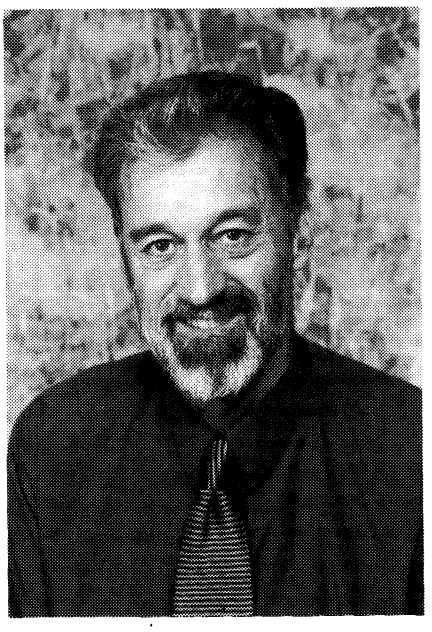
Looking to the future



By Dr Peter Toyne, NT Attorney-General

Customary law and Northern Territory law are increasingly being melded together to create a system that maintains the integrity of the western system of law, while at the same time respecting Indigenous culture.

The NT Law Reform Committee Inquiry into Aboriginal Customary Law made 12 recommendations, and this Government has accepted most of them and is moving towards implementation.

For example, work is well down the track towards the start of pilot community courts where elders will act as advisers to magistrates, so traditional laws can be taken into account in sentencing.

In addition, local Aboriginal Law and Justice Committees are already addressing issues, like violence towards women, getting children back into school and rehabilitating young offenders, through local solutions.

Customary law is also being intertwined with economic opportunities on Aboriginal lands. Traditional owners are using their hunting and fishing rights to generate an income to provide a platform for prosperity.

Many of these advances have at times been overshadowed by two practises where the clash of cultures is most divisive - payback and customary marriage.

Customary law is a complicated system - it is a whole way of living - it is not limited to payback and customary marriage.

The issue of payback polarises the two legal systems like no other.

The Government only recognises customary law to the extent that it does not contravene the NT Criminal Code. The *Criminal Code* expressly denies an individual the right to consent to grievous harm, and the *Bail Act* does not permit the release of a person to undergo traditional punishment that is likely to be unlawful, that is, likely to involve the infliction of grievous harm.

The Government supports the use of Aboriginal Law and Justice plans to advance forms of payback that do not breach the criminal or general law - such as substituting monetary payments for grievous physical harm.

The practice of payback needs to be considered in the context of changing social values within Aboriginal communities, the localised nature of traditional law and the fact that some communities experience significant problems with substance abuse and related violence, which was not a part of traditional life.

The role of the law and justice committees in this context is to act as the vehicle for changing thinking on customary law, including payback.

Overall law and justice committees are working hard to influence change that acknowledges customary law but at the same time recognises the changes that have taken place within the Indigenous cultures. This includes actively working with Government to develop a range of alternative measures such as alternative dispute resolution, increased input into the courts and sentencing, and reintegration strategies.

Issues surrounding customary marriage are also contentious, and the Government has had to draw the line in this area also. We recently removed the defence of customary marriage from the *Criminal Code* offence of having sexual relations with a girl under 16.

Originally, the defence was not one specific to Aboriginal men or Aboriginal customary marriage but a general defence of marriage. However, as a result of changes to the *Commonwealth Marriage Act* in 1991, and the definition of marriage in section one of the *Criminal Code*, which includes Aboriginal customary marriage, the defence has only been effectively available, since 1991, to men in an Aboriginal customary marriage.

The defence has been removed to ensure that Aboriginal girls have equal protection from the law.

The removal of the defence does not abolish Aboriginal customary marriage involving a child under the age of 16 years - the *Criminal Code* only prohibits adults from engaging in a sexual relationship with girls and boys under the age of 16 years.

While this reform has received some criticism, it is also supported by many Indigenous people in the Territory concerned about the protection of young people.

With the passage of the *Law Reform (Gender, Sexuality and De Facto Relationships) Act* last year, Aboriginal customary marriage is now to be recognised in all Northern Territory legislation that contains a reference to marriage, husband or wife.

