

background paper 13

Aboriginal women's interests in customary law recognition

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1. Introduction

This background paper discusses Aboriginal women's interests in the recognition of customary law. The adequate protection of Aboriginal women and children has been raised as a concern in the recognition of customary law.¹ The arguments in this paper can be summarised thus:

- (1) family violence and Aboriginal law are consistently presented as interrelated phenomena, whereas they should be understood as separate issues;
- (2) the way Aboriginal law is being presented and argued in the courts in relation to women is not always accurate; and
- (3) the status of women in Aboriginal society, both in historical times and today, is often misrepresented or otherwise neglected entirely.

It is now widely acknowledged that many Aboriginal women are the victims of horrific family violence, with women in remote and rural areas being particularly at risk. The statistics are staggering, for example:

[C]ountry Aborigines (ie, those living in rural areas or regional centres) are one and a half times more likely than Perth Aborigines and about 45 times more likely than 'country' non-Aborigines to be victims of reported domestic violence.

Aboriginal victims living outside Perth accounted for 38.3 per cent of total reported cases of domestic violence, 80.5 per cent of the total number of Aboriginal cases of domestic violence, and 71.2 per cent of the total number of domestic violence cases reported from the 'country'.²

Such statistics reflect the level of abuse Aboriginal women suffer through family violence. During interviews for this paper it was found that family violence is a serious and disturbing issue; however, it is a separate issue to Aboriginal law. The conflation of family violence and Aboriginal law—suggesting that acts such as beating a spouse have moral sanction under Aboriginal law—disables an adequate interpretation of women's position under Aboriginal law. Family violence and Aboriginal law are separate matters. Family violence reflects community dysfunction and the critical need for community development, while Aboriginal law incorporates the agency of Aboriginal women and has the potential to be a useful tool in addressing community justice.

Unfortunately, courts often receive a fragmented or one dimensional impression of the type of behaviour sanctioned under Aboriginal law. This can occur at the expense of Aboriginal women and children. More often than not, these arguments are used in an adversarial attempt to either divert Aboriginal males from entering the criminal justice system or as mitigation during sentencing. In her background paper for this reference, Victoria Williams refers to instances where the courts did not accept customary law as an explanation for an offence.³ Williams also highlights that '[o]f the cases reviewed, there are three which deal with offences involving violence against Aboriginal women by Aboriginal men'.⁴ One case involved a man beating his wife and attempting to justify his conduct by saying it was not unusual for Aboriginal men to beat their wives,⁵ the second case attempted to argue that it was sanctioned under customary law to 'discipline' your wife and children using a knife,⁶ and the third attempted to argue that an assault by the intoxicated brother on his sister was 'punishment' for her husband swearing in his presence.⁷ It is interesting to note here the author's comments that 'the failure to take customary law into account in mitigation appears to result from the manner in which the case was put to the court rather than because of the complete rejection of the explanation'.⁸ This is of concern because not only did the legal system allow opportunities to create false impressions of the status of women under Aboriginal law, but also the issue of what is culturally acceptable conduct was never really addressed.

Interviews for this paper focused on the west Kimberley with some information from the east Kimberley provided at major meetings, or in centres around Broome.⁹ The study is, therefore, predominantly Kimberley based. Cases of

1. Toohy J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above p 173, 175, referring to a report of the Australian Law Reform Commission (ALRC).
2. Ferrante A, Morgan F, Indemaur D & Harding RW, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 36–37 as cited in Kimm J, *A Fatal Conjunction: Two Laws Two Cultures* (Sydney: Federation Press, 2004) 4.
3. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Law Reform Commission of Western Australia, Project No 94, Background Paper No 1 (December 2003).
4. *Ibid* 22.
5. *Jadurin v The Queen* (1982) 44 ALR 424.
6. *R v Bulmer* (1986) 25 A Crim R 155.
7. *Ashley v Materna* (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997).
8. *Ibid*.
9. For example the Kimberley Aboriginal Law and Culture Centre, Kimberley Language Resource Centre and Kimberley Land Council Annual General Meeting at Bungarun in September 2004 and in interviews with women in the Broome Regional Prison.

violence against Aboriginal women and children are also reviewed to see whether, and how, Aboriginal law mechanisms operate in these situations. The lack of community justice outlined in the case study below illustrates some of the problems faced when two systems of law compete with each other for justice.

2. Case study – where's the law?

The following case study illustrates the difficulties faced when the state's legal system and Aboriginal law compete with each other for justice. This case study describes violence against women; however, had there been the opportunity within the research timeframe to interview and document a case study about women's violence against men,¹⁰ or ritualised moral violence against women under Aboriginal law sanction,¹¹ these issues might have been addressed in a case study for this paper. Instances of this type were not put forward during interviews and therefore were not pursued. During discussions with Aboriginal women, socially sanctioned Aboriginal law violence against women was not expressed to be an area of major concern. The priority issues that arose during inquiries were a lack of control and a lack of justice for women when dealing with the state's legal system. The case study below expresses these issues well. It also reveals some ongoing difficulties in police intervention, which Aboriginal people continue to experience when they come into contact with the criminal justice system. It illustrates the continuing problem of police treatment and methods of interviewing Aboriginal people and collecting evidence. The case study shows how difficult it can be for Aboriginal people to understand the criminal justice process and how the adversarial system can inadvertently work to the detriment of Aboriginal women. It appears that the recommendations of the Royal Commission into Aboriginal Deaths in Custody affecting police practice in dealing with Aboriginal people (in particular the importance of the Anunga Rules when interviewing Aboriginal people) are not uniformly embraced and applied across the state. The lack of the use of interpreter services¹² was a significant factor in the failure of the state's legal system to deliver justice in the case study described below.

The story¹³

Jupurru got a ride into Derby on a Friday with a group of people who were coming in to town for a meeting. They arrived at lunchtime and went to a hotel and had a couple of beers. After that, Jupurru went for a walk with some other people and bought a carton of beer. The carton was shared in the park with a group of people and then Jupurru got a taxi to his ex-wife's sister (his sister-in-law) Nyapana's house. She wasn't home, but he stayed there and the drinking continued. When he was drunk Jupurru made sexual advances towards Nyapana's daughter, whispering dirty things to her and sitting her on his knee. Jupurru was thought to have tampered with some children. He was believed to have sexually abused one of his step-daughters for an extended period of time. The daughter now has mental health problems, but nobody had spoken directly or openly about the issue. Another child in the house ran and fetched Nyapana, who was visiting friends. When she returned to the house, Nyapana argued with Jupurru, chasing him out of the house and hitting him with a chair. Jupurru left the house but continued drinking.

The killing

Later that evening Jupurru came back to the house. It was locked. He was very drunk by this stage and entered the house through the kitchen window. Once inside he opened one of the locked doors, picked up a large rock from outside and returned to the house. While Nyapana lay sleeping in her room with the children, Jupurru smashed the rock against her head. Jupurru then dragged Nyapana out of the house by the legs, stabbed her in the back of the neck with a metal file, dragged Nyapana to a vacant block then raped her. Despite the massive head injury Nyapana was still alive, biting him and fighting the rape, so Jupurru strangled Nyapana and stabbed her repeatedly with the pointed end of the metal file. Jupurru covered Nyapana's body with what he could find and left her, not knowing if she was dead or alive. Nobody else knew where Nyapana was. Her sister and children had found blood in the house and conveyed alarm to the

10. Aboriginal women did provide information about women killing their husbands in circumstances of family violence or abuse. In one case customary law was discussed as punishment for the murder; however, there was no opportunity to interview the people involved in that case. In respect of the case study presented here, the victim's and perpetrator's families were willing to be interviewed. It was chosen, therefore, to assess how customary law operated in such circumstances.

11. This type of ritualised violence is documented in anthropological material, such as the threat of ritualised rape for women's transgression of men's Law business or sex as part of female initiation practices. See Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Lansdowne Press, 1996).

12. Michael Cooke interviewed the coordinator of the Kimberley Interpreting Service during his work for the Commission. She suggested that the police are resisting the use of interpreters, mistakenly believing in their own ability to communicate effectively without them. Cooke quotes the coordinator as stating: '...there are interpreters in most regions, so potentially the police could use interpreters throughout the Kimberley ... I also went to visit a senior police officer for the whole of the Kimberley and he told me that although he understood that most Aboriginal people don't speak English, that his boys know how to handle them and ... that within a year or so the new police pick up the lingo.' See Cooke M, 'Caught in the Middle: Indigenous Interpreters and Customary Law', Background Paper No 2, above p 77, 114.

13. Skin names have been used in order to protect the identity of individuals in this case study. The skin names used are incorrect to provide further protection against identification.

family, but Nyapana lay in the vacant block for two days before the smell of her dead body led to her being found by a stranger.

Jupurru fled Derby, leaving forensic evidence of the killing at the hospital water taps. The families of both the victim and perpetrator knew that it was Jupurru who had killed Nyapana. Some of the elders started discussions on the right way to punish him under Aboriginal law. Talks began about where the best place was for everyone involved in the matter to meet and punish him. Jupurru's movements from Derby and across the Fitzroy Valley were being monitored by the Aboriginal community while discussions continued regarding what should be done about the matter. The police caught Jupurru in a remote community nearly one week after the murder.

The elders from the victim's family described Jupurru as being 'good' when he was a child, meaning that he was not seen as intrinsically 'bad'. They found it hard to believe that he had committed this act. Jupurru had been through the Law (men's initiation); his wife was a 'straight' marriage skin way, although the marriage was a love match, not an arranged one. The elders involved in discussion of the punishment had known Jupurru since he was a child. They had helped to raise him, he was remembered as a good child, and in his teenage years he had worked as a stockman on country. He was deeply immersed in and respected his law and culture.

The response under Aboriginal law

What could be regarded as inaction by Western understanding (that is, not capturing Jupurru immediately) was really a thorough grounding to the action required to resolve the situation. Before there was any chance for consensus or adequate meetings for those who live under Aboriginal law, the police arrested Jupurru and took him to Derby. A senior Law man described the arrest as taking Jupurru into Gudia law¹⁴ too quick. The elders needed time to speak and have meetings, to reach some sort of consensus about what would be the best outcome for the situation under their law. Differing responses were offered as to how Jupurru should have been punished. His family, particularly his mother, was concerned with the potential of his death under Aboriginal law. The victim's father is a Law man and described the ideal models of Aboriginal law punishment for his actions.

The conflicting responses show the differing opinions on how the murder should be dealt with. The other element that affects how Aboriginal law would be practised is the fundamentalist Christian faith that many of those involved in the case adhere to. The conflicting responses and Christian faith do not show that there is no response under Aboriginal law or that it has faded beyond any systematic approach, just that these elements will affect Aboriginal law and how it is conducted.

One of the main issues for the elders was deciding on the best geographical location to conduct the punishment for the murder. Gudia law is understood as not allowing this kind of punishment, people interviewed described senior Law men who had been sent to jail for punishment that had been administered under Aboriginal law. Some communities wanted the whole matter kept well away from them. The murder happened in Derby but the families of the victim and perpetrator now live in various remote and rural areas. The community or country that the meetings would be conducted on would have been heavily impacted upon. The ideal place was described as 'by the river' taken to mean as open country away from any community. Jupurru's mother wanted to show a tree where somebody had been killed under Aboriginal law, the events that had taken place there had now changed the country permanently. Deciding where to conduct the punishment was a serious matter.

The victim's father explained that under ideal forms of Aboriginal law Jupurru would have been killed. His actions showed that he was 'bad' (corrupted in a sense). Jail was described as a cruel option compared to Aboriginal law, the proper form of punishment under Gudia law was believed to be long-term jail. The Law elder stated that it could take 20 years for him to die there; things could happen to him in there to really 'mess him up'. He said that Aboriginal law was far less cruel as a punishment. Jail was described as resulting in death, locking Jupurru up and letting him die slowly in prison.

