



Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence

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Acknowledgement of Country

ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and future, and we value Aboriginal and Torres Strait Islander histories, cultures, and knowledge. We are committed to standing and working with Aboriginal and Torres Strait Islander peoples, honouring the truths set out in the [Warawarni-gu Guma Statement](#).

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Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence

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ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family and sexual violence who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing. Recommended support services include 1800 RESPECT–1800 737 732 and Lifeline–13 11 14.

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Acronyms

| | |
|-------------|---|
| ABS | Australian Bureau of Statistics |
| AIATSIS | Australian Institute of Aboriginal and Torres Strait Islander Studies |
| AIHW | Australian Institute of Health and Welfare |
| ALRC | Australian Law Reform Commission |
| ALRC Report | Australian Law Reform Commission Report no. 31 <i>Recognition of Aboriginal Customary Laws</i> (1986) |
| APLOs | Aboriginal police liaison officers |
| AustLII | Australasian Legal Information Institute |
| CDEP | Community Development Employment Projects |
| DFV | Domestic and family violence |
| DV | Domestic violence |
| FASD | Foetal alcohol spectrum disorder |
| GERAIS | Guidelines for Ethical Research in Australian Indigenous Studies |
| HREOC | Human Rights and Equal Opportunity Commission |
| KALACC | Kimberley Aboriginal Law and Cultural Centre |
| KJ | Kanyirninpa Jukurrpa |
| LRCWA | Law Reform Commission of Western Australia |
| NSWLRC | New South Wales Law Reform Commission |
| NTCCA | Northern Territory Court of Criminal Appeal |
| NTLRC | Northern Territory Law Reform Committee |
| NTSC | Northern Territory Supreme Court |
| NYPWC | Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council |
| SNAICC | Secretariat of National Aboriginal and Islander Child Care |
| VRO | Violence restraining order |

Definitions and concepts

| | |
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| Carceral feminism | A perspective critical of some feminists' reliance on the punitive apparatus of the state to achieve reductions in violence against women, even to the extent of incarcerating victims who fail to break with abusive men. |
| Cultural security | An important element in contemporary Aboriginal and Torres Strait Islander thinking. Places that may be physically secure from a Western perspective may not offer cultural security if they fail to provide an environment that reflects Aboriginal and Torres Strait Islander ways of being, obligations and responsibilities. The placement and design of buildings, having recognisable Aboriginal and Torres Strait Islander artefacts, having Elders engaged in processes, etc. can enhance cultural security. |
| Cultural Boss/ Cultural Elder | <p>Cultural Bosses are those who have been selected and trained by previous Bosses to, among other things, hold and carry the Law (men's and women's) forward, provide an authoritative voice on Law matters, make decisions according to the Law and lead ceremonies.</p> <p>Cultural Bosses/Law Bosses/Cultural Elders are terms used by different communities to describe this role. In the Kimberley, for example, Law Boss and Cultural Boss are used. Law Bosses can be Elders and people not considered to be Elders. Their status is determined by their selection to be a Law Boss and the training they have undertaken to support the role they have been given.</p> <p>We use Cultural Bosses in this report, which is taken to cover both Law Bosses and Cultural Elders.</p> <p>Elders are senior people who do not have this specific role but are important knowledge holders who contribute to decision-making and leadership within families and communities.</p> |
| Decolonising methodology | Associated with the writings of Māori scholar Linda Tuhiwai Smith, decolonising methodology demands that researchers listen to the storytelling of Indigenous peoples with respect and humility, checking the tendency for non-Indigenous researchers to impose knowledge standpoints onto Indigenous peoples and "interpret" Indigenous meanings via Western frames of knowledge. It also means that authentic partnership is embedded in research processes in order to support power-sharing during research projects. |
| Domestic violence | A term used to describe violence against women and children in the private sphere of the domestic family (also known as "intimate partner violence"). It is linked to Western feminist theories of patriarchy, male power and coercive control. |
| Duluth model | A model of intervention taking its name from practices in the United States which call for robust use of policing and courts to leverage abusers into behaviour change programs. It is linked to feminist theories in that it views domestic violence in the context of male power and coercive control. |

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| Family violence | A more flexible term (than domestic violence) that can include domestic violence but also a range of forms of violence and abuse covering a broad spectrum of family relationships. Family violence in the Aboriginal and Torres Strait Islander context is often linked to colonisation, trauma, jealousy and humbugging, alcohol and dispossession. The family violence approach leans towards solutions that “decolonise” the justice and other systems and create opportunities for “healing”. |
| Healing | Unlike mainstream Western notions of treatment and healing, Aboriginal and Torres Strait Islander methods involve the use of traditional cultural practices and being on-country to bring people back into healthy relationships. Cultural knowledge is used to address trauma and restore and sustain holistic wellbeing. It does not exclude Western therapies but insists on cultural leadership. |
| Humbugging | While difficult to translate accurately into mainstream English, “humbugging” is well understood, particularly in remote areas, as forms of anti-social behaviour that can involve, or cause, family violence. Humbugging involves what anthropologists call “aggressive demands to share” which can include money, goods, loans of vehicles, alcohol, sexual favours, or demands to be allowed to stay in a dwelling. Humbugging is frowned upon because it often involves family and disrespects elderly relatives who are often under pressure to give. |
| Hybridity | Associated with theorists such as Edward Said and Homi K. Bhabha, hybridity asserts that there can be positive forms of inter-cultural dialogue through the creation of a hybrid “third space” between colonist and colonised where new narratives can be created. It is used in this report to describe initiatives such as Aboriginal and Torres Strait Islander sentencing courts, Community Justice groups and Night Patrols, all of which provide an alternative to mainstream practices by incorporating Aboriginal and Torres Strait Islander knowledges. |
| Jealousy | Considered to be a key cause of family violence; when people are insecure and tightly police one another in relationships, being seen with, or talking to, other men or women can create situations where violence occurs. The problem is exacerbated by alcohol, drugs, family feuds, mental health issues and disabilities. |
| Jealousing | An act performed by an individual that tests the commitment and seriousness of relationships by deliberately setting out to make their partner jealous, by flirting with or looking at others. It often leads to violence. Though not restricted to young people it appears to be more widespread among them. Both genders are involved in jealousing and it often leads to fights between females as well as fights between males. The ubiquity of social media also means “jealousing up” behaviours are an increasing source of stress for young people (see Blagg et al., 2018). |
| Post-colonial | Post-colonial theories, associated with the work of Edward Said (1978), stress the degree to which colonial relationships of dominance and subordination continue in the present and are structured into settler laws, policies and practices. The prefix “post” does not mean after colonisation has ended, but rather that the global structures of conflict and contestation brought into being by colonisation continue to shape relations between coloniser and colonised. |

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| Settler colonialism | Associated with the writings of Patrick Wolfe, settler colonialism is where Europeans come to stay and inhabit, rather than just exploit, another part of the globe. Wolfe (2006) suggests that settler colonisation is a structure not an event. It is intent on extinguishing Indigenous sovereignty over, and occupation of, traditional lands. |
| Skin systems | A method of subdividing Aboriginal society into named categories which are related to one another through kinship. Essentially, "skin" determines who one can marry. A person is born into a specific group, and there are between four and eight classifications across Australia. Marrying "wrong way" is considered to be a highly dangerous practice that can massively upset the legal order, leading to censure and even physical punishment. |
| Two-Way Law | References the fact that Aboriginal and Torres Strait Islander people live their lives under two legal systems and that just outcomes for them require that the two laws work together. A good example of this would be Elders sitting with judges in court and finding resolutions nested in Aboriginal and Torres Strait Islander forms of conflict resolution and/or punishment. It might also include entering into an undertaking with the court to spend time on a remote outstation, work on Ranger programs and stop alcohol use. Related concepts employed by Aboriginal and Torres Strait Islander people include "walking in two worlds" and "one country, two laws". |
| Yarning | A traditional Aboriginal and Torres Strait Islander peoples' form of communication and knowledge-sharing and therefore one more appropriate and respectful than a structured and direct questioning approach from a Western perspective. |

Executive summary

Family violence in Aboriginal and Torres Strait Islander communities continues to attract considerable scholarly and public attention. The standpoint of this research project is that family violence experienced within Aboriginal and Torres Strait Islander communities is shaped by the specific and historical context of colonialism, systemic disadvantage, cultural dislocation, forced removal of children and the intergenerational impacts of trauma. As a result, it requires a distinct and tailored set of responses across multiple fronts led by Aboriginal communities and nested in Aboriginal and Torres Strait Islander cultural values and worldviews.

Background

Aboriginal and Torres Strait Islander peoples have consistently advocated for strengths-based and community-led solutions that are culturally safe, involve Aboriginal justice models and recognise Aboriginal and Torres Strait Islander Law and Culture (Australian Law Reform Commission [ALRC] & New South Wales Law Reform Commission [NSWLRC], 2010; Behrendt, 2002; Hovane, 2015; Kelly, 2002). Cultural healing and community-led responses are also supported in family violence policy frameworks at the state and national levels. However, little is documented about the role Aboriginal and Torres Strait Islander Law and Culture can play in responding to and preventing family violence.

The aim of this project was to explore the role Aboriginal Law and Culture could play in the creation of an alternative paradigm for prevention, intervention and healing in Aboriginal family violence. The project sought to create space for Aboriginal and Torres Strait Islander voices and perspectives on family violence and counter the dominant deficit discourse that exists in relation to Aboriginal Law and Culture and family violence in mainstream literature, case law and policy documents.

This study included a review of existing criminological and legal literature, policy and practice in relation to Aboriginal and Torres Strait Islander Law and Culture and family violence; and a qualitative research phase involving a range of place-based interviews and yarning groups with community members, key individuals and groups across research sites in

Western Australia, the Northern Territory and Queensland. In the selection of sources, priority was given to Aboriginal and Torres Strait Islander scholars and organisations, and to the views of respected Elders and other community members wherever possible. To give primacy to Aboriginal and Torres Strait Islander voices, where possible we quote rather than paraphrase their words in this report.

To ensure that our research aligned with the aspirations of Aboriginal and Torres Strait Islander peoples in the communities we were researching, we formed partnerships with the following prominent Aboriginal and Torres Strait Islander organisations:

- Gawooleng Yawoodeng Aboriginal Corporation Women's Crisis Accommodation Centre, Kununurra, Western Australia
- Kimberley Aboriginal Law and Cultural Centre (KALACC), Fitzroy Crossing, Western Australia
- Mornington Island Justice Group, Mornington Island, Queensland
- Catholic Care, Tiwi Islands, Northern Territory
- Martu Kanyirninpa Jukurrpa (KJ), Newman, Western Australia
- Darwin Aboriginal & Islander Women's Shelter, Darwin, Northern Territory
- Darwin Indigenous Men's Service, Darwin, Northern Territory.

The project had strong Aboriginal governance measures in place and was guided by our senior research advisor Professor Victoria Hovane (Ngarluma, Jaru and Gooniyandi); an expert research advisory group formed by Aboriginal members of the Aboriginal and Torres Strait Islander Peoples and Community Justice Centre's Reference Group (Law School, University of Western Australia); and our Aboriginal partner organisations. Two respected Aboriginal researchers, Donella Raye (Jabirr Jabirr and Bardi) and Teejay Worrigal (Gooniyandi and Gija), conducted fieldwork in the communities. The fieldwork took place between August–December 2019 and involved a mix of settings, including on-country camps, community facilities, and men's and women's places. A total of 161 men and women participated in the groups. This included 12 women and six men on Tiwi Island; 23 women and 35 men in Darwin; 12

women and four men in Kununurra;¹ 12 women and eight men on Martu country; 15 women and 12 men on Mornington Island; and 15 women and seven men in Fitzroy Crossing.

Methodology

In relation to research methodology, this process involved what Jo-Ann Archibald Q’um Q’um Xiiem (Stó:lō and St’at’imc), Jenny Bol Jun Lee-Morgan (Waikato–Tainui) and Jason de Santolo (Garrwa and Barunggam) (2019) call the four principles of respect, responsibility, reverence and reciprocity to guide research. This framework demands that researchers listen to the storytelling of Indigenous peoples with respect and humility, checking the tendency for non-Indigenous researchers to impose knowledge standpoints onto Indigenous peoples and “interpret” Indigenous meanings via Western frames of knowledge.

Working from Linda Tuhiwai Smith’s (Ngāti Awa and Ngāti Pouro, Māori) (1999) approach to decolonising methodology, we privileged the experiences and aspirations of Indigenous peoples. We dropped the notion of research “subjects” and replaced it with “collaborative partnerships” as an important first step in realigning relationships. Our approach was qualitative, based on fieldwork in six designated sites across northern Australia, and embedded in ethnography, phenomenology and “grounded research” (Denzin & Lincoln, 2011). A grounded research approach, as originally defined by Strauss and Corbin (1998), seeks to ground theory in observation and dialogue, based on a number of generative questions to guide, but not bind, the research.

Research questions (employed as prompts rather than interrogatory questions) were developed in consultation with each Aboriginal partner organisation. They covered, but were not restricted to, issues such as:

- How do Law and Culture influence behaviour in communities?
- How would violence and related problems (alcohol, humbugging, jealousy, etc.) be responded to under Law?

¹ Unfortunately, many of the men who were due to attend the group in Kununurra were prevented from attending for reasons beyond their control.

- To what extent is Law (and processes) still used? In what instances might Elders and Cultural Bosses prefer non-Indigenous law to take its course rather than Law?
- What kinds of punishment might communities use against wrongdoers?
- What can Law and Culture offer for victims of violence to be safe?
- What can Law and Culture do to heal conflict and trauma?
- What role do the Elders see for themselves to work alongside non-Indigenous justice personnel, such as judges and magistrates?
- Do they find the use of temporary banishment from the community helpful?
- Do they tend to deal with families as a whole, rather than with discrete “victims” and “offenders”?
- Are outstations and other on-country sites being used in healing and could more be done to make them better equipped in this role?

Key findings

The sites varied in relation to the extent to which Aboriginal forms of law, and legal structures, continued to operate. In all sites, however, Aboriginal Law remained a feature of daily life, particularly in relation to what one senior woman in Fitzroy Crossing referred to as the “skinship” system, which references the complex, intricate web of mutually binding duties and obligations that tie people together within a particular community.

In many Aboriginal and Torres Strait Islander communities, Law and Culture remain “facts of life” and form the basis for maintaining social order and harmonious relations and ensuring cultural continuity (ALRC, 1986; LRCWA, 2005, 2006; Northern Territory Law Reform Committee, 2003). However, participants across the research sites agreed that Aboriginal communities struggle to maintain Law and Culture and that settler law and forms of governance constantly undermine the authority of Elders. There was a shared belief that Culture is the core of Aboriginal society—as one senior woman in Fitzroy Crossing said, “we live and breathe in a cultural world”. In relation to family violence, the Western

legal system prevents Elders from enforcing Law and Culture; they are discouraged from doing so or punished by the Western legal system.

In all research sites there was a uniform belief that Aboriginal and/or Torres Strait Islander dispute resolution processes should be employed first, and mainstream systems second (see Diagram 4)—but there were differing opinions about the relevance of physical punishment, with some communities seeing it as a necessary part of their Law, and others seeing it as outdated.

The majority of consultees favoured the use of community-endorsed practices run by Aboriginal Elders. These included:

- “growling” offenders and community admonishment
- temporary banishment from community
- being taken to a remote outstation or island for a time (under the authority of Elders or Cultural Bosses), sometimes taking partners and even other family members
- ostracism from some community facilities (e.g. not being allowed to buy goods at the store or use the pub)
- temporary separation of parties.

Physical punishment was supported by many as an ideal but it was widely acknowledged that it may not be acceptable in many localities (although it is still practised in some of the sites) and could lead to penalisation by the mainstream legal system.

Alcohol has been the principle factor in the destruction of Law and Culture, according to a number of men and women. It is also a major factor in family violence.

Women’s Law was viewed as essential for preventing and resolving family violence. Women Elders from Kununurra said Law—especially Women’s Law—and Culture bring strength and unity to the community.

Recommendations for practitioners and policymakers

In summary, the communities consulted expressed a desire for practitioners and policymakers to:

1. Recognise the link between violence and issues stemming from colonisation such as alcohol, intergenerational trauma, cognitive disabilities and jealousy, rather than being ideologically driven through a focus on gender inequality, patriarchy and male power.
2. Place greater focus on prevention work (such as healing, trauma counselling, alcohol or drug rehabilitation) with Elders’ knowledge at the centre of the process.
3. Recognise that Aboriginal Law and Culture must play a significant role in healing conflict and implement responses based on Law and Culture. Such cultural models should undergird work with Aboriginal victims and offenders to assist with health issues, trauma, healing and other issues impacting their wellbeing and their ability to function to their full capacity within the communities.
4. Provide financial and infrastructural support for community-owned, on-country healing, run by Elders rather than non-Indigenous, non-government organisations. The work of Ranger programs and Elder-regulated bush camps is strongly supported.
5. Place a greater focus on diversion from the mainstream justice system into community-owned, place-based structures. Young people should not be jailed.
6. Enable greater involvement of Cultural Bosses, Elders and/or respected leaders from within the community in the criminal justice system, such as Koori and Murri Courts, Law and Justice or Mediation Groups. Also, resource Night Patrols to work alongside, or instead of, police and invest in interpreter services as an integral part of any model.
7. Promote community leadership on laws, regulations and policies governing the sale and consumption of alcohol, for example, whether to ban it, or just restrict access. This is an issue that can only be dealt with on a local basis.
8. Engage in dialogue with Cultural Bosses, Elders, government, police and judicial officers regarding the role of traditional justice mechanisms.

9. Increase investment in Aboriginal shelters and refuges that understand Aboriginal women's issues, their cultural obligations, and realistic fears of having children removed.
10. Ensure a place for men at the table when local family violence strategies are designed.
11. Focus on policies that keep families together, rather than breaking them up, which is the outcome, if not always the intention, of mainstream approaches.
12. Develop a greater understanding of the nature of Aboriginal family obligations and ties, particularly through skin systems, and the important role played by relatives such as brothers-in-law, uncles, cousins and grandparents in supporting victims, admonishing violent partners, and resolving conflict.

Introduction

Family violence within Aboriginal and Torres Strait Islander communities continues to attract considerable scholarly and public attention, particularly as to its causes, extent and under-reporting and, increasingly, the need for community-led responses (Australian Institute of Health and Welfare [AIHW], 2018; Blagg, 2002; Blagg, Bluett-Boyd, & Williams, 2015; Blagg et al., 2018; Cheers et al., 2006; State of Victoria, 2016). It is now well established that family violence experienced within Aboriginal and Torres Strait Islander communities needs to be situated within a historical context of colonisation, dislocation from country, systemic disadvantage, cultural dislocation, forced removal of children and the intergenerational impacts of trauma (Aboriginal and Torres Strait Islander Women's Task Force on Violence, 2000; AIHW, 2018; Atkinson, 1990a, 1990b, 1996, 2002; Australian Bureau of Statistics [ABS], 2016; Behrendt, 2002; Blagg et al., 2015; Cheers et al., 2006; Cripps, 2007; Cripps & McGlade, 2008; Dodson, 2003; Gordon, Hallahan, & Henry, 2002; Kelly, 2002; McGlade, 2012; Nancarrow, 2003, 2010; National Aboriginal Community Controlled Health Organisation, 2006).

This body of research recognises that the distinctiveness of family violence in Aboriginal and Torres Strait Islander communities necessitates a tailored response, uncoupled from the dominant feminist narrative that locates violence against women in ideological and structural gender inequality and patriarchy (Blagg, 2002; Blagg et al., 2018; Dobash & Dobash, 1979, 1992; Nancarrow, 2006; State of Victoria, 2016; Wall, 2014; Yodanis, 2004). Instead, policies must reflect the experiences and viewpoints of Aboriginal and Torres Strait Islander peoples (Hovane, 2015; Kelly, 2002; Nancarrow, 2016; Olsen & Lovett, 2016). There is strong support in the literature, as well as law reform and policy reports, for enabling Aboriginal and Torres Strait Islander peoples to develop their own solutions to family violence in their communities (see for example Aboriginal and Torres Strait Islander Social Justice Commissioner, 2006; Atkinson, 1990a; Blagg et al., 2015, 2018; Law Reform Commission of Western Australia [LRCWA], 2006; Memmott, Stacey, Chambers Commission, & Keys, 2001; Wright, 2004).

It is not the intention of this report to weigh up the arguments for and against the mainstream feminist and Aboriginal approaches to family violence. We have explicitly set out

from the premise that *if Aboriginal communities are telling us they prefer an alternative to the mainstream approach to family violence grounded in Aboriginal Law and Culture then space needs to be created for a dialogue on what this might look like*. There are sufficient voices, cited in this report, advocating for a fresh approach to merit such a dialogue. Inherent in this approach is a recognition that Aboriginal women are not simply bystanders or passive victims but actively participate in, and lead, important cultural, legal, social and familial processes, as we demonstrate. Also, a family violence approach, unlike models such as Duluth, recognises multiple, intersecting causes of violence, rather than a singular cause such as “coercive control”.

Aboriginal and Torres Strait Islander peoples increasingly advocate for strengths-based and community-led solutions that are culturally safe, involve Aboriginal justice models and recognise Aboriginal and Torres Strait Islander Law and Culture (see for example Atkinson, 1990a, 1990b, 1990c, 2002; Hovane, 2015; Hovane & Cox, 2011; McGlade, 2012). Cultural healing and community-led responses are also supported in family violence policy frameworks (Commonwealth of Australia, 2017; Healing Foundation et al., 2017; Secretariat of National Aboriginal and Islander Child Care [SNAICC], 2017; State of Victoria, 2016; Western Australia. Department for Child Protection and Family Support, 2015). The *Safer Families, Safer Communities: Kimberley Family Violence Regional Plan 2015–2020* (Western Australia. Department for Child Protection and Family Support, 2015, p. 11), for example, states:

For family violence prevention and intervention to be relevant and effective, it must be grounded in Aboriginal law and culture (Hovane, 2015; Hovane & Cox, 2011). For Aboriginal people, Aboriginal law sets out the norms, beliefs, expectations and rules for everyday living. Aboriginal law is stable and enduring and embedded within it is dignity, wellbeing and equality between men and women. The day to day living and expression of Aboriginal law is “culture”. Family violence has no basis in either Aboriginal law or culture (Hovane, 2015). Working alongside Law People, Elders and community leaders provides important opportunities to develop culture and community based responses to family violence that are safe, effective and enduring (Hovane, 2015).

