



## Summary of the Social Justice Commissioner's main findings and messages on ending family violence and abuse in Indigenous communities

This appendix summarises the main findings from research and consultations conducted by the Human Rights and Equal Opportunity Commission between 2001 and 2006 that relate to family violence and abuse in Indigenous communities. The summary has also been published in a more detailed research paper prepared by the Social Justice Commissioner in 2006 entitled *Ending family violence and abuse in Aboriginal and Torres Strait islander communities: Key issues*.<sup>1</sup>

The prevalence of family violence and abuse in Indigenous communities is becoming well known as a result of media attention and more open community discussion in recent years. As a result there is greater awareness of the social and cultural harm that this violence is inflicting, predominantly on Indigenous women and children, and often across generations.

The Social Justice Commissioner is committed to working with Indigenous communities and governments to end family violence in Indigenous communities.

Over the past five years, the Social Justice Commissioner has actively engaged in public discussions, undertaken research, and consulted with Indigenous communities about how best to address family violence. Through this work, he has drawn attention to the fact that Indigenous Australians are entitled to live their lives in safety and full human dignity, and sought to ensure that program responses to family violence in Indigenous communities are built on solid evidence and facts. Above all, the Social Justice Commissioner has sought to emphasise that violence against women and children has no place in Indigenous customary laws and no place in contemporary Indigenous communities.

Much of the work presented in the summary is the result of consultation with Indigenous peoples, in recognition of the fact that addressing family violence will require partnerships with Indigenous peoples and communities. We need to ensure that the day-to-day realities that exist in Indigenous communities are recognised

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1 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues – An overview paper of research and findings by the Human Rights and Equal Opportunity Commission 2001-2006*, Human Rights and Equal Opportunity Commission, Sydney, 2006, available at [http://www.humanrights.gov.au/social\\_justice/familyviolence/family\\_violence2006.html](http://www.humanrights.gov.au/social_justice/familyviolence/family_violence2006.html) accessed 24 January 2007.



and reflected in any policy responses to family violence. We also need to ensure that policy responses are holistic and able to address the range of causal factors that contribute to family violence. Only in this way will Indigenous Australians be able to enjoy their right to live in safety, free from family violence and abuse.

## Family violence – key messages

- Family violence is abhorrent and has no place in Aboriginal or Torres Strait Islander societies. It is a scourge that is causing untold damage and trauma among Indigenous communities, to our women and children, and to the fabric of Indigenous cultures.
- Indigenous, women, children and men are entitled to live their lives in safety and full human dignity. This means without fear of family violence or abuse. This is their cultural and their human right.
- Violence and abuse is a criminal matter. If an Indigenous person commits an offence they should be dealt with by the criminal justice system just as any other person would be. There should also be swift intervention from care and protection systems to ensure that the 'best interests of the child' is the primary consideration.
- Government officials and community members should be fearless and bold in reporting suspected incidents of violence and abuse. This means addressing the code of silence that exists in many Indigenous communities about these issues. And it means government officers meeting their statutory obligations, meeting their duty of care and taking moral responsibility in the performance of their duties as public officials.
- Violence relates to almost every aspect of policy making and service delivery to Indigenous communities. The solutions to family violence and abuse in Indigenous communities are complex, multi-faceted and require long term focus and commitment to address. They require bi-partisan political will and leadership at the highest levels of government.
- Governments must work in partnership with Indigenous peoples and communities to identify and implement solutions to address family violence and abuse.
- We need to adopt a holistic approach to address the causes and the consequences of family violence in Indigenous communities.
- We can no longer accept the making of commitments to address Aboriginal and Torres Strait Islander inequality *without* putting in place processes and programs to match the stated commitments. Programs and service delivery must be adequately resourced and supported so that they are capable of achieving the stated goals.
- We can also not accept the failure of governments to commit to an urgent plan of action. It is not acceptable to continually state that the situation is tragic and ought to be treated with urgency, and then fail to put into place bold targets to focus policy making over the short, medium and longer term or to fund programs so they are capable of meeting these targets.



- 1 **Turn government commitments into action:** Governments have been making commitments to address family violence for some time already. What we need is concerted, long term action which meets these commitments.
- 2 **Indigenous participation:** This action must be based on genuine partnership with Indigenous peoples and with our full participation.
- 3 **Support Indigenous community initiatives and networks:** There are significant processes and networks already in place in Indigenous communities to progress these issues. We need to support them to lead efforts to stamp out violence, including by developing the educational tools to assist them to identify and respond to family violence.
- 4 **Human rights education in Indigenous communities:** There is a need for broad based education and awareness-raising among Indigenous communities. Working with communities to send strong messages that violence won't be tolerated, that there are legal obligations and protections, and that individuals have rights, are critical if we are to stamp out family violence.
- 5 **Don't forget our men and don't stereotype them as abusers.** Family violence is fundamentally an issue of gender equality. We need strong leadership from women, but we also need the support of Indigenous men if we are to make progress in stamping out violence. Indigenous men need to model appropriate behaviour, challenge violence and stand up against it, and support our women and nurture our children.
- 6 **Look for the positives and celebrate the victories.** There are good things happening in Indigenous communities, even if the national media is not interested in reporting them. We need to confront family violence, but also do so by reinforcing the inherent worth and dignity of Indigenous peoples, not by vilifying and demonising all Indigenous peoples.
- 7 **Re-assert our cultural norms and regain respect in our communities.** Family violence and abuse is about lack of respect for Indigenous culture. We need to fight it as Indigenous peoples, and rebuild our proud traditions and community structures so that there is no place for fear and intimidation.
- 8 **Ensure robust accountability and monitoring mechanisms:** There must be accountability measurements put into place to hold governments to their commitments. This requires the development of robust monitoring and evaluation mechanisms. These will also allow us to identify and celebrate successes.
- 9 **Changing the mindset:** We require a change in mindset of government from an approach which manages dysfunction to one that supports

