Customary Law

Kurunna Mwarre "Make My Spirit Inside Me Good"

KEY POINTS

1. Prior to 2006, customary law had the potential to impact upon criminal proceedings for offences against the laws of the Northern Territory in a number of ways relevant to both sentence and conviction.

2. In 2006 the Commonwealth enacted the *Crimes Amendment (Bail and Sentencing) Act* 2006 which introduced s 16A(2A) to the *Crimes Act* 1914 (Cth). It prohibited the Court from taking into account any form of customary law or cultural practice as a mitigating or aggravating factor in sentencing or in evidencing bail.

3. The greatest apprehension regarding these changes lies with the protection of women and children from violence and sexual abuse.

4. The amendments were introduced under the pretense that it "ensures that all Australians are treated equally under the law and that criminal behavior cannot be excused or justified by customary practice or customary law" however S91 which prohibits customary law provisions is considered to uphold racial discrimination.

5. Consistency with basic human rights standards and consideration of similar relevant rights under other conventions would offer one way for both systems to potentially work together.

6. There appears to be overwhelming support within the legal profession for the reconsideration of customary law as a mitigating or aggravating factor in sentencing or in evidencing bail.

SUMMARY OF CUSTOMARY LAW ISSUES

1. Background

- Prior to 2006, customary law had the potential to impact upon criminal proceedings for offences against the laws of the Northern Territory in a number of ways relevant to both sentence and conviction.

- From 1994 to 16 September 2006, of the 3679 persons convicted of criminal offences in the Court, 1798 (49.00%) involved Aboriginal defendants.

  a) **As a mitigating factor**: Of these, only 36 decisions were handed down by the Court where customary law was raised by the defendant. This equates to an average of three cases a year (less than 1% of all cases before the Court), or 2% of Aboriginal offenders who have raised customary law as a mitigating factor in criminal matters. A further 6 cases involving customary law and criminal matters were heard on appeal.

  b) **In terms of sentencing** and the infliction of some form of traditional punishment upon the offender, either before or after sentence, 27 cases were reported for the same period. The Supreme Court accepted the existence of such punishment as a mitigating factor in 20 of these cases.

  c) With regards to **moral culpability**, only 13 cases before the Supreme Court in the same period claimed that the offending behavior was related to customary law. Warbrooke categorises these as follows:

     i) Five cases where the offence was committed as punishment or payback for a breach of customary law.
     ii) Four cases where the offender was provoked by a breach of customary law.
     iii) Two cases where the complainant was the offender's promised bride.
     iv) Two cases where the offender was acting in accord with customary law.

2. Key Legal Acts and Reports

2.1 Crimes Amendment (Bail and Sentencing) Act 2006

This Act prohibited the court from considering customary law issues. In 2006 the Commonwealth enacted the *Crimes Amendment (Bail and Sentencing) Act* 2006 which introduced s 16A(2A) to the *Crimes Act* 1914 (Cth) under the pretense that it "ensures that all Australians are treated equally under the law and that criminal behavior cannot be excused or justified by customary practice or customary law". It prohibited the Court from taking into account any form of customary law or cultural practice as a mitigating or aggravating factor in sentencing or in evidencing bail.

2.2 Little Children Are Sacred Report 2007

In August 2006 the Chief Minister of the Northern Territory commissioned a Board of Inquiry into the Protection of Aboriginal children from Sexual Abuse. This formed the basis of the *Little*

Children Are Sacred report, which was released in 2007. **It supported customary law**. Chief Justice Brian R. Martin summarises some of the key findings of the report as follows:

1. That Aboriginal law is not the reason for high levels of sexual abuse (also negated by Gordon et. al.; HREOC, 2006; LRCWA, 2006).

2. That Aboriginal law is not used as an excuse to justify abuse. The inquiry was unable to find any case where Aboriginal law was used and accepted as a defence (in that it would exonerate an accused from any criminal responsibility) for an offence of violence against a woman or a child.

