

Zero Tolerance or Community Justice? The Role of the Aboriginal Domain in Reducing Family Violence.

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“Stanley Brown (was)... an Aboriginal man heavily involved in matters affecting traditional Aboriginal law and active in the revival of its ceremonies... his role as Law man provided him with respect and status in his own community... In contrast (this) is how a police sergeant describes him and the manner of his death in custody: 'I was really surprised that he had hung himself because he was such a wimp. I never thought he would have enough guts to do something like that. His only attempts at violence were at Mary ... basically he was gutless' (W/13/45).

The essentially contradictory perceptions of this one person stem, at least in part, from the way in which non-Aboriginal law, and the enforcers of that law, refused to recognise what the law meant for Aboriginal men.” (Dodson P, 1991, *Underlying Issues in Western Australia, Royal Commission into Aboriginal Deaths in Custody*).

This paper draws heavily on a number of research processes conducted in partnership with Aboriginal people in Western Australia: including several projects on family violence prevention, crisis intervention and healing and (from 2000-2006) a major project on Aboriginal Customary Law. It also draws on work on Aboriginal Night/Community Patrols, community justice mechanisms and justice planning. I am grateful to all the Aboriginal people involved in these processes – including members of the Queensland Aboriginal community – who gave their time and energy and shared their stories, knowledge and experience.

As we meet this week to discuss violence in Aboriginal families the Queensland Crime and Misconduct Commission is holding consultations in Aboriginal communities in the wake of a series of profoundly tragic and unsettling events involving the violent death of an Aboriginal man in custody on Palm Island, and a subsequent systemic failure to offer justice to the man’s family and the Palm Island community. This inquiry into the policing of Aboriginal communities underscores a number of themes of relevance to this gathering and its aims and purposes. The ‘chains’ we need collectively to break to end family violence were forged in the heat

of colonial violence and locked in place by several centuries of oppression, neglect and indifference.

Policing in, or of, the Aboriginal domain raises a number of issues of relevance to this forum. My own view is that mainstream policing models are having difficulty in shifting the fundamental historical purposes of policing in Aboriginal communities. Policing is still systemically and structurally about *fixing the Aboriginal problem*, rather than *dealing with Aboriginal people's problems*. This has consequences for Aboriginal victims of violence.

Today I want to talk mainly about Aboriginal law and Aboriginal family violence. The two issues have become synonymous in the minds of – mainly white – commentators. I want to suggest that this position is simplistic and self-serving. It is also classic ‘victim blaming’ in the sense of turning the spotlight on aspects of an oppressed people’s culture and identifying them as the source of the problem.

Aboriginal people – including women and children – have been the subject of violence, exploitation and abuse for generations; some of this has been captured in the courageous work of Judy Atkinson and in the groundbreaking Queensland women’s task force report. There have in fact been numerous state and territory reports as well as some exhaustive research carried out by the Commonwealth’s Office of the Status of Women’s *Partnerships Against Domestic Violence* program in the 1990s, all detailing the significant crisis in Aboriginal life and the unacceptable levels of violence.

It is an accepted tenant of critical victimology that becoming a ‘socially sanctioned victim’ requires that those claiming the ‘status of victim’ fulfil a number of criteria.

Traditionally, Aboriginal women have found it hard to achieve ‘victim status’ because of degrading, racist stereotypes about them and a because of a lack of empathy by enforcement authorities and courts. They are not considered to be what Nils Christie called ‘ideal victims’. In fact Aboriginal women are routinely viewed as

‘offenders’, and lacking those characteristics western men associate with femininity and therefore deserving of sympathy and chivalry.

Over-representation

The 2004 Social Justice Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner documents the rate of incarceration of Indigenous women as follows.

Table 1: Indigenous women – rates of incarceration, March Quarter 2004²⁰

State/Territory	Number of Indigenous females in corrections	Rate per 100,000 for Indigenous females	Rate per 100,000 for females	Ratio: Indigenous to non-Indigenous females in corrections
NSW	178	489.4	2 22.1	31.9
Victoria	14	186.1	1 12.0	16.4
Queensland	76	202.7	22.0	12.0
South Australia	16	297.0	14.1	16.0
Western Australia	98	518.5	31.0	28.7
Tasmania	7	np	16.7	np
Northern Territory	12	68.1	1 29.5	4.7
ACT	–	np ²¹	10.5	np
Total	401	303.7	19.5	20.8

Other statistics are:

- Indigenous women are between 23 and 42% of the population of women in prison (Kilroy:2005). On some days over 50% of women in WA’s women’s prison (Bandiyup) are Aboriginal.
- Indigenous women are invariably serving short sentences, many of which relate to fine default and to convictions for public order offences. (Social Justice Report 2002)
- Indigenous women in gaol are slightly younger than non-Indigenous women. The majority are aged between 20 and 30 years old. A majority of incarcerated women are mothers. (Social Justice Report 2002)

