

## **Mainstream Law and Culture Working together with Aboriginal Law and Culture**

### **Mr Rex Wild QC, Barrister, Northern Territory, Co-Chair of the Protection of Aboriginal Children from Sexual Abuse Inquiry**

Distinguished colleagues, thank you very much, firstly, to the organising committee for inviting me to speak to you today, and secondly I acknowledge the owners of the land, and adopt what Mick has said in that respect.

I should tell you that in the Northern Territory we have a provision in the Sentencing Act precisely along the lines that Mick has just referred to, which requires the courts to take account of Aboriginal issues in sentencing, and to advise itself in accordance with strict guidelines, as to how that should happen.

This followed a decision in the Court of Criminal Appeal about thirteen years ago now, *Warramurra*, in which the court said [that] in future it would not accept Bar table protestations about the rights and wrongs of matters in Aboriginal terms, but would require evidence to be given, and for the prosecution to be given advance warning, so that these matters can be properly tested.

Can I also say that during the course of the Board of Inquiry, that some of you know I was involved in, the report that is called the “Little Children are Sacred Report”, we adopted a great deal of what came from the Western Australian report that Mick has just told you about, that he was involved in, and we accepted not only the recommendations of it but adopted them in a very positive way.

What you’ll find here in Australia is that, once again, there’s been a report done which is ignored by the authorities to a large extent. There are reports, and reports and reports dealing with customary law, and explaining it to people, and they’re entirely ignored by the general population, and by the governments of this country. Hopefully, that will change at some stage but it hasn’t yet. At the same time, the report that we wrote has not been entirely ignored, as you know. We were fearful that it might be, when we were writing it. We were concerned about many of the issues in it and we were delighted – ‘we’; I use the royal plural because it’s Pat and myself I speak on behalf of – Pat and I were delighted that it actually hit the Prime Minister’s desk last June some time, and some action has been taken, although the action that has been taken is not in accordance with our recommendations and, having said that, as I’ve said in a number of public fora in the last eight months.

We’re not God’s gift to the Aboriginal people, in terms of these matters. We took on board what we were told in our consultations with the Aboriginal people, and the recommendations, of which there are 97 in that report I just held up, are a synthesis of the suggestions, ideas of the Aboriginal people of the Northern Territory and, in some cases, people outside the Territory who made submissions to us.

Now, that’s some background to what I’m going to talk about in my limited time today. There is a perception out there somewhere – not in here I know, but out there – that

Aboriginal offenders are treated lightly, that creating harsher sentencing regimes will reduce the severity and the prevalence of the offending by Aboriginal people.

As we were told very forcibly, in an address last night at dinner by Justice Harrison of New South Wales, this proposition has never, in any society, proved effective. That is, harsher penalties do not do anything to decrease criminality, to deter; they do nothing but remove the offender from society, and to that extent may I adopt much of what he said last night, except for the humour, which I couldn't possibly attempt.

The statistics in the Northern Territory show some alarming figures. We have the largest percentage of Aboriginal people – it's 29% at the moment; it's a very small population, of course, in the Territory; it's only 200,000, so 30% of that is 60,000 or thereabouts – but the Aboriginal people, despite those percentages, provide about 70% of those who appear before the courts and 80% of those who go to gaol. So, you can't say, on those figures, that they're treated lightly and it shouldn't be thought as such.

The criminal justice system has often been used as a 'blunt instrument', - dealing unfairly at every stage of its process with Aboriginal people, whether they appear as offenders, defendants – who are defenders, necessarily – victims, or as witnesses. Some progress has been made in the Territory because, as I like to think that the judicial system there has a lively awareness of Aboriginal problems, those of you who have been to these conferences before may have heard Justice Mildren of the Supreme Court, who's written extensively on these issues.

The mandatory sentencing – and this harks back, again, to what Justice Harrison said last night – when imposed discriminated unfairly against Aboriginal people. You might remember, we had the 'three strike' rule in the mid-90s, until the change of Government, and that also immediately affected Aboriginal people only.

