginal law and culture is breaking down. The lack of support from mainstream law and culture means that it is constantly misunderstood, disrespected, over-ridden and undermined.

Consequently, Aboriginal people feel disempowered and powerless to deal with “new” problems such as family violence and the sexual abuse of children.

Community Elders want to sit down with the Australian Law lawmakers and find a way that they can reassert their traditional laws with the backing of the Australian Law. Attitudes would change to abuse and violence. At present everyone just accepts it because they feel powerless to do anything about it. If this power is restored then there will be a snowball effect and soon attitudes will change.

Walpiri Elder

Australian law has knocked us out.

Western Arrente Elder

The Inquiry has heard and seen enough to confidently assert that there can be no genuine and lasting success in dealing with the dysfunction in Aboriginal communities (including child sexual abuse) unless Aboriginal law is utilised and incorporated as an integral part of the solution.

We need to breathe life back into the old ways.

Anindilyakwa female Elder

This can only be done through ongoing dialogue between the lawmakers of the two systems.

The Inquiry acknowledges that a stumbling block to this dialogue occurring is a general misunderstanding and misapprehension about Aboriginal law. While an analysis of the complexities, intricacies and deeper meanings of Aboriginal law are beyond the scope of this report, the Inquiry has, through its consultations and research, been able to glean some understanding of what Aboriginal law is and what it is not.

The Inquiry believes there is a misapprehension that the present violence and abuse existing in Aboriginal communities has a pathological connection to Aboriginal law.

These views are rejected by the people consulted by the Inquiry and by other authoritative sources. (Gordon et al, 2002; LCRWA 2006; HREOC 2006)

Based on its own consultations and research, the Inquiry rejects the notion that Aboriginal law itself is connected to causing, promoting or allowing family violence or child sexual abuse.

The Inquiry's experience was that there was generally more overall dysfunction in urban centres and those communities where Aboriginal law had significantly broken down. In the more remote, "traditional" communities, there was still dysfunction but often on a lesser scale.

The Inquiry was told that the foundation of Aboriginal law is "natural law". That is, law that exists in nature and is not made by man. The "natural law" is permanent and unchanging. The practical devotion to this "natural law" constitutes the foundation for Aboriginal law.

When the earth came into form and was created the Madayin (law) was there at the same time. When humans first breathed, the Madayin was there already. The Madayin tells us who we are at law, who belongs to which estate, who has the right to resources on each estate, and it tells us our rights and obligations and the way we should live. This is not something man has made up.

Yolngu Elder

The majority of the Aboriginal people consulted by the Inquiry understood that it is impossible to restore Aboriginal law to the way it was in pre-colonisation times.

However, Aboriginal law is clearly not confined to precolonisation times. While the "natural law" itself exists as a *solid unchanged table over which the tablecloth of whitefella law has been thrown* and cannot be changed, the Inquiry was told that the Aboriginal law that ensures compliance with this "natural law" has changed and can continue to change to reflect the changing world. The only requirements of "new law" are that:

- it is consistent with the "natural law"
- it creates a state of peace, harmony and tranquillity among the community
- it is assented to by the members of the community.

The Inquiry was told that while Aboriginal law can change, it had not been given the support or opportunity to appropriately evolve or adapt to deal with "new" problems, such as family violence and child sexual abuse that did not exist in pre-colonisation times.

It is in assisting and supporting the adaptation, modification and evolution of existing Aboriginal laws and the development of new laws that meaningful dialogue between the two systems of law is so vital.

The traditional fences have broken down and we need to repair them.

Gunbalunya Elder

(176) The Inquiry observed that many Aboriginal people are struggling to understand the "mainstream" modern world and law. They therefore do not know how to change Aboriginal law so that it works positively within the framework of the modern "mainstream" world.

In the old days we were going in a straight line, now we turning around and going in different directions.

Burarra Elder

Whitefella law is very slippery, like a fish.

Anindilyakwa Elder

Many of the Aboriginal people consulted by the Inquiry want to engage in dialogue with the “mainstream” lawmakers to work out how Aboriginal law can be adapted, changed or made so that it still respects the “natural law”, but also works smoothly within the mainstream system and does not conflict with it nor with International human rights standards.

The Inquiry understands that such an exercise in “legal development” has never been seriously attempted in postcolonisation Australia.

