CUSTOMARY LAW – IS IT RELEVANT?

The Hon Justice D Mildren, RFD

In 1986 the Australian Law Reform Commission published its report No 31 on the Recognition of Aboriginal Customary Laws. The report made a number of recommendations, some of which were accepted by the various Federal, State and Territory Legislatures and some of which were not. There appear to have been a number of principles which guided the Commissioners in reaching their conclusions and it is necessary to reflect on these principles again to see to what extent they remain relevant in the twenty-first century.

Fundamentally, the report recognised that the reality of customary law still influenced the lives of traditionally oriented Aboriginal people; that Federal Government policy at that time recognised the right of Aborigines to retain their identity and traditional lifestyle, or, where they desire, to adopt a partially or wholly European lifestyle; that non-recognition can, in some cases, lead to injustice; that Aboriginal people supported some form of recognition of their laws and a better relationship between traditional Aboriginal people and other Australians; that in some cases customary law may assist in the maintenance of law and order; and that recognition might enhance Australia's international standing and reputation. On the other hand, there were arguments that recognition could discriminate against women; were contrary in some cases to basic human rights; involved practical difficulties in working out their content and to whom they should apply; were racially discriminatory; and violated the basic notion of equality before the law: there should be 'one law for all'.

The Commission concluded:

> "that special measures for the recognition of Aboriginal customary laws will not be racially discriminatory and will not involve a denial of equality before the law or equal protection as those concepts are understood in comparable overseas jurisdictions, provided the measures:

- are reasonable responses to the special needs of those Aboriginal people affected by the proposals;
- are generally accepted by them;
- do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.

Special measures should only confer rights on those Aborigines who, in the particular context of the measure in question, suffer the disadvantages or the problems which justify recognition. Thus the Commission has applied the following guidelines in making the recommendations in this Report:

- Aborigines should, wherever possible, retain rights under general law (e.g. to enter into Marriage Act marriages).
- Legislation should be no more restrictive than necessary to ensure fidelity to the customary laws or practices being recognised.
- Measures of recognition should not unreasonably withdraw legal protection or support for individuals, whether Aboriginal or non-Aboriginal."[1]

The underlying principles which guided the Commission's findings and recommendations are, it is submitted, as true today as they were twenty years ago. Recent legislative changes have seen departures in some critical respects from the recommendations which need to be discussed to see if there is a movement away from these fundamental concepts.

Changes to the Criminal Code relating to tribal marriages

A significant change to the law relating to the recognition of tribal marriages has come about as a result of the decision of the Court of Appeal in *Hales v Jamilmira*[2].

[1] Summary Report, pg 15, para 31

[2] (2003) 13 NTLR 14

In that case, the defendant was charged with unlawful sexual intercourse with a female under the age of 16. The female had been tribally promised to him. There was no allegation of lack of consent. The sentence imposed by the Court of Summary Jurisdiction was successfully appealed to the Supreme Court and the Crown appealed to the Court of Appeal which, by a majority, allowed the appeal and increased the sentence. The case gained significant media attention because the defence raised the question to what extent should leniency have been afforded by virtue of the fact that the defendant's conduct, although unlawful, was in accordance with tribal custom. An anthropologist had given evidence that sexual relations with a post-menarche promised wife by an older man was considered by the defendant's society as a "cultural ideal sanctioned and underpinned by a complex system of customary law and practice" and "as entirely appropriate – indeed, morally correct – within the traditional boundaries of the Burarra life-world". The Court held that whilst some proper recognition must be given to claims of mitigation, the Court must be influenced by the need to protect the community and that included women and children. At that time, if the defendant and the child had actually been married in accordance with tribal custom, the defendant could not have been convicted. The evidence did not support a finding that the marriage had taken place, but because there is no symbolic ceremony to mark the moment in time when a marriage would occur, it could not have been long after the parties had begun to cohabit. The legislative reaction to this state of affairs was two-fold. First, it removed from the Code the need for the prosecution to prove that the parties were not tribally married in such cases (and in a number of other cases involving offences of a sexual nature). Secondly, it dramatically increased the maximum penalties for such offences.[3]

