THE (NON-)ROLE OF ABORIGINAL CUSTOMARY LAW IN SENTENCING IN THE NORTHERN TERRITORY

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I Introduction

The title of the 2013 National Indigenous Legal Conference, 'Atnengkerre Atherre Akwete-Two Laws Together', succinctly reflected the aspiration of many Aboriginal people, particularly in Northern Australia, for the mutual recognition and respect of mainstream law and traditional Indigenous laws in Australia. It is an uncomfortable fact, however, that this aspiration has never seemed more out of kilter with prevailing legal norms.

In the Northern Territory the judiciary has recently provided formal acknowledgment of the crucial role of Aboriginal interpreters,[1] but the increasing presence and acceptance in Northern Territory courtrooms of traditional Aboriginal languages should not be mistaken for an increasing presence or acceptance of traditional Aboriginal law in Northern Territory courts. Indeed, it is arguable that legal interpreters will increasingly be required not just to work as bridge builders to span the gulf of misunderstanding between yapa and kardiya.[2] They may also be required to take on a less appealing gate-keeping task, to do the dirty work of holding up the sign which in effect says to yapa, "Check Your Law at the Door: White Laws Only Allowed Within".[3]

For that is the purport and import of section 16AA of the *Crimes Act 1914* (Cth) ('*Crimes Act*'), formerly section 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*'),[4] which generally prohibits a sentencing court from having regard to cultural practice or traditional law for the purpose of assessing the seriousness of criminal behaviour to which a Northern Territory offence relates.

To appreciate the ramifications and repercussions of this provision – which was initially introduced in 2007 as part of the Northern Territory Emergency Response ('the Intervention') – it is necessary to sketch the background. Given the rhetoric of reconciliation and the recent celebrations of the twentieth anniversary of *Mabo*, it would surprise many to learn that the Northern Territory criminal justice system is now far further away from the utopian conception of two laws together than it was, not just in 2007, when the provisions referred to above first commenced, but many decades previously.

II The Good Old Days

Indeed, since the very early days of colonial administration, Northern Territory courts had taken into account tribal custom when imposing a sentence. The first such recorded case is *R v Long Peter*[5], in which Dashwood J imposed an extraordinarily lenient sentence of three months imprisonment for manslaughter following the jury's recommendation for mercy on the ground that the offence had been committed as a result of administering tribal punishment.

For half a century, from 1934 until 1984, the Northern Territory statute books provided implicit recognition of cultural practices and traditional laws by allowing judges to depart from the generally applicable sentencing laws for murder (mandatory capital punishment until 1973 and mandatory life imprisonment thereafter) when dealing with Aboriginal offenders: section 6(1C) of the *Criminal Law Consolidation Act No. 10 1934* (SA) provided that 'where an [A]boriginal native is convicted of murder, the judge shall not be obliged to pronounce sentence of death, but, in lieu thereof, may impose such penalty as, having regard to the circumstances of the case, appears to the court to be just and proper'. Section 6A provided that 'for the purpose of determining the nature and extent of the penalty to be imposed where an Aboriginal native is convicted of murder,

the court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty'.

Significantly, this beneficially discriminatory legislation – what would these days be characterised as a special measure for the purpose of the *Racial Discrimination Act 1975* (Cth) – came into force on 2 May 1934, just 24 days after the arrest in Darwin of one Dhakiyarr Wirrpanda, who was subsequently charged, tried, convicted and, notwithstanding section 6A, sentenced to death for the murder of Constable McColl at Woodah Island on 1 August 1933.[6]

The furor which erupted over Constable McColl's death and Dhakiyarr's trial graphically illustrate that at the time, local and national public debate regarding Aboriginal people and the criminal justice system in the Northern Territory was no less spirited and contentious than it is today.[7] Proposals to establish native courts and a native constabulary, as they were called, had been circulating since at least 1931. For example, in 1933 the Aborigines Friends' Association submitted that:

> 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.[8]

The Commonwealth even got as far as enacting the *Native Administration Ordinance 1940* (NT), which would have enabled the establishment of a special summary Court for 'Native Affairs'. However, this Ordinance never came into force, as war clouds massed and matters of national defence and security supervened.[9]

During the following decade, Justice Kriewaldt presided as the single judge of the Supreme Court of the Northern Territory from 1952 until 1960. He made ample use of the discretion accorded to him by the *Criminal Law Consolidation Act 1934* (SA). For example, in sentencing a Pitjantjatjara man for a murder committed in the course of administering tribal punishment, Kriewaldt J considered that in the circumstances of the case, retribution and rehabilitation (or, as he termed it, reformation) were not relevant sentencing principles, and imposed a sentence of 18 months 'as a deterrent to other natives who may be minded to exact tribal vengeance'.[10] This sentence was decided after taking expert evidence from officers of the Native Affairs Branch, a missionary and an Aboriginal witness he described as 'of superior intelligence, a Christian'.