The Inquiry believes that in recent times any discussion about Aboriginal law has focused only on where it conflicts with mainstream law in the areas of “payback” and “traditional marriage”. Many Aboriginal people consulted by the Inquiry stated that their law had become weak as their sanctions were not supported by the mainstream law. The Inquiry adopts a position that any sanction that is inconsistent with international human rights cannot be supported by the mainstream law.

However, as the LRCWA (2006) pointed out in its report, some traditional physical punishments will not be unlawful. The LRCWA reached a conclusion that the lawfulness or otherwise of traditional physical punishments must be determined on a case-by-case basis. They also noted that such practices, if conducted for overall cultural benefit, do not necessarily conflict with international human rights (pages 137-148 LRCWA Report).

While not advocating violent punishment, clearly there is a need for dialogue between the two systems of law with a view to developing guidelines about the use of some (agreed) traditional punishments. Such dialogue may lead to a situation where modified traditional sanctions could be legally exercised for breaches of Aboriginal Law. It could also mean that, in certain circumstances, courts could lawfully bail offenders to undergo sanctions for breaching the Aboriginal Law. Such dialogue could have a focus on the adoption of non-physical sanctions.

While these issues are generally ignored by the mainstream law, the Inquiry gained the impression that they are extremely important to Aboriginal people. The Inquiry notes that the *Northern Territory Law Reform Committee's* Report on Aboriginal Customary Law reached the same conclusion and recommended in 2004 that the government establish an inquiry with a view to formally recognising certain traditional sanctions.

The Inquiry does not suggest an inquiry is necessary but is strongly of the view that there needs to be dialogue in relation to the issue.

The same can be said for “traditional marriages”. Provided such “marriages” are entered into by consent and that there is no sexual contact until after the “wife” is 16 and sexual contact is with consent, then there is no unlawful activity. Many of the Aboriginal people spoken to by the Inquiry were not aware of legal issues such as “age of consent” and “consent” generally. Dialogue is needed in relation to this issue.

One positive initiative where Aboriginal and non- Aboriginal lawmakers have had dialogue and combined the two laws is the *Mawul Rom Project*. The *Mawul Rom Project* is named after an Aboriginal conciliation ceremony. The project involves a training program designed to teach people mediation and leadership skills from both an Aboriginal and mainstream cultural perspective.

The project is relatively new but is exceptionally well run by a knowledgeable group of people. The Inquiry considers this project to be an extremely valuable resource and perhaps one that could be utilised by government agencies such as FACS and the Police to develop protocols for the mediation that is invariably necessary when allegations of child sexual abuse are made within a community. The project could

also provide or recommend trained, culturally appropriate mediators to assist with this task.

(178) This example only touches the surface of what positive initiatives are possible if dialogue is begun.

The LRCWA formed an ultimate view that the continuing existence and practice of Aboriginal law in Western Australia should be recognised, with such recognition to occur within the existing framework of the Western Australian legal system.

This was termed “functional recognition”, which is recognition of Aboriginal law for particular purposes in defined areas of law. This approach allows for a variety of methods for recognition. The LRCWA identified two broad categories of recognition, affirmative and reconciliatory. In the affirmative category, the objectives of the LRCWA’s proposals are the empowerment of Aboriginal people, the reduction of Aboriginal disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal law in the Western Australian legal system.

In the reconciliatory category, the objectives of the LRCWA’s proposals are the promotion of reconciliation and of pride in Aboriginal culture, heritage and identity.

This would primarily be encouraged by “constitutional recognition”. The Inquiry understands that the Northern Territory Statehood Steering Committee is giving consideration to this and commends such an approach.

It must be recognised that the intent of the LRCWA Report is not to restore Aboriginal law structures, systems and methods to the state they were in prior to colonisation.

The intent of that report is to encourage the searching out of and the recognition of the several positive strengths in Aboriginal law and utilising those strengths to achieve successful outcomes.

One of the LRCWA Report’s primary recommendations is that any recognition and application of Aboriginal law must be consistent with international human rights standards. The Inquiry agrees with this recommendation.

The LRCWA Report also goes to great lengths to explain that the acknowledgment, recognition and application of Aboriginal law structures, systems and methods does not create a separate system of law. The report’s recommendations enable Aboriginal law and culture to be recognised *within* the Australian legal system:

because recognition is demanded under general principles of fairness and justice and in order to achieve substantive equality for Indigenous Western Australians.

