Aboriginal child sex cases in the Northern Territory

By David Dalrymple, managing partner of Darwin law firm Dalrymple and Associates.

This article was written in reaction to initial claims by Federal Indigenous Affairs Minister Mal Brough that paedophile rings operated in remote Indigenous communities.

I have worked as a lawyer in the Northern Territory since 1986. For almost all of that time I have acted for Aboriginal clients, in various kinds of cases including: land claims under the Aboriginal Land Rights (Northern Territory) Act; criminal cases acting as a defence lawyer; and victims assistance claims acting as the lawyer for victims of crime. I have been involved in some high profile cases involving a perceived "clash" between Aboriginal customary law and the law of the Northern Territory and have closely followed jurisprudential developments and/or pronouncements both in relation to the "two laws" issue and in relation to sentencing of Northern Territory Aboriginal offenders generally.

Abhorrence of abusive behaviour towards Aboriginal children is a "motherhood", touchstone moral axiom that is, and in my experience always has been, universally endorsed and upheld in the Northern Territory. Despite such abhorrence, it has been long recognised amongst those who work at the "coal face" that there is an Aboriginal child sex problem in the Northern Territory. It is not a new problem, and all those who have a role to play in the criminal justice system, but especially Police, have in my experience worked steadily and to the best of their ability to ensure that perpetrators are effectively prosecuted and appropriately punished. What is however new is the assertion of two canards that have the effect of denigrating and dismissing the efforts of the people who are doing their best each day to make the system work.

The first is that "cultural defences" are being presented and accepted on behalf of perpetrators. The second is that Northern Territory Aboriginal communities are blighted by the sort of organised paedophile predation that has been revealed to exist in the white population down south (indeliby etched in the public consciousness as a result of media coverage of the cases of Dolly Dunn and his ilk).

In addressing the "cultural defence" issue distinctions need to be drawn between three things: child sex abuse in the sense of molestation of prepubescent victims; unlawful sexual acts with pubescent minors; and violence by Aboriginal men towards Aboriginal women.

Dealing with the last of those things first, it remains (although with ever decreasing frequency) the case that from time to time defence lawyers acting for Aboriginal men charged with offences of violence on Aboriginal women are instructed that there was a "cultural" justification for the conduct because of the disrespectful behaviour of the victim. The Northern Territory sentencing authorities, comprising rulings going back at least 15 years, reject the mitigatory significance of such justifications and in fact tend to establish a sentencing regime in which Aboriginal men who commit violent offences on Aboriginal women should expect to receive harsher penalties than equivalent offenders in the general population.

Sexual intercourse by an adult Aboriginal male with a teenage Aboriginal minor used to be an area where there was a specific customary law marriage defence available under Northern Territory law. The defence was rarely, if ever, used in recent decades. In fact, in the Pascoe case which brought the existence of the defence up on everyone's radar screen, no mention was made of the defence when the case was heard at the first instance by way of a guilty plea to a carnal knowledge charge, with customary law marriage raised in mitigation of sentence. This, despite the fact that the defendant was represented by experienced Aboriginal Legal Aid defence lawyers. It was only later, in the appeal stage, that it was noted by a judge that proof of the existence of a customary law marriage would have constituted a complete defence to the charge. The legislative reaction to the Pascoe

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case was to remove customary law marriage as a defence to a charge of unlawful sexual intercourse with a minor.

The debate has now moved on to whether, despite there no longer being any technical defence of customary law marriage, such a relationship should be taken into account by a sentencing judge or magistrate as one of the circumstances tending to explain or mitigate the offence. Legislation has been passed requiring any assertion of customary law marriage to be established by formal proof. My understanding is that the intention of the legislation was that such proof should in the normal course be tested by way of the obtaining by the prosecution or at the direction of the Court an independent anthropologist's report in respect of any customary law marriage assertion made on behalf of an offender, in a similar fashion to the practice of decades in Northern Territory land claims, and it is unfortunate that that course was not followed in the recent widely publicised case of an offender from Yarralin.

In a mid-1990s case I was involved in regarding sexual offences at that same community, a report from an eminent anthropologist was obtained and that report confirmed the abhorrence of the community for the offending that had occurred and its wish that the offender be severely punished. The more recent Yarralin case has now been the subject of an appeal judgment by the Northern Territory Court of Criminal Appeal, and once again it has been stated in clear and direct terms that there is no special sentencing benefit available to Aboriginal offenders and that criminal law sanctions will apply by reference to community standards common to all Territory citizens.

That brings us to child sex offences of the kind highlighted in the recent debate prompted by Nanette Rogers' statements to the media - molestation of very young children. I have never received instructions from an Aboriginal child sex offender that criminal behaviour of that kind is sanctioned under Aboriginal customary law. I have never heard, or even heard of, any such submission being made on behalf of an Aboriginal offender in any Territory criminal Court. I would be extremely surprised if any such submission ever has been made, and I am confident that if it was it would have been automatically rejected by any Northern Territory judge or magistrate that I have ever appeared before. The assertion that cultural authorisation is being put forward as a "criminal defence" is a total furphy and a calumny on both the Aboriginal communities concerned and all players in the criminal justice system.

Equally false and misleading is the assertion that child sex offences in the Northern Territory follow a pattern of organised and jointly planned orchestration and execution. The truth is that the offences we are talking about, appalling and horrific as they are, are almost always depraved opportunistic acts by individuals fuelled by alcohol or other mind-warping substances. The offenders are frequently mentally impaired in some way. There is no magic wand to be waved here, and misleading and inaccurate commentary is going to make the everyday work of those on the ground even harder than it already is.

A day in the life of an ALS lawyer cont...

the bus in Katherine (pronounced "Kath-er-ine") and flog me". Shit! "Can you tell the driver to let me stay on the bus when we get to Katherine?"

Decision time. Harder than your average bail application. If I tell the bus driver that he might be driving into the middle of a payback exercise in three and a half hour's time he is going to refuse to take my bloke. I whip out a bit of paper and scrawl down "Hi, I'm in a bit of trouble. When we get to Katherine can I stay on the bus? Some people might want to fight with me. I'll stay quiet and duck down until we head off to Timber Creek". I tell him to give this note to the driver when they cross the Edith River – about 40ks from Katherine. Now get going!

It is 8.10am. Job done. I'm a bit hung over and worried about the potential blow up in Katherine. But it should be right. Home to the missus.

POSTSCRIPT:

Our Darwin-based service and the Katherine-based Aboriginal Legal Aid Services merged between the thong purchase and the Timber Creek hearing for the aggravated assault. So I did that court appearance. My bloke turns up barefoot. We run the hearing. Acquitted... just.

I remind him to front for his committal for the dead woman business in Katherine in a month or so. I ask him "How did you go with that payback business in Katherine and the note to the driver?" He says "The bus driver good, let me stay on bus, no worries". Bingo!