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# *ABORIGINAL CUSTOMARY LAW AND SENTENCING*

**Her Honour Judge Mary Ann Yeats**

**District Court of Western Australia**

In 1986 the Australian Law Reform Commission (ALRC) recommended that Aboriginal customary laws be an element to be taken into account in sentencing Aboriginal offenders either in aggravation or in mitigation of sentence[1]. In 1994 in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody[2] (RCIADIC) and the ALRC report on Multiculturalism and the Law[3], the Commonwealth amended s 16A of the *Crimes Act 1914*[4] by inserting in subsection (2)(m) the words "cultural background" which Judges were required to take into account if relevant and known when sentencing federal offenders. Yet in 2006 the Commonwealth enacted legislation directly in conflict with earlier recommendations of the ALRC and the RCIADIC when it amended s 16A of the *Crimes Act*[5]. It not only removed the reference to "cultural background" in s 16A(2)(m) but also added subsections (2A) and (2B) to s 16A in these terms:

> (2A): However, the court must not take into account under subsection (1) or subsection (2) 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.
>
> (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.

By imposing different rules for sentencing Aboriginal offenders who live under customary law than apply generally in sentencing offenders, the legislation is contrary to the common law principles developed over many years for

sentencing Aboriginal offenders in Australia[6] and is contrary to the recommendations of every law reform body or inquiry which has reported on sentencing Aboriginal offenders in recent years[7].

Two aspects of the legislation should initially be noted:

- The legislation does not mention "Aboriginal" customary law or cultural practice. It applies to all customary law and cultural practice. This paper is limited to a consideration of the effect of the legislation on Aboriginal offenders. But the legislation will also affect migrants or other persons. Given this apparently general application of the amendments, it is surprising to find that the Attorney-General in the Second Reading Speech referred specifically to a recommendation of the Inter-Governmental Summit On Violence And Child Abuse In Indigenous Communities and a Council of Australian Governments (COAG) recommendation in 2006 ("the 2006 COAG Recommendation")[8]:

  > COAG agreed 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.

- The amendments only apply to State and Territory judicial officers sentencing Aboriginal offenders for offences against the laws of the Commonwealth. Commonwealth laws do not generally govern issues of violence and sex abuse in remote communities; the laws of the States and Territories do that. For that reason the legislation will have no effect on violence and child abuse in indigenous communities. But that was not the stated purpose of the *Crimes Act* amendment. According to the Attorney-General, the purpose of the legislation was to provide leadership and guidance to all States and

Territories, encouraging each to amend its sentencing laws to incorporate like provisions[9]. A Bill had been introduced into the Northern Territory Parliament in 2003 for a similar purpose but it did not succeed[10]. No other State or Territory has legislated in this manner.

In August 2007 the Commonwealth enacted s 91 of the *Northern Territory National Emergency Response Act 2007*[11].

> **91. Matters to which court is to have regard when passing sentence etc.**
>
> In determining the sentence to be passed, or order to be made, in respect of 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.

"Criminal behaviour" is defined in the legislation in the same way as it is defined in subsection (2B) of s 16A of the *Crimes Act*[12].

It is the contention of this paper that the limitation on judicial sentencing discretion in the amendments to s 16A of the *Crimes Act* and in s 91 of the Northern Territory emergency legislation (the new provisions) will, in some cases:

(1) Require unequal treatment in sentencing Aboriginal offenders; and

(2) Prevent judicial officers sentencing Aboriginal people from complying with the spirit of the judicial oath or affirmation to "do right by all manner of people"[13].

**What is Aboriginal Customary Law?**

Pat Dodson, a Yawuru man from Broome, defined Aboriginal Customary Law in 2004[14] in a simple but highly descriptive way that demonstrates what customary law is to Aboriginal people:

> Customary Law is an all-encompassing reality. There are the secret-sacred aspects, men's' business or women's' business; then there's the broader protocol and reciprocity that applies under the kinship structures and systems; and then there's the protocols of behaviour in relation to people and country, and people outside of your own group, and the respect and recognition you provide to others for where they belong and how they conduct their affairs and their business. There are many obligations and responsibilities and structures of accountability in customary law. Most people unfortunately have only ever thought of customary law from a punitive position. They've thought about it in terms of punishment, in terms of spearing someone in the leg as a consequence of some violation.

The West Australian Law Reform Commission's (WALRC) 2006 definition of customary or traditional law is in similar terms[15]:

> … traditional "law" was a part of everything, and was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion…
>
> Aboriginal customary law "connected" people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance of this order.

