Making the case against customary law

By Jodeen Carney MLA, Northern Territory Opposition Leader.

The *Lateline* interview with Dr Nanette Rogers has focussed national attention on violence against women and children. While much of the commentary has strayed into other areas, such as the dysfunction in many remote communities, it is the culture of male violence in communities that seems to have shocked most Australians.

There can be no doubt that a culture of violence exists in many Aboriginal communities. Violence is not new to women victims, some of whom bear the physical and emotional scars of years of domestic violence. One violent husband is known to have told police about the assault on his wife:

> *"I thought she'd eventually wake up after I bashed her; she usually does".*

The Chair of the Government's Domestic and Family Violence Advisory Council, Jane Lloyd, told *The Australian* newspaper:

> *"There are high levels of violence and that violent behaviour has become tolerated and acceptable".*[1]

Ms. Lloyd also said that the women in many of the communities are:

> *"...looking to our justice system to impose really strong penalties...at the outset, not after the second, third, fourth serious offence."*[2]

Lawyers and legislators must respond to this culture of violence. The Chief Minister's unfortunate view that more houses would, somehow, reduce the levels of violence is hardly an appropriate response. Violent Aboriginal men should be punished for their violent acts, and they should receive long periods of imprisonment. They should also be removed from their community while they wait to be dealt with by the Courts, and women need to be given practical assistance in order to escape the violence.

Predictably, cultural practices and customary law have also been discussed since the *Lateline* interview. Despite claims to the contrary, customary law is regularly used in the Territory's criminal Courts. When talking about her research for her doctoral thesis in the interview, Dr Rogers said she was

> *"...taken aback at how much emphasis was placed on Aboriginal customary law in terms of placing the offender in the best light, and how it 'closed off' the voices of Aboriginal women..."*[3]

The Chief Minister has, mischievously, trotted out the old line that customary law can be used as an aggravating factor. The Attorney-General has used this in the past, but has only ever suggested it occurred twice. I have invited him to provide me with more instances, but he has failed to do so.[4]

In her interview, Dr Rogers said that:

> *"...it's important to recognise that sometimes Aboriginal cultural practices do not benefit the victim. They benefit, more often than not, the offender, and if it means criticising those Aboriginal practices that constrain victims or witnesses from giving evidence and ensure the ability of the offender to keep behaving in exactly that same way, then why should there be an Aboriginal cultural practice that sustains that?"*[5]

Customary law in all its guises is used frequently in the Territory Courts in an attempt to reduce or excuse an offender's criminality. Defence lawyers urge the Court to take into account the fact some violent men have been subjected to payback, and ask the Court to take that into account when sentencing. Sometimes, they argue that the woman victim referred to "men's business" which made her attacker angry which is why he beat her. On other occasions, Courts hear how violent men are "initiated" and have "ceremonial responsibilities" and are asked to take these into account when sentencing.

When writing about a particularly violent case in Alice Springs in 2004, Paul Toohey quoted a Central Australian lawyer who said, when referring to the offender:

> *"Just because he lives out bush and hunts and dances, so f...ing what?"*[6]

There is nothing culturally appropriate about violence.

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ries could further explore whether a more formal and consistent approach needs to be taken, for example providing some sort of guidance in their sentencing acts.

But the Minister's appeal to abolish something that was set up to improve the justice system which was already so severely failing our Indigenous community (and broader community for that matter) is simplistic. Our justice system was not perfect before. Simply returning to it will not eliminate all violence.

In fact, some argue that the lack of clarity on the application of customary law and its precise limits have contributed to the damage, and confusion, within the community. For example, there could be express limits to make sure that customary law can't be used to excuse or belittle the seriousness of rape, assault and sexual abuse.

Simply abolishing customary law just isn't a perfect solution from some halcyon days that the Minister seems to yearn for. If it is removed, what will be achieved and what will go in its place? Let's not go from one mistake to yet another without calm and thorough debate.

It is clear that we have, collectively, been severely failing Indigenous communities. Many of the approaches of the past, however well meaning, have clearly not been successful in providing safe, happy and healthy lives for many Indigenous children and families.

We must revisit our plans, our support and our strategy. Swashbuckling change and pulling down everything that is an easy target without proper consideration will not provide the long term change that is so desperately needed. If the changes are misdirected, it will just leave us frustrated and no further advanced in another 10 or 20 years.

It's not culture and customary law that causes rape and abuse, it's the breakdown of culture and customary law. We cannot stabilise dysfunctional remote communities without reinforcing both customary and non-Indigenous law. That is the bottom line of numerous State and Territory Law Reform Commission reports and it shouldn't be lost in the current debate.

By all means, have customary law as part of a sensible debate but let's not pretend its removal would fix the far reaching problems that must be tackled by all levels of Government.

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Customary law, in its various guises, should be precluded from the Courts' deliberations when sentencing. It is an unconscionable mechanism by which the criminality of an offender is reduced or excused. It should not be used to mitigate a sentence for crimes of physical or sexual violence. It is a veil behind which violent Aboriginal men hide, and politicians and lawyers should not sanction its continued use.

It is remarkable that some in the Territory's legal profession have, on the one hand, been very supportive of Dr Rogers' comments, but on the other, have completely and somewhat hysterically rejected any consideration of the removal of customary law for sentencing purposes.

Opponents of the removal of customary law from sentencing assert that to do so is to impinge a person's human rights. One wonders to whose human rights they refer: those of violent Aboriginal men, or the women and children who are their victims?

It is disappointing that little has been said by feminist lawyers and politicians on this issue. As *The Australian* notes:

> *"If yesterday's feminists are wondering why they lack traction with today's young women, it's because of their silence on the big issues, such as this one. Allowing cultural rights to trump human rights is never a good look".*[7]

The national debate that has occurred since the *Lateline* interview has been, for the most part, a useful one. While it has strayed into areas beyond violence against women and children, it serves, nevertheless, to focus our collective thinking on how these problems may be overcome. Our justice system and those who work within it, have a role to play. Improvements must be made that are directed at protecting women and children. Those who are resistant to change are part of the problem.

ENDNOTES

1. Manager, domestic violence unit, Ngaanyatjarra Pitantjatjara Yankunytjatjara Women's Council The Australian, 16 May 2006
2. *ABC radio*, 16 May 2006
3. *Lateline*, 15 May 2006
4. Parliamentary Hansard, 26 November 2003.
5. *Lateline*, 15 May 2006
6. *The Bulletin*, 27 July 2004
7. The Australian, 24 August 2005