These amendments arguably marked a significant change from a key recommendation of the Commission that, what should be recognised "is the actual, existing relationship between the parties. To deny to the parties protection or benefits based on a different view of preparedness for marriage is a distortion rather than a recognition of Aboriginal customary laws and it does nothing to advance the values being asserted."[4] Consequently, the Commission rejected the possibility of putting an

[3] *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* which came into force on 17 March 2004

[4] Report No 31, Vol 1, para 261

age limit on such marriages, notwithstanding that the marriageable age for females at that time was 16 (with parental consent)[5], foreign marriages involving females under 14 were not recognised[6] and there was concern in many Aboriginal communities at under-age marriages. The Criminal Code (NT) had clearly, up to the time of the amendment in 2004, reflected this recommendation. However, even in 1987 one of the Commissioners (Professor J R Crawford) believed that traditional marriages below the marriageable age should not be recognised so as to prevent marriages at too young an age[7]. As was noted in the subsequent decision of the Court of Criminal Appeal in *The Queen v GJ*[8], the amendments to the law stopped short of making such marriages illegal or void, but such marriages could not be consummated until the promised wife has turned 16.

In this respect, the legislature, it might be argued, has complied with the principles adopted by the Commissioners in that the legislation went no further than was necessary to protect those individuals who had entered into such marriages (e.g. in cases involving compensation, damages, rights to inheritance, etc under other statutory or common law provisions the marriage would still be recognised), but at the same time, protected such basic human rights of females and children as are recognised, for example, in the Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Discrimination Against Women. In considering the relationship between protecting minority rights and the rights of women to equality under Article 3 of the International Convention on Civil and Political Rights the Human Rights Committee has said:

> "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of

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[5] *Marriage Act 1961* (Cth) s 11

[6] *Marriage Act 1961* (Cth) s 88C(3)

[7] Report No 31, Vol 1, para 261

[8] (2005) 196 FLR 233 at 241 [36]

> women's right to equality before the law and to equal enjoyment of all Covenant rights...[9]
>
> The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law."[10]

The principles thus enunciated are also in conformity with principles established by the Court of Criminal Appeal. In *R v Wurramurra*[11] *the Court said:*

> "The Courts have been concerned to send what has been described as "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the Court to do so."

Nevertheless, in both *Hales v Jamilmira*[12] and in *The Queen v GJ*[13] the Court accepted that it is legitimate, when assessing the culpability of any offender for sentencing purposes to take into account whether what he or she has done has been in accordance with customary law, whether or not the offender knew he was breaching the criminal law and whether or not the offender was subjected to act as he or she did by social pressures within his or her community. To this extent, customary law may still be relevant, at least in relation to state and territory offences.

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[9] Human Rights Committee, General Comment 28 – Article 3 (equality of rights between men and women), para 5, in Compilation of General Recommendations adopted by Human Rights Treaty Bodies, UN Doc: HR1/GEN/.1.Rev 7, 12 May 2004, 178

[10] Human Rights committee, General Comment 28 – Article 3 (equality of rights between men and women), para 32, in Compilation of General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc: HR1/GEN/.1.Rev 7, 12 May 2004, 184

[11] (1999) 105 A Crim R 512 at 520 per Mildren, Thomas and Riley JJ

[12] (2003) 13 NTLR 14 at 29, 37, 48

[13] (2005) 196 FLR 233 at 239-240 [30]-[31]; 248-249 [71]

Changes to Commonwealth Law

In 2006, the Commonwealth Parliament passed the Crimes Amendment (Bail and Sentencing) Act 2006 which effected an amendment to the sentencing guidelines involving Commonwealth offences by introducing s 16A(2A) as follows:

> "However, the Court must not take into account under subsection (1) and (2) any form of customary law or cultural practice as a reason for:
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> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
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> (b) aggravating the seriousness of the criminal behaviour to which the offence relates."

