ABORIGINAL WOMEN AND THE LAW

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In order to fully understand the impact of European laws and lifestyle, violence and alcohol, and to gain some idea of how entrenched and misused these influences are in contemporary Aboriginal society, it is necessary to examine the factors leading up to it. It is a sad legacy of history that the Aboriginal people were colonised by a people who considered it their God-given duty to go forth and civilise the heathen, at a time when humanity was at best based on superiority, and at worst, at its lowest point. Aboriginal women have borne the brunt of much of this legacy.

Traditionally, women in Aboriginal culture have a status comparable with and equal to men. They have their own ceremonies and sacred knowledge, as well as being custodians of family laws and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining marriage partners and the moiety (or tribal division) of the children.

Consecutive policies and practices have served to undermine that status. While it would not serve any purpose, however, to itemise these in this paper, suffice to say that whatever the cause, by distorting and rejecting the Aboriginal experience, non-Aboriginal people absolve themselves of guilt. This has manifested itself in a double-edged sword—a society, which while rejecting Aboriginal people, still expects them to accept the values of the dominant society.

Recent anthropological studies have also contributed to a view of Aboriginal women, where if they appeared at all, were portrayed as the passive victims of white and Aboriginal men alike, and Aboriginal men as the freedom fighters. Male social and psychological researchers unquestioningly refer to the compromising of traditional male roles with the domestic or welfare economy, while describing women as conforming more easily to the welfare identity, implying that there is no difference between Aboriginal and Anglo cultures at least in relation to women (Hunter 1990). As Jocelynne Scutt writes, however, 'The invisibility of white women's culture and the
secondary role (white) women have . . . has a tendency to pollute any culture' (Scutt 1990). This, coupled with the experience of European settlement has had the effect of disempowering Aboriginal women, downgrading their role in society and silencing their cultural voice.

One of the most disempowering acts of all for women particularly was the 'assimilation' policy which saw Aboriginal babies taken from their mothers. The devastating effects of this institutionalisation and forced adoption of Aboriginal infants and children will continue to be a major factor in Aboriginal over-imprisonment for both sexes for a long time to come. A perusal of the backgrounds of the deaths investigated by the Royal Commission into Aboriginal Deaths in Custody reveals how common this was.

The Big Picture

There is little information available specifically on Aboriginal and Torres Strait women and the law. This in itself is symptomatic of the issues relating to Aboriginal women and the law, and for this reason, numerical data does not form a major part of this paper.

Statistics show, for instance, that in 1989, Aboriginal women represented some 16.3 per cent of the female prison population, compared to the figure for Aboriginal men of 14.1 per cent of the total male prison population, indicating that the situation for women is worse than for men. These figures depict one day of the year only, however, and caution should be used when looking at them. For instance, in the Northern Territory, Aboriginal women represented 100 per cent of the inmates at the time of the census, an appalling distribution you might think, until you see that this actually represents three women in total. The number for Aboriginal men was 240.

Indeed, the numbers are so small it is hard to gain an accurate or reasonable picture. According to the National Prison Census 30 June 1990, there were 105 Aboriginal and Torres Strait Islander women out of the total female prison population of 778, a decrease from the 1989 figure of 111. This represents 13.5 per cent and 16.3 per cent of the total female prison population respectively. (There were 2,041 Aboriginal and Torres Strait Islander men at the time of the National Prison Census).

The most frequently committed offences usually involved non-payment of fines, drunkenness (or the new improved, disguised lawful means of arresting for intoxication) and social security fraud—the result of extreme poverty.

In terms of recidivism, Aboriginal women (75 per cent) again rate lower than Aboriginal men (80 per cent). Compared to non-Aboriginal men (48 per cent) and women (29 per cent), the rate is substantially higher. Aboriginal women also returned to prison sooner than non-Aboriginal men and women (Broadhurst 1988).

Notwithstanding the available data, there is a deficiency of conclusive statistics to accurately portray the position of Aboriginal women in relation to the law. There is a need rather, to rely on anecdotal evidence and first hand accounts, such as those mentioned in the Discrimination in Government Policies and Practices Report where grave allegations were made relating to 'the sexual harassment and rape of Aboriginal women and girls by police while in custody' (Equal Opportunity Commission 1990) and the investigations carried out by the Royal Commission into Aboriginal Deaths in Custody.
Royal Commission into Aboriginal Deaths in Custody

The Royal Commission, by focussing on the underlying issues of Aboriginal disadvantage generally, and in each individual death, emphasised that underlying issues such as racism, alienation, poverty and powerlessness resulting in hopelessness and alcoholism all contributed more significantly to the imprisonment of Aboriginal people than any degree of criminality.

