CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY (CLANT)

Aboriginal Customary Law under jeopardy

By John B Lawrence, CLANT President

In 1990 I attended the sixth Conference of the International Criminal Law Reform Association. I was then a junior Crown Prosecutor, working for the Prosecution Division of the Northern Territory Attorney-General's Department.

I delivered a paper at the conference entitled 'The Sentencing of Aboriginal Offenders in the Northern Territory of Australia'. The theme of the conference was equality before the law, and the specific session I was presenting was on sentencing. It was introduced by the then Chief Justice of the West Australian Supreme Court, David Malcolm. There were two presenters for this session: yours truly and a Texas Supreme Court Judge whose name, unfortunately, escapes me.

His presentation was interesting. It was an exposition on how Texas Courts sentence offenders. They do it by slide rule. You work with the offender's sex, age, racial origin, previous convictions, the present offence, his cooperation with authorities and other indicia which are tabulated. You look at the table and the offender lands on fourteen over eleven. Discretion may still be the better part of valour, but it has little play in the sentencing courts of Texas. I was tickled pink and honoured to present my paper in his wake.

It was chalk to his cheese. My paper's main theme was that, through the application of sentencing discretion, Northern Territory Judges and Magistrates have taken into account Aboriginal customary law where it was relevant to either explain the commission of the crime, or impact on the ultimate sentence. The paper outlined, through case examples, historically how Justice Kriewaldt had set the tone in the 50s, which was carried through by succeeding Judges of our Supreme Court. With pride, as a relatively junior Crown Prosecutor, I described the accommodation of Aboriginal customary law as "the jewel in the crown" of the Northern Territory Justice System. That was in 1990. Part of the politics of Australia in 2008 includes, in our criminal justice system, the demolition of respect for Aboriginal customary law. To attack Aboriginal customary law is politically sexy. And so it is attacked and, indeed, the Federal Government in its Intervention legislation has directly precluded the taking into account of Aboriginal customary law as regards excuse and authorisation. The days of it being taken into account re. mitigation may well be numbered. This would be ignorance of the highest order.

It wasn't a big deal when they tightened the noose in requiring evidence of customary law to be adduced by strict evidential means. However, politics will 'drive the bus over the cliff' if it bans Aboriginal customary law from being taken into account in any mitigatory way. One of the main drivers of this bus is Professor Helen Hughes whose book 'Lands of Shame' was very much the previous Federal Government's mantra for its 'Intervention' approach to Indigenous affairs. I've read her book and it is full of errors.

Let me give you an example. At page 40 she says, "Murders are masked as manslaughter. When Gavin Makuba Yunupingu killed his sister in law he was charged with manslaughter." This is completely wrong. Gavin Yunupingu was charged with murder upon his arrest

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the day after the killing. He was charged with murder at his committal hearing. Following the evidence his lawyer argued no case to answer in relation to the murder charge. That argument was rejected and he was committed on murder. He was thereafter indicted on murder. He was arraigned before a jury on murder and pleaded not guilty. He stood his trial on murder. Following the evidence in his trial the jury found him not guilty of murder: not guilty of manslaughter but guilty of dangerous act causing death. Those are the facts. Professor Hughes is not good on facts. The point I am making is that our judicial system would be reduced by depriving our Judges and Magistrates from taking into account what can sometimes be a compellingly relevant aspect to a case. The 'baby is going out with the bath water' here because the politically driven agendas of Professor Hughes and the previous Federal Government have tarred all Aboriginal customary law as savage. The bath water is old men having sex with underage girls. The baby still exists. There are cases: refer as an example R v Mathew Jumbajinga

Egan (sentence of Olssen J 16 December 2005) when traditional Aboriginal people commit a crime contrary to the Northern Territory Criminal Code in accordance with their still existent customary law. To exclude that fact in gauging their culpability and, therefore, their penalty, would be unjust. It hasn't happened yet, but it looks like the next 'cab off the rank'.

