NORTHERN TERRITORY LAW REFORM COMMITTEE

"TWO JUSTICE SYSTEMS WORKING TOGETHER"

REPORT ON THE RECOGNITION OF LOCAL ABORIGINAL LAWS IN SENTENCING AND BAIL

Report 46

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ABBREVIATIONS

ALRC	Australian Law Reform Commission
COAG	Council of Australian Governments
Crimes Act	*Crimes Act 1914* (Cth)
LCA	Law Council of Australia
LRCWA	Law Reform Commission of Western Australia
LSNT	Law Society Northern Territory
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NTNER Act	*Northern Territory National Emergency Response Act 2007* (Cth)
RDA	*Racial Discrimination Act 1975* (Cth)
SCJCS	Standing Committee on Justice and Community Safety (ACT)
Sentencing Act	*Sentencing Act 1995* (NT)

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TERMS OF REFERENCE

On 29 January 2019, the Honourable Natasha Fyles, Attorney-General and Minister for Justice, asked the Northern Territory Law Reform Committee (the Committee) to investigate, examine and report on an appropriate alternative legislative framework to take into account Aboriginality in criminal law proceedings.

Matters for the Committee to Consider

1. The current application of section 104A of the *Sentencing Act 1995* (NT) and sections 15AB, 16A(2A) and 16AA of the *Crimes Act 1914* (Cth) in bail and sentencing proceedings in the Northern Territory;

2. The extent to which the Northern Territory's sovereignty to make laws for 'maintaining law and order and the administration of justice' pursuant to section 35 of the *Northern Territory (Self-Government) Act 1978* (Cth) and regulation 4 of the *Northern Territory (Self-Government) Regulations 1978* (Cth) is being compromised, as a result of the above statutory prohibitions in the *Crimes Act 1914* (Cth); and

3. Whether sections 15AB, 16A(2A) and 16AA of the *Crimes Act 1914* (Cth) should be repealed and, if so, recommend an appropriate alternative legislative framework which is consistent with common law and the relevant findings of the Australian Law Reform Commission Report 'Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'.

In undertaking this reference, the Committee should consult with relevant professionals and agencies in both the Northern Territory and in other jurisdictions. In particular, the Committee should consult with the relevant stakeholders who are involved in the development of the draft Aboriginal Justice Agreement.

The Committee should have regard to previous reports and research into Aboriginal Customary Law, including but not limited to the reports of the ACT Standing Committee on Justice and Community Safety (2015), NSW Law Reform Commission (2013), Law Reform Commission of Western Australia (2006) and Australian Law Reform Commission (1986).

In addition, the Committee should consider the legislative and policy approaches taken in other Australian and overseas jurisdictions but have regard to the unique Northern Territory context in making recommendations.

FINDINGS

The Committee makes the following findings:

1. Many Aboriginal people from across the Northern Territory (NT) subscribe to, adhere to, practise and consider themselves bound by local Aboriginal laws.

2. Local Aboriginal law plays a significant and positive role in building community strength and harmony. It plays a role in protecting and nurturing children, developing people into becoming productive and respectful members of society, restoring people who have committed wrongs, protecting and healing victims, and resolving conflict.

3. Section 16AA of the *Crimes Act 1914* (Cth) (*Crimes Act*) is seen by many Aboriginal people as being deeply offensive, disrespectful and discriminatory, in part because of its association with the Intervention, which is also seen by many Aboriginal people as being deeply offensive.

4. The prohibition on courts considering local Aboriginal law is alienating and stigmatising for Aboriginal people, which leads to disengagement from the criminal justice system, and in turn erodes the authority and perceived legitimacy of the system.

5. Because the dominant system does not respect local Aboriginal authority, this has contributed to the erosion of local Aboriginal authority exercised by the custodians of local Aboriginal law within communities.

6. Some Aboriginal people with whom the committee consulted and in particular some delegates of the Central Land Council, do not support reforms such as the repeal of section 16AA, because they consider that such reforms do not sufficiently address underlying issues such as the systemic racism of the justice system, and the lack of recognition of Aboriginal sovereignty.

7. There is on the whole strong support for section 104A of the *Sentencing Act 1995* (NT) (*Sentencing Act*).

8. There is an appetite in Aboriginal communities for developing a respectful dialogue with judges regarding local Aboriginal law: 'deep listening and two-way learning'.[1]

9. There is strong consensus amongst all of the Aboriginal people with whom the Committee consulted that under-age sex is not excusable or justifiable by reference to local Aboriginal law.

[1] Consultation with Tangentyere Council Women's Safety Group, 22 September 2020.

10. There is strong consensus amongst all of the Aboriginal people with whom the Committee consulted that it would be improper to use local Aboriginal law to justify or excuse domestic violence.

11. There is widespread acceptance that substantial corporal punishment is no longer effective or appropriate, but a significant number of people, particularly amongst Aboriginal men in Central Australia, continue to express support for the use of substantial corporal punishment as a component of the exercise of local Aboriginal law.

12. Although it is frequently stated that local Aboriginal law does not change, there is also significant acceptance that the way in which local Aboriginal law is applied and practised adapts in response to changing circumstances.

13. There is a strong view in Aboriginal communities that sending people to prison does not in itself restore harmony following community disruption caused by offending. Unlike the use of local Aboriginal law, the mainstream criminal justice system does not operate so as to address underlying sources of conflict and restore community harmony.

14. There is support for Law and Justice groups to be resourced and supported. They are respected as a repository of expertise regarding local Aboriginal law on which courts can draw. Law and Justice groups also have a significant role to play in mediation, the settlement of disputes, diversion of minor offenders and rehabilitation.

15. There is support for the resumption of Community Courts, where supported by, designed, and operated in consultation with Aboriginal communities.

16. The phrase ‘customary law and cultural practice’ as used in section 16AA and section 104A is not fit for purpose.

17. Before the passage of section 16AA, local Aboriginal law was only raised to excuse, justify or mitigate the seriousness of an offence in rare cases.

18. Section 16AA does not totally extinguish consideration of local Aboriginal law: it has had very limited legal impact, but it has had significant political, social and discursive impact.

19. As a consequence of the enactment of section 16AA, counsel and courts have become inhibited or deterred from referring to local Aboriginal law, resulting in sentencing proceedings that are superficial and decontextualised.

20. Section 16AA was a disproportionate and ineffective response to the problems of child sexual offending in the NT.

21. Prior to (and indeed, since) the enactment of section 16AA and its precursors, the common law developed to meet the challenges and opportunities faced by courts in dealing with Aboriginality and local Aboriginal law in a manner that was appropriately responsive to community standards and attitudes, and in accordance with established legal principles.

22. Section 16AA is inconsistent with the common law sentencing principle of proportionality, and with section 5(1)(a) of the *Sentencing Act*.

23. The Committee accepts and endorses the following findings and recommendations of previous related inquiries:

    a. *The Recognition of Aboriginal Customary Laws* (ALRC, 1986) – findings and recommendations [195], [196], [208], [503], [504], [505], [506], [507], [508], [509], [510], [511], [512], [513], [515], [516], [517], [522], [526], [527], [528], [529], [531] subject to the following modifications:

       [506] Courts should not prevent a defendant from returning on bail to a community to face traditional punishment if the court is satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim's family and the particular community; provided that the court does not consider that the grant of bail would facilitate the infliction of unlawful traditional punishment (see *Re Anthony* [2004] NTSC 5).

       [507-8] Courts should not mitigate sentence on the basis that an offender is willing to submit to traditional punishment, if the traditional punishment that is apprehended would be unlawful, because 'courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice' (*Munda v Western Australia* (2013) 249 CLR 600 at [63]).

    b. *Sentencing* (ALRC, 1988) – recommendations 94 and 111;

    c. *Royal Commission into Aboriginal Deaths in Custody, National Report* (Australian Government, 1991) - recommendations 92, 96,97, 104 and 219

    d. *Multiculturalism and the Law* (ALRC, 1992) – recommendations 29 and 30;

    e. *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC, 2006) – recommendations 29.1 and 29.2;

    f. *Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory* (2017) – recommendation 25.34;

g. *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC, 2018) – recommendations 5-1, 5-2, 6-1, 6-2, and 6-3;

h. *Report on Aboriginal Customary Law* (NTLRC, 2003) – recommendations 1, 2, 3, 4, 7, 8, 9, 10 and 11;

i. *Ampe Akelyernemane Meke Mekarle*: "Little Children are Sacred" (NT Government, 2007) – recommendations 71, 72, 73 and 74;

j. *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (LRCWA, 2006) – recommendations 5, 17, 24, 33, 34, 36, 37, 38 and 39;

k. *Inquiry into Sentencing* (ACT Standing Committee on Justice and Community Safety, 2015) – recommendation 18, 19, 20, 21 and 22;

l. *Sentencing* (NSWLRC, 2013) – recommendations 4.2(1)(d), 16.7, and 17.1;

m. *Sentencing: Aboriginal Offenders* (NSWLRC, 2000) – recommendations 1, 2.

RECOMMENDATIONS

The Committee recommends that the Northern Territory Government:

1. Petition the Commonwealth to repeal sections 15AB, 16A(2A) and 16AA of the *Crimes Act.*

2. In accordance with Recommendations 6-1, 6-2 and 6-3 of the Australian Law Reform Commission (ALRC) 'Pathways to Justice' Report No. 133:

    a. amend the *Sentencing Act* to provide that, when sentencing Aboriginal offenders, courts take into account unique systemic and background factors affecting Aboriginal peoples;

    b. develop and implement a scheme that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal offenders appearing for sentence in the Supreme Court; and

    c. develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal peoples in the Local and Youth Justice Courts, including through Elders, community justice groups, community profiles and other means.

3. Resource, reinvigorate and support the establishment and maintenance of Law and Justice committees.

4. Amend section 104A(1) of the *Sentencing Act* by omitting the expressions 'customary law' and 'cultural practice'.

5. Amend section 104A to provide that it is only intended to operate for contentious submissions about local Aboriginal law.

6. Amend the *Sentencing Act* to confer on a judge the power to make orders that give effect to the exercise of local Aboriginal law for the purpose of sentencing, to the extent that it is not inconsistent with other laws, in recognition of the positive benefits of integrating local Aboriginal law into sentencing orders.

7. Resume the operation of Community Courts, where supported by, designed and run in consultation with Aboriginal communities.

CHAPTER 1 – INTRODUCTION

1. On 24 October 2018, Mr Yingiya Mark Guyula MLA, the Member for Nhulunbuy, rose in the NT Legislative Assembly to move, as a matter of urgency, that the NT Government petition the federal government to repeal section 16AA of the *Crimes Act*. Mr Guyula said:[2]

> It imposes an assimilationist and discriminatory approach on all First Nations people, which impinges on every Territorians' right to natural justice; and that the NT Government reviews relevant legislation and works to incorporate in sentencing practices the principles of Aboriginal law that look to heal and restore communities when harm is done.
>
> This motion is about the importance of recognising Aboriginal culture and customs in the realm of justice. This motion is also about recognising the overrepresentation of Aboriginal people who are caught in the Western legal system, a system of laws that for many is not their own.
>
> …
>
> There are many Aboriginal nations of the Northern Territory, many of whom still have connection to their law. It is extremely important that the Aboriginal nations' laws are upheld and supported by this government and that all attempts are made to review, repeal and amend all legislation and processes that do not allow Aboriginal culture, customs, law and ceremony to be part of creating justice for Aboriginal people. When our laws sit side by side, we will see a reduction in incarceration and reoffending rates, and stronger and healthier communities.

2. In her response, Attorney-General and Minister for Justice Natasha Fyles MLA commended the motion, and introduced an amendment, the effect of which was to refer this matter to the Committee. The amended motion was agreed to by the Assembly on 31 October 2018.

3. Consequently, on 29 January 2019, the Attorney-General transmitted Terms of Reference to the Committee asking it 'to investigate, examine and report on an appropriate alternative legislative framework to take into account Aboriginality in criminal law proceedings' and consider the current application of Commonwealth and NT legislative provisions which apply to bail and sentencing proceedings in the NT.[3] The legislative provisions referred to in the Terms of Reference appear in Appendix 1 to this Report.

4. Given the subject matter, the Committee's preference for the conduct of this inquiry was to recruit a sub-committee with a majority of Indigenous members.

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[2] NT Legislative Assembly, Hansard Debates, 24 October 2018, 4581.

[3] The Terms of Reference are set out in full at the beginning of this Report. The Committee was requested to present its completed report by September 2019. At the request of the Committee, the Attorney-General extended the time allowed to submit the report to 30 November 2020.

Ultimately, the sub-committee that undertook the inquiry and prepared this report comprised three Indigenous lawyers working with three non-Indigenous lawyers.

5. The Committee is a voluntary body without a budget, an office, staff or facilities. The Committee is grateful to Mr Greg Shanahan, CEO of the Department of Attorney-General and Justice, for providing the part-time services of one of its officers, Ms Eilish Copelin, who provided an exceptionally high standard of administrative support to the sub-committee; and for paying the travel costs between Darwin and Alice Springs of a member of sub-committee, Ms Tamika Williams, so that she could attend a consultation with the Central Land Council in Kintore. The Committee also acknowledges with thanks the generosity of Disability Royal Commission Commissioner Ms Andrea Mason OAM, who permitted Ms Williams and another sub-committee member, Mr Russell Goldflam, to travel with her at no cost on a charter flight to and from Kintore.

6. As the Committee has such limited resources, its capacity to undertake consultations with a broad range of Aboriginal Territorians and other stakeholders was constrained. Ultimately, the sub-committee conducted consultations with or received written submissions from eighteen organisations and individuals.[4] The Committee thanks all those who gave so generously of their time, expertise and experience for this inquiry.

7. In particular, the Committee is indebted to two individuals. First, we thank the Director of the NT Department of Attorney-General and Justice Aboriginal Justice Unit, Ms Leanne Liddle, who briefed the sub-committee on the results of the extensive consultations undertaken by the Aboriginal Justice Unit for the purpose of developing the Aboriginal Justice Agreement. Secondly, we thank Mr Yingiya Mark Guyula MLA, without whose advocacy and initiative this inquiry would not have been commissioned. In recognition of Mr Guyula's contribution, the title of this Report, 'Two justice systems working together', is drawn from his speech to the Assembly on 24 October 2018.

8. In its terms, this inquiry is directed to inquire into 'customary law', a term that, along with the composite expression 'customary law or cultural practice' found in section 16AA of the *Crimes Act*, the Committee considers, for reasons discussed below, to be unsatisfactory.

9. In discussing the significance of the concepts underlying these terms as they apply to First Nations peoples, Ngaantyatjarra/Karonie woman and former CEO of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, Andrea

[4] See Appendix 2.

Mason OAM, instead uses the richly evocative expression 'governance operating rhythms', which she explains as follows:[5]

> laws, traditions, trade rules and protocols based on their country, their language and their unique social structures… interconnected through knowledge super highways called Songlines. Songlines held multiple libraries of knowledge ensuring through word and song that knowledge of lands, heavens, seas and their ecosystems was passed down from generation to generation to ensure everyone knew their place, and every place knew their nation.

10. In conducting this inquiry, and in particular in listening to the Aboriginal people with whom we have consulted, the Committee has been repeatedly required to reflect on the theme of respect. Andrea Mason identifies respect as a core value of Australian society, of the Australian legal system, and of Indigenous governance operating rhythms. Ms Mason also asserts, however, that Indigenous governance operating systems – local Aboriginal laws – have not been accorded 'a proper place of honour' in Australia:[6]

> [A]s Australian citizens, we are members of Australia's democracy and so there are values connecting us to each other. These values are mutual respect, tolerance, fair play, equality between men and women, compassion and equality of opportunity regardless of race, religion, or ethnicity. Importantly, these values are embedded in Australian laws.
>
> However, I put to you that there is a value missing from this list: the value of governance operating rhythms. The first governance operating rhythms did not arrive in Australia in 1788, but evolved thousands of years prior to this date. As of today, Australia is yet to give Indigenous governance operating rhythms a proper place of honour in Australia. These rhythms are anchored to common foundation pillars: land, law, language and family. These four pillars like the legs on a table, held the network of tables of Indigenous societies on an even and balanced footing. These structures are, quite simply, pure Australian structures to enculturate in Indigenous nations peace, order and good governance. During the period of first contact, these pillars were attacked, brutalised, dismissed and even ridiculed. Even though this is the history, Indigenous nations have in their own way and through different means, nurtured, maintained and re-established their nations' tables. The foundation pillars are critical because they give effect in Indigenous societies to the interconnection of men and women, to families, to identity, to responsibilities, to authority, to vision, to hope, to dreams, to qualifications to speak and to tell. Importantly, they connect Indigenous nations to each other and these nations to modern Australia.

11. Mr Guyula, Ms Mason and many other thoughtful senior Aboriginal leaders have impressed on the Committee the fundamental importance of reciprocity in the administration of justice: so long as the mainstream legal system disrespects

[5] Andrea Mason, 'Where do a bird and a fish build a house? An alumna's view on a reconciled nation' (2019) 40 *Adelaide Law Review* 173, 174.

[6] Ibid.

local Aboriginal laws by ignoring them or excluding them, it seems all but inevitable that many Aboriginal Territorians will remain alienated from and disrespectful of mainstream legal authority. Conversely, if there is genuine dialogue between legal authorities in these two domains, there is a real prospect that mutual respect will grow. That is why Mr Guyula, in his speech to Parliament, said 'when our laws sit side by side, we will see a reduction in incarceration and reoffending rates, and stronger and healthier communities'.

12. In the course of its consultations, the Committee was also confronted by a rejectionist view. Why, it was said, should we sit down and discuss local Aboriginal laws with your committee when our people are being treated so unfairly and harshly by your racist justice system? The Committee accepts that this view is sincerely and strongly held by many Aboriginal Territorians. The Committee however, with respect, considers this position to be a counsel of despair. It was also a minority position. A large majority of the people with whom the Committee consulted welcomed the prospect of respectful and meaningful dialogue: 'two way learning and deep listening', as the Tangentyere Council Women's Safety Group succinctly and powerfully put it.

CHAPTER 2 – THE STATUTORY BACKGROUND

[2.1] The early days of the NT

13. Controversy over the interaction of NT criminal law and local Aboriginal laws has vexed legislators, lawyers, administrators and the public for the best part of a century. Following its establishment in 1911, the Supreme Court of the NT encountered serious challenges in administering a colonial system of criminal justice in a jurisdiction where many accused were Indigenous people who spoke little or no English, had little or no understanding of whitefella laws, and considered themselves bound by their own Indigenous laws.

14. To address this challenge, in 1931 the Commonwealth Minister for Home Affairs (Interior) advocated that 'a simple tribunal, presided over by a person or persons with a thorough knowledge of native customs, who can sift through native evidence' be established for NT Aboriginal defendants.[7] Similarly, in 1933, twenty members of the NT jury panel presented a petition to the Supreme Court recommending that offences committed by Aboriginal people against other Aboriginal people in accordance with their customary law be tried in 'a tribal court', in accordance with Aboriginal customary law.[8] In that year the Aborigines' Friends' Association made similar representations, urging that 'full consideration should be given to tribal traditions and customs, in order that full justice may be done'.[9] The sentiment underlying these proposals was itself the best part of a century old. In 1837, the British House of Commons Select Committee on Aborigines had declared that to oblige Indigenous Australians 'the observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust'.[10]

15. The Commonwealth eventually decided to implement these proposals by enacting the *Native Administration Ordinance 1940* (Cth) to establish a Court for Native Affairs with jurisdiction to preside over matters arising from disputes between Aboriginal people, and between Aboriginal people and the Administration. However, with the transformation shortly afterwards of the NT into a frontline jurisdiction on a wartime footing, the work required to establish

[7] ALRC, *Recognition of Aboriginal Customary Laws (Report 31)* (1986, Australian Government, Canberra), [50].

[8] Mildren, D, *Big Boss Fella all same judge: A History of the Supreme Court of the Northern Territory* (2011, The Federation Press, Sydney), 87.

[9] ALRC, supra, n. 7, [50].

[10] Ibid, [1].

the Court for Native Affairs was sidelined, and the Ordinance never came into force.[11]

16. Meanwhile, in 1933, Justice Thomas Wells, who had only very recently been appointed to the Supreme Court, drafted a law that would have exempted an Aboriginal person convicted of murdering another Aboriginal person from the then applicable mandatory sentence of capital punishment, if the Court considered, having regard to all the circumstances of the case, that a different penalty would be just and proper. Wells J recommended that in considering penalty in such cases, the court be permitted to receive evidence of 'native law and custom'.[12]

17. Justice Wells' recommendation was substantially accepted by the Commonwealth Parliament, which in 1934 inserted the following provisions into the *Criminal Law Consolidation Act 1876* (SA):[13]

> Provided that, where an aboriginal native is convicted of murder, the Court shall not be obliged to pronounce sentence of death but, in lieu thereof, may impose such penalty as, having regard to all the circumstances of the case, appears to the Court to be just and proper.
>
> For the purpose of determining the nature and extent of the penalty to be imposed where an aboriginal native is convicted of murder, the Court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty.

18. This provision remained on the statute books for 50 years, until it was repealed upon the commencement on 1 January 1984 of the *Criminal Code 1983* (NT), passed by the NT Legislative Assembly during its first term following the grant of self-government in 1979. Thereafter, mandatory life imprisonment (until 2005, with no power to fix a non-parole period) applied to all persons convicted of the crime of murder in the NT.

19. Over the next twenty years, as Douglas and Finnane have put it, 'a kind of weak legal pluralism operated' in NT sentencing matters: 'where judges accepted evidence of payback, custom or customary law and took it into account, they consistently stressed that it was not necessarily condoned; rather it was recognized as inevitable'.[14]

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[11] Mildren, supra, n. 8, 126.

[12] Ibid, 93.

[13] *Crimes Ordinance 1934* (SA), No. 10 of 1934.

[14] Douglas, H and Finnane, M, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, London, 2012), 182, 180.

[2.2] Events leading to the enactment of sections 15AB, 16A(2A) and 16AA of the *Crimes Act* and section 104A of the *Sentencing Act*

20. During this period, some prominent Indigenous leaders, supported by feminist legal and anthropological scholars, began to strongly criticise what became characterised as the use of 'bullshit' law by and on behalf of Indigenous male offenders to minimise their culpability for crimes of violence, particularly against women.[15] Ultimately, concern about 'the insidious way customary law is used to benefit violent Aboriginal men'[16] escalated to a national debate conducted in parliaments and the media, culminating in the passage of the *Northern Territory National Emergency Response Act 2007* (Cth) (*NTNER Act*).