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2 These ten issues are discussed in more detail in a speech delivered by the Social Justice Commissioner at a national forum on *Ending violence in Indigenous communities* that was convened in Parliament House in Canberra on 19 June 2006. The full speech is available at: [http://www.humanrights.gov.au/speeches/social\\_justice/violence20060619.html](http://www.humanrights.gov.au/speeches/social_justice/violence20060619.html) accessed 25 January 2007.



functional communities. Current approaches pay for the consequences of disadvantage and discrimination. It is a passive reactive system of feeding dysfunction, rather than taking positive steps to overcome it. We need a pro-active system of service delivery to Indigenous communities focused on building functional, healthy communities.

**10 Targeting of need:** Let us be bold in ensuring that program interventions are targeted to address need and overcome disadvantage. As it stands, government programs and services are not targeted to a level that will overcome Indigenous disadvantage. Hence, they are not targeted in a way that will meet the solemn commitments that have been made. They are targeted to maintain the status quo.

## Defining family violence in Indigenous communities<sup>3</sup>

- Indigenous concepts of violence are much broader than usual mainstream definitions of domestic violence. For Indigenous peoples, the term *family violence* better reflects their experiences.
- Family violence involves any use of force, be it physical or non-physical, which is aimed at controlling another family or community member and which undermines that person's well-being. It can be directed towards an individual, family, community or particular group. Family violence is not limited to physical forms of abuse, and also includes cultural and spiritual abuse. There are interconnecting and trans-generational experiences of violence within Indigenous families and communities.
- There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in communities. What data exists suggests that Indigenous people suffer violence, including family violence, at significantly higher rates than other Australians do. This situation has existed for at least the past two decades with no identifiable improvement.
- Indigenous women's experience of discrimination and violence is bound up in the colour of their skin as well as their gender. The identity of many Indigenous women is bound to their experience as Indigenous people. Rather than sharing a common experience of sexism binding them with non-Indigenous women, this may bind them more to their community, including the men of the community.
- Strategies for addressing family violence in Indigenous communities need to acknowledge that a consequence of this is that an Indigenous woman 'may be unable or unwilling to fragment their identity by leaving the community, kin, family or partners' as a solution to the violence.

<sup>3</sup> For a more detailed consideration of Indigenous perspectives on family violence, see Social Justice Commissioner, *Social Justice Report 2003*, Human Rights and Equal Opportunity Commission, Sydney, 2004, chapter 5 – Addressing family violence in Indigenous communities, p157-161, available at [http://www.humanrights.gov.au/social\\_justice/sjreport03/data/chap5.html](http://www.humanrights.gov.au/social_justice/sjreport03/data/chap5.html) accessed 25 January 2007.



## Designing programs to address family violence<sup>4</sup>

- There are currently a patchwork of programs and approaches to addressing family violence in Indigenous communities among federal, state and territory governments. However, there remains a lack of coordination and consistency in approaches to addressing these issues between governments and among different government agencies. Significant gaps also exist.
- There are three recurring strategic aspects that need to be present to address family violence in Indigenous communities, namely that:
  - programs be community-driven (with leadership from men as well as women);
  - community agencies establish partnerships with each other and with relevant government agencies; and
  - composite violence programs are able to provide a more holistic approach to community violence.
- An emphasis solely on criminal justice responses to family violence poses two main concerns for Indigenous women:
  - The first is 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.
  - The second is that there are a range of barriers in the accessibility and cultural appropriateness of legal processes which discourage Indigenous women from using the criminal justice system in the first place.
- Existing programs addressing Indigenous family violence programs can be categorised into the following broad areas of intervention:
  - *Support programs*: Accessible and appropriate counselling is essential, not only for the victims and perpetrators of violence, but also for family and community members who not only deal with the issue of violence itself, but to also provide post-violence counselling to family members.
  - *Identity programs*: Identity programs aim to develop within the individual, family or community, a secure sense of self-value or self-esteem. This can be achieved through diversionary programs and also through therapy based programs that focus on culturally specific psychological or spiritual healing. All these programs may be accessed prior to, and after involvement with violence, and offer a

<sup>4</sup> For a more detailed consideration of programs to address Indigenous family violence, see Social Justice Commissioner, *Social Justice Report 2003*, Human Rights and Equal Opportunity Commission, Sydney, 2004, chapter 5 – Addressing family violence in Indigenous communities, p168-191, available at [http://www.humanrights.gov.au/social\\_justice/sjreport03/data/chap5.html](http://www.humanrights.gov.au/social_justice/sjreport03/data/chap5.html) accessed 25 January 2007.



