Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

BRIEFING PAPER[1]

Stronger Futures and Customary Law

25 June 2012

The Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 is before the Senate.

Schedule 4 of the Bill amends the *Crimes Act 1914* (Cth) to insert s 16AA. The effect of this provision is to prohibit a court, in bail and sentencing matters, from taking into account customary law or cultural practices which may lessen or aggravate the seriousness of criminal behaviour.

Impact of the provision

The provision is clearly targeted at Aboriginal people and will impact overwhelmingly upon us. The Chief Justice of the Northern Territory has said of the equivalent provisions in the existing *Northern Territory National Emergency Response Act 2007*:

> The effect is that the court is not entitled to consider why an offender has offended and pass an appropriate sentence. The Court is required to ignore the actual circumstances of the offending. The artificiality involved is obvious...
>
> Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community. It seems to me this is a backwards step.[2]

The law distorts ordinary and well-established principles for setting fair sentences. It prevents courts from taking into account all relevant factors when sentencing Aboriginal people. This is fundamentally unjust.

It is important to recognise that customary law has never been a defence to violent crimes. It has only been relevant as one of the factors that a court should consider in understanding the context of an offence in determining an appropriate sentence.

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[1] Aboriginal Peak Organisations of the Northern Territory – APO(NT) – is an alliance comprising the Central Land Council (CLC), Northern Land Council (NLC), Aboriginal Medical Services Alliance of the NT (AMSANT), North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS). The alliance was created to provide a more effective response to key issues of joint interest and concern affecting Aboriginal people in the Northern Territory, including through advocating practical policy solutions to government. APO(NT) is committed to increasing Aboriginal involvement in policy development and implementation, and to expanding opportunities for Aboriginal community control.

[2] Riley CJ, address at the ceremonial opening of the NT Supreme Court on its 100th anniversary, May 2011, http://www.cla.asn.au/Article/2011/NT_Supreme_Court_2.pdf

These provisions deny the existence of a fundamental truth – that customary law affects the lives of many Aboriginal people. These provisions compel a court to sentence Aboriginal people in an artificial and false context. In doing so, the rule of law is undermined, and community respect for the law is diminished.

The provisions also deliver a strong message to Aboriginal people that customary law is not valued; that customary law is not sufficiently important for a court to take it into account in sentencing, or indeed that it is part of 'the problem'.

This message is deeply troubling and insulting for Aboriginal people. Customary law is central to the identity of Aboriginal people. It always has been, and always will be, a core part of Aboriginal culture.

Aggravating circumstances and customary law or cultural practice

Victims of crime deserve all relevant factors to be taken into account in the sentencing process. The fact that an offence involves both a breach of the criminal law and a breach of customary law may be an aggravating factor for the purposes of sentencing. These provisions prevent a court from increasing a sentence on the basis that an offence is contrary to customary law and cultural practice and therefore unacceptable in both an Aboriginal and Western context.

Customary Law in the Supreme Court

Between 1994 and 2006 the Supreme Court of the Northern Territory convicted 3976 persons of criminal offences[3]. Customary law was raised in 36 cases (less than one per cent and an average of three a year). Of those 36 cases, a submission that moral culpability was related to customary law was made in only 13 cases. In four of these cases the court accepted the defendant committed the offence whilst acting in accordance with customary law. Only two of these cases involved 'promised brides'. In these two cases, initial sentences were inadequate and were properly increased by appellate courts.

The former Chief Justice of the Northern Territory has said:

> When the current position is carefully analysed, 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. The constant stream of violence by Aboriginal men against Aboriginal women and children is fed by alcohol and other drugs. Rarely are these cases connected to customary law, practices or beliefs. Repeatedly the courts in the Northern Territory have emphasised that the general law of the Territory must prevail in all circumstances and that violence by Aboriginal men against women and children will not be tolerated.[4]

[3] Northern Territory Chief Justice Brian R Martin *Customary Law* Paper presented to JCA Colloquium 5 October 2007 http://www.nt.gov.au/ntsc/media/docs/commonwealth_intervention.pdf p 31

[4] Northern Territory Chief Justice Brian R Martin *Customary Law* Paper presented to JCA Colloquium 5 October 2007 http://www.nt.gov.au/ntsc/media/docs/commonwealth_intervention.pdf p 31

Customary law in the Magistrate's Court

Customary law and cultural practice is sometimes raised in criminal cases in the Magistrate's Court. Between 1994 and 2006 there were 6 appeals from the Magistrate's Court involving cases where customary law was relevant (on average one every two years)[5].

