

**Talk Given at the 2022 Women Lawyers' Drinks
on the Supreme Court Balcony**

26 August 2022

Justice Judith Kelly

I have been asked by the organisers to speak on the subject of domestic violence against Aboriginal women in the NT.

In fact, my speech this afternoon has dual themes. First – domestic violence against Aboriginal women and what we as lawyers and courts can do about it – which (unfortunately) is “not a lot”.

Second, I want to talk (briefly) about a difficulty which has grown up in even talking about the problem – that is an ideology of supposed “antiracism” which is beginning to assume the dimensions of a religion or a cult under the influence of which people and institutions are casually and inaccurately labelled as “racist” without any evidentiary basis for the charge. I say an ideology of “supposed anti-racism” because the underlying assumption of this ideology appears to be that Aboriginal people must exist in a permanent state of victimhood, an assumption that is in fact deeply racist. Further, among those in thrall to this ideology, labelling someone or something “racist” seems in many cases to be an end in itself – not a prelude to remedial action, but a substitute for it. (I am mentioning

this only peripherally and briefly but it deserves an entire topic to itself.)¹

The Australian articles

Earlier this year I agreed to do an interview with Amos Aikman from *The Australian*. The article based on that interview appeared in *The Weekend Australian*. Some of you may have read it. That article followed two others which described horrific violence inflicted on a number of women in Yuendumu by family members and quoted from sentencing remarks by Blokland J and by me. I gather that is why I was asked to speak on this topic.

But really – what is there to say? It’s bad? – It’s bad. It’s really bad.

I have twice in the past invited television cameras into my court room when sentencing – first a man who bashed his wife to death in 2015; then a man who bashed and then stabbed his partner to death in 2021. (The victims in each case were Aboriginal women.) Both times I did so not just to draw attention to horrific acts of domestic violence but because in both cases, people witnessed what was happening and did nothing. In the 2015 case, around 20 people saw or heard that woman being bashed and crying out for help –and not one person intervened or even dialled 000.

¹ An excellent book on this topic is John McWhorter, *Woke Racism: How a New Religion Has Betrayed Black America*. Penguin Random House, 2021

Everyone is willing to talk about the over-representation of Aboriginal men in prison. It has been called Australia's shame and so it is.

But, as I have said before, the stream of Aboriginal men going to prison is matched by a steady stream – a river – of Aboriginal women going to the hospital and to the morgue. It is an epidemic of extreme domestic violence, and I'm certainly not the only one to point it out.

Between 2000 and 2022, two Aboriginal men were shot by police both times followed by massive press coverage, calls for enquiries etc. In that same period, 65 Aboriginal women were killed by their partners (I am quoting from Libby Armitage's report in a recent coronial inquiry) and in each case you would have been flat out seeing a small report on page 5 or 7 of a local newspaper - nothing nationally.

Indigenous women are approximately 10 times more likely to be the victim of an assault than non-indigenous women, and 32 times more likely to end up in hospital than a non-indigenous woman victim. (These figures are from a 2011 paper by Richard Coates. Things have not got better over the intervening years.)

What can we as lawyers – and the courts – do about it? Pretty much nothing.

In my experience, both prosecutors and defence lawyers do a good job and as a result, in most individual cases, justice according to the law can be said to have been done.

We judges (in both Courts) keep making the same sentencing remarks – talking about the prevalence of domestic violence, emphasising general deterrence, personal deterrence for repeat offenders, denunciation, community protection etc etc. - for all the good it does anyone.

We imprison the offenders. Judging by the recidivism rate, that doesn't do anyone much good either, although in an article in Balance some years ago which I have just read, Sally Gearin referred to incarceration of offenders as at least “giving some respite” for victims – which is an interesting concept. Sadly, the only time some women are safe (or relatively safe) is when their abuser is locked up.