This amendment was said to be the result of a decision made by the Council of Australian Governments made on 14 July 2006 following the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006[14]. The purpose of the amendment according to the Minister's Second Reading Speech was to:

> "...ensure customary law or cultural practice cannot be used as an excuse that the criminal behaviour concerned is somehow less culpable. All Australians, regardless of their background, will thus be equal before the law...
>
> The high levels of family violence and child abuse in Indigenous communities is appalling. The Australian government are (sic) committed to protecting Australians from criminal behaviour, and those who are most vulnerable are obviously those most in need of protection."[15]

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[14] See Explanatory Memorandum circulated by authority of the Attorney-General, the Hon Philip Ruddock, MP, and the two Supplementary (or Revised) Explanatory Memoranda

[15] Hansard Debates, House of Representatives, 28 November 2006, p 19

As was acknowledged by the Minister (and became clear during the debate), the amendment will not directly affect Aborigines who live in remote communities, nor will it have any effect on the appalling levels of violence or child abuse in those communities, because Commonwealth laws do not affect such matters, but it was passed in order to encourage the states and territories to pass similar laws. So far, no state or territory has done so, but that it not to say that state and territory governments will not come under pressure to adopt similar amendments in the future. The legislation has been criticised as "fundamentally flawed" by Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and National Race Discrimination Commissioner in an address to the 35th Australian Legal Convention, Sydney, 24 March 2007[16]. In the Northern Territory, the Opposition introduced the Sentencing Amendment (Cultural Practice and Customary Law) Bill 2006 which sought to prevent courts from having regard to customary law or cultural practices in sentencing. The Bill failed because the government considered that the Territory's laws already complied with the COAG decision.

What is the justification for this law? First, as was pointed out by the Shadow Attorney-General, Ms Nicola Roxon MP, the occasions when courts are called upon to consider such customary law as relevant to sentencing are quite rare. In the Northern Territory I know of only a handful of cases in the last 30 years. An amendment of this kind, should it be passed by the Territory Parliament will have a negligible effect on sentencing outcomes involving violent offending against women and children in remote Aboriginal communities for the simple reason that, in general, customary law does not authorise the use of violence against women and children.[17] Clearly the Act was the result of extensive media interest in the cases of *Hales v Jamilmira* and *GJ v The Queen*. The fact that the media hype wrongly portrayed these cases as rapes, and that the original sentences were increased significantly on appeal went unnoticed.

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[16] reproduced in *Balance* (Law Society of the NT), March/April 2007, p 17 at 21

[17] See Ken Brown, *Customary Law, Sex with under-aged 'promised wives'*, Alt L J, Vol 32:1, 11 at 14

The relevance of customary law

In my submission customary law or cultural practices sometimes provide relevant background material of a secondary fact to prove a primary fact which has traditionally been regarded as a mitigatory fact. For example in cases involving "pay-back", the relevant primary fact is that the accused has already been punished or in the future will be punished by others for his offence. The principle being invoked in such cases is that, to ignore this would expose the offender to an element of double punishment. In such cases the court applies exactly the same sentencing principles when sentencing an Aboriginal person as anyone else.[18] For example, if a person X committed a violent offence against Y, and before sentence, Y's relatives in order to punish X for what he did, inflicted violence upon X, it is submitted that the court ought to take this into account.[19] When the punishment has already been inflicted, no evidence about customary law is usually required. However, if the court is asked to take into account the possibility of future pay-back punishment, evidence of customary law is relevant to prove that future pay-back punishment is likely and the nature of the punishment to be inflicted. The proposed punishment may or may not be unlawful.[20]

