and unfinished Aboriginal Australia today cont...

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:
>
> * 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.
>
> 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'.