Finger pointing ignores the issue

By Larissa Behrendt.

Larissa Behrendt is Professor of Law and Indigenous Studies and Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney and Director of Ngiya, the National Institute of Indigenous Law, Policy and Practice.

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 outspoken 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 courts 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.

No where, in the calls from Aboriginal women for the judiciary to reject so-called customary defences that seek to imply that mistreatment of women and children is culture 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 cyclical 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

Continued page 34...

Calls to scrap customary law misguided

By the Law Council of Australia.

The Law Council has labelled recent calls for Aboriginal customary law to be excluded from consideration by the courts as misguided, and urged governments to focus on more demanding social problems that require urgent attention.

The pleas came in the wake of Federal Indigenous Affairs Minister Mal Brough's calls for a national summit to "scrap" customary law as a mitigating factor in serious crimes.

But the President of the Law Council, John North, said that customary law was not being used as a means of avoiding criminal conviction.

"Customary law provides no lawful excuse for violent crimes or abusive behaviour," Mr North said.

He said courts had always taken into account any matter relating to the circumstances of an offender, whether it be cultural, religious or socio-economic.

"Courts should not be prevented from taking account of relevant matters affecting their sentencing decisions and Aboriginal behavioural customs are in no different category from the customs of the rest of Australia's multicultural community," he said.

"This country does not apply customary law as the law of the State and the Law Council is not aware of any case in which customary law has been used to determine guilt or innocence."

Customary laws have been recognised by the courts for decades as potentially relevant to the sentencing process in a variety of different matters.

However, domestic violence and abuse of children have never been recognised by the courts, or Aboriginal communities, as being justified by customary law.

"Limiting the discretion of the courts to consider customary law will not lead to equality – it will result in further disadvantage for one of the world's most disadvantaged minority groups," Mr North said.

"The Federal Government is demonising customary law, which is a sideshow to the real problems facing Indigenous communities in this country."

Finger pointing ignores the issue cont...

government policy and neglect. This neglect has occurred in three ways: the failure to provide basic essential services to Aboriginal communities across the country; the failure to provide adequate infrastructure in those same communities; and the failure to invest in human capital. It is this neglect that has created profound cyclical poverty, despondency and hopelessness, and an unravelling of the social fabric that create an environment in which substance abuse and violence become normalised.

While the Federal Government claims that is has a commitment to end the cyclical 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. With this as their position, there is little hope that the root causes of violence in Aboriginal communities will be addressed and 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.