The WALRC commented on the role played by customary law for those living in remote communities[16]:

> … it is Aboriginal law, not Australian law, which provides the primary framework for people's lives, relationships and obligations… Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others, as well as to the land and natural resources.

The 2003 report of the Northern Territory Law Reform Commission (NTLRC) contained a shorter definition[17]:

> Aboriginal members of the committee and many others who have expressed their views have emphasised Aboriginal tradition as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed.

In 2000 the New South Wales Law Reform Commission (NSWLRC) defined Aboriginal customary law in very broad terms[18]:

> "Following Justice Blackburn's approach, including acknowledging that it is probably inexpedient to attempt a definition, it may be possible to say that, in very broad terms, Aboriginal customary law is constituted by a body of rules, values and traditions which are accepted as establishing standards or procedures to be followed and upheld. It is also the context of relationships between people within families and among groups across social systems."

The NSWLRC went on to discuss the practice of Aboriginal customary law:

> "The practice of Aboriginal customary law is: the practice of well-health for the individual in the family and the group. Aboriginal law was/is the maintenance and healing of relationships and was/is a constant process of negotiation, mediation and conciliation in managing and resolving the conflicts natural to all human associations."

In 1986 when the ALRC issued its report on "The Recognition of Aboriginal Customary Laws" it declined after a learned and wide-ranging discussion[19] to adopt any precise definition of Aboriginal customary laws; instead the ALRC was content to proceed on the basis that "exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted"[20].

It is interesting to notice the use of the plural – Aboriginal customary laws by the ALRC in 1986 and in the reference to the WALRC in 2006 - whereas Aboriginal people tend to use the singular – Aboriginal customary law. To

Aboriginal people it is Aboriginal customary law[21] – not Aboriginal customary laws. Use of the plural implies the existence of a code or series of discrete rules each of which could be identified and considered. That sort of approach is not consistent with the "all-encompassing reality"[22] that customary law is to Aboriginal people. Nor is it consistent with the internalising of customary law within Aboriginal people creating a connecting web of relationships among people and with ancestral spirits and with groups and the land itself[23].

We as lawyers want to write laws down, analyse and discuss them. But Aboriginal customary law is not our law. It belongs to Aboriginal people who are its custodians and interpreters. As the NTLRC concluded in 2003[24]:

> We in no way wish to denigrate lawyers or the legal system. But it must be accepted that lawyers have a duty to seek to refine and define the written law in the way most favourable to their clients.
>
> In our view this would defeat the "customary" part of Aboriginal customary law by drawing it into the general body of legislation and taking away from the Aboriginals their own interpretations which may very well be very different from what the lawyers would say. The whole body of Aboriginal customary law would then be subsumed into the general law and, while this may seem one way of dealing with the question, it may not be satisfactory for those for whom those very laws are enacted. To write it is to lose it.

**Sources of Aboriginal Customary Law**

Judges in Western Australia have learned from past experience that the source of Aboriginal customary law is the elders – the entrusted custodians of the law. If an aspect of customary law is important when sentencing an Aboriginal offender, the evidence of that customary law must come from the elders – not merely as submissions from the bar table. During meetings I have had with Aboriginal women from remote communities during the years I have been on the bench, the one message they have consistently brought home to me is that alcohol plays no part in Aboriginal customary law[25]. When alcohol is involved any acts

done are not part of their law or their culture. The women have had the experience of sitting in the back of a courtroom during sentencing and hearing submissions by defence lawyers which misstate their customary law. They hear references to customary law when they know the offender was affected by alcohol at the time of the offending. These women emphasise the need for evidence to be taken from appropriate male and female elders when customary law needs to be considered in our courts, a procedure endorsed by the WALRC[26]. That is not difficult to arrange now that Aboriginal Liaison Officers with extensive local knowledge have been appointed to the courts in remote parts of Western Australia. Those local ALOs can advise the Court which elders are custodians of the law applicable in the case if customary law needs to be considered.

These arrangements also ensure that in Western Australia we have not been afflicted with what Sue Gordon refers to as "bulldust customary law"[27] described elsewhere as "bullshit"[28] customary law. We as Judges cannot know Aboriginal customary law. We must rely on the appropriate elders to tell us and explain it to us in sworn evidence.