Furthermore, pay-back punishment may well be relevant to contrition and remorse and, therefore, to prospects of rehabilitation, because the offender will usually have to give his consent to the punishment. In such cases, it is often necessary for the court to know if the offender will be accepted back into his community, which is the

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[18] *R v Minor* (1992) 2 NTLR 183 at 194-195; *Jadurin v The Queen* (1982) 7 A Crim R 182; (1982) 44 ALR 424 at 428-429 (Full Court of the Federal Court)

[19] *Gooley* (1996) 66 SASR 380; (1996) 87 A Crim R 209 is to the contrary, but in my respectful opinion it is wrongly decided on this point. I note that the submission of counsel on this point was dismissed in a single sentence without any discussion of the relevant principles. It is surprising that *Gooley* appears to be the only case directly on the point. However, as a matter of principle the High Court recognised that there should be no double punishment for the same acts: *Pearce v the Queen* (1998) 194 CLR 610. Injury suffered by an offender in the course of committing an offence was treated as mitigatory by the Court of Appeal in *Barbery* (1976) 62 Cr App R 248; see also D A Thomas, *Principles of Sentencing*, 2nd edn, p 206. In *Ireland v Samuels; Laube v Samuels* (1974) 7 SASR 19, Bray CJ held that two prisoners convicted and sentenced in Victoria for illegal use of a motor vehicle should not be punished for the illegal use of the same vehicle in South Australia as it was one continuous journey "and it is not right that they should be punished twice for the same offence". *Gooley* recognised that tribal punishment could be taken into account. It is difficult to see why there is a distinction.

[20] See for example *Munungurr v The Queen* (1994) 4 NTLR 63 where the Court accepted that the "punishment" did not involve any physical punishment and as part of the conditions of a bond required the offender to be dealt with in the traditional manner. A description of what was involved is at pp 76-77. See also *R v Minor* (1992) 2 NTLR 183 at 185.

usual consequence of undergoing such punishment. If the court is considering a partially or fully suspended sentence on conditions, acceptance or non-acceptance back into the community may be relevant to any residential condition imposed by the court and would also affect the court's view of the possibility that the accused may commit further offences against the victim or others in the community.

The court is less likely to take a lenient view if there is evidence that the offender's behaviour has not resulted in an acceptable solution to tensions in the offender's community. In some, admittedly rare cases, failure by an accused to submit to tribal punishment has lead to feuding with resultant further violence, or, to punishment being meted out to the offender's relatives. A sentencing court's principal concern is to ensure, as best it can, the protection of the community. If the court were to be unable to inform itself of these matters, the court would be constrained in the approach it will be required to take. Thus, traditional punishment may have relevance to addressing ordinary sentencing principles and the weight to be given to remorse, contrition, future prospects of rehabilitation and community protection. In addressing these issues, the court neither gives recognition to customary law nor does it seek to enforce it either against the will of the accused, or with the accused's consent if the punishment is itself illegal or likely to be so. It merely gives weight to matters of fact which provide evidence relevant to ordinary sentencing considerations.

Provocation

Provocation is another area where customary law may become relevant. In those states where provocation is still a complete defence to a charge of assault,[21] and in all jurisdictions where provocation reduces murder to manslaughter, the accused's defence based upon provocation will depend upon an appreciation of the nature and gravity of the provocative conduct which in such cases may well require evidence from an appropriate expert. Matters of fact of this nature are not difficult to visualise and could include the revelation of tribal secrets to women; the crossing into a secret area or the viewing of secret objects by women; the unauthorised possession of sacred knowledge and objects; unauthorised sorcery; sexual intercourse between

[21] s 269 of the *Criminal Code (Qld)*; s 246 of the *Criminal Code (WA)*

members of the wrong clan or skin; the usurpation of tribal privileges or duties; and various kinds of insult.[22]

In *Masciantonio v The Queen*[23] the High Court accepted that the accused's personal characteristics were relevant to the assessing the gravity of the conduct said to constitute the provocation. Brennan, Deane, Dawson and Gaudron JJ said[24]:

> "Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in the manner which would encompass the accused's actions."

