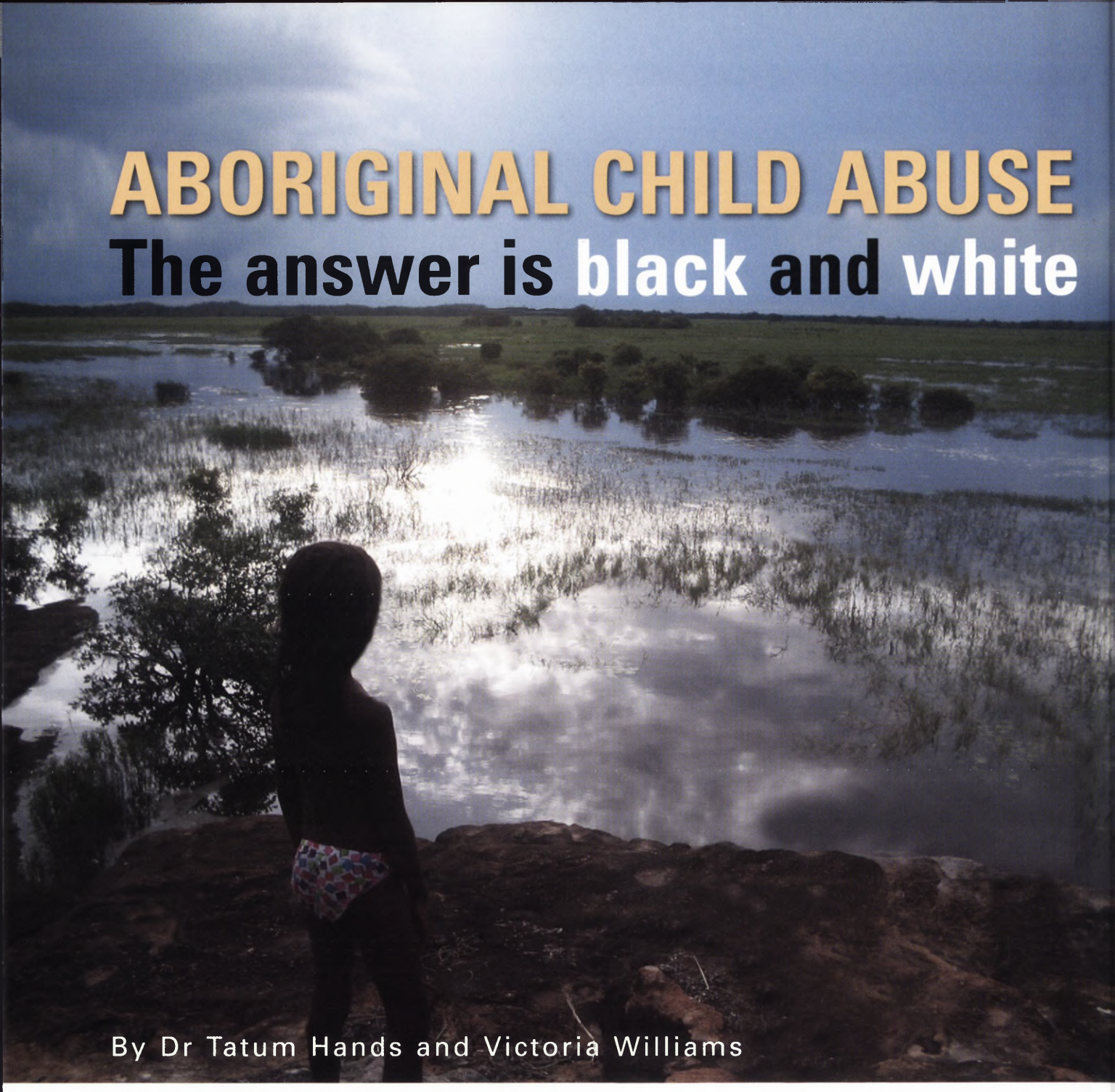

ABORIGINAL CHILD ABUSE
The answer is black and white

By Dr Tatum Hands and Victoria Williams

Child abuse and family violence in Aboriginal communities is at crisis point. The federal government's recent response to the problem in the Northern Territory is a welcome intervention, but by rejecting Indigenous cultural input it is in danger of repeating the failures of the past. This article examines the federal government's response and the role that Aboriginal law and culture can play in addressing the problem of Indigenous child abuse.