**Customary law and human rights**

During the 8th Biennial Conference of the International Association of Women Judges held in Sydney in May 2006, Judges from Papua New Guinea, India and South Africa[29] discussed the role of customary law and traditional culture in their courts. The Judges agreed that many aspects of customary law and culture are biased against women. Recognition of customary law and culture in their courts was only allowed when customary law or culture was found to be consistent with their country's Bill of Rights or Charter of Rights. Where women were subordinated by customary law or culture such was not applied. Judges applied instead international principles of equal justice and equal treatment for women.

Because Australia has no national Charter or Bill of Rights[30], judges in Australia, particularly in the criminal courts, have limited experience with human rights jurisprudence and no clear basis for testing customary law or cultural practice.

All law reform commissions who have recently made recommendations about the recognition of Aboriginal customary law in sentencing have referred to the need to ensure that no customary law is recognised that would breach international human rights norms[31]. That is a principle every sentencing court can apply generally in exercise of the sentencing discretion. It is important that, despite Australia's lack of a Charter of Rights, our common law develops under the legitimate influence of international human rights norms forming part of International Covenants ratified by Australia[32], including the International Covenant on Civil and Political Rights 1976[33], the International Convention on the Elimination Of All Forms of Racial Discrimination 1969[33] and the Convention on the Elimination Of All Forms of Discrimination Against Women 1981[33]. If any aspect of customary law or cultural practice breaches human rights norms ratified by Australia under these covenants, that customary law should not be taken into account in sentencing.

**What is "cultural practice"?**

There are parts of Western Australia where Aboriginal culture seems to be stronger and more visible than in other parts. The Kimberley region offers great depth and richness of living culture and tradition. That same richness is also experienced in the remote regions of the Pilbara and is particularly apparent in the Western Desert out of Kalgoorlie. Cultural practice includes the song cycles, corroboree, dancing, initiation, secret men's business, secret women's business that emerge and are alive in remote areas. It is apparent that there is an overlap between the definition of Aboriginal customary law on the one hand and cultural practice on the other hand.

Cultural practice also includes matters that make up what we sometimes call "Aboriginality" and includes such things as: the traditional view of property as communal property so that offenders have obligations to share what they have with others in their community; the traditional attitudes to offending that require immediate payback or negotiation or restitution so that the issue is promptly resolved and the community can move on; concepts of time where events in the past become remote and irrelevant after a relatively short time. Cultural practice also includes such things as the treatment of aunties as mothers and the treatment of cousins as sisters/brothers so that immediate family is much more extensive than in the non-Aboriginal community. Tied to that is the cultural practice of sorry time and funerals which take a disproportionate amount of time from the lives of Aboriginal people compared to the time taken for such events in the lives of non-Aboriginal people.

The use of drugs and alcohol play no part in cultural practices in Aboriginal communities. Nicholas Rothwell, in his book Another Country, wrote of the tragedy now emerging in remote communities ravaged by parental alcohol abuse, drug use, poverty, lack of health and education services. He described an emerging group of children whose mode of existence is no part of the mainstream culture in Australia, nor is it any part of Aboriginal culture. He described a

> … whole generation of kids growing up in these towns in a totally different headspace – another world, one that European culture knows nothing about and Aboriginal culture knows nothing about[34].

**Interpretation of the New Provisions**

The new provisions use the singular "customary law", a term that is not defined in the legislation. It is used in conjunction with "cultural practice" and the composite form of words tends to convey a broad and not a restricted definition - "**any** form of customary law or cultural practice". Use of "any" and use of the conjunction "or" tend to broaden the phrase. It might have been argued that

"customary law" standing alone could bear a confined legal definition under our laws. But when used with "cultural practice" the combination covers a much broader field. Depending on one's definition of customary law, that concept itself may cover many areas of cultural practice. The form of words used in the legislation indicates the intention of Parliament to cover the field so that whether a relationship or practice is part of customary law or merely a cultural practice would not matter.

As enacted the composite term includes all of the protocols, obligations and secret/sacred aspects of men's and women's business referred to by Pat Dodson[35]. The composite term includes the web of relationships, rights and responsibilities referred to by the WALRC[36] as well as the body of rules, values and traditions referred to by the NSWLRC[37] and the rules governing all aspects of Aboriginal life referred to by the NTLRC[38].

The new provisions are limited in application. The prohibition on taking any customary law or cultural practice into account applies only in mitigation or aggravation of "the criminal behaviour to which the offence relates"[39]. "Criminal behaviour" is inclusively defined[40] as "any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question, and, any fault element relating to such a physical element".

The Commonwealth *Criminal Code* provides that "an offence consists of physical elements and fault elements"[41]. To establish guilt the physical elements and, usually, one of the fault elements must be proved[42]. A physical element may be an act, omission or a state of affairs so long as it is voluntary[43]. Fault elements may be intention, knowledge, recklessness or negligence[44].