- longer-term response through attempting to change the situational factors underlying violence.
- *Behavioural change (men and women's groups)*: As the majority of family violence is perpetrated by men, strong support for men's behavioural reform programs is required. Complementary groups and support services for Indigenous women should be run parallel to men's programs, and complementary preventative/intervention programs for youth be an integral part of the whole strategy.
  - *Night patrols*: Have the potential to build cooperation and mutual respect and support with local police. Night patrols, particularly in remote areas, use and strengthen Indigenous mechanisms for social control, thereby ensuring that traditional methods are afforded a key role in the control of anti-social behaviour, minor criminal infractions and potentially serious criminal incidents in the Indigenous community.
  - *Refuges and Shelters*: While an important part of any family violence intervention strategy, they are not a sufficient response to the difficulties produced by high levels of violence in Indigenous communities. They represent a reactive strategy in addressing the underlying causes, thereby creating no possibility of a change in the pattern of violent behaviour. Refuges and women's shelters need to be coupled with other proactive strategies targeted at the perpetrators of violence and other situational factors.
  - *Justice programs*: These programs are characteristically aimed at the perpetrators of violence. They aim to mediate between people in conflict, designate appropriate cultural punishments for offenders, and reduce the likelihood of re-offending.
  - *Dispute resolution*: Anecdotal evidence suggests that success has been achieved where impartial members of the Indigenous community are used as facilitators and traditional dispute-resolution techniques are incorporated into mediation processes.
  - *Education and awareness raising*: Education and training programs are vital to raise awareness about family violence prevention; as well as develop skills within communities to resolve conflicts and identify the need for interventions with perpetrators. There are (currently) no educational programs targeted at young children for use in Indigenous pre-schools and schools. With the knowledge we now have about the detrimental effects of violence on children, or witnessed by children and the generational cycles by which violence is transmitted, it is essential to provide violence prevention education programs within pre-schools and schools.
  - *Holistic composite programs*: Programs which are comprised of elements of the above categories. These operate to target different forms of violence in the community, target different categories of offenders or victims, or employ different methods of combating or preventing violence.



- The implementation of composite programs, particularly in communities displaying multiple forms of increasing violence, is shown to be an emerging and preferred approach that reflects a more systematic way of combating violence, combining both proactive and reactive methods which target different age and gender groups.
- An issue for governments introducing services is how to best trigger such programs in communities where they are obviously needed while at the same time creating a climate whereby the programs are community-originating, motivated and controlled. The *Violence in Indigenous Communities report*<sup>5</sup> (by Memmott, Stacy, Chambers and Keys, herein the Memmott report) recommends 'that government agencies take a regional approach to supporting and coordinating local community initiatives, and assisting communities to prepare community action plans with respect to violence.'

## A human rights based approach to overcoming Indigenous disadvantage<sup>6</sup>

- Australia has legal obligations in international human rights treaties to address the disadvantage experienced by Indigenous Australians, including in relation to family violence issues and the social and economic conditions which contribute to violence. Article 2 of the *International Covenant on Economic, Social and Cultural Rights* requires that the government 'take steps to the maximum of its available resources, with a view to achieving progressively the full realization of' rights 'by all appropriate means' [emphasis added].
- This obligation means that governments must progressively achieve the full realisation of relevant rights and to do so without delay. Steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.
- This also requires that governments establish timeframes for the achievement of outcomes and identify appropriate indicators, in relation to which they should set ambitious but achievable benchmarks, so that the rate of progress can be monitored and, if progress is slow, corrective action taken. Setting benchmarks enables government and other parties to reach agreement about what rate of progress would be adequate.

5 Memmott, P., Stacy, R., Chambers, C. and Keys, C., *Violence in Indigenous Communities – Full Report*, Commonwealth Attorney-General's Department, Canberra, 2001.

6 For a more detailed examination of a human rights based approach to overcoming Indigenous disadvantage, see: Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission, Sydney, 2006, chapter 2 – Achieving Aboriginal and Torres Strait Islander health equality within a generation, p9-98, available at [http://www.humanrights.gov.au/social\\_justice/sjreport05/chap2.html](http://www.humanrights.gov.au/social_justice/sjreport05/chap2.html) accessed 25 January 2007. See also: Human Rights and Equal Opportunity Commission and Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: partnerships between indigenous peoples, governments and civil society*, Workshop Report, available at [http://www.humanrights.gov.au/social\\_justice/conference/engaging\\_communities/index.html#link2](http://www.humanrights.gov.au/social_justice/conference/engaging_communities/index.html#link2) accessed 25 January 2007. See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Benchmarking reconciliation and human rights*, Seminar, 28-29 November 2002, materials available at [www.humanrights.gov.au/social\\_justice/benchmarking/report.html](http://www.humanrights.gov.au/social_justice/benchmarking/report.html) accessed 25 January 2007.