For many Aboriginal and Torres Strait Islander peoples, Law and Culture are “facts of life” that govern the broad spectrum of social relationships and make daily life meaningful and intelligible (Australian Law Reform Commission [ALRC], 1986; LRCWA, 2005, 2006; Northern Territory Law Reform Committee [NTLRC], 2003). However, little is documented about the role Aboriginal and Torres Strait Islander Law and Culture can play in responding to and preventing family violence. There is no empirical research that identifies aspects of Aboriginal and Torres Strait Islander Law and Culture that may be amplified to promote the safety of women and their children in Aboriginal and Torres Strait Islander communities.

The overall aim of this project is to create space for Aboriginal and Torres Strait Islander voices in the family violence literature and policy arenas, and in doing so encourage the qualitative research needed to elevate Aboriginal and Torres Strait Islander perspectives. The project is grounded in a decolonising approach, guided by principles of respect, responsibility, reverence and reciprocity, and underpinned by Aboriginal and Torres Strait Islander governance structures. The project methodology was largely based on appreciative inquiry and “yarning” as interfaced research tools, respecting Indigenous perspectives and knowledges and integrating them into the research process. Aboriginal governance structures were put in place to ensure the project worked with Aboriginal ways of knowing, being and doing, and in partnership with Aboriginal peoples (discussed in detail below). The team formed partnerships with key Aboriginal community organisations in each region, and conducted the research under the guidance of Professor Hovane (Ngarluma, Jaru and Gooniyandi), and an Aboriginal research advisory group from the University of Western Australia’s Aboriginal and Torres Strait Islander and Community Justice Centre. This partnership model ensured considerable local ownership of the research process and grounding in the local environment: partners took a leading role in defining areas of inquiry and ensuring that cultural protocols were adhered to; organised community meetings on sites of their choice; provided interpreters and local researchers; and led in terms of providing cultural security for participants.

This report is structured as follows: first, a review of extant literature about the role of Aboriginal and Torres Strait Islander Law and Culture in responding to and preventing family violence (State of knowledge review); second, an overview of the project methodology and approach (Methodology); third, a thematic analysis of the empirical findings (Key findings); fourth, a discussion linking the research findings to the State of knowledge review (Discussion); and finally, conclusions and recommendations (Conclusion). This study’s fieldwork revealed unanimous agreement in communities that the mainstream justice system neither prevents nor adequately penalises family violence, nor does it provide a framework for healing. There was a consistent view that Elders groups need to work in partnership with, but not subordinate to, police and courts, and be involved in the decision-making and include “truth telling” as an option. Communities want to see Aboriginal cultural models of conflict resolution or “hybrid models” of conflict resolution developed that are informed by Cultural principles and worldviews. Aboriginal Law and Culture, and in particular Women’s Law, was viewed as essential to preventing and resolving family violence and healing and empowering individuals and communities. As Martu Elders told us:

Getting men and women and families living together, being together, working together, on-country is the solution for much family violence ... People get well on-country, particularly without alcohol.

It was decided to site the fieldwork in six communities in northern Australia, under the auspice of a number of well-established, Aboriginal community-owned organisations:

- Gawooleng Yawoodeng Aboriginal Corporation Women’s Crisis Accommodation Centre, Kununurra, Western Australia
- Kimberley Aboriginal Law and Cultural Centre (KALACC), Fitzroy Crossing, Western Australia
- Mornington Island Justice Group, Mornington Island, Queensland
- Catholic Care, Tiwi Islands, Northern Territory
- Martu Kanyirninpa Jukurrpa (KJ), Newman, Western Australia

- Darwin Aboriginal & Islander Women’s Shelter, Darwin, Northern Territory
- Darwin Indigenous Men’s Service, Darwin, Northern Territory.

These partnerships helped to ensure that this study reflects the diversity of Aboriginal Law and Culture across northern Australia. The fieldwork sites were identified on the basis of exploratory discussions with Aboriginal knowledge-holders to represent a cross-section of places where Law and Culture are practiced.

State of knowledge review

Introduction

This state of knowledge review draws on national and international literature, policy documents and Australian case law to discuss what is currently known about the role of Aboriginal and Torres Strait Islander Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence.

The review suggests that the deficit-based approach to Aboriginal and Torres Strait Islander Law and Culture still dominates in the context of family violence. Too often, Law and Culture are erroneously associated with sanctioning family violence and/or only offering “violent” forms of punishment out of step with modern notions of human rights. There is little appreciation outside of Aboriginal and Torres Strait Islander communities of the strengths of Law and Culture and their ability to heal and empower individuals and communities.

Search methodology and terminology

Search methodology

This multi-method state of knowledge review has been prepared using a combination of academic and grey literature, along with Australian cross-jurisdictional case law. In this section, we outline the search strategy and selection criteria used, ensuring our approach is both reviewable and replicable. The topic being discussed, “Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence”, required a broad research strategy across legal and social science resources. These encapsulated sentencing justifications in criminal cases and Indigenous justice responses; family violence prevention and response programs; and models of cultural healing to support Aboriginal and Torres Strait Islander men, women, families and communities. In Appendix A we have summarised some of the Australian case law where Aboriginal Law has been the topic of judicial comment.

This state of knowledge review is explicitly grounded in a decolonising approach. Māori scholar Linda Tuhiwai Smith (1999), of the Ngāti Awa and Ngāti Porou peoples, argues that

mainstream research methods need to be “decolonised” by fostering the active engagement of Aboriginal and Torres Strait Islander peoples in the research process. Research must take into account the heterogeneity of Aboriginal worldviews (Kwaymullina, Kwaymullina, & Butterly, 2013) and give prominence to Aboriginal voices (Evans, Hole, Berg, Hutchinson, & Sookraj, 2009, p. 894). Our approach, informed by the appreciative inquiry paradigm, identifies strengths (or potential strengths) rather than just focusing on weaknesses (Robinson, Priede, Farrall, Shapland, & McNeill, 2013). Appreciative inquiry is philosophically aligned to contemporary thinking regarding research in Indigenous communities, in the sense of endorsing and validating Indigenous knowledge and acknowledging the validity of Indigenous epistemologies (Fitzgerald, 2001). In the selection of sources, priority was given to Aboriginal and Torres Strait Islander scholars and organisations, and to the views of respected Elders and other community members wherever possible. To give primacy to Aboriginal and Torres Strait Islander voices, where possible we quote rather than paraphrase their words.

We have drawn on three contemporary theoretical frameworks to support our analysis: postcolonial theory, settler colonial theory, and decolonising theory. Post-colonial theories, associated with the work of Edward Said (1978), stress the degree to which colonial relationships of dominance and subordination continue in the present. The prefix “post” is frequently misunderstood as meaning *after* colonialism, when in fact it describes the degree to which the world has been transformed by colonial power (Bhabra, 2007; Blagg & Anthony, 2019). It also stresses that colonised peoples engage in and create constant cultural contestation, which often takes place in the “interstitial spaces” (Bhabha, 1994; Waters, 2001) between the settler mainstream and Indigenous peoples. These interstitial spaces are sites of ambivalence, hybridity, compromise, resistance and contestation, and move us beyond the focus on entrenched, binary opposition between coloniser and colonised, creating possibilities for fresh narratives to emerge within “in-between” (Bhabha, 1994) spaces. It opens space for a pluralist alternative where settler law increasingly cedes sovereign power to Indigenous Law and Culture, allowing what Fitzgerald (2001, p. 41) calls a “vibrant and decentered” justice system that respects Indigenous Law and Culture to flourish. Our approach is

intended to heal, rather than perpetuate, colonial binaries. The term “hybrid model” or “hybrid response” is used to describe a partnership between mainstream and Aboriginal and/or Torres Strait Islander service, or services, to offer a coordinated response to address family violence. We have also been influenced by the work of Patrick Wolfe (2006), who argued that settler colonisation remains a structure rather than an event. It is not something we can consign to the distant past but continues to shape relationships in the present. Decolonisation of relationships between the mainstream and Indigenous peoples takes precedence over other justice “reforms” that may be a priority for non-Indigenous activists (Blagg & Anthony, 2019).

Our work has also been strongly influenced by the decolonising framework set out by Māori scholar Linda Tuhiwai Smith (1999) in her foundational text on the way Western knowledge systems have deployed notions of scientific rigour, evidence and neutrality to suborn Indigenous knowledges and naturalise the occupation and exploitation of Indigenous lands. We view Aboriginal and Torres Strait Islander communities as places of knowledge production, rather than simply “raw material” to be refined by Western sites of knowledge production such as universities, think tanks and government departments (see Comaroff & Comaroff, 2012). The insights from postcolonial, settler colonial and decolonising perspectives influenced our approach to undertaking research with Aboriginal and Torres Strait Islander communities, particularly in relation to allowing spaces to emerge where Aboriginal and Torres Strait Islander people could set the agenda for dialogue. We were guided by the viewpoints, expressed in previous research by Aboriginal women (Blagg et al., 2018), that Aboriginal Culture, Law and Indigenous knowledge is not contained, or containable, within the Western legal system, nor academic texts, but is embodied in knowledge-holders and embedded on-country.

Search strategy

The search strategy involved four distinct areas of research: an update on Aboriginal and Torres Strait Islander Law in Australian primary sources and grey literature since the 1986 ALRC Report no. 31 *Recognition of Aboriginal Customary Laws* (ALRC Report); a review of significant Australian criminal

law cases that discuss Aboriginal Law and/or Torres Strait Islander Law; the role of Aboriginal and/or Torres Strait Islander Law and Culture in healing; and family violence in Aboriginal and Torres Strait Islander communities. The search strategy and selection criteria for each distinct area will be dealt with individually.

An update on Aboriginal and/or Torres Strait Islander Law in Australia since the ALRC Report

The research material used for this topic commenced with the ALRC Report (1986) and included other relevant national law reform reports, along with government responses to these reports over time. National and state parliamentary debates, committee discussion papers, ministerial statements and reports were then examined. Publications of relevant state and national Law Reform and Human Rights and Equal Opportunity Commissions were searched and chosen based on relevance. The search ranged from June 1986 to March 2019. A combination of broad and specific search terms were used including “Aboriginal/Torres Strait Islander/Indigenous customary law/law/lore/law(s) and custom”, “tribal law” and “traditional customary law”.

A review of significant Australian criminal case law relating to Aboriginal and/or Torres Strait Islander Law

As we have noted, Aboriginal and Torres Strait Islander Law and Culture are not bound and contained by the Western legal system and its forms of jurisprudence. Discussions with “Law Bosses” (a specific term used to identify those men and women who hold ceremonial knowledge and adjudicate in Aboriginal legal processes) in remote regions of Western Australia provided clear evidence that Aboriginal Law was entirely different from Western law and could not be written down and absorbed into Western legal processes (LRCWA, 2006). It remains autonomous and embedded within strictly Indigenous worldviews, spirit and consciousness.

Australian case law from June 1829 to March 2019 that discussed the significance and role of Aboriginal and/or Torres Strait Islander Law in sentencing was sought. This was achieved through a broad search of the AustLII and Westlaw AU databases using various search terms including

“Aboriginal/Torres Strait Islander/Indigenous Law/customary law/law(s) and custom”, “tribal law”, “traditional laws and customs”, “traditional customary law”, and “traditional punishment”. A close examination of the following legal works, written by respected academics on the topic and which referred to key case law, were also relied on to assist in the identification and examination of relevant cases: Anthony (2013); Behrendt, Cunneen, and Libesman (2009); Blagg and Anthony (2019); Douglas and Finnane (2012); McRae and Nettheim (2009); and McRae, Nettheim, Beacroft, and McNamara (2003). Cases of significance were identified from across Australian jurisdictions and court hierarchies, including from the High Court of Australia, Federal Court, Supreme Courts, and Criminal Courts of Appeal, as well as from unreported judgments. Criminal case law only was considered; no native title, fishing or other cases that discuss Aboriginal and/or Torres Strait Islander Law were included in the subsequent analysis. Suitably identified cases from 1829 (the year the earliest relevant reported case, *R v Ballard*, was decided [Kercher, 1998]) were analysed to determine those of significance in that the court either recognised Aboriginal and/or Torres Strait Islander Law through bail conditions or court orders; imposed a sentence despite the existence and recognition of tribal punishment; respected tribal punishment already imposed and refrained from imposing further punishment; or restricted the recognition of Aboriginal and/or Torres Strait Islander Law. Specific groups of cases dealing with statutory rape in marriage and payback were also considered. These cases and their significance are contained in Appendix A.

The role of Aboriginal and Torres Strait Islander Law and Culture in healing

In setting out our search strategy, we acknowledge that Aboriginal Law and Culture and Indigenous knowledges are not contained within academic texts or policy documents, but rather are embodied in knowledge-holders and embedded on-country.

Research materials covering this topic came from a wide variety of sources following a broad and extensive search of legal and social science databases—including AGIS Plus Text, AGIS-ATSIS, AustLII, and Westlaw AU—as well as Google Scholar and the University of Western Australia (UWA) Library search engine, using the following terms: “Aboriginal/Torres

Strait Islander healing”; “Indigenous healing”; “traditional law(s) and culture”; “Aboriginal/Torres Strait Islander healing programs for Aboriginal/Torres Strait Islander men/women/youth/families”; “evaluation of Aboriginal/Torres Strait Islander healing programs”; “Aboriginal healing centres”; “on-country Aboriginal programs”; “Aboriginal/Torres Strait Islander mental health”; “Aboriginal/Torres Strait Islander cultural programs”; “Aboriginal/Torres Strait Islander community healing;” and “Aboriginal/Torres Strait Islander family violence programs”. The search was not limited by a start date to ensure all relevant literature was discovered, and ceased in January 2020. Resources included books sharing views and opinions of Aboriginal Elders about Aboriginal youth self-harm and suicide, and stories of Aboriginal community resilience, self-determination and healing. Academic commentary and reports of the Healing Foundation and other relevant Aboriginal and/or Torres Strait Islander organisations were also searched and drawn on. A wide variety of Aboriginal healing programs operating across Australian jurisdictions and focusing on the role of Culture in addressing various complex issues including family violence were found, including programs targeting women, children, men, boys and families, some of which had program evaluations. Our search was limited by time constraints and does not reflect the totality of initiatives in this space nor all potential sources of literature.

Materials were also sought around individual, family and community healing, in particular understanding of the needs of Aboriginal and Torres Strait Islander men. Government and Healing Foundation reports, along with academic commentary sourced via social science databases, were searched to determine the current physical and mental health status of and social issues faced by Aboriginal and Torres Strait Islander men in Australia and the reasons for their need to heal. These same resources, along with the views of Elders (see People, Culture Environment, 2014), were then used to understand the role of Culture and identity in healing for Aboriginal and Torres Strait Islander men. Further examination of academic commentary, government and organisational reports and website searches identified programs and men’s spaces (including men’s sheds and men’s groups) being used to address family violence in Aboriginal and Torres Strait Islander communities and to facilitate cultural healing.

While the majority of resources reflected healing on mainland Australia, academic commentary and searches of websites and legal and social science databases also included the Tiwi Islands and the Torres Strait.

Family and domestic violence in Aboriginal and Torres Strait Islander communities

Research materials covering this topic came from a wide variety of sources following a broad search of legal and social science databases—namely, AGIS–ATSIS, AustLII, HeinOnline, Informit law, and Westlaw AU—including Google Scholar and the UWA Library search engine, OneSearch, media commentary obtained from internet searches and Factiva research reports, and a focused study of the writings of leading Aboriginal and Torres Strait Islander scholars. The search concluded in January 2020 and was not limited by a start date to ensure all relevant literature was discovered. For the database search, the following terms were used: “family violence in Aboriginal/Torres Strait Islander/Indigenous communities” and “family violence and Indigenous/Aboriginal/Torres Strait Islander peoples”; this search was repeated substituting “domestic violence” for “family violence”. The search also looked at “family violence and Aboriginal/Torres Strait Islander law and policy”, and involved a search of international and domestic policy documents and reports on family and/or domestic violence.

Detailed analysis was then undertaken of the works of leading Aboriginal scholars on the issue—including Pat Anderson AO (Alyawarre), Professor Judy Atkinson (Jiman, Bundjalung), Professor Larissa Behrendt (Eualeyai/Kamillaroi), Tom Calma (Kungarakan, Iwaidja), Professor Megan Davis (Cobble Cobble), Patrick Dodson (Yawuru), Professor Mick Dodson (Yawuru), Dr Kylie Cripps (Pallawa), Professor Victoria Hovane (Ngarluma, Jaru and Gooniyandi), Loretta Kelly (Gumbaynggirr, Dunggatti), Professor Marcia Langton (Yiman, Bidjara), Dr Hannah McGlade (Noongar), Professor Aileen Moreton-Robinson (Goenpul), and Professor Irene Watson (Tanganekald, Meintang and Boandik)—and leading Torres Strait Islander scholars including Martin Nakata (Naghir Island) and Ephraim Bani (Mabuiag Island). The resources sourced in the original database search were cross-checked against the references contained in these works to ensure the literature search was thorough and relevant.

Materials were also sought regarding the views of Aboriginal and Torres Strait Islander peoples on how to respond to family violence in their communities, and in particular the role that Law and Culture might play in this response. This involved a search of leading Aboriginal writers, media commentary, speeches of Aboriginal leaders and office holders—such as Aboriginal and Torres Strait Islander Justice Commissioners, June Oscar (Bunuba), Mick Gooda (Gangulu), Tom Calma (Kungarakan, Iwaidja), Dr William Jones (Worimi), Professor Mick Dodson (Yawuru), Dr Jackie Huggins AM (Bidjara, Birri Gubba Juru), and Djirra CEO Antoinette Braybrook (Kuku Yalanji)—and recent research reports (such as Blagg et al., 2015; Olsen & Lovett, 2016) around the terms “family violence and Aboriginal and Torres Strait Islander peoples/Indigenous peoples and responses” and “Indigenous community responses to family violence”.

Our literature search, for completeness, included the many permutations of terms employed to describe Law and Culture in Aboriginal and/or Torres Strait Islander communities and family violence. However, this report takes a very deliberate approach to the terminology employed and we outline this approach below.

Terminology

Aboriginal and Torres Strait Islander peoples

We use Aboriginal and Torres Strait Islander peoples, rather than Indigenous peoples or Indigenous Australians, to refer to Australia’s First Peoples. This is the preferred terminology of many Aboriginal and Torres Strait Islander people, some of whom reject the term “Indigenous” as too generic and failing “to respect their identity and preferences” (Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS], 2018; Common Ground, n.d.; Reconciliation Australia, 2018; UWA School of Indigenous Studies, 2017). We use this terminology when collectively referring to Aboriginal peoples and Torres Strait Islander peoples, and distinguish between the groups where appropriate by using the inclusive terms “Aboriginal peoples” and “Torres Strait Islander peoples”. In adopting the plural form “peoples” and “communities” we acknowledge the diversity of communities, cultures, laws, languages, kinship structures, and histories of over

250 groups that make up First Nations people in Australia. We also acknowledge the preference of Aboriginal people to identify themselves by their language group and country, and Torres Strait Islander people by their home island (AIATSIS, 2018; Common Ground, n.d.; UWA School of Indigenous Studies, 2017). Where appropriate, we refer to a particular language group and country for Aboriginal peoples, and island home for Torres Strait Islander peoples.

Aboriginal and/or Torres Strait Islander Law and Culture

This paper adopts the terminology of “Law”, rather than “lore” or “customary law”, to describe Aboriginal Law or Torres Strait Islander Law.

“Lore” is employed by many Aboriginal people to refer to “Aboriginal traditional knowledge, wisdom, learning, erudition, information, and science” (Atkinson, 2002, p. 27; see also Janke & Sentina, 2018; Kaartdijin Noongar, n.d.), often to distinguish it from Western “law” (Atkinson, 2002, p. 42; Porter, Behrendt, & Vivian, 2017, p. 39). However, “lore” has also been criticised as indicating a less advanced version of “law” and “another of the colonisers’ legitimising charters for their denial of our fundamental rights—a denial based on the perceived superiority of Western legal, social, economic and political systems” (Dodson, 1995, p. 2). We are conscious however that for many Aboriginal and Torres Strait Islander people, the notion of “law” can exclude cultural/kinship obligations that are not recognised in the Western legal system, and they prefer the term “lore”, as it is seen as inclusive and representative of that cultural narrative.

“Customary law” is often used in legal and policy documents, law reform commission reports, scholarship, and public commentary to describe Aboriginal Law or Torres Strait Islander Law (see ALRC, 1986; ALRC & NSWLRC, 2010; *International Labour Organisation Convention 169*; LRCWA, 2005, 2006; NTLRC, 2003). However, “customary law” has been rejected by Indigenous peoples worldwide and in Australia (Borrows, 2010; Kwaymullina & Kwaymullina, 2010; Tobin, 2014, pp. 6–9; Tobin & Taylor, 2009, p. 7) as an inappropriate descriptor. Cunneen (2018, p. 3) also rejects the term on the basis that “Indigenous law was seen as merely

customary—an essentially imperialist concept which negated the integrity of Indigenous law and imposed the centrality of the law of the coloniser”.

