Fictions, freedoms and unfinished business - Aboriginal customary law in Australia today

By Colin McDonald QC*

Coming to terms with Aboriginal customary law is part of Australia's unfinished business. The issue of recognition of the laws and customs of Australia's Indigenous inhabitants has passed from opposition to indifference, from indifference and inertia to the too hard basket and now, there is just selective recognition depending on the views and values of the wider white society.

Yet, as two recent cases from the Northern Territory Supreme Court exemplify, the problem of how to deal with Aboriginal cultural realities continues and, due to the strength and persistence of Aboriginal custom and law, the problem shows no sign of abating.

The two cases were seized on by the media with the usual range of misinformed to insightful comment.

One case involved a bail application on behalf of a Yuendemu man charged with manslaughter where the prospect of traditional corporal payback punishment was real. The applicant was released on bail to another Aboriginal community, Ngukurr, far away from Yuendemu, inter alia, because the Court considered that although the applicant was entitled to bail, he could not be released to return to his home community lest it be seen the Court was condoning traditional payback punishment.

The other case - *Hales v Jamilmiram* - was an unusual case, only the second reported case of its kind in the NT Supreme Court since 1869. In this case, Jackie Pascoe Jamilmira, a traditional Aboriginal man, was charged with having carnal knowledge of his 15-year-and-3-month old promised wife at an outstation 120 kilometers from Manningrida. On the Crown appeal against sentence, the Court of Criminal Appeal by a majority increased his sentence from one day of imprisonment to 12 months imprisonment with one month to actually serve. The case gained notoriety in that the defendant chose to follow his customary marriage law whilst cognisant of the offence of carnal knowledge under the wider law. He had complied with his customary obligations and the promised woman's family had consented and arranged for the cohabitation in accordance with local marriage practice. The prosecution conceded before the sentencing judge that the intercourse was consensual, that the victim was not in need of protection from her customary laws and that the age difference was not an aggravating factor in the case and indeed on the evidence conformed to the cultural ideal.

For this Mr Jamilmira was demonised. Mr Jamilmira received poor press. The air was poisoned by media misrepresentation of the carnal knowledge charge to which he had pleaded guilty in any event. His case was consistently portrayed from the wider community perspective as aberrant. Mr Jamilmira's choice to conform to his own community pressures and mores didn't fit the media theme and so did not get an airing.

These two cases join a list of such cases where the laws set by the wider Australian community have come into conflict with the values and morality which inform Aboriginal customary law. They are the latest reminders that customary law problems do not go away whilst the issue of recognition sits in the too hard basket or is viewed only with stranger's eyes. Today there is as urgent a need as ever before to address the role customary laws are to play in Australian society.

Australia was founded on a legal fiction in 1788 which worked injustices for Aboriginal people until as late as 1992 when the High Court of Australia handed down its landmark decision in *Mabo*. The fiction was at the core of Aboriginal dispossession and cultural destruction across much of Australia. Historically, there was hostility to or, at best, indifference to any recognition of customary law until the 1960s and 1970s.

In the late 1960s to the 1980s there was a strategic rethink amongst intellectuals, in church groups and the Australian community about the rights of Aboriginal people and what to do with the cultural realities as lived by them. It was only in 1967 Aboriginal people gained constitutional recognition to participate in the political process.

On 25 January 1972 Prime Minister McMahon revolutionised Commonwealth policy and defined the doctrine of the four Aboriginal freedoms. By this doctrine Aboriginal persons were entitled to decide or try to decide for themselves four things they had been denied in the past. First, they could decide *to what degree* they will identify with 'one Australian society.' Second, they could decide the *rate* at which they might so identify. Third, they would have the right to *preserve* their own culture and, fourth they would have the right to *develop* their own culture. Governments have

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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.

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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

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with particular matters of conflict between customary law and the general Australian legal system on an issue by issue basis. At paragraph 127 of its Report, the ALRC expressed this general conclusion from its nine years of investigation:

> "In the Commission's view, the objections to recognition set out in this Chapter are either not objections to recognition as such (as distinct from considerations in framing proposals for recognition), or are not persuasive, for the reasons given. On the contrary there are good arguments for recognizing Aboriginal customary laws, including in particular:
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> * the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines;
> * their desire for the recognition of their laws in appropriate ways;
> * their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right;
> * the injustice inherent in non-recognition in a number of situations.
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> The approach adopted in this Report towards recognition of Aboriginal customary laws is also consistent with stated policies and those principles relating to Aboriginal affairs which enjoy substantial bipartisan support at federal level."

Amongst a wide range of issues, specific recommendations for recognition of aspects of customary law were made in respect of marriage and family matters and the criminal law. Since 1986 those words and the contents of the Report have gathered dust. It seems that it was all just too hard. The political will to deal with Aboriginal custom and cultural realities faded away.

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Customary Law in Parliament

By Jodeen Carney, Shadow Attorney-General

In August 2003, I introduced two Bills that dealt with Aboriginal customary law. The first proposed an amendment to the *Criminal Code* that would have ensured that offenders who have sexual intercourse with, or who commit acts of gross indecency upon Aboriginal girls under the age of 16 years, cannot rely on the veil of 'marriage' as a defence. It meant that Aboriginal girls would have had the same protection as non-Aboriginal girls under our justice system.

The Government opposed my amendment, however, happily the same outcome was achieved by sections of the *Law Reform, (Gender, Sexuality and De Facto Relationships) Bill*, passed late last year. As a politician, I could say that the Government saw the good sense of the Bill I introduced, and came up with its own way of fixing the problem. As a citizen of the Northern Territory, I don't really care who got the job done, because the right outcome was achieved.