- This is fundamentally an issue of government accountability for service delivery and outcomes. It requires governments' actions to match the commitments that they make, and for governments to demonstrate that they have a plan for when outcomes will be achieved – ie, that programs are benchmarked with targets and goals.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives. Such participation should be based on the principle of free, prior and informed consent, which includes governments providing information which is accurate, accessible, and in a language the indigenous peoples can understand.
- Governments should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities. This should allow for the full and effective participation of indigenous men, women and young people in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.

## Recognising Aboriginal customary law consistently with human rights<sup>7</sup>

- Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.
- Aboriginal customary law must be applied consistently with human rights standards. At no stage does customary law override the rights of women and children to be safe and to live free from violence.
- Any attempts to recognise Aboriginal customary law in a manner *inconsistent* with human rights standards would place Australia in breach of its obligations under international law and activate a duty on the part of the federal government to nullify or override such breaches.
- There will be many instances where there will be no conflict between individual and collective rights (as expressed through customary law), and where they will be able to operate in an interdependent manner. The recognition of Aboriginal customary law and collective rights has the capacity to strengthen social structures within Aboriginal communities as well as the observance of law and order.

## Balancing customary law with human rights standards

- There will, however, be other circumstances where individual and collective rights are in opposition and a balance must be struck. This does not mean that collective and individual rights are irreconcilable. Decisions made under the Optional Protocol to the ICCPR and General

<sup>7</sup> See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4B - Recognising Aboriginal customary law consistently with human rights, p40-60.





Comments interpreting the scope of the ICCPR by the United Nations Human Rights Committee in relation to Article 27 of the Covenant, for example, provide guidance on how this contest between collective and individual rights should be resolved.

- The Human Rights Committee has noted that Article 27 applies to indigenous peoples, and that it creates a positive obligation on governments to protect such cultures.
- The Committee has, however, placed limits on those measures that can be recognised. So while it acknowledges that positive measures by governments may be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, it also notes that such positive measures must respect the provisions of Articles 2.1 and 26 of the Covenant. These Articles relate to the principle of non-discrimination and how it applies in relation to the treatment between different minorities, as well as the treatment between the persons belonging to a minority group and the remainder of the population.
- Similarly, the Committee notes that 'none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant'. This includes, for example, Article 6 (the inherent right to life); Article 7 (torture or cruel, inhuman or degrading treatment); and Article 23 (requirement of free and informed consent for marriage).
- The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion, do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.
- The Committee has also stated that female genital mutilation is a practice that breaches Articles 6 and 7 of the Covenant, despite the cultural significance of the practice in some societies; and has expressed concern about domestic violence, including forced sexual intercourse, within the context of marriage.
- The provisions of the ICCPR are also to be read consistently with the interpretation of similar relevant rights under other conventions such as the *International Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC').
- The right to freedom from violence is accepted as implicit in the right to freedom from discrimination under CEDAW. The Convention also requires that all appropriate measures should be taken to 'modify the social and cultural patterns of conduct of men and women' so as to eliminate 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.



- The Committee on the Elimination of Discrimination Against Women has noted that traditional practices by which women are regarded as subordinate to men or as having stereotyped roles, perpetuate widespread practices involving violence or coercion. These can include: family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.
- The particular vulnerability of children is recognised by the CRC. Similar to the ICCPR, the CRC specifically recognises the right of indigenous children to enjoy their own culture in community with other members of his or her own group. However, governments have obligations to protect children from all forms of sexual abuse and all other forms of exploitation prejudicial to any aspects of the child's welfare.

### **Resolving conflicts between human rights and Aboriginal customary law**

- Mainstream law should consider apparent conflicts between Aboriginal customary law and women's individual rights on a case by case basis. It is also important to recognise that custom and law can adapt to general societal change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid the recognition of Aboriginal customary law or by Aboriginal communities to condone breaches of human rights.
- In situations where women's human rights are at risk, Indigenous communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women's human rights. While all attempts should be made to reconcile women's individual human rights with the rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. HREOC considers that the recognition of Aboriginal customary law must also take active steps to ensure women's right to individual safety and freedom from violence.
- HREOC considers that it is preferable for judicial decision makers to be required to balance Aboriginal customary law issues with human rights standards, rather than imposing a legislative uniform ban or refusing to recognise certain practices.
- It is also the view of HREOC that international human rights principles are relevant to the balance that must be achieved in sentencing decisions involving Aboriginal customary law. Further, a sentence which leads to impermissible discrimination against a woman or a child under international human rights principles is an error of law both in the balancing exercise under the provisions of Sentencing Acts and under the common law.



- The Court of Criminal Appeal of the Northern Territory in a recent decision (*The Queen v GJ*) has confirmed that where Aboriginal customary law conflicts with Territory law, the latter must prevail. The Court also stated that it has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory.<sup>8</sup>
- The Court of Criminal Appeal of the Northern Territory also noted that to date 'consultation with Aboriginal communities about (these) principles has too often been perfunctory' and suggested that it may be an appropriate matter for HREOC 'to give consideration to the implementation of educational programs about (conflicts between customary law and criminal codes) in Aboriginal communities'.