It was said that in punishment there would be group discussion and consensus; that under Aboriginal law Jupurru's mother and sister would have been the first to give him a hiding then the victim's father would have beaten him, probably until he was dead.¹⁵ The extent of the beating would depend on the outcome of discussions for all involved,

14. Gudia (also Kartiya) translates loosely as 'white'. Gudia law is the state's legal system.

15. Whether he would actually be killed is debatable. Many of those involved are fundamentalist Christians which might affect any killing under customary law. The model put forward is social organisation as an ideal form of punishment under customary law.

with both the victim's and perpetrator's families coming to an agreement about what action to take. There would have been time given to Jupurru to talk to his family and for his family to release him for punishment.

The middle-aged family members (about 25–45 years old) believed that some type of Gudia law should be involved in the punishment. Weapons such as guns could have a catastrophic impact on the punishment and having a policeman involved would help keep elements like this under control. Many of the younger people (under 25) thought that 'old law' was too harsh and that jail would be a better option.

When the police arrested Jupurru and took him to Derby it was understood that Jupurru was now going to be dealt with under Gudia law. The time for justice under Aboriginal law had passed and Gudia law would deal with him in its way.

Arrest and police interview

When the police found Jupurru at a remote community, he was asleep and was taken away at 3.00am. He travelled back to Derby in a police van and interviewing commenced at the police station at 11.45am. In the interview room were two detectives and a cousin brother¹⁶ of the murderer. Jupurru and his cousin brother speak a traditional language as well as Kriol and Aboriginal English. They have Standard English as their fourth language. There was no interpreter in the room. The interview began as follows:

Police: Okay. All right, we're making inquiries into the death of Nyapana, okay? Before we continue I must tell you that you do not have to talk to the police, to us here today, unless you want to. Alright? Whatever you and we say is going to be recorded on the video camera which is recording us now, and that's everything in the room here. What we say and what we do is being recorded, okay, and that may be used in the court as evidence later on when you go to court. Do you understand that?

Jupurru: (Nods) no audible response.

Police: Okay? So do you have to talk to us? If I ask you a question, do you have to answer it? Can you talk when you answer questions?

Jupurru: I'll leave it out.

Police: So do you have to talk to me or not?

Jupurru: I'll leave it or —

Police: You can leave it if you — if I ask you a question and you don't want to answer if -

Jupurru: Yeah.

Police: — you just say, "No, I don't want to answer that question".

Jupurru: I'll leave it on the murder.

Police: That question.

Jupurru: Yeah.

Police: Yeah. But you don't want to talk to us at all?

Jupurru: No.

Shortly after saying this Jupurru sent his cousin brother out of the interview room. The cousin brother does not speak Standard English as a first language; therefore, as a prisoner's friend under the Anunga guidelines he is far from ideal. Jupurru's expressed desire not to speak is obvious, however, the police continue.

Police: Okay. Now, just going back, do you have to — if I ask you a question and if you don't want to answer that question, do you have to?

Jupurru: Yeah.

Police: Do you have to talk to me?

Jupurru: Yes.

Police: If I ask you a question and you don't want to answer it, what happens then? What do you do?

Jupurru: If you're asking me a question?

Police: Yeah. If you don't want to — if I ask you a question that you don't like, do you have to tell me something?

Jupurru: Yeah.

Police: Or can you say "No, I don't want to talk to you"?

Jupurru: Yeah I'll try.

16. Cousins under Aboriginal way can be brothers as well. The 'cousin brother' was his mother's sister's son. Such people are regarded as siblings.

Police: You only talk to me if you want to.
Jupurru: Yeah.
Police: You want to talk?
Jupurru: Talk now?
Police: Yeah.
Jupurru: No.
Police: You just told us before though —
Jupurru: Yeah.

From here Jupurru makes what the police regard as a confession to murder. There is nothing in the confession that is really his own words, he merely agrees to the propositions police make about his actions. As stated before, English is not his first language. The remote location of the arrest should have been an obvious indicator of potential communication troubles through language and cultural difference; however, the police fail to address this. There is no interpreter or prisoner's friend in the room and an obvious lack of understanding of the caution given by police that Jupurru is under no obligation to speak to them. Considering the seriousness of the offence, the police should have taken more care.

The type of confession given is full of leading statements from the police. Throughout the arrest and confession process Jupurru does not deny murdering Nyapana. Early in the interview he says that he is going to jail 'for life'. He has been raised under a strict system of Aboriginal law where answering back gets people into more trouble. Gratuitous concurrence is a concern during the interview.

The two detectives interviewing him believe that they have gained a confession on video and this can be used in court. They tell Jupurru that he can get a lawyer and the lawyer can request a copy of the video. Jupurru spends 18 months on remand before his case comes to court.

Jupurru does get a lawyer from the Aboriginal Legal Service (ALS). The lawyer immediately picks up on the failure to properly deliver the caution to Jupurru. The lawyer believes that he can prove a point of law in this case and decides to resource the case generously. A lawyer from Melbourne with extensive experience in the Northern Territory is brought in to represent Jupurru and an anthropologist is called in to present expert evidence. Culture is argued in court in the form of gratuitous concurrence; the difficulties of communication and language are used to explain how things went wrong. Jupurru has been raised in Aboriginal tradition, he's been through a strict system of Aboriginal Law. Making use of his right not to speak would have been seen as challenging those in authority and risking further punishment. English is his fourth language; there was no interpreter in the room and no prisoner's friend with Jupurru. He was picked up at 3.00am, travelled a long distance and interviewed the same morning. The Anunga guidelines are put before the court and the conduct of the police is challenged. The role of the families or the notion of Aboriginal law is not put before the court.

Inadmissible evidence

The magistrate hearing the case decides that the video-taped confession to murder is inadmissible as evidence. The cultural divide is obvious and the magistrate accepts the evidence of gratuitous concurrence. The magistrate acknowledges that Jupurru did not have the opportunity to understand his rights and was merely agreeing with the police, apparently thinking that by doing this he would not get into further trouble. The charge of murder is reduced to manslaughter and Jupurru is sentenced to seven years' imprisonment. He has already spent 18 months on remand so from the seven year sentence Jupurru eventually only serves a further 18 months. The families have little to no understanding of why the sentence is so minor. The victim's family feel that no justice has been done in the Gudia court; they think about requesting an appeal but do not follow it through.

While Jupurru is in jail the victim's mother's brother Jakarra serves a sentence in the same jail. The prison staff find out that Jakarra and Jupurru are from the same country and Jakarra asks if they can work together. Not long after they are placed together Jakarra assaults Jupurru with a spanner. Jupurru serves the rest of his jail term without further incident and is released on strict parole conditions.

Jupurru goes to Broome not long after he has been released from prison. He sees Nyapana's mother and mother's sister, who are in Broome for a visit. The mother couldn't go to the court hearing because of the distress of the daughter's death. When Jupurru sees her, he taunts her, motioning for her to come over to him. The two women run

away clinging on to each other frightened of the bold actions of the man. He has changed after the murder and his jail term. He seems to have an attitude of being bullet proof: nobody's law is controlling him anymore.

A second offence

After being in Broome for less than a week, Jupurru is sitting on some steps near the local caravan park and says hello to an older non-Aboriginal woman and her Aboriginal granddaughter, Nanyjili, who is in her mid-twenties. He calls the granddaughter by name and says that he remembers her when she was a baby in his community. Jupurru tells her that he is waiting for a friend who hasn't come back. He hangs around the caravan while Nanyjili has dinner with her grandparents. She eventually consents to his request to give him a lift home. While they are driving Jupurru appears to have trouble with his seat belt. Nanyjili stops the car to let him adjust the seatbelt. As he is doing this Nanyjili leans over to turn the radio on. Jupurru grabs her hair and pulls her head down and forward, so all she can see is the floor of the car. Nanyjili is young and fit, has learnt kickboxing and is confident of her own strength. She starts punching him, but Jupurru has a knife and attempts to stab her. She hits him but is stabbed in the right arm. She manages to fight him off and he runs from the car. Nanyjili goes to the hospital to seek attention for the wound and the police are called in by the hospital staff.

Jupurru is arrested and charged for unlawful wounding. Nanyjili is advised not to attempt to charge for grievous bodily harm because the lesser charge of unlawful wounding would be more likely to get a conviction. Jupurru was still on parole when the stabbing happened and he received a sentence of one year for unlawful wounding.

The legacy

There are differing opinions about how to resolve the situation now with Jupurru. His family love and care for him, they keep in phone contact in prison, but the issue of Nyapana's death is not discussed openly. Others now see Jupurru as dangerous; he has gone 'bad'. Some elders now believe that long-term jail is the only option for him. Others want his death as revenge for the woman's murder. It was stated by a Law elder that it is too late to punish him under socially sanctioned ritualised Aboriginal law. The right time to punish Jupurru under structured Aboriginal law was described as passed. Any punishment would now be considered individual revenge, not socially sanctioned Aboriginal law. The talk of punishment appears unstructured and volatile. The two families were once close; they had intermarried and are strong in their Aboriginal culture. Both families worked at the community school teaching Aboriginal language programs and doing school building maintenance work. Now members of the two families that can talk to each other do so in a distant and guarded fashion. There is constant suspicion and fear that one of Jupurru's family members will be the victim of revenge for the death. Some family members say that they cannot leave home without a weapon to defend themselves and worry particularly about being in danger from guns.

Because of tension in the community the victim's family have been forced to move to a more remote outstation in country that they regard as 'harsh' and that is further from the river. Some members have moved to the Northern Territory. There is talk of pursuit of compensation for the death; however, the victim's mother feels that it is too soon, that she still can't speak about her dead daughter. The longer they leave the compensation claim the harder it will be under the Western legal system.

Jupurru is due to be released in early 2005. The tension between the families because of the murder and now the family of the second victim make it difficult for Jupurru to return to the Kimberley. His family has decided to have him sent to a southern relative when he is released. There was an opinion from both sides that around five years would be needed to have the event 'cool down'. The unresolved tension, the lack of any form of justice and the friction between the families make it difficult for Jupurru to be near home. All that is left for the families is a big mess.

Comment

This case study illustrates how injustices, disharmony and existing social problems are exacerbated for Aboriginal people that live under two systems of law. It also highlights that there is moral outrage at violence inflicted against women and children under Aboriginal law. It was understood that Jupurru's motivation for the murder was a fear of the deceased telling her family about his interaction with the young girl. He never denied the murder, but did deny tampering with the young girl. The elders were quick to talk of punishment for the murder under Aboriginal law. The role of Aboriginal law in peace-making was never addressed by the state's legal system and the community tension created is extreme. It also reveals how perpetrators of violence are processed through the state's legal system and its failure to address the cause of an offender's behaviour.

3. Family violence and Aboriginal law

Family violence and the position of Aboriginal women under Aboriginal law

Without formal recognition of Aboriginal law, Aboriginal mechanisms for dispute resolution and community justice compete with the state's legal system and a ripple effect occurs, compounding social problems.

The Law Reform Commission is concerned to investigate any risk for women and children through the formal recognition of Aboriginal law. There is undoubtedly brutality inflicted on Aboriginal women and children by Aboriginal men—the case study shows the type of violence—however, the violence shown in the case study is not part of Aboriginal law. Mechanisms for justice and community harmony were available to restore peace under Aboriginal law but were not acknowledged by the state's legal system.

