Recent cases concerning the sexual assault of young Aboriginal girls in the Northern Territory have raised national attention on issues facing Aboriginal victims of sexual assault. This serious issue of discrimination within the criminal justice system is a longstanding one that requires immediate political will and action. The overriding principle of equality before the law demands nothing less.

In 1994, the Australian Law Reform Commission (ALRC) undertook a national inquiry into “Equality Before the Law” and formally recognised that Australian women were being subjected to systemic discrimination within the legal system. The ALRC was also told that Aboriginal women were being multiply disadvantaged: “The problems for women stem from the fact that we’re Aboriginal people as well as being women” (Australian Law Reform Commission, 1994, p. 118). They faced particular disadvantages both within the mainstream legal system and also in the administration of Aboriginal and Torres Strait Islander legal services. In addition, it was found that there was a “disturbing level of ignorance” of Aboriginal women’s culture on the part of the legal profession and that Aboriginal women’s views were given little acknowledgment in the legal systems operating in each Australian jurisdiction, even in cases that directly concerned them (Australian Law Reform Commission, 1994).

These findings made over a decade ago are just as relevant today and continue to be echoed in the experiences of the Aboriginal women victims/survivors of sexual assault who seek justice through the courts. Aboriginal women and girls are being discriminated against by the criminal justice system on the basis of their Aboriginality and gender, notwithstanding the existence of formal legislation prohibiting such discrimination. In examining the legal system’s unequal treatment of Aboriginal women and girls, this paper details and considers the two recent and high profile decisions of the Northern Territory Supreme Court concerning sexual assault of Aboriginal girls. Both cases are clear evidence of the continuing discriminatory treatment of Aboriginal women and girls who still now face a long road to equality before the criminal justice system.

Case examples of discriminatory law

The legal system’s discriminatory treatment of Aboriginal women and girls in sexual assault matters dates back many years and was made very clear in the 1980 case of Lane where the Northern Territory Supreme Court accepted the arguments made that the rape of an Aboriginal woman was not as serious or significant a crime as the rape of a white woman. Justice Gallop found in this case:

There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal communities as it is in the white communities ... and indeed the chastity of women is not as importantly regarded as in white communities. Apparently the violation of an Aboriginal woman’s integrity is not nearly as significant as it is in a white community (McRae, Nettheim, & Beacroft, 1997, p. 380).

The view that sexual assault was not a serious crime in Aboriginal communities was entirely inconsistent with the opinion of Aboriginal women as reported to the ALRC:

When traditional women are asked about rape and about the incidence of incestuous sexual assaults, their responses are emphatic that it is not the Aboriginal way, that it is not in accordance with Aboriginal traditions or customary law. They said that a man could be put to death for rape or speared in the thigh (Australian Law Reform Commission, 1994, p. 123).
According to Sue-Jane Hunt, Aboriginal women of north western Australia were “valued sexually as women and economically as labour, yet abused as a colonised and subject people, Aboriginal women were victims of both racism and sexism” (Hunt, 1979, p. 40). Aboriginal women and girls lacked legal status and they had little or no protection under the law. Consider the case of Mercedes, an Aboriginal lady from the Beagle Bay mission who was raped by a police constable while searching for a mission child. She took her complaint to her husband who would not approach the authorities, next to the priest in charge of the mission who did not believe her, and then to the police constable’s superior who reported the case to the Native Department (Hunt, 1979). There were four witnesses to the rape but they were also Aboriginal and their evidence was rejected. The police constable clearing himself of the charges stated: “From my knowledge of this said woman Mercedes, I do not think that it would have been necessary to make much attempt to interfere with her as she enjoys the reputation of being one of the greatest native prostitutes in this district” (Hunt, 1979, p. 40). Mercedes was ultimately denied legal equality by reason of both her race and gender.