Later, their Honours said[25] that the question is:

> "...whether an ordinary person **could** have lost self-control to the extent that the accused did. That is so say, the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intent to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it... It is the nature and extent – the kind and degree – of the reaction which could be caused in an ordinary person by the provocation which is significant."

It is submitted that expert evidence of customary law could well be relevant to those issues. Indeed, the Crown may also have its own reasons for calling evidence on this

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[22] see Mary W Daunton-Fear, *Sentencing in Western Australia*, University of Queensland Press, 1977, pp 198-199

[23] (1995) 183 CLR 58

[24] at p 67

[25] at p 69

topic. In *Yildiz v R*[26] evidence led by the Crown concerning attitudes of members of the Turkish community towards the passive partner in a homosexual relationship was held to be admissible to show the appellant's motive in killing the deceased.

If evidence of this kind is admissible for this purpose it is difficult to see why it would not be relevant and admissible to prove the nature and quality of acts or words said to be provocative.[27] If a verdict of manslaughter is reached because of provocation the nature and quality of the acts by the victim said to amount to provocation is a relevant sentencing consideration. Clearly, s 16AB(2) of the Commonwealth Crimes Act, if enacted in its present form by a state or territory legislature would not affect the admissibility of evidence of customary law at trial. It is arguable that it would not affect the admissibility of such evidence on a plea hearing, whether following a trial or a guilty plea, because strictly speaking it is the provocation offered which lessens the gravity of the offence rather than the customary law or cultural practice. In cases other than murder, it is well established that provocation may be a relevant sentencing consideration.[28]

Other defences

It is conceivable that customary law may become relevant to a defence of duress. It is not necessary to examine the limits of this defence as it now applies in the Northern Territory or elsewhere, but it is conceivable that evidence of customary law could be relevant to determine the reasonableness of the accused's belief that the threat against him was likely to be carried out, that there was no reasonable way that the threat could be rendered ineffective and that his conduct was a reasonable response to the threat. Such a case could arise if an offender was charged in relation to his role in carrying out tribal punishment in accordance with Aboriginal customary

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[26] (1983) 11 A Crim R 115 (Victorian Full Court). See also *Atieno* (Victorian Full Court, unreported, 06/03/1991 discussed in Fox and Freiburg, *Sentencing State and Federal Law in Victoria*, Oxford University Press, 12th edn, p 286)

[27] See *Khan* (1996) 86 A Crim R 552 at 557-558

[28] The Sentencing Act (NT) s 5(1) does not specifically refer to the extent to which the victim is to blame for the offence, but it does refer to the extent to which the offender is to blame (s 5(1)(c)). Provocation has been taken into account in England: *Blake* [1979] Crim LR 735; *Heyfron* [1980] Crim LR 663; *Knight* [1980] Crim LR 253; and in Australia on numerous occasions, see for example, *Morabito* (1992) 62 A Crim R 82; *Bruzzese* (1970) VR 813 at 817; *Okutgen* (1982) 8 A Crim R 262 at 264. See also Ruby, *Sentencing*, Butterworths, 3rd edn, pp 187-188. See also Crimes (Sentencing) Act 2005 (ACT), s 33(1)(q); Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3)(c)

law. The last reported case of a killing carried out on orders of tribal elders in accordance with tribal law is *R v Charles Mulparinga*[29], but then, as now, duress is not a defence to murder. Nevertheless, it could be a defence to a lesser offence such as recklessly endangering serious harm under s 174D or negligently causing serious harm under s 174E of the Criminal Code (NT), if for example the defendant was involved in a spearing. Even if the defence is not successful or not available, the fact that the defendant operated under the influence of a threat would be a relevant sentencing consideration.[30] In some circumstances at least, it may be possible to argue that the relevant sentencing fact is that the accused acted under duress, rather than in accordance with tribal custom and, to this extent, the wording of s 16A(2) of the Crimes Act (Cth) may not affect the ability of a sentencer to have regard to that fact.

