10 December 2003
Carney comments on customary marriage defence

Media Releases
Media Release Archive
Speeches

This page is maintained by the Office of the Chief Minister

Date: 26/11/2003
Member: Dr TOYNE
Other Speakers: Ms CARNEY

This is an uncorrected proof of the daily report. It is made available under the condition that it is recognised as such.

Status: Justice and Attorney-General
Information: Continued from 13 August 2003.

Dr TOYNE (Justice and Attorney-General): Mr Acting Deputy Speaker, these two bills which are related and I assume we are dealing with them cognate, but I will nevertheless take them in two parts because they do deal with two separate issues. The first issue is if the member for Araluen, and I am sure she did, studied the bill that went through this House yesterday she would be aware already that we have removed the marriage defence from the whole range of child abuse offences. I think that is a pretty good response to the issue that you brought to us.

I will just name them. Under the definitions within the Criminal Code Act there is no longer a reference to 'unlawful'. In other words, defining a boundary between marriage and non-marriage and then from there we go through to sexual intercourse or gross indecency involving a child over 16 years under special care; no marriage defence available. The attempts to procure a child under 16 years; no marriage defence available. Sexual relationship with a child; no marriage defence available. Indecent dealing with a child under 16 years; no marriage defence available. Abduction, enticement or detention of a child under 16 years for immoral purpose; no marriage defence available. Abduction of a child under 16 years; no marriage defence.

We have comprehensively taken out the marriage defence, not only in the case of what we would see as a traditional mainstream body of society marriages, but any form of a marriage-like relationship such as de facto, customary law, same sex de facto. It is off the menu. Basically, we will not be allowing anyone to take up sexual relationships with a girl less than 16 years old, under the guise of a claim of a marriage arrangement. I assume that in the light of that, that you would basically withdraw the provisions you wanted to argue for today.

The second part is the amendments to the Sentencing Amendment Act and I would like to go through these because we do differ on our approach to the role of customary law issues in terms of the sentencing process within our courts. At the recent release of the government responses to the Inquiry into Customary Law, we made it very clear that we will be supporting the use of customary law claims within court processes as part of the body of evidence that a court will take into account when it is determining sentencing.

I will go through the problems that were seen with the amendment proposed. These are the main points.

The government believes there are a number of problems with the proposed
amendments. First, the bill would exclude the customary beliefs of one particular group in our society. This is only directed against Aboriginal customary law and not against other types of customary law. In a multicultural society such as the Northern Territory, there are many cultures that embody customary arrangements, which could be considered customary law and could be claimed as such in court proceedings.

Second, the blanket exclusion of Aboriginal customary law such is proposed by the bill is inconsistent with the policy to which I was just referring of recognising Aboriginal customary law where it is relevant and consistent with the general law and human rights standards.

The bill fails to recognise that in some cases customary law can be considered as an aggravating factor in the sentencing process. For example, in cases of sexual assault where there is an avoidance relationship between the offender and the victim according to Aboriginal customary law, the courts have taken this into account relevant to the gravity of the offence as an aggravating factor when sentencing the offender.

The bill is a reaction, we presume, to the Pascoe matter, which certainly attracted a lot of publicity around the time that the member proposed this. I see you are not saying that is the case …

Ms Carney: The first part was, but not the sentencing stuff wasn't, not really.

Dr TOYNE: That is not key to our argument. In the Pascoe case of course, the public perception was that a claim of a customary law relationship with the girl concerned was taken by the court to be a mitigating factor to too great an extent. Of course, that case was subsequently appealed and is has been presented to the High Court on application. We shall see what comes out of the court processes.

Certainly, the issue of to what degree customary law claims can be claimed in the sentencing process in a court, either in mitigation or aggravation of the offence, is under active consideration through the court system. As far as the government is concerned, we would consider it to be a part of the body of evidence that a court would take into account to explain or understand the basis of the alleged offender's conduct and to assess the culpability of the offender.

It is evidence just like a great number of factors might be presented in evidence in a court hearing; no more, no less. As evidence, we propose that while customary law claims should continue to be allowed within the body of evidence in a court, like all evidence, it should rigorously be tested. We believe that courts, and particularly our public prosecutors, need to be empowered to fully test customary law claims as evidence, either through the introduction or assessment by senior custodians of the law who are expert in the correct action of the law or by anthropologists who have a knowledge of the customary law structures in which an alleged offender may be operating. In each case, that testing of the evidence should be available to both sides advocating to a court and any claims should be open to such rigorous testing.

As I have already stated, that could be to the benefit of the accused at the point at which the sentence is being determined or, indeed, it could be an aggravating factor that actually adds to the detriment of the accused. So, as I said, we are simply seeing it as part of a body of evidence.

We also recognise, under our policy, that where custom and law are inconsistent,
the law should prevail. We have said that repeatedly during the customary law inquiry, that the customary law claims and customary law practices must lie within the overall constraints of the NT Criminal Code, and the standards of international human rights. That is the overall arching framework on our entire response to issues of customary law within our community.

We will simply not be condoning or enshrining, in the practices of our courts or in the body of the general law, arrangements where one group of Territorians are exposed to practices that would be either illegal under our own law, or unacceptable within the human rights framework that our nation actually exists in. We also recognise that customary law does not always provide an adequate response to violence against women and children, and that customary law has been used by people accused of violence to excuse or minimise their actions.