The level of family violence suffered by Aboriginal people, particularly women and children, disables an adequate interpretation of Aboriginal women's status under Aboriginal law. At a shallow reading the violence appears as an expression of the subordination of women to men. If violence is not a sign of passive subordination then the level of violence inflicted upon Aboriginal women by men must be creating subordination. Violence against women and children is symbolic of the social problems that beset Aboriginal communities. One senior Aboriginal woman stated not to focus on 'domestic violence' during this project on Aboriginal law, that there had been enough of that and there was an implied dissatisfaction with how these issues were being addressed by the police, courts and welfare agencies.

Understanding the position of Aboriginal men also assists in understanding family violence. Blagg points to the dynamic interplay of Aboriginal masculinity 'in crisis' and colonial relationships in the context of family violence.¹⁷ Atkinson shows how family violence is regarded as a breakdown in social order rather than an expression of pre-existing male domination. She writes:

Violence towards Aboriginal women is neither a private, family or Aboriginal community problem. It reflects the broader structures of racial, sexual and economic inequality in society. The level of Aboriginal male violence towards Aboriginal women reflects a breakdown in Aboriginal social order.¹⁸

This 'breakdown in Aboriginal social order' and violence that accompanies it is unrelated to the gender relations and value systems that sustain Aboriginal law. Aboriginal women are not docile creatures 'enabling' their men's behaviour, they are looking at the issue in a holistic way. Not 'forgiving' violent behaviour, implying a sense of loss to themselves; they hate the violent act, rather than the man who committed it. One Aboriginal woman explained the 'web' of relationships that many women are embedded within. The relationships that develop, particularly growing up in small communities, mean that social obligations exist beyond husband and wife. There are community obligations, affinal obligations and family obligations that Aboriginal women need to take into consideration in dealing with family violence. Many family violence situations are multifaceted. Such factors coupled with oppressive structures in mainstream Australia stated above by Atkinson add to the complexity of family violence situations. Regarding the problem of family violence as an Aboriginal community problem or as inherent in Aboriginal social structure (and, by extension, Aboriginal law) misinterprets the status of Aboriginal women in Aboriginal society.

The strategies that Aboriginal women have orchestrated against family violence, outlined later in this paper, reflect their status in Aboriginal communities. They show the agency of Aboriginal women and their use of law and culture to work against violent acts perpetrated by Aboriginal men.

Protection of Aboriginal women in the recognition of customary law

The Northern Territory Law Reform Committee (NTLRC) summarised the Australian Law Reform Commission's (ALRC) arguments for and against recognition of customary law. Part of the summary against recognition was that 'customary law may not adequately protect Aboriginal women'.¹⁹

Previous work by the ALRC has shown that Aboriginal women support the recognition of customary law. In 1986 the ALRC stated:

17. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Domestic Violence Prevention Unit (WA), 2000) 4.
18. Atkinson J, 'Stinkin' Thinkin' – Alcohol, Violence and Government' (1991) *Aboriginal Law Bulletin* 4, cited in Blagg, *ibid*.
19. ALRC as cited in Toohey, above n 1, 3.

[T]he predominant view expressed to the Commission, in particular by Aboriginal women, supported appropriate forms of recognition of Aboriginal customary laws. But the need to ensure support and legal protection to Aboriginal women has been a major consideration in the formulation of the Commission's proposals.²⁰

During the interviews there was a concern for Aboriginal empowerment in the form of Aboriginal law recognition; this was seen to benefit women, men and children. What was stressed was the potential for Aboriginal law in establishing community harmony. One woman stated that:

The convenience of using Western law means not dealing with the Aboriginal side. A person can be having trouble for the rest of their life, not totally whole functioning humans, they're damaged because there's no opportunity to deal with that issue properly. Aboriginal law way would have cleared the issue. White law way is the easier option at the time, but there's no resolution.

Aboriginal women play a role in Aboriginal law²¹ and act as moral arbiters. Unfortunately, Aboriginal women's status is often belittled when they use pronouncements of their law and culture to address social problems. An example from central Australia is the Yuendumu women's night patrol. The patrols were instrumental in reducing assaults in town camps and at Yuendumu. The initial media coverage described the women as the "Granny Vice Patrol" belittling their authority and use of Aboriginal law that was the basis for their success in reducing the level and range of assaults and offences.²² Understanding the agency of Aboriginal women in matters related to Aboriginal law assists in understanding why they may support the appropriate recognition of Aboriginal law. The agency of Aboriginal women has often been either ignored or misrepresented. Part of this can be blamed on the historical representations of women's status in Aboriginal society. Some of the early representations of Aboriginal women have led to stereotypes that Aboriginal women are still resisting today.

Historical misrepresentations of Aboriginal women

The misrepresentation of Aboriginal women from the time of colonisation continues to affect the understanding of Aboriginal culture and gender relations today. The interpretations of the role and status of women in Aboriginal society, particularly by early anthropologists, are now regarded as containing a gender bias because most of the research was conducted by male anthropologists working with Aboriginal men. The European male chauvinism harboured by the male researchers inevitably expressed itself in their descriptions of Aboriginal women.²³

Catherine Berndt summarises some of the problems of representation for Aboriginal women in the following.

Discussion of the role and status of Aboriginal woman is still haunted by early observations, or *mis*-observations, on the subject. This is partly because, although so much has changed in the Aboriginal scene, the attitudes and perspectives underlying such statements have not done likewise, or not to the same extent. In many respects, they are very much the same as those of a hundred or so years ago. Aborigines in general were regarded, and still are regarded by some, as 'rude', 'crude', 'primitive', 'savage', and so on.²⁴

She also quotes Moore from 1842 who, compared to most Europeans of the time, was sympathetic towards Aboriginal people and interested in Aboriginal culture. Moore stated that:

Women are the mere slaves of the men, obliged to watch and attend their movements, and to carry all their property as well as the young children, in bags at their back. They must construct the hut, make the fire, provide roots for themselves, and give a share to their husband, whilst he does not always share his game with them. Little affection can exist in this state, and the woman is favourably disposed to any one who will pay his court to her. This occasions frequent dissension, which often ends in the woman eloping with her lover.²⁵

Berndt captures the attitude of the late 19th century ethnography where the assumption was that 'women were regarded by [European] men as personal possessions, to be deployed or even ill-treated as their 'owners' saw fit, without the need to take their personal wishes into account'.²⁶ The status of women in such accounts is of slaves and chattels – objects at the mercy of their men.

20. ALRC, *Recognition of Aboriginal Customary Laws – Summary Report*, Project No 31 (1986) 27.

21. For example in male initiation ceremonies or arranged marriages outlined later in this paper.

22. Cited in Lloyd J and Rogers N 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications.proceedings>> (accessed 15 September 2004).

23. See Bell D, *Daughter of the Dreaming* (St Leonards, NSW: Allen and Unwin, 1993).

24. Berndt CH, 'Aboriginal Women and the Notion of the 'Marginal Man'', in Berndt RM & Berndt CH (eds) *Aborigines of the West: Their Past and Their Present* (Perth: University of Western Australian Press, 1979) 29.

25. *Ibid.*

26. *Ibid* 30.

The early literature was either male-centric or operated under the assumption that what was being learnt of Aboriginal culture through the men must apply to women. Men were regarded as the sole arbiters of Aboriginal law; therefore, the highest authority must have a majority of the say in what happened in the group. As Berndt states:

European observers imposed their own models on what they saw or heard, highlighting some aspects at the expense of others. In these models, the status of Aboriginal women was distorted, and their positive role was barely recognised.²⁷

It was not just that men working with men caused perception problems. Early female ethnographers were hindered by cultural prejudices in their descriptions of Aboriginal women. Daisy Bates took male authority and superiority for granted in Aboriginal society. She saw Aboriginal women as chattels, on par with boomerangs, the difference being that a man who offered his wife for a price to a white man could expect her returned, while a boomerang once sold would not be returned.²⁸ Bates took sensationalised accounts of events in remote Aboriginal communities back to town to shock her audiences. Berndt refers to Bates' work on cannibalism and her statement about an Aboriginal woman killing and eating her newborn baby; according to Berndt, upon investigation the bones were found to be from a cat.²⁹ Bates apparently gave another account of a woman who had killed and eaten four of her own babies. Infanticide has been recorded amongst Aboriginal societies and certainly did happen, but it was something that occurred in circumstances of extreme stress and where the survival of others was at stake.³⁰

The purpose of dredging up these tales is to show the negative interpretation that even women can give to Aboriginal women. As Berndt points out, Bates' descriptions were perhaps the most destructive kind of verbal attack that could have been made about Aboriginal women, because they undermine the centrality of women in family life and the bond of mother–child relationships. The problems associated with non-Aboriginal women interpreting the status of Aboriginal women persist today.

Feminist approaches to research

In the 20th century female anthropologists began to research specifically into Aboriginal women's lives. Phyllis Kaberry (working in the Kimberley region), Catherine Berndt and Jane Goodall all helped to provide insights into Aboriginal women's status countering male-centric descriptions. With fully fledged feminism in the West in the 1960s and 1970s anthropologists such as Diane Bell and Annette Hamilton recorded women's position in Aboriginal society in detail.

To counter the male bias in historical research there has been an attempt to measure female knowledge and power against male authority so that gender relations are viewed as 'a see-saw balanced on a central fulcrum with women sitting on one end and men on the other'.³¹ Hamilton suggests that a more useful understanding of Aboriginal society is one where it 'appear[s] to show both acute sexual inequalities and a high level of autonomy for women'.³² Interpreting the position of women in this way avoids having to measure the comparative worth of men's and women's roles and allows an assessment of them in their own—either separate or interrelated—spheres of influence.

Applying this type of analysis, gender can be used to assess how relationships are structured. The 'see-saw balanced on a central fulcrum' reflects an approach to gender relations through binary or oppositional analysis. The current trend is to abandon binaries and look at the way gender informs relationships in certain contexts. In assessing the role of gender in affiliation to land Toussaint, Trigger and Tonkinson point out:

It is important to stress that past tendencies which have assumed oppositional and 'either/or' analysis (for example 'traditional' or 'contemporary', 'hierarchical' or 'complementary'), have imposed limitations on the descriptions and interpretations of women's situations, women's relationships to men and women's and men's relationship to land. In our assessment, much more attention needs to be paid to the complex ways in which gender is given meaning, informs behaviour and shapes social structures in Aboriginal societies before comprehensive understandings of gendered relationships to land can be reliably articulated.³³

27. Ibid 32.

28. Ibid.

29. Ibid 32–33.

30. Ibid.

31. Hamilton A, 1981. *Nature and Nurture. Aboriginal Child-rearing in north central Arnhem Land.* Australian Institute of Aboriginal Studies, Canberra, as cited in Brock P (ed), *Women, Rites and Sites: Aboriginal Women's Cultural Knowledge* (St Leonards, NSW: Allen and Unwin, 1989) xx.

32. Ibid xxi.

33. Toussaint S, Tonkinson M & Trigger D, 'Gendered Landscapes: the politics and processes of inquiry and negotiating interest in land' in Brock P (ed), *Words and Silences: Aboriginal Women, Politics and Land* (St Leonards, NSW: Allen and Unwin, 2001) 160.

The misrepresentation or oversimplification of gender relations in Aboriginal society can result in the silence of women in their dealings with non-Aboriginal society. Misconceptions of status have practical consequences when working with Aboriginal women. Cultural 'blinkers' or the potential for eurocentrism in white feminist politics can exclude Aboriginal women from critical processes in the bureaucracy and judiciary, silencing or making Aboriginal women invisible. The risk is serious negligence in the recognition of Aboriginal women's rights.