By limiting the prohibition on taking account of customary law or cultural practice to the "criminal behaviour to which the offence relates" as defined, the limitation imposed by the new provisions will apply only to the elements of the offence – not to matters personal to the offender. Those matters personal to an

offender are arguably "antecedents" which remain available for the Court to consider because the amendments have left in s 16A(2)(m) "The character, antecedents, age, means and physical or mental condition of a person" as matters the sentencing Court must take into account if relevant and known to the Court when sentencing. By removing "cultural background" from subsection 16A(2)(m), an inference could arise that the Court should no longer take "cultural background" into account in sentencing so that when sentencing an Aboriginal offender that offender's antecedents could be considered but arguably not his/her cultural background. For an offender who lives under customary law such an interpretation would lead to absurdity because such an offender's antecedents would necessarily include cultural background.

This ambiguity is not easily resolved by reference to the Second Reading Speeches. The Attorney-General said:

> The Australian Government firmly rejects the idea that an offender's cultural background should automatically be considered, when a court is sentencing an offender, so as to mitigate the sentence imposed[45].

In the Second Reading Speech in the Senate Senator Ellison said something quite different:

> What we are saying is that by taking out cultural background and leaving in antecedents … we are treating everyone in the same fashion. That is any person who comes before the Court will have their antecedents considered, and those antecedents, by the very definition of them will include the person's cultural background. But what we are saying is that you should not place too much emphasis on cultural background to the exclusion of other factors and, in fact, to the extent that justice may be distorted. Of course there will be a variety of cultural backgrounds of the people coming before the Courts of Australia. That can well be considered in the antecedents of the individual concerned – and not just an indigenous cultural background but others, whether from the variety of overseas countries or not. That needs to be remembered. The question of antecedents has been left there deliberately for that reason, that there will be an

> overall consideration of the person and that person's background when they come before the Court. It is just that we do not believe that cultural background should be used in a way that could distort the administration of justice[46].

Because the new provisions limit the power of Judges when sentencing Aboriginal offenders, Judges will no doubt interpret the provisions strictly. Ambiguity that would allow reference to the Second Reading Speeches[47] could arise from the failure to define "customary law" in the legislation. But there is no assistance on that issue in the Second Reading Speeches of Senator Ellison in the Senate[48] and the Attorney-General in the House of Representatives[49]. Each emphasised the origin of the new provisions in the 2006 COAG Recommendation. Yet when the amendments to the *Crimes Act* were considered, that legislation applied only to Commonwealth offences and not to any State or Territory offences dealing with violence or child abuse in Indigenous communities. Now the new provisions apply to sentencing for all offences against the laws of the Northern Territory[50].

If the contentions advanced in this paper are established – that the limitation imposed on judicial sentencing discretion will in some cases require unequal treatment of Aboriginal offenders and prevent Judges sentencing Aboriginal offenders from complying with the spirit of the judicial oath or affirmation to "do right by all manner of people" – that would form another basis for a restricted interpretation of the new provisions. Judges may well believe that the Parliament would not have enacted legislation requiring such unequal treatment or depriving them of the ability to remain true to the spirit of their judicial oath.

**Equal Treatment**

No-one doubts that equality under the law and equal treatment under the law are essential to the proper administration of justice. Those principles are well-established and found in the International Covenant on Civil and Political

Rights to which Australia is a party. In a country such as Australia where all its citizens arguably live under the rule of law, these principles are fundamental. Against that background it is interesting to note that on the one hand Senator Ellison relied on the need for equal treatment in his Second Reading Speech to justify the amendments to s 16A[51]:

> The government is concerned that all Australians are treated equally under the law and wishes to ensure that every Australian is subject to the law's protection and equally subject to its authority.

On the other hand, the ALRC in 1986[52] and the NTLRC in 2003[53] relied on equal treatment in the form of non-discrimination as a basis for taking account of Aboriginal customary law.

This apparent contradiction flows from a failure by the Commonwealth to appreciate the true meaning of equality. That is because the concept of equality is itself problematic in the sense that equal treatment of unequals can be as unjust as unequal treatment of equals[54]. Judges in other parts of the world working from a broad and well-developed background of human rights jurisprudence understand this. Tanaka J in the South West Africa Cases said:

> The principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal[55].