21. It is noteworthy that although the debate was prominent, the hearing of actual cases by the Supreme Court of the NT involving issues of local Aboriginal law was not. In the 12 years from 1994 to September 2006, less than 1% of Aboriginal offenders sentenced by the court (13 matters out of 1798) submitted that their moral culpability was mitigated by reference to an aspect of local Aboriginal law: in five cases the offence was committed as punishment for a breach of local Aboriginal law; in four cases the offender was provoked by a breach of local Aboriginal law; in two cases the victim was a promised bride; and in two cases the offender was acting in accord with local Aboriginal law. In approximately half these matters the court accepted the submission in mitigation and allowed for a reduction of sentence.[17]

22. In 2007, after citing these and similar statistics, Chief Justice Brian Ross Martin stated:[18]

> 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.

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[15] Ibid, 197-198.

[16] Hon. Jodeen Carney MLA, *The Australian*, 21 July 2006.

[17] Melanie Warbrooke, *To What Extent is Customary Law Raised as a Mitigating Factor in Criminal Cases in the Northern Territory?* (LLB Research Paper, Charles Darwin University, 2006), 34.

[18] Chief Justice Brian Martin, 'Customary Law—Northern Territory' (Speech delivered at Judicial Conference of Australia Colloquium, Sydney, 5 October 2007), 31.

23. In 2003, the *Pascoe* sentencing appeal stirred significant controversy.[19] Jackie Pascoe Jamilmira, a member of the Arnhemland Burrara language group, was convicted of having sexual intercourse with a person under the age of 16, a 15 year old girl who had been promised to him as his wife pursuant to *Joborr,* 'the traditional corpus of normative moral values' of Burrara society. Pascoe was ultimately sentenced to twelve months imprisonment suspended after one month for this offence. The case challenged judges to balance the competing objectives of protecting children and respecting traditional culture, custom and law. It generated intense debate, in response to which the NT Legislative Assembly enacted the *Law Reform (Gender, Sexuality and Defacto Relationships) Act 2004*, which, *inter alia*, increased the maximum penalty for this offence from 7 years to 16 years. In addition, the amending Act repealed the defence arguably available to defendants in circumstances similar to Pascoe (who himself had pleaded guilty) that the parties to the impugned conduct had been married according to tribal custom.

24. This statutory reform was consistent with the Committee's 2003 finding that in relation to promised wives, 'the welfare of the child is the paramount concern of the law'.[20]

25. As will be seen, however, these reforms did not quell the controversy.

26. In the meantime, although NT courts had repeatedly emphasised the importance of supporting with properly adduced evidence submissions relating to matters relating to customary law and cultural practice in mitigation of sentence,[21] there was growing concern that counsel for offenders such as Pascoe were pulling the wool over the eyes of judicial officers by leading evidence of purported local Aboriginal law from the bar table.[22]

27. To allay these concerns, in 2004 NT Attorney-General Dr Peter Toyne introduced the Sentencing Amendment (Aboriginal Customary Law) Bill 2004, which, when enacted, inserted section 104A into the *Sentencing Act*. The Second Reading Speech contextualises the Bill's rationale, the associated procedural issues, and the relevant sentencing principles:[23]

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[19] *Hales v Jamilmira* (2003) 13 NTLR 14.

[20] NT Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Law (Report 28),* (2003), 24.

[21] For example, *Munungurr v The Queen* (1994) 4 NTLR 63.

[22] For example, see Rogers N, *Aboriginal Law and Sentencing in the Northern Territory Supreme Court at Alice Springs 1986-1995*, unpublished doctoral thesis, University of Sydney.

[23] NT Legislative Assembly, Hansard Debates, 13 October 2004, 8051-8052.

The purpose of this bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender.

The bill implements one of the government's commitments made in response to the Northern Territory Law Reform Committee's [2003] Inquiry into Aboriginal Customary Law. The government made a commitment to developing mechanisms to ensure that where customary law is relevant in a case, the courts have access to fully tested evidence about the relevant customary law issues.

This bill provides a formal mechanism for raising issues relating to customary law, or the views of members of an Aboriginal community when a court is sentencing an offender. It has long been an accepted practice for courts in the Northern Territory to accept and take into account evidence of relevant customary law when passing sentence on an indigenous person. Aspects of customary law and attitudes of members of a particular indigenous community towards an offence or an offender are often material facts that a court must take into account in the sentencing process.

However, the Northern Territory Court of Criminal Appeal indicated in the case of *Munungurr* that it was not satisfactory for information on community views or proposed tribal punishment to be admitted in an informal manner. There is a risk that the material provided informally to the court on important issues would only be from the perspective of the offender or would not contain adequate detail. Rather, the courts should be provided with information directly from people who have appropriate knowledge about a community, its language and customs.

In many cases, indigenous people have directly provided courts with important information about customary law. However, despite the views of the court expressed in *Munungurr,* it remains common for information regarding customary law to be presented to a court in an informal manner. In addition, information may be presented without notice to the other party so they do not have an opportunity to undertake their own inquiries in relation to the information. In these situations, the court may then only be presented with information about aspects of customary law by one party which supports that party's position and does not take into account conflicting views within the community on the issue.

The government recognises that some indigenous people are concerned about the way information about customary law is presented in courts, and that the informal presentation of information in the form of submissions from counsel representing an offender may not provide the court with adequate information about what, in many cases, are very complex issues.

Unfortunately, our attention is often drawn to the more controversial or difficult aspects of Aboriginal customary law. However, Aboriginal customary law in the Northern Territory is a significant and positive part of contemporary Aboriginal society and an important source of obligations and rights. Aboriginal customary law, as it is practised in contemporary Aboriginal communities, is the outcome of many historical, social and cultural influences, and is generally specific to a particular community or language group and subject to change over time. Therefore, there may be disagreement within the communities or groups on aspects of customary law and its application to particular

> circumstances. Research and consultation, particularly with indigenous women, has highlighted that some beliefs and practices presented to courts as embodying customary law do not adequately represent the views of all people of that particular community.
>
> This bill formally recognises that information regarding Aboriginal customary law can make an important contribution when a court is sentencing an Aboriginal person for a criminal offence. While the most common example of this are cases where an offender is liable to receive punishment under customary law in relation to the offence, there are many other instances where information about customary law is relevant to an offender or an offence and needs to be taken into account in the interests of justice.
>
> The bill, if passed, will require a party to criminal proceedings who seeks to present information regarding aspects of customary law or the views of members of the community, to give notice to the other party and to provide the information by way of oral evidence in court, affidavit or statutory declaration. The amendment does not stipulate what notice should be given as the court will be able to make an assessment about what is a reasonable notice in each particular case. This will, of course, depend on many factors, including the nature of the information that a party wishes to present to the court, the nature and seriousness of the offence, and the facts giving rise to the offence.
>
> The bill recognises that our system of criminal law is an adversarial model that relies on the prosecution and the offender to provide information relevant to the sentence. The bill seeks to provide a fair framework for the presentation of information on customary law that is consistent with the adversarial model.

28. In 2014, the strictness of section 104A of the *Sentencing Act* was ameliorated by amendments that omitted the requirement that information for sentencing purposes about an aspect of customary law or cultural practice be supported by formal evidence. Instead, courts were now authorised to receive such information without formal evidence, but before deciding to accept the information, the court was required to have regard to whether the tendering party had provided notice to the other party, and whether it intended to present the information by way of formal evidence. It is of significance that in introducing this amendment, Attorney-General John Elferink stated that it was prompted by advice from the Solicitor-General that the pre-existing provision was 'more likely than not inconsistent with the provisions of the *Racial Discrimination Act 1975* of the Commonwealth'.[24] In the view of some commentators, section 16AA of the *Crimes Act* can be similarly characterised.[25]

[24] Hon John Elferink MLA, *Justice and Other Legislation Amendment Bill 2014* (NT) (Second Reading Speech, 14 February 2014).

[25] See, for example, Jack Maxwell, "'Two Systems Of Law Side By Side': The Role Of Indigenous Customary Law In Sentencing" [2016] AUIndigLawRw 16.

In any event, as discussed below, by 2014, section 104A had been virtually nullified.

29. For reasons discussed in Chapter 6.4 and 6.5, the Committee recommends that section 104A be amended to omit the expressions ‘customary law’ and ’cultural practice’. In making this recommendation, the Committee notes that in drafting any such amendment, care should be taken to avoid creating any inconsistency with the RDA.

30. In 2005, another ’promised wife‘ case, *R v GJ* (2005) 16 NTLR 230, attracted national media criticism and a flurry of political attention. In joining Mildren and Riley JJ in substantially increasing the sentence imposed on the respondent to this Crown appeal, Southwood J stated at [71]:

> It has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory. Nonetheless the law of sentencing involves important principles including that a person should not be punished twice for a crime and that the punishment should fit the crime. The assessment of the culpability of the offender is an important element in the application of the latter principle. Subsection 5(2)(c) of the *Sentencing Act* directs a court to have regard to the extent to which an offender is to blame for an offence when sentencing an offender. The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders: *Hales v Jamalmira*. It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities. [Citation omitted]

31. Notwithstanding this orthodox statement of well-established principle, and despite the fact that GJ was sentenced to serve a minimum period of 18 months imprisonment (in contrast to Pascoe, in which the circumstances of both the offender and the offending had been rather similar), in the eyes of many GJ was a child rapist who had gotten off lightly thanks to his ‘bullshit law’ plea.

32. On 16 May 2006, Alice Springs Crown Prosecutor Nanette Rogers gave graphic details to a national television audience of recent NT cases in which Aboriginal men had committed extremely serious physical and sexual assaults on Aboriginal women and children. A furore ensued, leading the Council of Australian Governments (COAG) to convene an Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006.

33. COAG invited the Law Council of Australia (LCA) to make a submission as to what legislative reforms should be made arising from the Summit. In its submissions, the LCA pointed out that only 12 years previously, the *Crimes Act*

had been amended – with bipartisan support – to expressly require courts to have regard to cultural background when sentencing offenders, in accordance with recommendations of the ALRC in no less than three reports.[26] The LCA, after referring to an analysis it had undertaken comparing sentencing decisions in the NT and New South Wales, submitted that:[27]

> There is no evidence that 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.

34. The LCA further submitted that statistical data demonstrated that courts have not been 'soft' on Indigenous offenders, that to remove the discretion to consider cultural background would be unfairly discriminatory, that cultural background is a relevant consideration in sentencing, and that the proposed reforms would be ineffective to reduce 'violence, abuse and misery in Indigenous communities'.

35. Nevertheless, on 14 July 2006, COAG resolved that 'no customary law or cultural practice excuses, justifies, authorises, requires or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment'.[28] Accordingly, the Federal Government introduced the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth), to insert *inter alia* sections 15AB and 16A(2A) into the *Crimes Act*, prohibiting courts from having regard to customary law or cultural practice when considering either bail or sentence in relation to federal offences. The Senate Legal and Constitutional Affairs Committee conducted an Inquiry into the Bill, which received submissions opposing its passage from the LCA, the ALRC, the Human Rights and Equal Opportunity Commission, Aboriginal legal services and National Legal Aid, among others.[29] The Committee recommended that the Bill be amended to permit courts to continue to consider cultural background when sentencing federal offenders. That recommendation was not accepted, and the Bill was enacted. These provisions proved to be the seeds of sections 16AA and 15AB of the *Crimes Act* which apply to Territory offences.

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[26] *Multiculturalism and the Law (Report 57), Recognition of Aboriginal Customary Law (Report 31)* and *Sentencing (Report 44).*

[27] LCA, *Recognition of Cultural Factors in Sentencing* (10 July 2006).

[28] 'Council of Australian Governments Meeting: Communique' (14 July 2006) 10(3) *Australian Indigenous Law Reporter*, 90.

[29] Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Amendment (Bail and Sentencing) Bill 2006.*

36. In the meantime, the NT commissioned Pat Anderson and Rex Wild QC to conduct an inquiry, resulting in the 'Little Children are Sacred' report,[30] in which the authors rejected what they characterised as the myths that Aboriginal law is the reason for the high rates of child sexual abuse, and that Aboriginal law is used as an excuse to justify abuse.[31] The Report stated:[32]

> The Inquiry has heard and seen enough to confidently assert that there can be no genuine and lasting success in dealing with the dysfunction in Aboriginal communities (including child sexual abuse) unless Aboriginal law is utilised and incorporated as an integral part of the solution.

37. However, the release of the report was overshadowed by the Prime Minister's declaration just a few days later of a national emergency, shortly followed by 'the Intervention', one element of which was the legislated extension of the scope of the *Crimes Amendment (Bail and Sentencing) Act 2006* provisions referred to above, to cover all NT offences, by way of sections 90 and 91 of the the *NTNER Act*.

38. In the Second Reading Speech given on the introduction to the Commonwealth Parliament of the Northern Territory National Emergency Response Bill 2007 (Cth) on 7 August 2007, Minister Brough stated:

> It is the Government's intention that, if the Northern Territory enacts sufficiently complementary provisions, the bail and sentencing provisions contained in this bill will be repealed.

39. To date, the NT Legislative Assembly has not taken up Minister Brough's invitation. In 2012, as the *NTNER Act* contained a sunset provision, what had been sections 90 and 91 were inserted into the *Crimes Act* as sections 15AB and 16AA.

[2.3] The effect of sections 15AB, 16A(2A) and 16AA

40. As is discussed in Chapter 3 below, these provisions have been the subject of stringent criticism from the bench. Similarly, in their joint submission to this Inquiry, the LCA and the Law Society Northern Territory (LSNT) summarised the reasons for supporting the repeal of section 16AA as follows:

> It is inappropriate to restrict judicial discretion in sentencing. Judges must always retain discretion to ensure sentences are appropriate to the facts of a case. It is widely recognised that, '[i]n the context of sentencing, discretion is fundamental to ensuring that a sentence is individualised and proportionate; in other words, that the "punishment fits the crime".' Judges are well-practiced in

[30] NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007, Darwin).

[31] Ibid, 57-58.

[32] Ibid, 176.

> weighing different factors, including multiple and conflicting sentencing considerations, and in the rare instances where mistakes are alleged then their decisions can be appealed.
>
> In exercising discretion, judges do not have unchecked power. Rather, their choices are constrained by legal limits and structures, including: precedent; sentencing guidelines, purposes and principles under both legislation and case law; the requirement to explain their reasoning; and the principles for review of discretionary decisions by appellate courts, with 'appealable errors' including 'allowing extraneous or irrelevant matters to guide the discretion'.
>
> …
>
> The ALRC [in its 'Pathways to Justice' Report] … recognises, as Brennan J observed in *Gerhardy v Brown*, that formal equality may be 'an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life"'. Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.

41. The Committee concurs with this analysis.

42. In their submission, they further stated: 'from a purely legal standpoint, the Commonwealth Government does have the power under section 122 of the Constitution to make laws directly regulating Northern Territory matter'. The Committee accepts this submission. As Martin CJ and Mildren J stated in *Wake & Gondarra v The Northern Territory & Asche* (1996) 5 NTLR 170 at 184, 'the Commonwealth Parliament may pass specific legislation to undo the effect of a Territory Act in the exercise of its powers under s122 of the Constitution'. That case concerned the validity of the *Rights of the Terminally Ill Act 1995* (NT), which was subsequently nullified by the *Euthanasia Laws Act 1997* (Cth).

43. Like the *Euthanasia Laws Act 1997* (Cth), sections 15AB, 16A(2A) and 16AA of the *Crimes Act* exemplify the manner in which the NT's sovereignty to make laws for 'maintaining law and order and the administration of justice' pursuant to section 35 of the *Northern Territory (Self Government) Act 1978* (Cth) and regulation 4 of the *Northern Territory (Self Government) Regulations 1978* (Cth) is incomplete, and subject to the will of the Commonwealth legislature.

44. To the extent, if any, that section 16AA is inconsistent with the *Racial Discrimination Act 1975* (Cth) (RDA), in the view of the Committee section 16AA prevails over the RDA.

45. An indirect consequence of this federal legislative intervention was to virtually nullify section 104A of the *Sentencing Act*. Since 2007, it has only been in the rarest of cases that there has been any utility in adducing evidence of customary law for a sentencing hearing, given the circumstance that section 16AA forbids the court from taking 'into account any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates'.

46. A second indirect consequence was the cessation of 'community courts', which, at least in the Top End, had become a regular feature of magistrates' circuits to some remote communities. Community courts, in which judges consulted with community leaders before imposing sentence, had represented the practical if long-delayed implementation of the 'native court' proposals of the 1930s.

47. Goldflam has characterised the developments outlined above as a 'paradigm shift' away from the recognition of customary law.[33] Another lens through which to view these events, as identified by Douglas and Finnane, is as part of 'the trend identified throughout the Western world for criminal justice systems to focus more on the protection of victims'.[34]

48. The *Crimes Act* limits consideration by sentencing courts of customary law and cultural practice for all NT offences, and for all federal offences, wherever committed. No other Australian jurisdiction is regulated in this manner. Only the ACT and Queensland have statutory provisions that bear on these issues, and they do so in a positive sense, as follows:

- *Crimes (Sentencing) Act 2005* (ACT), section 33(1):

  > In deciding how an offender should be sentenced (if at all) for an offence, a court must consider whichever of the following matters are relevant and known to the court:
  >
  > …
  >
  > (m) the cultural background, character, antecedents, age and physical or mental condition of the offender

- *Penalties and Sentences Act 1992* (Qld), section 9:[35]

  > (2) In sentencing an offender, a court must have regard to—

[33] Goldflam, R., "The [Non-]Role of Aboriginal Customary Law in Sentencing in the Northern Territory, (2013) 17(1) AILR 71, 78.

[34] Douglas and Finnane, supra, n. 14, 203.

[35] There is a similar provision in Queensland relating to submissions by community justice groups regarding bail applications. See *Bail Act 1980* (Qld), s. 16(2)(e).

…

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates.

CHAPTER 3 – THE COMMON LAW BACKGROUND

[3.1] Introduction

49. This chapter considers both the way in which NT courts have dealt with issues of customary law and with issues relevant to the Aboriginality of offenders prior to the Commonwealth intervention and the circumstances in which such issues may still be able to be considered notwithstanding section 16AA of the *Crimes Act*.

50. In Chapter 2, the background to the limitations in sentencing offenders that have been placed upon the courts in the NT by amendments to the *Crimes Act* has been discussed. Those provisions are set out in Appendix 1.

51. Although these provisions significantly constrain the ability of the courts to take into consideration relevant issues of local Aboriginal law and Aboriginality, they do not now completely remove it. Section 16AA (including subsection (2)) and section 16A(2AA) were inserted into the *Crimes Act* in 2012 when the former *NTNER* provisions were repealed.[36] The amendment was made in response to the decision in *Aboriginal Areas Protection Authority v S & R Building and Construction Pty Ltd*[37] which highlighted the effect of unintended consequences with respect to the recognition of Aboriginal culture and belief systems that had been considered when the Commonwealth enacted the original limiting provisions in the *NTNER Act*.[38]

52. In that case, the defendant building company had pleaded guilty to a charge under section 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) with carrying out unauthorised work on an Aboriginal sacred site. The company had entered the community of Numbulwar without a permit and had constructed and used a pit toilet behind the area on which they were to perform construction work connecting electricity, toilet and water to the main lines for a Government Business Manager Facility[39] that was being constructed. They had not performed the appropriate checks, and thus they did not realise that this part of the land was a sacred site. There was a brief use of the pit toilet of about 24 hours, but they failed to remove it and it was sighted by the custodians of

[36] See *Stronger Futures in the Northern Territory (Consequential & Transitional Provisions) Act 2012* (Cth), schedule 4, ss. 7-8.

[37] [2011] NTSC 3.

[38] See *NTNER Act*, ss. 90 and 91.

[39] Ironically, another feature of the NT Intervention.

the site not long after that. The defendant pleaded guilty to the offence and was fined $500 by the sentencing magistrate.

53. That decision was appealed to the NT Supreme Court on three grounds, including a failure to take into account the emotional harm and the damage, injury or loss that had been caused. A victim impact statement had explained the ongoing hurt and shame that had been brought upon the traditional custodians of the site. However, it was conceded and accepted that customary law could not have been be taken into account, because (the then) section 91 of the *NTNER Act* precluded customary law and cultural practice being considered in sentencing. The appeal was dismissed, despite the appellate judge acknowledging that 'there was a need for denunciation and both specific and general deterrence. In the circumstances the penalty imposed by the Court of Summary Jurisdiction was so unreasonable and so plainly unjust as to be manifestly inadequate'.[40]

54. Unlike section 91 of the *NTNER Act*, section 16AA(2) provides exceptions to the prohibition on taking into account customary law or practice in prosecutions for offences that are aimed at the preservation and protection of heritage and sacred sites by allowing for consideration of customary law and cultural practice in prosecutions of conduct that interferes with heritage and sacred sites.

55. The difference made by the exceptions by section 16AA(2) is provided by *Aboriginal Areas Protection Authority v OM (Manganese) Ltd.*[41] A mining company was found guilty of desecration of a sacred site following significant damage to a site known in the English language as 'Two Women Sitting Down' arising from blasting operations in opening a pit for manganese mining at Bootu Creek. Absent the exception, a court would be unable to determine the particular seriousness that attached to destruction or desecration of a sacred site in order to fix a proper penalty.

[3.2] Sentencing considerations

56. The NT courts have a long history of recognition of cultural and other factors arising from Aboriginality relevant to the operation of the criminal justice system. An early example of the recognition of the disadvantage under which aboriginal persons may operate within the criminal justice system is the Anunga Rules. In *The Queen v Anunga,*[42] Forster CJ set out principles to be followed in the questioning of Aboriginal persons or others for whom English was not a first language in order to counter any disadvantage that may arise for those persons.

[40] *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd* [2011] NTSC 3, [26].

[41] [2013] NTMC 19.

[42] *R v Anunga* (1976) 11 ALR 412.

57. There is a plethora of NT cases going back for almost a century in which courts in the NT were confronted with the need to consider aspects of customary law and Aboriginality in criminal and other matters. For example, in two early matters, the Supreme Court was required to consider the competing interests for a child in maintaining links to their Aboriginal heritage in adoption applications by non-Indigenous parents.[43] There are too many matters for full discussion in this chapter. A number of cases that reflect sentencing practice where issues of local Aboriginal law or Aboriginality have arisen have been chosen to illustrate the way in which NT courts have approached these matters, including as to evidential requirements.

58. In *Jadurin v The Queen,*[44] two aspects of cultural consideration and customary law were considered by the Federal Court on appeal from the NT Supreme Court. The appellant had been sentenced to a term of imprisonment of four years with a 12 month non parole period for the manslaughter of his wife. She had died from horrific injuries after two severe beatings by the defendant who was intoxicated. First, it had been put, not by way of justification but by way of explanation, that in Aboriginal society it was not unusual for women to be beaten if they disobeyed their husbands. The Court dismissed this submission on the basis that the evidence given went no further than describing 'something which may occur from time to time; it goes no distance towards establishing that such conduct is an accepted facet of Aboriginal society'. The Court took the view that it should approach the matter on the basis that the appellant beat his wife in anger when they were both drunk, and that this brought about her death.