Feminism and Aboriginal women

As stated above, the rise of feminism (or feminisms) in the West has changed the focus of research and attempts have been made to assess the cultural significance of gender and how it informs social behaviour. Non-Aboriginal women armed with feminist politics have conducted research to redress misconceptions about women's status in Aboriginal society. Diane Bell's work is well known for this. A feminist approach has the practical consequences of supplying a body of knowledge that makes some attempt to represent the status of women in Aboriginal society. The flipside to this positive action is that non-Aboriginal feminists may carry with them a cultural bias; the power position of non-Aboriginal women in Aboriginal research can 'blink' their approach and ultimately influence their findings. Inserting a woman does not always mean that women's interests will be represented through some type of universal feminist sisterhood.

Marcia Langton, in the context of native title research, warns that placing a woman into the process will not guarantee the adequate representation of Aboriginal women's interests. She states:

Some researchers and legal representatives are aware that the involvement in land claim research and the expert evidence of a female anthropologist (or researcher from a related discipline) or female legal representative is no guarantee that the women claimants will have a fair opportunity to present their evidence, nor even that evidence of the kind they would prefer to present will be presented. Nor will a female researcher or lawyer guarantee appropriate circumstances for the hearing of women's evidence, having regard to the gender differential rules relating to Aboriginal ritual knowledge.³⁴

Non-Aboriginal women may be guided by a eurocentrism that stifles the agency of Aboriginal women. Aboriginal women have argued that non-Aboriginal women remain in a separate set of power relations. It is difficult to form a universal sisterhood when non-Aboriginal women are situated in power structures that oppress Aboriginal women. According to Huggins:

[T]hat's why a lot of Aboriginal women don't participate fully or don't have anything to do with the white women's movement here in Australia, because they see it as assimilationist and they haven't yet given us the respect and dignity that we deserve as women in this country.³⁵

Aboriginal women see themselves as Aboriginal first and women second.³⁶ The battles fought because of racial inequality mean an alignment with Aboriginal men before non-Aboriginal women. Problems arise for Aboriginal women when non-Aboriginal women retain their ethnocentrism and attempt to liberate Aboriginal women from situations such as family violence. Such problems are interpreted as somehow inherent in Aboriginal culture; no time is spent reflecting on the appropriateness of a particular approach, or on sharing platforms of power with Aboriginal women. The result may be that Aboriginal women's community power base is usurped by the non-Aboriginal 'expert' and strategies developed without the guidance or support of the local Aboriginal women.

The agency of Aboriginal women

Blagg reports that the Kurudju Committee, formed because of frustration with government agencies,

felt that the image being portrayed of Aboriginal women in remote communities was one of helpless, docile victims of traditional violence, incapable of developing strategies to combat violence. The implication being that only law and policing strategies driven from outside the community and based upon the general law could be effective.³⁷

The shock of the social problems³⁸ affecting Aboriginal Australia is severe for many non-Aboriginal people when they enter remote Aboriginal communities. For feminists the level of violence that Aboriginal women suffer is horrific:

34. Langton M, 'Grandmother's Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems', in Yunupingu G (ed), *Our Land is Our Life, Land Rights – Past, Present and Future* (St Lucia, Qld: University of Queensland Press, 1997) 86–87.
35. Huggins J, *Sister Girl: the writings of Aboriginal activist and historian Jackie Huggins* (St Lucia, Qld: University of Queensland Press, 1998) 62.
36. *Ibid.*
37. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia', Background Paper No 8, above p 317, 328.
38. Many social problems stem from colonial dispossession of which white women were a part.

Aboriginal women are diminished to the status of 'docile victims of traditional violence'.³⁹ The response is that Aboriginal women need to be emancipated from their culture. Violence against women is interpreted as inherent in Aboriginal culture and a reflection of the universal subordination of women. Little time is taken to assess the appropriateness or longevity of strategies created outside the community. Government policies and general law are clung to, rather than shaping the rules to suit local circumstances or, more importantly, stepping aside to make room for Aboriginal women's initiatives. As a result, Aboriginal women lack the resources they need to fund their own, usually more viable, strategies.

Colonisation has been a gendered process either in its intent or its outcome.⁴⁰ Aboriginal women and men have been affected in different ways. The effect of colonisation on Aboriginal men has meant that women have a changing status in Aboriginal society. A recent television program about the Marika family in the Northern Territory on the ABC's *Dynasty* series portrayed the changing status of women. In the 1960s Marika men began to pass on painting styles to women that were previously the cultural property of men only. The Marika men were granting the women access to what were once male only domains. The same program showed the problems of Aboriginal males and how the women were working with such problems through the assertion of culture. This can also be extended to understanding women's role in Aboriginal law. The agency of Aboriginal women may be relied upon to a greater extent.

4. Aboriginal women and the courts

Making the law 'fit' – urban models in remote areas

Through not sharing power platforms or reflecting upon strategies shaped outside the community, non-Aboriginal people may disempower and silence Aboriginal women. If the state's legal system is being used as the primary tool of justice without any recognition of Aboriginal law, then there is a risk of exacerbating social problems in Aboriginal communities. The case study above illustrates the ripple effect of the lack of justice.

One example cited consistently through the consultations was the problem of restraining orders. They illustrate the need for protection of Aboriginal women against violence, but they also show the limitations of procedures developed outside the community. Restraining orders are constantly violated and at times create more trouble.

In his report on crisis intervention in Aboriginal family violence, Blagg said:

There is concern that the present system is an 'all or nothing' approach to the problem, particularly where the legal process is concerned. (In consultations for this report the perceived inflexibility of the present system of restraining orders in Western Australia has been singled out for particular criticism). The family violence approach focuses on identifying appropriate ways of ensuring victims' safety at the point of crisis, and imposing sufficient controls over perpetrators to prevent future violence, without the use of incarceration. There is clear preference by Aboriginal women, who are the main victims of violence, for strategies that change behaviour while maintaining family relations.⁴¹

Restraining orders (and particularly the breach of restraining orders) demonstrate the 'all or nothing' nature of intervention that may result in no behavioural reform. Although restraining orders were consistently discussed during interviews, how they were understood by Aboriginal women varied. One senior woman from a remote area who had walked desert country as a child stated that she did not need restraining orders. She indicated that Aboriginal women could fight back, saying that if she was being beaten by an Aboriginal man she would 'bash him' herself to counteract the violence, not rely on a restraining order for protection. Other people spoke of how restraining orders might fit urban areas but the small size of remote communities meant that people could violate a restraining order simply by being at the only community store. Restraining orders send out a strong message that certain behaviour will not be tolerated; however, they are also reportedly being used to settle grievances with the risk of creating further problems. It was said that teenagers are lodging restraining orders against parents; mothers against daughters; women against women; and women against men. The police will often not take a restraining order request seriously and send applicants away telling people to think the matter through and come back. There is also a danger of police abuse of restraining orders. A mother told how her 19 year old son was constantly harassed by police after his girlfriend was granted a restraining order against him. She believed the police used the restraining order as an excuse to intrude into his life; the 19 year old ended up in a southern jail.

39. Blagg, above n 37, 328.

40. See Cunneen C, *Conflict, Politics and Crime: Aboriginal communities and the police* (Crows Nest, NSW: Allen and Unwin, 2001).

41. Blagg, above n 17, 319.

In discussing restraining orders Aboriginal women indicated that many people did not know what a restraining order entailed and did not know when they were breaching the order. Some communities are developing alternative strategies. If a couple are having difficulties one of the partners is sent to another community for a period of time to let the situation 'cool off'. The couple are encouraged to 'talk' to 'get the story', so that each can take responsibility for their own actions. Strategies such as these are designed by Aboriginal people to cope; they remain unrecognised alternatives to restraining orders and criminalisation of causal behaviours under Australian law. The use and abuse of restraining orders illustrate some of the limitations of urban justice models in remote areas.

Working with two systems of law for the protection of Aboriginal women

John Toohey's background paper for the Commission refers to the work of Joan Kimm⁴² as a valuable treatment of the material produced on violence suffered by Aboriginal women. As the book is referred to by someone of John Toohey's status and experience, I could not ignore her work and felt the need to make a response in the context of this paper. The amount of effort put into the literature review in Kimm's book is impressive, she has obviously worked hard and as Toohey points out, it is a relevant summary of the material produced on Aboriginal women and violence. However, Toohey is also quick to state in relation to the violence that '[i]t is the existence and identification of any customary law aspect with which the Commission is concerned'.⁴³ The majority of the violence described in Kimm's book appears to have little justification under Aboriginal systems of law (each case would need more detail than Kimm has provided to be absolute). From an anthropological perspective Kimm's work suffers from Eurocentrism in interpreting the status of Aboriginal women and an assertion of the centrality of the Australian legal system in dealing with the violence.

Part of Kimm's argument is that the Australian legal system must address the violence suffered by Aboriginal women, she relies on the work of Eggleston from the 1960s and refers to the role of the judiciary in sentencing and the need to look at sentencing as an 'educative deterrent'.⁴⁴ Kimm states:

In general law deterrence is that sentencing factor which acts as a warning that the law will not tolerate a particular form of behaviour. General deterrence is a judicial warning to the community against committing particular criminal acts; specific deterrence is a warning to the prisoner against repeating criminal behaviour. Effectively in many cases concerning Aboriginal men's violence to women sentences have not constituted either a specific (to the prisoner) or a general deterrence (to other men) against committing such acts.⁴⁵

Kimm goes on to say:

Yet because of the intensity of the violence, Aboriginal men frequently commit indictable, that is serious, offences that are heard by a judge and jury in District, County or Supreme Courts. Paradoxically it is in these courts that judges have dealt with Aborigines more leniently than non-Aborigines, although men's violence might be seen as behaviour where deterrence should be particularly important.⁴⁶

There is an assumption made that extending the general law in the form of harsher sentencing will work as an 'educative deterrent', that jail will actually punish and rehabilitate Aboriginal men and that jail terms carry the same stigma for Aboriginal people as they do for non-Aboriginal people. The case study that opened this paper showed that jail did little to rehabilitate the offender. The extensive research and on-the-ground information collected by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended that 'imprisonment should be the sanction of last resort in sentencing'.⁴⁷ Regarding prison sentencing as an 'educative deterrent' illustrates an approach where the current system is merely intensified or extended, to address problems, rather than find alternatives. General law is needed to ensure the support and protection of Aboriginal women in situations of violence, however, it is only one element of protection. The assertion of Aboriginal law in such cases may benefit women. Aboriginal men may be held more accountable – be made to 'own' their behaviour under Aboriginal law.

In fairness to Kimm she does conclude her book with notions of Aboriginal autonomy and sympathy for the plight of Aboriginal men; however, her interpretation of extreme violence against women by Aboriginal men as inherent in Aboriginal culture and by extension 'moral' punishments under Aboriginal law is flawed. Kimm writes:

42. See Kimm, above n 2.

43. Toohey, above n 1, 12.

44. Kimm, above n 2, 138.

45. *Ibid.*

46. *Ibid.* 138–39.

47. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991) recommendation 163.