LRCWA Report – page 13

The Inquiry agrees with this approach and it is consistent with the approach being sought by Aboriginal people during the Inquiry’s consultations.

The ideal would be to take the positive aspects of culture and reaffirm and strengthen them and combine them with those aspects of the dominant culture that can be readily and positively adopted by Aboriginal people

Alyawerre Elder

The Inquiry notes that the present perception of many Aboriginal people is that the media and the government are always making assumptions about Aboriginal law that

are disrespectful and rooted in ignorance.

The LRCWA Report notes that its recommendations:

seek not only to empower Aboriginal people by creating an environment where Aboriginal people can build and exercise their capacity to make decisions that affect their everyday lives, but also to bring respect to Aboriginal people, law and culture.

LRCWA Report – page 38

The LRCWA recognised that the only way to achieve this goal was to:

- *acknowledge that Aboriginal people were ruled by a complex system of laws at the time of colonisation and give appropriate respect and recognition to those laws within the mainstream legal system*
- *introduce statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal law in the exercise of their discretions where circumstances require*
- *encourage the institution of community-based and community-owned processes and programs that can more effectively respond to local cultural dynamics and needs*
- *institute substantially self-determining governance structures, such as community justice groups, that are empowered to play an active role in the mainstream justice system, as well as create community rules and sanctions to deal with law and order problems on communities*
- *establish Aboriginal courts which encourage respect for Elders by involving them in the justice process*
- *encourage the involvement of Aboriginal people in decision-making on matters that affect their lives and livelihoods*
- *ensure constitutional recognition to accord Aboriginal people respect at the very foundation of the law*
- *remove bias and cultural disadvantage within the mainstream legal system.*

LRCWA Report – pages 37-38,

Given the uniqueness of the Northern Territory, particularly its large Aboriginal population and the strength of culture that has survived, there is potential for it to become a world leader in achieving these goals, developing new structures, methods and systems that see Aboriginal law and mainstream law successfully combined and bringing a newfound strong respect to Aboriginal people, law and culture that will benefit the whole of the Territory.

The Inquiry believes that the first step is for the government, along with members of the legal profession and broader social justice system, to identify the relevant law-men and law-women in each region (including those in urban areas). A framework and forum for regular ongoing discussion with these Aboriginal lawmakers, with the assistance of interpreters and “cultural brokers”, needs to be established.

The Inquiry believes that these small steps, which create the space for dialogue, will ultimately have a positive impact on the Northern Territory. This includes restoring law and order and reducing child sexual abuse in Aboriginal communities.

In addition to this dialogue, the development of Community Justice Groups and Aboriginal Courts provides mechanisms to put that dialogue into action.”

Conclusion

The debate continues. As readers contemplate on these complex issues, I invite consideration of the attitude of the Commonwealth reflected in the provisions in the Family Law Act 1975 (Cth) which recognise the right of children “to enjoy their culture (including the right to enjoy that culture with other people who share that culture)”. In the case of an Aboriginal or Torres Strait Islander child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture, that right includes the right:

- “(a) to maintain a connection with that culture; and
- (a) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s view; and
 - (ii) to develop a positive appreciation of that culture.”

I also invite careful consideration of the attached extract from the website of Aboriginal Resource and Development Services, an organisation involved in offering a range of services directed to assisting “community development and education for Aboriginal communities”. It provides a small insight into both the complexity of the issues under consideration and one of the major problems for today’s Aboriginal children who will experience the extraordinarily difficult transition from “traditional” life into the strikingly different “modern world”.

Media Release 20
1 November 2006
FOR IMMEDIATE RELEASE

Traditional Law is Keeping the Peace On Aboriginal Lands: Says Senior Aboriginal leader, Dji nyi ni Go ndarra from Galiwin'ku, Elcho Island, Northern Territory.

Our Traditional Ma dayin Law outlaws any form of sexual or other abuse to children, women, old people or anyone else . These types of crimes are totally repugnant according to our Traditional Madayin Law. It is Traditional Aboriginal Law that is keeping the peace on Aboriginal communities' right across the Northern Territory not the NT or Federal Government Law or Police.