In his charge to the jury in a Papunya murder case, Kriewaldt J explained the law with characteristic clarity: 'I have an unfettered discretion to impose any penalty I think proper, from imprisonment for one minute to hanging. Native laws and customs are relevant on the question of punishment, but they are quite irrelevant on the question of whether a person is guilty of a crime or not'.[11]

In *R v Anderson,* Kriewaldt J explained his approach in terms which graphically articulated the then prevailing policy of assimilation:

> The nearer his mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime.[12]

This may sound rather offensively paternalistic by modern standards, but perhaps it is not so different in concept to recent judgments, similarly premised, although differently expressed. For example, in a Northern Territory Court of Criminal Appeal decision in 2005, there was an increase in the sentence imposed on a 55 year-old traditional Aboriginal man for assaulting and having sexual intercourse with his 14 year old promised wife. The Court found that:

[t]he learned sentencing judge observed in his sentencing remarks that the respondent's traditional beliefs reduced the respondent's moral culpability. It is not in contention that where Aboriginal customary law conflicts with Territory law the latter must prevail. Similarly, 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.[13]

III In a Limbo

By the 1980s, the court was taking a broader approach to the scope which could be given to sections 6A and 6(1C).

In *R v Herbert*,[14] O'Leary J imposed sentences of 12 years imprisonment with non-parole periods of five years and six months on each of three Aboriginal women who had been convicted of murder, despite the fact that no issues of traditional law or custom arose: the case involved a drunken attack on a fellow drinker in a disused Beer Garden of the Parap Hotel in Darwin. O'Leary J found that section 6A permitted him to sentence 'an Aboriginal by reference to the special problems of Aboriginal people',[15] and that in this case, 'there is a trans-cultural dimension of their condition… they find themselves in a limbo: they belong nowhere'.[16] This is markedly similar to the propositions subsequently enunciated in *Fernando*[17] and approved by the High Court in *Bugmy v The Queen*,[18] that a sentencing court may have regard to an offender's social disadvantage, including a background of alcohol abuse and alcohol-related violence.

Throughout the half century from 1934 to 1984, there is no doubt that out of the bush, systems of traditional criminal law continued to operate in the Northern Territory. Right through the twentieth century, Aboriginal people away from centres of kardiya legal power continued to hear, determine and dispose of matters involving breaches of traditional Aboriginal criminal laws. As the century progressed, no doubt the incidence of matters in which offenders came to the attention of two criminal justice systems, the yapa and the kardiya, grew. But for most of this period, these systems were not so much conflicting bodies of law, as they were ships passing in the night, unseen by and largely unknown to each other. From the 1950s, cases were reported of yapa, aware that their legal process might be looked at askance by whitefellas, deliberately navigating their ships so as to avoid detection by and collision with kardiya ships.[19] As will be discussed below, it is readily foreseeable that this tactic will re-emerge in the environment of section 16AA of the *Crimes Act*.

Every now and then, however, a kardiya magistrate or judge became aware that a person he or she was about to sentence had already been, or reasonably expected to be, punished by a traditionally constituted yapa tribunal, and the kardiya judicial officer was permitted to, and sometimes did, make an adjustment to the sentence accordingly.[20]

Significantly, however, while not expressing a concluded view, the High Court of Australia has recently disparaged this well-established judicial practice, expressing serious reservations about whether submission to, or a willingness to submit to traditional punishment, should be accepted as a mitigating circumstance at all. The six judges who joined in the plurality judgment of the Court in *Munda v Western Australia* did not mince their words: 'Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment … courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice'.[21]

The statutory sentencing regime of sections 6A and 6(1C) was replaced on 1 January 1984 by the Northern Territory's *Criminal Code Act 1983* (NT), which, in keeping with the liberal spirit of the times, not to mention the *Racial Discrimination Act 1975* (Cth), abolished racially based distinctions, and gave everyone convicted of murder the same rights when it came to be sentenced: namely the right to be mandatorily sentenced to life imprisonment, with no opportunity to ever apply for parole.