## Indigenous women, imprisonment and post-release support needs<sup>9</sup>

- Indigenous women are increasingly over-represented in criminal justice processes. This is occurring in the context of intolerably high levels of family violence, over policing for selected offences, ill health, unemployment and poverty.
- There is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives. Indigenous women are also significantly over represented as victims of violent crime.
- A matter of great concern in relation to current debates about addressing family violence in Indigenous communities are issues of access to justice for Indigenous women. **A matter of particular concern is the limited ability of funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS) to provide access to justice for Indigenous women through legal representation and family violence services.**
- There is an urgent need to ensure appropriate funding levels for ATSILS, Family Violence Prevention Legal Services and Indigenous women's legal services, in order to provide a greater focus on the legal needs of Indigenous women as well as a greater focus on preventative action and community education.
- Links must be drawn and holistic models developed and supported which address the connections between culture, drug use, alcohol use, separation from family, violence, poverty, spiritual needs, housing, health, boredom, race discrimination and gender discrimination.

8 *The Queen v GJ* [2005] NTCCA 20. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4B – Recognising Aboriginal customary law consistently with human rights, which summarises the decision of the NT Court of Criminal Appeal in *The Queen v GJ*, p54-57.

9 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4E – Indigenous women and imprisonment and post-release programs, p79-85. See also Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission, Sydney, 2003, chapter 5 – Indigenous women and corrections: a landscape of risk, p135-178.



- Effective pre-and post-release programs should include community based, Indigenous specific programs to help women deal with the effects of violence and to help women develop alternative strategies for coping with violence in the future. People require protection from violent behaviour and alternative structures for prevention and punishment of violent behaviour which provide more than imprisonment with all its risks and consequences.
- Effective pre-and post-release programs need to recognise and treat the complexity of experience of the experience of Indigenous individuals who are both victims and perpetrators of violence. Programs will also need to provide support for Indigenous women to reintegrate back into the community. The types of support required by each woman will be determined by her location and other issues. For instance, for some women there may be issues of payback, and she may not be able to return to her community until those issues are resolved. Other women may need to return to small communities, where contact with the perpetrator of violence cannot be avoided.
- The issues of healing and wellness are critical issues for Indigenous women exiting prison. Processes for healing are seen as having the potential to increase the health and wellbeing of Indigenous women, with a possible outcome of this being reductions in rates of involvement of Indigenous women in criminal justice processes.
- Indigenous concepts of healing are based on addressing the relationship between the spiritual, emotional and physical in a holistic manner. An essential element of Indigenous healing is recognising the interconnections between and effects of violence, social and economic disadvantage, racism and dispossession from land and culture on Indigenous peoples, families and communities.
- Healing can be context specific. For example, it may be necessary to address issues of grief and loss- or there may be a more general need to assist individuals to deal with any trauma they may have experienced. The varying nature of healing demonstrates that it cannot be easily defined, with healing manifesting itself differently in different communities.
- Healing is not a program, rather it is a process. Healing is not something that should only be available at the post-release stage. It should be available at any point when a woman is ready. This may be before a woman comes into contact with the criminal justice system, or after she has been in and out of prison over a number of years. Further, healing in the context of criminal justice, attempts to help the individual deal with the reasons why they have offended in the first place. This element of healing is strongly linked to the notion of restorative justice. For this reason, healing has the potential to fit within a restorative justice framework.
- There are, however, relatively few programs and services for Indigenous women exiting prison that presently focus on healing processes in Australia. The conversion of concepts of healing into actual programs and services is very much in its infancy here. As the case study of the



Yula Panaal Cultural and Spiritual Healing Program in New South Wales demonstrates, they also face difficulty in attracting operational funding.<sup>10</sup>

- The traditional approach to distributing available funding for programs and services is dictated by an economy of scale. This impacts negatively on Indigenous women as it delivers minimum resources to a population within the community that has a high level of need. Given that Indigenous women are manifestly the smallest population in the Australian prison system, it is somewhat understandable that they are the group with the least amount of resources directed towards them. However it is precisely this lack of direct resources that goes some way to maintaining Indigenous women's distinct disadvantage in society.

## Indigenous youth and criminal justice systems<sup>11</sup>

- The Aboriginal and Torres Strait Islander population is growing faster than the non-Indigenous population. The annual rate of growth for Indigenous peoples has been estimated at 2.3% compared with approximately 1.2% for non-Indigenous Australians. As a result, the challenges for service delivery to Indigenous youth will be exacerbated over the coming decades.
- Indigenous males comprise 46 percent of the total national male juvenile detention population and Indigenous females comprise 57 percent of the total national female juvenile detention population. Although overall there has been a decline in rates of detention for both Indigenous and non-Indigenous juveniles, the ratio of over-representation continues in a stable trend with Indigenous young people 20 times more likely to be incarcerated than non-Indigenous young people.
- While there are limited statistics available, it is believed that a significant percentage of Indigenous juvenile detainees have a disability. Indigenous young people living in poor physical and social environments experience higher rates of cognitive / intellectual disabilities and poorer mental health.
- There are a range of developmental issues that impact on the cognitive functioning and mental health of Indigenous young people and their communities such as Foetal Alcohol Syndrome, petrol sniffing, physical and emotional violence and poor nutrition.
- The *Western Australian Aboriginal Child Health Survey (WAACHS)* revealed that Aboriginal children experience a high risk of clinically significant

10 See further: Social Justice Commissioner, *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission, Sydney, 2005, chapter 2 – Walking with the women: addressing the needs of Indigenous women exiting prison, p11-66.