- Between 1993 and 2003 the Indigenous female prison population increased from 111 women in 1993 to 381 women in 2003. This represents an increase of 343% over the decade. (Social Justice Report 2004)
- 78% of Aboriginal women in prison have been victims of violence as adults. (Social Justice Report 2002) 89 percent of Indigenous women in prison have been sexually assaulted or abused, 98 per cent have experienced physical violence, 50 per cent were seized from their families as children by statutory authorities, 77 percent will return to prison after release.” (Kilroy:2005)
- Four out of five Aboriginal women in custody believed that alcohol or drugs was an underlying issue in their offending with approximately 80% of participants responding in the affirmative. (New South Wales Aboriginal Justice Advisory Council) (Social Justice Report 2004)

Our system of justice habitually and routinely incarcerates Aboriginal women at unacceptable levels. Aboriginal women have been arrested by the police in WA under new domestic violence legislation intended to improve services for victims of domestic violence! Small wonder, therefore, that Aboriginal women do not see the police as a ‘service’ – as women in Bandiyup prison told us – ‘the service is locking us up’.

It is noteworthy, however, that some Aboriginal women *are now being accorded victim status in some instances*, provided they are positioned within victim discourse as *helpless, hopeless victims of traditional Aboriginal male violence, sanctioned – even encouraged – by Aboriginal law*. Aboriginal women will be rescued from beneath the dead weight of Aboriginal law and culture and from their Aboriginality. In central Australia Aboriginal law has been targeted as sanctioning violence against children and Minister Mal Brough talked of a ‘pedophile ring, child sex slaves, petrol warlords, murder, kidnappings, gangs, arson and cliques of violent Aboriginal men’ in one community.

Some Indigenous commentators are suspicious of white interest in the ‘plight’ of Aboriginal women, and see continuities with colonial strategies of dismantling Aboriginal culture, as Pat Dodson suggests:

‘throughout the ‘protection’, ‘assimilation’, ‘integration’ eras of the twentieth century, Aboriginal women have been consciously nominated targets of government in its pursuit to destabilise and dismantle Aboriginal society’, (Dodson P 1991).

Aboriginal Law

The issue of Aboriginal Customary Law has been pushed onto the political agenda in connection with the issue of violence in Indigenous communities. But what is Aboriginal Law? Is it really about violence and a charter for abusers? Does law condone violence against women, the rape of children? There have been a number of landmark inquiries into Aboriginal law, the most comprehensive national inquiry was undertaken by the Australian Law Reform Commission (ALRC) in the 1980s and there have been localised studies more recently in the Northern Territory and Western Australia, as well as a number of important studies which have examined the continued relevance of Aboriginal law in sentencing offenders (New South Wales) and in building community justice mechanism (The Cape York Justice Study).

Customary law is difficult to define in non-Indigenous terms, as it encompasses far more than the right to inflict physical punishment: ‘law’ represents a grammar for living and an intricate set of religious principles which make the world meaningful and intelligible. Aboriginal customary law cuts across the divisions we impose in western thinking between law, culture and religion.

Anxieties about the recognition of Aboriginal customary law are interwoven with colonial history and Australia’s claim to sovereignty. Recognising Aboriginal forms of law means in effect acknowledging the existence of Aboriginal society as in many respects still a separate society.

Anthropologists have tended to see Aboriginal law as a mechanism for establishing and reproducing balanced relationships between social/kinship systems, the natural environment and religious deities. It is hazardous to attempt a legal

definition or attempt to squeeze the construct into already existing legal categories: customary principles are not like statutes and codes.¹ Aboriginal law does resemble other forms of law, however, in the sense that it constitutes a body of rules, even if these rules are not written down, which are widely accepted as legitimate by those who uphold them and which are enforced by sanction and penalty.

The Australian Law Reform Commission and the Recognition of Aboriginal law.

This approach to the issue was adopted by the 1986 ALRC inquiry, which pointed to the continuation in Aboriginal culture of a set of customary practices ‘accepted as legal requirements or obligatory rules of conduct’ so vital to the maintenance of Aboriginal society that they were ‘treated as if they were laws’. The ALRC argued that:

A basic precondition for the recognition of Aboriginal customary laws is the simple assertion that it exists as a real force, influencing or controlling the acts and lives of those Aborigines for whom it is ‘part of the substance of daily life’².

