

29th June 2015

To: Director Legal Policy
Department of Attorney General and Justice
Northern Territory Government
Darwin

Submission to the Review of the Northern Territory Domestic and Family Violence Act (2007)

This submission addresses issues around the non-compliance of female Aboriginal victims of family and domestic violence in central Australia from an anthropological perspective. It attempts to explain why Aboriginal women are 'bad victims' – without blaming them – and it suggests enhancing current restorative justice mechanisms (such as the Cross Border Indigenous Family Violence Program) and developing others. Finally, it finds that the broader set of mandatory legal mechanisms that attempt to enforce safety, including the operations of the Child Protection and Family laws, also subordinate Aboriginal women and maintain their 'bad victim' status. Likewise, the partial defence for provocation that operates in the criminal justice system that routinely reduce sentences to manslaughter, also intersects with the mandatory regimes above and potentially operate as a cascade of marginalisation for Aboriginal women and, by extension, their families. To this end, this Submission focuses on Recommendations under 11, 12, 14 and 19 in the Issues Paper (April 2015).

I draw on ethnographic research that I have undertaken over the last several years on *Anangu* (Pintupi-Luritja) engagement with the legal and policy systems that attempt to enforce and/or enable universal human rights. This field of gender violence is one aspect of my research interests on the social practice of human rights amongst Pintupi-Luritja speakers in central Australia. And this data is drawn from work in progress chapters from a book in preparation on Human Rights in Aboriginal Central Australia. Please contact me for further queries, as I appreciate that this is a very brief outline of a complex field of inquiry.

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Why the non-compliant legal subject? (12)

The perception of magistrates and prosecutors that “women are very non-compliant” when they interact with the legal system as it attempts to prosecute the case against their spouse, compels the “bad victim” tag. Sally Merry (US legal anthropologist) coined this term for women that are “tracking back and forth across a significant line of identity transformation”, as they file charges and then drop them or fail to appear for restraining order hearings.¹ In Alice Springs the police routinely file the domestic violence orders, as the female victims are rarely present at court. According to a prosecutor, they are regarded as a hindrance to proceedings by the prosecutors and the police. This is because if they do present at court it is to accompany the defendant (their partner) “95% of women will say ‘I want to drop the charges’ ”.

I acknowledge up-front that women and children overwhelmingly bear the brunt of family violence. Nevertheless, I have found that the categories of “female victim” and “male perpetrator” elide far more than they reveal. These categories dis-articulate the spousal relationship and contradict the often heard view within the Aboriginal community, especially by older people, that “kungka’s [young women] always the ones that start it off”. We need to re-consider these categories to realise the inter-subjectivity of these intimate encounters where the lines of fault and blame are often blurred. The broader normativity of violence within communities also plays a role here and the rising figures of Aboriginal women in prison for violence against their spouse and for manslaughter also suggests a broader tolerance for forms of violence – including physical violence - within Aboriginal communities.

Yet, what makes women “bad victims” and “non-compliant” within the legal system? There are kinship networks and the custody of children at stake and it is these relationships that are negotiated when women remain with their spouses even after years of abuse and that restrain certain categories of family from coming to their aid. As a Prosecutor stated: “when you sit down and ask a woman why [she wants to drop the charges] she will say ‘I want him home because the kids are crying for him, he’s a good father when he’s sober’”. So while there is acknowledgement by those within this protective legal system that women have their reasons for not obliging their victim status, the disjunct between this need for coercion to ensure women rights to be free from violence and the women’s own attitude to the violence has to be routinely excluded from the legal process for it to be formally effective.

The Legal Individual versus the Aboriginal Collective (12)

A fundamental conundrum is that the current legal system is premised on the individual as a human rights-holder subject. The effect of the liberal individualism embodied in legal rights is to logically oppose the collective rights of Aboriginal peoples. Such collective rights are the assets of families, and communities of language speakers and land-holders. They are embodied in the relational personhood of *Anangu* where the ‘self’ is necessarily implicated in kinship and exchange. As a recent UN Permanent Forum on Indigenous Issues Report

¹ Merry, SE. 2003. Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence. In *Human Rights Quarterly*. 25: 343-381.

states: “The problem of violence against Indigenous women and girls is not only the question of individual human rights but also of the rights of Indigenous peoples and general human rights of women and girls”.² Finding an accommodation between *Anangu* women’s right to be free from violence, as a universal right, and her right to co-exist with her family via maintaining her spousal relationship (and remaining with her children), is not countenanced in this mandatory system. For Aboriginal women, the contradictions and tensions between the formal legal system as it operates on and for them as an individual ‘victim’, contrasts with their socio-centric subject position amongst family and community. Ideas about personhood and agency are intimately intertwined.