On 16 June 2007, Australia awoke to the headline 'Nation Child Sex Shame Uncovered'.[1] One could be forgiven for thinking that the extent of the problem of child sexual abuse and family violence in remote Aboriginal communities was a shocking new revelation. But in fact it is an issue of which governments have long been aware. The Northern Territory's *Little Children Are Sacred* report[2] is simply the most recent in a long line of reports of government task forces, commissions and inquiries that have drawn attention to this problem and to ways of resolving it.[3] All have pointed to the critical nature of the problem and to the underlying issues of entrenched poverty and debilitating disadvantage that feed it. All have highlighted that 'now' is the time for action. The problem is that 'now' was at least 20 years ago.

Despite the countless reports and papers devoted to the issue of child abuse in Aboriginal communities, and the collaborative response plans already underway in states like Western Australia, it appears that the federal government has only just recognised the urgent need for action. Some would say that its well-publicised 'national emergency response' is a cynical election ploy. The timing of the response – mere months before the federal election – certainly evokes memories of 'emergencies' involving asylum-seekers and terrorists that have dominated past campaigns. So much so that community members in Mutitjulu (the first community visited by the intervention) reportedly commented, 'this is black children overboard … this government is using these kids to win the election'.[4]

Yet it is undeniable that child sexual abuse in Aboriginal communities has reached a crisis point requiring immediate action with bipartisan support. Those of us who have been involved with Indigenous social and legal issues can only express relief that one of the many concerns threatening Aboriginal communities is finally worthy of a national response. The problem is not that the federal government has finally acted, but *how* it has acted. In particular, how it has acted with defiant disregard of the recommendations of the many expert reports on this matter, including the very report it is said to be responding to.

THE FEDERAL GOVERNMENT'S EMERGENCY RESPONSE

The federal government announced its emergency response to Aboriginal child sexual abuse in the Northern Territory on 21 June 2007. The response focuses on restoring law and order in Aboriginal communities by means of a temporary influx of police and army; banning alcohol and pornography; garnishing welfare payments; requiring Aboriginal children under 16 to undertake medical examinations; enforcing school attendance; compulsorily acquiring Aboriginal land and townships; and 'scrapping' the permit system that controls access to communities on Aboriginal land.

The government makes no apologies for the radical nature of its intervention, but its response raises as many questions as it answers. For example, what happens to those people forced to abandon longstanding alcohol addictions – where is the rehabilitation, medical attention and support? What happens when the police, army and healthcare professionals move on to the next community? It is, as the government acknowledges, enormously difficult to fill childcare, healthcare, teaching and governance positions in remote communities – so what measures will be put in place to sustain Aboriginal communities and protect Aboriginal children in the long term?

While other aspects of the emergency response have a clear connection to the causes or effects of Aboriginal child abuse, the government's plan to acquire Aboriginal land and abolish the permit system does not. As the Law Council of Australia has pointed out, neither of these measures is necessary, justified or even desirable.[5] Despite repeated requests from the Law Council, members of parliament and Aboriginal leaders, no convincing evidence has yet been provided to support the need for these measures or to show how they will help protect Aboriginal children or restore law and order to communities. In fact, the Northern Territory Police Association, among others, has spoken out in support of the permit system, saying it is an effective policing tool that helps to keep grog-runners and undesirables away from Aboriginal communities.[6] And why compulsorily acquire Aboriginal land? Law enforcement and other government agencies already have unfettered access to Aboriginal lands in the Northern Territory – a fact clearly demonstrated by the government's immediate movement into communities upon >>

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announcement of the intervention. We can only speculate about the real reason behind these measures, but Aboriginal land in the Northern Territory has been a federal government target for some time. The 'emergency' appears to have provided a convenient smokescreen for actions that would otherwise be widely condemned.