The Western Australian Law Reform Commission (2000-2005) found widespread support for the recognition of Aboriginal customary law amongst Aboriginal people and evidence that continued non-recognition, and constant attempts to dismantle traditional practices, profoundly disadvantaged Aboriginal people by undermining social structures and systems of authority. The Commission heard evidence to the effect that the western system of justice and allied agencies alone were ineffective in dealing with issues within Aboriginal communities. The inquiry in the Northern Territory found that,

Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory, not just those in Aboriginal communities. This is because it defines people’s rights and responsibilities, who a person is, and it defines a person’s relationships to everybody else in the world.

¹ Toohey, J, 2006, *WALRC Background Paper* via www.lrc.justice.wa.gov.au

² ALRC, 1986, 79

In 2001 the Western Australian Law Reform Commission began a major review of Aboriginal Customary Law in Western Australia. The overall aim of the project was to reconcile Aboriginal and non-Aboriginal systems of law. Underpinning the inquiry was the recognition that Aboriginal people are frequently disadvantaged in their dealings with the non-Aboriginal system of justice, this disadvantage, moreover, appears to be the product of systemic factors rather than simply a reflection of individual racist attitudes and beliefs.

Community consultations were conducted across Western Australia in urban, rural and remote locations³. What these consultations revealed was that:

- Aboriginal law still governs many aspects of daily life for many Aboriginal people, providing the maps of meaning that make communal life possible and predictable.
- Law provides an overarching framework of rules and obligations, forms of penalty and censure, codes of conduct, etiquette and address.
- It informs people about with whom they can associate and under what conditions, it informs them about their obligations and their relationship to those around them.
- There was widespread support for greater recognition of Aboriginal law.

At a meeting with senior law men and women at Wuggubun in the East Kimberley the view was.

Traditional law says that justice should be administered by the community. Traditional law is potentially stronger than European law, in terms of addressing the underlying concerns in offending. Our law has been practised for some time. But it needs reinforcement, and greater respect. (Thematic Summary, Wuggubun)

³ consultations can be found at: www.lrc.justice.wa.gov.au

The consultations also found that law was still respected and practiced in prison – for both men and women. Women prisoners in Bandyup Women’s Prison told the commission,

Women's law business goes on in prison. Aboriginal women carry out law, to help or punish, but only on other Aboriginal women...

One clear message we received through the consultations was that violence against women and children is not culturally sanctioned. Practices such as girls being married off to much older men is virtually unknown today in areas of WA where law is still strong. Aboriginal women did not want to be saved from their law and culture – they wanted help with alcohol induced violence on their communities and with negotiating the bewildering complexities and ambiguities, the capriciousness and arbitrariness of *the white justice system*

What interested me about the NT revelations of violence was how little space was given to Aboriginal women’s voices on the issue.

Family Violence

Unlike the notion of domestic violence, Aboriginal family violence is difficult to define: its usage within Aboriginal communities remains diverse and localised. It is not my purpose to reconcile the construct of family violence with domestic violence, indeed I believe there is good reason to retain a degree of distance between the two constructs.

Too often, the kinds of conceptual certainty and specificity desired by non-Indigenous discourse (and demanded by the justice system, law and funding agencies) can operate to the detriment of Indigenous agency: ‘discourse capture’ ensures that concepts become refined in a way that fits them into mainstream law and policy but distorts their meaning from an Indigenous perspective. Take this Aboriginal women’s definition for example:

If you are being abused in any of the following ways: family fighting, jealousy, physical abuse, emotional blackmail, racial or cultural abuse or have problems caused by too much alcohol, drugs or gambling, this is family violence (Kimberley Domestic Violence Resource Directory, 1997).

Some of the above fits into dominant discourse about Aboriginal violence but some of it doesn't. Yet, Aboriginal women may see violence as being connected with a web of issues in their communities that the present pre-occupation with *domestic violence* minimises or ignores.

How do Aboriginal communities themselves define family violence?

Let us dispense with the notion that there is, or can be, a unitary definition of family violence and explore the construct in its diversity. There is no settled, one-fits-all definition and the meanings associated with the term shift from region to region in the light of local history, circumstances and concerns. They can also shift over time as new issues emerge. In the family violence category generally belong issues related to violence against women and children, but the category is broad enough to contain:

- clan and family feuds;
- jealous fights and *jealousing up* behaviour,
- the bitterness and uncertainties left in the wake of 'wrong way' marriages (people marrying outside of 'skin' relationships);
- alcohol and drug fuelled violence;
- neglect of obligations around kin and country;
- man on women violence;
- men on men violence;
- (less typically) some women on men violence;
- losing money on gambling;
- the 'humbugging' of elderly relatives for food and money,
- providing petrol to sniffers in return for sexual favours.

Memcott *et al* define it terms of a 'range of violence forms occurring frequently between kinspeople in Indigenous communities' (Memcott, 2001)

Aboriginal women want to violence to stop but they are ambivalent about the white legal system.