59. Secondly, the Court was asked to take into account 'that the sentence imposed manifested a failure to take into account 'that the Appellant is a full-blood Aborigine, who has undergone and is likely to undergo further traditional punishment'.[45] The Court had heard evidence that the defendant had undergone traditional punishment from his relatives and would undergo further punishment from the victim's family and after that he might be banished for a time. After referring to the following passage from *Neal v The Queen*:[46]

> 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

[43] In *McMillen and McMillen v Larcombe, Director of Child Welfare* [1976] NTJud 9; [1976] NTJ 1001 and *Chandler and Chandler v Larcombe, Director of Child Welfare* [1975] NTJud 4; [1975] NTJ 959.

[44] (1982) FCA 215; (1982) 44 ALR 424, 426.

[45] Ibid, 426.

[46] (1982) 149 CLR 305, 326 per Brennan J.

> 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.

the Federal Court said:[47]

> In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account.

60. The NT Court of Criminal Appeal in *The Queen v Minor*[48] considered whether the sentencing judge had been in error in structuring a sentence that would allow for an earlier release on the understanding that the defendant would undergo payback and that this was something he and his community wished to take place.

61. Asche CJ considered what has been an ongoing issue of the evidence necessary for a court to be satisfied of an aspect of local Aboriginal law and illuminates the difference between payback as a form of punishment, as it had often been often viewed in discussions of the practice, and payback as a form of conciliation within a community:[49]

> Payback is not vendetta. There must be clear evidence of the difference. As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process; vendetta never. It would be a serious and impermissible abrogation of the court's duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If however it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the court could countenance any really serious harm.

62. His Honour noted that the concept of payback was not something that should automatically or even generally be considered to apply to all Aboriginal people and to do so would be 'unreal, patronising and insulting to these citizens'.[50]

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[47] Supra, n. 44, 429.

[48] (1992) 2 NTLR 183.

[49] Ibid, 185 per Asche CJ.

[50] Ibid.

63. In his judgment, Mildren J referred to the 'long history [in the NT] of taking into account tribal law when sentencing a tribal aboriginal'.[51] This included formal recognition by the amendment of the *Criminal Law Consolidation Act* (SA) to abolish the automatic death penalty for Aboriginals and to permit the court in murder cases to 'receive and consider any evidence that may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty'.[52] As his Honour noted, in practice such considerations were not confined to murder cases but more generally taken into consideration.

64. His Honour was careful however to distinguish taking into account further retribution 'whether lawful or unlawful' from orders that would actually facilitate that occurring, saying that 'it would be quite wrong for a sentencing judge to so structure his sentence as to actually facilitate an unlawful act'.[53] However, Mildren J stated that in sentencing, a judge was entitled to have regard not only to the interests of the wider community but also to the special interests of the community of which the respondent is a member:[54]

> There are numerous occasions when the court has had regard to the wishes of a particular community of which a prisoner is a member in order to consider the need to protect that community:… it is my opinion that no criticism can be directed to a sentence which gives appropriate weight to those needs. In the present case, the finding of the sentencing judge was that the community needed, as much as the Respondent, to finalise this matter in the tribal way and the evidence before him suggested that without this there was a real fear of excessive, possibly drunken, violence with the real prospect of someone else being severely injured or perhaps killed.

65. The *Crimes Act* provisions are unlikely to affect similar decisions. Sections 16AA and 15AB are concerned with the objective seriousness of the offence itself. The objective seriousness of an offence is only one factor to be considered in arriving at a just sentence or determining whether a person should be granted bail. In that exercise it essentially fixes a starting point from which the Court must then determine a sentence under the terms of the *Sentencing Act* or the *Bail Act 1982* (NT).

66. Section 5(1) of the *Sentencing Act* fixes the only purposes for which sentences may be imposed on an offender. They are:

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[51] Ibid, 193 per Mildren J.

[52] See paragraphs 17 to 18 above.

[53] Supra, n. 48, 196.

[54] Ibid, 197.

a. to punish the offender to an extent or in a way that is just in all the circumstances;

b. to provide conditions in the court's order that will help the offender to be rehabilitated;

c. to discourage the offender or other persons from committing the same or a similar offence;

d. to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;

e. to protect the Territory community from the offender; and

f. a combination of two or more of the purposes referred to above.

67. Section 5(2) then provides for a list of matters that a court must have regard to in sentencing but also provides that it may 'consider any other matter'.[55] There is therefore a very broad range of matters that a court must and can consider when determining the appropriate sentence.

68. Setting a sentence that included a release to undergo some form of traditional punishment would be compliant with a number of the purposes in section 5(1), depending on what is proposed in an order,[56] and is a matter to which a court may have regard under section 5(2). Provided that the fact that the offender will undergo traditional punishment is not taken as a mitigation of the offence, a sentence that incorporates that condition will not infringe section 16AA of the *Crimes Act*.

[3.3] Bail considerations

69. As noted above, the amendments to the *Crimes Act* with respect to the exclusion of evidence of customary law or practice apply also when a court or other authority is considering the question of bail.

70. Section 15AB provides:

> **15AB 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 Commonwealth or the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority:

[55] *Sentencing Act,* s. 5(2)(s).

[56] A court could not order an act of traditional punishment that would breach the general law.

(a) …

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

(i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or

(ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.

71. The consideration of customary law or practice is a matter not only raised in sentencing but may also be relevant as a consideration for the grant of bail. In *Ebatarinja v The Queen*,[57] the defendant sought bail in order to have traditional punishment administered to him. It was put to the NT Supreme Court that he was concerned that if he was not free to undertake traditional punishment in the usual form, which he believed would involve spearing in the legs or thighs, that either the relatives of the deceased would punish one of the defendant's own relatives in accordance with Aboriginal tradition, or the Aboriginal elders would use Aboriginal magic involving a snake to kill him.

72. The Court considered that traditional punishment might be relevant to a grant of bail in three ways:[58]

> First it may be suggested that under s24(1)(b)(iii) it is a factor relevant to the question of the need of the defendant to be free for any lawful purpose. Secondly, it may be suggested that it is relevant to another matter dealt with under s24(1)(b)(iv), i.e. whether the defendant is in danger of physical injury or in need of physical protection and, thirdly, it may be suggested it is relevant to s24(1)(c), i.e. the likelihood that the defendant will commit an offence whilst on bail.

73. The Court was satisfied that the defendant should be granted bail. It was accepted however, that the courts ought not to grant bail in order to facilitate an unlawful act but there was no evidence that any unlawful act was likely to occur. The defendant was found to hold an honest and genuine belief that Aboriginal magic could be used to punish him if he did not accept traditional punishment and that might affect his health if not released.

[57] [2000] NTSC 26.

[58] Ibid, [12].

74. The Supreme Court elaborated on the issue of granting bail for the purpose of traditional punishment in the case of *Re Anthony*.[59]

75. The defendant was charged with the manslaughter of his wife and alternatively with doing a dangerous act that caused serious danger to life and caused the death of his wife.[60] Martin (BR) CJ noted:[61]

> In respect of bail applications, without either approving or disapproving of particular traditional punishment, circumstances might arise in which it would be permissible and appropriate for a court to grant bail on terms that would allow lawful traditional punishment to occur. It is necessarily impossible to attempt to define the circumstances in which such a course would be permissible or appropriate, but I have in mind as an example minor physical punishment to which the offender is capable in law of consenting. If the court was satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim's family and the particular community, in my view it would be permissible for a court to structure orders in a way that would allow for the opportunity for such punishment to be inflicted.

76. The issue of taking into account a release on bail for the purpose of traditional punishment turns on whether the punishment to be imposed involves a lawful or unlawful use of force. His Honour said (as had previously been said in *Minor*[62] and *Barnes*[63]) that it was not permissible for a court to structure orders with a view to facilitating the unlawful infliction of traditional punishment, nor was it permissible for a court to structure orders in the knowledge that the effect of the orders would be to facilitate the infliction of unlawful traditional punishment.

77. In *Anthony,* the Court received considerable evidence from senior community members as to the form of traditional punishment proposed. Ultimately, the Court was satisfied that what was proposed as punishment carried a significant risk that the applicant 'will suffer grievous harm as defined in s 1 of the Code. The applicant cannot authorise another person to cause him grievous harm (s 26(3) of the Code)'.[64] Consequently, His Honour found that:[65]

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[59] [2004] NTSC 5; (2004) 142 A Crim R 440.

[60] The latter offence has since been repealed from the Criminal Code.

[61] Ibid, [26].

[62] Supra, n. 48, 195-196.

[63] [1997] NTSC 123; (1997) 96 A Crim R 593.

[64] Supra, n. 59, [34]. The offence of causing 'grievous harm' in the Code has been replaced by one of causing 'serious harm' however the exclusion provided by section 26(3) remains in relation to that offence.

[65] Ibid, [36].

> In terms of s 24 of the [Bail] Act, the need of the applicant to be free for the infliction of the particular traditional punishment is not a need to be free for a lawful purpose. In these circumstances it cannot be said that it is in the interests of the applicant that bail is granted in the sense that he has a need to be free for the lawful purpose of traditional punishment.

78. Section 24 of the *Bail Act 1982* (NT) was amended in 2015 to add *inter alia* section 24(b)(iiic) which requires a court to take into consideration 'so far as [it] can reasonably be ascertained… any needs relating to the person's cultural background, including any ties to extended family or place, or any other cultural obligation'. The amendment specifically notes that 'when considering bail, an authorised member or court must have regard to section 15AB(1)(b) of the *Crimes Act*'.

79. Section 15AB(1)(b) of the *Crimes Act* will not preclude the court or an authorised member from taking into account traditional beliefs when assessing the need for a grant of bail in the same way as it did in *Ebatarinja* because the consideration of 'cultural obligation' or 'cultural background' is not taken for the purpose of excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour or aggravating the seriousness of the alleged criminal behaviour. The court is free to determine on ordinary principles whether bail should be granted for purposes such as funeral or other significant ceremonies.

80. However, section 24(b)(iiic) is unlikely to have the effect of altering the outcome of cases like *Anthony* where a grant of bail would in effect grant permission for the commission of a serious criminal offence.

[3.4] Other circumstances in which aspects of local Aboriginal law may be relevant

81. The *Crimes Act* amendments do not prohibit the taking into consideration the issue of customary law or practice that may arise outside of questions of sentencing or bail applications. Customary law or practice or indeed Aboriginality are factors that can be relevant to the partial defence of provocation.[66]

82. There was some doubt following the High Court decisions in *Masciantonio v The Queen*[67] and *Green v The Queen*[68] as to whether the reactions of a defendant should be measured as against that of the 'ordinary person' or against those of an 'ordinary Aboriginal person' as they had in the line of cases

[66] See for example *R v Mungatopi* (1992) 2 NTLR 1.

[67] (1995) 183 CLR 58.

[68] (1997) 191 CLR 334.

in the NT. In *R v Miller*,[69] the Queensland Court of Appeal rejected the 'ordinary person test' as being one that required comparison with a person of the same ethnic or cultural background.

83. However, in the more recent decision in *Lindsay v The Queen*,[70] the High Court affirmed that the issue of Aboriginality may be a relevant consideration in determining whether the provocation could have caused an ordinary person to have lost self-control:[71]

> And as the appellant submitted on the hearing of the appeal in this Court, it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.

and:[72]

> Further, as counsel for the appellant suggested in the course of argument (although no such submission was advanced below), it is not impossible that a jury could reasonably infer that, because the appellant is Aboriginal, he perceived the deceased's conduct towards him to be racially based and for that reason especially insulting.

[3.5] How is evidence of customary law to be received

84. One of the criticisms that is sometimes raised in relation to evidence of customary law is as to how such evidence is to be received by a court. However, careful consideration had been given by the NT courts to the way in which evidence of customary law and practice should be given. In *The Queen v Munungurr*,[73] the Court of Criminal Appeal considered the way in which evidence of that kind should be received by a court:[74]

> We do not think that it is any longer satisfactory for information of this kind to be placed before the court by means of the kind adopted in this case. As Asche CJ emphasised in *Minor v R* (1991-2) 105 NTR I at 2, statements from the bar table are of little assistance if they are not backed up by evidence from those fully conversant with the language and customs [and we add, views] of the

[69] In *R v Miller* [2009] QCA 11 the Queensland Court of Appeal rejected the 'ordinary person test' as being one that required comparison with a person with the same ethnic or cultural background.

[70] [2015] HCA 16.

[71] Ibid, [37] per French CJ, Kiefel, Bell and Keane JJ.

[72] Ibid, [86] per Nettle J.

[73] (1994) 4 NTLR 63.

[74] Ibid, 72-73.

> community concerned. The same can be said of letters written by communities which are expressed in delphic tones. They are of little value if on their face, the facts appear to be wrongly stated, or if the views and opinions expressed in them raise more questions than answers. In this case much more information ought to have been put to the court than was attempted, and this ought to have been attempted, at the least by the provision of more detailed statements in the form of affidavits or statutory declarations served upon the Crown in time for the prosecution to make its own enquiries, to decide whether to call evidence of its own and to decide if it required the deponents to be made available for cross-examination. It was suggested by Mr McDonald that the Crown had a duty to make positive enquiries as to these sort of matters and to place that information before the court even if the accused does not. We do not agree. The Crown is under no such duty, although the prosecutor would be duty bound to appraise the court of relevant information which came to its notice if satisfied as to its truth.

The Court further stated:[75]

> The importance of having evidence put before the court in a proper manner cannot be over-emphasised. The court must be satisfied that the information which is presented to it is reliable. It would be very easy for the court to be misled by information reflecting only the views of the defendant's relatives and supporters.

85. Unlike *Munungurr*, in the case of *The Queen v Miyatatawuy*,[76] the Supreme Court received considerable evidence as to the way in which the community had dealt with the offender in a traditional manner. The defendant had stabbed her husband after an argument when both had been drinking. The victim gave evidence that there had been a series of meetings between the relevant clan groups and the offender had had to face them. Makarrata or payback had been discussed but was decided against. The couple had gone to an outstation and overcome their alcohol problems. The victim, in his victim impact statement, said:[77]

> As far as traditional law is concerned everything has been settled and finished .... If traditional law has resolved this issue, why can't balanda law respect this? After all, it is under the customary law that my wife Jane and I live and will continue to live. This system has already decided that the issue is finished .... If the prosecution proceeds, not only does it discredit our decision to deal with our own problems according to our cultural law, but Jane would be tried twice for the same alleged offence. To me, this does not seem fair. Any person not living under customary law would not be subjected to two trials for the same offence.

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[75] Ibid, 73.

[76] [1996] NTSC 84; 6 NTLR 44; 135 FLR 173; 87 A Crim R 574.

[77] [1996] NTSC 84, [9]. The Court noted the references to 'two trials' should be taken as meaning 'two penalties'.

86. The Court also received written statements from the victim's two mothers which noted that:[78]

> …the offender had cared for her husband for a long time and that they were still living happily together. They asserted that she had already been dealt with through their law. They said that as the victim's family they "Respect her now because we now see her she has earned her Respect back through Wisdom, Adaptability, TRUSTWORTHINESS, INTEGRITY. There was appended to the statement documents containing the names of about 140 people who, according to the two mothers, were members of the victim's families 'supporting Jane Miyatatawuy'.

87. Further, the Court noted:[79]

> In *Walker v The State of New South Wales* (1994) 182 CLR 45 at 50 Mason CJ. said that the customary criminal law of Aboriginal people was extinguished by the passage of criminal statutes of general application. However that may be, it seems to me that facts and circumstances arising from this offender's aboriginality remain relevant. (Brennan J., *Percy Neal* (1982) 7 A Crim R 129 at 145). They arise from the operation within aboriginal communities of practices affecting her. The Courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process…An obligation undertaken or to be undertaken to others which may assist in the restoring of peace between the affected communities may also be significant. As the facts in this case show, the offender has accepted obligations, has been subjected to discipline, and by so doing has assisted in restoring the peace. She has suffered a penalty analogous to that undertaken by entering into a supervised bond to be of good behaviour, and has not failed in her obligation.

88. In 2005, the decision in *Munungurr* was given statutory effect by the introduction of section 104A into the *Sentencing Act.*[80]

89. The operation of section 104A has been limited by sections 15AB and 16AA of the *Crimes Act*. The effect of the amendments was discussed in *R v Wunungmurra*:[81]

> [24] [Section 91 of the former *NTNER Act*] precludes a sentencing court from taking into account customary law or cultural practice as a basis for finding that an offender who acted in accordance with traditional Aboriginal law is less morally culpable because of that fact. That would be a consideration going to the criminal behaviour constituting the offence. To take into account customary law or cultural practice in that way would be for the purpose of justifying or lessening the seriousness of that criminal behaviour.

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[78] Ibid, [13].

[79] Ibid, [20].

[80] A subsequent amendment in 2014 was made for compliance with the *Racial Discrimination Act 1975* (Cth): see paragraph 28 above.

[81] (2009) 231 FLR 180; [2009] NTSC 24.

> [25] The fact that legislation might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences, provides no sufficient basis for not interpreting [section 91 of the *NTNER Act*] in accordance with its clear and express terms. The Court's duty is to give effect to the provision.
>
> [26] Parliament may preclude a court from taking particular matters into account for sentencing purposes. Such a course is little different to parliament prescribing the sentence to be imposed for a particular offence or stipulating what are the aggravating and mitigating circumstances in relation to a particular offence.
>
> [27] The effect of [section 91 of the *NTNER Act*] is that when sentencing courts are determining the objective seriousness of an offence in cases in which the section is applicable, proportionally greater weight will be given to the physical elements of the offence and the extent of the invasion of the rights of the victim of the offence. Less weight will be given to the reasons or motive for committing the offence.

90. Section 104A however remains in operation for purposes other than what is set out in sections 15AB and 16AA. For example, it would apply where a defendant wished to introduce into sentencing proceedings his or her need to be at liberty for a particular ceremonial purpose. Also it may be arguable that if the purpose of the sentence is rehabilitation (as it was in *Miyatatawuy*), taking into consideration what has occurred under customary law or practice for that purpose may not be prohibited because the evidence is taken into account for the purpose of determining the defendant's prospects for rehabilitation rather than focusing on the offence itself.

[3.6] The High Court Decisions of Bugmy and Munda

91. Much focus has been given to the decisions of *Munda v Western Australia*[82] and *Bugmy v The Queen*.[83] These decisions were preceded by the decision of *R v Fernando*,[84] which was considered by the High Court in *Bugmy.*

92. In *Fernando*, Wood J set out the following propositions:[85]

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[82] (2013) 249 CLR 600.

[83] (2013) 249 CLR 571.

[84] (1992) 76 A Crim R 58.

[85] Ibid, 62-63.

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but, rather, to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence, which to a very significant degree go hand in hand within Aboriginal communities, are very real ones and require more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless realistically assess the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) In sentencing an Aboriginal person who has come from a deprived background, or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him or her and which is dominated by inmates and prison officers of European background, who possess little understanding of Aboriginal culture and society or of the offender's own personality.

93. The majority[86] in *Bugmy* largely approved these sentencing principles but gave them broader approval than application just to Aboriginal offenders. The following principles from *Bugmy* can be distilled:

a. That an offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. The Court at 592-593 clarified the significance of the statements in *Fernando*, approving this observation by Simpson J in the New South Wales Court of Criminal Appeal:[87]

> Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.

b. Although intoxication was not in issue in *Bugmy*, the Court at 593 referred with approval to what was said on that issue in *Fernando*:

> As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct.[88] However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand.[89] His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor.[90] To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and:[91]
>
> > 'the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects'.

c. On the question of whether Aboriginality itself as proposed by Wood J as being relevant to a sentencing determination in a case in which, because of the offender's background or lack of experience of European ways, a lengthy term of imprisonment might be particularly burdensome,[92] the Court

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[86] French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

[87] *Kennedy v The Queen* [2010] NSWCCA 260, [53].

[88] Supra, n. 84, 62 (E).

[89] Ibid, 62 (C).

[90] Ibid, 62 (E).

[91] Ibid, 62-63 (E).

[92] Ibid, 63 (G).

at 593 said that they conformed with what had previously been expressed as a statement of sentencing principle by Brennan J in *Neal*:[93]

> 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 court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal**. (emphasis added)

It is this principle that is circumscribed by section 16AA of the *Crimes Act,* as the provision excludes matters of customary law or cultural practice as factors that either aggravate or mitigate the offending.

As a consequence in the NT, Aboriginal and indeed other offenders of ethnic backgrounds from which considerations of customary practices arise, are excluded from the application of this sentencing principle although it will continue to apply to those groups in all other parts of Australia.

d. That the effects of profound deprivation do not diminish over time:[94]

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

It is this principle that can be difficult to apply when exercising the sentencing discretion. A court must balance the effects of profound childhood deprivation against the other principles relevant to arriving at a just sentence. It can be compared to signposts pointing in different directions. There is a need to recognise the effects of exposure to violence and alcohol abuse leading to an inability to recourse to violence but the need to protect the community or specific individuals may increase the need for a sentence that provides that protection. The High Court discussed this issue further in the companion decision of *Munda*.[95]

e. The Court rejected two propositions that had been advanced by the appellant. First, that sentencing courts should take into account the 'unique

[93] Supra, n. 46, 326.

[94] Supra, n. 83, 594 [43].

[95] Supra, n. 82.

circumstances of all Aboriginal offenders' as relevant to the moral culpability of an individual Aboriginal offender. Secondly, that courts should take into account the high rate of incarceration of Aboriginal Australians when sentencing an Aboriginal offender because the rate reflected a history of dispossession and associated social and economic disadvantage:[96]

> There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

f. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background:[97]

> This principle conforms with what has been said many times. The evidence must be directed at this defendant's circumstances rather than a generality in relation to Aboriginal persons.

94. In the companion judgment of *Munda*, the High Court examined the adequacy of a sentence imposed on an Aboriginal man for the manslaughter of his Aboriginal wife. She had died following a brutal and prolonged beating by the appellant after a bout of drinking and arguing between them, a circumstance all too familiar to the courts in the NT. The Court considered, *inter alia,* the relevance of the deprived background of Aboriginal offenders and whether the appellate court had given appropriate regard to appellant's antecedents and personal circumstances.

95. The Court reiterated a number of the things said in *Bugmy* including that it would be contrary to the principle in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. The Court added that, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.[98]

96. The Court gave consideration as to the weight to be given to general deterrence in relation to crimes such as these which are not premeditated saying that 'where prolonged and widespread social disadvantage has produced communities so demoralised or alienated [that] it is unreasonable to expect the

[96] Supra, n. 83, 592 [36].

[97] Ibid, [41].

