

**Professor Michael Dodson AM, National Centre for Indigenous Studies, Australian National University**

*On the 30 April 2002, at the Manangrida Court of Summary Jurisdiction of Central Arnhem Land, a fifty-year old tribal Aboriginal man, Jackie Pascoe, was sentenced to thirteen months imprisonment, on the charge of having unlawful intercourse with a minor. She was his fifteen-year old promised wife. He also received a further two months imprisonment for firearm offences.*

Ladies and gentleman, my first duty is to acknowledge we're on the ancestral lands of the Ngunnawal peoples. My greetings.

Last year, the Federal Parliament amended the Commonwealth Crimes Act to prohibit courts from taking into account cultural background in sentencing people convicted under that Act. Now, there has been much misinformed and sometimes hysterical media reports regarding Aboriginal customary law, in the eighteen months or so leading up to this amendment.

Some of the coverage resulted from the Northern Territory's Supreme Court case referred to in my opening, and another case involving Aboriginal men and their promised brides, and some of this frenzy was generated by the ABC program Lateline, and the revelations of a former Northern Territory Public Prosecutor, and a Commonwealth public servant, and still some was unleashed by the then Federal Minister for Indigenous Affairs, and most of the commentary failed to understand Aboriginal customary law.

It should be mentioned that at the time many in legal circles opposed the Government's intention to amend the Crimes Act in the way that it did, well before it did it. Even the Senate's Legal and Constitutional Affairs Committee that examined the bill, did not think it was such a good idea. The Law Council of Australia, much to its credit, said that calls for Aboriginal customary law to be excluded from consideration by the courts, were misconceived and dangerous.

Ladies and gentlemen, in this presentation I don't intend to examine these cases, that I've mentioned. Others here are better equipped to do this than I am. What I wish to do is look at what we mean by 'customary law', and revisit the approach we took in the Western Australian Law Reform Commission on our customary law reference.

I participated in that inquiry as a Special Commissioner for the six years that it took, and claims were abounding about Aboriginal customary law when we were putting the finishing touches to our report. In our view, the claims were specious. Now, before I seek to answer – if there is an answer to this question of what is customary law – I think we need to deal with the reality, and this reality confronted us in our work at the Western Australian Law Reform Commission.

The reality is this: Aboriginal customary law will not go away, no matter how hard we try, and we've been trying for a long time. In 1837, colonist George Grey announced that from the moment the Aboriginals of this country are declared British subjects they should, as far as possible, be taught that British laws are to supersede their own; but what he failed to realise, and what Government still fails to realise is that our laws survive and evolve

with us. So long as we're still here, in body and spirit, our laws will remain. But we do know that the way forward must make some accommodation of Aboriginal customary law. Early colonists such as George Grey could perhaps plead ignorance, given the dominant cultural attitudes, and the immaturity of international law at the time. That attitude, I suggest, ought now to be history, and inexcusable, but it still persists, as we've seen.

The term *Terra Nullius*, 'empty land', for example, once included land occupied by 'backward people', like us. The assumption was that we were incapable of owning land in any sense compatible with full ownership. The colonists conveniently believed that they had peacefully discovered uninhabited territory, and had the right to claim it as their own; with no white people or white laws, it was theirs for the taking.

Now, Aboriginal law and custom permeates Aboriginal society; it does not lie dormant awaiting approval; it's not a 'lost tradition'. Another reality for us as Aboriginal peoples is that Australian law persistently withholds recognition of our laws. Since 1788, the most significant changes have been the imposition of restraints by white law, shackles restraining the practice of our law. Non-indigenous laws hold the power and decide when our law can enter into its domain. The harsh reality is that no matter how strong our law is, for us, mining companies, parliaments and their statutes, and police forces, have always proved stronger.

The Commonwealth Crimes Act before last year's amendments allowed a discretion to courts on Aboriginal law, but this still rendered Aboriginal law and its application limited, for example, to Criminal Justice or family matters. Our laws have become symbolised by bloodied spear and the sexual abuse of promised brides. But, Aboriginal law is diverse; it includes elements which would normally be described as private law, public law, religious beliefs and practices, and family and social relations.

The role of our law in the resolution of disputes and the maintenance of social control is a real option, I suggest, because they exist, and they're alive with the potential to assist, where nothing else seems to work, which, I think, brings me back to a point that recognition by white law does not legitimise our laws; it simply sanctions their existence and cautiously relaxes the control over their application. This in turn makes it a lot easier for us to live by them without fear of punishment or interference.

So, how did we deal with this in the Western Australian Law Reform Commission reference? Our terms of reference asked us to investigate whether there may be a need to recognise the existence of, and take into account, within the Western Australian legal system, Aboriginal customary laws. So, really, our first question was to find out, if possible, what it was. During our consultations in Western Australia, Aboriginal people and communities told us, and emphasised, that their traditional law was part of everything. It was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion.