We therefore, despite the lack of unanimity regarding appropriate terminology, adopt “Law”, rather than “lore” or “customary law”, to describe Aboriginal Laws and Torres Strait Islander Laws. This is in keeping with the approach of Aboriginal scholars and some international documents (Behrendt et al., 2009; Hovane, 2015; McRae et al., 2003; United Nations Declaration on the Rights of Indigenous Peoples, Art 34; Watson, 2014, 2015, 2018). Each Aboriginal or Torres Strait Islander community has its own Law and, where possible, we will refer to the Law of a particular community (e.g. Martu Law). However, we use “Lore” where it is used by a particular group or person. By adopting the term “Law” we do not equate Aboriginal Law or Torres Strait Islander Law with Western law, nor seek to define it through the Western lens of “law”. We do not assume a “common understanding of what is meant by ‘law’” (Toohey, 2006, p. 186). Aboriginal Laws are defined by Aboriginal peoples and Torres Strait Islander Laws are defined by Torres Strait Islander peoples and are not limited to laws that remain unaltered since colonisation (LRCWA, 2005, pp. 49–54, 2006, p. 19). Rather, as Dr Ambelin Kwaymullina and Dr Blaze Kwaymullina (2010, p. 198) of the Palyku people of the Pilbara region in Western Australia explain:

The concept of custom—which rests on the notion that behaviour practised over long periods solidifies into rules of conduct—inherently contradicts Aboriginal views on the origin of law in Australia. Aboriginal creation stories tell that law was given by the same Ancestors who made the world and continue to live within it, and that the purpose of the gift of law was to show all life how to sustain country.

Kwaymullina and Kwaymullina (2010, p. 199) continue:

Aboriginal law is formed by a worldview which does not contain notions of linear time ... In an Aboriginal worldview, time—to the extent that it exists at all—is neither linear nor absolute ... Time, like all things, is relative to the enduring physical and metaphysical context of country. Even the Dreaming—the myriad of universe-making events from which all Aboriginal knowledge

is derived—is not fixed in time. Rather, it is a complex ongoing happening that Aboriginal peoples engage with through songs, dance, ceremony, art and story.

We adopt the term “Culture” to describe Aboriginal or Torres Strait Islander Culture, as it is defined by Aboriginal peoples and Torres Strait Islander peoples. In the *Report of the Conference on Resource Development and Kimberley Aboriginal Control* (the Crocodile Hole Report), the Kimberley Land Council and Waringarri Resource Centre (1991, p. 18) defines Aboriginal Culture as

Dreamtime/Dreaming. It is knowledge, rules, memories, ceremonies, initiation, smoking, traditions, languages, corroborees, skin groups. It is practising Aboriginal law. Aboriginal Law never been changed, not like *gadiya* law, always changing.

The Crocodile Hole Report (Kimberley Land Council and Waringarri Resource Centre, 1991, pp. 1–2) defines Culture as follows:

- Culture is collective memory and the Law.
- Culture is continuity.
- Culture is a way of life.
- Culture is being together.
- Culture is maintaining its continuity.
- Culture is the care and use of land.
- Culture is a bond that ties Aboriginal People to country.
- Culture is a living dynamic force continually adapting.

Ephraim Bani (2004c, p. 32), from Mabuiag Island in the Torres Strait, explains Culture as follows:

Culture and languages affiliate with the land, with the sea and with the air. It is the sole identity of the custodian, his birthright and heritage. Culture gives directions as to when to fish, hunt or grow a garden. It is the sole strength for survival. All this can be achieved through long occupancy of the region. Ancient wisdom is the key for lasting ownership. To have our culture is abiding in the spirituality of the land which we enjoy and protect as our home.

Family violence

As noted earlier, we adopt the terminology of “family violence” rather than “domestic violence” or “intimate partner violence” as Aboriginal and Torres Strait Islander peoples regard it as encapsulating “both the extended nature of Indigenous families and the kinship relationships within which a range of forms of Indigenous violence frequently occur” (Day, Jones, Nakata, & McDermott, 2012, p. 105; see also Bagshaw, Chung, Couch, Lilburn, & Waldham, 2009; Council of Australian Governments, 2011, p. 2; Gordon et al., 2002, p. 29). It also, as Professor Judy Atkinson (1996, p. 5), of the Jiman and Bundjalung peoples, makes clear, “provides a greater contextual understanding of the intergenerational impacts of violence as its effects flow in-to and out-of our families”. However, the term domestic violence is also employed by some Aboriginal people, as demonstrated in the report, and we acknowledge that there is no standardised language: we prefer the term family violence because it clearly signals a shift—albeit an uneven one—away from the Western domestic violence paradigm.

Responding to family violence in Aboriginal and Torres Strait Islander communities

Conceptualisations of domestic and family violence in Aboriginal and Torres Strait Islander families and communities are different to prevailing dominant Western theories of domestic and family violence. It has a different background, different dynamics, it looks different, it is different. It needs its own theoretical discourse and its own evaluations.

Professor Victoria Hovane (Ngarluma, Jaru and Gooniyandi) (2015, p. 13)

The dominant feminist domestic violence narrative situates violence against women in a framework of ideological and structural gender inequality and patriarchy (Aboriginal and Torres Strait Islander Women’s Task Force on Violence, 2000; Blagg, 2002; Dobash & Dobash, 1979; Nancarrow, 2006; Wall, 2014; Yodanis, 2004). Significantly, it has tended to support greater and more vigorous use of mainstream criminal justice

penalties, maintaining that the unwillingness of the police and courts to robustly prosecute domestic violence has assisted in the normalisation of the behaviour. This narrative influenced the development of legal and policy frameworks in response to family violence: gender inequality underpins the prevailing legal conceptions of domestic violence, as articulated at the international level (see for example McQuigg, 2011; United Nations Declaration on the Elimination of Violence against Women, 1993) and in domestic laws (Nancarrow, 2016).

There is growing recognition of the inappropriateness of the “gendered aspirations of domestic violence laws” for Aboriginal and Torres Strait Islander peoples (Cunneen, 2009; Nancarrow, 2016, 2019). A number of Aboriginal women question the relevance of gender inequality as a driver of violence in Aboriginal and Torres Strait Islander communities, arguing that this is a Eurocentric construct that describes relationships in Western capitalist societies where the emergence of distinctively public and private worlds (with women consigned to the latter) created the basis for women’s oppression (Atkinson, 1996; Behrendt, 2002; Kelly, 2002; Langton, 2018). Similarly, patriarchy is a Western notion that identifies the dominance of men, and male power, in keeping women in a state of subordination. Domestic violence is one way men maintain patriarchal dominance. There is a voluminous literature premised on this perspective, and a range of policy initiatives such as the Duluth model (Pence & Paymar, 1993). We do not question the relevance of this thesis to mainstream women. Rather, we question its universality.

The distinctiveness of family violence experienced within Aboriginal and Torres Strait Islander communities, and its location in the specific and historical context of colonisation, systemic disadvantage and the intergenerational impacts of trauma, is now well established in the literature (Aboriginal and Torres Strait Islander Women’s Taskforce on Violence, 2000; Atkinson, 1996; Behrendt, 2002; Blagg et al., 2015; Cripps, 2007; Cripps & McGlade, 2008; Dodson, 2003; Kelly, 2002; McGlade, 2012; Nancarrow, 2003, 2010, 2019). So too is the distinctiveness of Torres Strait Islanders’ colonial experience of “soft violence” (Nakata, 2007, p. 135; Sharp, 1993). This understanding of family violence within Aboriginal and Torres Strait Islander communities is increasingly informed

by the experiences and viewpoints of Aboriginal and Torres Strait Islander peoples (Aboriginal and Torres Strait Islander Women’s Taskforce on Violence, 2000; Hovane, 2015; Kelly, 2002; Nancarrow, 2006; Olsen & Lovett, 2016), rather than by force of white feminism (see for example Moreton-Robinson, 2000). In this narrative, colonisation, rather than patriarchy, is the precursor for family violence.

However, we acknowledge that there is not a unified position on this issue. Aboriginal women such as Dr Jackie Huggins AM, of the Bidjara Central Queensland and Birri Gubba Juru North Queensland peoples, and Distinguished Professor Marcia Langton, a descendant of the Yiman nation of central Queensland, guard against using colonial narratives to excuse violence (Langton, 2018; Morton, 2018). Dr Hannah McGlade (2012, p. 70), a member of the Noongar people and a human rights lawyer and scholar, critiques the family violence discourse for its failures to recognise gender and to “acknowledge Aboriginal women and children’s distinct experiences of inequality and oppression within both the Aboriginal and wider society”. Recent research supports an intersectional analysis that positions violence at the junction of multiple forms of oppression (Blagg et al., 2018), and acknowledges the complexity and “multitude of inter-related factors” attributable to family violence (Cripps & McGlade, 2008, p. 242; see also Cripps, 2007; McGlade, 2012; Memmott, 2010).

Aboriginal and Torres Strait Islander perspectives

We are the most researched, the most investigated group of people on earth, and still our situation continues. We know what the issues are. We’ve been trying to tell government for years. We need action now.

Aboriginal and Torres Strait Islander Women’s Taskforce on Violence (2000, p. xxxiii)

Aboriginal and Torres Strait Islander peoples have long agitated for the “opportunity to develop their own solutions to family violence and sexual abuse” (LRCWA, 2006, p. 29, fn. 112; see also Atkinson, 1990a, 1990b, 1990c, 2002; Hovane, 2015; Hovane & Cox, 2011; McGlade, 2012). Aboriginal

peoples have continuously championed strengths-based responses to family violence that involve Aboriginal justice models and the recognition of Aboriginal Law and Culture (ALRC & NSWLRC, 2010; Behrendt, 2002; Hovane, 2015; Kelly, 2002). Professor Victoria Hovane (2015, p. 16), an Aboriginal woman from Broome in the Kimberley region of Western Australia, explains:

The overwhelming dominance of concentrated legal intervention of DFV [domestic and family violence] as the preferred approach to addressing DFV can be problematic for Aboriginal and Torres Strait Islander peoples. This is because it occurs within the context of a historical and ongoing mistrust of the police, courts and justice systems, and the perceived inability of these systems to provide responses that meet the specific needs of Aboriginal and Torres Strait Islander peoples. Consequently, further research and development is needed with Aboriginal and Torres Strait Islander communities on these specific needs and what Aboriginal Law and Culture can offer.

McGlade (ALRC & NSWLRC, 2010, para 23.143) has forcefully advocated for Aboriginal justice models to respond to family violence in Aboriginal communities:

Aboriginal customary law has not ceased to exist, although subjected to abuse from colonisation onwards. Violence offences against women and children are a grave breach of Aboriginal customary law, which includes women's customary law, however, the non-Aboriginal criminal justice system continues to diminish Aboriginal women by supporting violence, often as a matter of "culture". Aboriginal justice models will encourage the revival of our culture and lawful ways that prohibit violence and abuse of women and children.

Loretta Kelly (2002, p. 211), a descendant of the Gumbaynggirr and Dunggatti peoples and a legal academic, argues that the "informal" role of women Elders should be enhanced in responses to family violence. An Aboriginal women's advocate told Kelly (2002, p. 211):

"For Elders to facilitate or sit-in on the session with the family and help them discuss what's causing the problem, and provide support for women and children, this is far better than the current system. But women's and children's safety must always be a priority. The presence of women

Elders is very important to ensure the safety of women and children."

The recognition of Grandmother's Law and its vital role in securing safety for children has been recommended in a number of government reports (see Appendices to Aboriginal and Torres Strait Islander Women's Taskforce on Violence, 2000). Professor Irene Watson, of the Tanganekald peoples, the Traditional Owners of the Coorong in South Australia, talks of her own grandmother's laws to demonstrate the sovereign position, strength and centrality of the laws of women, and their role in empowerment and community safety (Watson, 2007).

Strengths and opportunities of Aboriginal and Torres Strait Islander Law and Culture

Law and Culture remain an integral part of daily life for many Aboriginal and Torres Strait Islander peoples, despite constant attempts by the settler state to extinguish Aboriginal forms of sovereignty over their land and its resources, and assimilate Aboriginal people into mainstream law and culture. For many Aboriginal and Torres Strait Islander peoples, Law and Culture remain "facts of life" that govern the broad spectrum of social relationships and make daily life meaningful and intelligible (ALRC, 1986; LRCWA, 2005, 2006; NTLRC, 2003). The ALRC (1986, p. 79) found in its research on Aboriginal Law that

a basic precondition for the recognition of Aboriginal customary laws is the simple assertion that it exists as a real force, influencing or controlling the acts and lives of those Aborigines [sic] for whom it is "part of the substance of daily life".

Davenport, Johnson, Nixon, Woomera Rocket Range, & Australian Institute of Aboriginal and Torres Strait Islander Studies (2005, pp. 7–8) explain the meaning of law for the Martu peoples of the Western Desert:

The Dreaming beings give life its form. While they no longer appear on earth, they left *yulupirti* ("everlasting")—the Law. The Law provides guidance on how life should be conducted: birth, initiation, marriage, death, knowledge of where people can travel freely and where only initiated

men can go, the structure of the kinship system, how an animal should be butchered and distributed, what is to be done when a camp is left. The Law explains the world and how things have always been: the country, each person's source and role, and all of the many obligations that are owed to people throughout society. Everything finds its place within Law, as it is continuously revealed to people.

Law has been described by the Kimberley Aboriginal Law and Cultural Centre (KALACC) (2006, p. 16) as

a complex system of governance which regulates people's social, political and economic lives ... it also defines the kinship structures, cultural traditions and spiritual beliefs of all Kimberley peoples and governs the restricted esoteric practices of its initiated members ... [it] provides the basis for traditional medicine, education and specialised training. This knowledge is encoded within the Dreaming stories, ceremonies, song cycles, cultural activities and dances of all language groups in the region.

Watson explains (1997, p. 39):

Our voices were once heard in light of the law. The law transcends all things, guiding us in the tradition of living a good life, that is, a life that is sustainable and one which enables our grand-children yet to be born to also experience a good life on earth. The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it. And it is, as explained by George Tinamin: *Ngangatja apu wiya, ngayuku tjamu*. This is not a rock, it is my grandfather. This is a place where the dreaming comes up, right up from inside the ground.

In relation to the Torres Strait, Bani (2004a, p. 151) explains:

Totem is the centre of Torres Strait traditions. It is one of the main elements that hold the society together, and operates law and order for stable society with respect to its moral conduct.

Bani (2004b, p. 231) outlines the strength of cultural values in maintaining community harmony:

Both the initiated boys and girls now have a special place

within the community. They are known as "Kawakuik" (initiated male) and "Ngwoka" (the female). Both initiated are now fully aware of their totems, their kinship, their responsibilities and their social duties. They conform in obedience to moral conduct with enormous respect and appreciation for the social values of their community. This is what kept the early communities intact. The traditional knowledge was the basic element for the efficient function of the whole society. The solidarity was evident that at this point in time there was no need for a patrolling police force.

Distorted Law:

The myth of condoning violence against women

Before examining evidence supporting the strengths and opportunities of Aboriginal and Torres Strait Islander Law and Culture in responding to family violence in particular, it is necessary to dispel reports in the media and by politicians that Aboriginal Law or Torres Strait Islander Law condones or contributes to family violence (see e.g. Anthony, 2013, p. 103; LRCWA, 2006, pp. 18–19). This view has been discredited by Aboriginal and Torres Strait Islander peoples, by Australian politicians, and in a number of governmental and law reform commission reports (e.g. Watson, 2009; Wild & Anderson, 2007, p. 174). Professor Mick Dodson (2003, p. 9), a Yawuru man from the Broome area in Western Australia, stated:

The violence occurring in Aboriginal communities today is not part of Aboriginal tradition or culture. It is occurring principally because of the marginalisation of Aboriginal people, the economic and welfare dependency, continuing high levels of unemployment, the dissolution of our culture and tradition and the breakdown of societal and community values.

Similarly, McGlade (2012, p. 55) and Kelly (2002, p. 214) have authoritatively rebuked contentions that Aboriginal Law has a role in condoning family violence. Where Aboriginal Law has been ostensibly used as a justification for offending behaviour—for example, by lawyers or defendants—it is regarded by Aboriginal peoples as a distortion of Aboriginal Law aptly termed "bullshit law" (see e.g. Davis & McGlade, 2006, p. 389). Where such claims have been made as a defence to criminal charges, they have been consistently rejected

by the courts (see e.g. *Jadurin v The Queen* [1982] 44 ALR 424; *R v Bulmer* [1986] 25 A Crim R 155; *Ashley v Materna* [Unreported, NTSC, No JA1/1997, Bailey J, 21 August 1997]).

The Gordon Inquiry (Gordon et al., 2002, p. xiv) commissioned a literature review on “customary practices to allow the Inquiry to assess the assertions that family violence and child abuse had a basis in the custom or practice of traditional law”. The Inquiry concluded that neither family violence nor child abuse was sanctioned under Aboriginal Law. This finding has been echoed in a number of reports from the Aboriginal and Torres Strait Islander Commissioner (2006), the LRCWA (2006), and the *Little Children are Sacred Report* (Wild & Anderson, 2007). The then Aboriginal and Torres Strait Islander Commissioner (2006, p. 10), Tom Calma, of the Kungarakan and Iwaidja peoples, reported:

Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.

The then Aboriginal and Torres Strait Islander Commissioner further reported (2006, p. 5):

Family violence and abuse is about lack of respect for Indigenous culture. We need to fight it as Indigenous peoples, and rebuild our proud traditions and community structures so that there is no place for fear and intimidation.

The LRCWA (2006, p. 22) eloquently highlighted that

the relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted on the extent of violence and sexual abuse in Aboriginal communities.

The LRCWA (2006, p.22) agreed with the Sex Discrimination Commissioner that Aboriginal and Torres Strait Islander Law responses to family violence need to be strengthened and supported (alongside a strengthening of mainstream criminal justice responses).

We acknowledge that these views are not universal (see e.g. Kelly, 2014). George Pascoe Gaymarani (2011, p. 291), of Yirritja, Ngaritj and Baru descent, and Traditional Owner for Milingiimbi, Gamurr-Guyurra, has written of lawful and unlawful domestic violence under Ngarra Law in Arnhem Land. However, Gurrwanngu writes that the law has changed and there is no lawful domestic violence: “Ngarra law has no room for domestic violence” (Gurrwanngu, 2012, p. 242). In response to claims by Warlpiri woman Jacinta Price that Yolngu Law excused family violence, senior Djambarrungu man Yingiya Guyula Yingiya Guyula (2020, p. 12) responded:

As a senior leader, I need to be clear: the family violence that we are seeing in our communities is not lawful—it is breaking the law [...] Including or referring to domestic or family violence as accepted in any culture is dangerous and harmful.

Yingiya Guyula (2020) also suggests that Yolngu Law, not Western law, should provide the vehicle for reducing levels of violence and other harms on Yolngu country with the key being to get Elders together to find solutions for a range of problems that were unknown before contact with white society.

Strength and protectiveness of Law and Culture in responding to family violence

Professor Hovane (2015, p. 17) articulates a strengths-based approach:

Here again we can reference the strengths and opportunities provided by Aboriginal Law and Culture. It provides a pathway for achieving positive environments in which communities and families stand in support of those experiencing DFV, to curb the behaviour of perpetrators. Implicit in Law and Culture is gender equality, as well as a culturally relevant behavioural template which does not endorse DFV. This template may be used to respond effectively to DFV, as well as culturally relevant consequences for those who do not follow the rules required under Aboriginal Law and Culture. Unfortunately, these important opportunities continue to be ignored as a result of prevailing systemic racial inequalities, and Aboriginal people continue to experience serious harm as a result of violence including DFV.

Despite experiences with colonisation and oppression, many Aboriginal people continue to retain a connection to Aboriginal Law and Culture and identity. If theories that describe DFV are to be relevant, and if responses are to be effective, they must be grounded in this Law and Culture. By its very nature, Law and Culture is about wellbeing, dignity and the survival of Aboriginal and Torres Strait Islander peoples. DFV does not equate with dignity in Aboriginal Law.

Instead, Aboriginal Law and Culture offers opportunities for creating safe communities of care in which every person has an important role in curbing abusive behaviours like DFV. Such an approach is strengths-based and reminds Aboriginal people about important roles, responsibilities and obligations, and the strength of Aboriginal Law and Culture. Embedded in this approach is a fundamental rationale and motivation for changing DFV behaviours, as well as pathways to achieving community safety. Once understood, Aboriginal Law and Culture provides insights into options for cultural solutions and importantly, it gives cultural permission to have healthy boundaries and to live without violence and abuse.

Cultural healing and community-led responses are also supported in family violence policy frameworks (Commonwealth of Australia, 2017; Healing Foundation et al., 2017; SNAICC, 2017; State of Victoria, 2016; Western Australia. Department for Child Protection and Family Support, 2015). The *Kimberley Family Violence Regional Plan 2015–2020* (Western Australia. Department for Child Protection and Family Support, 2015), for example, states:

For family violence prevention and intervention to be relevant and effective, it must be grounded in Aboriginal law and culture (Hovane, 2015; Hovane & Cox, 2011). For Aboriginal people, Aboriginal law sets out the norms, beliefs, expectations and rules for everyday living. Aboriginal law is stable and enduring and embedded within it is dignity, wellbeing and equality between men and women. The day to day living and expression of Aboriginal law is “culture”. Family violence has no basis in either Aboriginal law or culture (Hovane, 2015). Working alongside Law People, Elders and community leaders provides important opportunities to develop culture and community based responses to family violence that are safe, effective and enduring (Hovane, 2015).

The *Little Children are Sacred Report* (Wild & Anderson, 2007, p. 176) found a correlation between the strength of Aboriginal Law in a community and the level of overall dysfunction:

The Inquiry’s experience was that there was generally more overall dysfunction in urban centres and those communities where Aboriginal law had significantly broken down. In the more remote, “traditional” communities, there was still dysfunction but often on a lesser scale.

This is not to suggest that protection and recognition of Aboriginal Law is relevant only to remote communities: the recognition of Law “is a common goal of Indigenous peoples’ aspirations” (Davis & McGlade, 2006, p. 386, drawing on Behrendt, 2003). Indeed, the *Little Children are Sacred Report* (Wild & Anderson, 2007, p. 54) also found that

an overwhelming request from both men and women during community consultations was for Aboriginal law to be respected, recognised, and incorporated within the wider Australian law where possible.