Generally speaking, the Royal Commission into Aboriginal Deaths in Custody did not include specific references to problems faced by women. Investigations by the Royal Commission into the individual deaths of the eleven women within their scope of inquiry reveal, however, the considerable disadvantage that these women faced within the wider society as well as within the criminal justice system.

One of the deaths involved the apparent suicide of a young girl aged fourteen years and three months, Karen Lee O'Rourke. Both of Karen's parents, an Irishman and an Aboriginal woman, drank heavily and had a history of conflict with the law. Karen was born with a disfigurement (webbing between the fingers and toes), and was raped before she was three years old. She was placed in an institution when she was six, after her mother left. She was raped again at the age of twelve and after ten years, when she was finally reunited with her mother, was unable to communicate emotionally with anyone.

Karen died after starting a fire at the Birralee Children's Home where she was being detained in yet another institution, before being sent back to Sydney. Before she died, the doctor who treated her asked 'Why did you want to kill yourself?' 'I didn't', she replied, 'I just wanted to get out of the place' (Wyvill 1990)—no suicide at all in fact.

In the case of Barbara Yarrie, Commissioner Wyvill states that 'Barbara's criminal history resulted largely from her . . . addiction to alcohol from an early age'. She had been taken to watch-houses some forty times for drunkenness, as well as on occasions for other 'crimes' associated with alcohol abuse. And while her criminal record reveals a history of drunkenness and poverty, she was never convicted of crimes against the person. Like her young sister Fay and all the other deaths investigated by the Commission, 'Barbara Yarrie witnessed very little justice in her life' (Wyvill 1990).

Commissioner Wyvill also sums up the circumstances surrounding Fay Yarrie's death. He says:

Fay Yarrie died because the place to which she was removed was designed without consideration for her safety. She died because the people charged with the responsibility for her welfare were unable or unwilling to care. The horrible circumstances of her death—being set upon by another in a cell in which she was placed for 'protective custody'—underlies the obscenity of placing severely intoxicated people in police cells (Wyvill 1990).

All of the deaths have a common thread of destitution, drunkenness and hopelessness—'The Young Woman who Died at Ceduna', was a life-long chronic alcoholic and a victim of many assaults; Christine Jones's life was 'affected by family dislocation and cultural breakdown and habituation to alcohol' (O'Dea 1989). Joyce Thelma Egan died from an overdose of a potent cocktail of alcohol, Mogadon, Serepax and Doxepin; Muriel Binks suffered a life threatening illness, masked by intoxicification and undetected, with the police involved blamable for 'inadequate screening procedures, infrequent, neglectful and insensitive supervision, poor training
and ingrained and misconceived attitudes concerning the behaviour and management of the severely intoxicated’ (O'Dea 1990).

**The Other Side of the Coin**

Aboriginal women's contact with the justice system does not involve only their direct contact with the police, the judiciary or prisons. Their contact must also be counted in terms of being the wives, mothers and sisters of the prodigious number of Aboriginal prisoners and as the victims of homicide, assault and rape crimes at levels unheard of in the rest of Australia and against which the criminal justice system seems helpless.

Criminal activity can be delineated along male/female lines. As for non-Aboriginal groups, it is a fact of life that there is one law for men and another for women. Men are responsible for the vast majority of crime committed, yet it is women who suffer disproportionately.

Men rarely suffer sexual assaults, domestic/family or other physical violence at the hands of women. However, for many women being the victims of such crimes at the hands of men is an all too common occurrence.

Comprehensive studies of violence in Aboriginal communities in the last couple of years, particularly in the Northern Territory, the Kimberleys and in North Queensland, have revealed a degree of violent crimes against women which is affecting the future existence of whole communities. Data from those studies expose a level of death by homicide among Aboriginal women by their spouses, sons, grandsons, uncles, and the list goes on to include all male relatives, at a rate which rivals that of all Aboriginal deaths in custody over the same period.

There were no deaths in custody of Aboriginal women in the Northern Territory during the Royal Commission reporting period, yet according to Northern Territory police crime reports, thirty-nine Aboriginal women died due to homicide. Aboriginal women in the Northern Territory are twenty-eight times more likely to die from homicide than any other Australian person (Bolger 1989).

It is also appropriate to look at the issue of violence in mainstream Australian society and compare that with the experience of Aboriginal women. While physical aggression may be seen as a feature of Aboriginal communities, the use of force in the wider population is much more common than is generally recognised. The National Committee on Violence's Report, *Violence: Directions for Australia* (1989), observes that 'violence permeates all life in contemporary Australian society' and notes that the hidden nature of this crime is such that estimates may only be in the nature of informed guesses.