3. That there is an opportunity and support for mainstream law and culture to work together with Aboriginal law and culture to create a unique, prosperous and positive living environment and recommendation was made for meaningful dialogue between the government, mainstream lawmakers and Aboriginal law-men and law-women.[1]

4. That many of the problems that presently exist in Aboriginal communities, including the sexual abuse of children, are as a result of breakdown of law and order. During consultations, it was a regular and consistent complaint and observation that many people were not respecting either Aboriginal law or Australian law.

5. There is a strong link between identity and Aboriginal law, even for urban-based Aboriginal people. Without the support from mainstream law and culture, Aboriginal people feel disempowered and powerless to deal with "new" problems such as family violence and the sexual abuse of children.

6. Part of the problem is that Aboriginal law and culture has been misunderstood and misrepresented, particularly in the media.

7. That Aboriginal law can change to reflect the changing world, as long as it is consistent with the "natural law". Part of the problem has been that any discussion about Aboriginal law has focused only on where it conflicts with mainstream law in the areas of "payback" and "traditional marriage".

Consequently, the inquiry concluded that **'Aboriginal law is a key component in successfully preventing the sexual abuse of children, the rationale being that it is much more likely that Aboriginal people will respond positively to their own law and culture'.**

Martin mentions one positive initiative, the *Mawul Rom Project*, where Aboriginal and non-Aboriginal lawmakers have had dialogue and combined the two laws. The project is named after an Aboriginal conciliation ceremony and involves a training program designed to teach people mediation and leadership skills from both an Aboriginal and mainstream cultural perspective

2.3 Northern Territory Emergency Response Act 2007- The Intervention

Despite these recommendations, on 17 August 2007, as part of the *Northern Territory National Emergency Response Act* 2007 (NTNER), the Commonwealth extended the prohibition against taking into account customary law or cultural practice in respect of sentence or bail to offences against the law of the Northern Territory.

Part 6 – **Bail and sentencing**

90 Matters to be considered in certain bail applications:

(1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority:

(b) **Must not take into consideration any form of customary law or cultural practice as a reason for**:

S91 Matters to which court is to have regard when passing sentence etc.

(1) In determining the sentence to be passed, or the order to be made, in respect of *any person* for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

Case study

R v Wunungmurra 2009

R V Wunungmurra, 2009, was the first decision to **apply S91.** Dennis Wunungmurra, an Aboriginal man from Milingimbi, was charged with aggravated assault and causing harm with intent to cause serious harm to his wife, Wendy Manamawuy Garrawarra in August and September 2008. Wunungmurra pleaded guilty to both of the counts against him, but argued he was acting under Milingimbi customary laws, which entitled him to physically punish his wife for abandoning their family and failing to fulfill important community duties. In support of this plea, the defendant wished to read an affidavit from Ms Laymba Laymba, a senior member of the three Aboriginal clan groups at Milingimbi, however, the prosecution argued that it could not be used on the basis of s91. Wunungmurra was sentenced to four and a half years imprisonment.

3. Key Responses

Supporters customary law

Chief Justice Brian R. Martin

According to Chief Justice Brian R. Martin, neither of the amendments previously presented are based upon recommendations by a Law Reform Commission. **In fact, he argues to the contrary; that every Law Reform Commission has supported the continuing role of customary law in the administration of the general criminal law across the country.** He claims **the justice of the application of customary law, practices and beliefs to the substantive law and sentencing is readily apparent.** There is no evidence that these considerations have been abused.

Jonathon Hunyor, Director of Legal Services, Human Rights and Equal Opportunity Commission
Jonathon Hunyor, writing on behalf of HREOC notes that they were one of a number of groups and individuals who opposed the *Commonwealth Crimes Amendment (Bail and Sentencing) Act* 2006 in their submission to the Senate Legal and Constitutional Affairs Committee Inquiry in 2007. While HREOC agreed that family violence and abuse of children or women should not be tolerated, they argued that the measures taken in the Act were "fundamentally flawed": **'…rather than these changes being part of a solution to violence and child abuse, they might be part of the problem because they undermine a potentially powerful source of Indigenous authority.'** HREOC's main criticisms of both Acts are as follows:

1. The provisions have been introduced without adequate consultation with Indigenous people, and both Acts were rushed through.