Professor Megan Davis, a Cobble Cobble Aboriginal woman from the Barrungam nation in southwest Queensland, and McGlade wrote (2006, p. 384):

It is also necessary to counter claims that recognition means a “returning” to old, traditional ways to correct dysfunction in Aboriginal communities. Such claims are simplistic when the content and diversity of Aboriginal law is fully considered. The claims serve only to “oversimplify the complexity and fluidity of culture by treating culture as monolithic and moral norms within a particular culture as readily ascertainable” (Higgins, 1996).

The link between self-determination, governance and Aboriginal Law has been made (see for example Cunneen & Schwartz, 2006). For example, William Jonas, a Worimi man and the former Aboriginal and Torres Strait Islander Social Justice Commissioner (2003), noted that:

Customary law should be treated by the Government as integral to attempts to develop and maintain functional self-determining Aboriginal communities. Customary law is therefore more than a mitigating factor in sentencing processes before the courts. It is about providing recognition to Aboriginal customary processes for

healing communities, resolving disputes and restoring law and order.

Behrendt et al. (2009, p. 9) reflected that

the failure of the courts to recognise Aboriginal law and custom has denied Aboriginal peoples a fundamental way of maintaining social cohesion and reinforcing understood community standards of behaviour. Both these denials have ongoing repercussions for Indigenous peoples in terms of their right to equality and law and order within their communities.

The importance of Aboriginal and Torres Strait Islander Law and Culture for wellbeing, healing and empowerment is well recognised (Aboriginal and Torres Strait Islander Healing Foundation Development Team, 2009; Anderson & Tilton, 2017; Dudgeon & Bray, 2018; Dudgeon, Milroy, & Walker, 2014; Dudgeon, Walker, Scrine, Cox et al., 2014; Dudgeon, Walker, Scrine, Shepherd et al., 2014; McKendrick, Brooks, Hudson, Thorpe, & Bennett, 2013; People, Culture Environment, 2014; SNAICC, 2017). This was a strong theme emerging from the *Elders' Report into Preventing Indigenous Self-Harm & Youth Suicide* (People, Culture Environment, 2014). For example, Central Desert Elder, David Cole explained (People, Culture Environment, 2014, p. 9):

"The Elders are the ones that hold on to the culture and the lore, they are the most important aspect of healing our people. And when we lose that, we lose who we are and when you lose who you are what do you have to live for. And many of our people are giving up; many of our people are suffering because of that loss of spirit loss of identity."

This was echoed by Walmajarri Elder Joe Brown from Fitzroy Crossing (People, Culture Environment, 2014, p. 18): "If they lose language and connection to culture they become a nobody inside and that's enough to put anyone over the edge."

Healing centres are internationally recognised for their effectiveness "in addressing intergenerational trauma, improving wellbeing and reducing rates of suicide, incarceration, domestic and family violence and drug and

substance abuse" (Healing Foundation, n.d.). There are an increasing number of examples of healing programs that are embedded in Law and Culture, such as the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NYPWC) Domestic and Family Violence Service that is driven by Aboriginal Women's Law and authority (Dudgeon & Bray, 2018, p. 105; NYPWC, n.d., 2018), and Wurraminyaanga Tiwi Men's Healing Project (Healing Foundation, 2015). The NYPWC Domestic and Family Violence Service is grounded in a holistic, Anangu-led approach. The NYPWC explains that, "by practising in a culturally safe way, we also nurture ongoing mental health and wellbeing, and build empathy and common understanding which, in turn, strengthens communities" (NYPWC, 2018, p. 16). Wurraminyaanga Tiwi Men's Healing Project aims to strengthen, support and empower men through cultural healing and reconnection. Their work has led to a 50 percent reduction in men registered with Northern Territory Correctional Services and increased feelings of safety for women in the community (Healing Foundation, 2015).

Our discussions with partner organisations and reading of the literature suggest that healing should be integral to work at all levels of intervention given the preponderance of intergenerational trauma in Aboriginal populations, extending from preventive work in schools through to work with offenders and victims. Healing is not just an outcome: healing should also be the method. This is why non-Aboriginal systems and methods should be employed sparingly because they do not offer enough in the way of cultural safety and security. The healing circle provides safety. As Central Desert Elder David Cole, who developed the Balanu Foundation, further explained (People, Culture Environment, 2014, p. 31):

"The healing circle is where we spend most of our time. It's the place where we do our talking and listening, where the kids can be heard. It's where we sit and express our problems and ourselves. It's where we let things go. It's where we share our knowledge. It's a safe place, a powerful place. The kids respect us when they come and sit here."

The Balanu Foundation provides "healing, suicide prevention and cultural renewal programs that are based on-country" (Aboriginal and Torres Strait Islander Healing Foundation Development Team, 2009, p. 18), and in its first 7 years worked

with over 550 children and young people (People, Culture Environment, 2014, p. 32). The program was independently evaluated, and the young people who participated were found to have improved quality of life (Aboriginal and Torres Strait Islander Healing Foundation Development Team, 2009, p. 18).

Another successful cultural healing program is Red Dust Healing (2020), designed in 2007 by Wiradjuri man Tom Powell and further enhanced by Randal Ross, of Bindal, Juru and Erub descent. To date over 14,000 people in New South Wales and Queensland have participated in the program (Red Dust Healing, 2018, 2020). The Red Dust program “incorporates traditional practices and cultural symbolism to engage participants and help them understand the roles and responsibilities of Indigenous men in their families and communities” (Cull, 2009, p. 36). Ross explained in an interview with Cull (2009, p. 41) the strength of Aboriginal Law and Culture:

“That lore represents again who we are, that dignity that integrity, why we are who we are and it’s also about that power: that power to model and guide our families through safe waters. And the last part of it is freedom. We’re free already but the moment we abuse that then we come into contact with the L-A-W and we don’t realise just how free we are until we see that freedom disintegrate in front of our very own eyes. So by just using this simple concept it gives [participants] the understanding that they still have that power, that integrity, that dignity in who they are, where they come from, the people they represent and they have their freedom.”

A recent evaluation of the Red Dust program (Red Dust Healing, 2018, p. 54) found that it had

ongoing positive impacts on the lives of participants, their families, clients and colleagues with respondents consistently reporting positive changes in their social and emotional health; increased skills to bring about conflict resolution in the family and community settings; enhanced ability to deal with grief and loss; a stronger sense of cultural and spiritual identity; better life choices; and increased self-awareness and clarity.

Effective healing programs have positive impacts not only for individuals, but for families and communities (McKendrick

et al., 2013; Red Dust Healing, 2018). The LRCWA (2006, p. 19) also articulated a benefit of the recognition of Aboriginal Law in relation to reduced offending behaviour:

It is the Commission’s belief that permitting the criminal justice system to have regard to relevant aspects of Aboriginal customary law has the potential to reduce rates of violent and sexual offences.

Functional recognition of Aboriginal and Torres Strait Islander Law

Each Aboriginal community will define its own problems and solutions ... Traditional law can sometimes be better than Australian law at solving disputes in Aboriginal communities.

NTLRC (2003, pp. 15, 21)

A long line of public inquiries and reports have recommended the recognition of Aboriginal and Torres Strait Islander Law (see for example Aboriginal and Torres Strait Islander Women’s Task Force on Violence, 2000; ALRC, 1986; Gibson, 1994; Johnson, 1991; NTLRC, 2003;). Recognition is also supported by academic scholarship (Flynn, 1998; Rose, 1995). In 2006, the LRCWA (2006, p. 30) noted:

The Commission is of the view that the Western Australian government should provide assistance to Aboriginal communities to develop their own responses and solutions to family violence and sexual abuse. That is not to say that Aboriginal communities should do it alone. The government must provide ongoing resources and support for community-based initiatives [...] The difficult issues surrounding sexual abuse and violence and the failure of the criminal justice system to protect Aboriginal women and children must be addressed [...] The recent debate has ignored the positive and many non-contentious aspects of Aboriginal law and culture. It has also ignored the importance of recognising Aboriginal customary law for the wellbeing and enhancement of Aboriginal people in this state.

The failure to recognise Aboriginal and Torres Strait Islander Law has been repeatedly criticised (Gibson, 1994; NTLRC, 2003). At the same time, Watson (2018, p. 6) alerts us to the

violence of recognition:

The idea of First Nations seeking “recognition” from colonial states negates the truth: we have always been on our territories, and we were here first. First Nations have our own names, our own languages, and our own territories, laws, peoples and ways of being in the world. However, this alternative narrative, this “truth” of the coloniser continues to be constructed: the “native” seeks recognition.

Watson (1997, p. 58) also incisively highlights the hypocrisy of concerns that Aboriginal Laws might offend human rights:

Colonial powers play with the question of indigenous law-ways. In Australia they play with the idea of incorporating “customary law”, as they call it. They examine which part of indigenous law they can splice and incorporate into the colonial system of laws and which unsavoury, uncivilised parts are best left out. In the name of human rights. “God forbid, spearing and other inhumane acts.” And yet we watch as the incarceration levels of indigenous peoples rise and we watch our indigenous children become institutionalised at levels in excess of any peoples on earth.

The *Little Children are Sacred Report* (Wild & Anderson, 2007, p. 176) argues for increased dialogue between the two types of law, noting that hybrid initiatives such as community justice groups and Aboriginal courts can form a dialogic space where the two laws can create mutually respectful practices. This idea was also central to Tony Fitzgerald’s (2001) report on community controlled justice in Cape York, where he called for the creation of vibrant and localised justice initiatives run according to Aboriginal legal principles.

Aboriginal courts emerged in the late 1990s alongside the introduction of specialist courts to deal with particular types of offenders, such as drug offenders (Bennett, 2015, p. 2). While not uniform, Australian Aboriginal courts tend to share the following features: involvement of Elders and respected persons in the court process; a non-adversarial, informal, and collaborative approach; awareness of the social context of the offender and offending; provision of culturally appropriate options; and a focus on rehabilitative outcomes and links to support services (Bennett, 2015; King, Freiberg,

& Batagol, 2014; Queensland Courts, 2015, p. 41). While not applying Aboriginal Law, these sentencing courts arguably create a space—albeit within the mainstream justice system and governed by mainstream law—for mutually respectful practices.

The former Sex Discrimination Commissioner argued, in a submission to the 2003 Northern Territory Inquiry into Aboriginal Customary Law, that women’s safety must be the priority:

HREOC [the Human Rights and Equal Opportunity Commission, now the Australian Human Rights Commission] considers that the need to ensure women’s safety and freedom from violence must be a priority for any system of recognition of Aboriginal customary law. Aboriginal women must be able to access mainstream law in cases involving violence, including where an Aboriginal customary law approach has failed. However, this should not be used as an excuse by governments to avoid recognising Aboriginal customary law.

One possible approach is to limit the cases in which Aboriginal customary law will apply. For example, mainstream law could apply to crimes such as rape, sexual assault and domestic violence. This approach acknowledges that women may be in a relatively powerless position within their community, particularly in relation to these crimes, and require the external support of mainstream law.

Another possible approach would be to structure measures so that Aboriginal customary law is applied in the first instance, with access to mainstream law used as a last resort. This would give communities the opportunity to resolve issues using Aboriginal customary law, while providing women with a safeguard. It would require clear guidelines and protection against intimidation, so that women are not forced to accept the Aboriginal customary law solution if it is inadequate. (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2006, p. 66)

Mainstream law and resistance

In Australia, the High Court recognises Aboriginal law for the purposes of native title, but denies recognition

of Aboriginal law-making capacity in other areas of social life—a contradiction at the heart of Australian jurisprudence.

Professor Chris Cunneen (2011, p. 314)

While the mainstream legal system has resisted the formal recognition of Aboriginal and Torres Strait Islander Laws, and in particular criminal laws (*Walker v State of New South Wales* [1994]), there have been attempts to “accommodate” them in sentencing through the exercise of discretion by judges under sentencing legislation (ALRC, 1986, para 70–71, Ch 21; Douglas, 2005, p. 144; Goldflam, 2013; Martin, 2007). In 2006, federal sentencing legislation was amended to prohibit a court from considering “any form of customary law or cultural practice” as either a mitigating or aggravating factor on sentence for a federal offence (*Crimes Act 1914* [Cth], ss16A; *Crimes Amendment [Bail and Sentencing] Act 2006* [Cth]). This prohibition was extended, in 2007, to the Northern Territory by Commonwealth legislation as part of the Northern Territory Intervention (*Northern Territory National Emergency Response Act 2007* [Cth] Pt 6; *Stronger Futures in the Northern Territory [Consequential and Transitional Provisions] Act 2012* [Cth] s8). All other Australian jurisdictions retain broad sentencing discretion to take relevant factors into account. “Accommodation” through the exercise of judicial discretion at sentencing is fraught. As Anthony (2013, p. 107) explains:

The Northern Territory Supreme Court’s recognition of Indigenous culture sways between vaporization of the functional role of culture and condemnation of its criminal tendencies [...] Without a stable undergirding in the form of legal pluralism, judicial recognition of Indigenous cultures can operate as much to incorporate Indigenous community views as to subordinate and sideline them.

The case law in Appendix A displays this oscillatory pattern. In the 1970s, 1980s and 1990s many courts took traditional punishment into account as a mitigating factor in sentencing Aboriginal people, albeit with many judges observing the limited extent of mitigation that could be afforded while also ensuring the administration of mainstream justice (Martin, 2007, p. 14; see also Anthony, 2010, p. 4). In some cases, there was an alignment with or incorporation of community views

(for example *R v Mamarika* [1982]; *Munungurr v The Queen* [1994]; *The Queen v Walker* [1994]; *R v Miyatatawuy* [1996]; *R v Yakayaka and Djambuy* [2012]), with Muirhead J, in *R v Charlie Limbiari Jagamara* (1984), even stating that “this is truly a cultural matter that has been tackled energetically by the people ... there are cases where I consider complete regard should be had for Aboriginal custom and tribal law. This is one of them.” However, since the beginning of the 21st century, the vast majority of cases subordinate or sideline community views (see for example *The Queen v Webb* [2003]) or entirely reject community views and use the judgment as an opportunity to “school” the community (see for example *The Queen v Bara* [2006]; *Amagula v Chambers* [2007]; *Police v Dickenson & Ors* [2010]; *The Queen v Turner* [2011]; *The Queen v Sims & Walker* [2012]). What is common to this approach is the mainstream justice system *speaking for* Aboriginal Law and Culture. Watson (2009, p. 5) explains:

Throughout the legal history of the Australian common law Aboriginal law has been translated by non-Aboriginal experts in law and anthropology, as they affirm they have come to “know” tradition. But how and what do they know? How do they know that Aboriginal culture is inherently violent? How do they separate or not separate Aboriginal violence from the wide-scale colonial violence which has occurred in the past 200 years?

In this way, as Anthony (2013, p. 7) argues, “the ‘white’ court is the ultimate arbiter of acceptable Indigeneity”. The mainstream legal system retains—and maintains—its privileged position as the mechanism through which Aboriginal and Torres Strait Islander Law and Culture are defined, proven and evaluated. The content of Aboriginal Law is determined according to the mainstream legal system’s procedures, such as the rules of evidence, and its value “assessed by reference to the Western theories of punishment and responsibility” (Maxwell, 2015, p. 103). The recognition and accommodation of Aboriginal and Torres Strait Islander Law in sentencing “ensures the fantasy of ‘whiteness’ as humane” (Anthony, 2013, p. 6).

At the same time, the jurisdiction of mainstream law, and white sovereignty, have long been and remain sites of contestation and resistance for Aboriginal and Torres Strait Islander peoples (Blagg & Anthony, 2019; Douglas & Finnane, 2012). Worimi man John Maynard (1997, p. 1) explains:

Opposition to the invasion of this country is not some newfound strength that Aboriginal people have suddenly discovered. It did not spring from the Mabo decision or the *Native Title Act 1993*, nor was its birth a result of the vibrant period of the 1960s, which culminated in the Aboriginal tent embassy in Canberra. The groundswell of Aboriginal resistance to domination has been ongoing since Cook and the *Endeavour* first appeared over the horizon. It did not cease when the last gunshot was heard on the frontier. Resistance has taken many forms since 1770, from small encounters, to guerrilla warfare, open warfare and the war of words.

The refusal to consent to white law and sovereignty, and to “‘recognition’ that does little to disrupt the structural arrangements of settler colonialism”, along with the political resurgence of Indigenous nationhood, “signal a turn *away* from settler institutions, values and ethics and a turn *towards* Indigenous institutions, values and ethics” (Maddison, 2019, pp. xxxi–xxxii).

Conclusion

There is a need for an honourable dialogue, in which the dominant society fully discards its sense of social and cultural sovereignty. Otherwise, the same old assumptions continue to silently inform new policy positions and their implementations.

Davenport et al., (2005, p. 175)

There is strong support for the adoption of strengths-based responses that recognise the resilience and power of Law and Culture, however, little is documented in the academic literature about the role Aboriginal and Torres Strait Islander Law and Culture can play in responding to and preventing family violence. While some Law has been written down, such as *Ngarra Law* of Arnhem land (Gaymarani, 2011), the Law is held by Elders in communities. Empirical research is needed to identify aspects of Aboriginal and Torres Strait Islander Law and Culture that may be amplified to promote the safety of women and their children in Aboriginal and Torres Strait Islander communities. While much debate

within mainstream society is fixated on “tribal punishment” as the visible—indeed the only—face of Aboriginal Law and Culture, Aboriginal people are engaged in dialogue about the potential for Aboriginal Law to heal the traumas inflicted by colonisation. Aboriginal Elders, Law Bosses and other people of significance hold in their possession a horde of cultural knowledge that could be employed to heal the trauma that many in Aboriginal communities believe underpins family violence. The literature points to the centrality of “country” as a place of Law and Culture and as a place of healing. Its role in violence prevention and in repairing damaged relationships across families is yet to be fully appreciated by mainstream society (Blagg et al., 2018).

There is a significant degree of incommensurability between Aboriginal and settler legal systems. Controversy continues as to whether the two systems can be reconciled or harmonised. As Thalia Anthony (2013) and Irene Watson (2009) have argued, the settler legal system remains the dominant partner and essentially determines how and under what circumstances Aboriginal Law will have jurisdiction. Furthermore, since the 2007 Northern Territory Emergency Response, judicial officers in the Northern Territory have had their discretion to take cultural practices into account when sentencing Aboriginal offenders curtailed. Therefore, it may make sense to focus on building up community-owned and place-based healing programs run on-country by Elders that do not require the consent of the court to operate. Evidence suggests that for most Aboriginal people in remote Australia, Law and Culture remain a vivid and essential part of everyday life and further devaluation of Law and Culture would generate considerable distress and conflict.

Methodology

Research aims and rationale

Research increasingly suggests that the mainstream model of domestic violence intervention, centred around the robust use of the non-Indigenous criminal justice system, has failed Aboriginal and Torres Strait Islander peoples (see Blagg et al., 2015, 2018). Where, then, do we turn for alternative ideas? The aim of this project was to explore the role Aboriginal Law and Culture could play in the creation of an alternative paradigm for prevention, intervention and healing in Aboriginal family violence. Such a paradigm shift necessitates the labour of two laws working together—what Martu Elders, the traditional owners of lands in the Western Desert region of Western Australia, refer to as “two-way law”. Eschewing a “binary” approach, itself an artefact of colonial epistemologies (Bush, 2017), our focus was not on replacing one system of laws with another. Rather, we attempted to create fresh engagement spaces where Western and Aboriginal and Torres Strait Islander laws can hold dialogue in a way that grants dignity and respect to both systems. In relation to research methodology, this process involved what Jo-Ann Archibald, also known by her Stó:lō name Q’um Q’um Xiiem (Stó:lō and St’at’imc), Jenny Bol Jun Lee-Morgan (Waikato-Tainui), and Jason de Santolo (Garrwa and Barunggam) (2019) call the four principles of respect, responsibility, reverence and reciprocity to guide research. This framework demands that researchers listen to the storytelling of Indigenous peoples with respect and humility, checking the tendency for non-Indigenous researchers to impose knowledge standpoints onto Indigenous peoples and “interpret” Indigenous meanings via Western frames of knowledge.

Furthermore, mainstream research on Aboriginal and Torres Strait Islander communities is usually triggered in response to a perceived Indigenous “problem”, often on the basis of what Stanley Cohen (1966) called a “moral panic”, such as Aboriginal youth crime and disorder where an Aboriginal community is demonised as criminogenic and incapable of controlling children and its deficits and dysfunctions aired for mainstream scrutiny and condemnation (Anthony, 2013). Much of this kind of commentary is not based upon engaged discussion with Aboriginal families, but culled from police statistics and superficial “consultations” with some Aboriginal “leaders”. Sociologist and Palawa woman Professor Maggie

Walter took criminologist Don Weatherburn (2014) to task for parroting tabloid beliefs that Aboriginal imprisonment rates simply reflect factors such as “poor parenting” and failing to reflect on the role of social inequality in generating crises in Aboriginal family life (Walter, 2016). Similarly, much discussion of family violence in Aboriginal and Torres Strait Islander communities is based on anecdote and mythology. The Northern Territory Emergency Response (the “Intervention”) in 2007, for example, was justified on the basis of claims of widespread sexual abuse of children and violence against women that were not borne out (Scott & Heiss, 2016), despite an official report calling for place-based and community-led initiatives.

Decolonising methodology

Decolonising research methods involve acknowledging what Canadian writer Alison Gerlach (2018, p. 1) calls “the multiple intersecting influences that shape research and knowledge”. These influences are informed by historical, social and cultural forces that need to be understood by deep listening to Indigenous voices and building relationships. Gerlach (2018, p. 1) advocates for a relationship building approach with Indigenous communities to “provide the necessary epistemological scaffolding to actualize the underlying motives, concerns, and principles that characterize decolonizing methodologies”.