The Code was enacted in the same year the Australian Law Reform Commission toured the Northern Territory for its landmark inquiry into Recognition of Customary Laws. The Report was published in 1986. That Report was arguably the high water mark of recognition, or to be more accurate, proposed recognition, of traditional Aboriginal law for sentencing purposes in this country. It recommended limited but substantive recognition of traditional laws. None of its recommendations were ever adopted by legislators.

Various other law reform bodies, including the Northern Territory Law Reform Committee, have subsequently made similar proposals.[22] In 1998, the Northern Territory government published a draft State Constitution which even gave (albeit limited) recognition to customary law as a source of law.[23] None of these proposals ever came to fruition either. One might have expected the long-awaited *Sentencing Act 1995* (NT) to refer to and regulate the issue of the role of customary law in sentencing, but it did not. So, for twenty years following the commencement of the *Criminal Code* in 1984, matters were left largely up to judges. Unsurprisingly, considering the difficult competing and conflicting considerations in play, the common law's response to the recognition of customary law was cautious, halting and equivocal.

For example, in his 1992 judgment in *R v Minor* (1992) NTLR 183, Mildren J noted that a spearing to the thigh might not

necessarily be unlawful, but also emphasised that 'it would be quite wrong for a sentencing judge to so structure his sentence as to actually facilitate an unlawful act'.[24] *Minor* was subsequently cited on occasion in support of bail applications or sentencing submissions in which the defendant sought to enlist the support, or at least the permission, of the court to undergo violent payback. Some of these applications were successful. Others were not. In 1997, Bailey J refused bail to an applicant in circumstances where he found the proposed payback might have fatal results.[25]

Although some magistrates continued to grant bail in similar cases,[26] this practice appears to have ceased following the 2004 matter of *Anthony*,[27] in which Martin (BR) CJ granted bail, but only on condition that the applicant *not* attend Lajamanu, where he wished to undergo payback by spearing. In defiance of this order, that particular defendant returned to Lajamanu, and was duly speared.[28] This illustrates a very serious dilemma faced by Northern Territory courts: unless kardiya law recognises and respects yapa law, it is all but inevitable that many yapa will neither recognise nor respect kardiya law. On the other hand, if such recognition and respect involves permitting or facilitating the infliction of serious violence, the integrity and authority of the kardiya legal system is compromised and undermined.

In 2005 the Northern Territory legislature finally bit the bullet – a bit – with the enactment of section 104A of the *Sentencing Act 1995* (NT), which added statutory weight to what judges had been enjoining counsel to do since at least the era of Kriewaldt J: 'if a party wishes to present an aspect of Aboriginal customary law (including any punishment or restitution under that law) that may be relevant to the offender or the offence concerned', then it must do so by adducing evidence, with reasonable notice to the opposing party. At last, the restoration of statutory recognition, if only by implication, to customary law for sentencing purposes. The following year, however, the Commonwealth embarked on a radically different course, enacting a provision which prevents judges from taking into account customary law or cultural practices with respect to sentencing on a Federal offence.[29] It then extended the same rule to Northern Territory offences in 2007 through the enactment of section 91 of the *NTNER Act*. The Law Council of Australia had strongly opposed this initiative in its submission to the Council of Australian Governments (COAG) meeting in July 2006, arguing that:

> proposals to prohibit courts from considering the "cultural background" of an offender as a relevant factor in sentencing are misconceived and will unnecessarily restrict the discretion of the court to consider matters which may be relevant, either to mitigate or aggravate, the seriousness of an offence … The consequence of preventing a court from considering "cultural background" will be that a person (usually white Anglo-Saxon) whose "culture" accords with mainstream beliefs and values will be at an advantage when compared with a person who has lived their entire life according to a different culture, with different values and beliefs … banning consideration of cultural factors will not address the serious problems which are causing endemic levels of violence, abuse and misery in Indigenous communities.[30]

Since its commencement, section 91 of the *NTNER Act* has also been pungently criticised by the judiciary.[31] This criticism is well-founded. At a statutory stroke, section 91 replaced the vacuum left by the repeal of the 1934 provisions with an enactment which turned them on their head: 75 years previously, judges had been directed to have regard to customary laws for sentencing purposes; 25 years previously, they had been left to work it out for themselves; and now, they were prohibited from doing so.