Within six weeks of its announced response, the government introduced a hurriedly assembled package of Bills into Parliament. Just ten days later, these Bills became law. The legislation vests extraordinary powers in the federal Minister for Indigenous Affairs to control and seize community assets, among other things. It also gives extensive coercive, investigative and surveillance powers to the Australian Crime Commission (ACC). These powers are not confined to ACC activity in the Northern Territory, but they are confined in application to Indigenous people. As Senator Bob Brown has stressed, this is 'racist legislation' and an 'unprecedented and obnoxious assault on the rights of Indigenous Australians'.[7] As if to underline Senator Brown's concerns, the legislation expressly precludes the operation of the *Racial Discrimination Act* 1975 (Cth) and any Northern Territory laws dealing with discrimination. With the majority in the Senate, the government was able to negate proposed amendments to protect the rights of Aboriginal people in relation to land and to provide for an independent statutory review of the emergency response in 12 months.

Like so much federal Indigenous policy, the emergency response is policy made on the run. It is short-sighted, generic and imposed from above. There was no consultation, no collaboration, and seemingly no appreciation of lessons past learnt. As Fred Chaney reminds us, governments know the way forward on this issue: 'And we know they know because the answers are presented in reports they have commissioned [and] in the words their operatives repeat, almost word for word, in every serious address on the subject.'[8] *Little Children Are Sacred* says nothing new. In fact it recommends an approach to the problem that appears to be undisputed across the many reports dealing with the issue. That approach involves collaboration with Aboriginal people; a response that is not only community-based, but that understands the cultural dynamics of the host community and is 'owned' by the community; and improvement of crucial government service-delivery and infrastructure – the things that most Australians take for granted, such as healthcare, education, clean water, adequate housing and electricity.

But the most important oversight of the federal response is recognition of and respect for Aboriginal law and culture. This is widely acknowledged as a key ingredient to the success of Indigenous initiatives.[9] Without this, Aboriginal people cannot take ownership of (and responsibility for) the solutions to the problems plaguing their communities. There is nothing to ensure the continuing wellbeing of Aboriginal children, and any short-term advances achieved by the federal response will ultimately be lost.

THE CONTINUING FEDERAL REJECTION OF ABORIGINAL LAW AND CULTURE

Over the past 12 months, the federal Minister for Indigenous Affairs, Mal Brough, has openly blamed Aboriginal law and culture for the extent of child sexual abuse and family violence in Aboriginal communities. In December 2006, the *Crimes Act* 1914 (Cth) was amended to preclude courts from taking into account '*any form* of customary law or cultural practice' to lessen the seriousness of 'criminal behaviour' when sentencing for federal offences.[10] The amendment was made in the face of strong opposition and contrary recommendations.[11] Its rationale is hard to fathom: federal sentencing law cannot have any direct impact on the level of sexual and violent offending because such offences are dealt with under state or territory legislation. Nonetheless, the federal government claimed that its amendment demonstrated 'leadership' in dealing with Aboriginal violence and abuse.[12]

The legislative package enacted on 17 August 2007 included almost identical provisions banning courts from considering customary law in sentencing and bail proceedings.[13] The justification for this is to ensure that the law in the Northern Territory reflected the agreement made at the Council of Australian Governments (COAG) meeting on 14 July 2006.[14] At this meeting, it was agreed by all states and territories that they would amend their laws, if necessary, to provide that 'no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of *violence* or *sexual abuse*'.[15] If the legislative amendments were designed to reflect the COAG resolution, then an obvious question arises: why are the provisions not limited to those offences that deal with violence and sexual abuse?

It has been asserted on behalf of the federal government that customary law can still be considered by courts provided that it is not relied on to lessen the seriousness of the relevant 'criminal behaviour'. For example, it is said that courts will still be able to take into account any tribal punishment meted out to the offender, or that the offender has strong cultural ties to his or her community.[16] But this argument ignores the full effect of these provisions. For *any* offence, customary law and culture cannot be considered when assessing the seriousness of the relevant criminal behaviour. As just one example, Aboriginal people might fail to attend court (and be charged with breaching bail) as a consequence of attending a funeral or other ceremony. When being sentenced for that

offence, the court cannot take into account the customary law obligations involved. These legislative provisions clearly go well beyond anything remotely necessary for protecting Aboriginal children. They not only demonise Aboriginal people and perpetuate misconceptions about Aboriginal law, but also 'clearly weaken Aboriginal culture by dismissing it as a factor even deserving of acknowledgement'.[17]

As an indigenous race with an ancient culture, it is easy to paint Aboriginal people as being less civilised with different moral values to 'middle Australia'. But as chairwoman of the Emergency Response Taskforce, Sue Gordon, reminds us, child sexual abuse is not just an Aboriginal problem: 'As a magistrate I deal with this – black, white and brindle – on a daily basis. This is not just in remote Aboriginal communities; this is in *your* suburb'.[18] Just as child sexual abuse is a problem in all walks of life, it is also committed by all types of people. Recent media reports claim to have uncovered examples of child abuse committed by Aboriginal elders. But this does not mean that Aboriginal law and culture should be rejected: people do not reject religion because some priests have been exposed as paedophiles.