So understood, when a judicial officer exercises the sentencing discretion, equality requires that "unequals" are treated differently. This happens regularly in exercising the sentencing discretion. Young offenders are treated differently from adult offenders. Repeat offenders are treated differently from first offenders. Those suffering mental illness are treated differently from those arguably mentally healthy. Those who steal money because they are poor and their children are hungry are treated differently from those well-to-do thieves whose

greed motivates them to steal. Insofar as Aboriginal offenders live their lives in compliance with customary law or cultural practice, an Aboriginal offender should be treated differently from another offender in circumstances where customary law or cultural practices impact on the offender's culpability for the criminal behaviour involved in the offence. Such differential treatment would not involve unequal treatment but allow for the equal treatment of offenders taking account of their personal differences.

The Commonwealth has attempted to confine its legislation to the criminal behaviour constituting the particular offence. But that in itself amounts to unequal treatment under the law for Aboriginal offenders who live their lives under customary law. Customary law and cultural practice are personal matters and affect individual offenders in different ways:

> To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself[56].

Such unequal treatment could occur in a number of different ways. Arguably it would not occur where an offender has undergone or will undergo punishment under customary law for the same offending that breaches the laws of the State. Whether that Aboriginal traditional punishment is physical (spearing or such) or involves banishment or temporary exclusion from the community or any other form of traditional punishment, the sentencing Judge will be able to take that other punishment into account in mitigation when sentencing because traditional punishment is not part of the "criminal behaviour" as defined in the legislation. For this reason the new provisions will not lead to double punishment for those living under customary law.

In the Second Reading Speeches no reference was made to the "promised bride" cases[57] in the Northern Territory. Yet the new provisions seem to be aimed at that situation where an Aboriginal offender was treated more leniently because

customary law supposedly allows underage sex. It is interesting to note that the "promised brides" defence is unknown to judicial officers and lawyers working in Western Australian courts[58]. There is some hint in Western Australia that such defences are part of the "bulldust" customary law sometimes heard of in our courts. Whatever the explanation, it is not a matter we meet when sentencing Aboriginal sex offenders in Western Australia.

On the other hand in Aboriginal sex cases it is often part of the prosecution case that the offender's sexual contact with the victim was prohibited by customary law because of kinship prohibitions. That is a matter judicial officers usually take into account in aggravation of the sexual offending, a practice endorsed by the ALRC in 1986[59] and consistent with the 2006 WALRC recommendations[60]. Under the Commonwealth legislation that would no longer be allowed. Yet the relationship between a sex offender and his victim is a matter that judicial officers regularly consider in sex offending by non-Aboriginal offenders. The prohibition in the legislation thus appears to require unequal treatment of sex offenders if they are Aboriginal offenders living under customary law.

Abuse of trust is one of the most serious – but unfortunately common – aggravating factors in sentencing child sex offenders[61]. Such offenders often gain access to children by abusing a position of trust as a family member or relative or a person in authority. In the case of an Aboriginal sex offender relationships are often governed by customary law. Customary law establishes the responsibilities and authority of persons living under customary law. A surprising effect of the new provisions is that when an Aboriginal sex offender is in a position of trust arising under customary law and the offending breaches that trust, the sentencing Court will not be able to take the breach of trust into account as a factor aggravating the criminal behaviour. Recently in Western Australia sex charges have been laid against some Aboriginal elders in the Kimberley. If the charges

are proved, the issue of breach of trust will need to be considered when sentencing these offenders. Judicial officers sentencing in the Northern Territory under the new provisions will be prevented from considering breach of trust in such circumstances. This is a surprising result which seems to be contrary to the Commonwealth's intentions in the Northern Territory so far as they relate to sex offending against children. And again, this amounts to unequal treatment of Aboriginal offenders living under customary law.

Another example of unequal treatment occurs where an Aboriginal offender commits an assault on a person viewing a sacred site or entering a sacred site or photographing a sacred site or handling sacred objects when the victim's actions breach customary law and the offender has responsibility under customary law for that particular sacred site or object. That is an important matter in mitigation of offending that judicial officers regularly take into account[62]. Under the new provisions no mitigation could be based on this customary responsibility of the offender. For non-Aboriginal offenders any evidence that an offender acted because of prior disrespectful behaviour by the victim such as showing disrespect for a war memorial or a religious icon would always be taken into account[63] in mitigation when sentencing a non-Aboriginal offender. Again the legislation requires unequal treatment based on whether the offender is Aboriginal.

