

VOICES IN THE WILDERNESS – RESTORING JUSTICE TO TRAUMATISED PEOPLES

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I INTRODUCTION

The focus of this *Forum* is 'Breaking the Silence'. Yet Aboriginal women broke their silence many years ago. As the Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence ('Women's Task Force') reported:

Indigenous women's groups, concerned about their disintegrating world, have been calling for assistance for more than a decade. ... The violence being witnessed can only be described as immeasurable and communities, pushed to the limit, are imploding under the strain.¹

Our voices, speaking out about our pain and shame, have echoed in a wilderness of incomprehension and bias. Those who hold power continue to assume that they know what is best for us. Policies are developed and programs are implemented from an inadequate theoretical framework geared more to a white, middle class feminist analysis of 'domestic violence', rather than the reality of our lived existence. Just as Colin Tatz writes that 'Aboriginal suicide is different',² so we could write that Aboriginal 'domestic' violence is different. It must be viewed within the context of violence generally within Aboriginal families and communities. Simply responding to one aspect of this complex problem may exacerbate and compound already distressed situations.

While the rhetoric of government at all levels promotes a whole-of-government/whole-of-community approach, the reality has been a lack of effective implementation of programs, whether legal or otherwise. The knowledge that the Australian criminal justice system is more likely to be counterproductive in its overall impact on Aboriginal lives has deepened. Reform, if any, is painfully and discouragingly slow. Meanwhile, the cycle of

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1 Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence ('Women's Task Force'), *The Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000) x, The Office for Women <<http://www.qldwoman.qld.gov.au/publications/atstiviolence.doc>> at 30 May 2002.

2 Colin Tatz, *Aboriginal Suicide is Different: A Portrait of Life and Self-Destruction* (2001).

trauma that both produces and perpetuates violence in Aboriginal communities continues unabated.

The purpose of this article is to explore the place of the current response of the criminal justice system to family violence in Indigenous communities within the context of this cycle, and to canvass alternative approaches that must be used to attempt to break it.

II 'DOMESTIC' VIOLENCE

Domestic violence is one aspect of family violence. While Aboriginal women know that they and their children suffer the brunt of domestic violence within their families, the term 'family' violence is used by them to bring attention to the interconnecting factors that feed and are fed by the larger social circumstances of Aboriginal lives. Violence by Aboriginal men against women and children cannot be divorced from the context of the violence committed against themselves through self-harm, suicides, homicides and their high incarceration rates.

Aboriginal women have been crying out to be heard on this issue for some time. In 1987, in response to a call for submissions to the Queensland Domestic Violence Task Force, the Aboriginal Coordinating Council wrote that the answers to domestic violence could not be found within the Australian criminal justice system.³ At that time, it was clear that there were interconnections between community disorder, the improper application of Australian legal and social policy to Aboriginal peoples, and the inadequacy of the Australian criminal justice system to address social disorder situations. Social disorder was evident in the increasing levels of alcohol misuse and alcohol related violence, which were unprecedented in Aboriginal histories. This situation has not improved. Rather, violence in its many forms appears to be increasing and intensifying. We now have young people who, having grown up experiencing alcohol related violence, do not need alcohol to be violent themselves.

Since then, many other commissions of inquiry have brought critical attention to the context and extent of violence within Aboriginal Australian societies. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families documented the violence that many children experienced in the institutions and homes in which they were placed.⁴ In 1999, the Women's Task Force reported 'the harsh reality is that many families are now trapped in environments where deviance and atrocities have become accepted as normal behaviour and as such, form an integral part of the children's socialisation'.⁵ More recently, the Cape York Justice Study has confirmed that 'Aboriginal men are four times more likely to die a violent death than are non-

3 Queensland Domestic Violence Task Force, *Beyond These Walls* (1988) 265.

4 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

5 Women's Task Force, above n 1, xv.

Aboriginal men, and women are 6.5 times more likely to die a violent death than are non-Aboriginal women'.⁶ The study clearly highlighted the relationship between alcohol, violence and welfare dependency. This year, the interim report of the Gordon Inquiry into family violence and child sexual abuse in Western Australia observed that there is 'distressing acceptance that violence and abuse are part of life in many Aboriginal communities'.⁷ Reflecting the sentiments of many Aboriginal women, Colleen Hayward (the acting State Policy Centre Manager of the Aboriginal and Torres Strait Islander Commission of Western Australia) recently commented in relation to the Gordon Inquiry that 'breaking the shroud of silence is vital but this is extremely difficult to do if you don't think it will make any difference'.⁸

The evidence is clear. It is time that the voices of Aboriginal women were heard, and that concerns about the toll that violence is taking on Indigenous communities were acted on.