I should say that of the huge percentage of Aboriginal people in gaol they're not all there for sex offences; they're not all there for murders, killings or violence; many of them are there for driving offences which they continually, unfortunately, commit. Driving and drinking are problems that we've brought to them, and you might think that 200 years ago they didn't commit any of those sorts of offences. It's something that we've managed to bring to them. There are underlying factors which affect Aboriginal people, which need to be dealt with by Government – and we've said this in our report – on a committed long-term basis.

So, although we've said that there is a dire problem out there in the communities, of sexual offence against children, what we said very clearly was that these were not problems unique to Aboriginal people; they are problems that are shared by most of the community, very sadly, and all indigenous communities around the world, but also mainstream communities as well. I don't know if it's a factor of the 21<sup>st</sup> Century, or the late 20<sup>th</sup> Century, but my own experience in court work is that it's a growing phenomenon. Perhaps it's more recognised, perhaps it's more out in the open, perhaps it's because victims are prepared to speak out that we are now conscious of the fact that children are abused, and [in] enormous numbers.

What we said in our report, very clearly, is that we identify this as a major problem in the Northern Territory, but that it was not an Aboriginal problem. The problem was one which we had foisted upon them because of the way in which Aboriginal dysfunctionality

of community has been allowed to occur over many, many, many years – you might think 200 years, at least – where governments have failed to address properly the difficulties and the underlying problems – which we’ve heard a lot of in recent months, and I won’t repeat all of that except to say that Pat and I, for our part, do not agree with the method by which the previous government mobilised the troops and sent them in, and nor do we accept that the current government should merely wait for some months before it does something seriously to reduce that. To that extent we share the views of many of the opponents of intervention, although accepting that there was the need to do something about those problems.

Perhaps I should preface this remark by saying that we were not impressed by the Federal Government’s introduction of anti-customary law legislation, that Mick has referred to already. In our report, we refer to that at footnote 17 on page 58, so it gets about six words; we dismissed it as being of no relevance to the Northern Territory, or to what we were talking about.

If Aboriginal customary law is blamed for taking a soft approach to Aboriginal sentencing, we would refute that; we say there is no such thing as a customary law defence, which the media of this country would lead you to believe. In respect of the cases which Mick referred to in passing, the Jackie Pascoe Jamilmira case, which I was involved in all the way to the High Court, so I’m familiar with it, and the case of GJ Jones, which was launched when I was the Director, do not involve a customary law defence. In both cases those men were charged with what we used to call ‘carnal knowledge’. The fact that they had promised brides as the victim was relevant in sentencing terms, but not in terms of the offence itself. So, it was no defence that they were promised brides, bearing in mind that they were both under sixteen.

As you know, whenever there is a direct conflict between the law of the land and Aboriginal customary law then the former must prevail. You’re all familiar with *Neal’s case*. I’d just remind you, if I may, with respect to what Justice Brennan said in *Neal’s case*:

“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 factors 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.”

Those words were repeated in the court’s rulings in both *GJ’s case* – this is in the High Court – and the *Jackie Pascoe case*, when the court refused special leave, in both cases saying there’s no doubt about the basic principle which is involved in those cases.

So, what we said, in our report – and this is the point at which I think I was invited to come to this conference – was that we recommended that there should be some adoption of Aboriginal law, in terms of sentencing practices, and that it should be taken into account in accordance with a system of community justice groups, which also emanate from the recommendations of the Western Australian Commission, so nothing new or brilliant about that, but also that there be community courts.

Now, in the Northern Territory we already have things called ‘community courts’. Our opinions were that they were coming on slowly, and not quite doing the job. I noticed that since our report came out, the Chief Magistrate of the Northern Territory has written a very good paper about the presentation of the community courts in which he says that many aspects of our complaints or suggestions have been adopted since the writing of the two reports. Maybe that’s going to work but we, nevertheless, think that there is a great deal of merit in continuing dialogue and, once again, this is what we’ve heard from Mick – we’re in furious agreement, it seems, on many of these things – and the hope being that there can be some collaboration between the two laws in such a way that the future is of use for the Aboriginal people, and they get some benefit from it.