Aboriginal people still make up about 30% of the Northern Territory's population and still make up between 80 and 90 percent of the prison population – and a significant percentage of that prison population are Aboriginal men in prison for serious crimes of violence against Aboriginal women.

Causes

The causes of this epidemic of violent abuse are multiple and complex, prominent contributing factors being unemployment and passive welfare dependency; lack of access to adequate education,

health and mental health services; lack of adequate housing and consequent overcrowding; substance abuse; dispossession and loss of culture. And one that deserves a stand-alone mention - the ‘rivers of grog’ (a phrase coined by Russell Goldflam) that run through our communities.

Cultural component

There is also a significant cultural component to the violence inflicted on Aboriginal women by Aboriginal men in the Northern Territory.

- There is still, in some quarters, a view that the use of physical violence to ‘discipline’ wives (and others who have done the ‘wrong’ thing) is justified and is lawful under customary law.
- There is also a widespread belief that the infliction of violence in retaliation for violence – whether formally in organised payback or haphazardly in individual assaults, raids or vendettas – is lawful (and at times obligatory). The blood feud is alive and well in the Territory and, by and large, the participants believe that they are justified by customary law.

References to evidence of a cultural component to violence against Aboriginal women

Evidence for this proposition can be found in many places, including cases before the Northern Territory Courts, published works and unpublished papers.

In *R v Wunungmurra*² (in 2009) a senior Dalkarra Aboriginal man from Milingimbi was charged with assaulting his wife. The assault was serious: one of the charges was causing harm with intent to cause serious harm. He indicated that he intended to plead guilty and sought to read an affidavit from a senior woman “knowledgeable about customary law and cultural practices of the Yolgnu people who live at Milingimbi”.³ The substance of her evidence is set out in the judgment.

“In her affidavit Ms Laymba Laymba deposes to certain traditional Aboriginal laws that apply to women who are married to Yidditja men and the circumstances when according to traditional Aboriginal law a man who comes from the Yidditja and Dhalwangu clan groups and is a Dalkaramirri may inflict severe corporal punishment on his wife with the use of a weapon. It is her opinion that the defendant acted in accordance with traditional Aboriginal law when he engaged in the behaviour which is the subject of the counts charged on the indictment. Ms Laymba Laymba states the defendant was carrying out his

² *R v Wunungmurra* (2009) 196 A Crim R 166

³ *Ibid* [7]

duty as a responsible husband and father and he was acting in accordance with his duty as a Dalkarra man.”⁴

In his 2011 article explaining the basics of the Ngarra (Yolgnu customary law from North East Arnhem Land), George Pascoe Gaymarani lists “being beaten by her husband” as one of the traditional punishments for “marriage troubles”.⁵

Two books which contain many footnoted references, and excellent bibliographies are Dr Peter Sutton, *The Politics of Suffering: Indigenous Australia and The End of the Liberal Consensus*, (Melbourne University Publishing, 2011) and Joan Kimm; *A Fatal Conjunction: Two Laws Two Cultures*, (The Federation Press, 2004).

The Australian Law Reform Commission Aboriginal Customary Law Reference conducted a Field Trip (No 7) to Central Australia in October 1982. Its reports of the discussions with men and women at various Central Australian communities are illuminating.

I also gave a paper at the NTBA Conference 2014 in Association with the School of Law, CDU in July 2014: *The intersection of Aboriginal customary law with the NT criminal justice system: the road not taken?* which contains numerous footnoted references to Law Reform

⁴ Ibid [8] The affidavit was accepted for the purposes of providing a context and explanation for the defendant’s crimes; establishing that the offender did not have a predisposition to engage in domestic violence and was unlikely to re-offend; establishing that the offender had good prospects of rehabilitation; and establishing the defendant’s character. The Court was precluded by s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) from accepting the affidavit for the purpose of establishing the objective seriousness of the crime: [28].

⁵ George Pascoe Gaymarani, ‘An introduction to the Ngarra law of Arnhem Land’ (2011) 1 *Northern Territory Law Journal* 283, 291

Commission reports from the Commonwealth, Northern Territory and Western Australia, as well as other sources. It can be found on the Supreme Court website.

