

‘Women, Safety and the Law’

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Hannah McGlade

‘New solutions to enduring problems’: future directions for Aboriginal victims and communities

Introduction

This paper concerns the need to find new solutions to the enduring problems experienced by Aboriginal victims and communities, and the place of restorative justice. As a human rights lawyer and advocate for Aboriginal women and children who have experienced sexual assault and violence, I am very conscious of the level of trauma, abuse and re-victimisation that Aboriginal women and girls are likely to experience at the hands of the justice system. Notwithstanding the many millions of dollars allocated yearly in the name of Aboriginal justice, Aboriginal victims experience injustices and discriminatory treatment as a matter of course. I sometimes find it difficult to advocate a criminal response to violence and abuse with the knowledge that there is likely to be no dignity, empowerment or justice for victims.

Many Aboriginal women do not have confidence in the police, and victims often experience a flawed police investigation process and lack of protection. This was very evident in the case of Susan Taylor, a 15 year-old Noongar girl whose death in 1999 subsequently led to a major government inquiry into how agencies respond to complaints of family violence and child abuse.¹ According to the WA Coroner, the cause of Susan’s death could not be determined and the official finding was ‘open’ due to the failure of police to follow basic investigatory standards. The WAPS never gave any public explanation as to why they had failed to comply with their own basic investigatory standards. Susan Taylor died only two weeks after well intentioned child protection workers encouraged her to make statements to the police concerning sexual

¹ Gordon, S, Hallahan , K, Henry, D “Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities’, 2002, Department of Premier and Cabinet. West Australia

abuse at the hands of her male family members, including a then prominent community leader.²

Research has shown that police lay charges in only a very small minority of sexual assault cases, and the evidence indicates that this is more likely to be so where the victim is Aboriginal. The latest research study to highlight this disparity is the *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* in which it was reported that no criminal charges were laid with respect to any of the 16 complaints of sexual assault made by Indigenous victims.³ An exception appears to be where there is strong commitment and political support for prosecution, and this appears to have been the case in the Kimberley region of WA where the establishment of a police taskforce in 2007 has resulted in 134 Aboriginal offenders facing charges.⁴

In the small minority of cases where Aboriginal sexual assault victims actually proceed to a court hearing, the research indicates the likelihood of their facing discriminatory and even abusive treatment on the grounds of their race and gender. The most comprehensive research concerning rape cases in Australia 'Heroines of Fortitude'⁵ showed that Aboriginal women were regularly bullied, harassed and intimidated during cross-examination⁶ and that 'the credibility of many Aboriginal women was frequently attacked with the use of racist myths and stereotypes about Aboriginal culture'.⁷ This study confirmed that Aboriginal women, who were ten times more likely to be complainants in rape trials, suffered 'enormous victimisation during the court process'.⁸ The lack of justice for Aboriginal rape victims was also highlighted by Jillian Bavin-Mizzi's 1993 study of rape cases concerning Aboriginal women in the Supreme Courts of Victoria, Queensland and Western Australia from 1880-1990 where it was reported that of the 1,200 cases prosecuted only six cases

² See Hannah McGlade, 'Justice as Healing: Developing Aboriginal Justice Models to Address Child Sexual Assault', (2007) 7 (1) Indigenous Law Bulletin 10-14

³ Zoe Morrison, 'What is the outcome of reporting rape to the police? Study of reported rapes in Victoria 2000-2003: Summary research report', ACCSA Newsletter No 17, 2008, pp 4-11 at p 9

⁴ As of March 2009, 134 offenders have been charged with over 600 offences. See Paul Toohey, 'Cycle of rape child sex smashed', The Weekend Australian, March 21-22, 2009 at p 1 and p 6

⁵ Department for Women, 1996, NSW

⁶ *ibid* at p105

⁷ *ibid* at p108

⁸ *ibid* at 109

concerned women identified as Aboriginal and only one of those cases resulted in a conviction.⁹

For these reasons I agree that we must begin the important task of restoring Justice to Aboriginal people, as Professor Judy Atkinson has explained, ‘Mechanisms designed to ensure justice are critical to the fulfilment of the need of Aboriginal people to rebuild relationships, and to repair the damage and devastation caused by family violence and the continuing impacts of colonisation’.¹⁰ Professor Atkinson has urged restorative justice (RJ) approaches that provide support to both victims and offenders and are aimed at healing the harm inflicted by the violent or abusive behaviour. As she points out, the key requisite of RJ is an acknowledgement of responsibility by the offender. Offenders are encouraged to accept responsibility for the harm done to another, to show remorse to the victim and to the wider community, and to commit to appropriate restitution.¹¹