III TRAUMA AND THE CRIMINAL JUSTICE APPROACH TO FAMILY VIOLENCE

From my experience, many of those who are labelled criminal and who have committed violent acts against others, were themselves violated as children. Their experiences would have to be judged as extremely traumatising under any criteria. Too many of our communities are like war zones or major disaster areas. The occurrence of violence in families and communities should be examined more closely within the context of the trauma that occurs after a disaster. It must also be seen in the context of the cyclic inter-generational patterns that contribute to and compound trauma.⁹

A disaster is a violent event which causes great distress or destruction to human beings. There are four kinds of disasters or conditions of extreme stress: those that are natural and those that are man-made; those that are acute and those

6 Tony Fitzgerald, *Advanced Copy: Cape York Justice Study Report Volume 1: Summary, Conclusions & Recommendations* (2001) 19, Queensland Government: Department of the Premier and Cabinet <<http://www.premiers.qld.gov.au/about/community/capeyorkreport.htm>> at 30 May 2002.

7 Sue Gordon, Kay Hallahan and Darrell Henry, *Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities: Interim Report* (2002) 29, Gordon Inquiry <<http://www.fvcainq.dpc.wa.gov.au/fvcainq/fvcainq.nsf>> at 30 May 2002.

8 'Crisis Point: Child Abuse Rife – Gordon Inquiry', *Koori Mail* (Lismore), 15 May 2002, 1.

9 On their return from Vietnam, Australian soldiers were often told to forget the past and get on with their lives. Many of these Vietnam veterans experienced deeply traumatic events that affected them so profoundly they could not just 'get on with their lives'. The lack of initial support to deal with their past trauma caused great hardship to many. We now know that a young man who went to Vietnam, whose father was in the Second World War, was three times more likely to suffer trauma than other soldiers. These facts reflect Indigenous situations today: Richard Trudgen, *Why Warriors Lie Down and Die: Towards an Understanding of Why the Aboriginal People of Arnhem Land Face the Greatest Crises in Health and Education Since European Contact: Djambatj mala* (2000) 187.

that are chronic. Emerging research into natural¹⁰ and man-made disasters¹¹ provides a broader context for our understanding of what is happening within our communities and across generations.¹² After a natural disaster or man-made atrocity, violence against women and children, suicide, alcohol and other drug misuse increases.¹³

More critically, an acute disaster can elicit an emergency state intervention. This often establishes chronic conditions that compound the trauma. Bureaucratic intervention can work to dismantle the natural healing process. While colonising impacts can be described as a disaster, government action over generations must be understood within the establishment of the chronic conditions that compound trauma. These conditions include incarceration on reserves or displaced peoples' camps, prisons and institutions for the containment and re-education of children, and the welfare dependency syndrome referred to by the Cape York Justice Study.¹⁴ Since the late '60s, the multiple, contrary, chaotic and incompetent government responses to Aboriginal needs in Australia have only compounded and intensified the trauma. The Australian legal system has also substantially contributed to this.¹⁵

