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Customary law and the sentencing of Indigenous offenders*

Professor Michael Dodson AM



For six years, the author was a special commissioner on the Law Reform Commission of Western Australia Inquiry into the recognition of Aboriginal law and culture. The following article reports on some of the Commission's key findings and recommendations in relation to customary law and sentencing Indigenous offenders.

In 2007, the federal Parliament amended the Commonwealth *Crimes Act* 1914 to prohibit courts from taking into account cultural background in sentencing persons convicted under that Act.¹

Specifically the amended legislation states:

“16A(2A) However, the court must not take into account ... any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.”²

In the lead up to this amendment, there was much misinformed and sometimes hysterical media reporting about Aboriginal customary law.

Justice Blackburn, in the Gove Land Rights case, acknowledged that in 1788 there existed in Australia:

“... a subtle and elaborate system highly adapted to the country ... which provided a stable order of society”.³

The Australian Law Reform Commission (ALRC) in its 1986 report into the recognition of customary law stated that:

“Generally, the customary processes operating do have an important role to play. If disputes and conflicts within Aboriginal communities can be resolved in unofficial ways this should be encouraged as a preferable alternative to reliance on the general legal system.”⁴

The role of customary law in the resolution of disputes and the maintenance of social control is a real option. Without doubt, customary law exists and has the potential to assist where nothing else seems to work.⁵

The Western Australian Inquiry into customary law

The Terms of Reference asked the Law Reform Commission of Western Australia (LRCWA) 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”.⁶



What constitutes customary law?

Many non-Indigenous Australians associate Aboriginal customary law with “payback” or traditional punishment. Customary law has been stereotyped as a bloodied spear and the sexual abuse of promised brides.

Aboriginal customary law however is holistic, governing all aspects of Aboriginal life, establishing a person’s rights and responsibilities to others as well as to the land and natural resources.⁷ It is a means of:

“... connecting people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance of this order”.⁸

Customary law includes elements which could normally be described as private law, public law, religious beliefs and practices, and family and social relations. The Inquiry found that Aboriginal customary law, as it is understood and practised in Western Australia, embraces many of the features typically associated with the western concept of law in that it is a defined system of rules for the regulation of human behaviour which has developed over many years from a foundation of moral norms and which attracts specific sanctions for non-compliance. 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.⁹

While there are common threads that unite Aboriginal laws across Western Australia, the diversity of laws (as with the diversity of Aboriginal peoples) must be stressed. Unlike Australian law, there is no single system of customary law that applies to all Aboriginal people. Because of the differences in the laws of different tribal groups and the complex application of rules within Aboriginal kinship systems, it is an impossible task to attempt an exhaustive list of what constitutes the substance of Aboriginal customary law. It cannot be precisely or legalistically defined. In these circumstances, we took the view that the issue of what constitutes Aboriginal customary law should be left to Aboriginal people themselves; in particular, those people in each Aboriginal community whose responsibility it is to pronounce upon and pass down the law to future generations.¹⁰

Traditional laws are more evidently in existence (or more overtly practised) in some Aboriginal communities than in others. For example, for some Aboriginal people, particularly those living in remote communities such as Warburton, Aboriginal customary law is clearly a daily reality and it is Aboriginal law, not Australian law, which provides the primary framework for people’s lives, relationships and obligations.

On the other hand, amongst urban Aboriginal communities, the existence of Aboriginal customary law is less immediately evident. Nonetheless, the Inquiry found that traditional law is still strong in the hearts of urban Aboriginals.¹¹

The cultural background of the offender

Sentencing principles should apply equally irrespective of the identity or cultural background of the offender.¹² In other words, an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal. 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 *Neal v The Queen*, Brennan J stated that a sentencing court is required to consider:

“... all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group”.¹³

In some Australian jurisdictions, sentencing legislation includes as a relevant sentencing factor the cultural background of the offender (both for adults and children). In Western Australia, in relation to adults, the *Sentencing Act 1995* is silent on the relevance of cultural factors. In comparison, s 46(2)(c) of the *Young Offenders Act 1994* (WA) provides that when sentencing a young person the court is to take into account the cultural background of the offender.

