The recognition of Aboriginal customary law in the criminal justice system

By Rex Wild QC, Director of Public Prosecutions

There continues to be an intense interest in the place of Aboriginal customary law in the general law, particularly in the Northern Territory. This is hardly surprising given the statistics, which in this instance do not lie, as to the significant and unbalanced majority of Aboriginal offenders in the criminal justice system and the prisons.

The editor of this journal has therefore sought contributions on the topic from various of the stakeholders. This writer does not profess to add anything new in the sense of a solution. Nor in the time, and space, available is it possible to adequately present the contrary arguments or to properly trace the long history. The latter has grown exponentially during the last twenty years. What follows therefore are some comments on two areas where issue has been joined before the courts.

In a very recent application to the High Court for special leave to appeal, some of the issues which may arise had a tentative airing. It was suggested on behalf of the applicant *Jackie Pascoe Jamilmira* that the High Court had not previously addressed the relevance of customary or traditional law in the Criminal Justice System. A Full Bench (Gummow, Hayne and Heydon JJ) unanimously rejected the application. They did so in the following terms:

Justice Gummow said:

> "The applicant was born in 1951. He seeks to appeal against orders of the Court of Appeal of the Northern Territory made in a prosecution appeal against sentence. By those orders the applicant was sentenced for the offence of unlawful sexual intercourse with a 15-year-old female to 12 months imprisonment to be suspended upon serving one month. The Court of Appeal set aside a sentence of 24 hours imprisonment imposed for that offence by a judge of the Supreme Court on the applicant's appeal against a heavier sentence which had been imposed at first instance by a magistrate."
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> "It was and is the applicant's contention that as an Aboriginal man and a member of a particular community his sexual intercourse with the complainant was not only permitted, but was the discharge of an obligation required, by Aboriginal customary law. The applicant accepts that the relevant principle to be applied in sentencing is that stated by Justice Brennan in Neal v The Queen (1982) 149 CLR 305 at 326 and referred to by all members of the Court of Appeal in this matter."

Justice Brennan 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."
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> "If special leave were granted here, the only questions that would fall for decision would concern the application of this principle to the particular facts of the case. Not being persuaded that the actual decision of the Court of Appeal of the Northern Territory is attended by doubt, it is not shown to be in the interests of justice, either in the particular case or more generally, that special leave be granted. Accordingly, special leave is refused. [1]"

The decision in *Neal* was observed to expound the relevant principle in sentencing terms. It had been identified as such by each of the members of the Northern Territory Court of Appeal who had heard the prosecution appeal from which the special leave application emanated (BF Martin CJ and Mildren & Riley JJ; although Mildren J was a dissentient from that court's decision).[2] There is no doubt, in this writer's opinion, that the *Neal* principle is applied in every case in which an Aboriginal offender comes before the Northern Territory courts. Sometimes, arguably, it is given too much mitigatory weight.

The *Jamilmira* case, of course, exposed two competing principles. The offender claimed he was observing traditional law in taking a 15 year old promised bride and having sexual relations with her. Assuming that she was an entirely willing partner to the act of sexual intercourse, which was not the case (although the prosecution accepted the plea to carnal knowledge, thereby disavowing any suggestion that the act of sexual intercourse amounted to rape), the offender was not in breach of customary law.[3] However, there is a strong movement among Aboriginal people (especially from the womenfolk) to protect young women from such traditional practices as promised marriages. The Government has picked up on this and the *Law Reform (Gender, Sexuality and De facto Relationships) Act* 2003 contains a provision repealing the defence of traditional marriage in cases where the

bride is under the age of sixteen years.[4] This might be said to be in keeping with Northern Territory obligations under international humanitarian laws (although these obligations, it is sometimes argued, are ignored in other Territory legislation; for example, those dealing with mandatory sentences).

The *Jamilmira* case in the High Court concerned sentencing principles, although it may have been a better vehicle for discussion of the applicability of customary law[5] if the issue had really been whether any offence at all had been committed in the given circumstances. The question would then have been whether observance of traditional law would found a good defence to a charge under the general law where the latter was inconsistent with the former.