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- 10 Studies of the experience in California after the earthquakes of 1989 indicated that women and children are at risk of sexual assault in the aftermath of a disaster. Preliminary evidence appears to indicate that violence against women increases after a major disaster, and that the capability for community agencies to respond to women's needs decreases: Mobina Jaffer et al, *Is Anyone Listening? Report of the British Columbia Task Force on Family Violence* (1992) 122. See also Commission for the Prevention of Violence Against Women, *Report to the Major and City Council of the City of Santa Cruz* (1990); Kai T Erickson, *Everything in its Path* (1976); Kai T Erickson, *A New Species of Trouble: Explorations in Disaster, Trauma and Community* (1994).
- 11 Such as war and colonisation. See, eg, Charles R Figley (ed), *Trauma and Its Wake: The Study and Treatment of Post-Traumatic Stress Disorder* (1985); Charles R Figley (ed), *Trauma and Its Wake Volume II: Traumatic Stress, Theory, Research and Intervention* (1986).
- 12 See, eg, Judy Atkinson, *Lifting the Blankets: The Transgenerational Effects of Trauma in Indigenous Australia* (PhD Thesis, Queensland University of Technology, 2002).
- 13 When the physical space of home or place is violated, the boundaries of a group's moral space may also collapse. In this, men may behave differently to women. Zahava Solomon's work on post-traumatic stress disorder in Israel shows the most traumatised group during the Gulf War were those who had previously been traumatised in the Holocaust. Men and women experienced and expressed their distress differently, with violence in the family increasing dramatically during war: Zahava Solomon 'Life in the Shadow of War: Pathogenic and Salutogenic Effects' in Jan Westerlink et al, *Trauma, Grief and Growth: Finding a Path to Healing* (1997) 60. Further, Miriam Vogel and Yael Danieli demonstrate that the transgenerational impacts of the Holocaust on Jewish people went beyond the current notions of post-traumatic stress disorder. In particular, Vogel argues that there is a need to acknowledge gender as a factor in traumatic stress, and to approach cultural behaviours from a gender perspective to promote healing after trauma: Miriam L Vogel 'Gender as a Factor in the Transgenerational Transmission of Trauma' (1994) 15(2) *Women and Therapy* 35; Yael Danieli, 'Treating Survivors and Children of Survivors of the Nazi Holocaust' in Frank M Ochberg (ed), *Post-Traumatic Therapy and Victims of Violence* (1988) 278. See also Anatasia Shkilnyk, *A Poison Greater than Love: The Destruction of an Ojibura Community* (1985).
- 14 Tony Fitzgerald, *Advanced Copy: Cape York Justice Study Report Volume 2: The Situation of Cape York Indigenous Communities* (2001) 284–5, Queensland Government: Department of the Premier and Cabinet <<http://www.premiers.qld.gov.au/about/community/capeyorkreport.htm>> at 30 May 2002.
- 15 See, eg, Caroline Atkinson et al, *Submission in Response to the Model Domestic Violence Laws Discussion Paper* (1998) (copy on file with author); Judy Atkinson, 'A Nation is Not Conquered,' (1996) 3(80) *Aboriginal Law Bulletin* 4.

Australia was colonised because England needed to find other prisons to relieve the pressure of the effluence from the stinking prison hulks in the Thames. It exported both its displaced peoples and the social policies that created this distress. The present Australian response to expressions of distress within displaced Aboriginal Australia is to again build more prisons – this time, for the incarceration of Aboriginal peoples. Rather than solving the problems of Indigenous communities, this approach exacerbates them.

While initial feminist strategies against domestic violence called for punitive action,¹⁶ it is debatable whether forcing ‘solutions’ to human distress from the institutional viewpoint of criminology and forensic psychology will work. In fact, research clearly shows that incarceration continues to be particularly and uniformly damaging to Aboriginal offenders, and it seems, victims of violence.¹⁷ A young man who has spent most of his life incarcerated in juvenile detention centres and adult prisons tells me that prison life is ‘a controlled drug and race war’, where ‘blackfellas go to gaol alcoholics and come out junkies’.

Incarceration then becomes part of the cycle of trauma. While some of the findings of the Royal Commission into Aboriginal Deaths in Custody (‘Royal Commission’) continue to be contested, most of the deaths investigated were ascribed to self-harm. Too often, self-harm, and the ‘criminal behaviour’ for which the person was incarcerated, can be linked to harm suffered by the person as a child. Today, many Indigenous suicides occur immediately after release from prison, and increasingly we see children in their early teens committing suicide, both young men and young women. There is a thin line between harm of self and harm of others.

The Royal Commission made clear recommendations that custody rates should decrease. Since the Royal Commission, custody rates have increased in most Australian States, not just with increased incarceration of Aboriginal men but, significantly, of Aboriginal women.¹⁸ In many instances, the imprisonment of Aboriginal women is a result of charges against Aboriginal women for assault related to domestic disputes, often at the time of police intervention in a ‘domestic’.¹⁹ Such behaviour can be a highly emotional response to trauma.

The criminal justice system is unable to resolve the complex factors that contribute to present levels of violence without serious reform. Criminalising violence against Aboriginal women appears to be having significant

16 For an account of the debates within the feminist approach to violence, see Kersti Yllö ‘Political and Methodological Debates in Wife Abuse Research’ in Kersti Yllö and Michele Bograd (eds), *Feminist Perspectives on Wife Abuse* (1988) 28.

17 Women’s Task Force, above n 1, 243–52.

18 Carlos Carcach, Anna Grant and Rowena Conroy, *Australian Corrections: The Imprisonment of Indigenous People*, Trends and Issues in Crime and Criminal Justice No 137, Australian Institute of Criminology (1999) 2, Australian Institute of Criminology <<http://www.aic.gov.au/publications/tandi/ti137.pdf>> at 29 June 2002; Margaret Cameron, *Women Prisoners and Correctional Programs*, Trends and Issues in Crime and Criminal Justice No 194, Australian Institute of Criminology (2001) 1, Australian Institute of Criminology <<http://www.aic.gov.au/publications/tandi/ti194.pdf>> at 29 June 2002.

