Federal Labor's say on the customary law debate

By Nicola Roxon MP, Federal Shadow Attorney-General

Like so much of the past few weeks of debate regarding violence in Indigenous communities, the debate on customary law has gone off the rails. Mal Brough has seized upon it as something the community will easily react to, conveniently forgetting to worry too much about whether his allegations are accurate or not. As it turns out, many of them are not accurate.

Of course there is no excuse for rape, violence and child sexual abuse. Labor has never suggested there should be. We should use all our efforts, all our energy and all our skill to prevent such violence from occurring and scarring a generation to come.

A crime is a crime, no matter the colour of your skin. We all agree with this. In fact, laws all around the country reflect this.

Despite these facts, Minister Brough uses the shocking level of violence as the basis for saying customary law should be abolished altogether and immediately.

His demand is based on a misunderstanding of what customary law provides for, and how it is used in our courts. He is also beating his chest at a Federal level, knowing full well that customary law has been primarily developed and applied in State and Territory jurisdictions after much debate and caution. It is easier for him to find fault with others than come up with solutions to the issues that actually fall within his own patch.

Over that last 30 years, customary law has been the subject of careful consideration by Commonwealth, West Australian, Northern Territory and NSW Law Reform Commissions. Some of these reports have been acted upon, others not. That work should not be swept away in a frenzy of rhetoric or media attention unless close scrutiny shows us that the current system is causing problems.

Customary law is now taken into account in all sorts of civil matters: from inheritance laws, property law, native title and contract law. For some people, it can lessen the sense of disenfranchisement and can be a valuable step towards reconciliation.

Yet the greatest public misunderstanding is in the criminal area – so let's be clear: customary law is not an excuse, or defence, to violent crimes. Customary law can only be taken into account in mitigation of sentence. The age of the accused, their cultural background and any traditional punishment can all have an effect on the sentence ordered by the Court.

To lawyers, of course, this is not an unusual concept – the age, background, religion, contrition etc are always taken into account and argued in mitigation for any defendant convicted of any crime. The conviction and the sentence are always separate. The factors that caused a crime to occur, or explain a defendants' conduct in any way will always be considered. Should this right be denied to Indigenous people, when it applies to everyone else? That wouldn't be fair.

Changing or removing customary law as a factor in sentencing will not automatically solve the undeniable problems involving criminal violence in Indigenous communities.

This is not to deny there are vexed issues that routinely come up for consideration, particularly what recognition traditional forms of "payback" should be given in the courts.

Further, if a distortion of customary law is being misused by some defence lawyers trying to excuse violent crimes, such misuse should be stopped. This sort of misuse devalues the purpose of customary law and is a disservice to all those trying to improve our justice system and the lives and circumstances of Indigenous people.

And if customary law is being misapplied or misused by the courts – or has developed beyond its original intent – then it can be revisited. States and Territo-

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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.

Making the case against customary law cont...

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