This kind of decolonising approach acknowledges the “messiness” and complexity of research in this domain. It is not possible to know with certainty what the “intersecting influences” are in a particular place in advance; this can occur only after building relationships of trust with communities. Professor Linda Tuhiwai Smith (Ngāti Awa and Ngāti Pouro, Māori) (1999) maintains that decolonising methodology is a necessary step in the creation of research that reflects the experiences and aspirations of Indigenous peoples. Dropping the notion of research “subjects” and replacing this with “collaborative partnerships” is an important first step in realigning relationships. This decolonising stance does not mean that researchers abandon all existing research

methods. Instead it involves *de*-centring what Stuart Hall (1990) referred to as the “ubiquitous white eye” that claimed exclusive ownership of the research process, and *re*-centring Indigenous knowledges and worldviews. Just as “two-way law” does not dismiss mainstream law as irrelevant, decolonised methods do not jettison Western methods. Rather, according to Archibald et al. (2019, p. 6), they

encourage us as Indigenous researchers to connect research with our own worldviews and to theorize based on our own cultural notions in order to engage in more meaningful and useful research for our people.

Building partnerships between Indigenous and mainstream forms of knowledge can be a productive process. Kanyirninpa Jukurrpa (n.d.), a Martu organisation, talks about the need for a “partnership model”:

We recognise that, in this cross-cultural interface, Martu have their specific skills and knowledge, while non-Martu have different skills and knowledge. Working closely together to blend and use both sets of competencies produces the best results in a complex cross-cultural environment.

These partnerships, Dr Ambelin Kwaymullina (2016, p. 447), an Aboriginal law academic from the Palyku people, explains, must be based on respectful research relationships with Indigenous peoples and knowledges:

Respectful research, in relation to Indigenous peoples, requires engaging with and through new modes of interaction that begin with the recognition of that which the colonial project has long denied: the inherent sovereignty and humanity of Indigenous peoples. The task of finding pathways forward from this point is one that is being taken up by Indigenous and non-Indigenous scholars, and the result is an ever-growing body of knowledge and “best practice” examples to guide scholars in navigating the complexities of ethical engagement. Out of these interactions, equitable and innovative partnerships between peoples and knowledges are created, and new futures are born.

Kwaymullina (2018, pp. 201–202) writes of enacting respect through listening, a process that involves, among other things,

not speaking for but prioritising Indigenous voices “as the primary and most authentic sources of our own realities”.

Embracing a “cross-cultural” approach, our research was concerned with validating the knowledge of Elders and Cultural Bosses in the research sites. Our aim was not to subject Elders’ knowledge to “scientific” scrutiny but to rigorously reflect the depth and diversity of Aboriginal knowledge systems as a precursor and prerequisite for creating new partnerships in the family violence space. One outcome of this exchange of knowledge may be the gradual “decoupling” of family violence strategies from the domestic violence space and integration of them in a community health and wellbeing space through greater investment in place-based, Elder-led prevention programs, healing places, and on-country initiatives for families, where Aboriginal and Torres Strait Islander knowledges tends to have a greater role (see for example Nindilingarri Cultural Health Services [n.d.] in Fitzroy Crossing). These initiatives could reduce the focus on the mainstream criminal justice process.

We acknowledge the diversity of Aboriginal and Torres Strait Islander peoples in Australia, and the diversity of individuals and groups within communities. We acknowledge the heterogeneity of Aboriginal worldviews (Kwaymullina et al., 2013). We considered these in the planning, carrying out and reporting of the project by forming partnerships with Aboriginal organisations in key regions, and ensuring that the project had a local Aboriginal researcher in each community who brought local cultural knowledge and networks to the project, and local community interpreters for yarning groups.

Qualitative and appreciative approaches

Our approach, therefore, was qualitative, based on fieldwork in six designated sites across northern Australia, and embedded in ethnography, phenomenology and “grounded research” (Denzin & Lincoln, 2011). A grounded research approach, as originally defined by Strauss and Corbin (1998), seeks to ground theory in observation and dialogue, based on a number of generative questions to guide, but not bind, the research. Ethnography and phenomenology share a commitment to

valorising the lived experience of participants and endowing human actors with purpose and motivation. Research in these traditions eschews the positivist paradigm and its assertion that scientific methods drawn from the natural sciences can be employed to analyse human behaviour in an objective way, from the “outside”. This is still a fluid and evolving space, and there is still a good deal of hybrid thinking borrowing from different, and often incommensurable, knowledge systems. There is, inevitably, tension between mainstream research methods and Aboriginal and Torres Strait Islander ways of thinking and being (Kovach, 2010). Some of the “gaps” between the two domains have been filled by our Aboriginal researchers, research partners and members of the Aboriginal Reference Group of UWA’s Aboriginal and Torres Strait Islander and Community Justice Centre, who have had considerable experience of “two-way” research and translating between mainstream and Aboriginal and Torres Strait Islander forms of knowledge. This brings our work into alignment with Gerlach’s (2018) suggestion that “relationality” should form the foundation for knowledge sharing between Indigenous and non-Indigenous worlds.

In keeping with the recommendations of Archibald et al. (2019) that respect, responsibility, reverence and reciprocity guide research, this research process, as we sketch out later, adheres to nationally accepted guidelines for conducting ethical research in Aboriginal and Torres Strait Islander communities, namely, the Australian Institute of Aboriginal and Torres Strait Islander Studies’ (AIATSIS) *Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS) (AIATSIS, 2012).

A “yarning” style

The project methodology was largely based on appreciative inquiry and “yarning” as interfaced research tools (Leeson, Smith, & Rynne, 2016). Professor Sir Mason Durie (Rangitāne, Ngāti Kauwhata and Ngāti Raukawa, Māori), explains that “research at the interface’ aims to harness the energy from two systems of understanding in order to create new knowledge that can then be used to advance understanding in two worlds” (2005, p. 306).

Appreciative inquiry is a qualitative method designed to identify what participants experience as good practice in their fields, as well as what is lacking and how change can be achieved. In that respect, appreciative inquiry goes beyond the usual social science “problem–identification”, and allows for the development of avenues towards positive change (Liebling, 2009). Our approach, informed by the appreciative inquiry paradigm, was orientated to identify strengths (or potential strengths) rather than just focusing on weaknesses (Robinson et al., 2013).

“Yarning” is a traditional Aboriginal and Torres Strait Islander peoples’ form of communication and knowledge sharing and therefore more appropriate and respectful than a structured and direct questioning approach from an outsider’s perspective. Yarning as a research method was developed by Indigenous scholars in response to Indigenous research participants often finding Western “question/answer” forms of interviewing “research subjects” to be unhelpful and a barrier to teasing out issues of concern to Indigenous peoples (Bessarab & Ng’andu, 2010; Laycock, Walker, Harrison, & Brands, 2011; Nagel, Hinton, & Griffin, 2012; Walker, Fredericks, Mills, & Anderson, 2014). Walker et al. (2014, p. 1216) described yarning as “a conversational process that involves the sharing of stories and the development of knowledge. It prioritises Indigenous ways of communicating, in that it is culturally prescribed, cooperative, and respectful.” The strength of yarning, Professor Dawn Bessarab, an Aboriginal researcher of Bardi and Indjarbandi descent, and Dr Bridget Ng’andu (2010, p. 47) explain,

is in the cultural security that it creates for Indigenous people participating in research. Yarning is a process that cuts across the formality of identity as a researcher [...] both are learners in the process.

In yarning, it is the participant who controls the knowledge exchange and provides the answers she or he finds most appropriate (from their perspective) (Rynne & Cassematis, 2015). We adopted a yarning style with Aboriginal and Torres Strait Islander participants, meaning that leading questions were kept to a minimum, allowing Aboriginal and Torres Strait Islander participants to frame the agenda for discussion. This was important, as otherwise the research may simply confirm Western suppositions about family violence, and

there may be alternative ideas about the role Culture may play in creating safe alternatives to mainstream services.

In adopting this approach, we were aware of the dangers of research at the interface of Western and Indigenous research methods, in particular of tokenism and complicity in deep colonisation (Leeson et al., 2016; Marchetti, 2006). As we outline further in this chapter, we put in place Aboriginal governance processes and partnerships, including with Aboriginal organisations in each research site, an Aboriginal research advisory group and senior research advisor Professor Victoria Hovane, to ensure that the collection and use of data was reflective of the subjective truth and beliefs of Aboriginal and Torres Strait Islander participants (Leeson et al., 2016).

The strength of Law and Culture

The project sought to identify the kinds of mechanisms nested within Aboriginal Law and Culture that could be adapted to meet the needs of Aboriginal peoples in other Australian contexts. While acknowledging that place-based initiatives cannot be simply copied and pasted elsewhere, we worked in collaboration with Aboriginal and Torres Strait Islander partners to identify comparable patterns in the way Aboriginal Law and Culture a) provide a code of conduct binding people to acceptable norms of conduct; b) intervene to stop and censure violent and abusive behaviours; and c) provide a framework for family healing. For example, while communities may differ in significant ways, a considerable number will acknowledge the salience of being on-country as a place where people can come together to heal (see for example Morgan, Mia, & Kwaymullina, 2008).

One clear difference between the approach adopted in this research and mainstream domestic violence research is the space this approach creates for honouring the positive role Aboriginal men have to play in the prevention of family violence—rather than presenting them as simply “perpetrators”. The recent work of the Healing Foundation (2015) on Aboriginal men’s healing demonstrates how Aboriginal men have had to cope with extreme marginalisation and demonisation by mainstream society, as well as carry inherited trauma. Many men’s lives have been characterised

by disempowerment; low self-esteem; excessive alcohol and other drug use; early exposure to family and domestic violence; unemployment and economic disadvantage; incarceration and recidivism; and self-harm and suicide. Understanding these realities of men’s lives offers an alternative to stereotyped understandings. Aboriginal women understand this reality, and it is often they who have led in the creation of men’s programs and men’s places in communities on the basis that “men are hurting too” (Blagg et al., 2018; Sam, 1992). In the early 1990s, Maryanne Sam, a Meriam Mer woman of the Torres Strait, authored *Through Black Eyes: A Handbook of Family Violence in Aboriginal and Torres Strait Islander Communities* (Sam, 1992), in which she explained:

From the start of research it became apparent that people felt family violence was a Community problem and therefore everyone in our Communities—men, women and children—needed to be made aware of the issues and to be involved in the search for solutions. (p. 21)

The starting point and rationale for the project, as set out in the State of knowledge review, was the growing disquiet, particularly expressed by Indigenous scholars and activists, regarding the presumed universal applicability of the mainstream domestic violence paradigm. The rationale, and justification, for this research was that there is sufficient concern about the limitations of the mainstream perspective to justify and warrant the exploration of alternative strategies and ways of thinking. An alternative narrative has emerged, arguing that family violence experienced within Aboriginal and Torres Strait Islander communities is situated in the historical context of colonisation, systemic disadvantage, cultural dislocation, forced removal of children and intergenerational trauma.

The mainstream response to domestic violence, criticised for being “formulaic” and rigid by some experts (Nancarrow, 2019), was initiated on the basis of feminist research in the United States (see for example Dobash & Dobash, 1979, 1992; Pleck, 1987) and is undergirded by the belief that violence against women is a reflection of gender inequality, patriarchy and male power. Australian literature on violence in Aboriginal communities increasingly questions this thesis and draws attention to other factors. While a search of the “international” literature on domestic violence leads

inevitably to the Duluth model of intervention and a heavy reliance on criminal sanctions (Pence & Paymar, 1993), searching through the literature on settler colonisation in societies such as Australia, Canada and New Zealand opens up alternative pathways, where violence in Indigenous society is set in the context of settler violence and the debilitating impact of residential schools, mass child removal, cultural dislocation and cultural genocide (see Rowe & Tuck, 2017; Tuck & McKenzie, 2015; Tuck & Yang, 2012; Wolfe, 2006). Solutions are posited in terms of greater empowerment of Indigenous communities and strengthening, rather than unravelling, Indigenous kinship mechanisms.

Furthermore, this research took place at a time when mainstream methodologies—those that tend to privilege the views of non-Indigenous experts in the academy, policy forums and think tanks—are being called out for their ethnocentrism and their neglect of other paradigms of knowledge. Māori scholar Linda Tuhiwai Smith (2012, p. 30) describes research as “one of the dirtiest words in the indigenous world’s vocabulary”. Western research methodologies are far from being a neutral, universal mechanism for understanding the world; they are deeply implicated in the colonial project and have served to validate and normalise white possession (Moreton-Robinson, 2000; Smith, 1999). Western criminological research, for example, has been accused of reinforcing stereotypes of Indigenous criminality, risk and problems through its positivist analysis (Anthony & Sherwood, 2018; Blagg & Anthony, 2019; Marchetti, 2017). According to Blagg and Anthony (2019, p. 85), Western criminological research “purports that the criminal justice system is simply a rational response to a set of problems arising from irrational criminal behaviour, rather than seeing crimes and the enforcement of criminal procedures as socially and historically constructed phenomena”.

Deficiencies and weaknesses of Western research methodologies

Historically, Western research methodologies have been deployed to highlight deficiencies and weaknesses within Indigenous culture, implicitly and explicitly affirming the superiority of Eurocentric lifestyles, beliefs and values, which

have been elevated to the status of a generic, universal norm (Archibald et al., 2019; Kwaymullina, 2016, 2018; Laycock et al., 2011; Moreton-Robertson, 2000; Smith, 1999, 2012). Settler colonial theories, initiated by the work of critical anthropologist Patrick Wolfe (2006, 2013) and Indigenous scholars such as Mark Rifkin (2017), maintain that the settler colonial project is concerned with eliminating Indigenous peoples as bearers of sovereign power as a necessary step in dispossessing them of land. Indigenous peoples, including Indigenous women, need to be reconstructed as something other than sovereign, cultural beings. As Heidi Kiiwetinepinesik Stark (Turtle Mountain Ojibwe) (2016, p. 1) argues in relation to Canada and the United States, imposing colonial law was “facilitated by casting Indigenous men and women as savage peoples in need of civilization and constructing Indigenous lands as lawless spaces absent legal order”. Stark (2016, p. 1) notes that the process of criminalisation necessitated the “forceful violent constructions of Indigenous men as savages, criminals, and lawless figures” and Indigenous women as “deviant, immoral beings” in need of domestication. Positioning Indigenous women as helpless, hopeless victims of Indigenous men serves to legitimise state intervention in the lives of Indigenous people.

Positivist research

Positivist research methods have been criticised for focusing in on a particular, discrete “problem”—such as alcohol use, domestic violence, or juvenile crime—and then exploring the social deficits that create the problem, often without reference to the views and experiences of the Indigenous people they investigate. However, as Smith (2012) maintains, this “problematizing” of Indigenous peoples is an obsessive reflex for Western research and is profoundly embedded in the normative structures undergirding Western institutions, such as universities.

The assumption that it is possible to construct general laws of human behaviour, valid in all circumstances, has been a feature of Western thought since the enlightenment (Mignolo, 2011). Positivist sciences presuppose there is only one reality, and that it can be ascertained, measured and objectified through the deployment of objective research techniques. This has led, in particular, to what de Sousa Santos (2007)

calls “cognitive injustice” or “epistemic injustice”. Cognitive *justice*, on the other hand, involves accepting that there is a plurality of forms of knowledge and working to affirm the validity of different ways of being in the world. Hence, the worldviews of Indigenous women are grounded in a particular constellation of historical, spiritual and cultural factors and cannot be constrained within a framework derived from women in mainstream settings. It is now abundantly clear that many Aboriginal women do not share the priorities and aspirations of women whose experiences of Australian society are shaped by white privilege (Moreton-Robinson, 2000).

As we outlined in the State of knowledge review, mainstream theory has also been criticised for reinforcing the belief that the settler state’s system of law enjoys universal legitimacy, while invalidating Indigenous legal systems and their forms of governance (LRCWA, 2006). This is sometimes achieved subtly by, for example, referring to Aboriginal *lore*, rather than law, and downgrading the importance of Indigenous law to the status of folklore (Grosfoguel, 2011). Similarly, the notion of *customary* law reduces Aboriginal Law to an exotic cultural artefact rather than a force in people’s daily lives. As Chris Cunneen (2018, p. 3) argues:

Historically, Indigenous people in Australia were seen as not belonging to “civilised nations” that could be recognised as sovereign states governed by their own laws. Indigenous law was seen as merely customary—an essentially imperialist concept which negated the integrity of Indigenous law and imposed the centrality of the law of the coloniser.

However, as a number of reports (ALRC, 1986, 2018; LRCWA, 2006; Northern Territory Law Reform Committee, 2003) have demonstrated, Aboriginal forms of Law survived colonisation and remain a fact of life in many Aboriginal communities. Aboriginal Laws have not been eradicated, and Indigenous peoples globally are seeking to build new decolonised structures, based on what Alfred (1999, p. 131) refers to as a resurgent Indigenous “spirit and consciousness”.

Mainstream gendered accounts of domestic violence have also been criticised as inappropriate for Aboriginal and Torres Strait Islander women. A number of Aboriginal women question

the relevance of gender inequality as a driver of violence in Aboriginal communities, arguing that this is a Eurocentric construct that describes relationships in Western capitalist societies where the emergence of distinctively public and private worlds (with women consigned to the latter) created the basis for women’s oppression (Atkinson, 1996; Behrendt, 2002; Kelly, 2002; Langton, 2018). Some Aboriginal women maintain that they have always had gender equality, evidenced by the fact that they have possessed their own laws and dreaming, patterns of governance, and roles in relationships to the Earth and to the community (Blagg et al., 2018). In this narrative, colonisation, rather than patriarchy, is the precursor to family violence.

Aboriginal governance and the research team

The project had strong Aboriginal governance measures in place, including Aboriginal and Torres Strait Islander project leadership, an Aboriginal and Torres Strait Islander advisory group and Aboriginal partner organisations. The project was guided by our senior research advisor, Professor Victoria Hovane (an Aboriginal woman from Broome in the Kimberley region of Western Australia); an expert research advisory group drawn from Aboriginal members of the Aboriginal and Torres Strait Islander Peoples and Community Justice Centre’s Reference Group (Law School, UWA); and our partner organisations. To ensure that our research aligned with the aspirations of Aboriginal and Torres Strait Islander peoples in the communities we were researching, we formed partnerships with the following prominent Aboriginal and Torres Strait Islander organisations:

- Gawooleng Yawoodeng Aboriginal Corporation Women’s Crisis Accommodation Centre, Kununurra, Western Australia
- Kimberley Aboriginal Law and Cultural Centre (KALACC), Fitzroy Crossing, Western Australia
- Mornington Island Justice Group, Queensland
- Catholic Care, Tiwi Islands, Northern Territory
- Martu Kanyirninpa Jukurrpa (KJ), Newman, Western Australia

- Darwin Aboriginal & Islander Women's Shelter, Darwin, Northern Territory
- Darwin Indigenous Men's Service, Darwin, Northern Territory.

Two respected Aboriginal researchers, Donella Raye (Jabirr Jabirr and Bardi) and Teejay Worrigal (Gooniyandi and Gija), conducted fieldwork in the communities.

In addition, the research team comprised non-Indigenous researchers, Professor Harry Blagg and Dr Tamara Tulich, and Ms Suzie May (research assistant and project manager). We were aware, as white researchers, that our standpoint is framed by our experiences of privilege; by our cultural, racial, class and gender positions; and by living within the dominant worldview of the coloniser (Walter, 2016). Unacknowledged and unproblematized, our standpoints can limit the frame of our research, closing down alternative narratives, experiences and understandings (Walter, 2016). In coming to this research and our role in it, we have been influenced by the work of Adam Barker (2010) and Clare Land (2015) on alliances and solidarity, and Regan (2006, 2010) on “unsettling the settler within”. We are also influenced by writings on white fragility and decentering whiteness (DiAngelo, 2011; McLaren, 1997) and Tuck and Yang's (2012) work on decolonisation and “settler moves to innocence”.

A participatory and strengths-based approach

Our approach to research has been guided by the *National Statement on Ethical Conduct in Human Research 2007* (the National Statement) and AIATSIS GERAIS guidelines (AIATSIS, 2012) which favour a “strengths-based approach” that sees Aboriginal Culture as the core strength of Aboriginal communities and embodies the principle of free, prior and informed consent (Kwaymullina, 2016, p. 443). Ethical approval for this project was received from the Human Research Ethics Committee of the University of Western Australia (approval number RA/4/20/5000). Our focus, in discussions with our partner communities, was on those aspects of Law and Culture that promote social integration

and offer pathways towards greater community safety and healing, rather than seeking out deficits and deficiencies. Therefore, we used a semi-structured interview method, informed by appreciative inquiry and yarning methods, as essential to complying with the National Statement and AIATSIS guidelines. This allowed participants to define key issues, with researchers using “prompts” to flesh out topics of interest. We cannot claim to have employed a co-design model because a number of the questions we asked were formulated in advance of the meetings (to meet the UWA Human Ethics Committee and funding body requirements), however partner organisations were able to see the questions in advance and a number made changes to make them more accessible, and/or added material. Only a qualitative and participant-led approach was sensitive enough to tease out the nuances and complexities of cultural issues in different places. A key element of the methodology was the use of Aboriginal and Torres Strait Islander community researchers who could relate to the community members through shared experience, language and culture.

The data were captured in a written form, no audio-tapes were used, and the notes were circulated within the research team. We did not use a qualitative data analysis software, such as NVivo; rather, we identified key themes in the narratives. The research questions guided, but did not dictate, the discussion flow or the report writing. Material has been stored in a locked desk in Professor Harry Blagg's office and will be maintained in accordance with UWA's Human Research Ethics guidelines. The partnership between researchers and communities was founded on open and honest discussion about the potential benefits of the research and the free, prior and informed consent of the groups involved as participants. The partnership meant that we respected the knowledge shared by communities and did not attempt to subject it to “scientific” scrutiny or verify it in relation to another group. “Power” in research with Aboriginal peoples is enforced largely through employing Western cultural norms as an assumedly “neutral” and value-free means of establishing what is knowledge and what is not. We employed an approach to the research that did not challenge the truth claims of partners but shared in a process of clarifying and validating place-based Aboriginal knowledge.