The oldest and most successful Aboriginal Law and Justice Committee, the Kurduju Committee, recognises that Aboriginal people are thinking through the place of customary law in the modern situation, as detailed in Committee's own report from December 2001:

> "...It is important to note that the legal system [customary Aboriginal law] described here is not a straight forward revival of customary law...it

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CAALAS and customary law

By Mark O'Reilly*

The majority of Central Australian Aboriginal Legal Aid Service (CAALAS) clients still live traditional lives where customary law, ties and rules of kinship and ceremony are the major influences on behaviour. The influence of custom is implicit in every aspect of daily life.

Whilst there has been some movement towards the recognition of customary law by the mainstream legal system, in effect, it does little more than pay lip service to this recognition. The attitude of our law makers is to say that we recognise it where there is no conflict with NT law. The position is that the mainstream legal system states it recognises customary law exists but where there is a conflict, NT law must prevail.

Where CAALAS' clients face a conflict between obligations of custom, ceremony or kinship and the obligations placed on them under "white fella law", custom will almost always prevail. Until this fact is recognised and more attempts are made to reconcile the conflict between the two laws we cannot be said to be recognising customary law in any meaningful sense. What is in fact happening is some recognition of its existence and the taking of it into account in some minor peripheral way but otherwise putting customary law into the "too hard basket".

If it is the case that some aspects of customary law are never going to be acceptable under Northern Territory law isn't it incumbent on our law makers to engage the custodians of Aboriginal customary law in an effort to reconcile and reduce the conflict between the two laws.

Resolution of conflict usually involves compromise. I believe compromise is possible and some aspects of customary law may be amenable to change if other aspects are given full recognition and respect.

Despite the rhetoric there has been little done to achieve reconciliation and reduce the areas of conflict between NT law and customary law. If a serious attempt is to be made it will necessarily involve a sustained effort and recognising the importance of customary law and really taking it into account in meaningful ways in the administration of NT law.

When Aboriginal people come into contact with NT law, their needs to attend ceremony, the importance of sorry business, the importance of their punishments and reconciliation, the influence of kins and its obligations have to be taken into account and give real weight and respect.

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Looking to the future cont...

is an innovative adaptation of the traditional decision making processes to the modern situation."

As I stated recently, all cultures change and adapt over time and our Indigenous culture is no different. While some aspects of customary law will remain, many aspects will and have adapted as indeed Indigenous culture has over time.

The controversies over payback and customary marriages often overshadow the major steps towards a system where on most issues NT law and customary law walk side by side, heading in the same direction, towards the same goal, fairness for all.

Fictions, freedoms business - customary law in

come and gone since then, but until 2003 in the Northern Territory those four identified freedoms, with varying emphases, have been at the heart of policy development in Aboriginal affairs. Certainly the freedoms have never been publicly denied to Aboriginal people by any Federal Government.

By the late 1970s it had become accepted that those Aboriginals who desired separately to pursue and develop their traditional culture and lifestyle should be encouraged to do so.

Consistent with the reformist ideas concerning Aboriginal people on both sides of party politics at the time, the Attorney-General in the Fraser Government, Bob Ellicott QC announced on 9 February 1977 a reference to the Australian Law Reform Commission (ALRC) to inquire:

> "whether it would be desirable to apply in whole or in part Aboriginal customary law to Aborigines, either generally or in particular means or to those living in tribal areas only."

The reference had particular importance to the Northern Territory, Western Australia and Queensland, given their large Aboriginal population.

The result of this reference was an epic nine-year inquiry which investigated and made recommendations on all manner of issues concerning Aboriginal customary law. The final two volume report published in 1986 entitled *The Recognition of Aboriginal Customary Laws* stands as the most comprehensive, objective and penetrating consideration of the issues surrounding recognition of Aboriginal customary laws.

The ALRC noted in its report that "although Aboriginal customary laws and traditions have been recognised in some cases and for some purposes by courts and in legislation, this recognition has, on the whole, been exceptional, uncoordinated and incomplete".

The general conclusion of the ALRC was in favour of recognition. The ALRC recommended a functional approach which would maintain flexibility and deal