One of the major similarities of violence suffered by Aboriginal and white women is the use of 'provocation' as a legitimate and acceptable excuse for men who are abusive. The major differences between violence in Aboriginal society and that in the general society appears to lie in the nature of the violence and the tendency for implements/weapons to be used against Aboriginal women and the frequently fatal outcome.

While a considerable amount of violence against women is not associated with excessive alcohol consumption, women in all levels of society, both Aboriginal and white, related the level of violence to problems with alcohol. The commendable move by most states and territory governments to decriminalise drunkenness has added another burden for Aboriginal women. The way in which governments have not
complemented the legislation with resources indicates that little has been learned by the way in which 'full citizenship' was given to Aboriginal people, when the churches and missions withdrew virtually overnight leaving no administrative structure or training and support to enable those left behind to manage their own affairs.

By not providing alternatives to police cells, such as sobering-up centres or detoxification units for detaining those excessively affected by alcohol, one answer has been to take them home. It is often the wives, mothers and grandmothers who are left to deal with the consequent violence and mental and physical problems.

**The Police and the Law**

As the vast majority of initial contact with the criminal justice system starts with the decisions of police, it is appropriate to examine past and present policing practices and procedures, and the subsequent impact on decisions by the courts.

The relationship between the police force, which is often the only continuing official presence, and the Aboriginal communities reflects the social imbalance where Aboriginal people are excluded from the dominant culture and placed in an inferior relationship. For women, the police role as agents of the old Aborigines Protection Boards, carrying out the assimilation policy and the zealous application of those duties, have soured the association even further.

Negative opinions are also reinforced if the only time Aboriginal people meet police is in times of conflict. An unbalanced view of police activities (and of community life on the part of the police) is bound to emerge. Criticism too has been levelled at police for the way in which they disclose the custodial deaths of relatives by the Royal Commission which found that lack of effective communication was bound to foster suspicion about the role the police have played in the deaths.

A personalised police force which consults and liaises more with communities is one way of changing perceptions. The Community Justice Panels in Victoria provide an excellent example of a consultative, liaison exercise which successfully brings together police and the community and which has been effective in reducing the number of Aboriginal people arrested in centres which have the program.

Another method for improving relations is to address the cultural ignorance and consequent racism within the police force. The development of cross-cultural training and recruitment procedures which exclude racists from the police service, rather than specialist services or increased numbers of police, is the approach needed.

The proposals put forward to receive funding to implement recommendations from the Royal Commission's Interim Report highlight the differing approaches. In Queensland, for example, the proposal outlined improvements to police training and enhanced recruitment practices as well as the establishment of alcohol rehabilitation centres. In New South Wales, they went for more police and bigger and better cells in areas of high Aboriginal population. It does not take a genius to work out which will have the effect of increasing prisoner numbers and amongst which minority group that increase will occur.

One answer I would not advocate is the establishment of Aboriginal police aide schemes as they presently exist. The criticisms concerning the scheme contained in the Western Australian Equal Opportunity Commission's Report, such as discriminatory powers of arrest limited to Aboriginal people only, doing all the 'dirty work' of police in Aboriginal communities with none of the benefits received by
regular police officers and limited career structure, are often repeated to me in forums across Australia. Not the least of these criticisms is the arrest and detention of police aides in Central Australia accused of raping an Aboriginal woman in their custody. The police aides themselves speak of being 'caught between two worlds, neither full members of the police force, nor accepted by the local Aboriginal Community' (EOC 1990).

Aboriginal communities must also recognise that entrenched attitudes against police are inhibiting the fostering of closer relationships. While we have been force-fed non-Aboriginal culture, the wider Australian community knows little of the societal and cultural values of Aboriginal people. Much of the police mismanagement and misinterpretation is based on cross-cultural ignorance and education through closer ties will alleviate a great deal of the ignorance.
Traditional Law: Solution or Illusion?

Traditional law is not necessarily an appropriate method to address the question of over-imprisonment and assault of Aboriginal women. Whilst conceding that traditional law solutions have much to offer, the current cry to return wholesale to the old ways is asking for trouble.

Groups of Aboriginal women are saying that they are being subjected to three types of laws, as women in the Northern Territory have so appropriately described it: 'white man's law, traditional law and bullshit law', the latter being used to explain a distortion of traditional law used as a justification for assault and rape of women, or for spending all the family income on alcohol and sharing it with his cousins, justifying the action as an expression of cultural identity and as fulfilling familial obligations. It is suggested that this is merely using 'Aboriginal tradition to justify what is in essence selfish exploitation based on an individual desire for alcohol' (Gibson 1987). It is ironic that it is the imposition of the white man's law on traditional law which has resulted in the newest one.