While the principles of restorative justice have often described as being drawn from traditional Indigenous justice practices, it has been argued that Indigenous programs controlled by the state cannot accurately be described as being based on Indigenous empowerment or Indigenous justice.¹² The problem of tokenism, co-optation and continuation of the colonial process remains just as pressing, as Maori criminologist Juan Tauri argues ‘Disempowerment will continue if there is no significant measure of jurisdictional autonomy included in the programs developed to deal with the problem of Indigenous over-involvement in the criminal justice system’.¹³ Similarly, Australian criminologist Harry Blagg has been critical of RJ claims to Indigenous justice while remaining disinterested in contemporary Indigenous aspirations, arguing

⁹ Cited in Hannah McGlade, ‘Aboriginal women, girls and sexual assault: The long road to equality within the criminal justice system’, ACCSA Newsletter No.12 September 2006 pp6-13, at p7

¹⁰ Judy Atkinson, ‘Voices in the Wilderness – Restoring Justice to Traumatized Peoples’, *UNSW Law Journal*, 2002, 25 (1) 233 – 241 at 238

¹¹ *Ibid* at p238

¹² Juan Tauri, ‘Explaining Recent Innovations in New Zealand’s Criminal Justice System: Empowering Maori or Biculturalising the State?’, *The Australian and New Zealand Journal of Criminology*, 32 (2) 153-167 at p161

¹³ *Ibid* at p162

that the principle of self-determination needs to be ‘placed at the centre of restorative initiatives.’¹⁴

In looking at how we can improve responses for Aboriginal victims, I will consider two leading Aboriginal Canadian justice models that have been developed by Aboriginal communities with support from the Canadian state today. The Community Holistic Circle Healing program of Hollow Water addressing the problem of sexual abuse, and the Aboriginal Healing Lodges that incorporates Aboriginal culture and healing in community controlled correctional facilities. In my view, these models are examples of best practice that we can aspire to in Australia as we seek to address the significant issues of sexual assault, particularly of children and young people, and the need for effective rehabilitation of Aboriginal prisoners.

Prior to exploring these justice models, I believe that we need to first acknowledge the contemporary Australian context surrounding the recognition of Aboriginal customary law, and the experiences of Aboriginal women in contemporary Australian society.

Contemporary Issues

Australia has largely resisted the recognition of Aboriginal customary laws, the subject of the Australian Law Reform Commission’s 1986 Inquiry that remained largely unheeded by government.¹⁵ At the same time, Aboriginal law and justice has been stigmatised as a result of the misuse of customary law to legitimise violence and sexual assault of Aboriginal women and girls, that is, as an excuse for human rights violations rather than a conduit for justice and healing.¹⁶ I believe that this contemporary abuse of Aboriginal law is related to the colonial misperceptions of the role of Aboriginal women, in which women were wrongly regarded as subordinate and subjugated to men (and male violence). The observations made some years ago

¹⁴ Harry Blagg, ‘Restorative Justice and Aboriginal Family Violence: Opening a Space for healing’, in ‘Restorative Justice and Family Violence’, Heather Strange and John Braithwaite (eds) 2002, Cambridge University Press, UK at p199

¹⁵ See James S Crawford, ‘The Recognition of Aboriginal Customary Laws: An Overview’ in ‘Aboriginal Perspectives on Criminal Justice, Chris Cunneen (ed), 1992, The Institute of Criminology, Sydney, pp53-76

¹⁶ See Hannah McGlade at fn2. See further, Heather Douglas ‘She Knew What Was Expected Of Her: The White Legal System’s Encounter With Traditional Marriage’, *Feminist Legal Studies*, (2005) 13: 181-203

by anthropologist Dianne Bell in her book 'Daughters of the Dreaming' are just as valid today:

'Within the historical context of Aboriginal society, the maintenance of male-female relations entailed a continuing dialogue which allowed women to participate actively in the construction of the cultural evaluation of their role in their society. But today, as members of a colonial frontier society, Aboriginal women no longer participate as equals in this process. Women's solidarity and autonomy are being eroded and devalued. They are constrained and defined by the male dominated frontier society as being a necessarily dependent sex. The activities of men and women within this new order are differently evaluated and different opportunities for participation are available to men and women.'¹⁷

Aboriginal women's experience of inequality was also the subject of a recent paper by Professor Marcia Langton, 'The end of 'big men' politics'.¹⁸ According to Professor Langton, Aboriginal women know full well that the 'realpolitic' of power in the Aboriginal world is the power of 'big men' that works to the advantage of few and all too often is used against women and children. Langton challenges non-Aboriginal society to overcome its preference for this style of political representation and the 'guilt infused romance with the exotic'. Her critique is a most powerful indictment of the failure of 'Indigenous affairs' where few have regarded Aboriginal women and children's right to life as a principle guiding their deliberations and actions and in which 'Those most vulnerable are absent, except as symbols of a fantasia.'