2. Neither Act is based on, or supported by, Evidenced Research.
   - in fact, they are in conflict with every major inquiry into the role of cultural background and customary law in the Australian legal system, including four inquiries by the Australian Law Reform Commission and inquiries by the New South Wales and Western Australian Law Reform Commissions.

3. The terms 'cultural practice' and 'customary law' are broad terms and not defined.

4. They do not promote 'equality before the law'.

5. Enjoyment of culture is a human right.

6. **The provisions undermine important initiatives involving customary law i.e. circle sentencing;** customary law can provide a means through which Indigenous communities can exercise greater self-governance and take control over the problems facing their communities.

7. The provisions are not necessary**- courts should consider the full range of factors relevant to the commission of the offence, including a person's culture.**

8. The provisions do not address family violence in Indigenous Communities. Solutions should address poverty, overcrowding, substance abuse, low levels of education and unemployment.

9. Again supported by Behrendt: "judges who hear criminal cases where violence has been committed against Aboriginal women and children are dealing with symptoms of

a far more complex social problem. And it is politicians, not the judiciary, who have the most power to profoundly influence the root causes of cyclical violence and the breakdown of the social fabric in Aboriginal communities."

The Central Australian Legal Aid Service and the North Australian Aboriginal Justice Agency.
In their 2008 submission to the Senate Select Committee on Regional and Remote Indigenous Communities, particularly in relation to 'child-bride' matters stated: In the Northern Territory, courts must consider "the extent to which the offender is to blame for the offence" and "the presence of any aggravating or mitigating factor concerning the offender". In their opinion the exclusion of customary law as a defense to consensual sex with a child under 16 is an instance of racial discrimination. 'While non-Indigenous offenders are given full consideration of all relevant circumstances, Aboriginal offenders are disadvantaged because the full context of their offending cannot be considered by the court.' In the absence of customary law as a mitigating factor, consensual sex with a child under 16 now receives a higher sentence.

Trish Crossin, Labor Senator for the Northern Territory
Labor senator, Trish Crossin, strongly opposes provisions that prohibit a court, in bail and sentencing matters, from taking into account customary law or cultural practices. She is currently considering referring the issue to the senate's legal and constitutional committee for investigation.

Qualified supporters

Ken Brown, Author of *Reconciling Customary Law* and *Received Law in Melanesia: the Post Colonial Experience in Solomon Island and Vanuatu*
Ken Brown argues that some judicial officers attach too much weight to claims made by defendants seeking to justify their actions by reference to cultural factors and traditional beliefs. In his opinion, there is the possibility that a distorted or 'bullshit' version of customary law exists which is put forward to justify behavior. Consequently, he argues that 21st century modern international human rights conventions to protect women and children should carry more weight than customary law and that provisions should be read consistently with the interpretation of similar rights under these conventions.

Sarah Bury, Arts/Law Graduate now working in the area of Indigenous justice
Sarah Bury argues that although s91 is an "inappropriate and misdirected response to criminal offending in remote Aboriginal communities", it still has an important role to play in "ensuring that courts do not reduce sentences of violent offenders on the basis that cultural traditions sanction such violence". Its operation should, therefore, be limited to cases of violence and sexual abuse of women and children.

4. Conclusion:

There appears to be overwhelming support within the legal profession for the reconsideration of customary law as a mitigating or aggravating factor in sentencing or in evidencing bail. At the very least, support exists from both non-Aboriginal and Aboriginal lawmakers for dialogue to occur regarding how the two systems could work in parallel.

The greatest apprehension lies with the protection of women and children from violence and sexual abuse. Although it has been argued that customary law does not sanction abuse of any kind, there is still concern that a 'distorted, bullshit' form of customary law may exist and, in turn, be put forward to justify behavior. Consistency with basic human rights standards and consideration of similar relevant rights under other conventions would offer one way for both systems to potentially work together.

S91 which prohibits customary law provisions is considered to uphold racial discrimination.

This resource and further information about Creating A Safe Supportive Environment is available to download at **www.casse.org.au/resources**.

CASSE Australia Inc
PO Box 156
Kew VIC 3101
T 0450 540 366
www.casse.org.au