Women in violent relationships with their partners are not only spouses. They are also mothers, sisters, aunts, daughters-in-law and cousins, and so on. These multiple intersecting subjectivities, with their attendant roles and responsibilities, are usually very close to hand. There are no Aboriginal strangers living on remote communities, those not originally from the community have married into it. While not all Aboriginal women are in violent relationships, it would be rare for a woman not to have family members or in-laws / affines affected and how they react to such violence either as a target or as a by-stander is very often a reflection of their subject status as a relative within a kinship network.

Partial Defence for Provocation (14)

This standard sentencing practice in criminal cases of family homicide of taking into account mitigating effects – such as the alcohol consumed and arguments about her infidelity – sends the opposite message to that being fostered and promoted by the Cross Border Indigenous Family Violence Program. This program strongly reiterates the message that the man needs to “walk away” no matter the supposed provocation: the ‘jealousing’, swearing, drinking and so on. The offender is taught that he does have options; it need not be inevitable that violence occurs. So the NT legal system is out of step with the responsabilisation discourse that is being actively promoted by its own Department of Corrections through the Cross Borders Program.

Likewise, provocation has been abolished as a partial defence to murder in other jurisdictions, such as Western Australia, Victoria, New Zealand and so on, realising it was conceptually flawed.³ While I am not advocating longer prison sentences for Aboriginal male violent offenders, I am suggesting that this formal justice response is symptomatic of a deeply subordinating system that appears to have changed little since Audrey Bolger’s research over 20 years ago.⁴ As the standard sentencing practice accepts defence for provocation, the State is prescribing a woman’s agency in her own death. Even in death she is the bad victim.

² United Nations Permanent Forum on Indigenous Issues (UNPFII), Economic and Social Council. 2013. “Study on the extent of violence against Indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples”. E/C. 19/2013/1.

³ Fitz-Gibbon, K. 2013. “Submission on the Partial Defence of Provocation”. To the South Australian Government. <https://blogs.deakin.edu.au/criminology/kate-fitz-gibbon-responds-to-nsw-provocation-law-reform/>

⁴ Bolger, A. 1991. *Aboriginal Women and Violence*. ANU, North Australian Research Unit, Darwin.

Furthermore, the ubiquity of incarceration for Aboriginal men as it occurs often and for short periods, such as 3 years for manslaughter (the 2012 Frank Egglely case for instance), also diminishes its effect. After violent offences, traffic and motor vehicle offences are the second most common type of offence for which offenders receive jail time; notably for driving while disqualified.⁵

Further developing the Cross Borders Indigenous Family Violence Program (11)

Currently this Program only operates in the several communities in the south of the Northern Territory (Kintore, Papunya, Mutitjulu and Docker River).⁶ Behavioural change programs that target violence using an intercultural framework such as this need to operate in all Northern Territory communities. However, in the NT far less programs are run than in the other 2 states. According to discussions with a range of people involved in the Program this is due to the Northern Territory Mandatory sentencing regime. Suggestions are that at the first instance it should be a mandatory program, or mandatory in the first breach of a DVO, then after that prison should be considered. Again, from discussions held, it is not until men are incarcerated for longer than 12 months that they have the opportunity to attend a behaviour change program, but even then that is not likely to be available due to the high numbers of men in the prison.

This IFV Program could also be bolstered to ensure the consolidation of broader community engagement with community leaders and affected Aboriginal families, notably spouses. Likewise, embedding the Program more deeply in the communities is only possible when they are more frequently run. For Aboriginal men and (and increasingly women) such Programs are, usually, the first opportunity they have had to engage with the expectations that the State holds toward appropriate individual behaviour both in terms of a no violence message and more broadly. In the Course that I attended, it was apparent that the *Anangu* male participants were almost uniformly unaware of the content of this modern liberal democratic social contract as it is, often tacitly, 'rights and responsibilities' based. The principles of human rights are a core element of the Program.

Encouraging Respectful Spousal Relationships as Restorative Justice (11)

While separation can be the most appropriate course of action for some women and indeed more women are actively pursuing this autonomy, there are also many more women for whom separation is not what they seek. Nevertheless, there appear to be no State sponsored mechanisms to support *Anangu* women and men to have respectful and safe relationships. The Cross Borders Indigenous Family Violence Program makes it clear that they are not a Program for couples counselling and the only Aboriginal specific programs run by Relationships Australia (RA) focus on mediation post-separation in the development

⁵ Pyne, A. 2012. Ten Proposals to reduce the Over-Imprisonment of Aboriginal Men in Northern Territory Prisons. In *Australian Indigenous Law Review*, Vol 16, No 2. Pp 2-17.