In considering the possible use of restorative justice for Aboriginal communities, Aboriginal academic Loretta Kelly has acknowledged that the impact of colonisation and dispossession, resulting in dislocation and disintegration of cultural values, has effectively meant issues for the victims of violence, especially family violence, 'can be ignored and the community can still continue to function'.¹⁹ Kelly argues that in pre-invasion societies restorative justice principles in relation to victim involvement

¹⁷ Diane Bell, 'Daughters of the Dreaming', 1990, Allen and Unwin, NSW at p249

¹⁸ Marcia Langton, 'The end of 'big men' politics', Griffith REVIEW Edition 22: MoneySexPower

¹⁹ Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities', in 'Restorative Justice and Family Violence', Heather Strange and John Braithwaite (eds) 2002, Cambridge University Pres, UK, pp 206 – 223 at p211

and satisfaction with the dispute resolution process were both present and essential to the continuing harmony of the community.²⁰ Notwithstanding the loss of some of our traditional ways, Kelly urges the strengthening of the informal role of Women Elders and community leaders to better ensure the safety and protection of women and children victims.²¹

I agree with this argument, and I think we also need to be conscious that because child sexual assault has been widespread, many community leaders and elders (including women elders) have been associated with abuse and they will abuse victims as they speak out today. In Perth, some very brave Aboriginal women and girls have instigated criminal charges against several of these powerful leaders who abused children all the time espousing Aboriginal culture. The pressure brought to bear upon victims disclosing has been untenable and suicides are considered a common response. In their insightful commentary on child sexual assault, US psychologists Cindy Veldhuis and Jennifer Freyd has argued 'Just as offenders demand silence of their child victims, they demand continued silence as the child becomes an adult.'²² The authors propose DARVO as a model of what happens when perpetrators are confronted with their abuse: Deny, Attack Victims and Reverse Victim/Offender.²³ In 2006 the former co-chair of Reconciliation Australia Fred Collard was imprisoned where he remains for the abuse of his granddaughter Ingrid Collard who said that at 19 years of age she became 'sick of the torment and the silence from everyone who wanted to keep the silence' and when she spoke up about the abuse received messages from extended family members telling her to 'shut up' and even death threats.²⁴

Over a decade ago, Aboriginal commentator Melissa Lucashenko argued that we need to find new ways of talking about the violence, that while Aboriginal women are rewarded for recognising and attacking White violence, to speak of Aboriginal male violence leaves women vulnerable to accusations of *coconut* or *feminist* (used as a

²⁰ Ibid at p211

²¹ Ibid at p211

²² Cindy B. Veldhuis & Jennifer J. Freyd, 'Groomed For Silence, Groomed For Betrayal', in 'Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse', Margo Rivera (ed), 1999, Gynergy Books, Canada, pp 253-282 at p 272

²³ Ibid

²⁴ Victoria Laurie, 'Breaking the Silence', The Weekend Australian newspaper, August 17, 2006 at p12

term of perceived abuse).²⁵ In current times our leaders, both Aboriginal and Non-Aboriginal, are being challenged to embrace an ‘intersectional’ framework of human rights that recognises the particular vulnerability of Aboriginal women and children who experience multiple oppression on the basis not just of race, but gender, age and social class. Professor Kimberly Williams Crenshaw in her seminal paper ‘Mapping the Margins: Intersectionality, Identity, Politics and Violence Against Women of Colour’ notes the failure of feminism to interrogate race means that feminisms resistance strategies will often replicate and reinforce the subordination of people of colour; and likewise, the failure of anti-racism to interrogate patriarchy means that anti-racism will frequently reproduce the subordination of women.²⁶ Crenshaw rejects the general tendency within anti-racist discourse to regard the problem of violence against women of colour as just another manifestation of racism, describing the chain of violence as more complex and extending beyond this singular link.²⁷

I am particularly inspired by work of Aboriginal Canadian women²⁸ who have rejected the position that feminism is ‘untraditional’²⁹ and that to challenge oppression and violence within our communities is an act of betrayal.³⁰ According to Joyce Green, Aboriginal feminists bring together two critiques, feminism and anti-colonialism to show how Aboriginal women are affected by colonialism and patriarchy, and are thus identified as political adversaries not only by the colonial society, but also male Indigenous elites whose power is challenged. They may also be criticised by Aboriginal women who deny their analysis and question their motives.³¹ I agree with the following inspirational comments made by the participants of a 2002 Aboriginal Feminism Symposium:

