Domestic violence

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Uniting law and community-based strategies.

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Violence born of the by-products of colonisation, such as dispossession and extreme poverty, has become endemic in Aboriginal societies with women too often the victims. Despite various studies in the area, responses to the problem, especially initiatives under the general law, have proved to be ineffectual.

There are no uniform means by which statistics are collated either within each State or nationally and thus available data cannot be relied on to provide a complete picture of the problem but only to give an indication.[1] Further, domestic violence is a 'dark figure'[2] and this is especially so in Aboriginal communities where violence generally is chronically under-reported. There are several reasons why this is so, including fear and mistrust of police and of the white justice system, fears of reprisal from a spouse, and lack of knowledge about available alternatives, or even that a crime is being committed.

The general law

An analysis of police and judicial perceptions of the problem demonstrates how gender and race are inextricably linked in the way violent offenders who perpetrate crimes against Aboriginal women are dealt with. Judicial statements and attitudes in the area of domestic violence have been instrumental in perpetuating racist and sexist stereotypes which marginalise Aboriginal women. In cases where a community is perceived to regard an offence as less serious than under the criminal law, judges have been prepared to award a lighter sentence than the norm. In *Police v Wurramurra,* 'violent disciplining of disobedient wives' was seen to justify such an approach.[3]

A further factor which severely marginalises the experience of Aboriginal women is the preparedness of the courts to take into account certain 'mitigating' circumstances such as alcohol abuse, dispossession and poverty as experienced by men. At the same time, the courts have failed to recognise the effect these factors have had on Aboriginal women.

In 1990, two Aboriginal men were given short sentences by Justice Higgins of the ACT Supreme Court after being found guilty of raping an Aboriginal woman. Evidence for the defence was admitted at the sentencing stage and was used to mitigate the sentence. This evidence included the fact that 'the offender felt a deep loss of cultural heritage', and that 'acts done under the influence of alcohol were regarded more leniently in Aboriginal communities'. In addition, evidence was accepted from that offender's mother 'that the victim was regarded as setting a bad example to Aboriginal women, "by her heavy drinking and previous disrespectful behaviour"'.[4]

Judgments such as these are, in effect, dehumanising to Aboriginal women. In the 1990 ACT case, alcohol was regarded as a mitigating circumstance. However, courts have not always been so ready to accept evidence of 'traditional' law or to allow alcohol to be a mitigating

circumstance where the rights of a victim have been seriously violated.[5]

In the case of the judiciary, when defence raises outside elements such as traditional law, dispossession or alcoholism, it is essential that the views of the victim and other women in the community are heard. There is, in the case where traditional law is raised, a necessity to hear from women who know and understand the law. There needs to be someone who takes on an *amicus curiae* or friend of the court role, so that the court can be informed whether what occurred was really traditional, or if it was just 'bullshit' traditional violence. In addition, a victim should have her own representative to ensure that she is not victimised by the judicial process and so that her views on dispossession, alcoholism and the effects on her of the assault can also be brought to the court's attention.

Apart from the criminal law, the general law offers a number of remedies to victims of domestic violence. However, they are generally ineffective and hence, special domestic violence legislation has been passed. These remedies include tort injunctions and damages and victims compensation. Victims' injuries compensation, although varying among States, has several requirements which prejudice victims of domestic assault. In most jurisdictions the crime must be reported to the police within a reasonable time. This is problematic because domestic violence cases often go unreported. Further, an applicant for compensation must usually assist the police in the identification, apprehension and prosecution of the offender thereby jeopardising an award of compensation if a women chooses not to give evidence against her spouse. Additionally, in all jurisdictions, the victim's behaviour must not have contributed either directly or indirectly to the commission of the offence. Given police attitudes and the prevalence of victim-blaming, this requirement may well be very difficult for the victims of domestic violence to meet.[6]

The *Family Law Act 1975* (Cth) allows the Family Court to issue injunctions to restrict a number of behaviours including violence and harassment and the police may arrest an offender if they have reasonable grounds to believe that he has caused or threatened to cause bodily harm.[7] However, this remedy is also ineffective because it relies on the victim bringing an action in the family court within 24 hours of arrest which is expensive and requires legal representation.[8]

Protection orders are available in all jurisdictions and are obtainable on the balance of probabilities. Breach of an order is a criminal offence and the police are empowered to arrest without a warrant if there is a breach. However, enforcement of a protection order depends on police action and police are often reluctant to intervene in 'domestics' or to exclude a man from his home if an order so requires it. Orders have also been criticised because they require a victim to be assaulted twice before the criminal law comes into play and even then the prosecution is for breach of an order and not criminal assault.[9] In effect, such orders can be ignored with little fear of police action or serious consequences.[10]