[98] Supra, n. 82, [53].

conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct'.[99]

97. However, three matters were noted in response to that.

a. First, the proper role of the criminal law was not to be limited to the utilitarian value of general deterrence. The criminal law was 'more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community'.[100] To do so would be 'to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence'.[101]

   The majority further noted what appears sometimes to be overlooked by commentators when discussing the appropriateness of sentencing principles to Aboriginal offenders, which is the effect of the sentence on the victim of a violent assault who most often themselves are Aboriginal women and the consequent message that sends to the community as to the value of their lives. The High Court had this to say:[102]

   > A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

b. The weight to be given to alcohol and other addictions. The majority approved what was said by McLure P in his decision in the Western Australia Court of Appeal below:[103]

[99] Ibid, [54].

[100] Ibid, [54].

[101] Ibid, [54].

[102] Ibid, [55].

[103] Ibid, [56]-[57].

> '[A]ddictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending'.[104]
>
> This observation by McLure P is particularly poignant in this case, given the very lenient sentence imposed on the appellant in May 2009 and its evident insufficiency to deter the appellant from the repetition of alcohol-fuelled violence against his de facto spouse, or to afford her protection from such violence. The circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.

c. Thirdly, as was noted above when discussing *Bugmy,* sentencing is a complex exercise and factors may point in different directions when attempting to arrive at a just sentence. The majority discussed the interplay between the two factors above that had been discussed:[105]

> As Gleeson CJ said in *Engert*:[106]
>
> > '[T]he interplay of the considerations relevant to sentencing may be complex … In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. …
> >
> > It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances.'

98. A final matter to be noted from *Munda* is the discussion in the majority judgement as to consideration of traditional punishment. The appellant had indicated that he was willing to submit to traditional punishment. This had been taken into account in his favour by the sentencing judge[107] and the respondent accepted that that possibility is a factor relevant to sentencing. The Western Australian Court of Appeal did not take a different view; and the respondent did not argue that the High Court should take a different view.

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[104] *Western Australia v Munda* (2012) 43 WAR 137, 152 [65].

[105] Supra, n. 82, [58].

[106] (1995) 84 A Crim R 67, 68.

[107] [2011] WASCSR 87, [24]-[27].

99. The majority did not express a concluded view but said:[108]

> There is something to be said for the view that the circumstance that the appellant is willing to submit to traditional punishment, and is anxious that this should happen, is not a consideration material to the fixing of a proper sentence. Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment.

[3.7] Summary

100. The ability of courts in the NT to take into consideration matters of customary law or cultural practice in sentencing and bail proceedings has been circumscribed by the amendments to the *Crimes Act*. No other jurisdiction has implemented similar reforms, nor has the Commonwealth sought to implement the same reforms in other Territories. In sentencing proceedings, Aboriginal defendants (amongst others) in the NT are subject to different considerations in arriving at sentence or a grant of bail than offenders in other jurisdictions.

101. Although there is a considerable body of case law over a substantial period as to the issues of local Aboriginal law and practice in sentencing, it is apparent that the frequency with which these issues arise has diminished over time. This would not be an unexpected consequence of remote communities moving to and adopting more urban lifestyles. Nevertheless, local Aboriginal laws and practices have continued to a greater or lesser degree across communities in the NT and, with narrow exceptions, can no longer be taken into account in determining a just sentence.

102. Evidence of customary law and cultural practices can be received provided it is for a purpose other than those proscribed by the provisions in the *Crimes Act*. Determining a sentence is a process of considering the objective seriousness of the offence (which is what the *Crimes Act* proscribes) and the objective and subjective features of the offender. A court can still receive evidence as to customary law or cultural practices to establish matters such as prospects for rehabilitation, the degree of remorse, the risk of re-offending, community safety and whether an offender is welcome back into a community or not. The *Sentencing Act* provides for the factors that must and can be considered and these are not circumscribed by the *Crimes Act* other than as to the establishment of the objective seriousness of the offence.

103. Other than the one exception identified (see (93.c)] above), the principles enunciated in *Bugmy* and *Munda* have application in determining an appropriate sentence in the NT. Factors that either aggravate or mitigate the offending arising out of factors associated with the offender's circumstances as an Aboriginal person are not precluded from consideration.

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[108] Supra, n. 82, [61].

CHAPTER 4 – PREVIOUS INQUIRIES

104. Numerous inquiries in Australia have dealt with the recognition of local Aboriginal law and Aboriginality in sentence proceedings, and to a lesser extent, bail proceedings. The key issues and recommendations arising out of these inquiries are summarised below.

[4.1] Commonwealth

[4.1.1] Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC, 2017)

105. In December 2017, the ALRC finalised its report *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*.[109] This was a significant inquiry in which the ALRC examined the overrepresentation of Aboriginal and Torres Strait Islander (ATSI) people in prison and recommended reforms to reduce disproportionate incarceration rates.

106. The ALRC was asked to consider laws and legal frameworks that contribute to the incarceration rate of ATSI peoples and inform decisions to hold or keep ATSI people in custody.

107. The ALRC Report contained 35 recommendations for reforms to laws and legal frameworks to address community safety and imprisonment rates amongst ATSI people.

<u>Sentencing</u>

108. The ALRC provided an extensive examination and discussion on the issue of sentencing and Aboriginality.[110] The ALRC recognised that ATSI offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders, and that this history may influence the sentencing decision.[111] ATSI offenders may have also 'experienced trauma that is unique to their Aboriginality', including direct or indirect experience of the Stolen Generation, loss of culture, and displacement.[112]

109. The ALRC noted that sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an ATSI offender when

[109] ALRC, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People (Report 133)* (2017, Australian Government, Canberra).

[110] Ibid, chapter 6, 185-271.

[111] Ibid, 14 and 185.

[112] Ibid.

taking into account subjective characteristics at sentencing, but are not required to do so.[113]

110. The common law position in Australia[114] and legal position in Canada[115] (including discussion of section 718, *Criminal Code, RSC 1985, c C-46*. Canadian case law *R v Gladue*[116] and *R v Ipeelee*[117]) was also discussed in detail in the Report.

111. The ALRC provided an in depth summary of case law in Australia including *Neal*,[118] *Fernando*,[119] *Bugmy*,[120] and *Munda*.[121] Noting particularly that in the decision of *Bugmy*, the High Court determined that taking judicial notice of the systemic background of deprivation of Aboriginal offenders may be 'antithetical to individualised justice'.[122]

112. The ALRC noted and supported the majority of stakeholder submissions to the Inquiry for the introduction of provisions requiring sentencing courts to take a two-step approach 'for reasons of fairness, certainty and continuity in sentencing' ATSI offenders. This two-step approach is:[123]

    a. to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples; and

    b. then to proceed to review evidence as to the effect on that particular individual offender.

113. The ALRC further recommended that in the courts of superior jurisdiction (District/County and Supreme Courts), taking account of unique systemic and background factors should be done through the submission of 'Indigenous Experience Reports', prepared by independent Aboriginal and Torres Strait

[113] Ibid, 14 and 186.

[114] Ibid, chapter 6, 192–197.

[115] Ibid, chapter 6, 197–204.

[116] [1999] 1 SCR 688.

[117] [2012] 1 SCR 433.

[118] Supra, n. 46.

[119] Supra, n. 84.

[120] Supra, n. 83.

[121] Supra, n. 82.

[122] Supra, n. 83, 196.

[123] Supra, n. 109, 186 and 204.

Islander organisations. In the courts of summary jurisdiction (Local or Magistrates Courts) where offenders are sentenced for lower level offending, and time and resources are limited, the ALRC recommended that courts accept evidence in support of the provisions through less formal methods.[124]

114. The ALRC noted (as at the date of the Report) that provisions related to considerations of Aboriginality when sentencing were found in a number of sentencing statutes in the Australian Capital Territory (ACT), Queensland and South Australia (SA).[125]

115. The ALRC recommended that:[126]

> Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

116. The ALRC noted that it was 'the view of most stakeholders that the principles of 'individualised justice' and 'equality before the law' – understood as substantive equality – required sentencing courts to consider' such factors. An explicit provision would encourage judicial officers and counsel to take a proactive approach toward ensuring relevant information is before the sentencing court.[127]

117. Consideration of obstacles concerning potential introduction of such provisions were investigated and discussed by the ALRC, including section 10 of the RDA and sections 16A(2A) and 16AA of the *Crimes Act*.[128]

118. In a discussion paper, the ALRC had asked stakeholders whether states and territories should introduce a statutory requirement to consider Aboriginality in sentencing in light of the decision in *Bugmy*. The High Court in *Bugmy* raised the question of whether a state law requiring consideration of Aboriginality in sentencing could be invalid by reason of inconsistency with section 10 of the RDA. The ALRC considered that:[129]

> … the RDA is unlikely to be an impediment to enacting such a statutory requirement—a view supported by stakeholders.

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[124] Ibid, 186 at [6.5].

[125] Ibid, 189.

[126] Ibid, recommendation 6-1.

[127] Ibid, 205.

[128] Ibid, 210.

[129] Ibid, 211.

> Where a state or territory law confers a right or benefit which does not have universal operation, questions of invalidity do not arise. Instead, s 10(1) of the RDA would operate to extend the right or benefit to persons of any race, colour, or national or ethnic origin. Australian sentencing courts are already 'bound to take into account all material facts including those which exist only by reason of the offender's membership of an ethnic or other group'. The recommended statutory requirement seeks to encourage judicial officers (and counsel) to take a proactive approach toward ensuring information relevant to those factors is put before the court. It does not contain a prohibition, and nor does it deprive a person of a right they previously enjoyed, and therefore would not be invalid. Section 10 of the RDA would operate to direct the court to consider factors arising from an accused person's membership of any racial or ethnic group as part of the sentencing process.

119. With regard to the *Crimes Act,* the ALRC noted that stakeholders raised sections 16A(2A) and 16AA as a possible impediment applied to sentencing in the NT. The ALRC noted that section16AA prohibits sentencing judges in the NT from considering customary law and cultural practice to mitigate criminal conduct. Section 16A(2A) provides the same prohibition for federal offenders.

120. The ALRC noted that the Commonwealth provisions were introduced to 'prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children'.[130]

121. The case of the *Wunungmurra*[131] was cited, noting that the NT Supreme Court found that provisions of this type did not prevent courts from considering customary law or cultural practice to provide context for offending, establish good prospects of rehabilitation (relating to sentencing), or to establish the character of the accused.[132]

122. However, the ALRC noted that:

> It is not clear how section 16AA may have an impact on the operation of the recommended provision to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander offenders in the NT. As customary law and cultural practice can be considered to provide context for offending, the effect of section 16AA on the operation of the recommended provision may be minimal.

123. The ALRC further noted the submission of Criminal Lawyers of the NT (CLANT) that in order to give statutory consideration to ATSI disadvantage when sentencing in the NT, 'necessary amendments will need to be made to other

[130] Ibid, 212.

[131] Supra, n. 81.

[132] Supra, n. 109, 212.

legislation that seeks to regulate how evidence of custom and culture is to be presented'.[133]

124. As such, the ALRC 'encouraged' the Commonwealth Government to review the operation of sections 16A(2A) and 16AA 'to ensure that they are operating as intended, and to consider repealing or narrowing the application of the provisions if necessary to the successful implementation of a statutory requirement to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders when sentencing in the NT'.[134]

125. The ALRC observed that despite pre-sentence reports and submissions on behalf of an offender, 'there remains a need for courts to be able to receive objective reports that provide insightful and accurate accounts of the experiences of ATSI offenders'.[135] The ALRC noted moves towards *Gladue*-style reports in Australia, which are specialist Aboriginal sentencing reports prepared in some Canadian provinces intended to promote a better understanding of the underlying causes of offending, including the historical and cultural context of an offender.[136] The ALRC considered submissions relating to the appropriate authorship, content and resourcing of reports. The ALRC then recommended:

> State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.[137]
>
> State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.[138]

[133] Ibid, 212 and Criminal Lawyers Association of the NT (CLANT), *Submission 75*.

[134] Ibid, 212.

[135] Ibid, 214.

[136] Ibid, [6.68].

[137] Ibid, recommendation 6-2.

[138] Ibid, recommendation 6-3.

Bail

126. The ALRC observed that ATSI peoples 'have continued to be over-represented on remand by a factor of over 11 compared to non-Indigenous remandees since 2010' and examined the drivers for this overrepresentation.[139] The ALRC also made specific recommendations designed 'to enable ATSI peoples accused of low-level offending to be granted bail in circumstances where risk can be appropriately managed':[140]

> State and territory bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending. The *Bail Act 1977* (Vic) incorporates such a provision. As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.[141]
>
> State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.[142]

[4.1.2] Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory (2017)

127. The Final Report of the Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory was tabled on 17 November 2017.[143] Relevantly to this inquiry, the Royal Commission recommended that resources be provided to support Law and Justice Groups, or other suitable entities, to allocate adults to be responsible for Aboriginal young people appearing in criminal proceedings whether in remote or urban communities.[144]

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[139] Ibid, 152-153.

[140] Ibid, 149.

[141] Ibid, recommendation 5-1.

[142] Ibid, recommendation 5-2.

[143] Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory, *Final Report* (2017).

[144] Ibid, recommendation 25.34.

[4.1.3] Review of Customary Law Amendments to Bail and Sentencing Laws (Attorney-General's Department, 2009)

128. In November 2009, the Commonwealth Attorney-General's Department reviewed customary law amendments to bail and sentencing laws for federal[145] and NT[146] offences, in order to inform a decision on whether the Government should retain, repeal or amend them.[147] The review was informed by stakeholder feedback, a literature review and analysis of comparable provisions in other jurisdictions.[148] The report ultimately recommended retaining the amendments in current form.[149] The report found there was 'little evidence available on which to base an assessment of the impacts of the amendments and no evidence to indicate the amendments are having unintended negative consequences'.[150] The report noted that further consideration could be given to reform 'if there are cases where the amendments are interpreted more broadly than was intended, or it becomes apparent that the amendments are having unintended negative consequences'.[151]

129. The report acknowledged that most stakeholders consulted were in favour of repealing the amendments that limited consideration of customary law and cultural practice and removed requirements to consider the cultural background of an offender or alleged offender.[152] However, the report stated that this opposition was on the basis of the potential impacts of the amendments and

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[145] *Crimes Act*, insertion of s. 15AB, omission of s. 16A(2)(m), insertion of s. 16A(2A) and (2B), omission of s. 19B(1)(b)(i), insertion of s. 19B(1)(1A) and (1B) and amendments relating to forensic procedures.

[146] *NTNER Act*, ss. 90 and 91.

[147] Attorney-General's Department, *Review of Customary Law Amendments to Bail and Sentencing Laws*, November 2009, 3.

[148] Ibid, 5.

[149] Other options considered included:
- retain the amendments but limit the application of the customary law provisions to violent or sexual offences (option 2);
- repeal the customary law and cultural background amendments to bail and sentencing laws (option 3);
- repeal the customary law and cultural background amendments to bail and sentencing laws and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings (option 4); and
- retain the amendments, but limit the application of the customary law provisions to violent or sexual offences and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings (option 5).

[150] Supra, n. 147, 4.

[151] Ibid.

[152] Ibid, 3. Stakeholders generally supported retaining the provisions requiring a court to specifically consider victims and witnesses in bail decisions.

policy arguments.[153] Relevant concerns by stakeholders included the potential for inequity arising from limiting judicial discretion, the amendments not being an appropriate or effective vehicle for addressing issues of family violence and sexual abuse in Indigenous communities, a lack of evidence that Indigenous offenders are treated more leniently by the courts, and the potential for significant disparities in interpretation among judicial officers.[154]

130. The report stated that the amendments were not intended to exclude entirely customary law and cultural practice as factors that may be taken into account in bail and sentencing decisions.[155] For example, it was intended that a sentencing court could still take into account whether an offender has received, or will receive, tribal punishment for his or her behaviour, and it was intended that bail conditions could continue to take into account any relevant family or community structure operating under customary law.[156]

131. The report cited the case of *Wunungmurra*[157] as evidence that the amendments were operating as intended. In that case, Southwood J of the NT Supreme Court interpreted the provision narrowly to the effect that evidence concerning customary law could not be admitted for the purpose of establishing the objective seriousness of the defendant's criminal behaviour, but could be admitted for other purposes, including to provide an explanation and context for the offences.[158] Southwood J was critical of section 91 of the *NTNER Act* in this decision.

132. The report also acknowledged there was 'some risk that the amendments limiting consideration of customary law and cultural practice in bail and sentencing decisions could be found to be indirectly racially discriminatory'[159] in breach of international human rights obligations[160] and the RDA. This risk could be minimised by reinstating judicial discretion to consider these factors where relevant or by restricting the application of those provisions to offences involving violence or sexual abuse, where the offending behaviour infringes

[153] Ibid, 14.

[154] Ibid, 3.

[155] Ibid, 12-13.

[156] Ibid, 12-13.

[157] Supra, n. 81.

[158] Supra, n. 147, 52.

[159] Ibid, 14.

[160] Ibid, 14.

upon an individual's human rights.[161] However, these recommendations were not ultimately favoured by the Attorney-General's Department.

[4.1.4] Same Crime, Same Time: Sentencing of Federal Offenders (ALRC, 2006)

133. In its April 2006 report entitled *Same Crime, Same Time: Sentencing of Federal Offenders,*[162] the ALRC emphasised that consideration of factors relating to the background and circumstances of the offender facilitates 'individualised justice', which is one of the fundamental sentencing principles.[163] The ALRC recommended that federal sentencing legislation continue to require courts to consider matters relating to an offender's personal circumstances, such as their cultural background.[164] This report pre-dated the repeal of section 16A(2)(m) of the *Crimes Act.*

134. The ALRC also affirmed its commitment to the recommendations made in *The Recognition of Aboriginal Customary Laws* report relating to the sentencing of federal Aboriginal offenders discussed below. In particular, without derogating from international human rights principles applicable to sentencing decisions, legislation should:[165]

- endorse the practice of considering traditional laws and customs, where relevant, in sentencing a federal ATSI offender; and
- provide that, in ascertaining traditional laws and customs or relevant community opinions, a court may give leave to a member of a federal ATSI offender's or ATSI victim's community to make oral or written submissions.

135. The ALRC also supported the recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to sentencing of federal ATSI offenders.[166]

136. The ALRC noted that only a very small percentage of the work performed by Northern Australian Aboriginal Legal Aid Services involved federal ATSI

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[161] Ibid, 50. For example, the prohibition on discrimination in Article 2 of the *International Covenant on Civil and Political Rights* and Article 2 of the *International Covenant on the Elimination of All Forms of Racial Discrimination*.

[162] ALRC, *Same Crime, Same time: Sentencing of Federal Offenders (Report 103)* (2006, Australian Government, Canberra).

[163] Ibid, [6.88].

[164] Ibid, [29.45]. See *Crimes Act*, s. 16A(2)(m).

[165] Above n 162, recommendation 29.1, [29.71].

[166] Ibid, recommendation 29.2, [29.70]. See recommendations 94, 96, 97, 100, 109, 111, 112, 113, 114 and 119.

offenders and that the federal offences committed by ATSI offenders tended to be offences against the *Social Services Act 1991* (Cth).[167]

[4.1.5] Multiculturalism and the Law (ALRC, 1992)

137. In its April 1992 report, *Multiculturalism and the Law*,[168] the ALRC again recommended that an offender's cultural background be specified as a factor to be taken into account when the court is passing sentence, and also when considering whether to discharge an offender without conviction.[169]

[4.1.6] Royal Commission into Aboriginal Deaths in Custody, National Report (1991)

138. The Royal Commission into Aboriginal Deaths in Custody[170] was established in October 1987 in response to growing public concern regarding Aboriginal deaths in custody. The ALRC examined the deaths of ninety-nine Aboriginal people in the custody of prison, police or juvenile detention centres that occurred between 1980 and 1989.

139. In 1991, the Royal Commission found that 'Aboriginal people are in gross disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody'.[171] Further that 'one cannot point to a common thread of abuse, neglect or racism that is common to these deaths. However, an examination of the lives of the ninety-nine shows that facts associated in every case with their Aboriginality played a significant and, in most cases, dominant role in their being in custody and dying in custody'.[172]

140. The Royal Commission made a total of 339 recommendations, a number of which are relevant to sentencing.

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[167] Ibid, [29.42].

[168] ALRC, *Multiculturalism and the Law (Report 57)*, Report 57, (1992, Australian Government, Canberra).

[169] Ibid, recommendation 29, [8.14] and recommendation 30, [8.15].

[170] Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991, Australian Government, Canberra).

[171] Ibid, [9.4.1].

[172] Ibid, [1.1.1].

141. The Royal Commission recommended that governments should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.[173]

142. The Royal Commission also recommended that judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. The programs should highlight the 'historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and the nature of relations between Aboriginal and non-Aboriginal communities today'. Further that wherever possible the above referenced people 'participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding'.[174] In devising and implementing such courses, the 'responsible authorities should ensure that consultation takes place with appropriate Aboriginal organisations'.[175]

143. The Royal Commission made a specific recommendation that with respect to sentencing involving 'discrete or remote communities', 'that sentencing authorities consult with Aboriginal communities and organisations to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases'.[176]

144. The Royal Commission also cited the ALRC's Report on the *The Recognition of Aboriginal Customary Laws* as being 'a significant and well-researched study'[177] and noted that the ALRC during the inquiry received requests from Aboriginal people regarding progress in implementation of this Report. The ALRC urged the government to report on the progress of the Report's recommendations.

[173] Ibid, recommendation 92.

[174] Ibid, recommendation 96.

[175] Ibid, recommendation 97.

[176] Ibid, recommendation 104.

[177] Ibid, recommendation 219.

[4.1.7] Sentencing (ALRC, 1988)

145. The ALRC's 1988 *Sentencing* report[178] recommended that an offender's cultural background be included in a non-exhaustive list of factors that a court must consider in sentencing.[179] It recommended that 'the fact that an offender is Aboriginal should not be a matter relevant to sentence but special factors arising from disadvantages suffered by Aboriginals, or Aboriginal customary practices, should be considered'.[180]

[4.1.8] The Recognition of Aboriginal Customary Laws (ALRC, 1986)

146. In 1986, the ALRC considered the issue of the recognition of Aboriginal Customary Laws in *The Recognition of Aboriginal Customary Laws*.[181]

147. The ALRC considered that Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system.[182] Such recognition must occur against the background and within the framework of the general law.[183] The ALRC recommended that customary laws be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.[184] The ALRC did not support codification or direct enforcement of Aboriginal customary laws as a general principle, and favoured specific, particular forms of recognition.[185]

148. The ALRC report addressed whether in criminal cases, existing courts should be able to apply Aboriginal customary laws to Indigenous peoples and whether Indigenous communities should have power to apply their customary laws in the punishment and rehabilitation of Aboriginal people. As part of the review, the ALRC considered whether, and to what extent, Aboriginal customary laws should be taken into account in the sentencing process.[186]

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[178] ALRC, *Sentencing (Report 44)*, (1988, Australian Government, Canberra).