Notably, the words 'Aboriginal' and 'Indigenous' do not appear in section 91 or section 16AA: on its face, the new provision applies to all Northern Territory offenders. But the unavoidable implication, given its statutory context in the legislative package of the Intervention, is that the reference to culture and custom is aimed primarily at yapa: kardiya, it would seem, don't have "culture", a standpoint which has been characterised as the 'majoritarian privilege of never noticing [oneself]'.[32] So much for what many had imagined, had by now become the received wisdom of multiculturalism, as enshrined by the amendment to section 16A of the *Crimes Act 1914* (Cth) passed with bipartisan support only a few years previously, providing that a sentencing court *must* take into account the "cultural background" of an offender.

Does section 16AA's sweeping erasure of culture as a sentencing factor amount to an invalid interference with the judicial power? Most probably not - in accordance with the principle of parliamentary sovereignty. Yet the scope of section 16AA seems so potentially broad and vague as to be arguably incompatible with fundamental features of the sentencing process. If applied broadly, it would presumably

prohibit a defendant pleading in mitigation that his or her misconduct was triggered by grief following the death of a family member, or exultation following the victory of a sporting team, or anger following a racial slur, and so on. Unpacking and separating culture from the circumstances of offending and offenders is impracticable, illogical and unjust.

IV The Watershed

In a sense, this particular storm is taking place in a teacup: the actual incidence of cases which come before the Supreme Court of the Northern Territory involving questions of customary law has been remarkably low, which suggests that section 16AA is directed at a largely non-existent mischief.

In the 12 years from 1994 to September 2006, of 1798 Aboriginal offenders sentenced by the Court, only 13 submitted that their offending was mitigated by a circumstance involving customary law: five cases in which the offence was committed as punishment for a breach of customary law; four in which the offender was provoked by a breach of customary law; two in which the victim was a promised bride; and two in which the offender was acting in accord with customary law. Some of these submissions were accepted, and others were not.[33]

Nevertheless, it is contended that section 91 of the *NTNER Act* was a significant watershed. Up until its commencement, in practice the kardiya legal system acknowledged that, as expressed in the Guidelines of the Office of the Northern Territory Director of Public Prosecutions, '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'.[34] That recognition had been expressed through 100 years of carefully developed common law sentencing jurisprudence, as well as in other ways. This includes: the practice of many police and nurses in bush communities of standing by while traditional punishments were carried out;[35] the rhetorical statements of support and respect for Indigenous law and culture by community leaders on formal occasions;[36] and the articulation of sympathetic attitudes to customary law and culture in the mass media.[37]

The passage of section 91, which enjoyed bipartisan support, was not an isolated legislative event. It is part of what has the hallmarks of a paradigm shift. In November 2010, following the killing of a young Warlpiri man, his family attempted to exact traditional punishment on another group of Warlpiri families in Yuendumu. They expected the police to stand by. Instead, however, the police (in accordance, it should be said, with official NT Police Policy)[38] stepped in, and a riot ensued. When sentencing the rioters in the Court of Summary Jurisdiction at Alice Springs, Bamber SM, who before going to the bench had served for many years as the Principal Legal Officer at the Central Australian Aboriginal Legal Aid Service, said:

> The message, if it is not clear, needs to be made clear; violence begets violence. There is no place for violent retribution. The days of payback with violence should end. The leaders should be concerned about changing their law. They should be working out ways to deal with disputes without violence, rather than feeling aggrieved with white fellow law preventing them from carrying out their old punishments.[39]

A few days later, the then Northern Territory Attorney-General spoke out in similar terms.[40]

The message was clear, and in keeping with a tone which had already been sounded. On 30 September 2010, *The Australian* had published an editorial about events at Yuendumu under the heading 'When Tribal Punishment is Just an Excuse for Crime':

> It is true that there are remnants of customary law in some [I]ndigenous communities, that there are old men who still understand the rules and their application. For a long time, these elders were the custodians of the culture, highly skilled practitioners of an ancient tribal system of justice. And there have been times when retaliatory spearings, enacted with the tacit approval of police or other authorities, have been effective in settling trouble. But payback is now more often than not a distorted version of tribal justice, an excuse for random and destructive violence … While cultural and social context should always inform the work of our courts and police forces, customary law can have no place in our legal system.