Before the white invasion, we had our own systems of law just like all other people throughout the world. We had our own Ringgitj (Nation States) and our family clans that all had parliaments and police through our Yothu Yindi system of law. We also had the Ma dayin Law itself. No group of people can exist without a system of law to protect its people's property rights and the people themselves. This was especially so for the most vulnerable people, the young and the aged, both male and female. Our law and the systems of law created a state of magaya; peace and tranquility with justice for all. Our Traditional Law is the original Common Law of Australia and contemporary Australian legal system needs to understand this law. Unfortunately very few English speakers know anything about this system of law.

It was the Balanda white fella law that first showed us what real lawlessness and violence was about by stealing our lands and resources. This was done through the use of British Law over the top of our Law. When we protested they shot our children, our women and our men. Along with this, our traditional national and international trade was stopped. In Arnhem Land we lost our 400 hundred year old pealing and trepang trade with Macassar. We have only just discovered in the last few years how this was stopped by the South Australian Government in 1907.

Then in the 1970s and 1980s you gave us some rights recognising us as humans and not children anymore. So you allowed us to come out from under your disgusting welfare laws that had treated us like children on missions and government settlements for a number of decades. But at the same time you stole more of our industry and employment. We had learnt new trade and industry in the mission days; we even built all our own housing. Some of us had started a new national trade in crocodile skins so our families could be self-reliant and stay in on our clan estates. All this has also been stolen from us since Northern Territory self-government.

Then more white culture was introduced; alcohol and other drugs, videos and movies that showed Aboriginal people all sorts of sexual violence and abuse

against women and even children. Our people knew nothing about these drugs and we did not know that the films and videos are just made for profit; we thought that these films and videos were real stories telling us the truth about white people's culture and law.

These films and videos reinforced the violent experiences of the past and the stories we already had about white fella law and culture being a lawless, violent culture; where you just take what you want when you want it. A rule of man - not a rule of law. These influences, and the confusion that came along with it, have now created a new sub-culture within many Aboriginal communities.

This sub-culture can be seen in many large towns of the NT and in some other Aboriginal communities around these towns where there is easy access to grog and other drugs. Now *some* anarchist Aboriginal people living in this sub-culture use what they think is white fella law as an excuse to do disgusting things. Then white people call this anarchistic, lawless action "customary law". But these lawless Aboriginal people are following what they think is accepted white fella law; it becomes their new custom and they call it, "*My Aboriginal law*", or "*customary law*" as it is now called across Australia. At times they use this "*customary law*" as a defence for their lawless, unthinkable crimes. Doing what they think is accepted under white fella law and culture. They should not be allowed to get away with this lawlessness!

Our Traditional Law is not "customary law" as in a rule of man. It is a real law system, the original system of law of this land. It has parliaments, politicians, constitutions and Acts of Law. Our people assent to this law through a ceremonial process and we have our own police and sanctions at law - not payback - but sanctions at law. Stop making naive and disgusting paternalistic remarks about this law and history that some politicians seem to know little about. I am sorry, Mr Howard, we were here first and so was our Law that was given to us by the Great Spirit Creator (God). Nobody will silence that Holy Law given by *Wangarr* to create peace and order on our lands.

For clarity, I say again; Our Traditional Law outlaws all form of sexual abuse. I am sorry but it is white fella culture that encourages and allows this form of disgusting drunken abuse and many English-first-language people and businesses have become very rich on the back of our people's suffering.

You have also stolen our culture and renamed it with English words that do not give the right meaning to either our culture or to us. Even though it is known medically that we have a greater brain capacity than most Europeans, you make us sound primitive and backward in your statements and government policies that are supposed to help us. We know it is our very different languages and history that keep us apart, so we have only a little understanding of each other. Those sent to 'help' have little encouragement from Government to learn our language. We just get more white fella excuses that there are too many languages. Rubbish. We have regional languages that can be used and they are rich teaching languages.

Our Traditional Law is still here and it is keeping the peace on hundreds of Aboriginal communities in the NT. That is, it is not the NT or the Federal Government jurisdictional powers that are protecting our women and children and keeping the peace amongst many different clans and families, and from English-first-language predators on the traditional Aboriginal communities across the NT; it is the Traditional Aboriginal law that is doing it and it is costing the government nothing. But our Law-keepers are finding this an almost impossible job. This ancient common law, the first common law in Australia, that has served Aboriginal people for thousands of years is under constant attack from naive and even lawless influences.