From August–December 2019, members of the research team travelled to the six research sites (Tiwi Islands, Mornington Island, Fitzroy Crossing, Kununurra, Newman and Darwin) and held yarning groups with community members, including Elders and cultural leaders. Separate groups were made up of Aboriginal men and women to deal with potentially gender sensitive issues, facilitated by a researcher of the appropriate gender. Our partner organisations identified appropriate individuals within the communities to speak on the issues relevant to the project, and ensured the research was conducted at “culturally secure” locations.

In total, 161 men and women participated in the groups. This included 12 women and six men on Tiwi Island; 23 women and 35 men in Darwin; 12 women and four men in Kununurra;² 12 women and eight men on Martu country; 15 women and 12 men on Mornington Island; and 15 women and seven men in Fitzroy Crossing.

Research questions (employed as prompts rather than interrogatory questions) were developed in consultation with each Aboriginal partner organisation. They covered issues such as the following:

- How do Law and Culture influence behaviour in communities?
- How would violence and related problems (alcohol, humbergging, jealousy etc.) be responded to under Law?
- To what extent is Law (and processes) still used? In what instances might Elders and Cultural Bosses prefer non-Indigenous law to take its course rather than Law?
- What kinds of punishment might communities use against wrongdoers?
- What can Law and Culture offer for victims of violence to be safe?
- What can Law and Culture do to heal conflict and trauma?
- What role do the Elders see for themselves to work alongside non-Indigenous justice personnel, such as judges and magistrates?
- Do they find the use of temporary banishment from the community helpful?

² Unfortunately, many of the men who were due to attend the group in Kununurra were prevented from attending for reasons beyond their control.

- Do they tend to deal with families as a whole, rather than with discrete “victims” and “offenders”?
- Are outstations and other on-country sites being used in healing and could more be done to make them better equipped in this role?

Information for participants

In keeping with the National Statement and AIATSIS guidelines, participants were provided with a participant information sheet and a participant consent form (see Appendix B for both) if they agreed to participate in the study. However, we acknowledge, too, that ethical research with Aboriginal or Torres Strait Islander participants is “not neutral territory” but laden with “racial, cultural, social and political assumptions” (Walter, 2016, p. 87).

Rights, respect and recognition

The non-Aboriginal researchers on the team were guided by the senior research advisor, the Aboriginal research advisory group and our partner organisations. We employed a collaborative approach to the kinds of questions that were asked during the fieldwork and how these were phrased with cultural sensitivity. Partner organisations, with input from the research advisory group members, ensured the research adhered to AIATSIS guidelines.

We carefully identified a variety of communities to engage with to ensure that our research reflected the diversity of groups and communities in Western Australia, the Northern Territory and Queensland with strong sites of traditional Law and Culture, and we did not generalise across communities. The rationale for choosing (relatively) strong sites of traditional Law and Culture was for us to be able to isolate and identify core values, practices and beliefs that, woven together, form a consistent pattern of social norms. These may be embedded through ritual and ceremony, respect for avoidance rules, proximity to country, vitality of women’s law (not just men’s law), maintenance of language, and the deterrent effect of potential traditional punishment (or contemporary variants such as banishment). We were not intent on identifying a simple formula that could be transported elsewhere to places

where Law and Culture is not as strong. The results of this research could, however, offer support to groups in urban and rural parts of Australia who wish to revive aspects of traditional Culture by, for example, holding men's and boys' gatherings on-country and women's and girls' gatherings on-country, creating strong men's and women's committees, cultural healing initiatives, recuperating songs and dancing, and so on.

The project set out from the premise that adherence to strong Aboriginal Law and Culture (particularly in matriarchal societies) creates conditions that guard against the abuse of women and children. The overall aim was to create space for a distinctively Aboriginal response grounded in Law and Culture and uncoupled from the domestic violence paradigm. The project did not seek to develop protocols about how to work with Aboriginal and Torres Strait Islander communities or evaluate the impact of culturally based perpetrator interventions. Instead, the intent of the research process was to provide a conceptual and theoretical foundation to inform and underpin future work. As outlined in our participant information sheet and consent form (see Appendix B), we respected the rights of individuals to participate freely in and dispose of research material. We also, as outlined in these forms, respected the rights of Aboriginal peoples to maintain, control, protect and develop their cultural heritage.

Negotiation, consultation, agreement and mutual understanding

Cultural protocols were respected by ensuring we held meetings with Elders in the research sites, through our partner organisations and under the guidance of our senior research advisor and research advisory group. For consistency, we have modelled our participant information sheet and consent form (see Appendix B) on the AIATSIS versions to ensure that the research project had free, prior and informed consent, and included a plain English statement signed by participants.

We ensured that Aboriginal and Torres Strait Islander peoples were equal participants in the research process by prioritising Aboriginal and Torres Strait Islander voices and knowledges; developing research partnerships with key Aboriginal and Torres Strait Islander organisations; using

community researchers in each community; having respected Aboriginal researchers as part of the research team; and drawing on the expertise of Professor Victoria Hovane, as senior research advisor, and the research advisory group. It is essential that Aboriginal and Torres Strait Islander people are full participants in research projects that concern them, share an understanding of the aims and methods of the research, and share the results of the work.

To ensure maximum community ownership, we based ourselves in community organisations when visiting the research sites and ensured formal and informal discussions took place. Organisations shared in the research process by identifying other Aboriginal and/or Torres Strait Islander organisations with whom it was important to engage. Importantly, the research captured local cultural perspectives from participating communities through a process that is valued for its methods and documented these local knowledges in a format that speaks to governments, policymakers and practitioners. The availability results gleaned from such methods will support Aboriginal and Torres Strait Islander organisations to assert their rights in negotiations with mainstream systems utilising this evidence-based knowledge. This research also provided local benefits to the communities by developing local worker capacity to understand research, its methods and its processes. It has achieved this by actively involving partner organisations and their workers in the various stages of the research. By doing this, partner organisations and their workers were able to observe the methods in action and, as such, were able to see how to undertake those activities.

Participation, collaboration and partnership

It is essential that Indigenous peoples are full participants in research projects that concern them, share an understanding of the aims and methods of the research, and share the results of the work. At every stage, research with and about Aboriginal and Torres Strait Islander peoples must be founded on a process of meaningful engagement and reciprocity between researchers and Aboriginal and Torres Strait Islander peoples. It should also be recognised that there is no sharp distinction between researchers and Indigenous peoples. Indigenous peoples are also researchers, and all participants

must be regarded as equal partners in a research engagement (AIATSIS, 2012, p. 2).

Partners provided community researchers with knowledge of local Law and Culture. They took the leading role in defining areas of inquiry and ensuring that cultural protocols were adhered to. Partner organisations organised community meetings on sites of their choice and provided interpreters where required. They led in terms of providing cultural security for participants. They were able to vet and critique any written materials, which were not distributed without their acknowledged consent.

In line with these roles, each partner organisation was paid. The payment reflected the amount of work necessary to successfully host workshops in communities where people may have had to travel long distances to participate, and required accommodation; and the costs of translators, cultural navigators, food, and four-wheel drive car hire and flights where necessary. The payment also covered administrative costs and the fact that some communities wished to pay sitting fees.

Conclusion

The aim of this project was to create space for Aboriginal and Torres Strait Islander cultural perspectives in the family and domestic violence literature and commentary. The project embedded Aboriginal governance structures within it to ensure it worked with Aboriginal ways of knowing, being and doing, and in partnership with Aboriginal peoples. Our partnership model ensured considerable local ownership of the research process and grounding in the local environment, and the research was underpinned by a participatory model of research that respects and integrates Indigenous perspectives and knowledge. This knowledge cannot be simply assimilated or integrated into mainstream knowledge systems; indeed, it challenges them and raises demands for a radical alternative grounded in Aboriginal Law and Culture. We found wide support from Aboriginal participants for a fresh approach to the family violence issue that takes recognition of the role played by past and ongoing patterns of colonisation in the disempowerment of Aboriginal people. The key message from

this report is that mainstream systems need to talk to, listen to and work with senior members, both men and women, of Aboriginal communities, whether they are described as Elders, knowledge-holders, Cultural Bosses or Respected Persons.

The importance of listening to these senior people is acknowledged by Aboriginal community leaders. As respected Mardoowarra woman, Dr Anne Poelina recalls (People, Culture Environment, 2014, p. 19):

“In terms of my life over the last 10 years, the opportunity to engage with Elders and other leaders who have been able to reinforce and validate who I am as an Indigenous person has been very, very important. It is very important to have Elders or leaders who can work with young people, who won’t judge them, who are there to support them and build their resilience and resourcefulness.”

Key findings

This section provides a brief thematic overview of issues raised by Aboriginal people in the research sites. We have developed diagrams to highlight and explain our findings, which are set out at the end of this section.

Law and Culture

The sites varied in relation to the extent to which Aboriginal forms of law, and legal structures, continued to operate. In all sites, however, Aboriginal Law remained a feature of daily life, particularly in relation to what one senior woman in Fitzroy Crossing referred to as the “skinship” system, which references the complex, intricate web of mutually binding duties and obligations that tie people together within the community:

Culture is living way for people ... Skinship is our constitution. Skinship—before alcohol came in, played biggest role ... Each Elder holds portfolios like government. One person is a speaker for that and so on like that. We need to identify the right people. Language is the core of all of these portfolios. That’s our identity.

However, communities differed in the strength and depth of Law and the continuity of important cultural practices, such as skin groups or moieties, as the basis for maintaining social order and harmonious relations and ensuring cultural continuity.

All of the research sites agreed that Aboriginal communities struggle to maintain Law and Culture and that settler law and forms of governance constantly undermine the authority of Elders. As noted by some community members in Fitzroy Crossing, “Culture is broken”. Another Elder from Fitzroy Crossing added, “It’s not that Culture is dying on its own, *gardiya* [white] law is killing it.” The Elder continued: “Kimberley still have Law and Culture and Language. It needs watering and fertilising from the Western world.” The imposition, from above, of mainstream social and legal norms constantly threatens to unravel the fabric of Law and Culture: “White men need to recognise our Law and Culture and Language, government white people, before we can sit together to talk about these issues.”

Participants reflected on the damage done to Culture and belief systems by religious and government missions, and how this has, in turn, led to more violence and alcohol use in communities. On Mornington Island, where Law and Culture are tied to a range of sea stories and dreamings, for example, Elders lamented that “people’s relationships with the sea are broken; this is what brings family violence”. This was said against a background of rising rates of suicide and early death. As one female Mornington Island Elder said:

Funerals are a weekly occurrence especially for renal failure/diabetes. It adds to grief and trauma and stress in community. My tears are all dried up now. We don’t cry anymore. We just sit down and listen to funeral service. It affects us because we are a close community.

Aboriginal and Torres Strait Islander family violence

Participants across all of the research sites argued that the mainstream system “selects out” which elements of Aboriginal Law and Culture are acceptable, and which are not, echoing concerns raised in the literature. Watson (1997, p. 58), for example, laments, “They examine which part of indigenous law they can splice and incorporate into the colonial system of laws and which unsavoury, uncivilised parts are best left out.” As one participant in the Darwin men’s circle said, “They don’t seem to understand that our Culture and our Law is very different to white culture and law, we do things differently.” For example, elements of the adversarial approach which encouraged defendants to deny guilt are alien to Aboriginal notions of justice that are based on truth-telling from the outset. There was unanimous agreement that the mainstream justice system does not prevent or adequately penalise family violence, nor does it provide a framework for healing.

Participants also highlighted the importance of cultural values and cultural obligations. For example, an Aboriginal woman in the Northern Territory said:

If our culture is encouraged in our communities then young people learn about their culture ... they learn about their cultural obligations ... they wouldn’t be fighting so much ... we won’t have all these problems ... young people need to know what they can and

can't do ... they need to learn proper way ... who has authority to growl them ... they need to learn respect ... they need to learn to respect themselves ... they need to learn to respect others ... right now some of them have no respect ... we want to discipline them but we get told that we can't ...

In relation to family violence, the mainstream legal system prevents Elders from enforcing Law and Culture: instead, they are discouraged or punished. For example, researchers were told that in a remote community in the Northern Territory an Elder who punished a young male offender following a family violence incident by spearing him was charged by the police and sent to gaol. Another Elder from Fitzroy Crossing noted the mainstream system stops them from using an effective method of reducing bad behaviour in the community. He described this system in the following terms: "If you did something wrong, you got a hiding, there was no more offending."

Similarly, male relatives of female victims are discouraged by Western law from fulfilling traditional roles of punishing male abusers of their kin. This has previously been an important mechanism for ensuring that men did not harm their wives. Now men fear that they will be punished by the mainstream law for fulfilling their obligations under Aboriginal Law, so women have been denied an important source of protection. A Mornington Island Elder said, "If there was fighting, we would sort it out through getting brother-in-law, uncle, cousin, close family to stop and make them listen so they walk away from fighting." This process is dependent on respect for authority structures and relationships, and it is seen as effective punishment for family violence.

Similarly, an Elder in Darwin said:

In Culture, uncles, brothers, cousins played a central role as protectors of women and children. They would physically punish violent men. Remove them from the community, banish them if they were really bad. Sometimes both parties would be growled by the community if both to blame and were neglecting children. Senior women look after and protect female victims.

And:

The white system does not recognise the rights of other kin to intervene, it's just between man and wife and the state—children are their property—but in our culture child rearing is carried out by uncles, aunties, grandmothers. They are not always consulted by government agencies.

Skin and kin

The breakdown of skin systems was identified as a significant problem across the research sites, with young people marrying outside of their skin groups, undermining Law and Culture and causing breakdown in kin relationships and considerable social problems. This leads to conflict and stress in communities and, participants believe, this is a cause of family violence, including feuds. But skin groups are still important. According to participants, young people still go through Law, and initiation still occurs in most communities. Men in Darwin said that initiation is critical in terms of sustaining Aboriginal Culture and offered an opportunity to show young people the right way to live: "We encourage initiates to spend time eating bush food so their bodies are healthy, nutrition is central to Culture, it is our medicine."

Elders in Fitzroy Crossing noted how skinship is still relevant and helpful in addressing contemporary issues using an example of how a community school used the skin system to deal with anti-social behaviour: "They had bullying in the school so they put them in their skin groups. Each skin has a responsibility to each other." They noted that using skinship in this way helped to reinforce this knowledge among the youth. A number of participants, however, lamented the damage inflicted on Law and Culture in modern society. An Elder in Fitzroy Crossing said:

Today, Law men are not always the best men. It used to be [in the Northern Territory and Kimberley] that men were chosen on the basis that they behaved like leaders—Elder women played a role in identifying these good men. A fact not always understood by whites. Now anyone can go through Law. The quality of cultural leadership is in decline.

In all research sites there was a uniform belief that Indigenous dispute resolution processes should be employed first and mainstream systems second (see Diagram 4 for example), but there were differing opinions about the relevance of physical punishment, with some communities seeing it as a necessary part of their Law and others seeing it as outdated. Men participating in the Darwin yarning circle said that it was no longer possible to identify Elders with the necessary level of sobriety and respect in the community to carry out traditional punishment in the right way, and often “payback” is carried out by close relatives after a few drinks, rather than Community Elders who have no axe to grind. Participants in the Tiwi Island women’s circle said that “serious” levels of violence needed to be left to the white system, with Aboriginal Law and Culture responsible for cultural healing, prevention and reintegration.

Alcohol has been the principle factor in the destruction of Law and Culture, according to a number of men. One man in Darwin said:

Law and Culture as we knew it, is dying out, white law is taking over. Even traditional ways of ending conflict have gone, people carry guns and knives not boomerangs and spears. Alcohol and drugs are the main problem, and they impact on everything. That’s the problem with payback today. Alcohol has taken over. There are other poisons too like petrol, home brew, glue, that make people mad and fries their brains. Alcohol creates death on the roads, overcrowded homes, violence, dirty people.

Partnership with community

There was a consistent view that Elders groups need to work in partnership with, but not subordinate to, police and courts. In Fitzroy Crossing, the women Elders noted, “We always have to fit into *gardiya* ways. We want to be driver of the vehicle. Our values, rules, all of that.”

On Tiwi Island, the Cultural Elders group run a process called “*Ponki*” which works with the police to intervene with skin group members who come into contact with the law (see Diagram 4). Relevant authority figures from skin groups work with the police to identify a diversionary alternative to court.

Working through skin groups ensures that the necessary authority is brought to bear on wrongdoers. On Tiwi, skin group systems remain strong, and people know which skin they are and generally conform to the rules governing relationships. Elders on Tiwi wanted to see greater recognition of the *Ponki* system by the mainstream justice system, including through having these Elders in court sitting with magistrates. There were also suggestions that appropriate men and women, perhaps linked to the local Night Patrol, should be part of the first response to family violence. This was because the police often “make things worse rather than better”. As one said: “Police go in all guns blazing, they don’t know the situation, or the people ... victims get arrested or served with a VRO [violence restraining order] ... it doesn’t work ... soon they will be back together and fighting again.” Research on remote Night Patrols (Blagg & Anthony, 2014; Blagg & Valuri, 2004a, 2004b; Walker & Forrester, 2002) maintain that they are an indispensable part of community-led initiatives to prevent violence and disorder in remote communities. They have been particularly successful when led by senior Aboriginal women in central and northern Australia (Blagg & Anthony, 2014). Across Australia, Blagg and Valuri (2004a) found that half of patrollers were Aboriginal women. They work through consensus and local knowledge and do not possess policing powers. Following the 2007 Intervention in the Northern Territory, Night Patrols were given additional resources, however training was centralised, and their roles restricted to a simple, mainstream “crime prevention” function. This has inhibited them from doing work that addresses women’s safety issues, as family violence intervention and prevention has become a specialisation of the police.

The community participants also said that the Aboriginal process is different to the white system in that most people within communities know each other: if a wrong is committed, they usually know who committed the wrong, and the wrongdoer is encouraged to speak the truth or “speak from the heart” and own up to their wrongful behaviour. An example of this “truth-telling” is the “Knowledge Tree”, where the wrongdoer is encouraged to make an admission of their wrongful behaviour. The Knowledge Tree operates at Bidyadanga community, in the Kimberley region of Western Australia, with the support of the police and magistrate. The participants said that this seems to be working in most

instances where offences or wrongdoing have been committed within the community. The system works through Aboriginal knowledge and by ensuring the “right people” are engaged. If someone offends in the community, including couples' fights and alcohol-related violence, Elders will work with police and gather the community together. They will come to a decision which might include temporary or long-term banishment, which involves going to another community or to an outstation. For example, an Aboriginal woman in the Northern Territory (Tiwi) said:

When we have problems and people misbehave or cause humbug they can be banished from the community ... sometimes they get banished from the [Tiwi] Islands ... they go to Darwin ... or sometimes they get banished to an outstation ... could be just out of the main town area or sometimes they go onto the other island [Melville Island] ... depends on what they do ... or who they are ...

Mornington Island men and women Elders informally use camps on the island to take men to who have been abusive to their partners. They are interested in using nearby, sparsely populated Bentinck Island, which belongs to the Kaiadilt clan group, as a place to send people who misbehave, and also a place for the reintegration of offenders leaving prison.

The Pilbara group (Martu) recently invited the magistrates and senior police to discuss community policing and justice issues with them on-country.

Women's Law

Women's Law was viewed as essential for preventing and resolving family violence, confirming calls made by Aboriginal women in the literature as well as recommendations in governmental reports about the presence of Women's Law, its value, and the need for it to be upheld (Aboriginal and Torres Strait Islander Women's Taskforce on Violence, 2000; Kelly, 2002; Watson, 2007). Women Elders from Kununurra said Law and Culture—especially Women's Law—bring strength and unity to the community. There was a general belief that Culture is the core of Aboriginal society: as one senior woman in Fitzroy Crossing said, “We live and breathe in a cultural world.” The women in Kununurra also use the presence of

Women Cultural Bosses and sacred women's objects in the women's refuge to keep women strong and to keep the men away. The staff said that this works because the men won't come near the refuge, or the women, if the Women Cultural Bosses are present. Another Fitzroy Crossing Elder suggested:

One way that Culture can help with DV [domestic violence]—the only thing I can think of is if daughters run back to the mothers—son-in-law can't/don't come near us. That's the kinship.

Women Elders in Fitzroy Crossing said that they are nurturers and healers within the community. If women are strong, the community is strong. The government needs to support more women's programs for when women leave a women's refuge. The women Elders also spoke about the important role of grandmothers in the everyday care of children. They noted that “for children, the grandmothers are first and then mothers”, indicating the strong voice grandmothers have in decision-making related to child rearing. As far as these women were concerned, Aboriginal Law and Culture had given them responsibility for family issues: it was their “portfolio”, as mentioned earlier. Men tend to have their own spheres of influence and responsibility.

Women also stressed the necessity of men's and women's Law to work together and men and women coming together to talk about family violence. Women Elders noted, “With DV, I've seen women brought the trouble too. My grandson experienced this with his mother-in-law.” They described that

victims of DV go to the women's centre. Women's with a 12-year-old boy [son] can't take him there. Males/men got nowhere to go to. They walk around the street, no support, no holistic wrap-around support. Children love their fathers. We need to look at both partners.

The women further explained, “the women work with the men”; “the men need women's support for men's business”; “they need to have their own programs to deal with their own issues”—whether those are grog or gunja or other things. There also needed to be work done with the whole family, not just the alleged wrongdoer: “We need family-level interventions.” There was a strong message that there was no point in getting one partner to recovery when the other

still carries trauma and addiction. For example, a female participant in the Northern Territory (Darwin) said:

Sometimes both partners can have problems with grog or alcohol addictions ... or if they are stressed out because of things that happen to them ... they start fighting ... one person might go to rehab and the other one is still drinking or taking drugs ... this can cause problems if they come back together ... the one who is still drinking or taking drugs or whatever ... they might put pressure on the other one to go back to the grog or drugs ... this is not good ... they need to both go to rehab or counselling ... or whatever ...