A misconception

There is a misconception that customary law has been used as a ruse by defence lawyers to achieve an acquittal, or improperly gain lesser sentences, or to inappropriately obtain bail.

The Law Council of Australia has stated that there is:

> no evidence that [Australian] courts have permitted manipulation of "cultural background" or customary law – and there has been no case in which the court has accepted such evidence as justification or excuse for violent or abusive behaviour.[6]

The *Little Children are Sacred Report* "was unable to find any case where Aboriginal law has been 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."[7] It must be remembered that "(i)t is common ground among Indigenous communities that violence against women and children is not, and never has been, a part of Aboriginal culture or customary law."[8]

The provisions result in the unequal application of the law

In a leading High Court judgment on the sentencing process, Justice Brennan stated:

> 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 facts including those facts 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. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the courts exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.[9]

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[5] Northern Territory Chief Justice Brian R Martin *Customary Law* Paper presented to JCA Colloquium 5 October 2007 http://www.nt.gov.au/ntsc/media/docs/commonwealth_intervention.pdf p 31

[6] Law Council of Australia *Recognition of Cultural Factors in Sentencing* Submission to the Council of Australian Governments, 10 July 2006, www.lawcouncil.asn.au, p 18

[7] Northern Territory, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (2007), p 58

[8] Law Council of Australia *Aboriginal Customary Law* Submission to the Law Reform Commission of Western Australia 29 May 2006 p 20
http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=&search=customary+law&searchon=titles

[9] *Neal v R* (1982) 149 CLR 305 at 326 per Justice Brennan at 326.

Justice Brennan went on to discuss sentencing of an Aboriginal person:

> Aboriginality of itself, therefore, is neither an aggravating nor a mitigating factor, but facts which exist only by reason of the offender being an Aboriginal may be. There may by many circumstances which only arise as a result of an Aboriginal being involved in the cultural affairs of his race which can be taken into account as a circumstance surrounding the commission of an offence.[10]

Unfairness arises in the rare cases where evidence is sought to be led that the defendant's actions were in accordance with, or in defiance of, Aboriginal customary law and cultural practice. As the Law Council has stated:

> The Law Council submits that removal of the power of courts to consider all factors relevant to the state of mind of an accused in criminal matters would be inimical to the principles upon which the law in Australia is based. The disposition and circumstances of the accused will always be relevant to the commission of a crime, whether it is murder, assault or trespass. Removing the capacity of the court to consider customary law will not only offend that principle, but will further confuse the Indigenous communities that continue to live by and observe age-old customs and laws.[11]

We note that across Australia, every Law Reform Commission recommendation has supported the continuing role of customary law in the administration of the general criminal law.[12] The Northern Territory Anti-Discrimination Commission shares the same view, as do those members of the Supreme Court who have commented on the issue.

Conclusion

Federal Parliament should be reinforcing the role of Aboriginal cultural practice and customary law, not further eroding it. Custom and culture are a source of social stability and community harmony. They are an integral part of rebuilding cultural authority within Aboriginal communities.

A country that is committed to ensuring equality before the law and respect for cultural diversity should not maintain a law that undermines these basic principles.

These unnecessary and unfair provisions should be removed from the proposed *Stronger Futures* legislation.

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[10] Ibid

[11] Law Council of Australia *Aboriginal Customary Law* Submission to the Law Reform Commission of Western Australia 29 May 2006 p 20
http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=&search=customary+law&searchon=titles

[12] We commend the detailed analysis of these issues by the Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report 31 (1986)