First of all the contemporary law of both the NT and Federal Governments does not recognize our Traditional Law that has kept the peace for thousands of years. In fact many Aboriginal elders, both male and female, have their hands tied behind their backs by the NT Law. If they try to keep the peace and/or protect someone whose rights are being violated, and in doing it have to use a degree of force or call upon a traditional policeman and he uses a degree of force, these peace-keepers can suffer under NT Law with charges of assault. Many have been put in jail. So our 'grandmother' law and other Yothu Yindi laws can not work properly because of contemporary NT law.

Secondly, most of these communities are now suffering from the sub-culture that is coming through the influence of the television, movies, bad schooling, and now the Internet. Our Elders are left powerless from this onslaught as they have no media outlets operating in our language to combat it.

Thirdly, because we have lost our industry and trade to dominant culture businesses, our people have no purpose or meaning in life. There is nothing left to do but drink alcohol and take drugs. That is all that has been left for us. Even now when some people look again for answers many talk about kit homes and houses on the backs of trucks. What about some real long term jobs and a chance at business for Aboriginal people?

In the NT, there has been some good discussion just starting to occur between traditional Aboriginal law and the NT government. Some judges and magistrates in Darwin are just starting to understand the difference between the disgusting excuses that are brought before their courts under the banner of customary law (sometimes by defence lawyers who know no better) and the real Traditional Law. Now they can say outright that this is not traditional law. But there is still a lot to be done.

Under the NT Sentencing Act some good work has been done to try and find some real answers to these complex issues. Aboriginal Elders believe they can help solve some of the problems in the NT through a true coexistence of Traditional Aboriginal Law and the NT law. For example, if an Aboriginal person is sent to jail by the NT government, they come home a greater criminal than before they went to jail. They will abuse their family if they do not get their way for money and resources that they are not entitled to, they

become very abusive, sometimes their anger leads to abuse of women and children. But when they are punished under Traditional Law they become respectful and courteous; that is they learn what real law is about.

So Aboriginal elders believe they can help in a real way through the application of Traditional Law and many of its legal systems. They believe the real law of this land can solve many of the problems facing the NT. No law-abiding citizen wants the violence happening around Alice Springs or any of the other major towns and some Aboriginal communities in the NT to continue. But do not blame Traditional Aboriginal Law for this violence and do not heap more criticism on our Aboriginal men for supposedly doing nothing when you make their job impossible.

There needs to be a real dialogue between these two systems of law so we can move away from the colonial mud slinging and find some real answers to real problems. Of course this will mean that there needs to be some true communication between these two systems of law. That is the real Aboriginal Traditional Law and the NT legal system.

I become tired of the naive paternalistic comments from some politicians who make broad statements that denigrate our Traditional Law, while we are working our guts out trying to maintain law and order on our communities with little real help from government. We need real dialogue, where we are met as equals with people who are looking for real long term answers. Confusion, unemployment, education that does not work, drug abuse, lawlessness, helplessness and the lack of purpose that many of our people experience must be dealt with in a real, constructive way. We are ready to live with a one foot in both systems of law; can we find others on the other side who are ready to stand and work with us for the good of this country that we all call home?

Rev . Dr. Dji niyini Go ndarra OAM

Chairman, Aboriginal Resource and Development Service Inc.

Political Leader of Golumala Clan

An interesting quote;

"We don't retain information - we hear teaching, especially in English and feel that we don't grasp what is being taught, and so it disappears. We go to school, hear something, go home, and the teaching is gone . We feel hopeless . Is there something wrong with our heads because this English just does not work for us? In the end, we smoke marijuana to make us feel better about ourselves. But that then has a bad effect on us. We want to learn English words but the teachers cannot communicate with us to teach us . It is like we are aliens to each other. We need radio programs in language that can also teach us English. That way we will understand what we learn"

Statements from 12 and 13 year old Aboriginal youths at Galiwin'ku, NT 2006 given to Yolngu Radio when they were asked what they want to hear on their non-funded radio service . These students speak English as a second or third language . Almost all of the teachers that come to teach them speak only English. ards.com.au

For further details contact Richard Trudgen 08 8987 3910
or visit www.ards.com.au