In similar terms, perhaps in a tacit reference to these highly publicised events in Yuendumu, the High Court has recently held that 'one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community'.[41]

Assuming that the purpose of section 91 was to decrease violence, there is no sign that this has been achieved yet. This is unsurprising. Indeed, it was predicted by Rex Wild QC and Pat Anderson in their *Little Children are Sacred* Report:

> 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 … unless Aboriginal law is utilised and incorporated as an integral part of the solution.[42]

The November 2010 riot at Yuendumu may itself exemplify this. During the riot, the mother of one of the deceased's assailants had offered to be hit by the mother of the deceased. The mother of the deceased accepted that offer, striking the other woman on the head with a nulla nulla, drawing blood. She was subsequently charged with assault, to which she pleaded guilty. In the course of her plea, she told the court (through her lawyer)[43] that 'now I have no feeling of anger against her' (the victim), that she felt satisfied and that for her this matter was now finished according to yapa law. It was certainly not finished for her according to kardiya law: she was sentenced to two months immediate imprisonment, with a further three months suspended.[44] On her release, it is reported that she no longer felt satisfied, and, as one observer commented, 'one can speculate that sending her and her family to prison undid any restoration that had been achieved through that fight'.[45] The communal violence in Yuendumu continued for at least two more years.

V The Pendulum

It appears there is no going back, not at least until the weighty pendulum of prevailing mainstream attitudes to customary law, which is right now in full swing, reaches the far end of its trajectory, and turns again, perhaps in another decade or two. Energetically swinging pendulums do not stop in the moderate middle.

As typically happens with sentencing enactments aimed at ironing out the exercise of judicial discretion, wrinkles emerge. In October 2007, a couple of months after the commencement of section 91 of the *NTNER*, at Numbulwar in the Gulf of Carpentaria, a construction team arrived to build a Government Business Manager facility, an initiative undertaken, ironically, as part of the Intervention. In ignorance, they dug, and for 24 hours used, a pit toilet on a sacred site, for which they were duly prosecuted under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), and fined $500. The Aboriginal Areas Protection Authority appealed against the inadequacy of the sentence. The appeal was dismissed,[46] in part because section 91 prohibited a court from considering customary law or cultural practice in assessing the seriousness of an offence. Accordingly, no account could be taken of the contention that according to Aboriginal traditional law, the damage inflicted to the site had been permanent and irreparable. Instead, the offenders were sentenced on the basis that the damage had been rectified simply and effectively by filling in the hole.

The Federal Government moved to iron out this wrinkle by introducing a new subsection (2) when section 91 was moved to section 16AA of the *Crimes Act* on 16 July 2012. That new subsection creates an exception to a general rule for matters concerning Aboriginal heritage protection.

In that very week, another potential wrinkle emerged, when an Alice Springs jury convicted a brain-damaged Arrernte woman of the murder of her sister. The trial judge, faced with the unpalatable prospect of sentencing this offender of prior good character, herself a victim of serious domestic violence over many years at the hands of family members, to mandatory life imprisonment with a non-parole period of 20 years, invited counsel to adduce material pursuant to section 53A(7) of the *Sentencing Act 1995* (NT). This provision provides that a shorter non-parole period can be fixed if the court is satisfied of the existence of specified exceptional circumstances, relevantly including that 'the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender'. Expert anthropological evidence was adduced regarding the relationship between the offender and the victim, with reference to their kinship obligations "entrenched in Arrernte sociality", and in particular the stresses which arise in relation to the traditional demand sharing between siblings in the setting of modern town life. The court embarked on this course of inquiry and made findings accordingly which resulted in a reduced sentence notwithstanding section 16AA, suggesting that in practice this provision is being construed more narrowly than had been initially anticipated.[47]

That case is perhaps relevant in another respect. After a two week trial in which several experts gave conflicting evidence as to the connection between the offender's acquired brain injury and her homicidal conduct, raising the partial defence of diminished responsibility manslaughter, it took the jury

less than two hours to return a verdict of murder. The previous day, in the adjoining courtroom, a magistrate, in the course of ordering a pre-sentence report for an Aboriginal youth who had just pleaded guilty to a series of moderately serious offences, announced that on release from detention, this youth would not be permitted to remain in or return to Alice Springs for a very long time, because he had by his conduct demonstrated that he was 'not fit to live in a civil society', and would be returned to 'the unregulated lands of the *Anangu Pitjantjatjaraku*', where he could stay 'for as long as you like'.[48]

These two vignettes can be seen to emblematise a sea-change in societal attitudes and responses to misconduct by Aboriginal people from dysfunctional communities. It is as though the Intervention has given us (that is, the kardiya community) permission to be unequivocally, unashamedly and unsentimentally punitive in a way which, just a few years ago, would have been considered extraordinary. Peter Sutton argues that under the rubric of "cultural relativism", Australian intellectuals, courts and mainstream society long turned a selectively blind eye to conduct amongst and by Aboriginal people which would not otherwise have been tolerated or condoned. As Sutton observes, however, 'we are now witnessing the downfall of cultural relativism in its strong form'.[49] Indeed, section 16AA represents the triumph of "anti-relativism" in its strong form.