Underpinning the federal government's stance against Aboriginal law is the popular belief that Australian courts have relied on customary law to excuse sexual abuse of children. This perception is wrong. There is no evidence that an Aboriginal person has ever been acquitted of a sexual crime on the basis of Aboriginal law. While there are isolated cases where Aboriginal offenders have argued that sexual offending against Aboriginal children is acceptable under customary law, Australian courts have invariably rejected these claims and emphasised the importance of protecting Aboriginal women and children.[19] Recent inquiries, including a six-year consultative inquiry undertaken by the Law Reform Commission of Western Australia (LRCWA), have found no basis for the argument that sexual abuse and violence against women and children is either acceptable under Aboriginal culture or condoned by Aboriginal law.[20]

The now infamous Northern Territory cases, *Hales v Jamilmira* and *R v GJ*,[21] are routinely relied upon as evidence of lenient sentencing of Aboriginal offenders for child sexual abuse. Both cases involved allegations of sexual relations with under-age children in the context of traditional promised marriages. The cases have been effectively dissected by other commentators, but it is pertinent to note that until 2004, the criminal law in the Northern Territory permitted sexual relations with a child if the parties were traditionally married.[22] In fact, until less than 15 years ago, non-consensual sexual relations within *any* marriage were considered lawful.[23] Given this background, it is not surprising that the sentencing judge in one of these cases specifically took into account that the offender did not realise that he was committing an offence against Northern Territory law.[24] It is unfair to blame Aboriginal law when white law in the Northern Territory countenanced under-age or non-consensual sexual relations within marriage until very recently.

Of course it is vital that the justice system protects Aboriginal women and children, but imposing a ban on courts considering Aboriginal law and culture is not the answer. In its 2006 report, the LRCWA concluded that it is preferable to ensure that courts are properly and reliably informed about relevant Aboriginal law and culture from community representatives of both genders. Further, it recommended that the recognition of Aboriginal law must be consistent with Australia's international human rights obligations and be determined on a case-by-case basis.[25] This approach requires priority to be given to the rights of children, but at the same time enables the criminal justice system to take into account the positive aspects of Aboriginal law and important issues affecting Aboriginal people. Aboriginal people must be allowed to rely on all of their individual circumstances and background during sentencing proceedings in the same way that any other Australian is entitled to do. The recognition of Aboriginal law and culture during the sentencing process is therefore crucial to ensuring equality across the justice system. But more importantly for the current debate, it also has a significant role to play in the prevention of child abuse.

Numerous reports and inquiries have documented the causes of sexual abuse and violence in Aboriginal communities.[26] The multiple and interrelated causes include historical factors such as dispossession; the effects of past government policies such as the removal and institutionalisation of children (which has entrenched a cycle of institution-learned abusive behaviour); alcohol and >>

substance abuse; socio-economic disadvantages such as the lack of appropriate housing, poor education, poverty and unemployment; lack of police presence; the impact of pornography; the decline of the traditional Aboriginal male role and status; and the breakdown of Aboriginal law and culture. Commonsense dictates that effective solutions must directly respond to these causes. Aspects of the federal government's response (such as measures to reduce alcohol abuse, banning pornography and providing police) clearly do so. Disappointingly, however, the federal government has not applied the same logic in its approach to Aboriginal law and culture. Significantly, the federal response ignores the benefits that can flow if Aboriginal law is supported and strengthened.

WHAT DOES ABORIGINAL LAW AND CULTURE HAVE TO OFFER?