[F]rom the viewpoint of non-Aboriginal society and law, Aboriginal women can be circumscribed by their culture. Male elders have the power to confine women in violent situations within communities. A man's status controls the level of support an abused woman might receive. ... Other matters signify the imbalance of gender rights; sexual assault is regarded as a community matter, a man's right to beat his wife, 'morally justified violence', is something between the two of them. They are isolated from Anglo-Australian law under which these offences would be regarded as serious.⁴⁸

Kimm also states that:

Despite areas of autonomy in traditional society, Aboriginal women have not enjoyed either in traditional, colonial or post-colonial societies the kind of ascendancy which would enable them to superimpose their rights on men in cases of violent assaults upon them.⁴⁹

In Kimm's estimation it appears that the picture looks bleak for Aboriginal women; they are 'circumscribed by their culture' rather than empowered by it. Taking a snapshot of particular incidences, without looking at the situation holistically, runs the risk of finding solutions that create more problems. The Aboriginal women interviewed during research for this paper looked broadly at the situation; some attempted to understand the problems of Aboriginal men. Would the status of a male elder over time be diminished if he was to 'confine women in violent situation[s] within communities'? The role of the family⁵⁰ in Aboriginal society goes unacknowledged in the statement 'a man's right to beat his wife, 'morally justified violence', is something between the two of them'. It neglects the kin-based nature of Aboriginal society.⁵¹ An example given from the east Kimberley to counter the notion that such actions are private or sanctioned in Aboriginal culture, is the assertion that mother-in-laws traditionally looked after young wives, this was explained as part of Aboriginal tradition. One senior woman explained that her mother-in-law told her to leave the marriage to her son; because of his violence toward her, the new husband was regarded as not ready for a wife and not seen as mature or capable enough to discharge the responsibilities that marriage entails. Lloyd and Rogers refer to the ideal models of social behaviour in central Australia stating that in fights between spouses, the families of both parties would protect the husband and wife.

Families—in particular the woman's brother, mother's brother and father's sister—would speak out on behalf of a woman and protect her interests. People then understood and respected the boundaries of customary law. The women acknowledge that there are problems in adhering to these laws and maintaining social harmony but they say 'we still have that law (traditional) in our hearts'.⁵²

Throughout her work Kimm uses the term 'moral violence' in association with Aboriginal men and violence against women. There is an assumption that this type of behaviour is sanctioned in Aboriginal culture and, by extension, under Aboriginal law. However, there is no attempt to show what aspect of Aboriginal law sanctions the abuse of women, it is simply regarded as inherent in Aboriginal law and culture.

Kimm's solution is to extend the general law as a means of 'educative deterrent' which could in fact create a culture of alienation for Aboriginal men and result in more violence suffered by Aboriginal women. Determining whether particular acts are part of Aboriginal law is difficult when considered away from its cultural context in a court setting. The history of contact with police and courts for Aboriginal people, particularly women⁵³ have silenced women's voices. This silence does not always mean that Aboriginal women have nothing to say.

Room to speak – Aboriginal women's voices

In a 1988 case in the Northern Territory Supreme Court, Justice Maurice asked:

Why should we only hear from the men? If we're going into this question of what's culturally acceptable behaviour, why shouldn't we hear from some female, some female leaders of the community at Port Keats? Why should it be men who are arbiters of what's acceptable conduct according to the social and cultural values of Port Keats?⁵⁴

48. Kimm, above n 2, 108.

49. Ibid.

50. Toohey notes the factions and family divisions in Aboriginal communities. Family division and the hierarchy of family factions may affect the support an Aboriginal woman or her family can expect in situations of family violence. See Toohey, above n 1, 8.

51. See Edwards WH, *An Introduction to Aboriginal Societies* (Sydney: Social Science Press, 2004)

52. Lloyd J and Rogers N, 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications.proceedings>> (accessed 15 September 2004).

53. During consultations young women told how some police were 'real itchy', which translates as 'wanting sex'. They told stories of girls being taken for drives out of communities so that police could facilitate the sex act.

54. Cited in Kimm, above n 2, 109.

The role of women as moral arbiters, instead of being accepted, has to be reasserted every time an aspect of Aboriginal social organisation is assessed from the outside. Any silence of women is interpreted as symbolic of a lack of information.

Bird Rose articulated this problem well when she said:

It seems that while the men's domain is readily accepted as an integral part of Aboriginal social and cultural reproduction, the existence of a women's domain must be argued afresh in each instance, and its relationship to the reproduction of Aboriginal society and culture must be demonstrated.⁵⁵

Bird Rose discusses the symbolism of women's silence within Aboriginal systems of knowledge. Women not speaking out or not being heard does not equate to a lack of knowledge. She interprets the knowledge structures of Aboriginal society and shows how 'freedom of information' is not a part of Aboriginal culture. She explains that knowledge is not free-floating in Aboriginal society, ready to be consumed by any interested person. Knowledge needs to be held and passed to the rightful keepers of such knowledge. In this form of cultural logic, silence may imply knowledge, rather than being symbolic of its lack.⁵⁶ Bird Rose cites Eric Michael's work with the Warlpiri, showing that 'knowledge is currency' and that silence can represent the withholding of knowledge rather than its absence.⁵⁷

Bird Rose distinguishes between active silence and passive silence. The latter is described as a tool of colonisation, described as the 'deployment of power to stifle or destroy people and their knowledge'.⁵⁸ The 'voice' of Aboriginal women is not readily recognised, resourced or strengthened by mainstream Australia. The lack of protest by Aboriginal women, or silence about such issues is at times construed as symbolic of a lack of power or knowledge. As Justice Maurice's comment shows, there is a need to hear from Aboriginal women.

The native title process provides relevant examples of how court proceedings can be modified to allow Aboriginal women 'room to speak'. The process also shows the centrality of women in Aboriginal social organisation. At the start of the native title process affiliation to land was regarded as the domain of men, patrilineages dominated the interpretations of connection to country. Women's role in family and continuity of affiliation to land following European occupation came to the fore during native title research, not through benevolence, but through the pragmatics of proving connection to land.

Aboriginal women and the native title process

The inclusion of women in the native title claim process was not a matter of goodwill; as the process evolved women's inclusion became a matter of necessity in proving connection to land. Brock pointed out the gulf that existed between what researchers were finding about women's knowledge and power and the practical operations of the judicial system and the bureaucracy in relation to land. In 1989 she wrote:

It is important for the future of Aboriginal women that past views of their status and cultural roles are reviewed and revised, because in the past 10 to 15 years a new issue has emerged to complicate the already complex question of knowledge and authority in Aboriginal society. That issue is rights to land, as set out not in Aboriginal law, but in legislation and conservation practice. An Aboriginal person, who has rights to land and can speak for the land, has authority both in Aboriginal and white society, and ultimately perhaps some economic return. So, at a time when researchers are acknowledging the full extent of women's knowledge and power in Aboriginal society, the judicial system and the bureaucracy are dealing with Aboriginal men over rights to land. ... This attitude is further undermining the status of women throughout Aboriginal Australia.⁵⁹

Brock was writing before the High Court's *Mabo* determination and before research into native title claims. Relatively early on in the native title process Langton asserted the role of 'Grandmother's Law' in Aboriginal social relations.⁶⁰ She stressed the important position that senior women hold in native title research and their critical role in proof of affiliation to country. Early research about continuity of land ownership was focussed on continuing traditional connections to country via patrilineages or patrification. Women were not regarded as central at first, but rather as something of an

55. Bird Rose D, 'The Silence and Power of Women', in Brock P (ed) *Words and Silences: Aboriginal Women, Politics and Land* (Crows Nest, NSW: Allen and Unwin, 2001) 93.

56. *Ibid.*

57. *Ibid* 98: 'In Aboriginal societies knowledge is land-based; personal authority, personal achievement, the authority of seniors, and the integrity and autonomy of local groups depend on the control of knowledge through restrictions on its dissemination. Such a system is subverted through any form of 'freedom of information'. If there is one thing that is absolutely not free, in Aboriginal society and culture, it is knowledge'.

58. *Ibid* 92.

59. Brock, above n 31, xxii.

60. Langton, above n 34.

'add on' to be incorporated if time and money allowed. The result was that Aboriginal men were gaining expertise in negotiating over country and the opportunity to assert themselves in the absence of women.

Proving connection to country soon reflected what was apparent in the broader research relating to Aboriginal women – patrilineages and patrification were relevant in proof of native title; however, cognatic descent was essential in proving Aboriginal law ownership of land. Connection to country needed to be shown through both men and women.

Langton points out that Aboriginal women were often denied the opportunity to present evidence to native title hearings and that appropriate circumstances for the hearing of women's evidence were often not arranged.⁶¹ When proper procedures were in place for the giving of women's evidence the information was forthcoming. As Langton states:

Women witnesses have often been silenced by the conduct and organisation of land claims, and thus much of the significance of 'women's business' in the general affairs of society has been missed. When women law holders have been given an appropriate forum in which to speak, they have given partial exegeses of their life-enhancing rituals and myths (often shared in a gendered fashion with the male law holders) and thereby expanded our understanding of customary land systems.⁶²

When women were given the opportunity to speak the value of their role and contribution to the process was obvious. Langton argued that the importance of Aboriginal women's role in native title claims is, in part, a product of colonisation. She wrote:

The paradigm in which men's evidence is the cornerstone in proving the existence and rules of customary land corporations will be less efficacious in native title claims in those areas where the massacres, epidemics, forced removals and impact of alcohol abuse, imprisonment, employment in the pastoral industry and itinerant labouring have resulted in female gerontocracy of the remnant clans and of amalgamated customary land corporation such as 'tribes'.⁶³

Both Aboriginal men and women have been severely affected by colonisation; however, as Dodson states, women often hold on to their 'culture bearing' capacity.

Whilst forced cultural change has had a substantial impact on the traditional role of Aboriginal men, Aboriginal women even though they have been exposed to the same cultural forces have basically retained the role of gatherer and child carer. This is despite the application of external forces in all manners and forms via the processes of government which could have severely undermined the role of women as it has done the men.⁶⁴

It is now ten years since the *Native Title Act 1993* (Cth) came into force. Aboriginal women have shown mainstream Australia the importance of their role in Aboriginal law and culture in relation to land. It is formally recognised in the sense of women's sites and areas of the landscape that are gendered through Aboriginal law. Bird Rose has written that:

Dreamings travelled; they were sometimes in human form, and sometimes in animal or other form. But whatever the form, they were almost inevitably either male or female. Dreaming men and women sometimes walked separately and thus created gendered places. There are now women's places and men's places: places which are associated with one or the other because Dreaming made it that way. There are varying degrees of exclusion: places where men can go but must be quiet, places where they can look but not stare, where they can walk but not camp, and then there are places where men cannot go at all, ever. There are places where men cannot drink the water, cannot even look at the smoke that rises from women's country. And of course the same is also true with respect to men's places, men's country.⁶⁵

Secular women's business is now becoming more readily accepted. Women's sites or the gendered nature of particular areas of country are acknowledged in heritage protection and native title.

During native title research women particularly showed their power in terms of family histories (genealogies). The 'private' area of family expressed its importance in the very major role of women in genealogies and aiding to put family history to the point of European occupation. Areas of Aboriginal women's ritual observance that relate both to land and broader Aboriginal law were summarised by Langton as:

61. Ibid.

62. Ibid 88.

63. Ibid 92.

64. Dodson P, *Regional Report of Inquiry into Underlying Issues in Western Australia*, RCIADIC (Canberra: AGPS, 1991), vol 1, 376.

65. Bird Rose, above n 55, 36.

- Place-specific or regional celebrations of Stories or Dreamings which may include song cycles, dance repertoires, ritual objects and body painting, for calling up ancestors and re-enacting their exploits.
- Ceremonial repertoires include those roles which they perform in public ceremonies as well as male-oriented ceremonies such as initiation and rituals for observing important species, particularly plants, and spiritually encouraging their reproduction. The Story or Dreaming places associated with the creative dramas of these species/beings are celebrated in these rituals.
- Extensive knowledge concerning midwifery, birthing rituals and practices, and rituals for investigating spiritual essence and power of particular births in places and trees, and for activating certain powers in new-born infants.
- Rituals concerning both the dangerous and nourishing powers of sexual attraction, courting, marriage and related emotional states, which empower women to control these states and explain their significance to younger women.
- Keeping of practical and spiritual bodies of medicinal and healing knowledge which they apply in ritual acts for the benefit of individuals, groups, sometimes for marriages, and sometimes for states of being within groups which are seen to be detrimental to the wellbeing of people or places invested with the spirits of ancestors. Certain sacred sites are associated with this knowledge and power.
- Specific roles in mourning and mortuary rituals, including funerary rites, coronial inquisitions to determine cause of death, and punishment rituals.
- A range of practical and spiritual practices for aggressive purposes when conflict arises, and can take vengeance on others when they feel aggrieved, through fighting or sorcery. Dispute resolution is achieved through these and specific rituals for peace-keeping.⁶⁶

Langton's summary provides useful insights into the role of women in social organisation that relate to Aboriginal law.

