Customary law and sentencing

By Professor Larissa Behrendt

When a public prosecutor raised issues of the high incidence of sexual assault in Aboriginal communities in the Northern Territory, it created a media frenzy.

Despite the fact that many reports have been written documenting this issue in Aboriginal communities across the country for decades, many written by Aboriginal women, it sparked a round of outrage by politicians and the knee-jerk reactions began. The federal government blamed the territory government (It was a law and order issue, they said); the territory government blamed the federal government (It was a result of underspending on housing, they said). And politicians and media alike mentioned that this violence was a result of Aboriginal culture.

Aboriginal people across the country were quick to say that physical and sexual abuse of Aboriginal women and children is not a part of Aboriginal culture and such behaviour does not represent the values of Indigenous culture.

This media frenzy coincided with the High Court hearing a special leave application in relation to the case of the *The Queen v GJ* in which a forty-year-old man had assaulted and sodomised a fourteen-year-old girl who had been promised to him as a wife. In sentencing the man, Chief Justice Brian Martin had balanced a range of factors including the severity of the crime and the fact that the perpetrator had thought that he had a right to act as he did under customary law.

I was amongst the Indigenous voices that called into question the original decision and agreed with the appeal court's decision to increase the sentence on the basis that too much weight had been given to the customary law defence. Aboriginal women have constantly asked the judiciary not to accept evidence given by defendants that violence and sexual assault are acceptable within Aboriginal culture and have also asked those undertaking the judicial process not to weigh customary practices that violate human rights above those of the victim. The appeal court increased the sentence and, as the chief justice himself pointed out, this was evidence that the appeal system worked to correct the error in this case.

Nowhere in the calls from Aboriginal women for the judiciary to reject so-called customary defences or to value the rights of victims more highly than cultural practices that breach human rights, was there a call for the blanket exclusion of customary law from the judicial decision-making process when determining a sentence. Those calls came from politicians.

The proposal to legislate to exclude customary law from the factors that can be considered in sentencing is dangerous. Like any attempt to restrict a judicial officer's capacity to weigh up all the relevant factors when sentencing, the inability to consider customary law at all will impede the capacity to ensure that a just sentence is given in each particular circumstance before the court. It is also a serious infringement on the judicial process by the legislature and, as such, has implications for the principle of the separation of powers.

But pointing the finger at the judiciary is an easy way for politicians to grand stand and score quick political sound-bites. Judges who hear criminal cases where violence has been committed against Aboriginal women and children are dealing with the symptoms of a far more complex social problem. And it is politicians, not the judiciary, who have the most power to profoundly influence the root causes of the cycle of violence and the breakdown of the social fabric in Aboriginal communities.

The situation in many Aboriginal communities, where there is chronic poverty and dysfunction, are the result of decades, even centuries of failed government policy and neglect. This neglect has occurred because of the failure to:

- provide basic essential services to Aboriginal communities across the country;
- provide adequate infrastructure in those same communities; and
- invest in human capital.

This neglect that has resulted in profound poverty, despondency and hopelessness. This creates an unravelling of the social fabric. An environment in which substance abuse and violence become normalised.

While the federal government claims to have a commitment to end the cycle of violence and abuse, it has also said that it will not put more money into the problem. It has been estimated that basic Indigenous health needs are under-funded by $450 million. Of the $100 million spent on its new policy of shared responsibility agreements, three-quarters was spent on administration. It does not spend adequately and when it does, it spends ineffectively. It abrogates its own responsibility for these issues while it blames state and territory governments and the judiciary for the problem. In the face of such a position, there is little hope that the root causes of violence in Aboriginal communities will be addressed. Judges will continue to be in the position of having to deal with the consequences of systemic and sustained government neglect.

The sad thing for many Aboriginal people faced with life in a dysfunctional Indigenous community is that, while this issue has captured the attention of Australians, the convenient finger-pointing at the judiciary and the blame shifting between governments does not bode well for the hope that something effective might be done to alter the situation.