However, in relation to the second the Bill I introduced, Government still refuses to act. I proposed amending S.5 of the *Sentencing Act* so that the Court is precluded from taking customary law into account when sentencing.

Violence in Aboriginal communities predominantly affects Aboriginal women and children: they are the victims. Yet, in the criminal law, Aboriginal customary law does not assist them; it disadvantages them.

Under S.5 of the *Sentencing Act* the Court can take into account 'any other relevant circumstance', which opens the door for customary law.

In their efforts to reduce their sentences, violent male offenders encourage their lawyers to make submissions akin to: "It was culturally appropriate for me to bash my wife"; or, "It was culturally appropriate for me to have sex with that woman without her consent".

There is, and can be, nothing culturally appropriate about crimes of violence. If we cannot actually stop the violence, surely we must act to prevent violent men hiding behind the veil of customary law.

Submissions about 'payback' are also used as a mitigating factor in sentencing. Evidence that an offender has been punished in accordance with customary law, so the argument goes, requires that the sentence imposed by the Court should be reduced. On occasion, the Court agrees.

Putting to one side various difficulties I have about punishing violence with violence, the fact is that customary law, a part of which is payback, often protects violent offenders from stronger sentences. It is an unfair and unconscionable mechanism by which their criminality is reduced or excused, resulting in reduced sentences, or in some cases, no periods of imprisonment at all.

In my view, offenders who invoke customary law do so for their own benefit. Indeed, a feminist analysis would be that it works to assist men, and disadvantage women. Customary law is used as a shield to further mitigate the sentencing disposition which follows a finding of guilt, or a plea of guilty.

For the foregoing reasons, I maintain that S.5 of the *Sentencing Act* should be amended, and Government must have the courage to say 'enough is enough'.

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The courts were left on a case by case basis to deal with customary law issues the politicians were too scared or indifferent to face. The cases which arose in the courts were overwhelmingly criminal cases where an Aboriginal offender had broken both white and black law. In the main, these cases were informed by the principle articulated by Brennan J in *Neal v The Queen* (1982) 149 CLR at 326 where his Honour said:

> "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."

But this principle had its limitations as recurring cases involving physical payback punishment have attested. Constrained by the values of the wider law, judges have sought to take into account in mitigation cultural factors which exist by reason of an Aboriginal offender's background, but not to the extent of condoning physical punishment whatever its salutary social results might be in the affected communities.

The tension has long existed in the very different world views and different dispute settlement objectives in Aboriginal and the wider Australian society. Both systems seek to achieve a just balance. Aboriginal customary law tends to emphasise balance and order for the society as a whole. While the wider Australian system is more concerned with the individual's conduct and questions of punishment of the individual. One society sees the incarceration of a man or woman for 20 years away from family and kin as barbaric and life denying. The other sees two spears in the leg and temporary banishment as utterly inappropriate in a civilised society.

As politicians continued to shun the hard questions regarding justice to Aboriginal people occasioned by dispossession, it was again in the courts that Aboriginal people achieved a measure of justice in *Mabo*. The High Court concluded that the notion of *terra nullius* was a "travesty of fact and a fallacy of law." In *Mabo* the majority held that the common law recognised native title, at least where it has not been extinguished, and reflected an entitlement of indigenous inhabitants, in accordance with their laws and customs to their traditional lands. The leading judgment of Brennan J. sourced this entitlement in customary law. His Honour said (at p58):

> "Native title has its origins in and is given its context by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."

In the later case of *Walker* the High Court rejected the argument that there was any analogy between the principles in *Mabo* and the substantive criminal law. Yet, practical problems continue to occur.

Aboriginal and other commentators have raised concerns that the whole issue of recognition has slipped backwards. They accuse the wider Australian society of being selective in what is and what is not recognised in customary law. Mick Dodson, the former Aboriginal and Torres Strait Islander, Social Justice Commissioner is representative of their views. In 1995 he said:

> "There appears an addiction in the Australian legal system of isolating components of Aboriginal law in order to place them into the artificial compartments which western legal systems are familiar with. This process of artificially selecting what is legitimate provides compromised justice for Indigenous people. If native title is a title based on our laws and customs, it is an absurd position if our title to land is recognised but the laws and customs which give meaning tot hat title are treated as if they do not exist. The Australian legal system must take the further step of accepting that native title is inseparable from the culture which gives it its meaning. As Kulchyski eloquently states: *Aboriginal cultures are the waters through which Aboriginal rights swim.*"

Recent events in the Northern Territory have to some extent born out the claims of selectivity.

Without so much as any consultation, traditional Aboriginal marriage practices in the Northern Territory were criminalised overnight in an amending Act called the *Law Reform (Gender Sexuality and De Facto Relationships) Act 2003*. No hints in the title of this amending Act that a fundamental aspect of Aboriginal traditional marriage practice was not just to be changed, but criminalised. The preamble of the amending Act was even more elliptical. It set out the purposes of the Act as being an Act:

> "To reform the law of the Territory by amending certain Acts and subordinate legislation to remove or modify legal distinctions based on a person's gender, sexuality or a de facto relationship with another person, and for related purposes."

Slipped in and characterised as an amendment relating to gender were substantive amendments made to sections of the Northern Territory *Criminal Code*, whereby the immunity was removed for traditional Aboriginal persons to charges of unlawful carnal knowledge with a female under 16 years.

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