⁶ Willis, M. and Holcombe, S. 2014. *Evaluation of the Cross Borders Indigenous family Violence Program*. Australian Government and the Australian Institute of Criminology. Unpublished.

of parenting plans.⁷ Yet, as RA indicate on their website, they “provide counselling to individuals, couples and families to enhance, maintain or where necessary, manage changes in their relationships”.⁸ It would seem that in the Northern Territory at least – their focus is on the “managing changes” aspects of *Anangu* relationships, rather than enhancing or maintaining them. Likewise, the recent RA Program - ‘Aboriginal Building Connections’ - developed for Aboriginal women in the Alice Springs jail, is focused on the women as an individual, rather than relationship issues.⁹

Anangu women are often blamed by their in-laws for the incarceration of their spouse and one of the reasons for this is that the women themselves will break the no contact order aspect of the DVO that they sought. Nevertheless, it is also the case that the police now have the mandate to order a DVO which include as a minimum no violence, but may also include no contact.¹⁰ And during this breach of no-contact, further violence may occur and in breaching the order the male partner will go to, or return, to prison. As a CAAFLU lawyer commented: “a DVO is of limited utility when the parties want to be together” (field notes 7/7/2014).

The range of mechanisms where the criminal legal system encourages or coerces separation includes incarceration for the violent spouse and within this system the ongoing implementation of Domestic Violence Orders (DVO), so that the female spousal victim is not enabled any physical contact. As an *Anangu* woman in her mid-thirties recounts her experience:

SM: When [my partner] went into prison they wanted me to get a DVO against him. But I said I’m not getting a Domestic Violence Order, if I do get that I won’t be able to go and visit him in prison and our daughter won’t be able to go and visit. Cause that was the best time for us to sit down and talk about our relationship.

SH: And did you get a chance to do that?

SM: Yes, by going and visiting him every weekend. That’s how our relationship started building better. I was out at [community] and came into town every weekend to visit him – just to talk about our relationship and how we can change it.

SH: So that made him think differently, hey?

SM: Yes.

SH: Do you think that’s unusual? Or do you think other *Anangu* women do that to?

SM: That’s unusual. Cause they always, they – someone else had a DVO against their husband and when they wanted to go and visit him, they were told they can’t – cause of the DVO.

SH: But if he’s already in jail why would you need a DVO?

SM: Yeah, that clicked in my head – he’s not going to touch me, or throw a punch at me. He’s in prison. I asked them before. I knew what a DVO was.

⁷ Ross, C. Mallard, D and Fisher, S. 2010. *Model of Practice for Mediation with Aboriginal Families in Central Australia*. Relationships Australia Family Relationships Centre, Alice Springs.

⁸ See the homepage of Relationships Australia, Northern Territory: <http://www.nt.relationships.org.au/> (accessed 18/05/2015)

⁹ This was co-developed with the Central Australian Women’s Legal Service (CAWLS) and the Department of Corrections (CBIFVP staff).

¹⁰ Three types of Orders can be made – which can also be a combination of any of the 3. They include 1) full contact and premise access orders 2) non-contact when intoxicated orders and 3) non-violence orders.

SM is still with her partner, who is now out of prison for aggravated assault against her. And while she managed to negotiate the system and had the resources to regularly visit the prison, this is not the case for many other young women. As a long term nurse in Papunya stated:

If there is an assault and the partner is taken away and locked up, the female may be relieved initially, but then they start to get really lonely. They wait for hours by the public pay phones waiting for the call. It took me some time to work out what it was, why they were sitting there waiting [by the phones]. So in fact they get so lonely that they might even regret the fact that they went to the clinic or reported the incident (field notes 4/03/2014).

Young women monopolising the public phone boxes for hours sitting on chairs – as though in their own living room - was especially noticeable before the advent of mobile telephone coverage in Papunya, in mid-2014.

While I acknowledge that some relationships are dysfunctional and should not be encouraged, there are currently no support mechanisms for Aboriginal people in remote communities to enhance and continue their relationships, post a violent incident. Such support would focus on developing healthy, respectful spousal relationships based on the norms of equality. Because an Aboriginal spousal relationship invariably involves more than the couple – any violence between them also impacts on the broader family and potentially escalates. So any investment in the couple needs to be understood as a social investment in a peaceful community.

The occasional NGOs who pass through communities – such as Jimmy Liddle Foundation - who teach nutrition and encourage men to cook (as one area where arguments start) are positive, but ad hoc. And though I am cautious about advocating further state intrusion into the private lives of Aboriginal people, currently there are no equivalent relationship counselling services in remote communities. And there are of course challenges to developing courses that can engage interculturally. Nevertheless, if RA can develop mediation approaches for separated Aboriginal families in central Australia and the Cross Borders IFVP is having some success working interculturally – the next step is to develop Programs and mechanisms to support healthy spousal relationships. Such an approach is an active early intervention – before these post-violence / post-separation Programs are required. And any such course would also have to confront the issue of substance abuse (alcohol and gunja) and subsequent management – as substance abuse catalyses the significant majority of the violence.