The relevance of Aboriginality to sentencing

In the Inquiry, we examined the manner in which courts have considered relevant facts associated with an offender’s Aboriginal background. Cases reveal that courts have taken into account various factors, such as social and economic disadvantages; alcohol and substance abuse (where that abuse is related to the environment in which the offender has grown up); the hardship of imprisonment for Aboriginal people who face the loss of connection to land, culture, family and community; the effects of past government policies that removed Aboriginal people from their families; and the views of the offender’s Aboriginal community. The Commission found that most cases have focused on historical and socio-economic factors. However, there is a limited number of cases that have acknowledged the disadvantages experienced by Aboriginal people within the criminal justice system.¹⁴

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 are not consistent in approach.¹⁵

For the purposes of consistency and to ensure that important issues associated with the Aboriginality of an offender are not overlooked, we considered that there should be a legislative provision requiring courts to have regard to the cultural background of the offender. The Inquiry was also of the view that there is no reason to limit this provision only to Aboriginal people because matters associated with the cultural background of other groups in the community may also be relevant to sentencing. We therefore recommended that the *Sentencing Act 1995* (WA) should be amended to include

a list of factors that are generally considered relevant to sentencing. This list should be for the purpose of guidance on the relevant principles, but it should not constitute an exhaustive list because flexibility is required in sentencing.¹⁶

We firmly rejected the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law.¹⁷ All accused, whether Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs. The removal of the reference to the cultural background of an offender in s 16A of the *Crimes Act 1914* (Cth) is contrary to the recommendations contained in the Australian Law Reform Commission Report dealing with the sentencing of federal offenders.¹⁸

We had a strong view that it was essential that all courts in Western Australia are directed to take into account any relevant matters connected with an offender's cultural background.¹⁹

Legislative recognition of Aboriginal customary law during sentencing proceedings

In its Discussion Paper, the Commission concluded that although there is judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, there is no consistent approach in Western Australia.²⁰ Further, the judicial recognition of Aboriginal customary law in Western Australia has generally been limited to physical punishments.

The Inquiry considered that reform is necessary in Western Australia to ensure that Aboriginal customary law is viewed more broadly.²¹ We proposed 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.²²

The Inquiry stressed that in all cases the court would retain discretion and determine the appropriate weight to be given to Aboriginal customary law depending upon the circumstances of the case.

Evidence of Aboriginal customary law in sentencing

For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented.²³

Section 15 of the *Sentencing Act 1995* (WA) provides that a sentencing court "may inform itself in any way it thinks fit". It is not bound by the strict rules of evidence that apply to a court when conducting a trial. We recognised 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 that false claims are sometimes made by Aboriginal people or their lawyers that an offender had been, or would be, subject to traditional punishment or that behaviour was permitted under Aboriginal customary law. In making our recommendations, we were aware of the need to ensure that false claims about Aboriginal customary law are discouraged.²⁴

In practice, information presented to sentencing courts about Aboriginal customary law has been varied. Courts have heard expert evidence from 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.²⁵

We concluded that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from the submissions of defence lawyers. We proposed that there should be a legislative provision in Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court.²⁶

The Inquiry's proposal provided that a sentencing court must have regard to any submissions made by a representative of a community justice group, or by an Elder or a respected member of the Aboriginal community of the offender or the victim. It was further proposed that submissions could be made orally or in writing on the application of the accused, the prosecution or a community justice group. The sentencing court must allow the other party a reasonable opportunity to respond to the submissions if requested.²⁷

The Inquiry concluded that whenever an Elder, a respected person or a member of a community justice group is providing information or evidence, that person should disclose his or her relationship to the offender or the victim. The presence of a relationship may not necessarily weaken the relevance of the information put forward but it is important that whoever is relying on the information is appraised of any potential conflicts of interest. We also said that the court must consider any submissions made by an appropriate member of the victim's community, to ensure that the views of the victim can be taken into account.²⁸

Endnotes

- * This article is an edited and abridged version of M Dodson, "Culture and sentencing Aboriginal offenders", paper presented at the National Judicial College of Australia and Australian National University Conference, Sentencing 2008, 8–10 February 2008, Canberra. The paper draws on the Law Reform Commission of Western Australian Inquiry, *Aboriginal Customary Laws*, Project 94, completed 2006.
- 1 The term "cultural background" was inserted into s 16A of the *Crimes Act 1914* (Cth) in 1994, along with a range of amendments, to implement recommendations of the Australian Law Reform Commission's Report, *Multiculturalism and the Law*, ALRC Report 57, Sydney, 1992, Recommendation 29, para 8.14.
- 2 Section 16A was amended by the *Crimes Amendment (Bail and Sentencing Act) 2006*, Sch 1 cl 4 and 5, commencement 13/12/06, s 2.