19 Judy Atkinson, ‘Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward’ (1990) 2(46) *Aboriginal Law Bulletin* 6.

repercussions, exacerbating and compounding the racist oppression of Aboriginal peoples, while failing to reduce violence against Aboriginal women and children.

It must be recognised that the offence of family violence is not just against an individual, but also against the community. To break the cycle of violence and trauma, whole communities must be involved. Responsibility lies with Australian governments to make the financial commitment to ensure justice for all people who have been victimised, regardless of the circumstances. As such, a more holistic community approach is required to heal both the offender and the victim.

IV RESTORING JUSTICE TO ABORIGINAL PEOPLES

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 impact of colonisation. 'Restorative justice' approaches are alternatives to the punitive approaches currently used in the Australian criminal justice system. The essence of restorative justice is to provide support to both victims and offenders in order to heal the harm inflicted by violent or abusive behaviour, regardless of the source.

The key prerequisite to restorative justice is an acknowledgment of responsibility by the offender. The offender is encouraged to accept responsibility for the harm done to another, to demonstrate remorse to the victim and to the community (sometimes described as 'shaming'), and to commit to appropriate restitution.

Restorative justice gives participants the opportunity to traverse the facts, in an informed and uninhibited environment. It is a philosophical framework concerned with repairing the harm done to victims of crime and to the community through a process of negotiation, mediation, victim empowerment and reparation. It provides an opportunity for the offender to get direct feedback about the consequences of his or her actions and to work towards attitudinal and behavioural change. It is important for the community to feel and see the restoration of balance and harmony in the relationships between its members.²⁰

While the criminal justice system is clearly inadequate and in need of serious reform, it may still have a role to play. The system needs to be innovative in order to force relevant reform and to ensure justice to victims of violence. Education, a redefinition of the victim-offender relationship and a creative approach to sentencing can be key factors in a restorative justice model. Canadian examples can be instructive in this area.

A The Role of Education in Restorative Strategies

If there is one single word that could be used to encapsulate the basis of a restorative strategy, it would be education. The word education comes from the

20 See generally Jim Consedine, *Restorative Justice: Healing the Effects of Crime* (1995).

Latin *educare*, to lead out from, to show the way. Along with alcohol and disrupted childhoods, a defining factor for most Indigenous offenders is a lack of culturally relevant education. Just as the criminal justice system does not provide justice to Indigenous Australians, the Australian education system has failed to *educare*, to provide life skills and deliver learning opportunities for Indigenous peoples.

The greatest connecting factor that can trigger attitudinal and behavioural change is the learning that comes through particular educational processes. In my own studies on violence and change, as people talked about 'healing', I asked what the word meant. The reply was simply that healing is about education: 'educating me about myself – the reasons why I think and do the things I do and the power I have to make choices and change in my life'. Such replies came from both victims and perpetrators of violence.²¹

The meaning and context of education in Indigenous lives must be revisited and redefined if the cycle of trauma is to be broken.

B Redefining the Victim–Offender Relationship

In *R v Moses*,²² Stuart J stressed the need to find appropriate means of including the victim, or at least the impact of the crime on the victim, in the sentencing process to motivate the offender to successfully pursue rehabilitation. He noted:

Many offenders perceive only the state as the aggrieved party. They fail to appreciate the very human pain and suffering they cause. ... Only when an offender's pain ... is confronted by the pain that victims experience from crime, can most offenders gain a proper perspective of their behaviour. Without this perspective, the motivation to successfully pursue rehabilitation lacks an important and often essential ingredient.²³

Many Aboriginal offenders are engulfed in their own pain, and are controlled by feelings of rage and grief. These feelings are often articulated through alcohol and expressed in violence. They have no capacity to hear, feel or understand the pain of the victim of their violence. Often the source of their own anger or rage is far removed from the immediate event that triggered the violence. Social learning may also have provided lessons that legitimise the violence as 'the way men behave'. The present criminal justice process helps an offender deny their responsibility, and often further victimises the victim. Acceptance of responsibility must be part of the educative process that seeks to heal both the offender and the victim.

C Innovative Sentencing

Once an offender pleads, or is found, guilty, those who have power within the criminal justice system must be more innovative in their use of sentencing

21 Atkinson, above n 12, 271.

22 11 CR (4th) 357 (Yukon Territorial Court).