The denial of legal recourse for Aboriginal sexual assault complainants was evident from Jillian Bavin-Mizzi’s (1993) study of sexual assault cases before the Supreme Courts of Victoria, Queensland and Western Australia in the years 1880–1990, where it was shown that of the 1,200 cases prosecuted only six concerned women identified as Aboriginal, and of those cases only one resulted in a conviction (p. 199). Aboriginal women, unlike white women, were not considered to be women who were worthy of legal protection. Such a perception remains and lingers on as a part of contemporary Australian race relations, where racist stereotyping of Aboriginal women as promiscuous, inherently bad, alcoholic, dishonest and culturally inferior has been shown to be commonly played out in NSW sexual assault trials (Puren, 1997). In the 2004 Western Australia case of R v Bropho [2004] WADC 182, the WA District Court even accepted defence arguments that questioned the credibility of established DNA procedures with respect to Aboriginal people in order to defeat the complainant’s credibility. This was notwithstanding that the DNA evidence was far greater than that required to establish paternity before the Family Court (O’Donnell, 2004).

The 2002 case of Jackie Pascoe Jamilmira concerned a decision of Magistrate Luppino of the Maningrida Court in Arnhem Land in which he sentenced a 50-year old defendant to 13 months imprisonment for unlawful sexual intercourse with a minor. The 15-year old victim’s police statement was revealed in a national newspaper, in which it was stated that the defendant had forced her to his outstation whereupon she was subjected to violent beating and sexual assault, managing to escape with her family the following day although the defendant objected by discharging his shotgun. According to the North Australian Aboriginal Legal Aid Service (NAALAS) the police had initially charged the defendant with rape (along with a firearms offence) but following investigations by the DPP and ‘negotiations’ with his lawyers from the NAALAS, the rape charge was reduced to one of unlawful intercourse with a minor. The lofty defence claim that the defendant’s actions were “entirely appropriate and morally correct within the traditional parameters of the Bururra lifeworld” (Bryant, 2002, p. 20) should be considered alongside of the victim’s statement of a violent sexual assault:

He started slapping my face and then punching me. He used his right and left hand to slap me in my face, he was hitting me real hard. He had that closed fist and he hit me eight times. I was feeling dizzy and he said to me ‘let me look, so I can hit you again’. I said to him I want to go out and have a drink of water and wash my face. He said: ‘No, you’re not going anywhere, no phone call, no truck [out of there] for you’. He told me to take off my clothes, so I did. He grabbed me by my left arm and my right leg and threw me onto that mattress. He put his foot onto my neck and he was pushing me down on that mattress. He had my right arm and he was twisting it – it felt like he would break it … He was on top of me and he forced me, and I was laying down and I was trying to cross my legs (Toohey, 2002, p. 21).

The Magistrate hearing the case appeared, understandably, not to have been convinced by the Crown’s failure to prosecute the defendant for sexual assault and he considered aggravating factors of duress and lack of consent. The defendant was sentenced to thirteen months imprisonment for the charge of unlawful intercourse and two months for firearm offences (Bryant, p. 20). This decision was appealed
to the Northern Territory Supreme Court where Justice Gallop agreed that the Magistrate had erred by taking account of the aggravating factors, holding that a person could not be sentenced for an offence (that is unlawful sexual assault) for which they have not been charged or convicted. Justice Gallop also found that the Magistrate had failed to give ‘due weight’ to the customary law practice of promised marriage, agreeing with the anthropological evidence presented to the court about promised marriages and commenting that: “She didn’t need protection [from white law] ... She knew what was expected of her. It’s very surprising to me [that Pascoe] was charged at all” (Toohey, 2002, p. 21). The defendant’s sentence was then reduced to 24 hours imprisonment for unlawful intercourse with a minor and 14 days imprisonment for the firearm offences (Bryant, 2002, p. 21).

The Crown appealed the decision and in *Hales v Jamilmira* [2003] NTCA 9 the Court of Appeal agreed that the sentence of 24 hours imprisonment was manifestly inadequate and to be increased to 12 months (to be suspended after a period of only 1 month). Again the court considered the expert anthropological evidence (provided by NAALAS from a non-Aboriginal male expert who had known Pascoe since the 1970s) to the effect that promised marriage was “... the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice” (*Hales v Jamilmira* [2003], paragraph 22). The failure of the Crown to prosecute a charge of unlawful sexual assault meant that the violent account of a rape that was originally provided to the police became recast before the Court of Appeal as a matter of consensual albeit underage sex. Although the young victim in this case spoke bravely of the sexual assault to the police, and later in her victim impact statement of the damaging effect that it had upon her life, the criminal justice system determined her case as one of underage sexual intercourse punishable by a one-month prison sentence.