- 3 *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141 at 267.
- 4 Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, ALRC Report 31, Canberra, 1986, Vol 2, Pt VI, at [720].
- 5 Law Reform Commission of Western Australia (LRCWA), *Aboriginal customary laws*, Project 94, Discussion Paper, 2005, p 51.
- 6 LRCWA, *The interaction of WA law with Aboriginal law and culture*, Project No 94, Final Report, Perth, 2006, p vi.
- 7 LRCWA, Discussion Paper, above, n 5, p 52.
- 8 LRCWA, *Aboriginal customary laws*, Project 94, Thematic Summaries of Metropolitan Consultations, Perth, 2004, p 3.
- 9 LRCWA, Discussion Paper, above, n 5, p 52.
- 10 *ibid* p 53.
- 11 *ibid* pp 51–52.
- 12 *Neal v The Queen* (1982) 149 CLR 305 per Brennan J at 326. See also *R v Fernando* (1992) 76 A Crim R 58 per Wood J.
- 13 (1982) 149 CLR 305 at 326.
- 14 LRCWA, Final Report, above, n 6, pp 171–172.
- 15 *ibid* p 172.
- 16 *ibid*.
- 17 *ibid* p 173.
- 18 ALRC, *Same crime, same time: sentencing of federal offenders*, ALRC Report 103, Canberra, 2006, at [29.45].
- 19 Recommendation 36, LRCWA, Final Report, above n 6, p 173.
- 20 LRCWA, Discussion Paper, above, n 5, p 208.
- 21 Proposal 29, *ibid*.
- 22 LRCWA, Discussion Paper, above n 5, pp 374–375, Recommendation 38.
- 23 LRCWA, Final Report, above n 6, p 183.
- 24 *ibid*.
- 25 *ibid*.
- 26 LRCWA, Discussion Paper, above n 5, Proposal 32, p 224.
- 27 LRCWA, Final Report, above n 6, Recommendation 39, p 184.
- 28 *ibid* p 184.

Judicial Commission acknowledges National Reconciliation Week 27 May–3 June 2008

To commemorate National Reconciliation Week and National Sorry Day, the Ngara Yura committee of the Judicial Commission invited Mrs Louise Campbell-Price to speak at the Judicial Commission on 30 May 2008. Louise is a Gumbaingirr woman from Bowraville Mission and a member of the Stolen Generation. She was taken from her family as a young girl and spent her formative years with two foster families and in various homes and institutions. She was eventually reunited with her father and siblings 20 years later. Louise is now a highly regarded speaker at conferences and Indigenous gatherings and is the Aboriginal Education co-ordinator for the Catholic Schools Office in the Maitland/Newcastle diocese. Louise's brother Richard Campbell also visited the Commission. Richard is a talented artist whose work is currently on display in the Indigenous Australian section of the Australian Museum in Sydney.



Louise Campbell-Price at the Judicial Commission



Tammy Wright, the Judicial Commission's Aboriginal Project Officer

Dubbo community welcomes judicial officers

Kate Lumley

Publishing Manager, Judicial Commission of New South Wales



A group of judicial officers and guests visited the Dubbo Aboriginal communities on the weekend of 17–18 May. The visit was organised by the Judicial Commission's Ngara Yura committee. Ngara Yura means "to hear the people" in Eora, the language of the traditional owners of the Sydney Central Business District. The purpose of the visit was to meet, to hear, and to better understand Aboriginal culture and issues and an opportunity for the community to meet with judicial officers.

"This is a dream come true for me. To have you people from the courts come to visit so you can see the work we're doing," Uncle Ralph Naden tells us. The group of judicial officers representing the Supreme, District and Local Court and the Industrial Relations Commission, their partners, and Judicial Commission staff, has come to visit the Yalmambirra Boogijoon Doolin Aboriginal cultural camp 50 km north of Dubbo.

Yalmambirra Boogijoon Doolin means "to teach little sand goannas". The cultural camp's mission is to educate children in traditional ways so they can learn respect both for Indigenous and white customs and law.