Intersections between the D&FV Act (2007) and the *Care and Protection of Children Act (2007)*, (19)

The interaction of these 2 Acts need to be considered for female victims who are also mothers as a compounding element in their non-compliance. According to an Aboriginal Legal Service staff member: “Every time there’s a family problem, child protection gets

involved”.¹¹ This plays out as nearly two-thirds of the notifications received by the Department of Children and Family Services (DCF) are made by government employees, and the majority of these by police who attend domestic and family violence incidences.¹² Like the legal regimes for D&FV, the *Care and Protection of Children Act (2007)* is also underpinned by mandatory reporting. There has been a threefold rise in child removals and subsequently in children in “out of home care” since the 2007 Northern Territory Emergency Response (NTER).¹³

Domestic violence is listed as a “reportable offence” for child abuse, alongside neglect and psychological harm.¹⁴ There is no debate that child abuse is a matter that must be taken seriously and there is considerable research on the inter-generational transmission of trauma and the risk of violence as learned behaviour in Australia and internationally amongst colonised peoples.¹⁵ However, the current approach severs the relationship between the rights of the child and that of the mother and other carers. As the legal service CAAFLU noted in a Submission to the Enquiry into the Northern Territory Child Protection System: “in any intervention the well-being of the parents (or carers) must also be addressed” (2010). Like the male perpetrators, the child/ren will be removed and the mothers will remain. As an Aboriginal Legal Aid staff member stated:

People are frightened...of going to the family court because they associate it with DCF. So if your husband is beating you up and you want to go to the family court and say “I want to have custody of the children’, you are scared silly that DCF is going to swan in and say, ‘oh, dad’s beating up the children, that’s not in the best interest of the children, you are not protecting the children from dad, we’ll take the children or we’ll give the children to aunty x or aunty y’ – you are much better resolving the issue within your own family group”.¹⁶

A counsellor from the Alice Springs Women’s Shelter Outreach service stated that: “On the most basic level the women are not consulted about issues over their children” (field notes 11/7/2014). The CAAFLU submission to the Child Protection Enquiry also argued that: “the interventions are disempowering and reactive of flying in [to communities] and flying out” (2010), as a further element in the cascade of interventions: “in the name of the child”.¹⁷ The current system makes it a likelihood that in one incident of violence the female victim will lose her children as well as her spouse.

Brief Conclusions

¹¹ Allison, F. Cunneen, C. Schwartz, M and Behrendt, L. 2012. *Indigenous Legal Needs project: Northern Territory Report*.

¹² Northern Territory DCF 2014:11

¹³ Gibson, P and Behrendt, L. 2014. Submission to The Out of Home Care Inquiry, Senate Standing Committee on Community Affairs.

¹⁴ See <https://www.childwise.org.au/page/48/state-legislation-reporting-nt>

¹⁵ See Menzies 2008, Atkinson 2002, Hunter 1998.

¹⁶ Allison, F. Cunneen, C. Schwartz, M and Behrendt, L. 2012. *Indigenous Legal Needs project: Northern Territory Report*.

¹⁷ Hinkson, M. 2007 Introduction: In the Name of the Child. In [eds] J.C Altman and M. Hinkson *Coercive Reconciliation: Stabilise, Normalise and Exit*. Arena Publications, Melbourne

“The moral currency of human rights is fundamentally concerned with reducing human suffering ... and to improve as best we can the security of ordinary people”.¹⁸ Does this legal system of mandatory reporting and mandatory sentencing reduce the suffering of victims? Or is the risk that the legal system - as it is supposed to enforce basic human rights - have served to rather replace one kind of suffering (physical) with another (family ostracism, loneliness and loss of children)? While Aboriginal women, like all other women, have a right to be free from violence, she fundamentally needs the support of her family to achieve this. The work of the State in attempting to mandate this “freedom” is inevitably only temporary under the current legal regime.

The legal framework has to focus less on the zero tolerance approach as mandatory incarceration and consider a justice re-investment approach that can account for and manage *Anangu* women’s on-going non-compliance. The emancipatory possibilities of learning about human rights are an essential part of this approach. The universality of human rights can be considered: “not as a vernacular of cultural prescription but as a language of moral empowerment. Its role is not in defining the content of culture but in trying to enfranchise all agents so that they can freely shape that content”.¹⁹ Freely shaping the content of culture that is also defined by structural inequality is a significant challenge. However, as in other countries such as in Latin America and Africa that have educational human rights Programs, it needs to start somewhere.

¹⁸ Brown, W. 2000. “Suffering Rights as Paradoxes”. In *Constellations Volume 7, No.2*, Pp230-241. Blackwell Publishers, UK.

¹⁹ Ignatieff, M. 2001. *Human Rights: As Politics and Idolatry*. Princeton University Press. Princeton and Oxford.