**The Judicial Oath or Affirmation**

When I was sworn in as a Judge the words of the judicial oath – "to do right by all manner of people"[64] impressed on me the most fundamental commitment required of me – that I must put aside all personal preferences, all my own prejudices as well as all my sympathies – so that in undertaking my judicial duties I ensured that I treated all kinds and sorts[65] of people fairly. It was an undertaking on a personal level and, in another way, expressed an essential principle of our justice system. There is something very egalitarian about doing right by all manner of people – those who are offensive and those who are nice –

the rich and the poor, the powerful and the powerless. It seemed essentially a requirement to respect all the sorts of people who come before the Court and do right by them.

The new provisions are contrary to the spirit of the oath as I have understood it and lived it. The new provisions do not respect customary law or cultural practices. Those of us who have met and known Aboriginal people who live under customary law recognise the "all encompassing reality"[66] that customary law is in their lives. To leave it out when sentencing touches on my ability to do right by such Aboriginal offenders.

**Sentencing Aboriginal Offenders**

Judges apply the same principles when sentencing non-Aboriginal offenders as they apply in sentencing Aboriginal offenders. But the Courts have for a number of years accepted that membership of a particular ethnic group should be taken into account. In ***Neal's*** case Brennan J held:

> The same principles are to be applied, of course, in every case, irrespective of the identity of the 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 administration of 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.[67]

The new provisions directly alter the principle in ***Neal's*** case. A different principle applies in sentencing Aboriginal offenders, i.e.; that customary law or cultural practice cannot be taken into account in mitigation or aggravation of criminal behaviour. All material facts can no longer be taken into account by sentencing courts sentencing an Aboriginal offender.

Race itself is not a permissible ground of discrimination in the sentencing process. Malcolm CJ in ***Rogers & Murray***[68] emphasised the point that a different approach to sentencing of Aborigines based on their Aboriginality would be contrary to s 9 of the *Racial Discrimination Act*. Although the new provisions do not name Aboriginal offenders, the reliance in both Second Reading Speeches on the 2006 COAG Recommendation and the inclusion of the new provisions in the Northern Territory emergency legislation leads inevitably to the conclusion that Aboriginal offenders are the intended target of this legislation.

In ***Fernando's*** case[69] Wood J set out a number of propositions relevant to the sentencing of Aboriginal offenders. The sentencing propositions from ***Fernando's*** case are widely relied on by Judges in other jurisdictions. The new provisions will have an impact on some of these propositions.

> (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of a particular 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.

The same sentencing principles no longer apply when sentencing Aboriginal offenders under the new provisions. The Court is required to ignore material facts in some cases.

> (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.

The effect of the new provisions is to prevent customary law or cultural practice from throwing any light on the particular offence if in doing so customary law or cultural practice would mitigate or aggravate the criminal behaviour.

> (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 their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

As I have noted in this paper customary law and cultural practice have nothing to do with alcohol abuse and therefore this principle remains unaffected by the new provisions.

> (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.

This principle remains unaffected by the new provisions.

> (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.

This principle has been picked up and adopted in a number of appellate Court decisions[70]. It is a well known principle of sentencing Aboriginal offenders and is not affected by the new provisions.

> (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective

> guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

This principle is limited by the new provisions in the sense that often the objective seriousness of the crime within its local setting will be determined by reference to customary law or cultural practice. As discussed above that would occur when the criminal behaviour is aggravated by breach of kinship rules or breach of trust or mitigated by the offender's responsibilities under customary law. These matters could no longer be considered in sentencing under the new provisions.

> (G) That in sentencing an Aborigine 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 and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

This principle is not affected by the new provisions because such mitigation does not relate to the criminal behaviour constituting the offence but, instead takes account of the experience of imprisonment.

**Conclusion**

Judges sentencing Aboriginal offenders under the new provisions will no longer be able to apply the same sentencing principles when sentencing Aboriginal offenders who live under customary law as are applied when sentencing other offenders. Judges will not be able to consider all the material facts when sentencing such Aboriginal offenders. In some cases aggravating factors based on relationships or breach of trust will not be able to be taken into account in sentencing. In other cases mitigating factors based on customary law

will not be able to be taken into account in sentencing. Requiring such unequal treatment of some Aboriginal offenders is inconsistent with sentencing principles developed in Australia for sentencing Aboriginal offenders and is inconsistent with the spirit of the judicial oath requiring Judges "to do right by all manner of people". In sentencing some Aboriginal offenders under the new provisions Judges will be required "to sentence him as someone other than himself[71]".