Now, in our inquiry we found that Aboriginal customary law, as it's understood and practised in Western Australia, embraces many of the features typically associated with the Western conceptions of law, in that it is a defined system of laws for the regulation of human behaviour, which developed over many years from a foundation of moral norms, and which attracted specific sanctions for non-compliance. We found that the existence of Aboriginal customary law in Western Australia today is beyond doubt, and we were of the view that the term 'customary law' cannot be, and on some arguments should not be,

precisely or legislatively or legalistically defined. Instead, we favoured an understanding of the term that encompassed the holistic nature of Aboriginal customary law.

So, what constitutes customary law? Well, many non-indigenous Australians, as I've indicated, would associate Aboriginal customary law with 'pay-back', or traditional punishment. However, Aboriginal customary law governs, as I've noted above, all aspects of Aboriginal life, establishing a person's rights and responsibilities to others, as well as to the land and natural resources. For example, there are laws that define the nature of a person's relationship to others, including how or whether a person may speak to, or be in the same place as, another, laws that dictate who a person may marry, laws that define where a person may travel within his or her homelands, and laws that delimit the amount and type of cultural knowledge a person may possess.

We looked at the question of cultural background of an offender. Now, we all know that sentencing principles are meant to apply equally, irrespective of the cultural background of the offender. In other words, an Aboriginal person can't be treated more leniently or more harshly just because he or she is Aboriginal, and this general proposition does not mean that the individual characteristics of a particular offender, including matters associated with his or her cultural background, cannot be taken into account by a court when determining the appropriate sentence for an offence.

In some Australian jurisdictions, sentencing legislation includes, as a relevant sentencing factor, the cultural background of the offender. We in the Western Australian Law Reform Commission Inquiry examined the manner in which courts have considered relevant facts associated with an offender's Aboriginal background, and we found that most cases had focused on historical and socioeconomic factors. There were a limited number of cases that have acknowledged the disadvantage experienced by Aboriginal people within the criminal justice system.

We concluded that although there is sufficient case law authority to allow matters associated with an offender's Aboriginal background to be taken into account during sentencing, the cases were not consistent in their approach. We recommended, to meet part of this problem, that the Western Australian Sentencing Act should be amended to include a list of factors that are generally considered relevant to sentencing, and this list should be for the purpose of guidance on the relevant principles, but it should not constitute an exhaustive list, because we felt that flexibility is required in sentencing.

The removal of the reference to cultural background of an offender in 16(a) of the Commonwealth Crimes Act is, of course, contrary to the recommendations contained in the Australian Law Reform Commission report, which dealt with the sentencing of federal offenders. We firmly rejected the argument that permitting courts to take into account the cultural background of the offender is contrary to the principle of equality before the law; this was the silly proposition put by some politicians. Because, all accused, whether they are Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs.

The Law Council had asserted that the Federal Government, in its approach, rather than resulting in 'one law for all' will in fact, discriminate against Aboriginal people, and other cultural groups. We had a strong view at the Western Australian Commission that it was essential to all courts in Western Australia that they be directed to take into account any relevant matters connected with an offender's cultural background.

We recommended that The Western Australia *Sentencing Act* (1995) be amended to include relevant sentencing factors. This is what we said:

“[T]hat it include as a relevant sentencing factor, the cultural background of the offender, and that the cultural background of the offender be included in a list of other relevant sentencing factors, and we propose that the Sentencing Act and the Young Offenders Act provide that when sentencing an Aboriginal offender the court must consider any aspect of Aboriginal customary law that is relevant to the offence, whether the offender has been, or will be, dealt with under Aboriginal customary law, and the views of the Aboriginal community of the offender, and the victim, in relation to the offence or the appropriate sentence.

We stress that in all cases the court would retain a discretion, and determine the appropriate weight to be given to Aboriginal customary law, depending on the circumstances of each case.”

Now, for Aboriginal Law to be properly taken into account as a relevant sentencing factor it's vital that reliable evidence, or information, about customary law is presented. We recognise that there is a need to balance the requirement for reliable evidence about customary law, and the flexible nature of sentencing proceedings.

We were told, during the course of our enquiry, that sometimes false claims are made by Aboriginal people or their lawyers, that an offender had been, or would be, subject to traditional punishment, or that the particular behaviour was permitted under Aboriginal customary law, and in making our recommendations we were mindful of the need to ensure that false claims about Aboriginal customary law are discouraged.

In practice, information presented to sentencing courts about Aboriginal customary law [has] been varied. Courts have heard expert evidence from Aboriginal elders, oral evidence from Aboriginal people, written statements from Aboriginal people, and submissions by defence counsel, which have sometimes been accepted or verified by the prosecution.

We concluded that it was inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues [by] the submissions of defence lawyers alone. We proposed that there should be a legislative revision in Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court.

Thus we recommended that the Sentencing Act 1995 Western Australia and the Young Offenders Act 1994 be amended to provide 1) that when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group, and elder and/or respected member of any Aboriginal community, to which the offender and/or the victim belong. 2) Submissions for the purpose of this section may be made orally or in writing, on the application of the accused, the prosecution or a community justice group. The court sentencing the offender must allow the other party, or parties, a reasonable opportunity to respond to the submissions, if requested, and finally that if an elder, respected person or member of a community justice group provides information to the court then that person must advise the court.

Thank you.