The above cited case is a typical example. It involved Walpiri mob from Yuendumu. Two families were in dispute. This started a bit like West Side Story: two teenage girls got into a fight over a boyfriend. One of the girls ended up bashed and bruised. The feud had begun and continued. She was an Egan. Her uncle was obliged in his customary law to exact some payback on the other girl's family: specifically her uncle. He did that. He went round to the uncle's house and called him out. The uncle knew the business and fled. He was caught and then assaulted by breaking his leg with a nulla nulla. Once that was done the assault ended. There was no alcohol in this equation. He was interviewed and admitted the assault; "I had to do that for my payback". He was charged with and pleaded guilty to unlawfully causing grievous harm contrary to s 181 of the Criminal Code. He was convicted and sentenced to three years imprisonment suspended after eight months. The sentencing Judge was Acting Justice Olssen. The law allowed him to take into account the fact that the offender was obliged in his law to commit that crime. It was clearly relevant. It did not excuse or justify his crime. It explained why this man committed the crime. He was still punished in Northern Territory law and in an appropriate way.

In some Aboriginal communities in the Northern Territory, Aboriginal customary law is still alive and well. Much of it is a positive aspect of their lifestyle amid so many other negatives. In many, it is a force of good. Elcho Island presents as a good example. I describe Elcho Island from the perspective of a white Australian criminal lawyer. I know little of anthropology or of history. It's an island 600 kms east of Darwin. It is populated by 2000 Yolgnu. Its main township is Galiwin'ku and it has a dozen outstations. It's a stunningly beautiful place. It has had its moments in the Territory's criminal justice system. It provides one of the earliest reports regarding petrol sniffing, and that malady has come and gone on Elcho Island over the last 40 years. At the moment, I understand, from various sources it has thankfully gone. Up until this year, the police presence consisted of two police aides and monthly visits from the Nhulunbuy police station officers. It has just been gifted a police station which will be manned by three officers plus one ACPO. As earlier stated, customary law is strong, alive and potent on Elcho Island.

In September 2005 my wife and I, along with the Chief Justice and three other Judges, the Chief Magistrate and the Director of Public Prosecutions and other senior legal people were invited to attend the final day of the Ngarra (Chamber of Law) of the Dhurili Njaymil clan nation which was held at Galiwin'ku, Elcho Island; their Parliament. We were all invited as representatives of the Westminster system of law in the Northern Territory. It was an incredible day. The Balanda males were painted up and given access to the workings of the Yolgnu Parliament and enactment of customary laws. That having been witnessed, we then witnessed the proclamation of the said laws to the entire community in a public place. The said 'legislation' was committed to writing and a copy of the same was donated to our Supreme Court library. That proceeding confirmed how customary law is still powerful and effective in that community and also the unending willingness of the Yolgnu to try and forge a union with Balanda law.

Having been to many Aboriginal communities over the last twenty years and, sadly, seen so much dysfunction and malaise, one was struck that day by the togetherness of the Elcho Island community. It's a dry community. Much of its 'togetherness' is directly attributable to the fact that they maintain much of their Yolgnu customary law, albeit with an acceptance that it has to sit with Balanda law.

Such a state of affairs led to the recently publicised settlement of the Yolgnu action against the police relating to an incident with the police in May 2006. The ALPA store was broken into by a group of young Yolgnu men. A large amount of money was taken. The community reported the matter to police seeking their help. The Nhulunbuy police station took the complaint and flew several officers from Nhulunbuy to Galiwin'ku to investigate. Meanwhile, the local elders, informed of the crime, had "arrested" all of the offenders bar one: Mishak Yunupingu. He had taken himself out of Galiwinku to his uncle's outstation 60 kms from the township. All the other lads admitted to the elders that they had done it. The amount of money actually stolen was always in question. The police arrived and took over where the elders had begun. All the lads admitted the crime and they were charged, bailed and subsequently pleaded guilty to the crimes in the Court of Summary Jurisdiction sitting on Elcho Island. Their sentence was community service orders. The drama emerged from the police investigation into the amount of money stolen and their arrest and dealing with Mishak Yunupingo. Elcho Island's biggest

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drama with the Balanda's criminal justice system was in 1990 when a mentally ill man armed with a knife was shot dead by a Northern Territory police officer. The whole community was very upset by the police actions back then and the memory of it had not faded for many of the elders earlier mentioned.