We found in our report that sexual abuse of children was serious, widespread and often unreported, but it had nothing to do with customary law. Much of the violence and the sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems which have developed over many decades. Our 97 recommendations started with a basic core recommendation, which was that there needs to be consultation. It was this consultation which was glaringly missing from the Commonwealth intervention of ten months ago, and which concerned us the most.

We were concerned that the attack would be on the underlying difficulties, not on just putting policemen in every house, which is the only possible way to stop there being sexual abuse of children in that house, but rather that the people be re-educated as necessary, and for that matter *educated*, forget the ‘re-’. And, of course, the drinking problem that we introduced for them.

Dialogue, community justice groups, and language-group specific courts. I know we have them, in other places, and the Chief Magistrate of Victoria is here, I know, and Koori courts exist and do very well; we have them in New South Wales and other places. So, that’s something that may assist in the future.

I just wanted to tell you a little story, in the time I’ve got. Mick has given you something about customary law, and I want to just read a little piece from a paper written by the Reverend Djiniyini Gondarra, who comes from Arnhem Land, a very famous man in that part of the world. He’s one of the keepers of the law, and he wrote this:

“For the Yolngu people of North East Arnhem Land, what is called ‘customary law’ is a holy and precious thing. It is the law and law processes that create peace and harmony, guards individual and corporate rights, protecting the old, the young, the sick and the vulnerable in our society. Of course, many Australians, and even some Aboriginal people, now see this same customary law as ‘pay-back’, and other things like the abuse of women etc. That idea is definitely not Yolngu law, and is not part of true customary law.

The customary law we are talking about is the law that was here in this land before the British came and took over Australia. Words like ‘customary law’, and all these other words like ‘pay-back’, and even thinking about Yolngu law, came from white people, as they made observations and named what they thought our law was, without any real understanding.”

He goes on to say: “All societies have lawbreakers, and there are lawbreakers in Aboriginal society. It’s not as if Aboriginal people excuse all misbehaviour of the kind

that we would regard as criminal; quite the contrary.” It’s powerful stuff. I offer those thoughts to you.

When I was still early in my time in the Territory – and I’ve been there for fifteen years, now; I wasn’t then the Director of Public Prosecutions, and I no longer am, if you’ve read the notes here – I went out to Arnhem Land, to a place called Yirrkala, which is near Nhulunbuy, and I sat down with the elders in the dirt – which is the only way to converse in some places; it’s the way to do it; you sit down there and you sit, and talk – and we were discussing a legal problem that had arisen – it’s a little bit complicated, and I won’t take you to the actual problem, but we were trying to sort out, in Aboriginal terms, a white man’s breach of law, and see if we could get some way in which the two could work together, and eventually we did. During the course of it, I was told I should take out with me some identification, to show that I was one of the law leaders of the white community, so that I could talk on even terms.

I might just say that one of the things I did, in doing the report, with Pat is that I kept talking about my lack of hair, and my grey hair, and my age, as being something which probably told them that I’d been sent out as one of the senior people – they took to that; ‘the old grey-haired man’, they said – which was very flattering!

We sat down on this occasion, when I was less grey and had more hair, but was still old and elderly, and I said ‘well, let’s talk about the law’, and I said ‘I want to take you to one of Sections in our law’, and I waved the Criminal Code of the Northern Territory, which I’d taken with me. They said, ‘what’s that?’ and I said ‘this is our law; it’s all written down here’. I thumbed through it for them. And then there was a little bit of chit-chat between the two of them, three of them, and language. I said, ‘what’s the problem?’ and they said, ‘is all your law written down, then?’ I said, ‘yes’. They said, ‘We thought you made it up as you went along’.

And that really is the way it’s seen by Aboriginal people. Their law is 40,000 years old, ours is comparatively new. The two can work together, in sentencing and perhaps in other areas, and I recommend that to you as a thought.

Thank you.