The less obvious role of women in connection to country came to the fore during the native title process; that is, women's role as transmitters of culture (culture bearers). Langton states that 'women are members of the laterally organised land managing groups that are responsible in ritual and ritual-related activity for the management of the landowners' affairs, ensuring fidelity to traditions'.⁶⁷ Even in male rituals such as initiation, women play a role. Where there is not separate women's business, women still hold their status as moral arbiters.

It is important for the Law Reform Commission to work with some of the aspects of native title hearings. The way women's evidence has been given and accepted in particular claims, might provide valuable models for establishing women-friendly court proceedings. As a result of the misinterpretation of women's status in Aboriginal society and the 'largesse' accorded to customary law in favour of Aboriginal males, the obligations that women have under Aboriginal law are often dismissed or neglected.

5. Status of women in Aboriginal society

Promised marriage

The issue of recognition of arranged or 'promised' marriages poses certain difficulties for the Commission. Child protection—particularly in view of the usual young age of a promised wife and sexual relations below the age of consent—could be an area for concern in the recognition of Aboriginal law. The *Pascoe* case in the Northern Territory exemplified such issues.⁶⁸ Buti and Young's earlier background paper for the Commission discusses the legal implications and the types of Aboriginal marriages.⁶⁹ The rights of the individual are highlighted in promised marriage. An example was provided to the author by Father Kevin McKelson who was concerned for the rights of a girl who wanted to pursue an education under the Western system; he questioned whether enculturation into arranged marriage systems may prevent this.⁷⁰ Understanding the flexibility of arranged marriages assists in comprehending the rights of the individual in such systems.

Christine Choo interviewed Mary Ruruala Pandilo born at Kalumburu Mission, who explained the following about young girls and promised husbands:

66. Langton, above n 34, 88–89.

67. *Ibid* 94.

68. The *Pascoe* case highlights the complexities of promised marriage and carnal knowledge. The case is discussed in McIntyre G, 'Aboriginal Customary Law: Can it be Recognised', Background Paper No 9, above p 341, 344.

69. Buti T & Young L, 'Family Law and Customary Law', Background Paper No 4, above p 143, 147–148.

70. In a personal communication with the author.

- MP: Promised one, they used to keep them. 'Now you are big enough, you go out and stay with your husband', they tell them like that. This is the bush way... They used to live with them but they didn't do anything [they did not have sexual relations] ... The old man never do anything until e [she] grow a little bit bigger like one or two years then they [start].
- CC: What happens if the girl doesn't want to go to the man?
- MP: I don't know. They'd kill em [her]. Good thing I was in the mission.⁷¹

The quote reflects the attitude towards sex with a girl at an early age. Choo goes on to describe that the threat of killing the girl was not carried out. If she ran away she was returned to the husband, if it happened a number of times the marriage might be abandoned and compensation sought by the husband.⁷² The problem of interpreting the rights of women in arranged marriages has in part to do with conceptualising women as mere 'objects' in the marriage exchange, depriving them and the families involved of any agency in making and breaking such arrangements.

The complexities of arranged marriage systems are misunderstood when they are reduced to the concept of bartering of a woman (or girl) as an object. In fact, arranged marriages create a network of exchange, bonding groups into relationships of reciprocity and responsibility. Sandy Toussaint, interpreting the work of Phyllis Kaberry stated the benefits gained for women in marriage:

Women were not oppressed by marriage, which brought with it a certain status, companionship, protection and settled existence that was sanctioned by all members of the community.⁷³

Kaberry, recorded the role of mothers of girls the subject of arranged marriages; she showed that mothers have a large part in the arrangement of marriages and that women were not simply 'objects' being bartered by their men.

The mother receives a share of the gifts distributed at the circumcision and subincision of her sons, and presents are handed over to her by her son-in-law during his marriage to her daughter. Some of these she later passes on to her own relatives. She has a part in the marriage negotiations of her daughters... These facts are important because they show that the marriage gifts do not establish the man as the absolute owner of his children.⁷⁴

It is difficult to assess the number of Aboriginal people today that marry traditionally through a promised or arranged marriage. The impact of missions and government policy regulating Aboriginal marriages is profound.⁷⁵ Apart from the obvious rituals of arranged marriage, women still play a role as moral arbiters in relationships, arranging and keeping relationships together⁷⁶ or pulling them apart.

Women Elders

An East Kimberley woman (approximately 30 years old) at Broome Regional Prison described how the law system worked for her. When asked questions about the two systems of law she stated that she only thought in one system of law, Aboriginal law. When questioned about the status of 'elder' she described it this way:

You can only be an elder if they [other women elders] allow you to be, pass it on to you, tell you gotta be boss when I'm gone, they're alongside of you at first, make sure you do it properly. In Law the old people want it their way, can't make any changes. They tell you what to do, your job you go do it. Girls go to law, come from main old people. If young girls try and change law, old people know and growl you [discipline you or become angry].

Old people guide you over who to chase, wrong skin, drinking, any issue that's forbidden the old people will guide you on. They can arrange where you go in life [kind of mentoring], if a man is a work person [active, a worker] old people admire them, keep him, if you don't treat him properly in the relationship the old women may growl you, in their eyes he's a good person. Should stay with him.

The old girls guide you on how to look after children, not looking after them, they growl you, give them [children] a hiding too much they growl you. If a woman can't be chased out of the community for whatever reason you live there as an outcaste.

The women guide in health, bush medicines, show the ways that they grew up. Use bush medicines when not much white medicines, easier and better way.

71. Choo C, *Mission Girls, Aboriginal Women in Catholic Missions in the Kimberley, Western Australia 1900–1950* (Perth: University of Western Australia Press, 2001) 191.

72. Ibid 192.

73. Toussaint S, *Phyllis Kaberry and Me: Anthropology, History and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 43.

74. Cited in Toussaint, *ibid* 42.

75. See Haebich A, 'For Their Own Good: Aborigines and Government in the South West of Western Australia 1900–1940' (Perth: University of Western Australian Press, 1988).

76. See Birdsall C, 'All One Family' in Keen I (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Canberra: Aboriginal Studies Press, 1988); Langton, above n 34.

In the same interviews at Broome Regional Prison a woman described the difficulties she was having getting released for a Law woman's funeral. She said that she had put in the application form for release. The funeral was for a woman who she described as 'training her up in the Law' she needed to be at the funeral to show respect, but not only for the deceased; she described her inability to go would be understood as showing no respect for the Law that the woman was guiding her through. She said she would 'get a hiding' when she got home regardless of the reason for not attending the funeral.⁷⁷

History, cultural dynamics and Aboriginal law

The information provided above from the interview at the Broome Prison reflects cultural dynamics. It is clear that outside of formal marriage arrangements in ceremonial settings Aboriginal women are still guiding younger women in their relationships and child-rearing. Culture is not static, it is dynamic, but the cultural logic that underpins change may be distinctly Aboriginal.

Swain and Bird Rose, in the context of anthropological study of the mission experience, state:

Until the 1960s politicians, missionaries and academics all took it for granted that there were but two genuine options open to Aboriginal peoples: complete traditionalism, which was ultimately dismissed as impractical and undesirable, or total assimilation in White Australian society. Responses lying between these polar opposites were described as embarrassing and unfortunate bastards whose existence was best ignored.⁷⁸

The lives of Aboriginal people in the Kimberley have been profoundly affected by the mission and pastoral experience. Around 85 per cent of Aboriginal people now identify as Christian.⁷⁹ Abandoning the idea of binaries is useful in understanding how a population with such a high percentage of Christians can assert the right for self determination through Aboriginal law. Being Christian and upholding Aboriginal law practices are not mutually exclusive.

The mission experience

Many early missionaries viewed Aboriginal religion—and by extension Aboriginal law—with contempt, believing it risked mortal souls. When Kaberry first came to work in Western Australia the friction between missionaries and anthropologists was intense. Schenk, the missionary who established the United Aborigines Mission at Mount Margaret, refused Kaberry entry to camp at the mission. Schenk believed that anthropologists encouraged Aboriginal people to return to their old 'devil devil' corroborees which included evil rituals.⁸⁰ Kaberry was of the belief that such rituals were vital for people's pride. With a style that reflected the era, she wrote:

Yearly participation in these rites will serve as an antidote for the contempt with which some of the station blacks are beginning to regard their own race. The Black will have to change eventually, but if changes are to be beneficial they must be based on pride of race, and in the meantime these ceremonies are keeping that race consciousness alive.⁸¹

The missionaries had a mixed relationship with various governments and Aboriginal people. AO Neville, the Chief Protector of Aborigines in Western Australia at the height of the assimilation era, despised the missionaries. He believed that through perceived acts of compassion they were allowing Aboriginal people to marry other Aboriginal people. In a speech in 1937 Neville stated that:

In my state there are several institutions for the treatment of the native, including eleven missions and a number of departmental establishments. At the mission stations, the natives are encouraged to multiply by marriage, with a consequent increase of population. The missions are thus able to claim that they are doing valuable work for the natives. Undoubtedly they are doing good work, but they keep an increasing number of natives on their properties, whereas the departmental institutions, whilst approving marriages, encourage the natives to mix with the general community [assimilate as whites]... As a matter of fact, for some years now I have been able to supply sufficient youngsters of both sexes to meet the demand for their labour.

In order that the existing state of affairs in Western Australia shall continue, and in order to prevent the return of those half-castes who are nearly white to the black, the State Parliament has enacted legislation including the giving

77. There may have been valid reasons for the woman's inability to attend (or failure to get permission to attend) the Law woman's funeral. The matter was not pursued with prison authorities.
78. Swain T & Bird Rose D (eds), *Aboriginal Australians and Christian Missions Ethnographic and Historical Studies* (Adelaide: Australian Association for the Study of Religions at the South Australian College of Advanced Education, 1988) 2.
79. *Mission Accomplished*, SBS Video, 1997.
80. Choo, above n 71, 189.
81. *Ibid* 190.

of control over the marriages of half-castes. Under this law no half-caste need be allowed to marry a full-blooded Aboriginal if it is possible to avoid it, but the missions do not always take steps to prevent this from occurring; they allow the half castes under their control to marry anybody.⁸²

The impact of government reserves and missions on culture was profound, interrupting arranged marriages and destabilising the law and culture of Aboriginal people. However, it was not to the point of cultural annihilation. The cultural logic used to embrace the Christian message was very Aboriginal; Kaberry gave a glimpse of this when she wrote that people at Forest River 'call Christ, Bundilmiri, and God, Wolara'.⁸³ The government project of assimilation resulted in failure.

The mission experience came up often in discussions with Aboriginal people. One woman stated that the Christian dormitory institutions that many Aboriginal people grew up in were intensely sex-segregated. The same woman regarded this as the beginning of sexual division and domination rather than seeing the separation of the sexes in this way as inherently Aboriginal. The dormitory systems of the missions were also cited as causing dysfunction in Aboriginal mothers, depriving them of positive family role models and the parenting skills required to raise their children in an Aboriginal way.