Sceptics might argue that the recognition of Aboriginal law and culture would be nothing more than a symbolic gesture. Such sceptics might also assert that culturally appropriate programs and strategies have been tried and tested and have failed. This is not correct. There are success stories – examples of Aboriginal-owned, community-based initiatives effectively responding to violence and abuse.[27] But governments across Australia are yet to provide co-ordinated and consistent support to Aboriginal communities to develop their own culturally appropriate solutions to deal with child abuse and other issues, like alcohol and substance abuse. The Northern Territory inquiry was told by one community that it had had a '20-year history of six-month programs'.[28] The LRCWA's inquiry made similar findings: successful local initiatives often had to be abandoned after initial establishment grants ran out. Aboriginal service-providers were caught in a vicious yearly cycle of applying for funding to continue their work, undermining their previously impressive outcomes. In some cases, these Aboriginal-owned programs were replaced by generic government-run initiatives, but the hard-won community goodwill, credibility and cultural relevance was lost.[29]

The government's Indigenous affairs catchcry is 'shared responsibility'. For Aboriginal people to share responsibility, they must be given the opportunity and support to take ownership both of their problems and the solutions. The truth is that Aboriginal people with a passion to improve the circumstances of their communities are constantly hit by changes to government Indigenous policy. As Fred Chaney observes, this 'start again' syndrome 'affects almost every new government and Minister'.[30] It is time to take heed of what all these reports are saying; the need for long-term government support and funding for community-driven initiatives has been repeatedly emphasised and the importance of building on the success of existing programs and strategies should not be ignored.

The LRCWA examined existing Aboriginal community justice mechanisms throughout Australia and – based on its findings and its consultations with Aboriginal people – recommended the establishment of community justice groups. In order to ensure the protection of Aboriginal women and children, these local groups would be required to have equal representation of men and women and of all relevant family, social or skin groups in the community. It was proposed that community justice groups would, among other things, develop culturally appropriate initiatives to respond to social and justice issues at the local level.[31] The *Little Children are Sacred* report endorsed the Commission's approach and recommended that it be applied to the Northern Territory.[32]

> The most important **oversight** of the federal response is the **failure** to **recognise** and respect Aboriginal **law** and **culture**.

The recognition of Aboriginal law processes (within the framework of the general legal system and subject to human rights obligations under international law) is one way of strengthening Aboriginal law and culture and restoring law and order in Aboriginal communities. There is nothing new about this proposition. The benefits of using Aboriginal law processes in this way are well-documented and widely supported.[33] In this context, Aboriginal law should not be viewed as frozen in time: recognising it would not necessarily mean sanctioning traditional physical punishments, nor would it mean returning to life as it was prior to colonisation. Aboriginal law processes for dealing with social and justice issues are diverse and include shaming, community meetings, cultural camps, separate programs for men and women, banishment and community healing centres. Noel Pearson, one of the more outspoken supporters of the federal government's emergency response, emphasised that Aboriginal law (in its contemporary context) is a necessary part of the solution. He stated that 'Howard and Brough will make a historic mistake if they are contemptuous of the role that a proper and modern articulation of Aboriginal law must play in the social reconstruction of indigenous societies'.[34] During the recent Senate Inquiry, Senator Bartlett referred to Pearson's statement and asked the Secretary of the Department of Families, Communities and Indigenous Affairs what aspects of the emergency response and what aspects of the legislative package 'are focused on ensuring the role of Aboriginal law in the reconstruction of Indigenous societies'.[35] No answer has yet been given to this question.[36]

CONCLUSION

Although the federal government's response to Aboriginal child abuse has, so far, shown contempt for Aboriginal law and culture, it is not too late. There is clearly no need for any further inquiries or reports. The federal government can

decisively act now to protect Aboriginal children and, at the same time, meaningfully engage with Aboriginal communities. This engagement should be done on the basis that the government *will* support existing successful strategies and *will* support communities to establish community justice groups to develop further solutions to ending the abuse and violence. Such an approach would facilitate partnerships and trust between Aboriginal communities and the government. Moreover, such an approach would demonstrate true national leadership. In other words, the answer is both black and white. ■