Numerous too are the instances where defence lawyers have abused customary law. In rape cases, a dangerous precedent has been set where sexual assault is cited as traditional or acceptable by quasi-anthropologists and all manner of experts. In Canberra this year, the defence for a particularly hideous attack on an Aboriginal woman was based on the loss of lands and culture on the part of the young males involved. Apparently the young woman had no such defence although she too had lost her heritage.

The judge accepted these 'extenuating' circumstances and gave the two men involved five and eight months respectively. The sentence for the main offender was later extended after an appeal. While the present system provides little incentive for the rehabilitation of violent men, it would have been preferable that the judgment mention something of the real situation. It was the combination of being young, male and drunk which led to the assault!

On the positive side, a case in the Northern Territory which involved the rape of a fourteen-year-old girl who was taken into 'protective custody' and released to walk home alone at 1.30 am in Alice Springs came to a different conclusion. Kearney J. found in this case that the evidence to have sex with the child under customary law irrelevant, that 'Aboriginal women have a right as all other women do to be protected by the law ... Rape ... in circumstances as this case where there are no elements of tradition involved, are crimes of violence in their essence'.

The implications of the increasingly common findings based on so-called cultural norms are frightening. Apart from the fact that these types of defences set dangerous precedents, they also denigrate Aboriginal men and Aboriginal culture. My grandfather had no need to resort to rape. His fifty-year relationship with my grandmother was based on love and mutuality.

The author is not an advocate of imprisonment or punishment generally—a traditional response to rape of Aboriginal women might prove an appropriate and long-term deterrent.
Solutions: Do Any Exist?

Solutions will come from within the Aboriginal community. Strong communities are made up of strong individuals brought about by the development of culturally specific training, which balances the physical, emotional, social and spiritual aspects of their lives.

One of the other manifestations of unexpurgated guilt of non-Aboriginal Australia has been the construction of Aboriginality. In the past, Aboriginal Australia was a multicultural society with hundreds of languages and 'tribal' groupings. The contemporary sense of community largely results from the common rejection by the white society. From the fractured societies of the Aboriginal past there has arisen a powerful sense of cultural identity, a commonality of purpose.

One important measure to ensure the success of community work remedies is to encourage and facilitate the growth of Aboriginal organisations and infrastructure to provide services to Aboriginal people. The revitalisation of Aboriginal culture and identity has come through the emergence of Aboriginal community organisations such as the various legal, medical or health services, arts and craft co-operatives, housing companies or sporting bodies. It is through such organisations that the avenue for change will continue to emerge.

In the field of criminal justice where states and territories have direct responsibility, differing laws, legal remedies and alternative services, the delivery of coherent community based initiatives, appropriate to the needs of Aboriginal people, is extremely difficult. Nevertheless there are many ways for achieving, through close consultation and consensus on the common objectives, greater consistency in these criteria throughout rural and urban Australia.

Community development, rather than social justice options offer the best chance for Aboriginal self-management and self-determination. The big picture of social justice, part of a grand vision, does not take account of local nuances or that resources of communities may be adapted to fit in with solutions, whereas community development occurs when communities identify their own problems and solutions are adapted to address these, using the resources within the community to develop and implement their own solutions.

It is with that commonality of purpose, through the resurgence and strength of positive and powerful Aboriginal community organisations that change will emerge. While non-Aboriginal people have a role to play as facilitators and advisers, the solutions will only be effective if they are developed by Aboriginal people, with services staffed and controlled and delivered by Aboriginal people. Non-Aboriginal people who cry racism at such specialist endeavours, should ask themselves where are the Aboriginal women at mainstream refuges, at rape crisis centres. Why don't the courts, the police or the health facilities treat the assaults and rape of Aboriginal women as seriously as for non-Aboriginal women? For Aboriginal women, they should question the heavily male-oriented organisations and demand their right to be heard as is culturally proper. The infighting and criticism of Aboriginal people by Aboriginal people has got to stop. We cannot go back but we can go forward, taking all that is positive and good and blending it with all that is acceptable.
Conclusion

It may be said that the issues facing Aboriginal women and the criminal justice system are a double indemnity; a reflection of the wider issues of dispossession, alienation, poverty, and discrimination which feature customarily in the everyday life of Aboriginal people, as well as the socio-economic position of women generally within a male dominated ‘western’ society. These issues will never be fully resolved while Aboriginal women occupy, whether by ignorance or design, their current position in Australian society. And, as Jocelynne Scutt writes ‘white women will be advantaged if the visibility of black women in Aboriginal culture is properly recognised by dominant Anglo-Australia’ (Scutt 1990).

References


National Committee on Violence 1989, *Violence: Directions for Australia*, Australian Institute of Criminology, Canberra.