Government

Participants shared similar views on the role of government and government funding. There was a consistent belief across all of the sites that Aboriginal organisations had been steadily stripped of resources which have been reinvested in a mix of religious or affiliated organisations that have no roots in communities and little knowledge of Aboriginal issues. As noted by a male participant in Fitzroy Crossing:

There's been so much stripped from communities. CDEP [Community Development Employment Projects] gave resources to be self-determining—we had a strong voice. But the CDEP reform to Centrelink ended up with people coming into town. Where they gonna live? There's overcrowding and all those problems.

We heard how the mainstream law failed Aboriginal people, but also that government policies around family and domestic violence are not working either. Participants expressed a universal belief that these policies are designed to “break up” Aboriginal families, rather than strengthen them, and to deal with conflicts typical of mainstream society rather than the kinds of conflicts they experienced. They stressed that “Aboriginal peoples’ story is different” to non-Aboriginal stories, therefore they require different responses to their issues and resolving conflicts. The Elders in Fitzroy Crossing noted, “Workers need to work with the community—you made this your home, so you should learn about the community.”

They told us that government needs to work very closely with the people to come up with solutions and not to put something in place without their input. Community members in Fitzroy Crossing stated, “Respecting Aboriginal Law is important ... Law, language and Culture is important ... Culture is living way for people.” Women wanted the men to have access to more support and specific programs to deal with their issues. Women in Tiwi, Darwin, the Kimberley and Pilbara said that they have been requesting this for a long time but government is not listening. For example, Women Elders in Fitzroy Crossing spoke about the importance of working from a cultural base and the importance of men working with men. A male worker noted that for support, “men go to a mate’s place—woman won’t go there”. He noted that he uses “a storytelling approach with men” and that “taking men out on-country is important” for dealing with issues like family violence. He further noted that a significant barrier to this is that there are “no resources, transportation to take them out on-country”.

They told us that government listens too much to white feminists who are defending their own resource base within women’s refuges and government policy units. Community members in Fitzroy Crossing spoke about the centrality of trauma, including foetal alcohol spectrum disorder (FASD), in the violence that is happening in the community. They noted that “older people get tired, we’ve seen it, the trauma, it’s affecting the younger ones ... we need Culture and healing rehabilitation for children” to break the cycle of intergenerational trauma.

Women maintained that there are currently no culturally safe or appropriate services for Aboriginal men. The government has put funding into some non-Aboriginal organisations, mainly run by religious groups or their affiliates. Community members in Fitzroy Crossing noted that “counselling that’s being done is not done in a cultural way. The NGO [non-government organisation] they got, we still trying to understand them”. The Men’s Shelter in Darwin said that these programs are often not culturally safe or appropriate and tend to hold negative stereotypes of Aboriginal men. Similarly, Martu participants suggested that neither men nor women believe these programs to be useful for them—especially when considered against Aboriginal history and

the role of some of these religious groups in the dislocation and disempowerment of individuals and families from their country and Culture. As noted by both women and men in Fitzroy Crossing, “behaviour change programs are not suitable for Aboriginal people”. Women said that government has cut a lot of funding from other community services including policing. The abolition of Aboriginal police liaison officers (APLOs) in Western Australia was seen as a major setback for community–police relations. Martu men and women partners also wanted more support for men. They wanted more funding for men’s programs that will assist men to tackle their issues before they get caught up with grog or gunja or go to prison. They want facilities or places for men to go to yarn and to take them out to country to do healing with them before they get caught up with grog and gunja or start hurting their women and families. The Martu want these programs to take place on-country. They want the potential partners to go to Martu country with them to sit down and talk about how this might happen.

Men, women and culture

There was a fairly universal view that there needed to be a community-driven series of processes that would define, from an Aboriginal perspective, how men and women would work together in unison to refresh and rejuvenate Aboriginal Culture. Men’s and Women’s Law and Culture hold equal weight and importance, but white belief systems push them apart. Community members in the Kimberley and the Northern Territory noted that an Aboriginal approach to family violence recognises that men and women must work together. This goes against the prevailing orthodoxy which pits men against women on the assumption that men and women have different agendas, with women needing to be liberated from male control. White people remain ignorant about how Law and Culture work; respected men and women both need to be at the table, and white policymakers need to understand this. Aboriginal women consistently maintained that how Women’s Law works and how Men’s Law works is very different to the assumptions being expressed or portrayed in the mainstream (that is, that Aboriginal Culture and Law are primitive or violent and discriminate against women, and that there is no gender balance or equality): “Both men and women must work together ... ‘this is the proper way.’”

One female Cultural Elder (Darwin) said:

White feminist think that we are not equal to our men. They think that we don’t share in any power or decision-making. They think that we don’t have a say in the values within our community or Culture or Law. This is not right. Before white people came here—Women’s Law was very strong. It still is!

Women Elders do not believe they are subordinate to men or that they don’t have a say within the community—they believe that their place and Culture are being misrepresented and downplayed by white people who either do not understand Culture or have their own political agenda. There was a widespread belief that current family violence policies are too focused on gender inequality, mirroring concerns raised in the literature (Atkinson, 1996; Behrendt, 2002; Cunneen, 2009; Kelly, 2002; Langton, 2018; Nancarrow, 2016, 2019). There was also a widespread belief that current family violence policies downplay the significance of inherited traumas, jealousy, alcohol and other addictions on people’s behaviour (both men and women). On Tiwi Island they spoke of the “four G’s”—“grog, gunja, gambling and gossiping”—as being the major cause of fights and conflicts in families. For example, a female participant on Tiwi Island said:

There are a lot of issues that the community have to deal with on a daily basis so we decided to come together to talk about them ... after a lot of talking the community identified the four major issues causing problems with family fighting or conflicts ... we decided to refer to them as the four G’s ... grog, gunja, gambling and gossiping ... all of these things affect both men and women on Tiwi ... they are not part of our Tiwi Culture ... they are very destructive ... if we deal with these things then the community can restore Culture back to what it was ...

Punishment

Aboriginal people we spoke with saw a need for communities to be involved in decisions about appropriate punishments for wrongdoers. In some sites, communities wanted to be consulted by the courts, and in others they also wanted to be involved in providing sanctions against wrongdoers. Participants maintained that there already existed a range of sanctions open to communities (see Diagram 4).

For example, a female participant in the Northern Territory (Tiwi) said:

When someone does something wrong in the community the white policeman would take that person away and they told us we weren't allowed to get involved in the process ... we don't know what they are saying or doing with that person ... they go to jail ... we don't see them ... we want to be involved ... we want to know what is happening with people ... that's why we set up *Ponki* ... we have our own system or process for dealing with people who do wrong things ... we also have a number of options for punishment ... we can banish them from the community ... or ... we can put alcohol restrictions on them ... or restrict them from doing certain things ...

Another example comes from a Martu Elder who said, "We used to spear them or flog them in the old days if they do something really bad ... some places still do that."

Few communities still carried out their own traditional forms of physical punishment. As noted in Fitzroy Crossing, "We can't go and flog our kids out there—it's against *gardiya* law." However, all communities acknowledged that there were many positive aspects to traditional punishments such as spearing or flogging. The white system takes too long and this means conflict is protracted, whereas Aboriginal retribution is immediate and restores damaged relationships in communities. Once it is over, people get on with their lives. As described by a senior male Elder in Fitzroy Crossing, "The beauty of our way is that when something happens, we deal with it straight away and there's no ongoing trouble in the community—because it's been dealt with." The white system simply drags everything out: people in jail might need to wait years before they can atone to the community and this sometimes means that their families carry the burden and are hurt in their place, or the wrongdoing causes community unrest to the extent that the community can erupt in riots, widespread fighting or violence. All of the communities that were consulted believe they need to deal with the offending behaviour or wrongdoing as quickly as possible in order to prevent or deter this from happening, and for them to appear to be administering justice as quickly as possible.

The groups consulted believe the Aboriginal process is better than the white system because it deals with the wrongdoing and offending behaviour quickly, and the community is involved in the process. For example, the community process looks at whether the wrongdoer/s show remorse and admit to their wrongdoing, which means that the process can be very quick (or efficient), before punishment is determined. Justice is seen to be done for the aggrieved person or family, and essentially, this prevents a sense of injustice or unrest and maintains peace and harmony within the community. Punishments such as spearing, flogging or beating; isolation or banishment; reprimanding or shaming the offender; counselling; or spiritual, emotional and physical healing, can be used to deal with wrongdoing more quickly than the mainstream criminal justice system is able. In some places they still "sing" people or put a curse on those who are wrongdoers, even if they are a considerable distance from the community (see Diagram 4). "Singing" people, cursing them or using "black magic" is still a part of retribution in some places. We understand that only special members of the community have the power, and authority, to undertake this sort of punishment, and only when certain values are violated or in certain circumstances—that is, if sacred Cultural knowledge or Law grounds are violated or interfered with then this sort of punishment may be administered. Martu Elders get a "troublemaker" to live in another community for a while: in Marble Bar, for example, some people who kept fighting were taken to Hedland by police, with the endorsement of communities. On an informal basis, communities take people who are drinking and fighting to outstations, where they can dry out and receive counselling from Elders. If a person has been punished or banished, they need to earn respect to come back into the community.

There was a uniform view among participants that governments should support more work around healing or counselling before people get into trouble with the system: for example, getting off the grog or gunja or attending healing programs, which should be run on-country (see Diagram 4). Elders emphasised the need for preventative programs directed at young people, about how to be good Aboriginal men and women. Males, in particular, needed to be taught "not to use their women as punch bags".

Defending culture

We have alluded to the fact that Aboriginal communities do not always share Western views of the causes of family violence. This is consistent with the findings of previous research (see Blagg et al., 2018). Mainstream views were criticised by participants for ignoring the role of colonisation and past and present government intervention and policies (protection, assimilation, “intervention” policy in the Northern Territory, etc.) which have led to disempowerment and caused a breakdown in cultural systems and men’s and women’s roles and voices within them. They said that lawyers and anthropologists are not always listening to what they are saying and that “the *gardiya* ones that come in and work with us are influenced by their own cultural bias or baggage and don’t understand the role of men and women under our Law and Culture”. Even sympathetic legal practitioners are ignorant of the realities of life for Aboriginal people in remote communities. As a female Elder in Fitzroy Crossing explained:

We don’t have enough time to talk to the lawyers when they come to town to represent us in criminal cases. They only speak with us for a short time before they go to court. This is not right. It shouldn’t be happening. We should have a lot more time to discuss our issues before court. It should also be compulsory to have interpreters for all clients where English is not their first language.

Participants said that the breakdown in cultural systems has caused social disorder and dysfunction and a lack of understanding by the younger generations of the values and expectations that Elders are trying to instil in them. A lot of Elders, and in particular those from the Martu peoples, feel that their aspirations for their young people are no different to what white people want for their young people (i.e. the Elders want them to be healthy, happy, proud, confident, resilient, employed, and to become valued members of their community). Many participants expressed concerns that loss of Culture, identity and language, as well as feelings of disempowerment and hopelessness, are commonplace. People self-medicate, and lash out at each other. This is compounded when governments and lawyers do not listen to communities.

Despite this, women Elders in Fitzroy Crossing spoke about the strategies they are using to strengthen Law, Culture and language:

They doing Bunuba and Ngarinyin Culture camps; to do intergenerational teaching. There’s no agenda, just gathering together to do healing. We need to do healing first before we can go forward. Younger women had a say. Older women had cultural input. Language, knowledge, Culture is going to be passed down. We worked out a cultural model ... We setting up women’s groups, out on-country is our classroom, our pharmacy, our IGA, our healing, our wellbeing.

The Martu participants agreed during yarning group that this is something that they want for other Martu and their young people.

Racism and stereotypes

Participants continually said that communities are feeling stressed out or traumatised because they are marginalised by Australian governments and mainstream society, and that they experience ongoing racial and sexual discrimination, along with grief and sadness from deaths caused at the hands of governments, police, and suicides. For example, a Martu Elder spoke of the Canning Stock Route massacre and the trauma that this caused him and his family, because they experienced this and still remember it to this day.

Another example is the constant negative media attention and portrayal of Aboriginal women or men, such as in the case of Adam Goodes. The participants in the Northern Territory also felt they receive second-class treatment within the criminal justice system. A participant in the Northern Territory (Darwin) said:

The white system is not fair ... If a young white male... can shoot and kill four people and not be shot by police, and a young Warlpiri man in Yuendumu is shot dead whilst apparently sleeping or getting up from sleep ... this is not right.

The case of Ms Dhu was raised in Western Australia; she died in police custody after reporting being a victim of

domestic violence and being detained by police to pay off an outstanding fine. Participants also remarked on the suicide of numerous young people within detention centres, prison or communities. There was a widespread belief that the mainstream justice system cannot deliver safety to Aboriginal women like Ms Dhu because of systemic racism and indifference to Aboriginal suffering.

Communities' sense of alienation and disempowerment extended to the lack of involvement of Aboriginal people in land management and land decisions. An Elder in Kununurra said that "if country is not looked after, people get sick". Martu people are connected to their country and have been for a long time, and want to show non-Aboriginal people their country and how they look after it. They want also to show them their Law and Culture and how things work in their communities.

Grog is poison

People sometimes turn to alcohol or drugs to deal with their stress or trauma. The Martu peoples call grog "*wama*" or "poison", and say that this poison was brought here by white men and is killing their communities. The Martu leaders want to see *wama* removed from their communities and for people to attend on-country alcohol rehabilitation and healing. A Martu Elder said that "Roebourne prison is not the place for Martu to dry out and get off *wama*. It is really hard."

Some younger males within the Northern Territory said they would like to see alcohol banned from the community entirely. Others wanted to see further restrictions. The young males also expressed their dissatisfaction with senior male members of their family group (biological and through skin group) who display drunken behaviours or other bad behaviours while intoxicated. They say that this behaviour not only shows that the person has no dignity and respect for themselves but also that they have no respect for other people around them. A Fitzroy Crossing Cultural Elder said that "alcohol has no country", and "alcohol has no Culture"; "Culture gets thrown out the door."

There were some differences of opinion regarding blanket bans on alcohol, however. Restrictions were generally welcomed but total bans were seen as counterproductive, creating a flourishing black market where even more family resources are expended in the pursuit of alcohol. In Kununurra we were told of slabs of beer changing hands for \$200, and bottles of Jim Beam for \$450. Further, there was some anger that communities were not being listened to when decisions about restrictions were taken. Mornington Island Elders told us "we are now known as Home-brew Island". They said:

Grog is a problem, especially home-brew. Junki Laka group was angry that alcohol management plan imposed by Queensland Government without consultation of community. Closing the pub has resulted in the toxic effects of home-brew and ensuing violence. Elders need more control over home-brew, e.g. banning excessive quantities of sugar, cordial and vegemite (as well as alcohol-based household cleaners) that are used for home-brew in the store.

People now wander around the community carrying what they call a "ten litre" which is a plastic container full of home-brew. Junki Laki Elders said that drinking it makes people mad and increases the rates of diabetes and other health hazards.

Aboriginal communities' sense of disempowerment is compounded by their lack of control over media, especially social media, which undermine their values. On Tiwi, they also believe that other cultures are infiltrating the community, and diluting Culture. Some of these were reported to be having a bad influence—for example, in the case of young people, access to the internet, DVDs, and Netflix where violence in other cultures is shown. They said that a lot of young Tiwi Islanders think that they are "Black American gangsters", and model their behaviours on this culture, and not their own Tiwi or Aboriginal or Torres Strait Islander Culture. Two young Tiwi males said that "we need to teach them their own Tiwi Culture. This will make them strong. They can learn to be proud of their identity and who they are."

Offenders, perpetrators, wrongdoers

The legalisation or white law generally refers to “offender” or “perpetrator”. The expected results of the criminal justice process where family violence is concerned usually come via restraining orders, misconduct restraining orders, or criminal charges such as assaults or more serious offences such as aggravated assault, grievous bodily harm or attempted murder, manslaughter or murder—which can result in a term in custody or, sometimes, other alternatives to prison. These alternatives may include (for less serious offences or incidents) rehabilitation or counselling (often run by non-Aboriginal people). Aboriginal participants found it difficult to comprehend the “offender” or “perpetrator” language and what this means in their language. The term that most sites preferred to use is “wrongdoer”. For example, a Martu person said: “We don’t use that word in our language ... that is white man English ... we call people who do something wrong—‘wrongdoers’ ... or we use other words.” Other sites said similar things and said that they preferred to use the word “wrongdoer”.

A senior Martu Elder said that people need to be guided by “the three C’s”—choice, challenge and change. First, it is your *choice* to drink or not to drink—the first thing to consider—only you can decide that. Second is the *challenge* to stay off the grog or gunja—to stand up to family or others pressuring you to drink or to celebrate an event with alcohol or gunja—to not allow yourself to be tempted to drink or go back to the grog or gunja—this is hard. Finally, learning to *change*—you must learn to change your behaviour/s in order to move forward and be better for your family—you must change so that you don’t hurt your family and you must change for yourself. Martu men said they were still subject to tribal Law. They get punished for doing something “wrong-way” or against Law and Culture.

Victim/s

Discussions found that victim services were virtually non-existent in remote communities despite high rates of victimisation, particularly of women. Women in Darwin said that there is nothing in place for them, despite there being “a whole industry based on victims and victim support

systems”. Aboriginal women simply can’t attain victim status. The women in Darwin said that non-Aboriginal women seem to get referred to services closed off to Aboriginal women, often because they are not treated the same way by police and government services, or don’t “present” in a way that will elicit sympathy. The fact that many women will return to their partner seems to invalidate their claims of being a victim in the eyes of police. It was suggested that Aboriginal community organisations need to be funded to provide ongoing victim support to women who *stay in relationships*, and to encourage men to seek help. This kind of thinking runs counter to mainstream beliefs that the best thing a victim can do is leave a relationship. However, the reality is that this is not an option for many Aboriginal women, or not something that can occur without considerable, and lengthy, support. Also, some participants found it difficult to understand the concept of “the victim” and how this translates across various language groups. The Martu people said that there isn’t a word in their language/s that specifically relates to “victim” or how this word is used in the legal system and said that this is “white man word and white man English”. Their system doesn’t focus so much on the victims but on the wrongdoer and their behaviour/s. According to Martu participants, and Northern Territory participants, their approach looks at the role of both sides in violence; there is no crude “victim/offender” binary. They said that the “offender” is not always the male and the “victim” not always the female.

In the Northern Territory a group of young Tiwi males said that people need to take responsibility for their actions or behaviours and the focus should be on the wrongdoer and their behaviour so that they can try to change it. If they change this then there should be no “victims”. This is seen in Diagram 6, from the Tiwi fieldwork, where the wrongdoer is at the centre. The Martu Elder, as noted, also advocates “the three Cs”—choice, challenge and change—as a way to alter behaviour.

A number of participants also acknowledged that Aboriginal women are often the “victim”, but they too can cause problems (i.e. because of the four G’s, as they refer to it on Tiwi: “grog, gunja, gambling and gossiping”)—and men don’t report them

to the authorities or the police because of shame, including the shame in their partners' behaviour and not wanting outsiders to judge their partners or them. Aboriginal men said that if they react to disrespectful, aggressive or bad behaviours by women, they are usually the ones being charged or reprimanded. They say this is very disempowering for them as members of the family and the children think they are weak because they appear powerless and can't fix the problem. They lose respect and authority within the family unit. Sometimes when the women gamble and lose all the money to gambling and there is no money for food, this can cause arguments or tensions in the household. Sometimes, the money is spent on grog or gunja and there is no money for food. Their children see this sort of behaviour and think that the bad behaviour is okay—irrespective of whether it is the woman's or man's behaviour—then arguments start.

They also said that sometimes it is difficult for the police to work out who the “victim” is because of arguing, drama and confusion. The participants said that men generally get removed or charged because of the perception or policy around women's safety. But we also heard stories of women being arrested or given a temporary exclusion order or restraining order because when the police arrive she is the one who makes the most fuss as the hurt party. There was a strong feeling among participants that more women are now being charged with assaults or other behaviours against men because women have had enough of the violence and disrespect. Some female participants said that women also suffer stress or have alcohol or other drugs issues that can lead to jealousy or other bad behaviours and that women need to be counselled to deal with this. The women at Fitzroy Crossing, Kununurra and Darwin reported similar things. They said:

Women need to deal with their issues too because they have problems also around alcohol, drugs, jealousy or gambling ... they need to deal with these things before they get out of control ... and ... before the behaviour leads to addiction ...

Place-based services (on-country healing)

Across the research sites there was a strong belief that there was a lack of adequate place-based services to deal with

alcohol, drug issues or mental health issues before things get out of hand. A number of young men on Tiwi Island said they would prefer to have no alcohol on the Island (however, see the earlier discussion on Mornington Island) and for the police to step up drug screening when people enter the island or do random drug searches to stamp out drugs on the island. We note, however, that participants at the Darwin Aboriginal Women's Shelter said that when offenders are banished from Tiwi Island or other communities for drinking or drugs, they travel to Darwin and continue the same bad behaviours. There is no one supervising them or assisting them to get help to get off the grog or gunja. The rehabilitation facilities appear to participants to be full. The general view was that these programs should be delivered on-country, not in Darwin.

Participants said that if Law and Culture were strengthened for both men and women—and there were proper facilities to provide support—the men and women would be able to deal with their issues separately and sort them out. They recommended “healing” camps and space where personal issues could be dealt with and people could receive proper mental health support. Women in Kununurra said there should be “healing” programs designed to deal with men's and women's business. The women should have access to this after they leave the existing women's refuge.

Working holistically or separately?

The general consensus from non-Aboriginal worker participants was that the family violence system and responses generally deal with “victim” and “perpetrator” separately, and not with the family as a whole. They said that during the initial conflict or dispute, generally the parties were separated by the police, and the victim (woman) removed from the home and taken to the women's shelter for her safety or protection. The women usually take the children with them to the women's refuge (if the children are under 13 years old). Some staff members working within the refuge (Aboriginal and non-Aboriginal) said that this is technically being “banished” from their home or community. They also acknowledge that children over 13 years old are left at home to fend for themselves. One staff member said:

The children are often seen wandering the streets because

they have nowhere to go for support. This can lead to them getting caught up with the police and the criminal justice system, leading to children being institutionalised because of issues at home. It also appears that once children enter the criminal justice system, they never seem to get out ...