Notes: **1** *The Weekend Australian* (16–17 June 2007) p1. **2** Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007) (NT Inquiry). **3** Earlier reports include M Tonkinson, *Domestic Violence Among Aborigines*, (Western Australian Domestic Violence Task Force, 1985); *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) and the accompanying regional reports of inquiry into underlying issues; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report* (2000); Memmott et al, *Violence in Indigenous Communities* (Crime Prevention Branch Commonwealth Attorney-General, 2001); Gordon et al, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) (Gordon Inquiry); Council of Australian Governments, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (2003); Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (2006); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues* (June 2006). **4** J Chandler, 'It's Black Children Overboard', *Sydney Morning Herald* (27 June 2007). **5** Law Council of Australia, letter to the Prime Minister regarding the 'emergency plan to address child sexual abuse in the Northern Territory' (4 July 2007). **6** See M McLaughlin, 'Top end communities resisting Indigenous intervention plan', *7.30 Report*, ABC (12 July 2007). These comments were echoed in a submission from the Police Federation Australia to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the National Emergency Response. **7** Commonwealth, Parliamentary Debates, Senate, 13 August 2007, p57. **8** F Chaney, Director of Reconciliation Australia, Speech at National Press Club (4 July 2007), p3. **9** See, for example, NT Inquiry, above n2, p175. **10** *Crimes Act* 1914 (Cth), s16A(2A) (emphasis added). **11** LRCWA, above n3, p183; Law Council of Australia, *Recognition of Cultural Factors in Sentencing* (Submission to the Council of Australian Governments, 10 July 2006); Australian Law Reform Commission (ALRC), *Same Crime, Same Time: The Sentencing of Federal Offenders*, report no 103 (2006) [29.45]; ALRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the provisions of the Crimes Amendment (Bail and Sentencing) Bill 2006 (25 September 2006). **12** Standing Committee on Legal and Constitutional Affairs, *Crimes Amendment (Bail and Sentencing) Bill 2006*, report (October 2006), p16. **13** *Northern Territory National Emergency Act* 2007 (Cth) ss90, 91. **14** Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, p11 (Mr M Brough, Minister for Families, Communities and Indigenous Affairs). **15** Council of Australian Governments Meeting, 14 July 2007 (emphasis added). **16** Commonwealth, Parliamentary Debates, Senate, 16 August 2007, p34 (Mr NG Scullion, Minister for Community Services). **17** Commonwealth, Parliamentary Debates, Senate, 15 August 2007, p92 (Mr AJ Bartlett). **18** Sue Gordon, doorstop interview with Mal Brough following first meeting of the Emergency Response Taskforce (30 June 2007). **19** LRCWA, above n3, pp25, 179–80. **20** LRCWA, above n3, pp21–2; Gordon Inquiry, above n3, p70; NT Inquiry, above n2, p58; Calma, above n3, p10. **21** *Hales v Jamilmira* [2003] NTCA 9; *R v GJ* (Unreported, NT Supreme Court, SCC 20418849, Martin CJ, 11 August 2005). **22** This defence was removed from the Northern Territory Code by the *Law Reform (Gender Sexuality and De Facto Relationships) Act* 2003 (NT), s5. **23** NT Inquiry, above n2, p69. The Northern Territory was the last jurisdiction to criminalise rape within marriage; see also *R v L* (1991) 174 CLR 379 [19]. **24** *R v GJ*, above n15. **25** LRCWA, above n3, pp25–6, 69, 180. **26** LRCWA, above n3, p21; Gordon Inquiry, above n3, p56 and ch 4; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000) [3.5]; NT Inquiry, above n2, pp222–30. **27** For examples of successful community-based family violence initiatives see LRCWA, above n3, p27; NT Inquiry, above n2, pp180–81. **28** NT Inquiry, above n2, p55. **29** LRCWA, above n3, p290. **30** Chaney, above n7, p4. **31** LRCWA, above n3, p112. **32** NT Inquiry, above n2, p179. **33** See, for example, Queensland Government, *Meeting Challenges, Making Choices: Evaluation Report*, (2005) p52; Calma, above n3, p7; LRCWA, above n3, p29. **34** N Pearson, 'An End to the Tears', *The Weekend Australian* (23–24 June 2007) p22. **35** Standing Committee on Legal and Constitutional Affairs, transcript of evidence, 10 August 2007, p17. **36** *Ibid.* The Secretary (Dr Harmer) said that he would take the question on notice and attempt to provide an answer by the end of the day. There does not appear to be any answer provided to this question in later proceedings before the Committee, and the Committee's Official Index of Questions Taken on Notice (12 August 2007) does not refer to this question.

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