Access to the legal system

Effective access to legal representation is essential so that women are not victimised when approaching the legal system for assistance. In 1992, Robyn Bella Kina told the ABC documentary *Without Consent* that when she killed Anthony Black after years of abuse she had never even heard the term 'domestic violence' and that she did not know she had any legal rights at all. Sadly, many women in abusive relationships still do not know that when they are assaulted by their partner a crime is being committed or if they are aware, they are unable to access the law.[11] Changing this situation starts with community education, particularly for women in remote and rural areas, so that they are aware of their rights and various legal remedies such as victims compensation and protection orders.[12]

Access to the white legal system starts through contact with service providers, especially police, who have traditionally been oppressive towards Aborigines. The experiences of women who have reported domestic assaults to the police has been far from positive, many finding a second source of victimisation at the hands of police. In some cases police interrogate complainants about their sexual history and whether or not they are a fit mother,[13] or tell them that there is nothing that can be done. Another common problem is that women who seek help are simply not informed of their legal rights by service providers.[14]

The Aboriginal Police Liaison Officer (APLO) scheme which was implemented to serve all Aboriginal people has done little to assist victims of domestic violence. For example, in 1991 in NSW there were 33 APLOs, all of whom were male, and whose role with respect to domestic violence was unclear. In one instance an APLO reported that his supervisor had told him not to involve himself in domestic violence complaints and thus victims were left unassisted by the very person appointed to provide them with a service.[15] This evidences a glaring need for the roles of APLOs to be clearly defined and also for the appointment of female APLOs who are trained to deal with domestic violence.[16]

Aboriginal women in domestic violence situations cannot generally access effective legal representation. The Aboriginal Legal Service (ALS) has a policy of not acting in a matter involving two Aboriginal clients and they give priority to defendants.[17] While on its face this policy appears to be gender neutral, it precludes victims from accessing the only culturally appropriate legal service available to them.[18]

The experiences of Aboriginal women who have had dealings with the white legal system clearly evidence a need for a culturally appropriate legal service for Aboriginal women. In both NSW and Queensland efforts are currently underway to set up a service which would focus on assisting victims of domestic abuse with culturally appropriate advocacy, and teaching women about their rights.[19] In NSW this move has prompted much debate in the Aboriginal community because it is potentially divisive, pitting Aboriginal men and women against each other in the white adversarial legal system and because domestic violence should not be separated from a host of other social issues.[20] However, the *Women Out West Project* found that women in all the communities consulted supported the establishment of a specialist legal service for Aboriginal women.[21]

Community initiatives

The white legal system does not cater adequately for the needs of white Australian women let alone for Aboriginal women whose experience with the white legal system has historically been negative. Thus, community initiatives have come to provide an alternative for dealing with the problem of domestic violence. This is especially so in communities that are inhabited by a number of tribal groups due to forced removal from their traditional lands. What is required 'is a careful marriage of community-based and controlled action

and the support of the law'.[22] Such a 'marriage' would be optimal if it keeps men out of white prisons by rehabilitating them, protects and supports victims and allows Aboriginal communities to obtain autonomy over their own justice mechanisms.

Several models which relate to policing, community justice processes and sentencing are available. They aim to empower women and give them a voice while at the same time understanding the needs of perpetrators so that they can be effectively aided to break the cycle of violence. No one model will be applicable to all communities but each should be considered in light of the cultural needs, resources and circumstances within a particular community.[23]

Community policing initiatives which reduce violence and restrict the use of alcohol have been developed in some remote communities and town camps. One example of community policing is the Yuendumu Women's Night Patrol which, with the support of the police, seeks out people who have been drinking. The police themselves recognise that this has led to a drop in violence in the community.[24] However, it is clear that whatever model for community policing is developed by the community in question, it must be coupled with the co-operation and support of police who will then be accountable to that community for failing to act or acting in a certain way.