Author Joan Kimm has argued that prior to the Pascoe case “there appeared to be acceptance that Indigenous defendants had a de facto claim of right to commit serious assaults on young girls when enforcing ‘the promise’” (Kimm, 2004, p. 69). But the fact that sexual assault charges were never prosecuted, and an alleged violent rape was punished by a one-month prison sentence, indicate instead that the NT justice system was continuing to uphold some Aboriginal men’s apparent ‘right’ to sexually assault women and girls. As NT parliamentarian Lorraine Braham made clear in her commentary on the case, “At this moment, many assaults are never reported for the simple reason that there seems to be little justice for young women and girls if they do go ahead”. She therefore proposed legislative amendments that would remove customary law as a relevant or mitigating factor in sentencing for cases of sexual offences against minors, however this proposal was rejected by the Territory Government who felt that it might possibly breach the Race Discrimination Act 1975 (Cth). ATSIC representatives did not agree that such a proposal was discriminatory, arguing instead that “Aboriginal girls should have the same protection under the law as other Australian girls under 16” (ATSIC, 2003).

The special leave application made by NAALAS to the High Court of Australia was refused and it was also positive to see that ATSIC declined to fund that application on the basis that it conflicted with their family violence policy (Northern Territory Legislative Assembly, 2004a). For too many years now Aboriginal women have voiced their criticism of Aboriginal legal services prioritising the legal representation of violent men, and that Aboriginal legal services expend government funding to argue customary law in cases of violence to Aboriginal women and girls is a legitimate matter of concern (McGlade, 2002). As Aboriginal women told Audrey Bolger in 1991:

> Legal Aid are good but there are things they shouldn’t support. There’s one man walking round after murdering his wife – now he’s bashing another woman. Legal Aid should take a hard line – why defend men who murdered before? They say it’s ‘human rights’ – but what about her rights? (Bolger, 1991, p. 85).

In responding to Pascoe’s case the NT Attorney-General agreed that Aboriginal women should also be given the opportunity to put their views to the court and that “The overriding principle will be that Aboriginal women and children have a right to equal treatment by the law” (Northern Territory Legislative Assembly, 2004b). The importance of women’s voices was an issue identified as long ago as 1988 by Justice Maurice of the Northern Territory Supreme Court in the case of *R v Dennis Narjic* where he rebuked defence counsel for his normalisation of Aboriginal male violence:
Never once have I had a glimmer that it’s a normal part of cultural life for Aboriginal people to treat women in this way ... for the kind of sadistic behaviour involved ... If we’re going to go into this question of what’s culturally acceptable behaviour, why shouldn’t we hear from ... some female leaders of the female community of Port Keats? Why should it be the men who are the arbiters of what’s acceptable conduct according to the social and cultural values of Port Keats? (Bell & Nelson, 1989, p. 411).

Cultural justifications

The importance of including Aboriginal women’s views on customary law was confirmed by Wendy Shaw’s research whose study of such cases led her to the conclusion that although violence against women was repeatedly argued and accepted as customary by the courts, there were no references being made to the source or authority of such claims (Shaw, 2003, p. 324). Australian courts and judges did not ascertain the origin of Aboriginal customary laws but instead routinely imposed their understandings of Aboriginal culture and sanctioning the violent assaults against women by men in doing so. Even in the case of a woman anthropologist gave evidence of the wrongfulness of sexual assault, the judge disregarded that evidence in favour of evidence tendered by a male anthropologist that condoned the rape of an Aboriginal woman (Shaw, 2003, p. 327). Shaw has described this judicial trend as one premised on “resistance to the imposition of dominant, non-Aboriginal values”, and it is clear that underlying this seemingly sympathetic liberal notion are values and belief systems that support the racial and gender dominance and oppression of Aboriginal women and girls. Aboriginal women and children are the most disempowered group in Australian society and the blatant discriminatory treatment engaged in by the courts and evidenced by such cases shows clearly the pervasive and ongoing nature of colonisation and patriarchy.