This question has hitherto been answered, unanimously it is thought, in terms of the criminal law, in favour of the general law.[6] That is, the offender remains criminally liable for his conduct but the customary laws' application to the facts are taken into account in the sentencing process.

The *Jamilmira* case in the High court received little media attention (Canberra remains a long way from the Northern Territory)[7]. On the other hand, cases dealing with payback make good press.

The most recent example of the latter is the bail application by *Jeremy Anthony.* This Walpiri man had been charged with the manslaughter of his wife in Katherine in December 2003. In February 2004 he applied for bail so that he could undertake payback. It was refused by a magistrate and a review of that decision went to the Supreme Court. Bail was in fact granted by that court but the orders were structured so as to prevent payback being undertaken and executed.

Chief Justice BR Martin in providing reasons in *Anthony's* case said:

> "In my opinion, regardless of the applicant's consent and where the line is drawn between lawful and unlawful infliction of physical injury, there is a significant risk that the proposed traditional punishment will involve unlawful infliction of physical force and injury. For these reasons, the fact that the applicant and others within his community wish that the applicant should be released in order to undergo traditional punishment cannot be advanced as a valid reason in support of the grant of bail. In terms of s. 24 of the Act, the need of the applicant to be free for the infliction of the particular traditional punishment is not a need to be free for a lawful purpose. In these circumstances it cannot be said that it is in the interests of the applicant that bail is granted in the sense that he has a need to be free for the lawful purpose of traditional punishment.[8]"

In the course of his reasons, His Honour agreed with the decisions of Mildren J[9] and Bailey J[10] *that it is not permissible for a court to structure orders with the view to facilitating the unlawful infliction of traditional punishment.*

The Chief Justice was subsequently interviewed on ABC Radio on 24 February 2004 and expressed views consistent with those expressed in his reasons:

> "A Court cannot make orders that will facilitate or help the infliction of unlawful physical violence. But we cannot at the same time be too paternalistic if a community and a victim and an offender all say, well there'll be some form of payback but it's going to be very minor and the offender consents to it and it's lawful."

He was asked by the reporter: "What do you say to the Aboriginal community in a case like this where the defendant has agreed to the payback and the community is saying if the payback doesn't happen then the rest of the community will suffer?"

His Honour replied:

> "This is part of the problem where you have two systems in effect. I have to apply the law that's given to me, is my answer to the community. I have no choice about the matter. And secondly I suppose then you start to get into the philosophical debate. And I don't think it's appropriate for me to get into that. It's my job to apply the law that I'm given, but I recognise that there is a conflict at times and a tension and it does create difficulties."

Ultimately, these questions are ones which need to be addressed by our political leaders. They have struggled to obtain answers which can be the basis for the implementation of a limited recognition of traditional law. The current Attorney-General established *an Inquiry into Aboriginal Customary Law in the Northern Territory.* This was conducted by a sub-committee of the Northern Territory Law Reform Committee chaired by Austin Asche AC QC and Yananymul Mununggurr. It had a distinguished membership. It reported in 2003 and made a number of recommendations. Two of the 12 which are particularly relevant to this paper:

Recommendation 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.

Recommendation 6: *Inquiry into the issue of payback*

The Committee recommends to government that it 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 the issue.

The major recommendations were said to be:

1.4 Government should adopt a whole of government approach: This recommendation means that any strategy to recognise traditional law should not cut across other government services or programs. It also means that services can support or complement each other.