At the level of practice, the family violence approach leans towards finding pathways to family healing, rather than new routes into the criminal justice system. In this crucial respect it transgresses current orthodoxy around domestic violence intervention, focussed on zero tolerance policing and criminal sanctions.

None of which means Aboriginal women do not hold offenders accountable or that the violence is culturally sanctioned. Emphasis is placed on the need to work constructively with Aboriginal men - acknowledging that they are 'hurting too' (Sam, 1992); and need to link work with men to past and ongoing social, economic and cultural marginalisation rather than just 'pointing the finger and laying blame' (Sam, 1992).

The Nguiu Indigenous Family Violence Offender Program

The Nguiu Indigenous Family Violence Offender Program offers an example of an initiative that remains Aboriginal community owned while having strong links with relevant agencies and the courts. It is holistic, firmly embedded in law and culture, involving men and women, and working through traditional authority structures. Nguiu is an Aboriginal community on Bathurst Island which is part of the Tiwi Islands. Funded in the first instance through ATSIC and the Commonwealth Department of Women's Policy the project is currently run by Northern Territory Corrections. Importantly, program is delivered by local Indigenous Facilitators and offers an alternative sentencing option: forty men had completed the program by mid 2006, also 12 women (spouses/partners) had voluntarily attended a partner group program (White, Alimankinni and Alimankinni, 2006).

The program aims to reduce the incidence of family violence in these communities and clients are usually referred through the court: charges faced include can include assault against women, including aggravated assault, and failing to comply with a Restraining Order. The program content combines a mix of methods similar to mainstream treatment modalities, such as anger management, with specifically Aboriginal concerns, such as the nature of Indigenous family violence, cultural issues and Aboriginal and spiritual healing. It also relies on painting and story telling as ways of transferring information.

One of the longest running is the Derby Family Violence Prevention Project, established in the late 1990's, now known as the Jayida Burru Abuse and Violence Prevention Forum. The project operates in Derby and the adjacent Mowanjum Aboriginal community, and has evolved to take into account local cultural factors by, for example, having separate young men and young women's spaces and programmes, and working with close support from local elders. The project is supported by the local Shire and an inter-agency support group, and has had a strong focus on alcohol issues (indeed the project was initially situated in the sobering up shelter because of this) as well as philosophy of early intervention. Aboriginal people simply do not want to their law 'recognised' where this involves processes of codification and writing. They want their law left alone. What they want is support when dealing with the white man's law and in managing the tensions between white law and the dictates of Aboriginal law. I have suggested that we engage in partnerships with Aboriginal people in building hybrid initiatives within the labile and fluid meeting grounds between Aboriginal and non-Aboriginal domains, which are not Aboriginal law in the traditional sense, but which allow Aboriginal values, beliefs and forms of cultural authority to intervene constructively in the shared space between domains.

Breaking the Chains

Aboriginal people simply do not want to their law 'recognised' where this involves processes of codification and writing. They want their law left alone. They fear that if law is written down it will become the property of the white legal system and white lawyers.

What they want is support when dealing with the white man's law and in managing the tensions between white law and the dictates of Aboriginal law. I suggest that we engage in partnerships with Aboriginal people in building hybrid initiatives within the labile and fluid meeting grounds between Aboriginal and non-Aboriginal domains: initiatives which are not Aboriginal law in the traditional sense, but which allow Aboriginal values, beliefs and forms of cultural authority to intervene constructively in the flied space between domains.

Increasingly, the focus of attention is on Aboriginal law and cultures as the problem: *if only Aboriginal people would stop being Aboriginal then we could help them*. Aboriginal people are often penalised for their incapacity/unwillingness to live like us; *our solution to Aboriginal people's 'problems' is still that Aboriginal people cease to be Aboriginal*

We need instead to invest in Aboriginal *community owned* not just in Aboriginal *community based* services. There is already a strong nucleus of initiatives: Night Patrols, Safe Houses, Community Justice Groups, Sober-up facilities. They are currently under-resourced and under-valued but they are excellent vehicles for expanding new initiatives. These arrangements have been loosely mapped out in the reports such as the Cape York Justice Study.

These need to be linked with strong initiatives around culture and empower Aboriginal women. They need to be linked with the emerging sphere of Aboriginal courts and sentencing courts. They need to work in prisons and provide a base for early release and parole.

The white legal system alone will not make Aboriginal victims safer. Many Aboriginal women see law and culture as part of the fabric of their lives and a necessary part of any meaningful long term solution. Aboriginal women, assumed always to be the passive, docile and helpless victims of culture (the only accredited means by which Aboriginal women can be currently accorded victim status) are active participants in processes intended to reduce levels of violence in urban, rural and

remote Indigenous communities. Most do so on the basis of law and culture and on the forms of authority flowing from them.

Figure 1

Community Justice Mechanisms