Notwithstanding the national outcry resulting from Pascoe’s case, the ‘successful’ appeal of Justice Gallop’s decision coupled with two separate legislative amendments, a 2005 decision of the NT Chief Justice Brian Martin raised once again these same issues of discrimination (Toohey, 2005). The case of The Queen v GJ involved a 55-year old man who violently beat a 14-year old girl (his ‘promised bride’) and later raped her at his outstation where she had been taken against her will. The defendant was charged with unlawful assault and unlawful sexual intercourse with a minor, once again the charges of sexual assault were dropped following negotiations between the DPP and the defendant’s lawyer (McLaughlin, 2005). Chief Justice Martin accepted that there was a reasonable possibility that the offender’s fundamental beliefs, which he considered based on traditional laws, prevented him from realising that the child was not consenting. He also took into account the fact that the man was a respected elder and an important ceremonial person who believed his actions in striking the girl and having sex with her were allowed under traditional Aboriginal law (and apparently not based on sexual gratification). The defendant was sentenced to 19 months in prison to be suspended after only one month.

In making this decision, Justice Martin did not properly recognise the violence perpetrated on the young victim (which left her with serious medical injuries) and instead showed preference to the legal arguments which minimised the violence as Aboriginal culture. Meanwhile, local Aboriginal men interviewed by media said: “We sort of got a shock. For an old man to do that”, and “He should be ashamed of what he done” (McLaughlin, 2005). In NSW, MP Linda Burney also commented on the case arguing that:

Aboriginal women have human rights too ... And when it comes to forcing women to have sex, there’s only one word and it’s called rape” (Karvelas & Koch, 2005).

Warren Mundine from the National Indigenous Council agreed:

Mistreatment of women, whether they are adults [or] children, is never on and it’s about time they [the courts] woke up to this fact. It’s about time Aboriginal women got treated with respect” (Karvelas & Koch, 2005).

The Director of Public Prosecutions also appealed this case and in The Queen v GJ [2005] the Northern Territory Court of Criminal Appeal agreed that the sentence was manifestly inadequate as there was
no doubt that the objective circumstances were very serious, and the respondent should instead be sentenced to serve an 18-month imprisonment before release. A further application for special leave to the High Court was refused. Following a national public outcry and the successful appeal before the Court of Criminal Appeal, Chief Justice Martin conceded that his sentence was ‘wrong’, however, he also maintained the appropriateness of applying an Aboriginal offender’s belief in their customary law as an established legal principle (Merritt, 2006).

Both these two cases, *Hales v Jamilmira* [2005] and *The Queen v GJ* [2005] can be contrasted with a 2005 decision of the New South Wales Court of Criminal Appeal (*R v MAK; R v MSK; R v MMK* [2005]). This latter case concerned an appeal by three brothers to have their sentences reduced for the rape of two teenage girls (two of these men were sentenced to 22-year jail terms, the third 16 years). Those sentences were upheld on appeal and the lawyer representing the defendants was severely criticised for attempting to argue before the court the influence of the appellants’ Pakistan ethnicity. Although the defence counsel argued that the rape was linked to their Pakistan culture (by describing the defendant as a “cultural time bomb”) Justice Groves described that argument as inappropriate and inept:

> If it was intended to suggest that difference might be observed in behaviour in the respective cultures of Pakistan and Australia, there was, and is, not the slightest basis for concluding other than in both places all women are entitled to respect and safety from sexual assault (*R v MAK; R v MSK; R v MMK* [2005], paragraph 61).

Australia is not alone in confronting sexual assault committed against women and girls in the name of culture. In Pakistan there has been international awareness raised of the issue of rape as a result of the work of Mukhtar Mai, a Pakistan Muslim woman who has refused to be silenced about her rape (ordered by a local tribal council) declaring that she would “rather die than give up her right to justice” (Jahangir, 2004). While the Pakistan High Court acquitted the men who raped her (in the name of ‘honour’) the Islamic or Sharia court has since suspended that ruling and ordered a new hearing under the Islamic or Sharia laws (“Rape ruling”, 2005).