[179] Ibid, recommendation 94, [170].

[180] Ibid, recommendation 111, [197].

[181] Supra, n. 7.

[182] Ibid, [195].

[183] Ibid, [195].

[184] Ibid, [196].

[185] Ibid, [208].

[186] Ibid, [490].

149. Further that:

- although the defendant‘s (or the victim‘s) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of Aboriginal dispute resolution processes involving physical punishments is not to be achieved through the existing law relating to consensual assault or through changes to that law;[187]

- courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it;[188] and

- the courts have recognised a distinction between taking Aboriginal customary laws into account in sentencing, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other.[189]

150. The ALRC noted that in applying that distinction, the following propositions have been recognised:

- a defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to ‘protect‘ the defendant from the application of customary laws including traditional punishment (even if that punishment would or may be unlawful under the general law);[190]

- similar principles apply to discretions with respect to bail.[191] A court should not prevent a defendant from returning to the defendant‘s community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met;[192]

[187] Ibid, [503], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing)

[188] Ibid, [491]-[497], [504], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing)

[189] Ibid, [504], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing)

[190] Ibid, [505], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[191] Op. Cit.

[192] Ibid, [506], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

- Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future;[193]

- Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the 'tariff') applicable to the offence;[194]

- the views of the local Aboriginal community (within certain limits) about the seriousness of the offence, and the offender, are also relevant in sentencing;[195]

- the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions;[196]

- neither can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law;[197]

- in some circumstances, where the form of traditional settlement involved would not be illegal a court may incorporate such a proposal into its sentencing order, provided that this is possible under the principles of the general law governing sentencing;[198] and

- an offender's opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect.[199]

151. The ALRC endorsed the above principles which strike the 'right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a

[193] Ibid, [507]-[508], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[194] Ibid, [509], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[195] Ibid, [510], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[196] Ibid, [511], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[197] Ibid, [512]-[513], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[198] Ibid, [512], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[199] Ibid, [515], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

condition to the release of offenders or for the mitigation of punishment and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws'.[200]

152. The ALRC considered that general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time.[201]

153. The ALRC was of the view that a sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases).[202]

154. The ALRC was also of the view that alternative sentencing options for Aboriginal communities need to be developed, taking into account local circumstances and needs.[203]

155. In relation to evidentiary and procedural issues, the ALRC recommended that:

- existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used (for example the prosecution's power to call evidence and make submissions on sentence and the use of pre-sentence reports);[204]
- defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary laws contrary to the interests of or otherwise than as instructed by the accused;[205]

[200] Ibid, [516], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[201] Ibid, [517], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[202] Ibid, [522], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[203] Ibid, [539]-[541], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[204] Ibid, [526] and [529], summarised at [542] (Related Evidentiary and Procedural Questions).

[205] Ibid, [527], summarised at [542] (Related Evidentiary and Procedural Questions).

- separate community representation is, in most cases, not appropriate;[206] and

- to reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, legislation should specifically provide that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's community, give leave to the applicant or applicants to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms (eg, as to matters to be dealt with, or not dealt with in the statement).[207]

156. The ALRC also considered the issue of customary law in courts determining to grant bail and in setting the conditions for bail. The ALRC recommended that account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged.[208]

[4.2] Northern Territory

[4.2.1] Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred' (NT Government, 2007)

157. In August 2006, the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse was established to investigate ways to protect Aboriginal children from sexual abuse. The *Ampe Akelyernemane Meke Mekarle: "Little Children are Sacred*" Report[209] was publicly released on 15 June 2007.

158. The Inquiry made 97 recommendations regarding alcohol restrictions, the provision of healthcare and many other issues relating to child abuse and neglect in regional Aboriginal communities. The Inquiry made some specific recommendations with respect to consideration of Aboriginal law.

159. In consultations, the Inquiry was told that 'many of the problems that presently exist in Aboriginal communities, including the sexual abuse of children, are a result of a breakdown of law and order… with many people not respecting either Aboriginal law or Australian law'.[210] The Inquiry was told that the lack of support

[206] Ibid, [528], summarised at [542] (Related Evidentiary and Procedural Questions).

[207] Ibid, [531], summarised at [542] (Related Evidentiary and Procedural Questions).

[208] Ibid, [517], summarised at [542] (relevance of Aboriginal Customary Laws in Sentencing).

[209] Supra, n. 30.

[210] Ibid, 175.

from mainstream of law and culture meant that Aboriginal law and culture is 'constantly misunderstood, disrespected, over-ridden and undermined', leading to disempowerment to deal with issues like child sexual abuse.[211]

160. The Inquiry was of the view that Aboriginal law is a key component in successfully preventing the sexual abuse of children, as it is more likely that Aboriginal people will respond positively to their own law and culture.[212] Further, the Inquiry stated that 'given the uniqueness of the NT, particularly its large Aboriginal population and the strength of culture that has survived, there is potential for it to become a world leader' in empowering Aboriginal people, 'developing new structures, methods and systems that see Aboriginal law and mainstream law successfully combined and bringing a newfound strong respect to Aboriginal people, law and culture that will benefit the whole of the NT'.[213]

161. Recommendations of the Inquiry concerning Aboriginal law are as follows:

- That, as soon as possible, the government facilitate dialogue between the Aboriginal law-men and law-women of the Northern Territory and senior members of the legal profession and broader social justice system of the Northern Territory. That such dialogue be aimed at establishing an ongoing, patient and committed discourse as to how Aboriginal law and Northern Territory law can strengthen, support and enhance one another for the benefit of the Northern Territory and with a specific emphasis on maintaining law and order within Aboriginal communities and the protection of Aboriginal children from sexual abuse.[214]

- That the government give consideration to recognising and incorporating into Northern Territory law aspects of Aboriginal law that effectively contribute to the restoration of law and order within Aboriginal communities and in particular effectively contribute to the protection of Aboriginal children from sexual abuse.[215]

- That the government commit to the establishment and ongoing support of Community Justice Groups in all those Aboriginal communities which wish to participate, such groups to be developed following consultation with communities and to have the following role and features.[216] The role of

[211] Ibid.

[212] Ibid.

[213] Ibid, 179.

[214] Ibid, recommendation 71, 30 and 179.

[215] Ibid, recommendation 72, 30.

[216] Ibid, recommendation 73, 30.

Community Justice Groups would include setting community rules and community sanctions consistent with NT law, presenting information to courts for sentencing and bail purposes about an accused who is a member of their community and providing information or evidence about Aboriginal law and culture, assisting in any establishment of Aboriginal courts, and participating in mediation, among other matters.[217]

- That, having regard to the success of Aboriginal courts in other jurisdictions in Australia, the government commence dialogue with Aboriginal communities aimed at developing language group-specific Aboriginal courts.[218]

[4.2.2] Report on Aboriginal Customary Law (NTLRC, 2003)

162. In 2003, the Committee finalised its *Report on Aboriginal Customary Law*.[219] The sub-committee conducting the inquiry consisted of Aboriginal members appointed by the Attorney-General and several members of the Committee. A wide cross-section of the community was consulted in the preparation of this report, including by way of public submissions and interviews. The report acknowledged the unique position of the Northern Territory as the only part of Australia where the Aboriginal population constitutes a substantial minority.[220] The report focussed on matters affecting Aboriginal communities in particular,[221] and its terms of reference were broader than the current terms of reference.

163. The Committee observed:[222]

> The important factor is that it appears to many Aboriginal people that traditions and customs recognised and applied by Aboriginal people over thousands of years have not been sufficiently or properly recognised by non-Aboriginals, and particularly by those concerned with making and administering the laws of the Northern Territory. Yet the belief is strong that a proper recognition and application of Aboriginal customary law would go a long way to dealing with issues which are presently of concern to many communities. This strong belief has been expressed by many Aboriginals during interviews with the Committee.

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[217] Ibid, recommendations 73 a-i (role) and a-c (features), 30 and 185.

[218] Ibid, recommendation 74, 31 and 188.

[219] Supra, n. 20.

[220] Ibid, 13.

[221] Ibid.

[222] Ibid.

164. The most relevant recommendation of the 2003 report, for present purposes, related to the adoption of a model allowing community input into the sentencing of offenders by both Aboriginal communities and the courts.[223] The recommendation was that, on application by an Aboriginal community and in consultation with them, the Attorney-General establish a Consultative Committee which may appear in court when a member of that community is charged with an offence. In appropriate cases where an offender has been found guilty, the Consultative Committee may request the Court to let the community deal with it. If the Court consents, it may adjourn the case and refer the matter to the community for reparation.[224] At the adjourned hearing, the Court may then take whatever action it thinks appropriate upon being told what resolution has been arrived at by the community.[225] The Committee acknowledged that certain traditional punishments which are contrary to the general law cannot be tolerated, but noted that in certain cases where all parties consent, there would be no reason why other traditional procedures should not be undertaken, particularly those involving mediation.[226] In cases involving domestic violence, the court should only allow an application if it is satisfied the victim has given informed consent to that course, and only then after consulting with legal advisers.[227]

165. The Committee was of the view that:[228]

> The important factor here is that traditional law is known only to the community, or more particularly community leaders, familiar with all its delicate subtle and local variations. The Court is thereby the better assisted rather than having the traditional law "interpreted" by lawyers who, with the best of intentions, may miss the real significance of the procedures.

166. Another major recommendation of this report was that Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.[229] The Committee's view was that each Aboriginal community will define its own problems and

[223] Ibid, recommendation 7, 31.

[224] Ibid.

[225] Ibid, 32.

[226] Ibid, 28.

[227] Ibid, 32.

[228] Ibid, 30.

[229] Ibid, recommendation 4, 22.

solutions.[230] The Committee recommended that government make resources available for several pilot programs for the implementation of law and justice plans.[231]

167. The Committee also made a general recommendation that government adopt a policy of ensuring the application of the general law of the NT does not work injustice in situations where Aboriginal people are subject to rights and responsibilities under traditional law, and that statute law should on appropriate occasions recognise this.[232] Within its timeframe, the Committee was not able to develop policy options for diverse areas of law, including criminal law.

168. Other recommendations included the provision of cross cultural training for judges, court officials and other appropriate persons;[233] access to video conferencing facilities for community elders and witnesses attending court;[234] a whole of government approach to the recognition of customary law in the delivery of services to Aboriginal communities;[235] the development of strategies to increase Aboriginal participation in the justice system;[236] and implementation the NT Statehood Conference resolution that Aboriginal customary law be recognised as a 'source of law'.[237] Specific recommendations were also made with regard to communicating government policy in relation to promised marriages[238] and the development of government policy for responding to the issue of traditional law punishment of 'payback'.[239]

169. A key principle underpinning the Committee's 2003 report was the view that Aboriginal customary laws should not be written into the general body of legislation. Rather, it is preferable 'to leave the interpretation of Aboriginal customary law to the Aboriginal people themselves who have had centuries of knowledge and practice behind them, of which others can have very little concept'.[240] If this view were to be accepted, the Committee stated that 'a way

[230] Ibid, 21.

[231] Ibid, recommendation 8, 31.

[232] Ibid, recommendation 10, 35.

[233] Ibid, recommendation 1, 16.

[234] Ibid recommendation 2, 16.

[235] Ibid, recommendation 3, 17.

[236] Ibid, recommendation 9, 34.

[237] Ibid, recommendation 11, 38.

[238] Ibid, recommendation 5, 24.

[239] Ibid, recommendation 6, 27.

[240] Ibid, 12.

must be found of transferring power to Aboriginal people to deal with these matters themselves'.[241] The Committee recommended that the Aboriginal members of the sub-committee should remain as a Consultative Committee to the Attorney-General about the operations of the Committee's recommendations.[242]

170. The Committee was also of the view that some elements of traditional law must be at least modified to ensure compatibility with human rights obligations.[243]

[4.3] New South Wales

[4.3.1] Sentencing (NSWLRC, 2013)

171. In July 2013, the New South Wales Law Reform Commission (NSWLRC) completed an extensive review of sentencing law in that state.[244] A broad range of recommendations were made, with a focus on ensuring adequate sentencing options and discretions and achieving simplicity, transparency and consistency in sentencing.[245]

172. The NSWLRC made a general recommendation that the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to provide that a sentencing court must take into account 'the offender's character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)'.[246] The NSWLRC was of the view that these factors were sufficiently broad to allow a court to take into account such matters as any history of disadvantage, limited education or employment, when considering an ATSI offender's prospects of rehabilitation, and when framing a sentence aimed at reducing the risks of reoffending while seeing the other purposes of sentencing.[247]

173. The NSWLRC did not consider it appropriate to attempt a statutory statement of the *Fernando* principles or to include a reference to the circumstances of Aboriginal people and Torres Strait Islanders in the purposes of sentencing.[248]

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[241] Ibid.

[242] Ibid, 41.

[243] Ibid.

[244] NSWLRC, *Sentencing (Report 139)* (2013, NSW Government, Sydney).

[245] Ibid, 1-2.

[246] Ibid, recommendation 4.2(1)(d), 83.

[247] Ibid, 369-370.

[248] Ibid, 372.

This was consistent with its earlier position advanced in its report *Sentencing: Aboriginal Offenders*, discussed below.

174. Acknowledging that 'sentencing law is a blunt instrument of social policy and can never hope to address the social, economic and other disadvantages that have been identified', the NSWLRC instead focussed on framing flexible sentencing options that address the causes of recidivism for all offenders.[249] In that process, it recommended removal of many of the requirements that have excluded ATSI offenders from community-based sentences and supported retaining, and where appropriate extending, diversionary options to make them more available in rural and remote communities.[250]

175. In particular, the NSWLRC recommended reconsideration of the Circle Sentencing program with the objective of reaching a larger proportion of ATSI defendants and simplifying the applicable legislation.[251]

176. The NSWLRC's report was finalised prior to the High Court's consideration of the *Fernando* principles in *Bugmy*. For this reason, the NSWLRC was of the view that it would be premature to propose specific legislative reform but that the *Bugmy* decision may provide the basis for reform.[252] The NSWLRC recommended that after delivery of the *Bugmy* decision, the government should consider, in light of the decision, whether to amend the factors that a court must take into account to include that an offender is an Aboriginal person or Torres Strait Islander where that is relevant to the sentencing exercise.[253] The NSWLRC suggested that a requirement could be added to Recommendation 4.2(1)(d) above, that particular attention be given to the circumstances of ATSI offenders. The NSWLRC was of the view this might help to ensure that courts give attention to any of the factors that are relevant to sentencing that arise because the offender is an Aboriginal person or Torres Strait Islander.[254]

[4.3.2] Sentencing: Aboriginal Offenders (NSWLRC, 2000)

177. The NSWLRC completed a significant report entitled *Sentencing: Aboriginal Offenders* in 2000.[255]

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[249] Ibid, 371.

[250] Ibid.

[251] Ibid, recommendation 16.7, 362.

[252] Ibid, 372.

[253] Ibid, recommendation 17.1, 372.

[254] Ibid, 372.

[255] NSWLRC, *Sentencing: Aboriginal Offenders (Report 96)* (2000, NSW Government, Sydney).

178. The NSWLRC supported the ALRC's analysis and conclusions in *The Recognition of Aboriginal Customary Laws* with respect to the recognition of Aboriginal customary laws by sentencing courts.[256] It recommended that courts shall have regard to any evidence concerning the customary laws of an Aboriginal offender's community, and the customary laws of any other Aboriginal community of which the victim was a member at a relevant time.[257] The NSWLRC was of the view that there should be a general legislative requirement to this effect.[258]

179. The NSWLRC found that although there was ample common law precedent for judicial discretion to recognise Aboriginal customary law, there were powerful arguments supporting legislative recognition.[259] These arguments included:

- failing to recognise the role played by Aboriginal customary law in a particular case could lead to injustice;[260]
- a legislative requirement of recognition, where relevant, would ensure that, where appropriate, Aboriginal customary law is always considered and would therefore promote consistency and clarity in the law and its application to Aboriginal people;[261]
- the potential symbolic significance of recognition for New South Wales credibility in the reconciliation process, for redress of the woeful consequences of Aboriginal contact with the criminal justice system, the incidence of incarceration and deaths in custody, and for according respect to Aboriginal people and real value to Aboriginal culture;[262] and
- legislative recognition would be in line with the emerging international trend towards providing Indigenous peoples with the right to self-determination or self-management.[263]

180. The NSWLRC also expressed the view that any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to

[256] Ibid, 72, 81.

[257] Ibid, recommendation 1, 96.

[258] Ibid. 96.

[259] Ibid, 93.

[260] Ibid.

[261] Ibid.

[262] Ibid, 95.

[263] Ibid.

distinguish legitimate and authentic customary law from false assumptions and misconceptions.[264] The myth that sexual and domestic violence against women is sanctioned, or not regarded as seriously, by Aboriginal culture must be 'categorically repudiated'.[265]

181. The NSWLRC also considered the question of whether common law sentencing discretion to consider Aboriginality requires legislative statement. It adhered to the position set out in an earlier *Sentencing* report,[266] that sentencing principles should not be reduced to statutory form, and reached the following view.[267]

> …legislative prescription of sentencing principles would add nothing to the existing common law and is consequently unnecessary. At present, the general sentencing principles may flexibly be applied to the individual circumstances of each case. As this chapter has shown, there are numerous precedents for regarding consideration of Aboriginality where it is a relevant factor in sentencing [e.g. *Fernando,* cases applying the *Fernando* principles and other cases]. This should ensure that all material factors which exist by virtue of an offender's Aboriginality can be considered by the sentencing court. The ALRC acknowledges that the potential for discrimination against Aboriginal offenders still exists, but rejects the notion that this would be overcome by a legislative statement of sentencing principles. Rather, in serving justice to the maximum extent, the challenge is to ensure that all factors relevant to each case and each offender are presented to the court. The recommendations in the remainder of this Report are designed to facilitate this in relation to Aboriginal offenders.

182. In the report, the NSWLRC also examined the role of the Aboriginal community in sentencing. It recommended that pilot schemes for Circle Sentencing and adult conferencing be instituted in consultation and collaboration with Aboriginal communities.[268] The NSWLRC also examined and reported on culturally appropriate sentencing options for Aboriginal people,[269] the sentencing of Aboriginal female offenders,[270] and matters relating to the need for cross-cultural understanding.[271]

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[264] Ibid, 104-105.

[265] Ibid, 105.

[266] NSWLRC, *Sentencing (Report 79)*, (1996, NSW Government, Sydney).

[267] Ibid, 54.

[268] Ibid, recommendation 2, 131.

[269] Ibid, chapter 5.

[270] Ibid, chapter 6.

[271] Ibid, chapter 7.

[4.4] Australian Capital Territory

[4.4.1] Inquiry into Sentencing (SCJCS, 2015)

183. In 2015, the Standing Committee on Justice and Community Safety (SCJCS) completed its report in a broad inquiry into sentencing in the Australian Capital Territory (ACT).[272] As part of the inquiry, SCJCS examined the ways in which contemporary sentencing practice in the ACT affects Indigenous offenders and made five key recommendations for reform based on the submissions it received.

184. The SCJCS noted that the *Crimes (Sentencing) Act 2005* (ACT) already required courts to consider an offender's cultural background[273] and made provision for pre-sentence reports, which are required to address an offender's social history background (including cultural background).[274] However, submissions to the inquiry noted that in practice, pre-sentence reports did not provide adequate evidence establishing relevant matters relating to an offender's cultural background.

185. Relevantly, the SCJCS recommended that the ACT Government introduce an explicit legislative requirement for courts to consider the Indigenous status of offenders at sentencing.[275] A submission was made to the Inquiry, noting that the *Fernando* principles had been interpreted narrowly to apply only to offences committed 'within Aboriginal Communities', and expressing a concern that 'without legislative guidance the tendency to consider some experiences of Aboriginality as relevant and not others fails to appreciate the complexity of Indigenous post-colonial experience and disadvantage'.[276]

186. The SCJCS further recommended that the ACT Government create a specific mechanism for the creation of reports similar to *Gladue*[277] reports in Canada, informing courts of any relationship between an accused's offending and his or her Indigenous status[278] and that the Government ensure that Indigenous case workers make a significant contribution to the creation of these reports.[279]

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[272] SCJCS, *Inquiry into Sentencing*, Report 4, March 2015.

[273] *Crimes (Sentencing) Act 2005* (ACT), s. 33(1)(m).

[274] Ibid, ss. 42 and 40A.

[275] Supra, n. 272, recommendation 18, 223.

[276] Ibid, 209, quoting submission from Mr Anthony Hopkins.

[277] *R v Gladue* [1999] 1 SCR 688.

[278] Supra, n. 272, recommendation 20, 223.

[279] Ibid, recommendation 21, 223.

187. The SCJCS also recommended that the ACT Government formally recognise the Galambany Circle Sentencing Court under statute, rather than through a practice direction of the Magistrates Court.[280] A relevant submission to this effect was made by the Aboriginal Legal Service, which noted that with legislative recognition the Court could play an increased role in addressing overrepresentation of Indigenous offenders before the courts. In particular, restorative justice principles should be enshrined in legislation, allowing the Court to continue in the work it is doing develop its own unique jurisprudence.

188. More generally, the SCJCS recommended that the ACT Government ensure it engages the Indigenous community, and provides a diversity of sentencing options, so as to foster appropriate pathways for the punishment and rehabilitation of Indigenous offenders and reduce rates of Indigenous imprisonment in the ACT.[281]

[4.5] Western Australia

[4.5.1] Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture (LRCWA, 2006)

189. In September 2006, the Law Reform Commission of Western Australia (LRCWA) completed a report entitled *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*.[282] As a small part of this wide-ranging review, the LRCWA examined the role of Aboriginal customary laws within the criminal justice system, including in relation to bail and sentencing. A general recommendation was made that the WA government should establish as a matter of priority Aboriginal courts for both adults and children in regional and metropolitan areas.[283] A series of recommendations were made with respect to the establishment of community justice groups.[284]

<u>Sentencing</u>

190. The LRCWA recommended that the *Sentencing Act 1995* (WA) explicitly include the cultural background of the offender as a relevant sentencing

[280] Ibid, recommendation 19, 223.

[281] Ibid, recommendation 22, 223.

[282] LRCWA, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture (Report 94)*, 2006 (WA Government, Perth).

[283] Ibid, recommendation 24, 136.