In *The Queen v Wunungmurra*,[50] Southwood J criticised section 16AA's predecessor, section 91 of the *NTNER Act*, on the basis that it distorts the sentencing principle of proportionality.[51] This principle was also referred to by the plurality of the Supreme Court of Canada in *R v Ipeelee*,[52] another recent case involving the sentencing of an Aboriginal offender. In Canada however, far from being prohibited from having regard to an offender's cultural background when assessing moral culpability, the courts are legislatively *required* to do so:

> Section 718.2(e) [of the *Criminal Code*, R.S.C. 1985] directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal…When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[53]
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> …
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> [These] principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.[54]

Section 718.2(e) of the Canadian *Criminal Code* had been enacted in 1996 following widespread concern regarding the over-representation of Indigenous people in Canadian prisons, which, it was accepted, resulted in part from systemic discrimination. Of course, at around that time, similar problems had been identified in Australia, and similar remedies had been proposed.[55] Of course, those problems continue to persist. In *Bugmy v The Queen*[56], the High Court observed that Australian legislators have not gone down this Canadian path and that accordingly the jurisprudence in *Ipeelee* has no application in this country. In reaffirming the fundamental importance of the principle of individualised justice in Australian sentencing law, the Court stated in its plurality judgment that there is no legislative 'warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender'.[57] In *Bugmy*, the High Court was dealing with a New South Wales offender, so consideration of section 16AA did not arise. However, it is noteworthy that section 16AA is arguably inconsistent with the principle of individualised justice, on which the High Court has placed such great store.

The swing of the pendulum is also the swath of the wrecker's ball. The stigmatisation of traditional culture, custom and law, together with other social processes, including the increasing rates of integration of Indigenous and non-Indigenous people,[58] will erode support for and adherence to customary law. Consequently, some yapa will turn away from it, particularly those features which are no longer tolerated by the mainstream.[59] It has also been suggested that some may 'move from severe physical violence to other forms of maybe shaming, or fining or exiling people, things which aren't as traumatic or as violent to the individual or the family'.[60] But how authoritative and viable could a diluted, synthetic "Customary Law Lite" be?

VI Conclusion

As the pendulum swings, it passes over ground previously visited. In 1977, Michael Kirby was appointed Commissioner-in-Charge of the Australian Law Reform Commission inquiry into the recognition of Aboriginal customary law. One of the first experts he consulted with was, the by then old and irascible but still eminent anthropologist and linguist, TGH Strehlow, who was uncompromising in his opposition to the recognition of customary law. Kirby paraphrased and summarised Strehlow's strident, stringent position as follows:

> A return to the law is a solution. It is even desirable. But in default of a return to the old religions, the old power structures, the unquestioned authority and rigid ceremonial, the endeavour to resuscitate customary laws in today's society will produce, with varying success, nothing more than a hybrid of uncertain content, ineffective enforcement and dubious respect.[61]

Another foreseeable consequence of the paradigm shift epitomised by section 16AA is that the practice of customary criminal law will be driven underground. That is an unattractive prospect. Equally unattractive is the prospect that many Indigenous Territorians currently alienated from the kardiya criminal justice system will remain or become more alienated from it. Strehlow foresaw this too:

> Despite the white man's welfare handouts, the old sense of security and intra-group human dignity appears to have been almost lost. The young men have become, it seems, virtually a lawless community, with all the horrors which that term implies. The old 'law' has lost its force, its remaining guardians can no longer control the younger generations; the new 'white man's law' has not taken any real root among the young people either.[62]

The Australian Law Reform Commission's 1986 report, in keeping with the tenor of its time, rejected these views of Strehlow as 'a counsel of despair'.[63] The young men Strehlow was writing about in 1978 are now old or gone, but their grandsons are today's young men, filling and overflowing the Northern Territory's prisons; living a grim reality not far removed from the one Strehlow inconveniently, insistently and unfashionably bore witness to.