“Bullshit” culture

Of course, some of the domestic violence which is claimed by some perpetrators to be “moral violence” or “culturally appropriate violence” is in fact what has been labelled by some indigenous women as “bullshit culture” - ie just made up by some men as an excuse to beat or control their wives – but it’s not all “bullshit culture”. Some of it is real and genuinely believed by some of the perpetrators of the violence – the victims, I think, maybe not so much.

Prioritising perpetrators over victims

Another cultural aspect which compounds the problem is that some communities prioritise the interest of the male perpetrators over that of the female victims. Victims are often actively discouraged from reporting the violence and may be punished for doing so. The punishment may be physical – more violence – or it may even extend to effective banishment. (There was an example of that in one of that series of articles in *The Australian* I referred to earlier. A 19 year old girl who had been repeatedly raped and bashed by her own father had effectively been banished from Yuendumu and was living in Qld because she gave evidence against him. And the brother of the guilty

man attacked the girl's aunt with an axe and threatened to kill another woman for helping the girl and for giving evidence against the man. My sentencing remarks for that man (ie the brother) were quoted in the article as were Blokland J's sentencing remarks for the original offender.)

The DPP now sometimes charges perpetrators with attempting to pervert the course of justice when threats are made over the prison telephone system and are recorded, but the pressure and intimidation are often carried out by the families of perpetrators (and sometimes even of victims) and this is difficult to detect.

If we can't do anything much as lawyers, what can we do as citizens to help stem the epidemic of domestic violence?

First (and this almost certainly does not need saying to this audience), if you see someone being bashed, or hear someone screaming for help, ring 000 immediately!

Second, there are some simple things which are urgently needed such as more money for Women's shelters in many communities. Marcia Langton has been calling for this for years. We're a democracy and citizens should be able to have some influence on decisions like this. Write to the paper. (How old fashioned is that?) Do whatever it is people do on social media. Maybe we should think about crowd funding. I don't know.

Third there are the deep societal disadvantages I mentioned: improvements in health, housing, education, bringing jobs to the bush should be amenable (at least partly) to amelioration through political and economic action from mainstream Australian institutions - in conjunction with Aboriginal communities who generally know best what they need. Again citizens in their capacity as voters can try to influence the priority that these matters are given.

Fourth, there is the culture in some communities that tolerates violence against women and others; that blames the victim and prioritises the interest of the male perpetrators over the female victims: that, in my view, can only be changed from within those communities. And there are some positive things happening – Charlie King’s anti-domestic violence program; the Tangentyere men’s behaviour change program, which involves Aboriginal men working with Aboriginal men. Programs such as this deserve to be properly resourced.

Fifth - Speaking honestly

Returning to my second theme - the difficulties being experienced in even talking about the problem: Talking honestly about the problems that exist and encouraging honest and open public debate would have to be a good start. And by “speaking honestly” about the problem I mean not “self-censoring” for fear of being branded a racist by the ideologues of the new “anti-racism” religion.

Eschew the invidious terms “institutional racism” and “systemic racism” unless there is at least some evidence that the institution in question does actually have racist policies – ie systematically treats Aboriginal people less favourably on the basis of their race.

Ascribing all disadvantage to “racism” is unhelpful and dishonest; it is simplistic and it trivialises genuine racism which should never be tolerated.

There is racism and there are racists in our community and we should call them out.

In the past, Australian Governments had racist policies and a significant portion of the community had unthinking racist attitudes.

These things should be acknowledged, and those times have left a legacy of disadvantage BUT the fact that some contemporary problems have been caused or contributed to by racism in the past does NOT mean that they are the result of racism today. On the whole, modern Australian society is not racist - and I think the majority of contemporary Australians are not racist. In fact, as a society we have become super sensitive to any charge of racism. (Most folk would almost rather be branded a paedophile than a racist.)⁶

⁶ This was intended as throw away hyperbole, but its source should be acknowledged. It (or something like it) originated in a discussion between John McWhorter and Sam Harris in a Sam Harris podcast on 27 October 2021.