- Aboriginal feminism is the tool that will bring about decolonisation;

²⁵ Melissa Lucashenko, ‘Violence Against Indigenous Women, Public and Private Dimensions’, in ‘Women’s Encounters With Violence’, Sandy Cook and Judith Bessant (eds), 1997, Sage, London, pp 147 – 88 at p 196

²⁶ Kimberley Williams Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color’, in ‘Critical race Theory: The Key Writings That Formed The Movement’, Kimbele Crenshaw, Neil Gotanda, Gary Peller, KendallThomas (eds), 1995, The New Press, NY, pp 357 – 384 at p360

²⁷ Ibid at p362

²⁸ See Joyce Greed (ed), ‘Making Space For Indigenous Feminism’, 2007, Fernwood, Canada

²⁹ Ibid at p26

³⁰ Ibid at p48

³¹ Ibid at p23

- Feminism has produced a lot of healing for sisters around the world; and,
- The larger picture of feminism is the genuine caring for humanity and the opposition to any kind of oppression.³²

Hollow Water

Recent Inquiries into Aboriginal child sexual assault have recommended that Government consider implementing in Australia a community healing process to address sexual assault, such as that established by the Aboriginal community of Hollow Water in Manitoba, Canada. The Community Holistic Circle Healing ('CHCH') model of Hollow Water, Canada was formed in 1987 as the community began to learn that sexual victimisation and intergenerational sexual abuse was at the core of the poor wellbeing of many individuals and families.³³ From their experience, the non-Indigenous adversarial legal system could not understand the complexity of this issue and what was needed for a community to break the cycle of abuse that impacted upon so many of its members. They developed the model in an effort to take responsibility for what was happening in their community, to work to restore balance and make their community a safe place for future generations. In developing their model, they considered that:³⁴

- a. Victimisers are created and not born;
- b. The vicious cycle of abuse in communities must be broken – and now; and
- c. Given a safe place, healing is possible and will happen.

Hollow Water does not support the incarceration of offenders:³⁵

What the threat of incarceration does do is keep our people from coming forward and taking responsibility for the hurt they are causing. It reinforces silence and therefore promotes, rather

³² Ibid at p26

³³ See Kyllie Cripps and Hannah McGlade, 'Indigenous family violence and sexual abuse' Considering pathways forward', 2008, Journal of Family Studies, volume 14, Issue 2-3, October 2008, pp 240 – 254. See further: Rupert Ross, 'Aboriginal Community Healing in Action: The Hollow Water Approach' in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005), Living Justice Press, USA, pp184 - 189

³⁴ Rupert Ross, 'The Sentencing Circle: Seeds of a Community Healing Process', in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005), Living Justice Press, USA at pp 190-195 at p190

³⁵ Rupert Ross, 'Aboriginal Community Healing in Action: The Hollow Water Approach' in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005), Living Justice Press, USA, pp184 – 189 at p 187

than breaks, the cycle of violence that exists. In reality, rather than making the community a safer place, the threat of jail places the community more at risk.

Within the CHCH process, offenders are instead held directly accountable to those most affected by the victimisation: the victims, families and the wider community.

Hollow Water's CHCH program uses principles that were traditionally used to deal with victimisation. These principles allow the community:³⁶

1. To bring it out into the open.
2. To protect the victim, so as to minimally disrupt the family and community's functioning.
3. To hold the victimiser responsible for his or her behaviour.
4. To offer the opportunity for balance to be restored to all parties of the victimisation.

Hollow Water founder Berma Bushie has explained the process as one that works in conjunction with the Canadian criminal justice system, following a disclosure of sexual assault, a team consisting of a Community Holistic Circle Healing team member, a representative from the Child and Family services department and the police (RCMP) will come together to investigate and record the victim's story and ensure their safety.³⁷ If it is then determined (beyond reasonable doubt) that the abuse has taken place, the abuser is confronted and charged. At the same time, a member of the Community Holistic Circle Healing team will encourage the person charged to admit to the abuse and agree to participate in the healing program. Only victimisers who agree to plead guilty and fully co-operate with the healing process are accepted into the program. The Community Holistic Circle Healing team make it clear that those who do not agree will not receive the support of the Community Holistic Circle Healing team, but will instead be abandoned to the courts with jail as a possible outcome. Abusers who agree to 'the healing road' and participation in the Community