The views of Aboriginal women and children on these issues are not always properly argued and put before the courts. As I have already indicated, the courts have used customary law as an aggravating factor in sentencing for offences of violence against Aboriginal women and children. It is important that the courts continue to be able to do this. One of these cases, R v Lee, the court was able to take into account the culturally offensive nature of an offence, where the Aboriginal man was sentenced for a sexual assault against a woman who was, according to custom, his aunty. In another case, a sexual assault on a child, R v SVA, the court was able to take into account that the child was a poison cousin to the offender, and that any sexual relationship was banned under customary law.

We believe a process that would resolve conflicts between customary law and the rights of the individuals on a case-by-case basis is a much better approach. This would retain the flexibility necessary for the courts to be able to consider customary law when it is an aggravating feature of the case, but to reject customary law claims where they are inconsistent with the general law and human rights standards. Problems with the way courts have determined issues of customary law in the sentencing process have arisen where the court is not fully informed about the customary law or practice, or where the Aboriginal women have not had the opportunity to place their views before the courts.

In some cases, the courts have had to rely on evidence adduced only by the defendant, with the result that the court has not had access to full information about the case. The submission by the Human Rights and Equal Opportunity Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner to the Northern Territory Law Reform Committee's inquiry into customary law has recommended the adoption of a flexible case-by-case approach to taking customary law into account in the sentencing process.

His recommendation also proposed that the customary law claim should only be taken into account where they are relevant, and consistent with upholding the human rights of the victim, including the right to equality before the law. Similarly, the Northern Territory Anti-Discrimination Commissioner supports a case-by-case approach that incorporates an open and transparent process that is consistent with human rights standards. Work has started to implement this case-by-case approach. It may involve the development of legislation to regulate the way in which courts are informed about customary law issues in the sentencing process.

Alternatively, legislation may provide for courts to develop their own rules to regulate this process. It is also necessary to take into account the existing duty of the prosecution to assist the court when issues such as relevance of customary law
in sentencing are raised. I hope the member for Araluen can see here that where, while differing in the basic approach to this, that we believe that it is unacceptable to single out one of our cultures within the Northern Territory, and particularly the culture that pre-existed in the Northern Territory before non-indigenous people came to the Territory, and to say to them, and them alone, that their customary practices are not tenable in a court as part of the body of evidence to explain the behaviour of the offender and, perhaps, the victim of an alleged offence.

We believe equally that the general law and the operation of human rights has to be superimposed on customary law practices to protect the rights of indigenous people within the Territory, to ensure that they are not living in a separate social system where those universal protections that are available to all other Territorians are not available to indigenous people. It is going to be a complex issue and it is going to require the courts to deal on a case-by-case basis with these, as they have in the past; but with this additional ability to test the customary law claims that come to them as part of the evidence that they take in a particular case.

So with those remarks, Mr Acting Deputy Speaker, we are indicating, again respectfully, that this is an issue that, quite rightly, should have been brought by the member for Araluen before this House. We have indicated that, as part of the strong body of work that was done on the inquiry into customary law, that the government's position has now been framed. As I said earlier to the member for Macdonnell, I am certainly intending to bring back regular reports to this House on our progress on these matters. I would certainly be happy to see that scrutinised by this parliament. In summary, we will not be supporting this bill in this form. The government has chose a fundamentally different approach to this problem.

Ms CARNEY (Araluen): Mr Acting Deputy Speaker, I thank the Attorney-General for his comments. Because these bills are cognate and because I am satisfied, for the want of a better word, as to the settlement, if you like, of the difficulties that arose around the Criminal Code Amendment Bill that I introduced - that is, those matters were dealt with in the bill yesterday – it, therefore, follows that these Sentencing Amendment Bill is doomed. Obviously, I am philosophical about that. However, I am not terribly worried about it because it gives me the opportunity to make some points in relation to it, and to assure you that I will continue to request, whenever it is appropriate, government to act in this area, because it terribly important. I will come back to that.

I say at the outset that the amendment proposed by government in the bill we debated yesterday has adequately dealt with the Criminal Code Amendment Bill that I introduce. I thank the government for dealing with that. Members will recall that the amendment I proposed to the Criminal Code would have ensured that offenders who had sexual intercourse with, or who commit acts of gross indecency upon Aboriginal girls under the age of 16 years could not rely on the veil of marriage as a defence. For my part, I wanted to ensure that Aboriginal girls were afforded the same protection as non-Aboriginal or non-indigenous girls under our legal system.

Members will also recall that I sought to change the definition of husband and wife in the Code. In its present form, it provides a defence to the offences committed under section 129. That defence was that the parties were married and, therefore - sorry, I will restate that. Clearly I am tired. The defence provided was that the parties were married and that existed by virtue of the definition of
'unlawful' under section 126 of the Code. I proposed changing the definition of husband and wife which would have removed the existence of that defence to Aboriginal men. The government dealt with the problem in a different way but in a satisfactory way nevertheless. I warmly welcome those amendments of the bill from yesterday. I note that the government's bill was introduced to parliament before government finalised its position before the committee finalised its recommendations in the inquiry into Aboriginal customary law, hence, I would suggest that if my original bill played even a small part in encouraging government to remedy this problem then clearly I am delighted.

Certainly, there has been a great deal of pressure on government to make the change to protect Aboriginal girls under 16 years of age. I, and I know many others, are pleased with the government's response. Unfortunately however, and the Attorney-General and I both know it, we do differ in relation to our views regarding the sentencing amendment bill and the role customary law plays in sentencing generally. I have read the public comments made by the Attorney-General about rejecting the idea of removing customary law from the deliberations of the courts. I am unmoved by his arguments. I will continue to urge him to reconsider his views. I hope that others will be moved to continue to apply pressure on government so that perhaps one day government will shift in its position.