[284] Ibid, recommendation 17, 112-3.

factor.[285] In an earlier discussion paper, the LRCWA examined the manner in which WA courts had considered relevant facts associated with an offender's Aboriginal background.[286] It concluded that, although there was 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 approach.[287] The LRCWA 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.[288]

191. The LRCWA also recommended that the *Sentencing Act 1995* (WA) and *Youth Offenders Act 1994* (WA) be amended to include a provision that when considering whether a term of imprisonment (or detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people.[289] This recommendation stemmed from the LRCWA's consideration of a similar legislative provision in Canada[290] in an earlier discussion paper and was supported by several stakeholders within WA. The LRCWA expressed the view that such a provision would encourage courts to consider more effective and appropriate options for Aboriginal offenders, such as those developed by an Aboriginal community or a community justice group.[291] Courts would need to be satisfied that the particular offender has experienced in some way the negative effects of systemic discrimination and disadvantage within the criminal justice system and the community.[292]

192. Further, the LRCWA recommended that the *Sentencing Act 1995* (WA) and *Youth Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender a sentencing court must consider:[293]

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[285] Ibid, recommendation 36, 173.

[286] Ibid, 171.

[287] Ibid, 172.

[288] Ibid, 14-15, 173.

[289] Ibid, recommendation 37, 177.

[290] Section 718.2(e) of the *Criminal Code 1985* (Canada) provides: 'All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders'. The Supreme Court of Canada considered this section in *R v Gladue* [1999] 1 SCR 688.

[291] Ibid, 177.

[292] Ibid, 177.

[293] Ibid, recommendation 38, 183.

a. any known aspect of Aboriginal customary law that is relevant to the offence;

b. whether the offender has been or will be dealt with under Aboriginal customary law; and

c. the views of the Aboriginal community of the offender and/or the victim in relation to the offence or the appropriate sentence.

193. In an earlier discussion paper, the LRCWA concluded that although there is judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, there was no consistent approach in WA.[294] Further, reform was considered necessary to ensure that customary law considerations are viewed more broadly, rather than being limited to consideration of physical punishments inflicted under customary law.[295]

194. The LRCWA noted that some offenders might try to argue that family violence or sexual abuse is acceptable under customary law, but this does not mean that that behaviour is acceptable or that courts would accept those arguments. The LRCWA was of the view that the possibility of these arguments being made does not justify a ban on courts considering Aboriginal customary law issues,[296] a measure the LRCWA described as unnecessary and inappropriate in reference to the 2006 COAG decision.[297] Due to the discretionary nature of sentencing, courts would be able to balance Aboriginal customary law and international human rights that require the protection of women and children. The LRCWA stated that the recognition of Aboriginal customary law and practices in WA must be consistent with international human rights standards and should be determined on a case-by-case basis, with particular attention paid to the rights of women and children and the right not to be subject to unhuman, cruel or unusual treatment.[298]

195. Finally, the LRCWA recommended that the *Sentencing Act 1995* (WA) and the *Young* Offenders *Act 1994* (WA) be amended to provide a framework for the

[294] Ibid, 182.

[295] Ibid, 28-29, 181.

[296] Ibid, 180.

[297] Ibid, 28-29 and 181. On 14 July 2006, all state and territory governments agreed to ensure, if necessary by legislative amendment 'that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse'.

[298] Ibid, recommendation 5, 69.

receipt of evidence relating to Aboriginal customary law during sentencing proceedings, as follows:[299]

a. that when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group, an Elder and/or respected member of any Aboriginal community to which the offender and/or the victim belong;

b. submissions 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

c. 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 of any relationship to the offender and/or the victim.

196. The LRCWA was of the view that there is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.[300]

Bail

197. The LRCWA also made a number of recommendations with respect to bail. Among these was a recommendation that the *Bail Act 1982* (WA) be amended to provide that a judicial officer or authorised officer shall have regard to an accused's family, social and cultural background, among existing matters such as the accused's character, previous convictions, antecedents, home environment, place of residence and financial position.[301] The LRCWA noted that the existing criteria in the *Bail Act 1982* (WA) focus on Western concepts and therefore have the potential to disadvantage Aboriginal people applying for bail. For Aboriginal people, assessment of their family, kin and community ties would be more appropriate.[302]

198. The LRCWA also recommended amendments to require a judicial or authorised officer to consider any known Aboriginal customary law or other cultural issues relevant to bail. Further, that the judicial or authorised officer should take into account any submissions received from a representative of a community justice group in the victim's community and/or the accused's person's community to

[299] Ibid, recommendation 39, 184.

[300] Ibid, 183.

[301] Ibid, recommendation 33, 167.

[302] Ibid, 165.

ensure they are reliably informed about customary law and cultural issues.[303] The LRCWA noted that customary law or cultural factors may explain more fully an Aboriginal person's ties to the community, provide a reason why an accused previously failed to attend court, or impact upon the choice of appropriate bail conditions.[304] The LRCWA was of the view that, although judicial officers and authorised officers were already permitted to take into account any matter considered relevant in determining bail, practices would likely remain varied, with the potential to disadvantage many Aboriginal people, in the absence of a positive obligation to consider customary law and other cultural issues.[305]

[303] Ibid, recommendation 34, 168.

[304] Ibid, 166.

[305] Ibid, 165-166.

CHAPTER 5 – CONSULTATIONS

199. The Committee, a voluntary body, undertook consultation with NT community and organisations, conducting numerous consultations with individuals, Aboriginal Elders, Aboriginal and non-Aboriginal organisations across the breadth of the NT. The Committee received oral and written submissions concerning the terms of the Review.

200. The quality of all submissions was highly informative, profound and of deep significance in the sharing of cultural information and understanding of Aboriginal law to the Committee. A summary of the discussions, viewpoints and positions are contained in this chapter of the Committee's Inquiry.

[5.1] Need for an agreement for the recognition of Aboriginal law

201. People with whom the Committee consulted emphasised the need for an agreement to recognise Aboriginal law:

> *Customary law is important, but we need to have some kind of agreement to fit our law. You break your promises and change your law. We don't. Our law carries on, from our old people.*
>
> Central Land Council Executive Council
>
> *Will Parliament listen to what we say?*
>
> Central Land Council Executive member
>
> *Any recognition of customary law within the criminal justice system should occur through consultation with Aboriginal and Torres Strait Islander controlled organisations and communities.*
>
> LCA and LSNT submission

[5.2] A better description of Aboriginal law

202. Stakeholders generally agreed that the phrase 'customary law' was problematic, and that an alternative term should be used:

> *We need to have a look at and put a healing into this, the system, like the whole customary law needs to be worded around so it doesn't cause harm as it has been there before, so that Balanda and Yolngu can work through Balanda law and order and Yolngu law and order through customary law. It even means we can change the word 'customary law' into something.*
>
> Mark Yingiya Guyula MLA
>
> *There should be another word used for that in English...because it is the law, it's not 'customary law'*.

Rachel Dikul Baker

By changing the term, it would be more easier for non-Aboriginal citizens, lawyers and others, by saying Australian Aboriginal law or First People Australian law… The reason why I'm trying to put that particular term… 'custom' is to do with something else, it's not to do with the law.

Rev Dr Djiniyini Gondarra OAM

You use the word 'culture': that can be very broad and confusing. I would be inclined to use 'local Aboriginal law', because it has to be localised, it has to be our law from the soil we are sitting on, where we come from.

May Rosas

[5.3] Strength of Aboriginal law and culture

203. Stakeholders with whom the Committee consulted spoke to the strengths of Aboriginal law and culture. It is clear that local Aboriginal law plays a significant and positive role in building community strength and harmony. It plays a role in protecting and nurturing children, developing people into becoming productive and respectful members of society, restoring people who have committed wrongs, protecting and healing victims, and resolving conflict.

It's everything that's us, as Aboriginal people, it's our law, it's our religion, it's what we do.

Tangentyere Men's Family Safety Group member

Traditionally, women were meant to take care of each other, the fact that there are no illegitimate children, everyone takes care of children.

Jacinta Price

Aboriginal customary law continues to have authority and legitimacy in Aboriginal communities, and continues to guide communities in the conduct of their day-to-day lives.

LCA and LSNT submission

[5.4] The role of respect and cultural authority in Aboriginal law

204. A common view expressed was the view that Aboriginal law is about respect.

Customary law is more than just punishment. It's about the behavior of people on country, it's about showing good manners, how to behave.

Central Land Council Executive member

There has to be some process where customary law has to come in so the perpetrator get the opportunity to come and apologise in a respectful environment, in a cultural environment, because he also has cultural responsibilities to carry on with that. As it is now, people aren't

encouraged to do that. People are not encouraged to take on and respect customary law, so there is no closure.

May Rosas

You can't have cultural law unless you have certain values embedded into that cultural law, and they extend around honesty, respect for Elders, accountability for actions, whether they be around the family unit rather than the individual, being held accountable for behaviors and more. And because community values have been eroded away so quickly with policies that have been put in by government and the removal of leadership platforms that were once there. So in the 259 consultations [conducted by the Aboriginal Justice Unit for the purpose of developing the Northern Territory Aboriginal Justice Agreement] what they have told us 'you can't get to cultural law and you can't enforce cultural law unless these values are embedded in the system'.

Leanne Liddle, Aboriginal Justice Unit, Department of Justice

[5.6] Support for the recognition of Aboriginal law

Aboriginal law needs to be recognised

We need to ensure that our local Aboriginal law is being recognised and being incorporated and being supported to ensure that we can bring about our law and order and justice for Aboriginal people in our way, because our way is meaningful and it does help. The process that we incorporate in there will allow for good outcomes to come about for everybody, for the perpetrator's family and the victim's family, they are the ones that suffer their most, and their children…Aboriginal law is strong, it's meaningful, and we need to start pushing to recognise Aboriginal law to be part of this Westminster law.

May Rosas

205. The LCA and LSNT indicated general support for the recognition of customary law in sentencing. They noted that significant time has passed since the LCA or LSNT last advocated on the interaction between customary law and sentencing law and that in the intervening period, the landscape of Aboriginal and Torres Strait Islander legal perspectives and advocacy has continued to evolve. The position on the detail of how customary law might be recognised will require substantial consultation with its constituent bodies and committees.

Aboriginal law is law

206. The Yolngu Madayin legal system states:

Aboriginal law does not artificially separate domains. Law, spirituality, morality, respect, discipline and education are essentially different aspects of the same thing; all designed to bring about peace, prosperity and social harmony.

Judicial College of Australia Colloquium 2019, NT Supreme Court

We Yolngu people use rom, Madayin rom, we don't use 'custom'. It's Madadyin.

Rev Dr Djiniyini Gondarra OAM

Madayin is a complete system of law. Complete system of law.

Dianne Britjalawuy Gondarra

Aboriginal customary law is unchangeable

Aboriginal law does not change. Your law changes tonight: tomorrow, you'll have a different law! That is your whitefella way…Customary law does not change.

Central Land Council Executive Council

The application of Aboriginal customary law is changeable

There is a diminishing of customary law…There was a strong law around wrong way marriages. People were punished for it. That doesn't exist anymore*. People can marry who they want.*

NPY Women's Council

Aboriginal law is universal and managed by skins and strategically structured. It never changes, but what is changing is our ability to apply and understand it.

Michael Liddle, an Executive Member of the Central Land Council

Recognising Aboriginal law can reduce incarceration

Customary law is one example of community justice mechanisms, which are recognised as having the potential to reduce rates of Indigenous incarceration and recidivism by returning control to communities.

LCA and LSNT submission

Cultural mediation

Our law is able to take place because we have cultural mediators, we have cultural law men and women, who have cultural authority to do that. But we have been pushed further back and not heard, so to speak and not been included in the Westminster system.

May Rosas

Gender discrimination

Worried about women not being able to apply customary law to their offences, but men being able to.

NPY Women's Council

[5.8] Violence or so-called 'payback'

207. There is widespread acceptance that substantial corporal punishment is no longer effective or appropriate, but a significant number of people, particularly amongst Aboriginal men in Central Australia, continue to express support for the use of substantial corporal punishment as a component of the exercise of local Aboriginal law.

208. The same conclusion was expressed by Leanne Liddle from the Aboriginal Justice Unit. In her consultations with Aboriginal communities during the development of the draft Aboriginal Justice Agreement, she encountered differences in attitudes concerning punishment or corporeal punishment.

> *In the Elliott north… there was distinct difference in people's relationship with authority, histories, connections to culture, land resources, language, the impact of missionaries, relationships with police and laws. From Elliott north, including the Top End, most people agree* [that substantial corporeal punishment is no longer acceptable].
>
> Leanne Liddle Aboriginal Justice Unit, Department of Justice

209. The dominant view was that local Aboriginal law no longer condones the use of substantial corporal punishment:

> *A law is a law. You cannot say that the law is being a violent law, it does not say that. The law cannot practise anarchy or violence. That has been a fault that has been a theory that someone else created. Not the dalkarra or the djirrikay. Not the senior elders of the law.*
>
> Rev Dr Djiniyini Gondarra OAM
>
> *And when I spoke to people out there in Arnhem Land, they said no, that's not what customary law means. There's a healing, makarrata, about discipline camps, about punishment that is not spearing someone. The punishment of giving people a term, about paying back like stone spears which are very, very rare, or really precious pearls, that's how they pay back, to get their payments cleared, of what they owe to people. Instead of being speared all the time, instead of being killed all the time through customary law.*
>
> Mark Yingiya Guylua MLA

[5.7] In favour of repeal of section 16AA of the *Crimes Act*

210. Most stakeholders expressed support for the repeal of section 16AA of the *Crimes Act.*

> *They should throw it away because it doesn't benefit Yolngu people. We want to see our people as law-abiding citizens, abiding both Balanda and Yolngu law. Yolngu law is a rule of law, Balanda law is a rule of law.*

Yolngu law existed since time immemorial and is still today practised as law.

Yolngu Elders

The federal government should repeal section 16AA of the Crimes Act 1914 (Cth).

LCA and LSNT submission

211. The LCA and LSNT submission raised the following concerns regarding section 16AA:

a. it impedes judicial discretion

b. it is an inappropriate legacy from the NT Intervention and no other state or territory has brought about similar laws; the section 91, the precursor to section 16AA, was supposed to be a temporary measure;

c. it ignores the principles of substantive equality that is 'premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality'.

[The] effect [of section 16AA] is discriminatory even though it doesn't refer to a specific group. Where a particular group of people have different practices and customs and that has direct impact on how they deal with others in society, if you fail to take that into account you are effectively discriminating because their behaviours and customs are different to the majority.

Pauline Wright, President of the LCA

[5.10] Limitations to the recognition of Aboriginal law

212. There is strong consensus amongst all of the Aboriginal people with whom the Committee consulted that it would be improper to use local Aboriginal law to justify or excuse domestic violence. Other stakeholders agree with this view:

Customary law has never been accepted by the Law Council or LSNT …. as a justification for violent or abusive behaviour.

LCA and LSNT submission

The exception to any support we may offer for customary considerations in sentencing would be where there is any form of domestic, physical or sexual violence. A stronger message is necessary to ensure that there is zero tolerance for these offences. Demonstrating a strong and consistent position in regards to zero tolerance validates the seriousness of any form of physical violence for victims. It also sends a clear message to offenders that physical violence is simply unacceptable.

Victims of Crime NT

213. Victims of Crime NT emphasised that 'the rights and experiences of victims need to be of equal consideration to other factors in the process of determining a sentence' regardless of customary law considerations and noted risks of leniency:

> *Whilst VoCNT acknowledges the individual circumstances, living arrangements, customs and past experiences of Aboriginal people and would give some support for consideration of customary law for sentencing at the discretion of the judiciary, a cautionary approach is necessary to protect the rights, needs and best interests of those impacted most by crime – the victims… We see a risk of greater leniency that may occur with customary law considerations in sentencing and if this happens, it will occur at the expense of victims, particularly where the victim has little or no understanding of the customary law being considered in the matter.*

214. The LCA and LSNT did not think that concerns around substantial corporal punishment justified the continued existence of section 16AA of the *Crimes Act*:

> *Legislators should be careful not to use reservations around traditional punishment to dismiss customary law outright. The Law Council has received advice from its expert committees that the concept of traditional punishment (eg 'payback') is a very small part of customary law and popular concerns around this concept are overplayed.*
>
> *However, the concept of traditional punishment (eg 'payback') does engage an ongoing tension in human rights literature between universalism and cultural relativism. Numerous commentators suggest that universal human rights can exist within a culturally sensitive universal framework, but concerns would remain if traditional punishment was sanctioned without safeguards. The Law Council and LSNT suggest that Indigenous peoples and communities should be consulted on any issue of recognising traditional punishment in the Northern Territory's sentencing legislation, including on any question of safeguards around traditional punishment.*

[5.9] Not in favour of repeal of section 16AA of the *Crimes Act*

215. Some stakeholders did not support the repeal of section 16AA of the *Crimes Act.* The NPY Women's Council advised the Committee that 'it does not accept the use of Customary Law in courts of law in sentencing'.[306]

Human rights and concerns regarding physical and sexual violence

216. Human rights considerations were cited as a reason for opposing the repeal of section 16AA.

> *It's about fundamental human rights and we should all be treated equally regardless of our culture when it comes to our rights as men, women and children.*
>
> Jacinta Price
>
> *No law – customary or otherwise – that could be used to justify domestic violence or sexual abuse.*
>
> NPY Women's Council member
>
> *Payback in many circumstances is violence. That violence is then a denial of human rights, but also against Australian law.*
>
> Jacinta Price

Leniency for offenders

> *We see a risk of greater leniency that may occur with customary law considerations in sentencing and if this happens, it will occur at the expense of victims, particularly where the victim has little or no understanding of the customary law being considered in the matter. Where a victim is unrelated or from a different cultural background emphasis on the offender's cultural background in sentencing may be quite distressing. A greater emphasis on victims needs would be required to avoid detrimental outcomes.*
>
> Victims of Crime NT

One system of law

> *I'm against the idea of two different laws for Australian citizens.*
>
> Jacinta Price

217. The Victims of Crime NT submission asks the question on whether it is fair to apply customary law considerations where the victim is not from that community or comes from a different cultural background. A lesser sentence for the offender would not bring the victim comfort.

[306] Resolution passed at 2020 Annual General Meeting.

Whether Aboriginal culture can be a form of restorative justice?

> *It's correct for an offender to have to face the courts and receive whatever punishment they're supposed to receive under Australian law. I don't think restorative justice should automatically replace any sort of process that should be taken under Australian law.., I don't think it should be used as a replacement – accompanying it perhaps but not replace it.*
>
> Jacinta Price

Aboriginal customary law is not a defence

> *Customary law has never been accepted by the Law Council or LSNT as a defence to any criminal offence except trespass.*
>
> LCA and LSNT

Laws are necessary to protect Aboriginal culture

> *Same as me going to a Catholic church and destroying the Catholic church and I go to Court. That's the same as a white man coming to my ceremonial grounds and doing the same thing. But yet I can't talk about my ceremonial things but the white man can talk about the Catholic church.*
>
> Tangentyere Men's Family Safety Group member

[5.10] Section 104A of the *Sentencing Act*

The effect of section 16AA of the *Crimes Act* on section 104A of the *Sentencing Act*

218. The LCA and LSNT submission noted that the effect of section 16AA of the *Crimes Act* on section 104A of the *Sentencing Act* is unclear:

> *Section 109 of the Constitution provides that in the event of an inconsistency between a federal statute and a state or territory statute, the federal statute prevails and the other statute is invalid to the extent of the inconsistency…*
>
> *The likely effect is therefore that section 16AA curtails the purposes for which a court can use the cultural information it might receive under section 104A: while it can receive it as part of the sentencing process as per section 104A, it cannot use it for the purpose of aggravating or mitigating the seriousness of the offence as per section 16AA. Those aspects of sentencing that are distinct from seriousness (and which therefore could be influenced by cultural information) include the offender's character, the prevalence of the offence, and the rehabilitation of the offender*.

Working together with Aboriginal law

> *Balanda justice and Yolngu justice is coming together, needs to come and work together. The raypirri camp we send them to… that Balanda and Yolngu law agrees with one another, instead of taking this offender to send him to court or into prison, let's work out a way how we can Balanda law and Yolngu law work together and create… if we take him through that, he's going to do his term of this as long as he goes through this cultural practices. They are just as penalty as law. So through that, we can even start to work towards putting it into paper. So, he's done this, he's done the other, and senior elders are there and under the watchful eyes of the elders he can come and perform and say 'I hold authority now'.*
>
> Mark Yingiya Guyula MLA

Receipt of evidence

> *With accessibility to an interpreter, if it's written in Pitjantjatjara and translated into English is another style of empowerment that says 'we value your culture'. You don't have to speak in English in a white court, we're allowing you to speak your native tongue. We value your history and your capacity and currency to speak a language… Aboriginal people like paper…that's how they get all these methods put on the table. Aboriginal people would not have any difficulty in understanding this is a marriage of two systems together that meets your needs and my needs, it's just the method that you go about it on how that evidence is presented to the court.*
>
> Leanne Liddle, Aboriginal Justice Unit, Department of Justice

219. The LCA and LSNT noted that there should be some structure around the identification and use of customary law:

> *There is a risk of legal practitioners attempting to apply what they hear is customary law from the loudest, though not necessarily most authoritative, voice. To this end, adequate resources and expertise must be provided to assist in identifying contemporary customary law.*

Changes can empower victims

> *[In reforming section 104A] With the right protocol and the right experts, it could provide victims even greater opportunity'.*
>
> NPY Women's Council

[5.11] Judicial learning of Aboriginal local law

> *Judges need to understand how we work, in our culture and implementing white system and our system together. Having our cultural leaders representing both parties, the victim and perpetrators, then you have to work with them to talk about how to keep them culturally competent.*
>
> Tangentyere Women's Family Safety Group

Dual Education on Aboriginal Law and Australian Law

We need to, like I said, bring it together … this is how we do it, and you show me practically how you do it, and I'll show you practically how we do it here. And then OK then, we'll come to an agreement. Maybe I don't agree with that or you mightn't agree with what I do but you say you don't agree with our law, you just want to accept our law. And vice versa, you mightn't accept my law, but you disagree, but that's how it works in our system. … Yolngu might do it differently to Balanda law. But on the other hand, we need to come together where we can make it so that I am not doing a lot of damage to who you are, and you're not doing a lot of damage to what I am.

Mark Yingiya Guyula MLA

CHAPTER 6 – KEY ISSUES

220. The research, consultations and analysis of legislation and materials dealing with local Aboriginal law gave rise to a number of key issues that warrant careful consideration. These issues include:

a. the rationale for section 104A of the *Sentencing Act*;

b. the impact of current legislation on public and legal discourse about customary law;

c. problems with the use of the term 'cultural practice' in section 104A of the *Sentencing Act* and section 16AA of the *Crimes Act*;

d. issues with the term 'customary law' when used to describe various forms of Aboriginal law practised in the NT;

e. conflict between current legislation and key recommendations of the Draft Aboriginal Justice Agreement and the NT Treaty process; and

f. the extent to which local Aboriginal law is able to adapt, the extent to which it is secret, and the implications of these questions for its interaction with the criminal justice system.