**Equality**

A fundamental principle of our legal system is that all who come before it are equal and entitled to its equal protection, but the discriminatory legal recourse offered to Aboriginal rape victims undermines and belittles this important human rights principle. In *The Queen v GJ* [2005], the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) made an application to give advice concerning international human rights law but that application was rejected by Mildren J (and also Riley J) who said that although the Court had power to admit HREOC as amicus curiae, he was not satisfied that the court would be significantly assisted by their submissions. Southwood J said that HREOC’s submissions were “important propositions” but he also did not see how the court would be significantly assisted by those propositions.

Unlike some other common law countries, Australia has no Bill of Rights to protect human rights standards within the Australian legal system, and to prohibit the kind of discrimination facing Aboriginal sexual assault victims within the criminal justice system. This situation can be compared to Canada where the Canadian Charter of Human Rights explicitly requires equality before the law without discrimination and allows for the domestic implementation of international human rights, including the Convention on the Elimination of Discrimination Against Women (CEDAW). This treaty was cited approvingly by Justice L’Heroux-Dube of the Canadian Supreme Court in the case of *R v Ewanchuk* [1999] in which her Honour rejected the stereotypical and discriminatory attitudes towards sexual assault survivors as evidenced in decisions of the lower courts (Tang, 2000, p. 683).

Although many Aboriginal women believe it is the breakdown of Aboriginal customary law as a result of colonisation and subsequent intergenerational trauma that needs to be addressed (Atkinson, 2002) some non-Aboriginal commentators have instead promoted assimilation on the ground that sexual
assault of women and children is a genuine cultural practice. This was apparent from the national media commentary concerning the GJ case wherein Aboriginal law (along with the Muslim Sharia law) is consequently positioned as vastly inferior and in need of urgent assimilation:

There is nothing too noble about polygamy and rape and violence. Cultures that embrace those practices are in dire need of a takeover” (Allbrechtsen, 2005).

Most recently the public revelations of child abuse by the Northern Territory Crown Prosecutor Nanette Rogers in turn sparked media reporting that described Aboriginal culture and especially ‘men’s business’ as being responsible for the endemic levels of sexual violence against children in central Australia (Kearney & Ashleigh, 2006). In 1993, Nanette Rogers also made it clear that Aboriginal women rejected violence and sexual assault as customary and said that the punishment traditionally for men was death or a spear in the thigh – Aboriginal women also told her ‘We still have that law (traditional) in our hearts’ (Lloyd & Rogers, 1993, pp. 150–151). Nanette Rogers argued that there were many difficulties facing women through the criminal court processes and that ‘little change can be effected until Aboriginal women themselves become empowered’ (Lloyd & Rogers, 1993, p. 163).

The Australian Government Department of Families, Community Services and Indigenous Affairs Minister, the Hon Mal Brough MP has now argued for the removal of Aboriginal customary law as a mitigating factor in the sentencing of sexual abuse cases, and he has supported the claim made for many years now by Aboriginal women agreeing that ‘there is no Indigenous cultural law that says you can abuse children’ (Yaxley, 2006). Any such legislative amendment raises interesting legal arguments because at face value it might reasonably be seen to differentiate Aboriginal offenders from non-Aboriginal offenders and be open to arguments of discrimination. However, the history of the criminal justice system’s misrepresentation and violation of Aboriginal women and girls’ human rights, coupled with the seriousness of violence and sexual abuse in Aboriginal communities, might be sufficient to characterise such a law as a legitimate “special measure” (Pritchard, 1995) necessary for the protection and promotion of the human rights of Aboriginal women and girls.

The issues of discrimination that arose in both cases discussed were also apparent at the prosecutorial level and it was not entirely clear whether the proposed legislative prohibition (aimed solely at the judiciary) would be sufficient to address the failure of the Crown to prosecute sexual assault charges. It was the Crown prosecutors who decided that the necessary element of criminal intent was negated by the defendant’s purported cultural beliefs. The Crown in both cases in accepting this contention did not properly consider the facts of violence surrounding both sexual assaults and prioritised the questionable arguments of culture that were promoted by the defendants and their legal representatives. Justice Mildren in The Queen v GJ [2005] alluded to this issue by commenting that:

Whilst it must be accepted that the respondent did not intend to have intercourse with SS without her consent, the reason for that lack of intent was to be found in his belief that intercourse was consented to, based on his understanding of traditional law and ignorance of territory law. Nonetheless, the respondent ought to have realised that he was mistaken and that she was not in fact consenting (Paragraph 29).