The pastoral experience

Some pastoral stations were also government reserves, for example Moola Bulla in the East Kimberley. Until the late 1960s Aboriginal people could maintain law and culture while working at pastoral stations: during the off-season they were able to 'go bush' to conduct ceremonies and access country. Changes to the award rates for Aboriginal people and increasing mechanisation of the pastoral industry in the 1960s led to a majority of Aboriginal families being forced off stations into town centres; into what is described as the 'welfare paddock'. People were excluded from country and unemployed. At the same time, drinking rights came in and as a result social problems festered.⁸⁴

History has had an effect on the ability to practice Aboriginal law, but not to the extent that Aboriginal law is now beyond recognition. It has been shown in this paper that the impact of colonisation has affected how Aboriginal law is being argued before the judiciary. Consequently this affects our understanding of Aboriginal law. The law is not regarded as lost, just hampered. The religious nature of Aboriginal law means that it has always been there, embodied in country 'people always teach law, rule for people in this ground, the law is there for people'.⁸⁵ Because Aboriginal law is earthbound law it is a matter of accessing the law system. Strategies to address teenage justice problems, outlined below, reflect how people are using law and culture that exists 'in this ground' to mentor teenagers.

'Bullshit' traditional law

There are problems for the post-1960s generation that grew up with limited access to traditional lands. What they begin to assert as Aboriginal culture often falls under the category of 'bullshit traditional law'. An example of this type of bastardisation of culture was given by a woman working at a women's refuge who believed that 'men are hiding behind culture'. She said that husbands often do acts of supposedly culturally sanctioned violence against their wives with the excuse that dinner was not there for him when he got home drunk, broke and hungry. Ethnographic sources show that women, as gatherers, were stable food providers.⁸⁶ For a woman to neglect her obligation⁸⁷ in this area might have created shame and outrage; however, today the reason for not providing for a husband relates more to social circumstances where gambling, alcohol or drugs have often robbed the household of food. The woman who shared this story was concerned for the next generation, particularly the males, who believe that such acts of family violence are culturally sanctioned. It is not that culture is lost; there is a concern about how it is being interpreted by the next generation. Statements such as, 'he hits me because he loves me' and 'he gets jealous because he loves me' caused older women grave concern for what the young were interpreting as Aboriginal culture.

82. As cited in Aboriginal Legal Service of Western Australia, 'Telling Our Story: A Report by the Aboriginal Legal Service of Western Australia (Inc) on the removal of Aboriginal Children from their Families in Western Australia' (1995) 206.

83. As cited in Swain and Bird Rose, above n 69, 2.

84. Australian Broadcasting Commission. 'Customary Law', *Message Stick* (April 2004).

85. *Ibid.*

86. See Berndt & Berndt, above n 10; Berndt, above n 21; Bell, above n 9; Merlan F, 'Gender in Aboriginal Social Life: A Review' in Berndt and Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies, a Contemporary Overview* (Canberra: Aboriginal Studies Press, 1988).

87. The Berndts stated that: 'Men's hunting activities are more uncertain in outcome than women's food-collecting. For this reason, women contribute, overall, the greater part of the food supply. ... a large animal is usually divided up, even to the extent that the main hunter may keep almost none of it for himself. The men need to share through ritual and kin obligations, the women on the other hand are required to focus on themselves, husband and children'. Berndt and Berndt, above n 10, 119–20.

Noel Pearson, writing of the situation at Cape York, expresses the demands that such misinterpretations of culture place on women and children. He speaks of 'welfare poison' and how this has undermined the Aboriginal principle of 'reciprocity'. In relation to men's alcohol consumption Pearson writes:

When you look at the obligations which are set up around the drinking circle, you see the drinkers under reciprocal obligations to contribute to buying the grog. When I have money it's my turn to shout. When your money comes, it's your turn to shout. Outside of this drinking circle are the women and the children and old people and the non-drinkers. The resources of these non-drinkers are used to feed the families – including those who have spent most or all of their money on grog, when they are hungry. But more than that, these non-drinkers are placed under tremendous social and cultural pressure to contribute resources to the drinking circle for buying grog. So the drinking circle becomes the suction hole for the family's resources. Wives and girlfriends, parents and grandparents, are placed under tremendous pressure—social and cultural and ultimately through physical violence: 'Why you wanna stop me from having fun with my brothers?'—to contribute to these pathological behaviours.⁸⁸

Pearson's comments reflect the aberration of fundamental cultural principles such as 'reciprocity'. Pearson's description and the example given above in relation to giving a spouse dinner show culture in crisis. The women interviewed for this paper responded that Aboriginal culture was not 'passing away' but that there was a need to educate the young on what culture means.

During the research for this paper the term 'bullshit traditional law' was not put forward often and when it was it tended to be by non-Aboriginal people with a close association or long working history with Aboriginal people. Women described what could be seen as a type of cultural aberration as the reality for the people that lived it, not crystallised under headings of classical and contemporary systems, or traditional and 'bullshit' law. The older women expressed the need to assert culture and to educate the younger ones about their culture.

In her studies on violence against women in the Northern Territory, Audrey Bolger recorded one woman as stating: 'There are now three kinds of violence in Aboriginal society – alcoholic violence, traditional violence, and bullshit traditional violence'.⁸⁹ Bolger believed that Aboriginal women were subject to all three. She discussed traditional and non-traditional violence in the Northern Territory and stated the 'true traditional violence accounts for only a minority of the incidents of abuse against women'.⁹⁰ She defined traditional law as follows:

By traditional violence is meant the punishments for transgressions which were part of the means of social control in Aboriginal society and were meted out to both male and female offenders. Such physical punishments, which could involve spearing, beating or even death, were not between individuals but were the responsibility of whole communities or relevant groups in those communities, both women and men. There were recognised punishments for specific transgressions and they were carried out by particular people under community control.⁹¹

The difference between the above and 'bullshit traditional violence' is that the latter is 'violence which is not now sanctioned through formal societal mechanisms'.⁹² Bolger's definition of 'bullshit traditional violence' is the assaults that women suffer that take place for illegitimate reasons, where alcohol is often involved and where there is an attempt to justify the violence as a traditional right'.⁹³ She found that men were working law 'two ways': using either perceived traditional law or general law to suit their needs and distorting the understanding of Aboriginal law in the process.

In a case from South Australia involving the rape of a woman in custody by two Aboriginal police aides and a community warden, the judge, relying on the evidence of the Police Sergeant, stated that:

There is no crime of rape known in your community. Forcing a woman to have sexual intercourse is not socially acceptable, but it is not regarded with the seriousness that it is by white people.⁹⁴

The offence was serious, perhaps more serious than the rape of a non-Aboriginal woman. The victim was in a sense defiled twice, once by the rape and a second time by the fact that the perpetrators were related to her: the rape was incestuous. In making the decision the judge took into consideration the probability of swift punishment by the community for the rape; however, the community had given the case to the courts to deal with. In this instance the community was immobilised by drug and alcohol abuse and unable to respond to the violence with appropriate or

88. Rowse T, *Indigenous Futures. Choice and Development for Aboriginal and Islander Australia* (Sydney: University of New South Wales Press, 2002) 154.

89. Bolger A, *Aboriginal Women and Violence* (Canberra: Australian National University, North Australia Research Unit, 1991) 49.

90. *Ibid.*

91. *Ibid.*

92. *Ibid.*

93. *Ibid.* 50.

94. *R v Wangkadi Mingkili* (Unreported, Supreme Court of South Australia, Millhouse J, 20 March 1991) 2. Cited in Lloyd J and Rogers N 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications.proceedings>> (accessed 15 September 2004).

meaningful reference to 'customary law'. The inaction does not translate as the offence not being regarded as serious under Aboriginal culture or law. As Lloyd and Rogers point out:

Once again in this case, attention and significance were given to Aboriginal male values which were reinforced by the values and attitudes of the white male community with no evidence or attention given to Aboriginal women's views of this matter.⁹⁵

The understanding of Aboriginal law is diminished. Aboriginal law was not exercised in addressing the crime and the message it sends about general law is that it condones the abuse of Aboriginal women.

'Largesse' accorded to Aboriginal law and the effect on women

In his regional report for the RCIADIC, Patrick Dodson outlined some of the problems in the application of customary law as being:

[A]d hoc; idiosyncratic to the individual police or judicial officer; confusing to Aboriginal and non-Aboriginal people when seen in the light of variable sentences; potentially open to abuse and over-statement and over-simplification.⁹⁶

Dodson also described the problems associated with Aboriginal law recognition, outlining the degree of 'largesse' bestowed on Aboriginal people in respect of their law.

It may be argued that in respect of informal recognition of customary law, Aboriginal people are accorded a degree of 'largesse' by police and courts, simply because those two agencies are aware of problems in the detection process; problems in the arrest process; problems in the interview process; problems in the 'confession' process; problems in the judicial procedural process; problems in the court hearing process and problems in the evidentiary process for some Aboriginal defendants. One might cynically state that 'largesse' may be so extended to reduce the prospects of appeal, and dispense 'justice' expeditiously. Aboriginal people are certainly not convinced that they receive justice anywhere, expeditiously or not.⁹⁷

Aboriginal women are grossly at risk by the misrepresentation of Aboriginal law and the 'largesse' accorded to certain practices under Aboriginal law. The rape case above shows the level of misunderstanding. The case study that opened the paper also illustrates the problems articulated by Dodson.

Problems associated with Aboriginal women being the 'female other' can mean that acts of gross violence are interpreted as socially acceptable or normal within Aboriginal culture. One non-Aboriginal woman described how the ALS in its (quite justified) attempt to keep Aboriginal people, particularly males, out of prison are building a stock pile of cultural knowledge. The ALS may use these cultural arguments in the defence of their clients. The woman believed that police should be educated about Aboriginal culture so that cultural knowledge could not be transformed into some type of 'excuse' for lack of justice. There are relatively simple but practical steps that may help to alleviate cultural misunderstanding, such as the mandatory use of interpreters from the moment people come into contact with the system, not just in court when the arguments for prosecution and defence have already been solidified. In this way both sides can be educated about the two competing systems of law.

A problem for Aboriginal women is that customary law is being argued as an excuse for violent acts committed against women. It is said that such violence is 'moral', implying that the behaviour is socially sanctioned under customary law. Issues of access and equity for Aboriginal women within the legal system can mean that their views on such matters do not enter court.

In the court setting, only segments of Aboriginal law are being put forward, in an Australian court setting Aboriginal law is out of its cultural context. The result being that any understanding of Aboriginal law in its legitimate form is diminished. The potential of child sex abuse under the guise of cultural practices (such as preparing girls for sexual maturity) was argued in part by the ALS in a case from the Kimberley in the late 1990s. The fact that such an act happened in the privacy of a home without ritual or ceremonial context, and therefore no social sanction should imply that it is not a part of Aboriginal law. Although there is ethnographic material on this type of activity, each case needs to be contextualised to see if this is in fact socially sanctioned behaviour. The formation of the Peninsula Women's group in 2002 (described below) shows women collaborating to dispel this type of segmented and decontextualised cultural interpretation. The Peninsula Women's Group shows that Aboriginal women regard the protection of children as paramount.

95. Lloyd and Rogers, *ibid.*

96. Dodson P, above n 64, 191.

97. *Ibid* 192.

6. The role of the family in support and discipline

The RCIADIC found that:

One of the most important mechanisms of social control in all Aboriginal societies is the reliance placed on the responsibilities of close kin. This is probably one of the major mechanisms of social control in Aboriginal societies, but one that is least recognised or tolerated by the broader legal system.⁹⁸

During consultations for this paper, a Fitzroy Crossing woman stated that there is a gender division in responsibilities in Aboriginal culture: that women deal with family and men deal with public punishment. She said that Aboriginal law (which seeks to protect families and resolve disputes) was treated as 'second rate' and that white institutions actively discriminate against the Aboriginal way of doing things. The courts and the welfare system were said to disempower Aboriginal people's abilities to deal with their own social problems.