11 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4F – Indigenous youth and the criminal justice system, p86-96. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young persons with cognitive disabilities and Australian juvenile justice systems*, Report to Attorney-General's Department 2005, available at [www.humanrights.gov.au/social\\_justice/cognitive\\_disabilities.doc](http://www.humanrights.gov.au/social_justice/cognitive_disabilities.doc) accessed 25 January 2007.



emotional or behavioural difficulties. It found that there are clear associations between family and household factors and risk of clinically significant emotional and behavioural difficulties experienced by Aboriginal children and young people. The factor most strongly associated with high risk of clinically significant emotional or behavioural difficulties in children was the number of major life stress events (e.g. illness, family break up, arrests or financial difficulties) experienced by the family in the 12 months prior to the survey.

- Similarly *Pathways to Prevention*, a report developed for the National Crime Prevention Strategy urges government to focus on early developmental phases of a child as a means to thwarting future contact with the criminal justice system.
- Failures to address issues relating to mental health, child protection, disability and community service systems contribute to the increased risk of children entering the juvenile justice system. These failures include lack of support services, appropriate treatment and behaviour intervention programs, family based care services and accommodation options; the use of inappropriate and harmful service practices, such as physical restraint and medication; the risk or actual occurrence of physical and sexual assault; and the reliance on the police to resolve challenging behaviour. There is also evidence to suggest that the lack of support services for children and appropriate policies and practices to deal with challenging behaviour often leads services to rely on or view juvenile justice facilities to provide a stable and secure care environment and as a solution to a complex problem.

## Restorative justice models<sup>12</sup>

- The past decade has seen an increased emphasis on restorative justice mechanisms for addressing criminal behaviour in Indigenous communities to address the needs of victims (including of family violence) as well as to make the system more meaningful to offenders.
- Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. As it is concerned with social equality, restorative justice inherently demands that one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships, restorative justice must be concerned with both the discrete wrong and its relevant context and causes.

12 For further information see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, op cit, chapter 5 – Addressing family violence in Indigenous communities, p174-191.



- This does not necessarily seek to return a relationship to the position prior to the commission of some wrongdoing, but instead to address the underlying issues. Restorative justice can thus incorporate concepts of restitution and healing, while focusing on the transformation of relationships.
- There are numerous new initiatives in Australia developing community based justice mechanisms for Indigenous peoples which are based on restorative justice principles. Some of these processes, such as Law and Justice Committees in the Northern Territory and Community Justice Groups in Queensland incorporate a holistic response to family violence into strategies for addressing offending in communities.
- The last two years have also seen the development of community justice mechanisms for involvement of Indigenous peoples in sentencing. Examples include the Ngunga Court and Ngunga Youth Court in South Australia; the Murri Court in Queensland; the Koori Court in Victoria and circle sentencing in New South Wales. Generally, these processes seek to incorporate an **Aboriginal traditional customary law approach to the sentencing of Aboriginal offenders within the framework of existing legislation**. While there are variations between the various models, they all involve **Aboriginal Elders sitting alongside the magistrate to advise on sentencing options**, with members of the offender's family, the victim, the victim's family and other interested community members participating in the sentencing process.
- A NSW report on circle sentencing in Nowra has been conducted to review the first twelve months of operation. The review found that circle sentencing helps to break the cycle of recidivism, introduces more relevant and meaningful sentencing options for Aboriginal offenders with the help of respected community members, reduces the barriers that currently exist between the courts and Aboriginal people, leads to improvements in the level of support for Aboriginal offenders, incorporates support for victims, promotes healing and reconciliation, increases the confidence and generally promotes the empowerment of Aboriginal people in the community.
- While these processes have been considered successful in their initial years, they are limited to dealing with particular non-violent offences. Accordingly, offences relating to violence and sexual offences cannot be addressed within these sentencing processes.
- The NSW Aboriginal Justice Advisory Committee has proposed the extension of community controlled justice mechanisms to deal with family violence. This involves establishing localised justice mechanisms and healing centres combined with alternative sentencing processes for offenders which seek to establish formal links with local Aboriginal communities. In this approach, community justice and healing centres would be established as a single point of contact for victims of family violence.