³⁶ Rupert Ross, 'The Sentencing Circle: Seeds of a Community Healing Process', in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005), Living Justice Press, USA at pp 190-195 at p190 - 191

³⁷ Berma Bushie, 'Community Holistic Circle Healing: A community approach', at http://www.iirp.org/library/vt/vt_bushie.html. Retrieved on 10 March 2009

Holistic Circle Healing are mandated to the CHCH program where they may remain for several years.³⁸

The CHCH model entails the development of a ‘healing contract’ that offenders must agree to be bound by; healing circles held separately with the victims and perpetrators and their families; the sentencing circle in which victims, victimisers, families and the wider community are brought together and in which a non-custodial sentence is imposed on the offender; and a final ‘cleansing’ ceremony held to acknowledge the offender’s participation within the program and their reintegration back into the community.³⁹ Fundamentally the Community Holistic Circle Healing process ‘lives within’ and is guided by the Anishnabe sacred teachings, the seven sacred teachings given by the Creator for Aboriginal people to follow. These are honesty, strength, respect, caring, sharing, wisdom and humility.⁴⁰ It is considered that the team members own personal healing is ‘foundational, extensive and inclusive’ and authenticity in both personal and public life is essential.⁴¹ In working with victims and victimisers the Community Holistic Circle Healing rely on their traditional cultural practices including prayer, smudging, sweatlodge ceremony and herbal medicines. The CHCH Members believe that their work is part of a spiritual process and in the sacred healing circle victimisers are able to learn about being honest about themselves, their abuse, the impact on their victims and the broader kin network.⁴²

To understand the Community Holistic Circle Healing model, we need to recognise that it was developed by individuals who are themselves victim survivors of child sexual assault and the success of the process is considered to be founded directly on the team member’s own personal knowledge and healing from sexual assault. Some members are also former perpetrators who have successfully completed the program and they too have an important role to play especially because of their understanding of an abusers denial system. According to Rupert Ross, former Canadian Crown

³⁸ Ibid

³⁹ Rupert Ross at p185

⁴⁰ Native Counselling Services of Alberta, ‘A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process’, 2001, Aboriginal Corrections Policy Unit, Canada at p 28

⁴¹ Native Counselling Services of Alberta, ‘A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process’, 2001, Aboriginal Corrections Policy Unit, Canada at p 17

⁴² Ibid at pp11-28

prosecutor, it is this personal and very real understanding of the emotional, mental, physical and spiritual complexities of sexual abuse that gives the team ‘an extraordinary rapport’ with victims and victimizers alike.⁴³ Through healing circles, the Community Holistic Circle Healing team members speak openly about themselves and their histories and understandings as both victims and victimisers. They confront abusers and work with them to address the anger, denial, guilt, fear, self-loathing and hurt that surround sexual assault and which must be faced.⁴⁴

At the same time, a worker is assigned to work closely with victims they assure them that the abuse was not their fault, to support their family in coming to terms with the abuse, to being able to directly confront and face their abusers, and to work towards healing from the harm caused by sexual assault. The CHCH has been described as a process of ‘building up’ the victim who has been harmed, and ‘stripping down’ the victimiser to redress the imbalance caused by sexual assault.⁴⁵ Within the circle process they speak directly to the victim, to make them understand that the abuse was not their fault, to praise them for their courage in bringing it out into the open, to acknowledge their pain and celebrate their courage.⁴⁶ As CHCH founder Burma Bushie explained, they are battling the generational silence, the generational blaming of the victim and the circle celebrates them for disclosing. ‘If it hadn’t been for them disclosing their parents would still be in denial or their victimisers would still be in denial. So it’s very much their courage that is celebrated that day’.⁴⁷

The Community Holistic Circle Healing model has reported achieving a remarkably low recidivism rate of offenders who had participated in the program. According to one study, of 107 offenders who had participated in the program only two have re-offended.⁴⁸ The CHCH has therefore been described as having a reported rate of success with offenders that ‘is nothing short of spectacular’ and not comparable to that of mainstream non-Indigenous approaches.⁴⁹

⁴³ Rupert Ross, ‘Returning to the Teachings: Exploring Aboriginal Justice’, 2006, Penguin, Canada at p 35

⁴⁴ Ibid

⁴⁵ Ibid at p189

⁴⁶ Aboriginal Corrections Policy Unit, ‘The Four Circles of Hollow Water’, 1997, Canada at p 176

⁴⁷ Ibid at p176

⁴⁸ Jan Dickinson Gilmore and Carol La Prairie, ‘Will the Circle be Unbroken’, 2005, University of Toronto Press, Canada, at p176