Despite this, the term “racist” is bandied about in contexts where it simply doesn’t apply. This starts with the ideologues but it is also spreading into general public discourse where it is often a distraction.

Reply to Leanne Liddle

At this point I want to reply to something the Australian of the Year, for the Northern Territory, Leanne Liddle, said at the Garma Festival this year.

First, I want to acknowledge the good work Leanne is doing in her capacity as Director of the Aboriginal Justice Unit and to congratulate her on being named the Northern Territory’s Australian of the Year. Her work on the Aboriginal Justice Agreement may well help to empower indigenous communities and contribute in a positive way to addressing the causes of crime, providing more appropriate sentencing options and other positive contributions.

Leanne has said many useful and positive things. However, in my view, her remarks at the Garma Festival are not among them.

At the Garma Festival, Leanne blamed “structural racism” for trapping Aboriginal people in the Northern Territory in jails and poverty – without saying what that means.

I came in for special mention in Leanne’s speech. I was criticised for saying that I wanted people to know what was happening to Aboriginal women. Ms Liddle invited the audience to reflect on what might be meant by “people” and she was quoted as saying: “I feel

strongly that such language reflects an undercurrent of racism – an “othering” of Aboriginal people that exists within our society.”

I am sorry Leanne feels that way so let me make my meaning clear. By “people”, I meant “people” – NOT “people other than Aboriginal people”. I want all the people of Australia in cities, towns, the bush and bush communities to know what is happening so that, just maybe, something might be done about this terrible scourge.

It was also implied that it was racist to suggest there was a traditional cultural aspect to the violence. I said that not to denigrate Aboriginal culture but because it is true. (References to some of the evidence above.) And it won’t change if it is not acknowledged.

Leanne also said, again without specifics or evidence, that “the judiciary system and judges” were “handcuffed to a broken idea of justice”. What does that mean? Specifically?

- We live in a society governed by the rule of law.
- We have laws made by a parliament, which is elected by universal adult suffrage.
- Those laws have equal application to all.
- We have an independent Director of Public Prosecution who lays charges and prosecutes accused people in the courts.
- We have legal aid organisations including NAAJA which in my experience do an excellent job with limited resources (as does the DPP).

- We have an Aboriginal Interpreter Service which performs an indispensable service and does a good job at it in difficult circumstances and which is improving its services year by year.
- We have courts with procedural rules that ensure fairness.
- We have judges whose independence is guaranteed, and who take an oath to do right by all persons, without fear or favour, affection or ill-will, and a system of appeal courts.

By all means say – it would be nice if we had better sentencing options for youth offenders – specifically X, Y or Z; it would be desirable to increase the age of criminal responsibility; maybe these specific steps could increase the participation of Aboriginal citizens on juries; – or make whatever other specific suggestions for improvement or reform one might think warranted.

But to say the judges and the judicial system are “handcuffed to a broken idea of justice” is not meaningful, it’s not true and it’s not helpful.

Incidentally, apparently the Director of Public Prosecutions is personally committed to taking the handcuffs off the court – or so he was quoted as saying by the NT News. I would be interested to know how he intends to go about it.

I want to emphasise that this is not a personal criticism, and I do not for one moment suggest that Leanne is one of the ideologues, but it is

important to call out false claims of individual racism and false claims of systemic racism – as it is to call out racism where it occurs. It is not helpful to see victimisation where it doesn't exist. Apart from anything else, it detracts from the search for solutions.

Not all disadvantage is a result of racism. People (all of us) have enough problems as it is without inventing more.

Thank you so very much for your attention and patience. I suggest we now get on with the vitally important task of enjoying afternoon drinks on this beautiful balcony.