[6.1] The rationale for section 104A of the *Sentencing Act*

221. The primary purpose of section 104A is to ensure that in sentencing, information presented to the court about issues of customary law or cultural practice is of sufficient quality or accuracy. The underlying concern reflected in the provision is that sentencing judges may not have sufficient direct knowledge of the matters raised, and therefore may not be able to distinguish between accurate and inaccurate representations about these issues. The provision functions by establishing a procedure by which notice is given to the opposing side when information about Aboriginal customary law or cultural practice is sought to be presented, and for that information to be presented by way of affidavit, statutory declaration or oral evidence.

222. In the course of consultations, there was general agreement that the courts need to ensure that information about local Aboriginal law was of sufficient quality and accuracy. Inaccurate or misconstrued submissions about local Aboriginal law were generally viewed as contributing to negative stereotypes about Aboriginal culture and law. A number of senior Aboriginal people consulted made statements to the effect that 'not all Aboriginal people understand their own law' and as a result they were concerned about the possibility of inaccurate statements about Aboriginal law being presented to courts.

223. Thus, there was general support for the underlying purpose of section 104A, to the extent that the provision is designed to increase the quality and accuracy of information about complex or sensitive issues of customary law. The next question, however, is whether the current provision is fit for purpose.

224. The primary discussion of whether the provision is fit for purpose involves consideration of whether the current formulation of the provision is discretionary or mandatory. If the provision is mandatory, in that it applies to every reference to customary law or cultural practice, that would give rise to a number of legal and practical concerns. If, on the other hand, the provision is discretionary, in that it gives the judicial officer the discretion to consider and apply the provision in cases involving sensitive, complex or controversial aspects of customary law, then most of the concerns about section 104A are alleviated. The Committee was overwhelmingly of the view that section 104A is a discretionary provision, based both on the plain construction of the provision, and the current practice of the courts.

225. A few points were noted about the current formulation of the provision;

a. The provision is not expressly limited to sensitive, complex or controversial aspects of customary law or cultural practice. In its current form, the provision is extremely broad in nature (see discussion at Issue 3 below) and potentially captures many submissions that are ordinarily non-controversial, such as family relationships, ties to the community and country (land) and community standing. There does not appear to be a strong rationale for placing additional procedural requirements on non-controversial or non-sensitive submissions touching on cultural practice. This is particularly the case in the context of submissions which are comparable to sentencing submissions made for non-Aboriginal people, which do not require additional procedural hurdles. There may be benefit in amending the provision to indicate that it is only intended to operate for contentious submissions about local Aboriginal law.

b. The forms of evidence listed in section 104A(2)[307] are potentially too restrictive and not appropriate in all cases for discussions about local Aboriginal law. For example, a sentencing judge may wish to engage in dialogue with family or community members who are present in court, without requiring those people to give sworn evidence from the witness box. Similarly, a judge may wish to receive other forms of evidence, such as copies of paintings or music recordings, or video or photos of a defendant engaging in activities such as fishing, sports or caring for family. In sentencing, these types of evidence would not ordinarily be required to

[307] 'whether the party intends to present the information in the form of evidence on oath, an affidavit or a statutory declaration'.

be presented on oath or affidavit, and there is no particular rationale as to why evidence about local Aboriginal law must be limited to the forms listed in the provision. Given the discretionary nature of the provision, these concerns can be alleviated by the exercise of judicial discretion, however there may be benefit in expressly broadening the forms in which evidence can be received.

c. The procedural requirements can potentially create an additional burden in the context of 'Bush Courts'.[308] Bush Courts tend to have a high number of matters listed each day, and both defence and prosecution appear on a fly-in-fly-out basis. This means that there is limited capacity to comply with the procedural aspects of section 104A, such as providing notice or creating affidavits. In many cases a lawyer will not have obtained their client's instructions (or victim impact statement) until the day of the first mention. If section 104A were strictly applied, a lawyer may be required to adjourn a matter that could have otherwise be finalised purely for the purpose of complying with section 104A. Adjournments in Bush Court locations are generally in the order of one to three months, and thus section 104A potentially creates significant inefficiency. Alternatively, a lawyer may be deterred from presenting matters of local Aboriginal law to the courts in order to avoid the inconvenience or impracticability of complying with section 104A, which means that key aspects of a person's identity and life are not presented to the court. Provided, however, that the section continues to be discretionary in nature, these issues can largely be alleviated by the exercise of judicial discretion. The presiding judge is best placed to determine whether the need for higher quality evidence in a particular case outweighs the need for procedural efficiency.

[6.2] The impact of current legislation on public and legal discourse about Aboriginal law and culture

226. As has been discussed in Chapter 3, the direct legal impact of section 104A and section 16AA on specific cases involving Aboriginal people is often relatively minimal.[309] This does not mean, however, that these sections do not have a broader impact in shaping public and legal discourse about issues of Aboriginal law and culture. The current provisions implicitly cast Aboriginal law and culture in a negative light. None of the legislation in question makes mention of the positive role and benefits of Aboriginal law, culture or traditional authority in building confidence, identity, reconciliation or rehabilitation. Rather, Aboriginal law and cultural practice are viewed as something which causes

[308] For a list and calendar of Bush Court locations see NT Local Court, *List of Circuit Courts* (Web Page, undated) <https://localcourt.nt.gov.au/about-us/list-circuit-courts#NorthernCircuitCourts>.

[309] Leaving aside the potential impact upon future iterations of Community Courts, and the impact on Bush Courts.

problems for the ordinary functioning of the justice system, and something which the courts are incapable of accounting for through ordinary practices. Aboriginal law and cultural practice have been singled out in the legislation as a source of problems rather than strength.

227. As a nation governed by the rule of law, the law is the highest authority in the land. As such, the power of the law to influence and create standards and public attitudes should not be underestimated. If Aboriginal law and cultural practice were not viewed negatively as problems, there would be no need to prohibit the courts from considering these matters. Thus, legislation which problematises Aboriginal culture and law provides justification for broader public discourse to also view Aboriginal culture and law in a negative light and as a source of problems.

228. Professor Mick Dodson AM, the current NT Treaty Commissioner, has previously articulated the link between the relevant Commonwealth legislation and public attitudes towards Aboriginal people and culture. Professor Dodson states: [310]

> the Federal Attorney-General's *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) is a flawed public relations exercise that potentially exacerbates dysfunction and despair which fuels antisocial behaviour.
>
> For a start the legislation is based on a false premise that customary law permits child sex abuse — a lie that would have Australians believe that Aboriginal culture is anathema to any civilised society.

229. And further: [311]

> Confidence grows when people and their cultures are treated with respect. We cannot do that while we continue to be represented as a people, as a culture, on the basis of the worst, most heinous behaviour perpetrated by some of our most damaged citizens.
>
> National discussion about the ugliest parts of the saddest Indigenous communities is played out by powerful people on both sides as some kind of culture war.

230. Thus, the impact of the Commonwealth legislation (and to a lesser extent section 104A of the *Sentencing Act*) must be viewed not only in light of its direct legal impact upon individual cases, but also in light of the negative impact upon broader discourse about Aboriginal law and culture.

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[310] Mick Dodson, 'A Reply to Populist Politics on Culture' (2007) 31 *Alternative Law Journal,* 3.

[311] Ibid.

[6.3] Problems with the use of the term 'cultural practice' in the *Sentencing Act* and the *Crimes Act*

231. 'Cultural practice' is a term that is broad and ambiguous and is not capable of precise definition or application.

232. There is no definition of 'culture' or 'cultural practice' in the *Sentencing Act* or the Criminal Code (NT). Equally, there is no definition of 'culture' or 'cultural practice' in the *Crimes Act*. The primary definition of 'culture' in the *Macquarie Dictionary* is 'the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another'.[312] The *Cambridge Dictionary* defines culture as 'the way of life, especially the general customs and beliefs, of a particular group of people at a particular time'.[313]

233. In a recent speech about the understandings of 'culture' in the law, Nic Peterson, anthropologist and Director of the ANU Centre for Native Title Anthropology states:[314]

> Raymond William in his famous book, Key Words, comments that 'culture' is one of the two or three most complicated words in the English language, something that is suggested by Kroeber and Kluckholn's 1952 survey of the term in which they list 164 definitions.

234. Culture or cultural practice is a term that is not limited to visible aspects of culture like music, ceremony, art and food. It encompasses attitudes, beliefs, knowledge, relationships and mundane patterns of life. As can be seen from the two dictionary definitions above, the primary focus of culture is on 'ways of living' or 'way of life'. There is very little human activity that cannot potentially be described as a type of cultural activity. In relation to the use of the term 'culture' by the courts and legal profession, Peterson states:[315]

> Two major questions are raised by this invoking of the 'cultural'. The first is what is meant or understood by 'culture/cultural'. Second, and more problematically what is to be made of the legal profession so blithely using core anthropological concepts such as culture, society, laws and customs: in particular at what point does the unreality of their usage become problematic.

235. Peterson's conclusion that the legal profession uses terms such as 'culture' with limited understanding as to what these terms encompass is arguably correct.

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[312] *Macquarie Dictionary*, 1st edition, 488.

[313] *Cambridge Dictionary*, online edition.

[314] Nic Peterson, 'Culture and Native Title' (Speech, Centre for Native Title Anthropology Annual Conference 2020, Melbourne, 6 February 2020). <https://cnta.org.au/wp-content/uploads/Peterson-Culture-And-Native-Title.pdf>.

[315] Ibid.

There is no systematic or precise way to distinguish cultural practice from general human interaction and patterns of life.

236. When properly considered, a prohibition on considering 'any form of cultural practice' is effectively equivalent to a prohibition on considering 'any form of human interaction, thought, practice or pattern of life.' An informed understanding of 'cultural practice' means that section 104A of the *Sentencing Act* and sections 15AB, 16A(2A) and 16AA of the *Crimes Act* would effectively apply to nearly every submission that could potentially be made about a living person in a NT criminal matter.[316] Employment is a form of cultural practice, family and relationships are cultural practice, participation in sporting teams is cultural practice and birthdays are a form of cultural practice. Neither the legislation nor subsequent case law provides guidance on how to distinguish 'cultural practice' from general patterns of human life. This gives rise to significant potential for selective or arbitrary application of the provisions.

The current application of the term 'cultural practice' is arbitrary and inconsistent

237. A necessary correlation of the discussion above is the fact that all humans and all groups have 'culture', including Anglo or 'white' Australians. 'Culture' is not a non-white phenomenon, and yet the *Sentencing Act* and *Crimes Act* provisions are applied as though mainstream Australia does not have culture, and therefore is exempt from the application of these sections. The second reading speech in relation to the most recent amendment of section 104A specifically states that the modification was made to ensure that Aboriginal people were not singled out, and the provision was amended to '(a) broaden the scope of the section so the procedural requirements apply to any form of customary law or cultural practice, rather than solely applying to Aboriginal customary law'. This means that section 104A was intended to apply to all forms of cultural practice irrespective of national, social or racial background.

238. Thus, properly applied, section 104A would govern the receipt of information about Anglo-Australian cultural practices. If applied consistently according to both the plain meaning of the statute, and the clear parliamentary intention, it would apply, for example, to a submission about a child's birthday party, a christening or baptism, attitudes towards employment, standing within the community, and participation in sporting clubs for Anglo-Australians, as well as people from other national backgrounds. Thus, for example, defence could object to a submission from a prosecutor that an offence was particularly serious because it occurred in the context of a child's birthday party.[317] If a priest

[316] See also Jonathon Hunyor, 'Custom and culture in bail and sentencing: part of the problem or part of the solution?' (2007) 6(29) *Indigenous Law Bulletin* 8, 9.

[317] The objection could be made on the grounds that the submission contravened section 16AA of the *Crimes Act* and also on the grounds that the evidence had not been adduced in accordance with the procedural aspects set out under section 104A of the *Sentencing Act*.

was sentenced for assault for a non-consensual baptism, the prosecution could object to the receipt of information about the purpose or function of baptism, or the role of a priest, as all of these are forms of cultural practice. This of course produces a legally absurd result and would significantly curtail the ordinary functioning of the court during sentencing. The only way that the legal system has avoided this implication is through the selective application of these provisions to Aboriginal people. No cases have been identified where section 104A was applied to non-Aboriginal cultural practices, and it is questionable whether the court would allow the section to be applied to Anglo-Australian cultural practices, despite this being the clear implication of both the wording of the section and Parliamentary intention.

239. At a discursive or social level, the references to 'cultural practice' in the *Sentencing Act* and *Crimes Act* reflect an underlying assumption of what is 'normal'; that is white Australian ways of life are normal, and thus are not a type of cultural practice, whereas other ways of life are different, and thus can be classified as a type of 'cultural practice'. This has been described as the 'majoritarian privilege of never noticing [oneself]'.[318] The ability to label one way of life as normal and other ways of life as divergent is part of ongoing debates around unconscious bias and privilege. Minority groups do not have the option of construing their way of life as 'normal', and this section of legislation appears to be based on, and reinforces, problematic underlying assumptions about normality and culture.

[6.4] Issues with the term 'customary law' when used to describe various forms of Aboriginal law practised in the NT

240. In the course of consultations, there was consistent opposition from many Aboriginal people to the use of the term 'customary law' to describe Aboriginal legal systems and laws. There were two primary reasons for opposition to this term. First, the term was seen as devaluing Aboriginal law as a lesser form of law. The term customary law was viewed as being lesser because it implies the law is based on 'custom', habit or social practice. This type of law is then viewed as lesser in contrast to Federal or Territory laws, which are held up as 'real' law because they are written and can be enforced by courts and the police.

241. A second reason for opposition to the term 'customary law' is that it is an imposed English term, which now carries significant negative connotations when used in public discourse. Some of those involved in consultations pointed out that they do not use the term 'customary law' within their own groups when they were engaged in the practice or discussion of traditional law. Aboriginal groups have their own language and terminology to refer to both systems of law and specific processes and laws. For example, Yolngu people consulted talked

[318] Patricia Williams, quoted in Hunyor supra, n. 316, 9.

at length about the Madayin system of law, and gave many other examples of legal terminology that they would use when discussing or practising aspects of Madayin law. Customary law is an 'outside' term that does not generally reflect how Aboriginal groups in the NT talk about or view their own law.

242. A corollary to this issue was the fact that due to the negative public discourse around customary law, the term is now often associated with issues of violent punishment, payback or 'promised brides'. Many of those consulted expressed a view that it was difficult to engage in dialogue with non-Aboriginal people about issues of traditional law, governance and authority if the term 'customary law' was used, because of the negative connotations associated with this label. Similarly, there was clear articulation that communication problems were created because what Aboriginal people may have in mind when the term 'customary law' is used is not necessarily the same as what non-Aboriginal people have in mind. In other words, just because two groups of people use the same label, it does not mean that they share the same understanding.

243. Linguistically, it is well documented that Aboriginal speakers of English may use English terms with different intended meanings than the meaning in Standard Australian English.[319] This gives rise to the possibility of significant unidentified intercultural miscommunication, when both sides in a conversation assume they are talking about the same thing just because the same word is being used. A speaker's intended meaning may be different than the meaning attached to the word or phrase by the listener. This issue was particularly noticeable in relation to the term 'payback.' In Standard English, this term carries connotations of revenge or unilateral retribution. To the extent that this term was used in consultations, and consistent with the overall experience of committee members, 'payback' was used with an intended meaning closer to 'paying back', in the sense of making restitution. There is a clear difference in meaning between the two usages of the word, and when the term is filtered through a Standard English lens, it imports a range of negative connotations that are not necessarily intended by the speaker. In relation to this particular term, many of those involved in consultations rejected the use of the term 'payback' as reflecting traditional legal practices and preferred the use of more precise terms from their own Aboriginal languages.

[319] See for example, Frances Morphy, 'The language of governance in a cross-cultural cultural context: What can and can't be translated' (2007) *Ngiya: Talk the Law – Volume 1 Governance in Indigenous Communities*; Michael Cooke, *Indigenous Interpreting Issues for Courts* (Australian Institute of Judicial Administration, 2002) 8-10, 33; Michael Walsh, '"Which Way?": Difficult Options for Vulnerable Witnesses in Australian Aboriginal Land Claim and Native Title Cases' (2008) 36(3) *Journal of English Linguistics* 239; David Moore, 'Unfriendly terms in court: Aboriginal languages and interpreting in the Northern Territory' (2014) 8/12 *Indigenous Law Bulletin,* 8.

244. Preferred alternatives to 'customary law' that were suggested include using group specific names (eg Yolngu law or Arrernte law), 'First Nations Law', 'Aboriginal law','traditional Aboriginal law' and 'local Aboriginal law'.

245. From the perspective of criminal law practitioners, views were expressed that criminal lawyers are now less likely to make submissions using the terminology of 'customary law' because negative attitudes associated with the term mean that the use of the term in submissions would cause more harm than benefit to a client.

[6.5] Conflict between current legislation and the Draft Aboriginal Justice Agreement and the NT Treaty Commissioner's Interim Report

246. In recent years, the NT Government has made a commitment to an Aboriginal Justice Agreement[320] and a treaty process.[321] There are a number of ways in which these NT Government endeavours may be undermined or in conflict with the relevant provisions of the *Crimes Act*. To the extent that section 104A of the *Sentencing Act* continues to be applied in a discretionary manner only to controversial or contentious aspects of customary law, section 104A is unlikely to create practical legal conflict with the Treaty process or Aboriginal Justice agreement, subject to a few issues discussed below.

[6.5.1] Conflict with the Draft Aboriginal Justice Agreement

247. The Draft Aboriginal Justice Agreement is based on a number of 'Guiding principles', which appear to be undermined by the *Crimes Act* provisions.

> **Guiding principle 4** – 'Adhere to the highest standards of cultural competence and best practice including *accepting and respecting Aboriginal knowledge and the enduring connection of Aboriginal Territorians to country, culture, kinship and language'* (emphasis added).

248. The *Crimes Act* provisions specifically exclude or limit the reception and consideration of Aboriginal knowledge with respect to country, culture, kinship and language in certain sentencing and bail matters. All of these types of Aboriginal knowledge form parts of Aboriginal customary law or cultural practice. As such, the provisions do not facilitate the courts in 'accepting and respecting Aboriginal knowledge.'

249. To the extent that section 104A is understood as operating to enhance the quality of information presented to the courts in controversial submissions about

[320] Reflected in the *Draft Aboriginal Justice Agreement* and *Pathways to the Northern Territory Aboriginal Justice Agreement.*

[321] See *Northern Territory Treaty Commission* (Website) <https://treatynt.com.au/>.

customary law, there is an argument that section 104A supports Guiding principle 4.

Guiding Principle 5 – 'Respect and honour the strength of Aboriginal Territorians and communities, and *actively discourage bias and the use of deficit labelling* (emphasis added).'

250. It is widely accepted that Aboriginal law, cultural authority and cultural practices are a source of strength, identity and healing for Aboriginal communities.[322] This view was reflected in consultations and the experiences of committee members. In contrast to this, the current legislation adopts a deficit approach, whereby consideration of customary law and cultural practice is a problem that must be addressed by specific legislative intervention. A small handful of cases have been used as justification to problematise all aspects of Aboriginal identity, cultural and law.

251. Additionally, the provisions in the legislation which problematise Aboriginal law and culture are not balanced by other provisions which recognise the value and strength of Aboriginal law and culture, or by provisions which encourage or facilitate the courts to construct sentences in ways that maximise the restorative aspects of Aboriginal law or recognise cultural authority. The sum total of the legislation leans heavily towards a deficit model rather than strength-based construction of Aboriginal law and culture.

Guiding Principle 7 – 'Ensure that Aboriginal Territorians have the same rights and opportunities as other Territorians.'

252. Despite the fact that the *Crimes Act* provisions do not expressly single out Aboriginal people, the committee was unable to find any examples of cases in the NT where they have been applied to any other cultural group, including Anglo-Australians. As such, Aboriginal culture continues to be singled out and treated differently than other groups.

253. A similar argument can also be made for s 104A, in that to date it appears to have only been applied to Aboriginal people. The potential problem, however, is largely alleviated by the discretionary nature of the provision.

[322] See, for example, Anderson, P., Bamblett, M., Bessarab, D., Bromfield, L., Chan, S., Maddock, G., Menzies, K., O'Connell, M., Pearson, G., Walker, R., Wright, M., *Aboriginal and Torres Strait Islander children and child sexual abuse in institutional settings* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2017), at 33-37, which cites extensive research on Aboriginal culture as a protective factor for children.

Guiding Principle 8 – 'Eliminate unfair treatment including conscious and unconscious bias.'

254. In addition to the points above, section 104A of the *Sentencing Act* and sections 15AB, 16A(2A) and 16AA of the *Crimes Act* appear to be based upon, and reinforce, unconscious bias in relation to Aboriginal cultural practices. The provisions appear to be based on the premise that Anglo-Australian practices are 'normal', and therefore are not a form of cultural practice, as discussed above.

255. In addition to the guiding principles, there are a number of specific aims under the Draft Northern Territory Aboriginal Justice Agreement which appear to be in conflict with, or undermined by, the current legislative provisions.

Aim 3 – 'Review and reform relevant provisions in the *Bail Act'*

256. This aim states 'The *Bail Act 1982* (NT) will be reviewed and reformed to promote equitable and culturally responsive decision-making processes. This will involve participation from Aboriginal leaders and community members to ensure that relevant background and cultural information is provided to bail decision-makers.' As long as section 15AB of the *Crimes Act* remains in force, this aim of the Agreement is likely to be frustrated in cases where issues of customary law are directly relevant to the seriousness of an offence in a bail matter.

Aim 4 – 'Review and reform relevant provisions in the *Sentencing Act'*

257. This aim states 'The *Sentencing Act* will be reviewed and reformed to promote culturally responsive sentencing practices. This will include the provision and consideration of relevant background and cultural information.'

258. Based on this statement, it may perhaps be inferred that the Draft Agreement has concluded that section 104A does not promote 'culturally responsive sentencing principles'. Whilst section 104A does not prohibit the reception of relevant cultural background by the courts, it does potentially place procedural hurdles on the receipt of this information. These procedural hurdles can be particularly problematic in the context of busy 'bush court' sittings (as discussed in issue 1 above), where many matters are heard and finalised on a single day and duty lawyers are given limited time to spend with each client. As has already been discussed, section 104A potentially creates a deficit labelling approach to Aboriginal cultural practices, which undermines culturally responsive sentencing practices. Thus, whilst section 104A does not strictly prevent culturally responsive sentencing practices, it equally does not 'promote'

culturally responsive sentencing practices. It may be advisable to clarify that the purpose of section 104A is to enhance the quality of evidence about customary law in controversial situations, and also to introduce a new strength-based provision acknowledging the many positive benefits of integrating cultural authority, cultural practice and customary law into sentencing orders.