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1 Northern Territory Supreme Court, *Interpreter Protocols*, 3 June 2013 <http://www.supremecourt.nt.gov.au/going2court/documents/InterpreterProtocols.pdf>.

2 The Warlpiri terms for 'Warlpiri' and 'non-Warlpiri' people. In this article, they are used, by extension, to refer more generally to 'Indigenous' and 'non-Indigenous' people.

3 The co-option of Aboriginal interpreters as 'a cog in [repressive] court machinery' has been adverted to both in apartheid South Africa (see N Steytler, 'Implementing Language Rights in the Court: the Role of the Court Interpreter' (1993) 9 *South African Journal on Human Rights* 205) and in Australia (see Russell Goldflam, 'Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (UNSW Press, 1995) 41, 53.

4 The *NTNER Act* was repealed in 2012, when the Intervention was replaced by a new set of measures called 'Stronger Futures'. Section 91 was effectively replicated in a new s 16AA of the *Crimes Act*. A new subsection (2) was added to deal with offences against Aboriginal heritage, such as desecrating a sacred site, in circumstances which are described further below.

5 Northern Territory, *Northern Territory Times and Gazette*, XXII No 1402, 28 September 1900, 3.

6 The conviction and sentence were subsequently quashed by the High Court in the well-known case of *Tuckiar v The King* (1934) 52 CLR 335.

7 See Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [49–52]; Ted Egan, *Justice All Their Own: The Caledon Bay and Woodah Island Killings 1932-1933* (Melbourne University Press, 1996); Hon Justice Dean Mildren, *Big Boss All Same Judge: A History of the Supreme Court of the Northern Territory* (Federation Press, 2011) 106 ff.

8 Australian Law Reform Commission, above n 7, [236].

9 See ibid [52], [56], [721].

10 *R v Charlie Mulparinga* (1953) NTJ 219, 223.

11 *R v Aboriginal Timmy* (1959) NTJ 676, 677.

12 (1954) NTJ 240, 249.

13 *The Queen v GJ* (2005) 196 FLR 233, [30].

14 (1983) 23 NTR 22.

15 Ibid 25.

16 Ibid 29. These three offenders were fortunate indeed: they had originally been sentenced to life without parole by a different judge, who had elected not to exercise the discretion accorded him by s 6A. It appears that the original sentence would have in itself been unchallengeable, but an appeal on other grounds against conviction succeeded, and the case was retried before O'Leary J.

17 (1992) 76 A Crim R 58.

18 [2013] HCA 37, [37]–[38].

19 Jeremy Long, cited in Stephen Gray and Jenny Blokland, *Criminal Laws of the Northern Territory* (Federation Press, 2nd ed, 2012) 45.

20 See, eg, *R v Jungarai* [1981] NTSC (2 November 1981); *R v Jadurin* (1982) 44 ALR 424; *R v Minor* (1992) NTLR 183; *Munungur v The Queen* (1994) 4 NTLR 63; *R v Miyatatawuy* (1996) 6 NTLR 44.

21 *Munda v Western Australia* [2013] HCA 38, [61], [63]. This case concerned a Walmajarri man from a traditional background who had been sentenced for the manslaughter of his de facto wife. The offence was one of drunken domestic violence, and it had not been submitted that the offending was mitigated by reference to issues of traditional law. However, the sentencing judge had taken into account the likelihood that on his release the offender would suffer 'payback' by being struck with sticks or nulla nullas on the arms, legs and body: *Western Australia v Munda* (2012) 221 A Crim R 548, [95] (Buss JA).

22 See, eg, Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003); Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report* (2006).

23 Ken Brown, 'Paper Promises?' (1999) 24(5) *Alternative Law Journal* 209, 221.

24 (1992) NTLR 183, 196.

25 *Barnes* (1997) 96 A Crim R 593.

26 ABC Radio, 'Interview with Michael Ward SM', *ABC Radio National*, 21 November 2010 (Michael Ward).

27 (2004) 142 A Crim R 440.

28 Gray and Blokland, above, n 20, 50.

29 *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).

30 Law Council of Australia, Submission to the Council of Australian Governments, *Recognition of Cultural Factors in Sentencing*, 10 July 2006.