In 1993, Uncle Ralph, a Wiradjuri Elder and shearer for 30 years, bought for one dollar from the Department of Lands a vacant rural block of land near Marthaguy Creek, a waterway that winds into the Macquarie marshes. With his wife Audrey and children Deirdre, Kim and Phillip, the Naden family has developed the camp into a self-funded respite centre. The camp is now a scenic property with sweeping lemon-scented gums and sheoaks, a campground, dancing and meeting areas. Many trees on the property have been scarred in the traditional way with wood-burned carvings of wildlife. The camp takes children referred

from government agencies such as the Department of Community Services and Juvenile Justice as well as anyone wanting to learn about Wiradjuri culture. Visitors to the camp can experience a smoking ceremony, eat bush tucker, listen to traditional stories, try their hand at carving and painting, and participate in dance performances and boomerang throwing.

Near the dance area, Uncle Ralph has lined a pathway with rocks from all the tribal lands in the western plains region in a symbolic gesture of reconciliation. This is significant because tensions between Aboriginal families from different regions of the State now living in the Dubbo area have periodically erupted into violence. In 2005–2006, riots resulted in the Department of Housing boarding up many homes in West Dubbo's Gordon housing estate and moving people on to other areas in Dubbo.

Uncle Ralph invites us to walk down the reconciliation pathway through the cleansing smoke of a ceremonial fire. We sit in a circle to watch a welcome dance performed by some young dancers as Uncle Ralph and his sons sing and sound tapsticks. The earthy sounds are mesmerising and many of us find the children's dance performance a moving experience.

The dancers then tell a traditional story about the Bugeen, a bad spirit who comes onto the country to pay back a wrongdoer. The moral, says Uncle Ralph, is that the Bugeen will always find you if you've done something wrong. He draws a parallel between the Bugeen and the impact of getting on the wrong side of "white man's law". "It's all about respect for the law," Uncle Ralph teaches his little sand goannas. In his storytelling, he constantly draws connections between the severe punishments for breaking traditional law with the consequences for Aboriginal people who get into trouble with Australian law today. Tammy Wright, the Judicial Commission's Aboriginal Project Officer and organiser of the weekend, reminds us that Aboriginal children are 18.6 times more likely to be imprisoned than other children.

The Yalmambirra Boogijoon Doolin cultural camp is one example of the many positive programmes being run in the Dubbo region as Indigenous people work to reclaim respect and overcome decades of disadvantage and discrimination. During the weekend we heard from local Elders Uncle Russ Ryan and Uncle Bill Phillips and community workers Mr Darren Toomey, Aboriginal Liaison Officer with Dubbo City Council, Mr Barry Coe, co-ordinator of the Aboriginal Community Justice Group, and Ms Leanne Greenaway, programme co-ordinator of the Dubbo Community Development Project. Government and non-government initiatives such as Circle Sentencing, the Community Night Patrol bus, the Yindyama Domestic Violence Offenders programme, the Gulbri Men's Group, and after-school and school holiday care are in place. Funding is a perennial problem for these programmes, but the determination and dedication of the Indigenous Elders and community workers is beyond doubt. Victor Wright, a Regional Project Officer for the Department of Corrective Services, spoke of the operation of Yetta Dhinnakkal ("the right pathway") 68 km from Brewarrina. This accommodates primarily Aboriginal inmates in an open establishment designed to provide employment skills and education about Aboriginal culture.

In acknowledging the Indigenous Elders and thanking them for their hospitality, Chair of the Ngara Yura committee, His Honour Judge Stephen Norrish QC, reflected on the value of our weekend visit to Dubbo:

"We seek a better understanding of matters which affect Aboriginal people which might prepare us better to treat Aboriginal people in our courts with the respect and dignity that they deserve and seek."

"Bill Phillips had these words of advice in relation to the sentencing of young Aboriginal offenders: 'keep them out of gaol otherwise that's the end of them!'".

Some of the main issues identified that need addressing include:

- mistrust of government agencies and dislike of authority
- lack of respect for elders by the younger generation
- loss of cultural identity particularly with young people
- hurt and anger over past government policies, particularly forced removal of children from their families
- community divisions arising from housing policies particularly placing people from different tribal groups together.



Uncle Bill Phillips and Mrs Phillips, Uncle Ralph Naden and Uncle Russ Ryan



Young dancers learning traditional ways from the Elders



Uncle Ralph Naden addressing judicial officers