Justice Mildren does appear to be implying that the Crown should have prosecuted the case as a rape case although the argument made is somewhat circular and continues rather than rejects the distortion of customary law that has condemned many times over by Aboriginal women and formally recognised by the ALRC in 1994.

As the Families, Community Services and Indigenous Affairs Minister, Mal Brough has appropriately identified, both these cases clearly identify the need for measures that address the distortion of Aboriginal customary law as an excuse for sexual assault. It remains to be seen whether or not the government also recognises that effective measures must include the relevant Aboriginal community. These issues were first identified many years ago by Professor Judy Atkinson:

Within the Anglo Australian court system power has been abused and the truth has been distorted. Women, particularly, have been subjected to discrimination. Lawyers blame police, police blame lawyers. As white males, both have been instrumental in facilitating and legitimating acts of violence towards women and children, either by their attitudes, inaction
or presentation in court. Western courts are largely the domain of men ... Aboriginal people need to sit in judgement of each other. At present many law and order problems are not dealt with at all. No statements are being made, therefore, that such behaviour is considered unacceptable. For example, if you bash or rape a white woman, the matter is considered very serious and every effort will be made to charge, convict and imprison you. If you rape or bash an Aboriginal woman, that's OK. Nothing will happen (Atkinson, 2001, p. 22).

The Aboriginal justice models that have been established in Australia in recent years, such as Sentencing Circles or Koori Courts, now allow for Aboriginal Elders and communities to address their own law and order issues and play an important role within the criminal justice process (Marchetti & Daly, 2004). Under the Aboriginal justice models it is the Aboriginal Elders who directly confront and punish offenders, who recognise and empathise with the hurt and suffering of victims, and who also seek healing and resolution as best as possible. While such models in Australia generally exclude sexual assault cases, the systemic discrimination experienced by Aboriginal women and girls within the mainstream criminal justice system should mean that Aboriginal justice models are not automatically precluded from determining such cases.

**Conclusion: A human rights perspective**

Any future law reforms should also be accompanied by comprehensive human rights education and awareness raising strategy within both the criminal justice system and Aboriginal communities that aims at promoting the right of Aboriginal women and girls to freedom and protection from sexual violence. More specifically there should be a concerted campaign that recognises that Aboriginal society and culture and the tradition of promised bride has changed such that it should not be accepted anymore.

As Lorna Doone (herself once a promised bride) explained:

> It’s been good ... in the early days ... old lady would help the younger ones, you know. But now there's alcohol involved. People doing silly things. And force themselves for the promised wife. That they can do whatever they like with them (McLaughlin, 2005).

Young Aboriginal girls of the Northern Territory are now having their human right to live free from violence and sexual assault jeopardised by this practice and the government should assist women’s bodies and other relevant organisations to ensure that a ‘promised bride’ becomes a practice that belongs only in the past.

There are many challenges that lie ahead but one thing should now be crystal clear – for far too long the criminal justice system has been allowed to discriminate against Aboriginal women and girls and to undermine Aboriginal women’s attempts to reject the distortion of Aboriginal customary law as an excuse for violence and sexual assault. Will we now witness law reforms that instead empower Aboriginal women and girls? This includes recognising that Aboriginal people, in particular women and Elders, should also be an important part of the criminal justice system’s response to the very serious problem of sexual assault and abuse taking place in our communities.

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Hannah McGlade is a Nyungar woman, an Aboriginal human rights lawyer and the John Curtin Postgraduate Scholar at Curtin University, where she is also an advisory board member with the Centre for Aboriginal Studies and the Curtin Centre for Human Rights Education. She is currently undertaking her PhD into the experiences of Aboriginal women and girls within the Australian criminal justice system.