23 *Ibid* 371.

options. The case of *R v Charleyboy*²⁴ (a determination by Barnett J in a circle court in British Columbia) provides a good example of the potential for sentencing in 'domestic' violence cases to promote behavioural change. A probationary period of 12 months was imposed. During this period, the offender had to report to designated supervisors, such as senior members of his community. Additionally, the offender had to organise and manage a youth rediscovery camp as part of a specified period of community service. The offender was ordered not to drink and to attend an alcohol treatment program. Finally, the offender was required to assist in organising, and to participate in, a support group for men who use violence against women. Twelve months from the date of sentencing, the offender was to appear for review.

Importantly, this approach recognises the role of alcohol in promoting violent behaviour. Feminist theorists long denied the relationship between alcohol and domestic violence and pursued criminal justice solutions. Within Aboriginal relationships, most acts of violence are committed while the offender (and often the victim) are under the influence of alcohol or other drugs. That does not mean that alcohol causes violence. Nor does it excuse an act of violence. Rather, the point is that the misuse of alcohol and other drugs is the single most immediate factor in the levels of violence within Aboriginal communities, acting as both a cause and an effect.²⁵ Programs designed to confront violent behaviour must therefore also be designed to help people look at the alcohol and drug misuse that contributes to violent offences.

Court-mandated programs in place in Australia are beginning to show considerable success in the form of documented behavioural change.²⁶ One example is the 'Rekindling the Spirit' program based in Lismore, which accepts both court-mandated and self-referred men. Its success rate is high.²⁷ Indigenous communities require additional programs such as this. Counselling services also appear to be one of the few current interventions used by the criminal justice system which are having a positive impact.²⁸ While courts are increasingly moving people into alternative sentencing options, such programs seriously lack funding. It is essential that the people who run such programs have the theory, skills and knowledge to ensure an ethical and relevant service.

However, some people are so badly damaged by the system that has 'educated them' that incarceration is the only solution – for their own good and for the

24 (Unreported, British Columbia Provincial Court, Barnett J, 21 October 1993).

25 See generally Fitzgerald, above n 14, 40–87.

26 Ibid 168.

27 'Rekindling the Spirit' is a program run by Greg Telford and Chris Binge, two Aboriginal men, for Aboriginal men. It operates in Lismore and receives court-mandated as well as self-referred men. It receives its funding through the NSW Department of Community Services. See generally Eddie Ozols and Tim Matthews, 'Rekindling the Spirit' (Paper presented at the Probation and Community Corrections Officer Association Annual Conference, Brisbane, 26–28 July 2000), PACCOA <<http://www.paccoa.org.au/conf/Ozols.pdf>> at 15 June 2002; Eddie Ozols, 'Rekindling the Spirit: An Appeal from the Heart' (Paper presented at the Best Practice in Corrections for Indigenous People Conference, Sydney, 8–9 October 2001), Australian Institute of Criminology <<http://www.aic.gov.au/conferences/indigenous2/ozols.pdf>> at 15 June 2002.

28 Fitzgerald, above n 14, 168.

safety of others. A young man, raped repeatedly during his early childhood in the institutions in which he grew up, who later rapes and kills a small child will never receive 'justice' for the crimes that have been committed against him. Nor can he ever repair the damage he had done to the child. He will however be punished, through life imprisonment, for the life he has taken.

The young man's story underlines the inability of the criminal justice system to provide 'justice' in relation to the layers of pain in the lives of too many so-called offenders, while the society that denies its own culpability and responsibility sits in judgment.

V CONCLUSION

The development and success of the restorative justice model in breaking the cycle of trauma will require a whole-of-government/whole-of-community approach. The role of Aboriginal communities cannot be overstated in this process. As Rollo May has argued,

communication makes community and is the possibility of human beings living together for their mutual psychological, physical and spiritual nourishment. ... Community can be defined simply as a group in which free conversation can take place. Community is where I can share my innermost thoughts, bring out the depths of my own feelings, and know they will be understood.²⁹

Legal processes do not allow the flow of communication whereby the essence of community can be rebuilt, during which people can 'share their innermost pain and know they will be heard and understood'. We as Indigenous peoples need to reflect more deeply on our use of the word *community* as we make commitments to work together towards change within our families, our communities and ourselves. I fail to see the relevancy of the Australian criminal justice system in this process.

29 Rollo May, *Power and Innocence: A Search for the Sources of Violence* (1972) 246-7.