[1] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986, Recommendation par 542, *Relevance of Aboriginal Customary Laws in Sentencing*, p 396

[2] *Royal Commission into Aboriginal Deaths in Custody (RCIADIC)*, National Report, 1991

[3] Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57, 1992, Recommendation par 8.14, *The Commission's Recommendation*, p 173

[4] *Crimes and Other Legislation Amendment Act*, No 182 of 1994, in force from 17 January 2005

[5] *Crimes Amendment (Bail and Sentencing) Act 2006*, No 171 of 2006, in force from 13 December 2006

[6] *Neal v The Queen* (1982) 42 ALR 609
*R v Fernando* (1992) 76 A Crim R 58
*Rogers & Murray v R* (1989) 44 A Crim R 301
*Juli v R* (1990) 50 A Crim R 31

[7] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986
New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000
Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law* 2003
Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006

[8] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Philip Ruddock (Berowra, Attorney-General, LP, Government), 28 November 2006. Also see *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Senator Chris Ellison (Minister for Justice and Customs, LP, Western Australian Government), 8 November 2006, p 3

[9] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Philip Ruddock (Berowra, Attorney-General, LP, Government), 28 November 2006, p 2

[10] The *Northern Territory Sentencing Amendment Bill 2003* pre-dates the amendments to the *Commonwealth Crimes Act*. It provides:
*'(2A) Despite anything to the contrary in this section, in sentencing an offender found guilty of a sexual offence involving a child under the age of 16 years, a court must not have regard to any Aboriginal customary law that relates to the circumstances of the particular case.'*

[11] *Northern Territory National Emergency Response Act 2007 (Cth)*, (No 129/07) s 91, date of assent 17 August 2007

[12] *Northern Territory National Emergency Response Act 2007 (Cth)* s 3

[13] *District Court of Western Australia Act 1969 (WA)*, Sch 1

[14] Kimberley Aboriginal Law and Cultural Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006 p 15

[15] Western Australia Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006, p 64

[16] Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006, p 64

[17] Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law*, p 11 par 3.9

[18] New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000, pars 3.18-3.19

[19] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986, pars 98-101

[20] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986, par 101

[21] Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15 - *'This Law has big important words.' Aboriginal Customary Law in the Kimberley*

[22] Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15

[23] Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006, p 64

[24] Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law*, pars 3.10-3.11

[25] 8 October 1998 – Port Hedland, Western Australia
October 1998 – Jiggalong Community, Western Australia
1 December 1998 – Albany, Western Australia
December 1998, July 2003 – Pilbara, Western Australia
June 1999 – The Kimberley (Broome, One Arm Point, Fitzroy Crossing), Western Australia
March 2000 – Geraldton, Western Australia. There were also earlier meetings in February 1999
13 August 2001 – Esperance, Western Australia
19 March 2002 – Goldfields, Western Australia
11 December 2002 – Bunbury, Western Australia
May 2007 – Fitzroy Crossing, Wyndham, Western Australia

[26] Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 95, September 2006, p 183

[27] *Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Senator Chris Ellison (Minister for Justice and Customs, LP, Western Australian Government), 8 November 2006, p 3

[28] Ken Brown, *Customary Law: Sex with Under-age 'Promised Wives'*, Alternative Law Journal Vol 32:1 March 2007, 14

[29] Justice Catherine Ann Davani (PNG), Justice Pradha Sridevan (India) and Judge Lucy Mailula (SA) - Saturday, 6 May 2006

[30] Mary Ann Yeats, *Criminal Justice without a Bill of Rights*, (2001-2002) 30 UWA L Rev 99 at p 100

[31] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986 – par 193
New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000 – pars 2.10 and 2.40
Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law* – Part 6 and Appendix A
Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006 – Recommendation 5

[32] Mary Ann Yeats, *Criminal Justice without a Bill of Rights*, (2001-2002) 30 UWA L Rev 99, p 101. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at [42] and *Dietrich* (1992) 177 CLR 292 per Brennan J at 305

[33] The date the treaty came into force internationally

[34] Nicholas Rothwell, *Another Country*, Black Inc., Melbourne, 2007, 114

[35] Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15

[36] Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006, p 64

[37] New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000, pars 3.18-3.19

[38] Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law*, par 3.9

[39] *Crimes Act amendment Act 1914 (Cth)* s 16A(2A)(a), (b) and *Northern Territory National Emergency Response Act 2007 (Cth)* s 91

[40] *Crimes Act Amendment Act 1914 (Cth)* s 16A(2B) and *Northern Territory National Emergency Response Act 2007 (Cth)* s 3

[41] *Criminal Code 1995 (Cth)* s 3.1

[42] *Criminal Code 1995 (Cth)* s 3.2

[43] *Criminal Code 1995 (Cth)* s 4.1. It may also be a result of conduct or a circumstance in which conduct, or a result of conduct, occurs. Also see s 4.2 for voluntariness.