The community itself must also be able to decide what constitutes acceptable behaviour and then decide if that standard has been breached and if so what sanction should be applied. By-laws, a legislative framework at the local level, can be utilised as a public forum to facilitate statements about what constitutes appropriate behaviour.[25] If there is a breach, then there are several ways in which a community may choose to deal with it. In Queensland trust areas there are already Aboriginal courts and people working in these should be trained to deal with domestic violence issues.[26] The Queensland Aboriginal Justice Advisory Committee is also piloting a program to train Aboriginal justices of the peace with powers in some cases similar to the magistracy. Other traditional law mechanisms for redress of conflict such as public debate, family meetings and clan/community moots should also be looked to as other areas where solutions may be found.[27]

Sentencing is the area where communities can have the most effective input in terms of keeping perpetrators from incarceration and rehabilitating them and supporting victims. One model which facilitates appropriate rehabilitative sentencing for perpetrators is the 'Circle Court' currently in use in some indigenous Canadian communities. For this model, the offender must plead guilty and show remorse and there must be a number of members in the community who are prepared to assist in rehabilitating him. The process allows members of the community, the perpetrator, a judge and sometimes a victim to meet and be heard in a public forum.[28]

The circle breaks down the formal justice process by enabling the court to hear the cultural context of the offence and the concerns of the community.[29] A sentence plan is presented to the court usually including alcohol and other counselling and support for the offender, with punishment to ensure responsibility for the offence and payment for the harm to victims, and the community being incorporated where appropriate. The circle meets again after a period of some months to decide if the sentencing plan has been effective before a final sentencing plan is made.[30]

In cases involving domestic violence, it is essential that the victim be given a voice in the process. Usually a victim support group is formed at an early stage, and if she chooses not to appear at the circle, a victim's impact statement can be made or someone can appear on her behalf.[31] Thus, the victim, rather than being victimised again by the official court process which is alienating and difficult to understand, is empowered and her input becomes part of the sentence. However, it is essential that the victim is protected from being intimidated by her partner. This problem occurred in a case in Quebec in 1993 where the offender was able to spend the 24 hours prior to the sentencing circle with his victim and intimidated her so that at the circle she was unable to express how her partner's actions had impacted on her.[32]

If the needs of the victim are to be met in an adequate and supportive way, the 'Circle Court' provides an excellent method for 'marrying' community initiatives with the support of the law. The sentence of the offender comes from the community, utilising the resources in that community, rather than being imposed from the outside, while the choice of sentence is supported in the law by a judicial order. It allows victims of domestic violence to become more confident about reporting instances of violence because they are not confronted by a hostile judicial process and know that incarceration will not be used as a sanction unless the community deem it absolutely necessary. Further, the 'Circle Court' process can also be used to formulate probation orders so that offenders who do return to a community after a period of imprisonment do not continue to assault their partners but are assisted by the community to break the cycle of violence.

Conclusion

The tragic relationship between Aboriginal people and the criminal justice system requires that incarceration of perpetrators be avoided where possible because Aboriginal men (as well as women) are victims of racial oppression. Without acknowledgment of this fact, the cycle of violence may never be broken. However, any effective solution cannot be one that is imposed from the outside. It must come from within the communities where the problems exist, with appropriate assistance from white authorities and service providers. It must also ensure a voice for Aboriginal women, so long silenced by a sexist and racist colonial mentality, so that they and their communities can own the solutions which will overcome the violence.

References

1. See, for example, Bolger, Audrey, *Aboriginal Women and Violence in the Northern Territory*, North Australia Research Unit, Australian National University, 1991, pp.22-3.
2. National Committee on Violence, *Violence: Directions for Australia*, Australian Institute of Criminology, 1990, Canberra, p.4.
3. *Police v Wurramurra* (unreported, NT Ct of Summary Jurisdiction, Groote Eylandt, 1977, No. GE 439 of 1977 cited in McRae, Nettheim and Beacroft, *Aboriginal Legal Issues: Commentary and Materials*, The Law Book Co. Ltd, 1991, p.273.
4. Atkinson, Judy, 'A Paper Presented to the Indigenous Education Workers' seminar, 'Working With Families', 3-7 December 1991', unpublished, pp.4-5.
5. In *The Queen v Wally Hagen and Robert Tilmouth*, the judge, in convicting the accused, stated that 'as to [the] evidence about your right to have sex with Bessie in Aboriginal law, I treat that as irrelevant on the facts of this case': (1990), unreported, Court of Summary Jurisdiction, Groote Eylandt, Northern Territory, 1997, noted in (1990) 2(46) *Aboriginal Law Bulletin* 18.
6. Seddon, N., *Domestic Violence in Australia: The Legal Response*, 2nd edn, The Federation Press, NSW, 1993, pp.81-5.