- There are similarities in this proposal with the Northern Territory Law and Justice Committee and Queensland Community Justice Group approaches, as well as similarities with the roles of services established under the Family Violence Prevention Legal Service Program. It also provides what the Memmott report, as discussed earlier, identified as a holistic composite set of programs for addressing family violence.
- It also has similarities to Canadian models for addressing sex offending by Indigenous peoples. The Canadian approach emphasises the need for restorative justice, community-based initiatives beyond the justice system such as victim-offender mediation, family group conferencing, sentencing circles and formal cautioning. It also highlights the gaps that exist in addressing Aboriginal sex offender needs and the need for Aboriginal control of appropriately cultural services. The report *Aboriginal Sexual Offending in Canada* identifies four areas where action is necessary to address Aboriginal sexual offending: community development; program development; research and human resources.<sup>13</sup> The effectiveness of this model and whether aspects could be transferred to the Australian context, particularly in regard to community capacity-building and service coordination, is an avenue for further investigation.
- These models and proposals suggest that the full potential of community justice mechanisms for addressing family violence has not been explored sufficiently, and may provide an appropriate way forward for addressing some aspects of need.

## Victims of crime<sup>14</sup>

- The criminal justice system is extremely poor at dealing with the underlying causes of criminal behaviour and makes a negligible contribution to addressing the consequences of crime in the community. One of the consequences of this, and a vital factor that is often overlooked, is that Indigenous victims of crime and communities are poorly served, if served at all, by the current system.
- Accordingly, the current system disadvantages Indigenous peoples from both ends. It has a deleterious effect on Indigenous communities through over-representation of Indigenous peoples in custody, combined with the lack of attention it gives to the high rate of Indigenous victimisation, particularly through violence and abuse in communities. Reform to criminal justice processes, including through community justice initiatives, must be responsive to these factors.
- There are limited services which target Indigenous victims of crime. A number of existing victim support services and victims compensations services, in particular, also do not record Indigenous status of their clients.

<sup>13</sup> Hylton, J.H., *Aboriginal Sexual Offending in Canada*, The Aboriginal Healing Foundation, 2992, p157.

<sup>14</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Addressing the needs of Aboriginal and Torres Strait Islander peoples as victims of crime*, Speech, launch of White Ribbon Day, 18 November 2005, available at [http://www.humanrights.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.humanrights.gov.au/speeches/social_justice/victims_of_crime_speech.html) accessed 25 January 2007.



This makes it difficult to assess whether services are being accessed and are meeting the needs of Aboriginal peoples and Torres Strait Islanders.



## Mental health<sup>15</sup>

- Poor mental health contributes to the crisis of family violence, anti-social behaviour, substance misuse, confrontation with the legal system, low participation in schooling and employment that are seen in a significant number of Aboriginal and Torres Strait Islander communities.
- There is currently no national data collection process that is able to provide accurate information on the incidence of mental health disorders or treatment occurring among Indigenous peoples in Australia. All we know is that suicide, substance abuse and family and community violence are problems and there are services in place in some communities to address these. Most of the data we have about mental ill-health in Indigenous adults is that gleaned after crisis situations, when the mental health issue results in hospitalisation.
- The Western Australian Aboriginal Child Health Survey, published in April 2005, surveyed a sample of approximately 5,000 children. It reported that *one in four (1:4) Aboriginal children are at high risk of developing clinically significant emotional or behavioural difficulties*. This compares to about one in six or seven (1:6/7) of non-Indigenous children.
- Research has also indicated that children with poor mental health have a greater tendency to develop into adults with poor mental health.
  - *Suicide and other forms of self-harm*: In 1998, Indigenous males committed suicide at 2.6 times the rate in the non-Indigenous population; for Indigenous females the rate is double that of females in the non-Indigenous population. In 2000-01, Indigenous males were hospitalised at 2.2 times the rate of males in the general population and Indigenous females at 2.0 times the rate of females in the general population for intentional self-injury. The National Health Survey in 2001 reported 10% of Indigenous peoples were likely to consume alcohol at risk or high-risk levels, compared with 11% of non-Indigenous people. However, this finding contrasts with other sources that report Indigenous peoples consume alcohol at risk levels twice that of the non-Indigenous community. Apart from alcohol, substance abuse is reported to be higher in Indigenous communities.
  - *Indicators for other forms of harm behaviours*: Violence is symptomatic of poor mental health in perpetrators and is associated with substance abuse. It is also a stressor to the mental health of victims. Violence

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15 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4D - Mental health issues, p68-78. See also Human Rights and Equal Opportunity Commission, *Submission to the Senate Select Committee on Mental Health 2005*, available at [http://www.humanrights.gov.au/disability\\_rights/inquiries/mental/senate05.htm](http://www.humanrights.gov.au/disability_rights/inquiries/mental/senate05.htm) accessed 25 January 2007.



kills Indigenous peoples at four times the rate of the non-Indigenous population. Reported physical, or threatened physical, violence, appears to have doubled over 1994 - 2002: 12.9% of respondents in 1994 identifying as victims, compared to 24.3% of respondents in 2002 in Indigenous social surveys. In 2001, Indigenous females were 28.3 times more likely to be hospitalised for assault than non-Indigenous females; males at 8.4 times the non-Indigenous rate.

