

‘Abolishing’ ‘customary law’ will do little to reduce violent Aboriginal crime

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I can still remember the first time I met a young Aboriginal ‘promise’ wife.

She was about 18, married to an ex-stockman in his 50s, with a couple of little kids on her hip (or his shoulder). In the weeks that I spent in their pastoral station ‘community’ trying to progress a land rights claim so they could get better houses, I saw nothing to indicate that this union was anything other than a normal marriage – one which offered the girl considerable social security. This was 1989.

I soon discovered that I was surrounded by other ‘promise’ wives – older women married for longer, many already widowed, some living next to their husbands’ first wives. More than once, I was impressed by the status and independence which these arrangements offered both women as they aged.

A lot has changed in a decade and a half. Rural decline, the generation gap, the sexual revolution, improved communications and influxes of tourists and evangelists into these small, marginalised villages have caused re-evaluation of these relationships. If girls are unwilling to marry this way any more, it is difficult for their ‘communities’ to make them. The erosion of ‘customary law’ which began with colonisation is being completed by other globally-driven processes.

But there are some important certainties about ‘customary law’:

1. People to whom it remains meaningful won’t give it up just because legislation ‘abolishes’ it;
2. Because its operation is now so locally specific, courts (whatever their failings) are in a better position to evaluate it than Canberra-based politicians;
3. ‘Abolishing’ it will not ‘solve’ Aboriginal crime, because ‘customary law’ is not a significant cause of Aboriginal crime.

The causes of crime among Aboriginal people are the same as the causes of crime in ghettos of disadvantage the world over. Culture does play a role, but too much emphasis on it allows us to avoid facing the implications for other people, like the residents of Macquarie Fields or Snowtown.

The *underlying* causes of Aboriginal crime are social inequality and economic stress – themes which, as NATSEM pointed out last week, often play out in Australia through rurality. Crime rates are high in many other parts of rural Australia: a 1990 study claimed Gippsland’s child sexual abuse rate was 2.5 times the Victorian average. We don’t know as much as we should about non-Aboriginal rural crime, partly because not many non-Aborigines live in the country any more. However, studies confirm that many other rural ‘communities’ contain a culture of non-complaint by victims. Isolated country people are denied opportunities and services - jobs, income, doctors, counsellors, police, cinemas, mobile phone coverage, preschools, universities - which the rest of us take for granted. Remote Aborigines are just at the extreme end of this spectrum. One unique factor, however, is Aboriginal demography: there are a lot

more people of criminal offending age in the indigenous population than the wider population, and a high ratio of children to adults. Both factors tend to produce more crime.

The *proximate* causes of Aboriginal crime are the consequences of this social inequality and economic stress. These include disrupted parenting bonds (stressed parenting techniques override or bring out the worst in traditional parenting norms, which favour affectionate and non-controlling parenting), association with delinquent peers, truancy, not succeeding at school and having a lot of family members who have gone to jail and none who have gone to university. Again, the indigenous difference is just one of degree: in remote 'communities', home conditions can be so bad that jail looks like a lifestyle option. If Aboriginal men abuse other people sexually at unusually high rates, it's likely that this bears some relationship to their very high incarceration rates (15 times the Australian average): a 1990s study of NSW prisoners found that a quarter of men aged 18-25 had been sexually assaulted in custody.

The *triggers* for Aboriginal crime reflect the long-term impact of these social conditions on individuals, families and infrastructure. Rural decline and small government play as much of a role here as Aboriginal-specific policies like land rights and self-determination. Factors like intergenerational drug or substance abuse, absence of police and poor housing security create new types of perpetrators or opportunities. We should not imagine that other communities are immune from developing similar conditions.

The criminal law's approach to 'customary law' is marginal to all of this. The Northern Territory 'promise marriage' defence to underage sex charges was so obscure that it was rarely used before its repeal by press release in 2004. It was never a defence to violence, or sex with pre-pubescent children. Aboriginal tradition prohibited a man having sex with his wife before she reached puberty, even if she was promised to him from birth. Anyway, much of the violence which has recently preoccupied other Australians is occurring outside 'promise' marriages.

The Martin government repealed the defence to 'protect all children equally'. This assumes that non-Aborigines know who a child is and traditional Aborigines don't – an idea undermined by the fact that Australian law allowed girls to marry at 14 until 1991. It also ignores the protective function which 'promise' marriages traditionally served: of keeping girls away from promiscuity and the depredations of other men. Such ideas may have reached their use-by date for Aboriginal Gen Nexts, particularly where men misuse them to justify violence, but there is no need to demonise them as vehicles of unadulterated gerontocratic male opportunism. In the current social and economic context, it's worth asking what release from traditional marriage frees Aboriginal girls up *for*. It's not as if Australia offers most of them great employment and educational opportunities. While middle-class city kids have iPods, a lot of Aboriginal teenagers have babies – something that the recent increase in the baby bonus and other 'family friendly' welfare reforms seem likely to encourage. Yet we know that kids of girls who parent solo in relative poverty are more likely than others to grow up into crime.

Mal Brough's plan to prevent courts from considering 'customary law' as a factor in sentencing is also poorly conceived. The criminal justice system fails many victims,

mainly by ignoring them. Courts can make bad sentencing decisions – that’s why we have appeal courts. They can be poorly informed about how ‘customary law’ should influence a sentence - for example when the prosecution doesn’t collect proper evidence of general Aboriginal opinion and all that the judge is left with is defence advocacy.

But legislatures which lay down arbitrary rules for dealing with *all* defendants are yet another step removed from the crime, the offender, the victim and their social circumstances. Under the Brough plan, a court sentencing a non-Aboriginal offender will continue to be capable of setting a sentence proportionate to the crime based on the defendant’s genuine personal circumstances, but a court sentencing a traditional Aboriginal offender will not.

But a man who insists on sexual intercourse with a teenager promised to him is *not* your average paedophile, and sentencing him without reference to ‘customary law’ will do very little to reduce sexual violence. This is illustrated by the 2005 Yarralin case. Like many men promised wives, ‘GJ’ was well past criminal offending age, pushing up against male Aboriginal life expectancy. He committed a nasty assault on a frightened girl, but he was a *first offender*. Someone like him is unlikely to offend again, as he’s unlikely to be promised another wife, and he’d probably be mad to take an underage one. He did not prey on a series of girls. He did not stupefy his victim or video himself having sex with her. He confessed to police so she didn’t have to give evidence. The Northern Territory Court of Criminal Appeal sentenced him to at least 18 months in jail. By comparison, some career paedophiles only get 10 years.

Brough appears out of his depth in criminal justice. There may be a need to reform the *processes* by which courts find out about or apply ‘customary law’, but preventing them from considering it entirely will bring about a new kind of racial inequality.