[44] *Criminal Code 1995 (Cth)* s 5.1(1)

[45] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Philip Ruddock (Berowra, Attorney-General, LP, Government), 28 November 2006, p 2

[46] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Senator Chris Ellison (Minister for Justice and Customs, LP, Western Australian Government), 8 November 2006, p 4

[47] *Acts Interpretation Act 1901 (Cth)* s 15AA, s 15AB(2)(f)

[48] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Senator Chris Ellison (Minister for Justice and Customs, LP, Western Australian Government), 8 November 2006

[49] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Philip Ruddock (Berowra, Attorney-General, LP, Government), 28 November 2006

[50] *Northern Territory National Emergency Response Act 2007 (Cth)*, (No 129/07) s 91, date of assent 17 August 2007

[51] *Crimes Amendment (Bail and Sentencing) Bill 2006*: Second Reading Speech, Senator Chris Ellison (Minister for Justice and Customs, LP, Western Australian Government), 8 November 2006, p 3, p 2

[52] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1985, par 130-131

[53] Northern Territory Law Reform Commission, *Report of Commission of Inquiry into Aboriginal Customary Law*, Part 6

[54] Mary Ann Yeats, *Cultural Conflict in Community-Based Corrections*, (1991) 2 Crim LJ 354
Also see Foley, *Aborigines and the Police*, in *Aborigines and the Law* 160, 167 (P. Hanks & B. Koen-Cohen ed 1984)

[55] Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* 1945, p 115; quoted in the dissenting Opinion of Tanaka J, *South West Africa Case (Second Phase)* (1966) ICJ Rep 6 (as reported in E. Lauterpacht, ed, (1968) 37 *International Law Reports*, Butterworths, London, p 463)
See also *inter alia* Article 26 ICCPR; General Recommendation XX111 (51) Concerning Indigenous Peoples: UN Doc CERD/C/51/Misc Rev 4 (August 1997)

[56] *R v Fuller-Cust* [2002] 6 VR 496 per Eames J (dissenting) [79]

[57] *The Queen v GJ* (unreported Supreme Court of the Northern Territory, Martin CJ, 28 September 2005) SCC 20418849
*The Queen v Mike Redford* (unreported Supreme Court of the Northern Territory, Mildren J, 26 March 2007) SCC 20624214

[58] This defence is unknown in my court. I have never come across this defence during my 14 years on the bench, nor my previous years as counsel appearing in criminal trials. The Magistrate in Broome and the principal legal officer of the Western Australian Aboriginal Legal Service have had no experience of this either. Also see WALRC, Project 94, January 2006, Background Papers, Background Paper 9, Greg McIntyre: *Aboriginal Customary Law: Can It Be Recognised?* p 343

[59] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31, 1986, par 510

[60] Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Project No 94, September 2006, par 181

[61] *Jermain* (2004) WASCA 293
*Chilvers* (2003) WASCA 87
*Dempsey* (unreported Supreme Court of Western Australia: Court of Criminal Appeal, 9 February 1996) Lib No 960059

[62] *R v Gregory Warren, Anthony Ross Coombes and Percy Gordan Tucker* (unreported South Australian Supreme Court, Doyle CJ, 3 April 1996) Judgment No 5543
Director of Public Prosecutions Reference No 1 of 1999 [1999] NTSC 23, 14 and 15 December 1998, 12 March 1999

[63] D.A. Thomas, *Principles of Sentencing*, 2nd ed, Heinemann Education Books Ltd, London, 1970, p 206

[64] *District Court of Western Australia Act 1969 (WA)*, Sch 1

[65] Macquarie Dictionary definition of *'manner'* – 'kind; sort'

[66] Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15

[67] *Neal v The Queen* (1982) 149 CLR 305 per Brennan J at 326

[68] *Rogers & Murray v R* (1989) 44 A Crim R 301 per Malcolm J at 307

[69] *R v Fernando* (1992) 76 A Crim R 58 per Wood J at 62-63

[70] *Rogers & Murray v R* (1989) 44 A Crim R 301
*Juli v R* (1990) 50 A Crim R 31
*R v Gibuma & Anor* (1991) 54 A Crim R 347

[71] *R v Fuller-Cust* [2002] 6 VR 496 per Eames J (dissenting) [79]