- Mental ill-health among Indigenous peoples must be understood in a holistic context. As the *National Aboriginal Health Strategy* put it '[h]ealth to Aboriginal peoples is a matter of determining all aspects of their life, including control over their physical environment, of dignity, of community self-esteem, and of justice. It is not merely a matter of the provision of doctors, hospitals, medicines or the absence of disease and incapacity'.<sup>16</sup>
- The combination of problems suffered within Indigenous communities is *the* prime example of negative social determinants of health in Australia. Violence and addiction in communities undermines the resilience of members and erodes the capacity of communities to support the mental health of members. The impact of addiction on communities has been most closely observed in relation to alcoholism, although petrol sniffing and other substance abuse must be considered in relation to some communities.
- Social support and social cohesion are associated with good mental health. Studies show that people in long-term, familial relationships and close-knit communities are better able to deal with stress and will live longer than those who do not.
- Strengthening communities and culture clearly has potentially positive implications for the mental health of community members. Likewise, policies and programs that erode the strength and culture of communities can be considered as having negative impacts on community members.

## Substance abuse issues<sup>17</sup>

- There are significant links between substance abuse and violence. The links between substance and abuse and violence mean that strategies to prevent and mitigate substance abuse also need to address the impacts of substance abuse on communities.
- Potential responses to address the impacts of substance abuse need to address the those directly affected by substances, those potentially at risk of taking up substances at dangerous levels, and the impacts on those who come into contact with people affected by substances.

16 National Aboriginal Health Strategy Working Group, *National Aboriginal Health Strategy*, AGPS, Canberra, 1989.

17 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues*, op cit, section 4H – Substance Abuse, p102-114.



- Typically, responses to address substance abuse are based on three phase health frameworks that include prevention measures, intervention strategies, and measures to overcome the impacts of those disabled through substance abuse. They include:
  - Primary interventions: to reduce recruitment into substance abuse;
  - Secondary interventions: seeking to achieve abstinence and rehabilitation;
  - Tertiary intervention: providing services to the permanently disabled.
- The social impacts of sniffing are as follows:
 

Petrol sniffing poses a range of problems to sniffers, their families, communities and to the wider society. Among the problems which have been associated with petrol sniffing are: serious health consequences including death or long-term brain damage, social alienation of sniffers, social disruption, vandalism and violence, increased inter-family conflict and reduced morale on communities, incarceration of sniffers and costs to the health system in terms of acute care and providing for the long-term disabled...<sup>18</sup>
- In introducing liquor licence conditions and restrictions in Indigenous communities on alcohol the *Racial Discrimination Act 1975* (Cth) must be considered.<sup>19</sup>
- HREOC's *Alcohol Report*, published in 1995,<sup>20</sup> considers the fact that while you might be detracting from the rights of the individual to alcohol by virtue of introducing restrictions, you may be in fact conferring rights on the group as a result (known as 'collective rights'). In the *Alcohol Report*, the Commission reasoned that alcohol restrictions *could* be conceived as conferring some benefits in terms of the 'collective rights' it might promote in Indigenous communities. Such benefits might be a reduction in the incidence of violent crime, a reduction in the rate of Indigenous incarceration, and an increase in money available for food.
- In order to not breach the RDA, alcohol restrictions would need be classified as a class of 'benefit conferral'. They must *also* meet all of the criteria for special measures, namely that:
  - It confers a benefit on some or all members of a class, and membership of this class is based on race, colour, descent or national or ethnic origin;

18 For further information see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, op cit, chapter 4 – Responding to petrol sniffing on the Anangu Pitjantjatjara Lands: a case study, p107-154, available at [http://www.humanrights.gov.au/social\\_justice/sjreport03/data/chap4.html](http://www.humanrights.gov.au/social_justice/sjreport03/data/chap4.html) accessed 25 January 2007.

19 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Implications of the Racial Discrimination Act 1975 with reference to state and territory liquor licensing legislation*, Speech, 34<sup>th</sup> Australasian Liquor Licensing Authorities' Conference 26-29 October 2004, Hobart Tasmania, 28 October 2004, available at <http://www.humanrights.gov.au/speeches/race/LiquorLicensingAuthoritiesConference.html> accessed 25 January 2007.

20 Race Discrimination Commissioner, *Alcohol Report: Race Discrimination, Human Rights and the Distribution of Alcohol*, Australian Government Publishing Service, Canberra, 1995, available at [http://www.humanrights.gov.au/racial\\_discrimination/reports/alcohol.html](http://www.humanrights.gov.au/racial_discrimination/reports/alcohol.html) accessed 25 January 2007.



- It is for the sole purpose of securing adequate advancement of the group so that they may enjoy and exercise equally with others, their human rights and fundamental freedoms; and
- The protection given is necessary so the group may enjoy and exercise equally with others, their human rights and fundamental freedoms.
- While not determinative, in his decision in *Gerhardy v Brown*, High Court Justice Brennan noted HREOC's *Alcohol Report* and stated:

The wishes of the beneficiaries of the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. In the *Alcohol Report*, Commissioner Antonios concluded: alcohol restrictions imposed upon aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures.<sup>21</sup>
- This highlights the importance of ensuring informed, real community consultation when considering alcohol restrictions in Indigenous communities.
- Evidence also suggests that alcohol restrictions *in isolation* of any mechanism to address *why* people are abusing alcohol actually entrench the problems that the restrictions were designed to stop.

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21 (1985) 159 CLR 70.