Aim 6 – 'Reintroduce community courts'

259. When community courts were discontinued for adult offenders in 2011, it has been reported that the primary reason given by the then Chief Magistrate Hilary Hannam was that community courts were incompatible with section 104A.[323] The Committee considers that it is likely that other factors, such as the *Crimes Act* provisions and a lack of funding and other resource constraints also played a role in the discontinuation of community courts.

260. Section 104A has been subsequently amended since community courts were discontinued. Given that section 104A is now discretionary, there is no direct conflict with community courts. There is still potential for conflict, however, if one party in a community court matter seeks to assert that section 104A should be applied in the particular case. Community courts are designed to facilitate a respectful dialogue between Elders and the sentencing judge, whereby elders and community leaders will 'assist judges to determine the most appropriate sentence for an offender'.[324] It is almost certain that some of the discussion between Elders and the judge will involve discussion of cultural practices within the community.[325] If section 104A were applied to community courts and elders were required to provide statements in advance of the matter, or given sworn evidence, it would undermine the restorative, interactive and conversational aspects of community court.

261. A 2012 Department of Justice report into community courts reached the same conclusion about the previous non-discretionary formulation of section 104A, stating:[326]

> [Section 104A] required, *inter alia*, that such "information is presented to the court in the form of evidence on oath, an affidavit or a statutory declaration." Such a formal requirement would appear to contradict the intent and practice

[323] Danial Suggit, 'Joining Forces: A partnership approach to effective justice – community-driven social controls working side by side with the Magistracy of the Northern Territory' (NT Department of Justice, August 2012), 10.

[324] Ibid, 11.

[325] Even if the courts were to adopt a narrow definition of 'cultural practice', the conflict between the provision and operation of community courts would still exist.

[326] Supra, n. 323, 10-11.

> of a Community Court to hear community views within an "informal atmosphere" which includes the offender, the victim, senior community members and others participating in a "[g]eneral discussion as to the impact of the offending and the appropriate sentence facilitated by a Magistrate (Community Court Guidelines, 27 May 2005). It is understood that the Department is currently considering possible legislative changes to the NT Sentencing Act to address this conflict.

262. In order to achieve Aim 6 of the Draft Agreement, it may be advisable to introduce a specific provision which excludes or modifies the operation of section 104A from community court matters.

263. The conflict between section 16AA of the *Crimes Act*[327] and community courts is also readily apparent. The 2012 report on community courts also identified this conflict:[328]

> Of note is section 91 of the Act, which appears to run contrary to the recognition for, and encouragement of Aboriginal 'traditional authority… and practices' within mainstream Australia court processes proposed within the *Little Children are Sacred* report.

264. Given, however, the infrequency in which issues arise under section 16AA, the presence of that section should not preclude the re-introduction of community courts.

Aim 12 – 'Establish and support Law and Justice Groups'

265. As discussed above, if procedural hurdles exist which prevent a natural and free-flowing exchange of information and ideas between Law and Justice Groups and visiting judges, the effectiveness of Law and Justice Groups will be undermined. To the extent that legal technicalities or procedural rules determine what information a court can receive from a Law and Justice Group, it will likely make the group dependent on a third party lawyer or facilitator, which may undermine the agency or authority of the group.

Aim 14 – 'Support Aboriginal cultural authority and leadership'

266. Aboriginal cultural authority and leadership is heavily intertwined with Aboriginal law and cultural practice. To the extent that legislation contributes to legal and public discourse which problematises Aboriginal law and cultural practice, it is

[327] Note that the now repealed *NTNER 2007* s 91 is identical in form to *Crimes Act* s 16AA(1).

[328] Supra, n. 323, 9.

more likely to undermine rather than to support cultural authority and leadership.

[6.5.2] Potential conflict with the NT Treaty Process and Treaty Discussion Paper

267. Based on the *Northern Territory Treaty Discussion Paper*, there does not appear to be a direct legal conflict between the provisions in question and the NT Treaty process. The Treaty Discussion Paper does not appear to anticipate the Treaty process or outcomes directly impacting upon the NT Criminal Justice system.[329]

268. Arguably, any conflict between the relevant provisions and the Treaty Process occurs at the conceptual or discursive level. The Treaty Discussion Paper exclusively refers to Aboriginal custom, law and culture in a positive light. The 2018 Barunga Agreement, which formed the basis for the current Treaty process, states, inter alia;

> The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom; and
>
> First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters.[330]

269. At the time of signing the 2018 Barunga Agreement, Michael Gunner, the Chief Minister of the NT said:[331]

> I know Aboriginal people make better decisions about how to develop their people, communities and resources in accordance with culture and custom than any bureaucrat in Darwin or Canberra ever could.

270. The text of the 1988 Barunga Statement is quoted as part of the 'Background to the Memorandum of Understanding' establishing the current treaty process.[332] Relevantly, the 1988 Barunga Statement calls for:[333]

> A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association…

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[329] The Treaty Discussion Paper does refer to an international example of treaty from Alaska which gave Indigenous people power over policing and imprisonment. *Northern Territory Treaty Discussion Paper* (Northern Territory Treaty Commission, July 2020), 36.

[330] Quoted in the *Northern Territory Treaty Discussion Paper* (NT Treaty Commission, July 2020) 9.

[331] Ibid, 32.

[332] Ibid, 81.

[333] Ibid.

271. The current NT treaty process suggests as a key condition a recognition that Aboriginal peoples possess of a form of ongoing sovereignty which gives rise to a need for 'a type of self-government.'[334] In contrast to this approach, the criminal justice system does not allow for any forms of legal pluralism. In the context of the criminal justice system, any recognition of Aboriginal law or custom must occur through the parameters set by non-Indigenous laws and court processes. The prohibition on consideration of customary law and cultural practice in the relevant Commonwealth legislation further entrenches the supremacy of non-Indigenous law, and the subordination of Aboriginal laws and customs. Based on this, it would appear that the underlying approach reflected in the Commonwealth provisions is in conflict with the spirit and foundational assumptions of the NT Treaty process.

[6.6] The extent to which customary law is able to adapt, the extent to which customary law is secret and the implications of these questions on interaction with the criminal justice system

272. In the course of consultations and deliberations on the issues within the scope of the reference, it became apparent that there were two issues of sensitivity, which often had the impact of impeding meaningful collaboration or discussion regarding the interaction of the NT legal system and Aboriginal systems of law. The two issues relate to frequently heard statements that Aboriginal law can never change, and that Aboriginal law is 'secret'.

Customary law cannot 'change'

273. In contrast to previously reported conclusions that Aboriginal law can never 'change', in the course of consultations with senior Aboriginal people, the committee was repeatedly told that the application and interpretation of Aboriginal law can and does adapt to the environment and context. This view was expressed widely, from both the Central Desert and Top End areas of the NT. For example, Michael Liddle, an Executive Member of the Central Land Council told the committee: 'Aboriginal law is universal and managed by skins and strategically structured. It never changes, but what is changing is our ability to apply and understand it'. Similarly, Professor Mick Dodson AM, the current NT Treaty Commissioner, has stated 'customary law does change and adapt with our culture and our environment'.[335]

274. The Committee was drawn to a number of examples where the underlying principles of law were applied in new ways. Rev Dr Gondarra provides a useful analogy, in that he compares the Yolngu Madayin law and its application as comparative to the Bible and the practice of Christianity. Most Christians would

[334] Ibid, 16.

[335] Dodson, supra n. 310.

strongly assert that the text of the Bible cannot be changed, and would react strongly to any suggestion that the text of the Bible be re-written. This, however, does not preclude significant variation and adaptation of Christian practices over time based on an unchanging text. In a similar way, Dr Gondarra argues that the language of 'changing the law' is likely to evoke a strong reaction amongst Yolngu, just as a statement about 'changing the Bible' would likely evoke a strong reaction amongst Christians. The songlines, ceremony, paintings, sacred objects and other embodiments of the law have been carefully guarded and passed down over countless generations and are not subject to the whims of human interference. This, however, does not mean that the fundamental principles of law cannot be applied in innovative and changing ways to new situations.[336] In this way, the system is not substantially different to how the principles of the common law develop over time.

275. Another example was given in relation to the 'promise' system. In one consultation it was stated that, contrary to current perceptions, the promise system was never primarily about marriage or sex, but was rather about ensuring resources were shared or provided to those with greater need. The 'promise' was a promise to provide resources, not a promise to provide a wife. It was stated that the promise system continues to operate in ways that have nothing to do with marriage or sex, for example, a person may promise to pay school fees for a family who struggles financially. In this way, the 'promise' relationship is more akin to a 'godparent' type relationship in the Judeo-Christian tradition.

276. James Gaykamangu provides an example from his grandfather, a senior lawman and leader in East Arnhem Land, who upon having an offender brought before him for punishment many decades ago, took the spear and speared the ground next to the offender. The action was accompanied by a declaration that whilst the crime warranted punishment and the offender should reflect upon the ways in which he deserved punishment for his actions, the offender would not be subjected to physical punishment. Since that time, the Gupapuyngu people would no longer use physical forms of punishment, but would instead ceremonially place the spear into the ground next to the offender.[337] There is video footage of this new practice of ceremonially placing a spear into the ground being used as part of dispute resolution as recently as 2017.[338]

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[336] Rev Dr Djiniyini Gondarra, LWA113 Customary Law teaching materials (Charles Darwin University, Darwin, 18 July 2019).

[337] James Gaykamangu, 'Integrating Indigenous Customary Law Perspectives' (Speech, *National Indigenous Legal Conference*, Darwin, 13 August 2019).

[338] See 'Makarrata' (Arnhem Land Progress Association, 2017) <https://www.youtube.com/watch?v=66U9-MyWZPE> from 3:27.

277. Thus, to the extent that arguments against recognition of customary law are based on an assumption or assertion that customary law is inflexible and incapable of adaptation, those findings were not supported by the Committee's research, consultations and prior experience.

Customary law is 'secret'

278. Another argument sometimes raised as to why issues of customary law cannot be heard by the courts is that Aboriginal law is 'secret' and it is not appropriate for non-Aboriginal people to be engaging in discussions or making decisions about customary law. Similarly, it is sometimes asserted that because customary law cannot be reduced to writing, it cannot be considered by courts in a meaningful way. Based on consultations, research and the prior experience of the committee, this was viewed as a relatively weak argument.

279. First, the courts, in both Native Title and criminal jurisdictions, have long-standing practices of adapting court process to respect sensitivities around customary law and cultural practices. For example, it is not unusual for courts to adapt the physical layout of a courtroom or use screens where there are issues of avoidance relationships between people who are required to be in a court room together. Similarly, it is not unusual for the courts and legal practitioners to take into account issues of gender in ensuring counsel, and in certain cases, judges, are of the appropriate gender. It is also possible for courts to restrict the viewing of certain evidence to legal practitioners of a particular gender. To the extent that the court is informed about particular sensitivities, judges are able to use their broad discretion over court process to create an environment more conducive to respectful exchange of sensitive information. Thus, rather than restricting consideration of Aboriginal law based on the sensitive nature of certain matters, this issue can be more appropriately dealt with by continuing to give the court broad discretion and resources to adjust court procedural matters to take into account sensitivities.

280. Based on information provided to the Committee, there was a wide variety of views as to the issue of secrecy or access to information in Aboriginal systems of law. Rather than assertions that it was not appropriate for courts to hear about issues of Aboriginal law, concerns were primarily expressed with regards to authority and process – that is whether the proper people were speaking about law, and also the purpose and place of discussions about law. There were concerns expressed, which perhaps echo some of the reasons underpinning section 104A of the *Sentencing Act*, about some Aboriginal people – particularly young people – speaking about the law in uninformed or unauthorised ways. One senior Aboriginal person expressed this sentiment by reminding the Committee that 'not all white people understand white law, just like not all Aboriginal people understand Aboriginal law.' The importance of recognising correct authority, however, did not necessarily mean that all

aspects of the law are secret, and a number of examples were given about aspects of Aboriginal law that are viewed as public or open. It was pointed out that not all aspects of NT legal processes are public, such as a judge's chambers, or the process of a judge writing reasons for a decision. Members of the public are not invited into those spaces. In a similar way, Aboriginal systems of law have both private and public aspects, and many of those consulted expressed a willingness to engage in dialogue about the more private aspects of Aboriginal law, provided correct authority and process was recognised.

281. Issues about 'secrecy' were also expressed in terms of how consultations are often conducted in Aboriginal communities. Negative views were expressed about the 'sausage sizzle' approach to consultations, whereby consultations were conducted in the middle of a community, open to anyone and people were sometimes enticed to attend through the provision of lunch or food. These types of forums were generally stated to not be the appropriate place to discuss sensitive and significant issues of law, and as such, attempts to engage in public discussions about Aboriginal law will often be rebuffed by assertions that the law is secret. In contrast, the discussion would be much different if a closed discussion were to be held between appropriately senior people from both systems.

282. A significant number of Aboriginal people consulted were already actively engaged in trying to generate greater understanding and respect of Aboriginal law and dispute resolution amongst non-Aboriginal people. There was also a number of statements expressed reflecting a desire to engage in greater comparative work between Aboriginal laws and systems and non-Aboriginal laws and systems. Similarly, there was a desire to create better mechanisms for judges and lawyers to develop more in-depth understanding of Aboriginal law and dispute resolution processes. Whilst there was not uniform agreement on the issue of committing aspects of Aboriginal law and process to writing, there were a number of Aboriginal people who expressed a desire to have appropriate Aboriginal law people articulate in writing various procedural aspects of Aboriginal dispute resolution from their respective groups. These resources could add to the pool of judicial understanding about these issues and serve as a check on submissions made about customary law from those communities.

283. In short, whilst there was continued acknowledgement that some aspects of customary law were not suitable for open public discussion, there was overall a desire expressed to engage in dialogue with the legal system provided proper authority and process was recognised. There was a desire to create better resources or mechanisms to allow judges and lawyers to more accurately understand and speak about issues of Aboriginal law.

284. As Dagoman Waraman woman May Rosas from Katherine said to the Committee:

> Westminster law needs to start including us as part of a legal process so that we are ensuring that every aspect of legal process is being looked at from both worlds, from the Westminster law and our customary law as well. And this is where we can be involved with looking at process and punishment in a way that becomes meaningful for our people. What's happening now, people are just being put away and they're learning a culture that is really not their culture. And there needs to be lessons taught and that's the way I see our customary law. It teaches people to have an understanding and respect for our customary law so they don't go reoffending… Our law needs to be included because it's a law that's allowed for us to survive in this country all these thousands and thousands of years. And we haven't lost that, we still maintain it, we still practise it where we can, and it has to be acknowledged, you know, it needs to be part of this whole system. Believe me, if this goes all well, we wouldn't have as many people in the prison as we do today.

CHAPTER 7 – CONCLUSION

285. Throughout this Inquiry, the Committee has been confronted with a stark disjunct.

286. On the one hand, there is the everyday reality of local Aboriginal law. This reality is widely recognised, both by Indigenous Territorians themselves,[339] as well as by key participants in the criminal justice system, including judges[340] and prosecuting authorities.[341] Similarly, as documented in Chapter 4 of this Report, a formidable array of law reform bodies, royal commissions, boards of inquiry and other experts have exhaustively investigated the issues at the heart of this Inquiry and come, time and time again, to the same general conclusions: local Aboriginal law runs, and it should be seen to run, alongside, but subject to statute law and the common law. This narrative is one of survival, resistance, resilience, dignity and hope.

287. On the other hand, there is the everyday reality of Australian politics. Time and time again, Australian governments and parliaments have failed to respond to the calls for recognition of their laws by First Nations peoples, and have declined the opportunity to implement the recommendations of the experts commissioned to advise on these issues.

288. The Northern Territory has recently embarked on the development of both an Aboriginal Justice Agreement and, even more ambitiously, a Treaty.[342] These highly significant initiatives are encouraging signs of a genuine commitment to change the narrative. The recommendations in this Report provide the Northern Territory with a fresh opportunity to do so. In the view of the Northern Territory Law Reform Committee, it is high time that the disjunct referred to above is reconciled.

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[339] See Chapter 5.

[340] See Chapter 3.

[341] *Guidelines of the Director Public Prosecutions*, Guideline 20: Aboriginal Customary Law, accessed at <https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574124/DPP-Guidelines-Current-2016.pdf>.

[342] See Chapter 6.

APPENDIX 1 – RELEVANT LEGISLATIVE PROVISIONS

Section 15AB of the of the *Crimes Act*

15AB 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 Commonwealth or the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority:

(a) must take into consideration the potential impact of granting bail on:

(i) any person against whom the offence is, or was, alleged to have been committed; and

(ii) any witness, or potential witness, in proceedings relating to the alleged offence, or offence; and

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

(i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or

(ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.

(2) If a person referred to in subparagraph (1)(a)(i) or (ii) is living in, or otherwise located in, a remote community, the bail authority must also take into consideration that fact in considering the potential impact of granting bail on that person.

(3) In paragraph (1)(b):

criminal behaviour includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and

(b) any fault element relating to such a physical element.

(3A) Paragraph (1)(b) does not apply in relation to an offence against the following:

(a) section 22 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;

(b) sections 15A, 15C, 17B, 22A, 27A, 74AA, 142A, 142B, 207B, 354A, 355A and 470 of the *Environment Protection and Biodiversity Conservation Act 1999*;

(c) section 48 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;

(d) sections 69 and 70 of the *Aboriginal Land Rights (Northern Territory) Act 1976*;

(e) section 30 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*;

(f) sections 33, 34 and 35 of the *Northern Territory Aboriginal Sacred Sites Act of the Northern Territory*;

(g) paragraph 33(a) of the *Heritage Conservation Act of the Northern Territory*;

(h) section 4 of the *Aboriginal Land Act* of the Northern Territory;

(i) sections 111, 112 and 113 of the *Heritage Act* of the Northern Territory;

(j) any other law prescribed by the regulations that relates to:

(i) entering, remaining on or damaging cultural heritage; or

(ii) damaging or removing a cultural heritage object.

(4) To avoid doubt, except as provided by subsections (1), (2) and (3A), this section does not affect:

(a) any other matters that a bail authority must, must not or may take into consideration in determining whether to grant bail or in determining conditions to which bail should be subject; or

(b) the operation of a law of a State or a Territory.

Note: Subsections (1) and (2) indirectly affect laws of the States and Territories because they affect section 68 of the *Judiciary Act 1903*.

Section 16A of the *Crimes Act*

16A Matters to which court to have regard when passing sentence etc. — federal offences

(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

Note: Minimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC.

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

(a) the nature and circumstances of the offence;

(b) other offences (if any) that are required or permitted to be taken into account;

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;

(d) the personal circumstances of any victim of the offence;

(e) any injury, loss or damage resulting from the offence;

(ea) if an individual who is a victim of the offence has suffered harm as a result of the offence—any victim impact statement for the victim;

(f) the degree to which the person has shown contrition for the offence:

(i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or

(ii) in any other manner;

(fa) the extent to which the person has failed to comply with:

(i) any order under subsection 23CD(1) of the Federal Court of Australia Act 1976; or

(ii) any obligation under a law of the Commonwealth; or

(iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the Judiciary Act 1903;

about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

(g) if the person has pleaded guilty to the charge in respect of the offence:

(i) that fact; and

(ii) the timing of the plea; and

(iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence;

(h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(ja) the deterrent effect that any sentence or order under consideration may have on other persons;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(ma) if the person's standing in the community was used by the person to aid in the commission of the offence—that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

(2AAA) In determining the sentence to be passed, or the order to be made, in respect of any person for a Commonwealth child sex offence, in addition to any other matters, the court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate, taking into account such of the following matters as are relevant and known to the court:

(a) when making an order—to impose any conditions about rehabilitation or treatment options;

(b) in determining the length of any sentence or non-parole period—to include sufficient time for the person to undertake a rehabilitation program.

(2A) However, the court must not take into account under subsection (1) or (2), other than paragraph (2)(ma), 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.

(2AA) Subsection (2A) does not apply in relation to an offence against the following:

(a) section 22 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;

(b) sections 15A, 15C, 17B, 22A, 27A, 74AA, 142A, 142B, 207B, 354A, 355A and 470 of the *Environment Protection and Biodiversity Conservation Act 1999*;

(c) section 48 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;

(d) sections 69 and 70 of the *Aboriginal Land Rights (Northern Territory) Act 1976*;

(e) section 30 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*;

(f) any other law prescribed by the regulations that relates to:

(i) entering, remaining on or damaging cultural heritage; or

(ii) damaging or removing a cultural heritage object.

(2B) In subsection (2A):

criminal behaviour includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and

(b) any fault element relating to such a physical element.

(3) Without limiting the generality of subsections (1), (2) and (2AAA), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.

(4) For the purposes of a reference in this Part to a family, the members of a person's family are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of ***child*** in section 3;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

Section 16AA of the *Crimes Act*

16AA Matters to which court to have regard when passing sentence etc.—Northern Territory offences

(1) In determining the sentence to be passed, or the order to be made, in relation to 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:

(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) Subsection (1) does not apply in relation to an offence against the following:

(a) sections 33, 34 and 35 of the *Northern Territory Aboriginal Sacred Sites Act* of the Northern Territory;

(b) paragraph 33(a) of the *Heritage Conservation Act* of the Northern Territory;

(c) section 4 of the *Aboriginal Land Act* of the Northern Territory;

(d) sections 111, 112 and 113 of the *Heritage Act* of the Northern Territory;

(e) any other law prescribed by the regulations that relates to:

(i) entering, remaining on or damaging cultural heritage; or

(ii) damaging or removing a cultural heritage object.

(3) In subsection (1):

criminal behaviour includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and

(b) any fault element relating to such a physical element.

Section 104A of the *Sentencing Act 1995* (NT)

104A Special provisions regarding cultural information

(1) This section applies if, as part of the sentencing process, a party to proceedings seeks to present information to a court about:

(a) an aspect of any form of customary law (including any punishment or restitution under that law); or

(b) a cultural practice.

(2) Despite section 104, before agreeing to receive the information the court must have regard to:

(a) whether the party intends to present the information in the form of evidence on oath, an affidavit or a statutory declaration; and

(b) whether each other party to the proceedings:

(i) has been given notice that the information will be presented to the court; and

(ii) has had a reasonable opportunity to respond to the information.

APPENDIX 2 – LIST OF STAKEHOLDER CONSULTATIONS

Law Council of Australia

Law Society Northern Territory

Aboriginal Justice Unit

Central Land Council executive

Central Land Council Full Council members

Tiwi Land Council

Ngaanyatjarra Pitjantatjara Yankunytjatjara Women's Council

Tangentyere Women's Family Safety Group

Tangentyere Men's Family Safety Group

Yingiya (Mark) Guyula MLA

Reverend Dr Djiniyini Gondarra OAM, Witiyana Marika, Diane Britjalawuy Gondarra and Rachel Dikul Baker

Jacinta Price

May Rosas

Chamber of Commerce NT

Victims of Crime NT