31 See *R v Wunungmurra* [2009] NTSC 24, [25] (Southwood J); see also Chief Justice Trevor Riley, 'Aborigines and the Court: The Northern Territory Experience' (Speech delivered at QUT Faculty of Law Public Lecture Series, Brisbane, 19 April 2012), 15–16.

32 Patricia Williams, *Seeing a Color-Blind Future* (Farrar, Straus and Giroux, 1998) 7; cited in Jonathon Hunyor, 'Custom and Culture in Bail and Sentencing: Part of the Problem or Part of the Solution?' (2007) 6(29) *Indigenous Law Bulletin* 8, 9.

33 Melanie Warbrooke, *To What Extent is Customary Law Raised as a Mitigating Factor in Criminal Cases in the Northern Territory?* (LLB Research Paper, Charles Darwin University, 2006) 34.

34 Northern Territory Office of the Director of Public Prosecutions, *Aboriginal Customary Law* <http://www.nt.gov.au/justice/dpp/html/guidelines/aboriginal_customary_law.shtml>.

35 See Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2011) 149.

36 See, eg, Transcript of Proceedings, *Farewell Ceremonial Sittings for the Honourable Chief Justice Brian Ross Martin* (Supreme Court of the Northern Territory, 20 August 2010) <http://www.supremecourt.nt.gov.au/media/documents/MartinBR_CJ_ceremonial_farewell_Darwin_20082010.pdf>; James Gurrwanngu Gaykamangu, 'Yolngu Ngarra Law: Customary Law Painting Presentation. Parliament House, Friday 12 August 2011' (2011) 4 *Balance* 30; Mildren, above n 7, 112.

37 For example, *Dhakiyarr vs. the King* (Directed by Tom Murray, ABCTV, 2004); *Bush Law* (Directed by Danielle Loy, ABCTV, 2009).

38 Northern Territory Police, Fire and Emergency Services Policy: Aboriginal Customary Law Involving Payback (3 November 2005).

39 *Police v Dickenson and Others* [2010] Alice Springs Court of Summary Jurisdiction 20920499 (1 December 2010).

40 Alex Johnson, 'No change to NT payback stance', *ABC News* (online), 7 December 2010 <http://www.abc.net.au/news/2010-12-07/no-change-to-nt-payback-stance/2365368>.

41 *Munda v Western Australia* [2013] HCA 38, [54].

42 Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 'Ampe Akelyernemane Meke Mekarle: Little Children are Sacred' (Report, Northern Territory Government, 2007) 176.

43 The lawyer in question was the author, who also appeared on that occasion for the offender's 13 co-offenders, all of whom pleaded guilty to various offences arising out of the Yuendumu rioting.

44 *Police v Dickenson and Others* [2010] Alice Springs Court of Summary Jurisdiction 20920499 (1 December 2010).

45 Mary Spiers Williams, 'The impossibility of community justice whilst there is intervention' (Paper presented at the 5th Annual Australian and New Zealand Critical Criminology Conference, July 2011) 16.

46 *Aboriginal Areas Protection Authority v S & R Building and Construction Pty Ltd* [2011] NTSC 3.

47 *Namatjira* [2012] SCC (17 December 2012) (Southwood J). Other aspects of this case were subsequently considered by the Northern Territory Court of Criminal Appeal, but it did not

comment on the sentencing proceedings: *Namatjira v The Queen* [2013] NTCCA 08.

48 Personal observation, Youth Justice Court of the Northern Territory, Alice Springs, 18 July 2012.

49 Sutton, above n 35, 144.

50 [2009] NTSC 24.

51 Ibid [25].

52 [2012] SCC 13, [37] (McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ).

53 Ibid [54]

54 Ibid [79]

55 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Recommendations 92, 95, 96, 104, 219.

56 [2013] HCA 37.

57 Ibid [36].

58 Sutton, above n 35, 158.

59 ABC Radio National, 'Interview with Bess Nungarrayi Price', *Background Briefing*, 21 November 2010 (Bess Nungarrayi Price).

60 ABC Radio National, 'Interview with Bob Durnan', *Sunday Profile*, 3 April 2011 (Bob Durnan).

61 Michael Kirby, 'TGH Strehlow and Aboriginal Customary Laws' (1980) 7(2) *Adelaide Law Review* 172, 198.

62 TGH Strehlow, 'Aboriginal Law', *mimeo* note, August 1978, 5 cited in Kirby, above n 61, 198.

63 Australian Law Reform Commission, above n 7, [121].