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Aboriginal and Torres Strait Islander Commission
2004 3rd Permanent Forum on Indigenous Issues
Third Session 10-21 May 2004

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CULTURE

- 1 | ^{Mr} Thank you Chairman
- 2 | I deliver this statement on behalf of the Aboriginal and Torres Strait Islander Commission.
- 3 | Firstly ATSIC would like to bring to the attention of the Permanent Forum members that the Australian government is abolishing ATSIC.

- 4 | This will be ATSIC's last international meeting.
Mr Chairman -
- 5 | ATSIC's recommendations to the Permanent Forum on culture are concerned with the complex issues that arise in relation to the practice of aboriginal customary law and its relationship with the international human rights obligations of states.

- 6 | ~~(ATSIC will also provide the Permanent Forum with recommendations on language but in the interests of time will submit those.)~~

- 7 | ATSIC's key recommendation is that the Permanent Forum compile a comprehensive paper documenting the jurisprudence of the United Nations human rights system that provide guidance as to how aspects of recognition can be achieved consistent with the international human rights obligations of states.

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This is
the
basis
of
the
02.

- 8 | The Northern Territory decision in *Jackie Pascoe v Peter William Hales* (which has been already been raised by the Australian government at this forum) led to a fleeting reopening of public debate about the status of Aboriginal customary law in Australia.

The decision is as much about inertia of states as it is about the detrimental effect of distorted customary law upon aboriginal women and raises important questions about how states can adequately resolve the relationship between the practice of aboriginal customary law and municipal legal systems.

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~~It is as much about state inertia and state silence because distorted customary law practices and its disproportionate impact upon indigenous women's well being, integrity and human rights, is not a new phenomenon.~~

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Indeed almost 20 years prior to the decision in *Jackie Pascoe v Peter William Hales* where an aboriginal man was at first instance imprisoned for only one day for sexual assault of an aboriginal girl, the same judge had stated that:

the same judge who delivered a one day custodial sentence
"There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal communities as it is in the white community... and indeed the chastity of women is not as importantly regarded as in white communities. Apparently the violation of an Aboriginal woman's integrity is not nearly as significant as it is in a white community"

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That comment was made 22 years ago and similar derogatory comments about aboriginal women have been made by the judiciary for decades in sentencing decisions involving rape, murder and sexual assault that devalue the integrity of aboriginal women.

* Almost 20 years prior to the JP decision
The same judge who gave a one day custodial sentence for sexual assault of a girl made these comments on another customary law case in the NT

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sexual assault of a girl said:

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fudging

ATSIC would note that this means that many agencies and many public institutions are complicit in the ~~fudging~~ of human rights in relation to aboriginal women for many decades. ~~10/12~~

On appeal ^{in the decision} ~~Riley J~~ in *Hales v Jamilmira*^{iv} overturned the one day custodial sentence stating that:

'... Whilst proper recognition of claims to mitigation of sentence must be accorded and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community including women and children from behaviour which the wider community regards as inappropriate.'

and Appl-As
ATSIC supports this. **view**

ATSIC also supports the drafting and formalising of firm sentencing directives and parliamentary guidance that provide a framework from which judges can (in relevant circumstances) recognise aspects of customary law but most importantly ensure that indigenous women too are the beneficiaries of international human rights.

~~In conclusion~~, ATSIC notes that there is substantial guidance within the international human rights system on this issue. 5

The Northern Territory Law Reform Commission, for example, drew upon some of this jurisprudence in its recently concluded inquiry into the recognition of Aboriginal customary law.

more importantly

ATSIC supports the comments of the Australian Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, Pru Goward who believes that ~~the~~ indigenous women who practice and know their custom ~~who~~ must be involved in any ~~such~~ ^{recogⁿ} process reflecting the importance of self-determination within communities of issues that affect them ~~and that~~ that: ^{Pru Goward} She also said that

That conflict or the tension should be worked out on a case by case basis [in relation to individual rights and customary law]. It is ~~also~~ important to recognise that custom and law can adapt to general social change, this allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid recognition of Aboriginal Customary Law.^{vi}

Indeed the Australia Law Reform Commission, (Australian Law Reform Commission Report No 31, The Recognition of Aboriginal Customary Laws) recommended that:

~~As far as possible aboriginal customary laws should 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.~~

↓
in conclusion
Chairman

ATSIC recommends that the Permanent Forum compile a comprehensive paper documenting the many comments of the United Nations human rights system, (for example, the Human Rights Committee General Comment 23 (50) on Article 27) on how aboriginal customary law can be practiced consistent with international human rights obligations of states. ^{starting}

recom^{ds}
ATSIC also ~~notes~~ that the Permanent Forum ~~can~~ formally request ECOSOC to engage the OHCHR to assist in this endeavour.

This would be of great benefit to both indigenous peoples and states.

X Thank you Mr Chairman

Thank you

ⁱ *Jackie Pascoe v Peter William Hales* Northern Territory Supreme Court 8 October 2002, http://www.nt.gov.au/ntsc/doc/sentencing_remarks/archives/Pascoe_08102002.html

ⁱⁱ *Jackie Pascoe v Peter William Hales* Northern Territory Supreme Court 8 October 2002, http://www.nt.gov.au/ntsc/doc/sentencing_remarks/archives/Pascoe_08102002.html

ⁱⁱⁱ *Gallop J in R v Lane* ALRC 1982b 22-23

^{iv} *Hales v Jamilmira* [2003] NTCA 9

http://www.nt.gov.au/ntsc/doc/sentencing_remarks/0/2003/0/ca9.htm

^v *Hales v Jamilmira* [2003] NTCA 9

^{vi} Pru Goward submission