The police found Mishak Yunupingu at his uncle's outstation and arrested him. He made admissions and gave the police $400 of ill gotten gains. He was taken into custody, driven in the back of the cage vehicle back to Galiwin'ku. The police tried to formally interview him at the police aide's office but the equipment was faulty so he was eventually released. Mishak, upon release, went to the community elders to admit his blame but the trouble emerged when he also told them that on the drive back to Galiwin'ku the police had stopped the vehicle, taken him from it, placed him on his knees and threatened to shoot him with a pistol if he didn't tell them where all the money was. The elders were greatly upset by such an allegation and immediately went to the ABC and reported it. Suffice to say Michak Yunupingu issued proceedings against the police in the Supreme Court for assault and other torts. Another member of the community whose house was searched without authority also sued. The matters were destined for a full blown Supreme Court trial with all that that entails. Thankfully, something clever happened. The Master ordered mediation to occur out on Elcho Island. The police, to their credit, were in agreement with such a proposition. Prior to flying out the lawyers from both sides discussed the prospect of mediation working. This involved the legal representatives flying out to Elcho Island and explaining the mediation process. The plaintiffs were interested in and attracted by such a proceeding. It appealed greatly compared with the normal Balanda Court experience. Factually, it was obvious that the police could not admit to the gun threat wrongdoing. That was explained to the plaintiffs. They wanted resolution and an outcome from their court case. They did not want money. They wanted a positive resolution to come from the situation and instructed their lawyers to agree with the mediation.

The community, virtually in its entirety, became involved in the proceeding. The issue of Northern Territory Police and policing on Elcho Island had historical aspects.

The police sent over Assistant Commissioner Dowd and one of the arresting officers.

The mediation was conducted by Mr Pat McIntyre and Mr Don Wirninba Ganambarr. It happened on the football oval with over 400 Yolgnu attending to witness: men, women and children. Mr Alan Maritja interpreted everything that was said in English into Yolgnu. Following introductions and explanations of the proceeding the plaintiffs' lawyer stated his case. The barrister for the police then explained the police position. Suffice to say wrongdoings were conceded by the police. The plaintiffs' first request was for an apology. That wasn't forthcoming. Both police officers got up and stumbled by replacing the sorry word with regret.

They were asked again by the plaintiffs for a real apology and that was given. The sorry word was used. This was the pivot for the mediation resolving. What was then agreed between the parties was cross-cultural training for the Northern Territory police provided by the Elcho Community and the establishment of a police community advisory group constituted by senior Yolgnu elders and senior and local

police officers to discuss policing issues with regard to customary law and alternative dispute resolution services.

That agreement was reduced to writing there and then. Following the Agreement the parties were then invited to a Rrakpala Gumatj ceremony conducted in accordance with the Madayan System of Law. This was conducted in a special area used by Yolgnu for ceremonies.

That ceremony (fire ceremony) involved the plaintiffs and family and the two representatives of the Northern Territory Police Force. Hundreds of people witnessed it. It was spectacular in effect and ended with handshakes all round. The written agreement for the day was thereafter converted into a formal settlement agreement which was later filed in the Supreme Court. The writs originating the civil action were duly withdrawn by the plaintiff. All's well that ends well. A lengthy, costly and potentially destructive Supreme Court proceeding was avoided and a positive outcome achieved for both parties. No little of that was due to the Yolgnu's willingness, emboldened by their adherence to their customary law, along with respect for Balanda law, to pursue the alternative of mediation, that being a form of resolution very much in accordance with their customary means at dealing with conflict.