⁴⁹ Ibid

It is also considered that the core values and teachings incorporated within CHCH have been re-embraced by the wider community whose own spiritual, emotional, physical and mental wellbeing has improved significantly since its establishment. This is being reflected in various ways – happier children and better parenting, more disclosures and empowerment of victims, women feeling empowered, community actions and responsibility, respect, broadening of resources, responsiveness, openness and honesty, strengthening of traditions, harm reduction, and violence being controlled. Without the Community Holistic Circle Healing model and process, community members said they felt that there would be ‘utter chaos’, ‘It would become silent again’, ‘The communities would fall apart. Suicides would be common. Many people would deny they need help’.⁵⁰

Hollow Water’s CHCH has great possibilities that should be explored in the Australian context. The potential of healing and rehabilitation of perpetrators, the participation and empowerment of victims in the process, the involvement of the community and the positive benefits to the community, the re-establishment of traditional culture and spiritual values are all valuable outcomes of CHCH. The criminal justice system, by contrast, seems to offer none of these benefits to Aboriginal communities. I think it is important to acknowledge that one of the reasons why Hollow Water works is because it is supported by the Canadian criminal justice system. Remember, it is the victimisers upon being charged by the police who are given the option to admit to the charges, disclose fully the offence and undertake the CHCH where imprisonment will not result. The CHCH has developed protocols and strong working relationship with the police and Crown prosecutors, and their direct involvement in the initial investigatory stage is critical to the success of the program.

As Aboriginal people beginning the important task of considering the development of our own models of addressing child sexual assault, we also need to recognise the concerns expressed in relation to Hollow Water and other Aboriginal Justice responses. In a 2001 report by the Canadian Aboriginal Women’s Action Network (AWAN), participants expressed tremendous concern that the adoption of Aboriginal

⁵⁰ Native Counselling Services of Alberta, ‘A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process’, 2001, Aboriginal Corrections Policy Unit, Canada

restorative justice measures were being based on a premise that presupposes a healed community, and yet a radical transformation of existing structures of gendered domination within Aboriginal communities had not yet happened.⁵¹ Women feared that the restorative justice reforms fail to address the underlying power inequity that was rife in communities from years of oppression.⁵² The silencing of victims and normalisation of violence in communities was regarded as a serious issue, as was sexual harassment, nepotism and discrimination.⁵³ Participants were also concerned that ‘unhealthy elders’ (with a past history of abuse) were frequently engaged in leadership roles and activities such as healing circles and spiritual ceremonies.⁵⁴ It was felt that there needed to be more learning around the actual dynamics of sexual abuse before restorative justice or alternative forms of Aboriginal justice were used.⁵⁵ Notwithstanding, it was still considered that Aboriginal justice reforms had the potential to address Aboriginal crime in a way that the existing justice system did not.⁵⁶

Professor Emma LaRocque has rejected models such as CHCH, arguing that they are oriented towards offenders; they promote leniency for the offender who is treated as a ‘victim’; they pressure victims to ‘forgive’; and are detrimental to victims’ overall wellbeing.⁵⁷ LaRocque argues that healing circles are influenced by Christian and new age concepts and are not consistent with traditional punishments that were quite often severe.⁵⁸ Notwithstanding her critique of CHCH, LaRocque still believes that measures based on tradition and healing may be adopted, such as native practices, therapies, and the involvement of elders within an alternative rehabilitative institution established to protect victims and restrict offender movement. Such an institution may combine historical and cultural education as well as consciousness raising on the

⁵¹ Wendy Stewart, Audrey Huntley and Fay Blaney, ‘The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five British Communities of British Columbia’, 2001, Law Commission of Canada at p39

⁵² Ibid

⁵³ Ibid at p45

⁵⁴ Ibid at p 53

⁵⁵ Ibid at p56

⁵⁶ Ibid at p41

⁵⁷ Emma La Rocque, ‘Re-examining Culturally Appropriate Models in Criminal Justice Applications’, in ‘Aboriginal and Treaty Rights in Canada’, Michael Asch (ed) 1997, UBC Press, pp 75-96 at p 81

⁵⁸ Ibid at p85

nature and devastating effects of colonisation and sexual violence, as well as adopting modern therapies.⁵⁹

Incorporating Healing within the Corrections System

In Australia, the federal government's 'Closing the Gap' commitment through the Council of Australian Governments (COAG) is based on a number of strategic platforms or 'building blocks', areas requiring priority commitment and including 'safe communities'.⁶⁰ However, it is not yet clear as to whether the commitment to safe communities goes beyond the immediate law and order agenda to encompass the wider imperative of effective intervention and treatment of Aboriginal offenders. What is clear is the continued escalation of Aboriginal incarceration rates, which notwithstanding the Commonwealth's constitutional law making powers with respect to Aboriginal people, is considered a matter of largely state responsibility. We can see from the official statistics that neither side appears to be making any inroad into addressing the staggering over-representation of Aboriginal men, women and children in our corrections system.