Bail

The Crimes Amendment (Bail and Sentencing) Act 2006 (Cth) also introduced s 15AB which relates to bail:

> **"15AB Matters to be considered in certain bail applications**
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> (1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Commonwealth, or in determining conditions to which bail granted to such a person should be subject, a bail authority:
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> (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

[29] (1953) NTJ 219

[30] see Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3)(d); *Principal Registrar of Supreme Court (NSW) v Tran* (2006) 166 A Crim R 393

(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 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."

It is difficult to know what s 15AB(1) is designed to achieve which is not already a consideration under the Bail Act (NT) s 24(c), however the principal concern is with s 24(b) and (c).

The most common problem in bail applications relates to applications for temporary release to attend funerals or other ceremonies where the prisoner has an important or pivotal role to play. It is clear that s 15AB will not affect the position in respect of that kind of application.

Alternatively, in rare cases bail has been sought in order to undergo tribal punishment. Section 15AB(2) does not specifically refer to tribal punishment but requires the court to take into consideration the fact that the prisoner lives in a remote community and the potential impact of that fact upon the prisoner. If it is

directed at prohibiting bail in order to undergo tribal punishment it does not achieve that purpose. The Supreme Court of the Northern Territory has refused bail solely for this purpose whenever the punishment is or is likely to be unlawful.[31] However, tribal punishment can take many forms and does not necessarily involve the infliction of any violence on the defendant[32], or the violence may amount only to a symbolic touching. As the defendant has consented to the punishment this would not in law amount to an assault.

The only other purpose of s 15AB which comes to mind is to require the courts to ignore customary law or cultural practices for the purpose of assessing the circumstances of the offence, its nature and seriousness, the strength of the evidence against the accused and the likely penalty when considering the probability that the defendant will answer his bail. In practical terms this is unlikely to affect the outcome except in very, very rare cases.

Conclusion

Customary law is still and is likely to remain relevant in an evidentiary sense to both criminal responsibility and sentencing for some time to come even if the states and territories were to adopt the Commonwealth's model.

However, the model may well have an impact on sentencing where the offender committed an offence because he was following his customary law or cultural practices. This has the potential to affect sentencing in areas of sexual offences involving tribal marriages, or where a person is charged with a violent offence carried out as part of traditional payback or punishment inflicted on a person who has broken traditional law.[33] It may also have an impact should the participants involved in the customary practice of circumcision of boys under the age of 18 are charged with assault causing bodily harm, but in such cases the community may have to reconcile

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[31] *R v Minor* (1992) 2 NTLR 183 at 195-196; *Barnes v The Queen* (1997) 96 A Crim R 593; *Re Anthony* (2004) 14 NTLR 6

[32] see for example, the punishment proposed in *Munungurr v The Queen* (1992) 4 NTLR 63 at 76-77

[33] The breach of traditional law will usually be an offence against state or territory law, but there are many instances where the offence does not amount to an offence against such laws; e.g. sacrilege, unauthorised possession of sacred knowledge and objects, unauthorised sorcery and many others.

such a prosecution with its failure to charge parents of Anglo-Saxon heritage who adopt the same practice for purely cultural and not medical reasons.

Finally, state and territory legislatures will have to carefully consider the constitutionality of any such proposed law as to whether or not the law conflicts with the Racial Discrimination Act 1975 (Cth) s 10(1),[34] if the effect of the law is to prevent a recognised sentencing principle to operate only because of the defendant's Aboriginality.

[34] *c.f. Rogers v Murray* (1989) 44 A Crim R 301 at 307, where Malcolm CJ held that s 9 of the Act in the form in which it then existed required the same sentencing principles to be applied to an Aboriginal as those in any other case. Section 9 has since then been amended.