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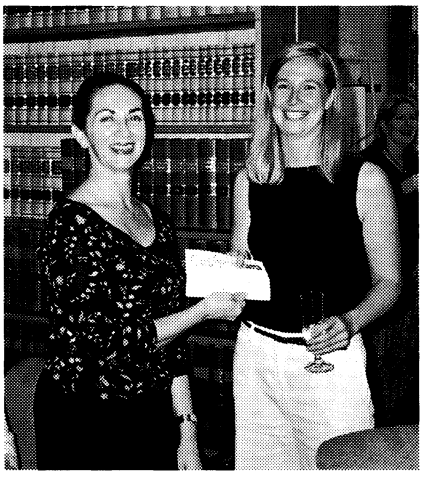
Life at the Bar and other activities cont...

I recently circulated to NTWLA Inc members, an article by the President of the Victorian Law Society titled, "From the President: Practise What We Preach".[2] President Dale quoted Federal Court Justice Cathy Branson on her view about the practise of law:

> "There is no genuine equal opportunity in allowing women to enter traditionally male institutions – but only on the basis that the values of such establishments, and the way they are run, are to remain unchanged. The freedom to be an honorary man, or alternatively, an outsider, is freedom few women aspire to."

The numbers of women completing degrees in law is increasing and should be applauded. However, it is not enough that women complete degrees in law nor is it enough that women join law firms to create equity for women in choosing law as a profession. The remedy to achieving equal representation in the judiciary and the magistracy, and in large law firms is complex. Courageously reviewing the values held by "traditionally male institutions" will hopefully lead to adopting values which will foster careers for women in law to positions of significance. However, not only do women lawyers need to assist 'traditionally male institutions' to be re-invented but they also need to remove their own barriers to achieving senior positions in the law.

This shift will not only benefit women lawyers, it will also provide men in the legal profession with yet, little recognised benefits such as greater flexibility at work and family-friendly work practises. It is logically inconsistent to advocate for human rights and the upholding of anti-discrimination laws while permitting its female members to languish. As President Dale said in the conclusion of her article (referred to above): "A profession dedicated to the promotion of rights and equality should practise what it preaches".



Gabrielle Martin presenting the Life at the Bar door prize.

Endnotes

1 After ADA – a new President for women in Law "29/10/02". Paper of the Law Society of the NSW adopted by the Law Society Council 19 September 2002.

2 This can be found at website http:\\www.liv.asn.au\journal\current\

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1.5 Government should assist Aboriginal communities to develop law and justice plans: This general recommendation is that each Aboriginal community should be assisted to develop its own plan to incorporate traditional law into the community in anyway that the community thinks appropriate. The inquiry's general view is that each Aboriginal community will define its own problems and solutions. Models may deal with alternative dispute resolution, family law issues, civil law, criminal law, or with relationships between Aboriginal communities and government officers/private contractors while in Aboriginal communities, and so on. This Committee does not wish to limit the matters appropriate for inclusion. Government must adequately resource this process, and may find it useful to fund pilot programs.

Where these recommendations presently sit is unknown to this writer.[11] However, it should not be thought that members of the Bench, in all Territory courts, are not very sensitive to these issues. For example, there are presently exercises being undertaken in courts in Arnhem Land presided over by Magistrates Blokland and Loadman where local input is obtained before sentencing. In recent years, the Supreme Court has sat in bush courts to demonstrate the significance of local issues and contributions to its deliberations.

There is a long and well-accepted history in the Northern Territory of sensitivity to customs and the applicability of them within the general law when it is appropriate. No doubt this will continue.

Endnotes

1 142 NTR 1.

2 A separate suggestion that he had a positive defence was not pursued, as he had pleaded guilty at an early stage to the offence of carnal knowledge.

3 Jamilmira v Hales [2004] HCATrans 18 (13 February 2004)

4 Not, at the time of writing, having commenced (1 March 2004)

5 The terms customary and traditional are used interchangeably in this paper.

6 See, for example, Walker v NSW (1995) 69 ALJR 111.

7 Although this particular application was actually heard in Melbourne

8 [2004] NTSCS, 13

9 R v Minor (1992) 2 NTLR 183 at 195-196.

10 Barnes (1997) 96 A Crim R 593).

11 They were released on 6 November 2003 on the Department of Justice website (http://www.nt.gov.au/justice)