According to the Australian Institute of Criminology:⁶¹

* At June 30 2006 the Indigenous imprisonment rate (1,985 per 100,000) was nearly sixteen times higher than the rate for non-Indigenous persons (127 per 100,000). The difference in prisoner rates has increased slightly since 2005.

* Indigenous prisoners comprised 24% of the total prisoner population in 2006, an increase from 14% in 1992.

* 74% of Indigenous prisoners were known to have previously been in prison, compared with 52% of non-Indigenous prisoners.

The Australian Bureau of Crime Statistics has also reported that the rate of Aboriginal imprisonment 15 years on from the Royal Commission into Aboriginal Deaths in

⁵⁹ Ibid at p91

⁶⁰ Australian Government, 'Closing the Gap on Indigenous Disadvantage; The Challenge for Australia', February 2009 at p 20

⁶¹ AIC, 'Australian Crime: facts and Figures 2007', at http://www.aic.gov.au/publications/facts/2007/06_corrections.html

Custody has increased by almost 55%.⁶² Figures released by the Australian Bureau of Statistics in 2007 showed Western Australian now had the nation's highest imprisonment rate for Aboriginal people. However, the State's Inspector of Custodial Services concern that services in terms of rehabilitation and care had not increased was seemingly not comprehended at all by the then responsible Minister who considered this was addressed by an increased commitment to Aboriginal economic development.⁶³

According to the Aboriginal and Torres Strait Social Justice Islander Commission:⁶⁴

- Indigenous women are currently the fastest growing prison population;
- Incarceration rates for women generally have increased more rapidly than for men and the increase in imprisonment of Indigenous women has been much greater over the period compared with non-Indigenous women; and
- Indigenous women were imprisoned nationally at a rate 20.8 times that of non-Indigenous women.

It is also now been widely recognised that a very high proportion of Aboriginal women prisoners have a history of untreated sexual abuse and victimisation.⁶⁵

In Heather Nancarrow's study of QLD Indigenous and non-Indigenous women's perspectives concerning family violence and restorative justice, Aboriginal women expressed a preference for restorative justice, rather than the criminal justice system, as preferred response to the problem of family violence.⁶⁶ Nancarrow noted that for Indigenous women the criminal justice failed them in three ways: it was irrelevant, symbolically, to Indigenous communities; it escalated violence more often than ended

⁶² ABC Online, 'AM – Report finds Indigenous prison has increased', Monday 6 November 2006 at <http://www.abc.net.au/content/2006/s1781819.html>

⁶³ ABC News, 'Aboriginal incarceration rate highest in WA', <http://www.abc.net.au/news/stories/2007/09/21/2039247.htm> retrieved on 10/03/09

⁶⁴ Aboriginal and Torres Strait Islander Social Justice Commission, 'A statistical overview of Aboriginal and Torres Strait Islander people in Australia', at http://www.hreoc.gov.au/Social_Justice/statistics/index.html Retrieved on 10/03/09

⁶⁵ See Further: Lawrie, R., Draft of Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody, New South Wales Aboriginal Justice Advisory Council, 2002. Western Australian Department of Justice, Community and Juvenile Justice Division, Planning, Policy and Review, Profile of Women In Prison, June 2002, p56.

⁶⁶ Heather Nancarrow, 'In search of justice for domestic and family violence. Indigenous and non-Indigenous Australian women's perspectives', *Theoretical Criminology*, Vol 10(1): 87-106

it; and interventions continued to separate Indigenous families. ⁶⁷Notwithstanding that Indigenous women preferred restorative justice, all research participants stated in cases of domestic homicide, serious assaults and sexual abuse of children by adults the criminal justice system must be applied. ⁶⁸

The concern that for Indigenous women the criminal justice system is likely to escalate violence rather than end it acknowledges that incarceration does not address the underlying issues causing violent behaviour and does little to deter further violence. This was the view of the Aboriginal and Torres Strait Islander Social Justice Report in the 2003 Report where it was argued that ‘... the system is generally ineffective in addressing the behaviour of the perpetrator in the longer term. The effect of imprisonment is to remove them from the community and then, without any focus on rehabilitation or addressing the circumstances that led to the offending in the first place, to simply return them to the same environment’ (See hard copy for page 2003: p4).