According to Blagg, people do not go to the police or welfare services by reflex.⁹⁹ In fact such services are under-utilised by Aboriginal people, primarily because their actions do not incorporate Aboriginal cultural logic. Women stated that often when they approached police for assistance they were told to go home and think the issue through and come back the next day. There is little appreciation that the police might not be the first to be called; an Aboriginal family usually attempts to resolve the situation at first instance and when they request police assistance they wish to be taken seriously.

The welfare system was described as incredibly narrow in its focus, looking at the individual and individual rights. It was stated that in the Aboriginal way, rights and responsibilities take the focus beyond the individual to look at the broader family picture. An example was given of child-rearing, what could be interpreted as inaction—a neglected child being left with a mother—may be the family's way of dealing with the situation. Rather than removing the child, the logic is to empower the person to deal with their problems. The problem is closely monitored by the family, particularly the grandmothers, to ensure the safety of the child. Welfare was described as looking at short-term interventions (such as placing a child in foster care) and giving financial incentives, but these interventions often create long-term dysfunction for both the child and its family.

Problems associated with this Western focus on individuals were also identified in education. At school the children are separated by age, at home they are told by their parents to look after their younger siblings. When older Aboriginal children attempt contact with their younger siblings at school they are told by the teachers to go back to the older children's side. This was described as going against the Aboriginal way of teaching responsibility for family (interestingly Kimberley Aboriginal Medical Service Council (KAMSC) research on child trauma found that bullying was the only area where Aboriginal statistics were lower than non-Aboriginal statistics).¹⁰⁰

Disciplining children

The issue of recognition of cultural practices and the disciplining of children entered discussions often during consultations with Aboriginal women. Aboriginal people believe that their right to discipline children has been intruded upon by welfare agencies. Women did speak about mothers taking stress out on children: a senior woman gave details of a mother who had beaten her child so badly he had to be taken to hospital. Grandmothers especially will intervene if they know a child is being senselessly beaten. Apart from this type of physical contact with children, women spoke about their right to discipline children.

The most pronounced ritual style of disciplining children was described by Balgo teenagers. They stated that two girls had been taken in front of a group and publicly 'got a hiding' from their parents. A policeman watched but did not intervene. The girls had broken into the shop and were also known to be petrol sniffers. When questioned about the hiding and asked if they thought it was for the shop theft or the sniffing they answered that it was probably more for the sniffing. Mentoring of the girls continued after the physical punishment had been conducted.

Parents also spoke of welfare agencies taking children away after they had been physically punished by their parents. Women said that there was a lack of adequate consultation by these agencies and that their actions would ultimately

98. RCIADIC, above n 43, volume 2, [11.10.13].

99. Blagg, above n 17, 7.

100. Kimberley Aboriginal Medical Services Council Inc, 'True Words – Real Life: A Study of the Social and Emotional Wellbeing of Young People in the Kimberley. Plain Language Report on the Preliminary Findings' (undated) 15.

cause more trouble. The children were being disciplined, not abused and the distinction between these actions was not appreciated by authorities.

Teenagers were regarded as particularly at risk from lack of discipline. Strategies are being developed by Aboriginal people to address the problem of teenagers. Balgo teenagers spoke of bush camps at *Killi Killi* with senior man Jimmi Chooga. The petrol sniffers were the main group targeted. The purpose of removing them was to abate their destructive behaviour in the community and educate them about their culture.

Sentencing controlled from outside the community was consistently put forward as a problem for young people. Sending young people away to receive punishment was said to change them, jail terms gave them a 'badge'. Young people boasted of their time away as a rite of passage—'I'm a jailbird'—implying that they are now tough. When, or if, they came back to the community they were often more destructive towards themselves and others. When young people are taken into custody they are still regarded by Aboriginal people as being under the responsibility and mentoring of parents and grandparents. The older generation in particular told of how they were not informed of police actions against their family, word had to get back to them through the Aboriginal network. One woman stated that when young people are sent out of the community for punishment they get them back in a box [coffin].

Like Balgo, Fitzroy Valley is conducting bush trips with teenagers to address their troubled behaviour through the use of culture. The Kurungal Yirraman track was walked by a group of teenagers, regarded as affected by 'drugs, alcohol and American movies', as a form of punishment. The teenagers were made to find and carry their own water and hunt for food. The walk educated the teenagers about resourceful use of country (eg, bush foods and medicines) and passed on knowledge of cultural sites. They were shown how to light fires, build windbreaks and serve meat properly. Within a couple of days their behaviour was described as changed. They started to bond with, and show respect for, the elders guiding the walk; they did as they were instructed and then did things without even being asked. They brought the experience of the walk back to the school and did a school project related to the walk. While on the track the teenagers forgot about the alcohol and drugs and understood more about their elders, their country and their cultural heritage. The walk was mainly organised by women; the senior women would like to see the duration of the walk extended to three months.

7. Aboriginal women's initiatives

Peninsula Women's Group

The Peninsula Women's Group was established in 2002 through the support of KAMSC. KAMSC have a policy of not intruding into people's affairs and can only act upon request. There was knowledge of the level of child sex abuse taking place in many communities, but they were unable to act until a request was made for assistance. One community woman asked KAMSC for help in dealing with the sexual abuse of her child and this request enabled KAMSC to act on child sex abuse as a community health issue. Meetings with prominent Aboriginal women elders in Broome were conducted and ideas and plans about addressing child sex abuse were canvassed.

At the Peninsula Women's Group bush meeting on the Dampier Peninsula in 2002 issues of child sex abuse were workshopped in detail. At this first meeting women were incredibly angry; the cultural logic to address the issues was very Aboriginal. A senior woman regarded as being knowledgeable in law issues addressed the meeting and stated that child sexual abuse is not part of Aboriginal culture. Strategies were discussed for dealing with the issue. Ideas emerged such as involving the families; getting people together for meetings; having the 'story' collected and 'right'; ways of keeping children safe; and ostracisation of perpetrators from the community for a certain period of time as punishment for child abuse. The role of non-Aboriginal support agencies was canvassed as well.

The momentum of the Peninsula Women's Group continued after this first meeting and the women banded together to address child sex abuse in their communities. The women's refuge in Broome sent staff to educate women about how to recognise the symptoms of child sex abuse. Culturally appropriate literature was designed and printed for children so they could learn to speak out about the issue. The Peninsula women set up a network with the women from Bidyadanga, south of Broome. As the momentum continued the attitude to child sex abuse changed from outrage to attempts to find solutions. Mothers of 'perpetrators' spoke of their pain and the initial hostility softened into ways of addressing the problem. People stated that they did not want to jail the perpetrators of child abuse; instead they regarded the perpetrators

as suffering from a sickness and wanted them sent away for treatment. ATSIC was asked for funding to keep the momentum of the project, but the group was told that funding would be problematic.

In 2003 a second bush meeting was organised which included magistrate Sue Gordon and representatives from bureaucratic agencies. The T-shirts printed for the meeting read:

Oorang Arr Arral Jugarrda Bowa,
(Women Look After Your Children).
Child sexual abuse is not a part of our culture.

The women again requested funding and ATSIC offered funds on the provision that the Group become incorporated. The Peninsula Women's Group was asked if they wanted a group to cover the ATSIC Kullari region. The request for funds was made in October 2003, the women waited for ATSIC's funds approval. They kept the momentum, organising a street march through the largest community on the Peninsula in protest of child sex abuse and continuing education programs on the recognition of child sex abuse. Funding was secured around April or May 2004 for a regional group; ATSIC wanted the group incorporated with a constitution by mid-June. What started as a grass-roots initiative using Aboriginal authority structures and senior women in the form of the Peninsula Women's Group metamorphosed into the Kullari Indigenous Women's Aboriginal Corporation (KIWAC). Networking started to focus on government departments (such as the Department of Justice and the Department of Community Development) and the police. KIWAC members worked hard but came under a lot of criticism. Because of its obligations under its constitution and its responsibilities to the funding body it lost its flexibility to an extent, becoming slower to act, more bureaucratic and authoritative in its relationships with women. One woman criticised KIWAC after it was founded saying: *'KIWAC can't tell us what and what not to do, we can ask them for help but they can't tell us what to do'*. In 2004 another bush meeting took place on the Peninsula; however, the solidarity of the women was diminished, the bureaucratisation of the project and the implied 'top down' approach had bred animosity.

KIWAC remains an important voice for Aboriginal women in the West Kimberley. The history of KIWAC highlights the difficulty of governance in Aboriginal women's initiatives. KIWAC needs to serve two masters, the Aboriginal women it represents and the funding agencies that demand a bureaucratic focus resulting, to an extent, in bureaucratic control.

Fitzroy Valley Action Group

Another example of social initiatives that have their conception in women's groups is the Fitzroy Valley Action Group. The group was formed through discussions in the local women's group. Alcohol related problems were targeted by the group; the sobering-up shelter and the women's shelter were seen as a necessary part of the community, but they were regarded as addressing merely the symptoms and not the cause of social problems. Rather than seeing social problems as insurmountable, the group targeted alcohol as a major factor in community dysfunction. The group accessed hospital records to obtain 'hard data' on the causes of trauma proving the major contributing factor to be alcohol. It was decided to hold a public meeting to discuss alcohol, with the proposition of selling light beer only in Fitzroy Crossing.

The community response to the meeting was extraordinary. Over 200 people attended the public meeting. People were asked to think about when they argue, and were called upon to take responsibility for their behaviour – alcohol was not a licence to hit women or take money from elders. The response to the meeting encouraged people to take further action. The group canvassed ideas to have the police work with the Fitzroy Valley Action Group, to look at an alcohol and drug strategy. A meeting was arranged with the magistrate in the hope of the community influencing the ramifications of his court decisions.

Fitzroy Crossing currently relies on a visiting service from Broome to conduct alcohol education, the Fitzroy Valley Action Group proposed to find money to fund their own local service to address the special needs of the area. Night patrols are now operating in communities in the Fitzroy Valley, ensuring that people stay outside the community to do their drinking. The night patrol is comprised of councillors, elders and young people, both men and women, dedicated to keeping alcohol related problems out of the community.

These kinds of community actions are 'energy centres' that need resources to maintain momentum. The Department of Justice is currently coordinating community justice plans throughout the Kimberley; it will be interesting to see the way that grass-roots initiatives like the Fitzroy Valley Action Group get a voice in the community justice plans.

8. Conclusion

The stereotyping of Aboriginal women since colonisation haunts the perspective of Aboriginal women today. Their perceived role or status in culture is diminished and this in turn has affected how decisions are made about their inclusion or exclusion from processes in the state's legal system and the bureaucracy that accompanies it.

From the interviews conducted with Aboriginal women in the Kimberley the recognition of customary law was far from inimical to their human rights. The perception of women and children as needing protection from Aboriginal law did not come through in the research. Aboriginal women in the Kimberley strongly believed that their right to identify as Aboriginal was of paramount importance. They believed that cultural knowledge and information was being misrepresented and abused.

Some women argued for the need for cultural revival because men were inflicting violence on women and children and 'hiding behind culture' to escape punishment from either system. Impressive strategies are being developed by Aboriginal women to combat social problems through the assertion of culture. Establishing proper mechanisms where Aboriginal women have a say in what is culturally sanctioned and acceptable behaviour within their communities and educating the legal system about Aboriginal culture within specific communities will help to overcome some of the misconceptions.

Overall, there was a definite argument for empowerment for Aboriginal women through culture, not liberation from Aboriginal law or the culture that sustains it. Aboriginal women play a significant role in determining their status and position within Aboriginal law mechanisms.