7. *Family Law Act 1975* (Cth), ss.114, 114AA(3)(a)(i), 70D(1)(b).
8. Seddon, above, p.72.
9. Seddon, above, p.89.
10. Australian Law Reform Commission, *Domestic Violence,* Report No.30, AGPS, Canberra, 1986, p.xv.
11. See, for example, *Aboriginal Women's Legal Issues Conference*, 19 June 1993, Town Hall, Parramatta, NSW, p.2.
12. See, for example, Women's Legal Resources Centre, *Women Out West: A Report on a Series of Workshops for Aboriginal Women in the West and Far West of NSW in 1992*, 1993, Harris Park, NSW, p.12.
13. Atkinson, Judy, 'Violence Against Aboriginal Women: Reconstitution of Community Law - The Way Forward', in 2(46) *Aboriginal Law Bulletin* 6 at 7.
14. See, for example, Thomas, C., *Report on Consultations With Aboriginal Communities: NSW Domestic Violence Strategic Plan*, NSW Women's Co-ordination Unit, July 1991 p.3; New South Wales Sexual Assault Committee, *Sexual Assault Phone-In Report: Held November 1992*, NSW Sexual Assault Committee, August 1993, Ministry for the Status and Advancement of Women, p.48.
15. Thomas, above, pp.4-5.
16. Women's Legal Resources Centre, above, pp.2, 13 and 15.
17. See, for example, Australian Law Reform Commission, *Equality Before the Law: Justice for Women,* Report No.69, Part 1, 1994, p.123; Secretariat of the National Aboriginal and Islander Child Care, *Through Black Eyes: A Handbook of Family Violence in Aboriginal and Torres Strait Islander Communities*, Victoria, SNAICC, 1991, p.32.
18. Australian Law Reform Commission, *Equality Before the Law*, above, p.123.
19. Aboriginal Women's Legal Issues Group Inc., *Application for Funding of the New South Wales Aboriginal Women's Legal and Advocacy Centre*, 1994.
20. See, for example, Neill, R., 'Domestic violence divides black women' in *The Weekend Australian*, June 18-19, 1994, p.9.
21. Women's Legal Resources Centre, above ref. 12, p.3; see also *Aboriginal Women's Legal Issues Conference*, 19 June, 1993, Town Hall, Parramatta, NSW, pp.3 and 6.
22. Dodson, Mick, 'The Rights of Indigenous Peoples in the International Year of the Family' (1994) 18(4) *Aboriginal and Islander Health Worker Journal* 13. See also Atkinson, Judy, above, ref.13, p.7.
23. See, for example, Airo-Farulla, Geoff, 'Community Policing and Self-Determination', 2(54) *Aboriginal Law Bulletin* 6 at 8.
24. 'Yuendumu Women's Night Patrol', (1992) 16(2) *Aboriginal and Islander Health Worker Journal* 14 at 15.
25. Atkinson, Judy, 'Violence Against Aboriginal Women,' above, p.7.
26. Atkinson, Judy, 'Violence in Aboriginal Australia: Part 2', (1990) 14(3) *Aboriginal and Islander Health Worker Journal* 4 at 23.
27. Atkinson, Judy, 'Violence in Aboriginal Australia', 1989, unpublished, p.2.
28. Lilles, H., and Stuart, B., 'Creative Justice: The Role of the Community in Sentencing', (1992) 8(4) *Justice Report* 1, p.4.
29. Lilles, H., and Stuart, B., above, p.4.
30. Lilles, C.J.C.T., 'We Can Do What I Cannot: An Outline of the Yukon Circle Sentencing Initiatives', unpublished, 10 February 1994, p.3.
31. Lilles, C.J.C.T., above, p.2.
32. Cmkovich, M., *Pauktuutit Inuit Women's Association:Report on the Sentencing Circle in Kangiqsujuaq*, prepared for Pauktuutit and Department of Justice, Ottawa, Canada, June 14 1993, p.13.

Letter

Dear Editor,

I refer to the article *Power without Accountability* written by Greg Connellan, published in the October edition (Vol. 19, No.5) of your journal.

On page 204, the author discusses recent amendments to the *Crimes Act 1958,* which give members of the Victoria Police power to request a person's name and address in certain circumstances. Section 456A has been quoted as the relevant section which gives Victoria Police this power. On reading the *Crimes Act 1958,* the section which the author is discussing actually is s.456AA.

This section has also been misquoted. When an author has placed quotation marks around a sentence or paragraph, the reader can assume that that particular sentence or paragraph has been taken directly from the relevant text. This is not the case in this article.

Is it the Alternative Law Journal's policy to allow authors the freedom to paraphrase legislation when using quotation marks ? If so do you not feel that this compromises the ability of the reader to formulate an *informed* opinion on the subject. Surely italics would be a more appropriate form (although still inadequate) of emphasis to convey to the reader that this is not a direct quote from a text, but the writer's interpretation of the relevant text.

Peter Keys
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Editor's note: Guilty as charged — but in mitigation we plead that the ANSTAT Update Bulletin upon which the author relied, also showed the incorrect section number.