The most serious consequence of our criminal justice system failing to address the Aboriginal offender’s violent and abusive behaviour is the death or homicide of Aboriginal women. In 2008 the Australian Institute of Criminology reported that Aboriginal people account for just over a quarter of all homicides in Australia. ⁶⁹ In a snapshot year (2004-2005) a very large number of those deaths were described as the result of ‘domestic altercation’. ⁷⁰ In my view the lack of culturally based treatment and intervention for Aboriginal incarcerated offenders is a breach of duty of care to Aboriginal women for whom homicide is a significant risk.

We should be looking very closely at the Healing Lodges that have been established by Canadian Aboriginal communities in conjunction with Correctional Services Canada (CSC) and in which Aboriginal prisoners may serve their sentence or release

⁶⁷ Ibid at p 97

⁶⁸ Ibid at p 96

⁶⁹ Australian Institute of Criminology, ‘Risk Factors in Indigenous Violent Victimization, AIC Report Technical and Background Paper 30, at p 23

⁷⁰ Ibid at p 39

order.⁷¹ The Aboriginal Healing lodge programs are designed and developed by Aboriginal people in accordance with local protocols. They offer services and programs that reflect Aboriginal culture and in an environment incorporating Aboriginal peoples' tradition and beliefs. In the Healing Lodge, the needs of Aboriginal offenders are addressed through Aboriginal teachings and ceremonies, contact with Elders and interaction with nature.⁷² Healing lodges emphasise Aboriginal core programming, a commitment to healing and the safe reintegration of Aboriginal offenders into the community. As Irene Fraser in writing of the importance of Aboriginal Canadian approaches within the criminal justice system reminds that 'No child is born an offender' but that Aboriginal families and cultures have been weakened by the reserve system, the Indian Act, the residential schools, the introduction of alcohol and racism.⁷³ The offender's attitudes and values are fundamental factors determining not just criminal behaviour, but also the prospects of rehabilitation and the re-introduction of Aboriginal cultural values and spirituality through substantive initiatives in the correction system is therefore significant.

In addition to the Healing Lodges, CSC has adopted an Aboriginal Corrections Continuum of Care model developed in consultation with Aboriginal stakeholders to develop new approaches to addressing Aboriginal offender needs. The Continuum of Care is premised on the understanding that the major factors contributing to Aboriginal offenders' success upon release were their participation in spiritual and cultural activities, as well as, programs (preferably delivered by Aboriginal people) and the support they received from family and community. The Continuum of Care model embraces the traditional teachings of the Medicine Wheel (incorporating physical, emotional, psychological and spiritual well being) as critical to the healing process. It is recognised that Aboriginal communities must be involved in supporting Aboriginal offenders during their healing journey and reintegration, as they link offenders to their history, culture, and spirituality.⁷⁴

⁷¹ Irene Fraser, 'Honouring Alternatives in the Criminal Justice System', in *Nation to Nation, Aboriginal Sovereignty and the Future of Canada*, (Eds) John Bird, Lorraine Land, Murray Macadam, 2002, Public Justice resource Centre, Canada, 109-119.

⁷² http://www.csc-scc.gc.ca/text/prgrm/correctional/abissues/challenge/11_e.shtml

⁷³ Above n6 at p 11

⁷⁴ Correctional Services Canada, 'Strategic Plan for Aboriginal Corrections' at: <http://www.csc-scc.gc.ca/text/prgrm/abinit/plan06-eng.shtml#6> retrieved on 10/03/09

Conclusion

In 2008 our recently elected Prime Minister issued an historic apology to the Aboriginal people for past government practices and made a commitment to ‘A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed.’ What we have seen from the myriad of reports, testimony and cases is that the old approaches to criminal justice based on the exclusion of Aboriginal people have failed Aboriginal victims, offenders and wider communities. We need more than ever a future that can embrace new solutions to justice, where Aboriginal communities have both the ability and responsibility to restore authentic & genuine cultural practices of justice and healing. Notwithstanding our government’s recent historic commitment, the primary stumbling block appears to be the ongoing nature of the colonial project in which Aboriginal people in practice are not yet treated with ‘mutual respect, mutual responsibility or mutual resolve’. At the same time, Aboriginal victims are marginalised and denied a voice by both Aboriginal and non-Aboriginal society.

How can we ever make Australia a safer place for Aboriginal women and children in these circumstances? Only a fundamental shift that gives full and unblinded recognition to the severity of Aboriginal women and children’s victimisation, and places women and children’s safety at the centre of all analysis and practice, has potential to alter the unacceptable level of violence and victimisation extant within our communities.

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