The Aboriginal response reinforced that they are generally not dealt with as a family by agencies and that the family (mother, father and children) are usually separated. The women and children are usually taken to the women's shelter (if there is one in the area, otherwise they have to leave the community), and the men are left at home or in the community. In serious cases, the men are removed from the community (see Diagram 2).

The participants from the Kimberley, Northern Territory and Pilbara said during the yarning groups that conflicts between partners or individual family members should be dealt with together. They also support the idea of "truth-telling"—that the guilty party needs to own up to their own wrongful behaviour/s. They said that men are not always initiating conflicts, arguments or fighting. Some women said that women can start problems also. They can be gambling, drinking or taking gunja and jealousing their men. Overall, they said that during the initial stages of the conflict, the parties should be separated so that they can cool down, but then they should be brought back together to try to work it out as quickly as possible. The participants said that the separation should not be too long because it is not good for the children or the family as a whole.

The separation of families was a cause of great concern among participants. An Elder from Fitzroy Crossing said that "children are crying for their fathers". Other participants said that children over 13 years of age are left at home to fend for themselves, which is not good for the children or the family as a whole. Women said they feel conflicted as to whether to leave or stay: "We can't protect our children because of the separation." A lot of incidents are not reported because of this. Sometimes, families don't report the incident (if it affects a woman) because the women will have her children taken off her. This has reportedly been happening on Tiwi Island where women are now having their children taken from them when they report abuse. The grandmothers are

unhappy because they are not consulted or involved in any of the decisions around their grandchildren. Women in all sites, particularly the Cultural Elders who were consulted, believe that there is sufficient cultural information for them to work with various partners (such as UWA and others) to develop better alternatives or healing programs that will assist the families to stay together over the longer term. They argued that government needs to acknowledge and expand on women's role in the healing and wellbeing of the family and also acknowledge the role men play in family healing and wellbeing.

Alternative options, diversionary programs or alternative decision-making

The majority of groups consulted would like to see more options made available to parties involved in family violence. They would like to see more of a health focus or health responses included in the options. There needs to be more health screening of people who get caught up in the criminal justice system for trauma, disability (including FASD), addictions and mental illness. They need to assess whether there are health issues at the point of contact with the police and the criminal justice system. Some women said that if women, men or youth come into contact with the criminal justice system, then assessment should be carried out for any health-related issues (e.g. trauma or other issues). A Martu Elder explained that families need to be involved with any health assessment (particularly mental health assessment) as well as any recommended treatment.

A Martu Elder said that better health screening for mental health should take place before a person is sent to prison or detention, and not when they are inside the prison. When they are assessed inside the prison for mental health issues, they do this without the family being involved, and they come out worse than when they went inside. "We don't know what they are giving our sons or daughters while they are in prison."

The Martu group would like to explore options around good behaviour bonds or agreements and/or diversionary programs, and make it tougher for wrongdoers to break their word on these agreements. Some say that this will of course depend

on the wrongdoers' ability to understand the agreement; if they don't have the ability to understand because of language or other barriers, then how will the criminal justice system assist with this? There was unanimity across research sites that government needed to increase available options, as well as who is involved in designing and delivering the programs. There needs to be more Aboriginal involvement in this process. Many participants acknowledged FASD as a big issue and noted that women and men should not be drinking if they are going to become parents. They said that more information around the harm of drinking while pregnant or planning for children should be readily available in their language/s.

The groups consulted referred to a number of programs operating in their areas that assist with taking or diverting men, women or youth away from the criminal justice system and back onto country to undertake cultural activities. They are the Yirriman Program (Fitzroy Crossing), the Women's Ranger Program, and the Men's Ranger Program (Martu). These are all on-country, Elder-led initiatives that take wrongdoers, and/or families, out onto traditional land to reconnect with Culture and get away from town. Martu Ranger programs have the additional advantage of providing work experience through their on-country initiatives, and offering pathways for wrongdoers to directly enter into work and remain healthy and sober while attending rehabilitation programs under supervision of the community (refer to Diagrams 3 and 4).

There was unanimous support for on-country healing for families. Darwin men's group said:

Bush camp's best option, learn about bush medicine, go through Law, learn about skin groups. We separate couples who fight and take them bush ... Elders need resources to take families on-country "away from all the shit" [Darwin]. This will help build respect for Law and Culture. Darwin Aboriginal Men's Shed does great work with men, takes them fishing and camping, then yarning together. This is the best way for men.

Mornington Island Elders want to see violent people "banished to country" (meaning an isolation on an outstation), "away from home-brew to learn hand crafts, stories, places and fish traps".

Conflict resolution and/or healing

Most participants argued that the criminal justice process needs greater flexibility and greater discretion to deal with social issues impacting an individual or family. Mainstream conflict resolution techniques are predominantly based on non-Aboriginal principles and worldviews. There was strong support across sites for greater partnership between government and Aboriginal and Torres Strait Islander communities to come up with other alternatives. Women from remote communities who attended the Darwin yarning groups, for example, want to see Aboriginal cultural models of conflict resolution or "hybrid models" of conflict resolution developed (refer to Diagram 5).

In summary, the communities consulted expressed a desire for practitioners and policymakers to:

1. Recognise the link between violence and issues stemming from colonisation such as alcohol, intergenerational trauma, cognitive disabilities and jealousy, rather than being ideologically driven through a focus on gender inequality, patriarchy and male power.
2. Place greater focus on prevention work (such as healing, trauma counselling, alcohol or drug rehabilitation) with Elders' knowledge at the centre of the process.
3. Recognise that Aboriginal Law and Culture must play a significant role in healing conflict and ensure responses based on Law and Culture are implemented. Such cultural models should undergird work with Aboriginal victims and offenders to assist with health issues, trauma, healing, or other issues impacting their wellbeing and their ability to function to their full capacity within the communities.
4. Provide financial and infrastructural support for community-owned, on-country healing, run by Elders rather than non-Indigenous, non-governmental organisations. The work of Ranger programs and Elder-regulated bush camps are strongly supported.
5. Place a greater focus on diversion from the mainstream justice system into community-owned, place-based structures. Young people should not be jailed.
6. Enable greater involvement of Cultural Bosses, Elders and/or respected leaders from within the community in the criminal justice system, such as Koori and Murri

Courts, Law and Justice or Mediation Groups. Also, resource Night Patrols to work alongside, or instead of, police and invest in interpreter services as an integral part of any model.

7. Promote community leadership on laws, regulations and policies governing the sale and consumption of alcohol, for example, whether to ban it, or just restrict access. This is an issue that can only be dealt with on a local basis.
8. Engage in dialogue between Cultural Bosses, Elders, government, police and judicial officers regarding the role of traditional justice mechanisms. The majority of consultees favoured practices such as “growling” offenders and community admonishment; temporary banishment from community; removal to a remote outstation or island for a time (under Cultural Elders’ or Elders’ authority); ostracism from some community facilities (e.g. not being allowed to buy goods at the store or use the pub); or temporary separation of parties. Physical punishment was supported by many as an ideal but it was widely acknowledged that it may not be acceptable in many places (although it is still practiced in some of the sites).
9. Increase investment in Aboriginal shelters and refuges that understand Aboriginal women’s issues, their cultural obligations, and their realistic fears of having children removed.
10. Ensure a place for men at the table when local family violence strategies are designed.
11. Focus on policies that keep families together, rather than breaking them up, which is the outcome, if not always the intention, of mainstream approaches.
12. Develop a greater understanding of the nature of Aboriginal family obligations and ties, particularly through skin systems, and the important role played by relatives such as brothers-in-law, uncles, cousins and grandparents in supporting victims, admonishing violent partners, and resolving conflict.

Diagram 1: Non-Indigenous conflict (dispute) resolution process

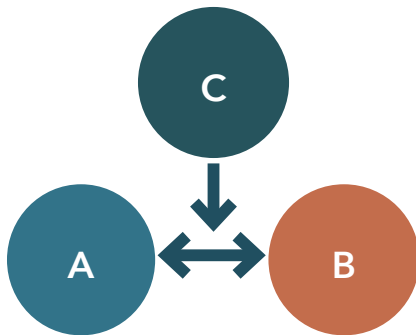
1. PERSON A & B



2. INTERACTION OR RELATIONSHIP BETWEEN A & B: DISAGREEMENT OR DISPUTE



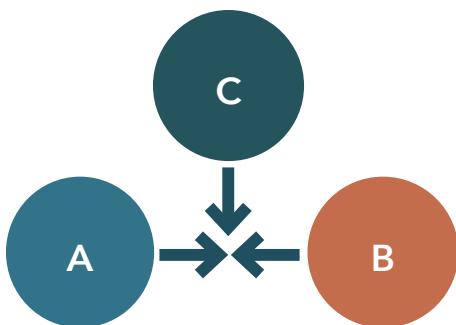
3. INTERVENTION –BY C (AS INTERVENER OR MEDIATOR)



- (i) Police; or
- (ii) Family member; or
- (iii) An agency

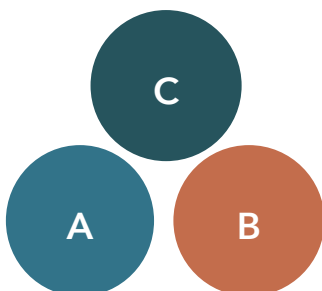
C’s role as Intervener: Separate the disputing parties (for a period of time –temporary or permanent –depending on the severity of the offence or seriousness of the behaviour)

4. ROLE OF C: AS MEDIATOR (OR OTHER?)



- (i) Intermediary (short or long term); or
- (ii) Facilitator –work on bringing the parties back together; or
- (iii) Conciliator –work on a solution (usually in an office)

5. ROLE OF C: AS MEDIATOR (OR OTHER?)



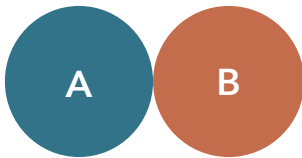
- (i) Counselling (short or long term)
- (ii) Work on bringing the parties back together or work on a solution (usually in an office)

Diagram 2: Aboriginal and Torres Strait Islander conflict (dispute) resolution process

1. PERSON A & B

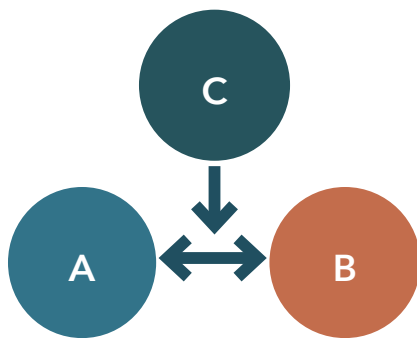


2. INTERACTION OR RELATIONSHIP BETWEEN A & B: DISAGREEMENT OR DISPUTE



Responders to the dispute or disagreement must assess (or identify) issues causing dispute or stress or, and the circumstances leading to the dispute or disagreement

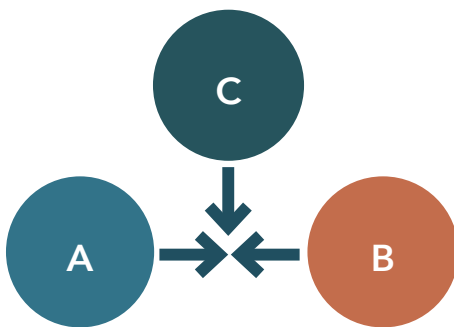
3. INTERVENTION BY C: COMMUNITY INTERVENER (CAN BE AN ELDER, ADVISOR OR MENTOR)



- (i) Family member; or
- (ii) Elder or Cultural Elder (men or women); or
- (iii) Agency; or
- (iv) Police

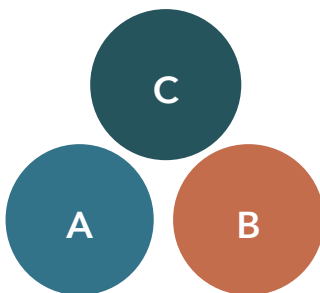
C's role as Elder: Work with A's and B's families and stakeholders as required to separate the disputing parties (for a period of time –depending on the severity of the offence or seriousness of the behaviour and issues)

4. ROLE OF C: AS ELDER, ADVISOR OR MENTOR



- (i) Advisor (period of separation)
- (ii) Mentor or peacemaker –work through issues with parties to eventually bring them back together; or
- (iii) Healer to work on healing (usually “on-country”) and link A and B with Cultural Healers as required

5. ROLE OF C: AS ELDER, CULTURAL ADVISOR OR HEALER



- (i) Provide cultural advice
- (ii) Healing (short or long term)
- (iii) Elder or family can work on bringing the parties back together or work on a solution (usually “on-country”)

Note:

The timeframe is generally very quick in order to restore peace to the community as quickly as possible.
 Family and Cultural leadership are key components of this process.
 Stage 3 –involvement of family leaders is an important part of this stage.
 Stage 4 –during this stage mechanisms similar to “knowledge tree” (Bidjadanga), or “truth telling” (NT) may be used.

Stage 5 –involves the use of healers to ensure the individuals are healthy and resilient.

Important: this process occurs within a cultural context of collective consideration of issues within families and communities and collective decision-making by those authorised to do so. C will understand this and respond by engaging with important family and cultural stakeholders as appropriate throughout the process.

Diagram 3: Criminal justice system (non-Aboriginal and Torres Strait Islander)

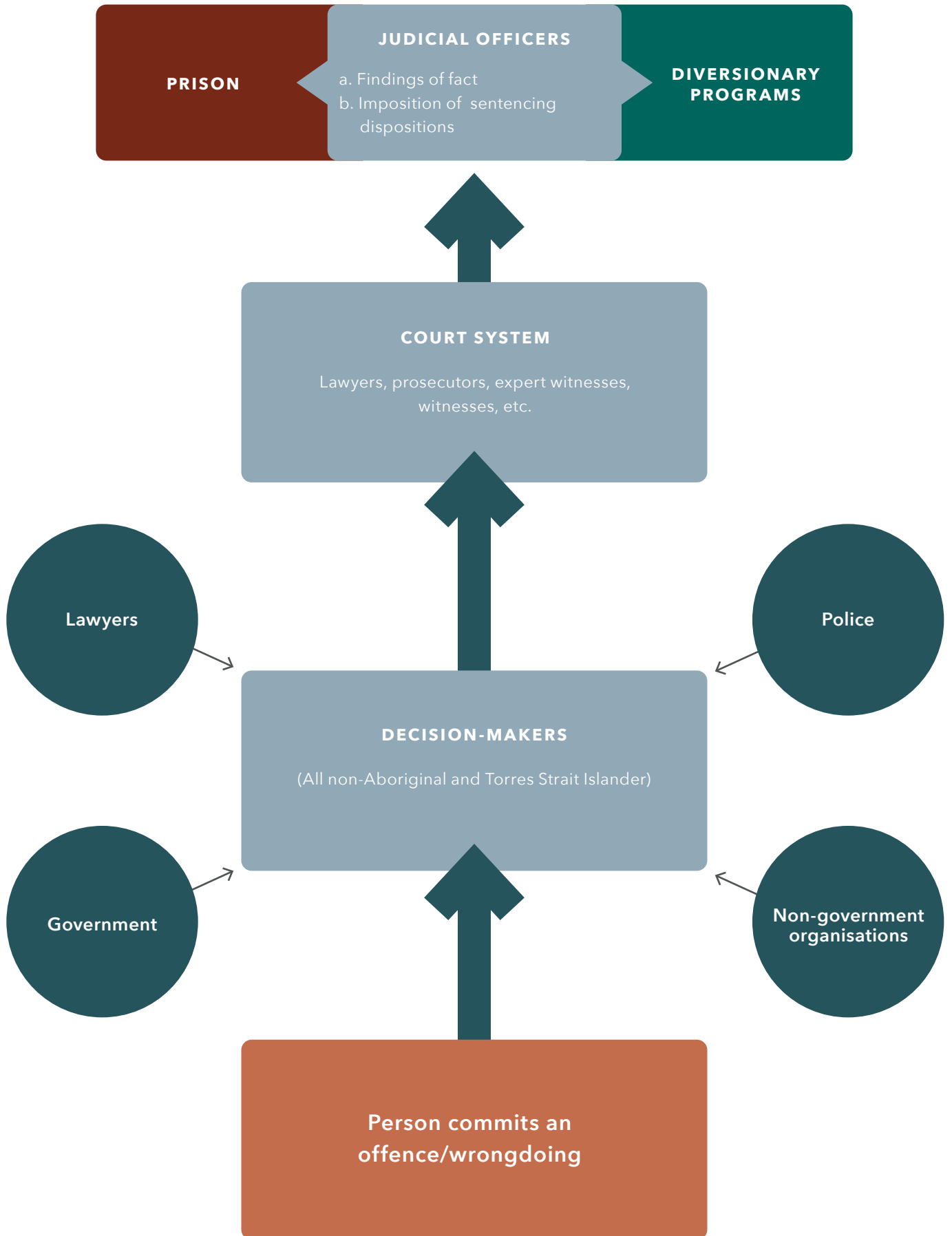
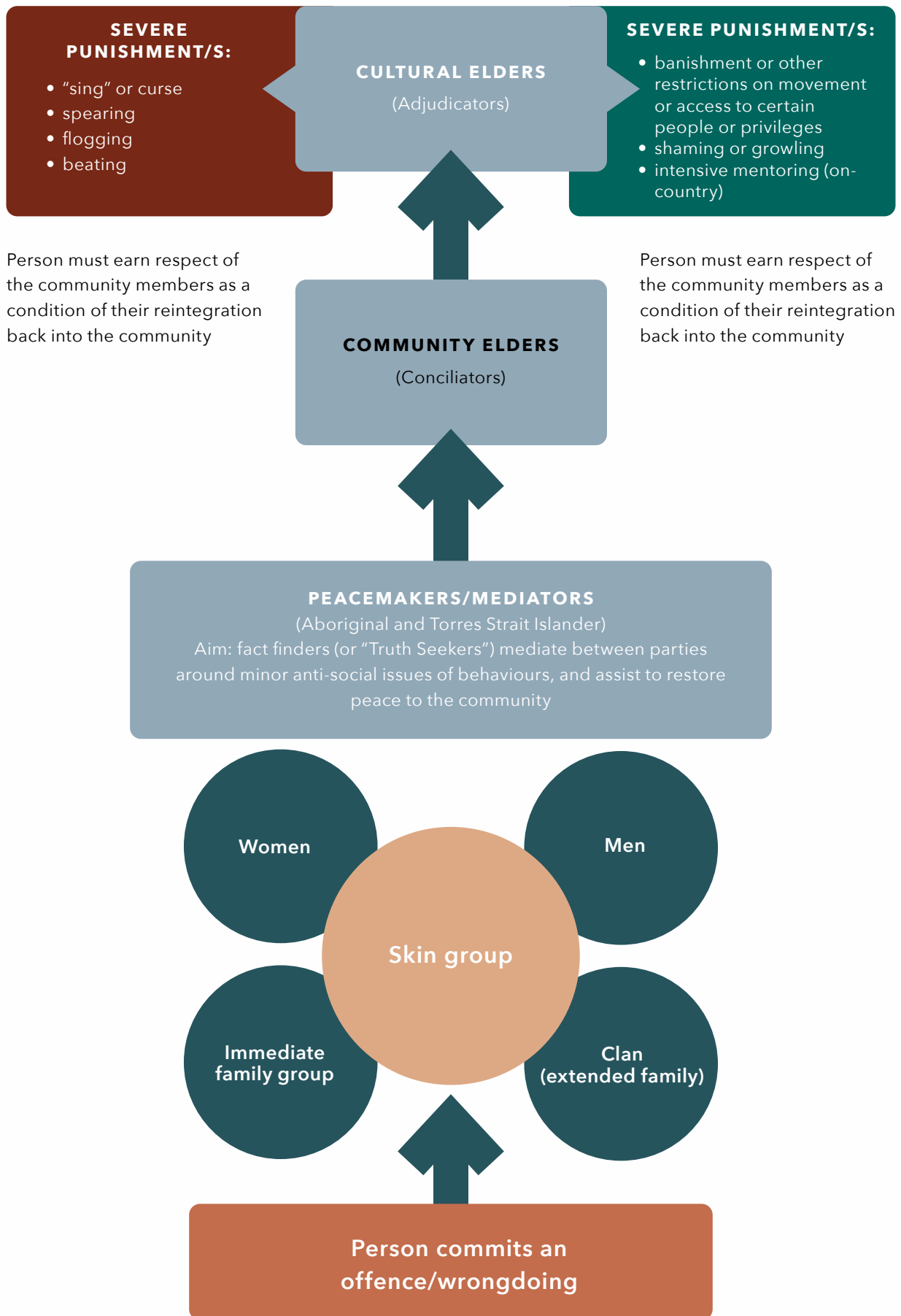


Diagram 4: Aboriginal and Torres Strait Islander process for dealing with offending behaviour or wrongdoing (based on traditional ways or “old ways” of doing things)



NOTES:**Adjudicators**

This is the role of Cultural Elders: Cultural Elders tend to act as adjudicators for any wrongdoing and decision-makers of relevant punishment (includes men and women).

Conciliators

This is the role of Community Elders: Community Elders tend to act as intermediaries or agents or managers for the community and/or go-betweens for the community, wrongdoer and cultural elders (includes men and women).

Skin group: Mediator

The role and composition of Mediators will depend on the particular community and how the community operates and its dynamics. For example, there are many communities within the Northern Territory, Kimberley and Pilbara that operate in accordance with their Traditional Customary Law and relationships are determined according to their skin groups. An example is Tiwi Island where the community refer to this group as "Ponki". This group is composed of women and men, and connected not only through their family and clan but, more importantly, their skin group.

Wrongdoer

The process for dealing with wrongdoers will generally depend on the wrongdoer. For example, if the wrongdoer is a male or female, there may be some differences in process.

Wrongdoing

The wrongdoing/offence will also determine the process. For example, generally where an Aboriginal or Torres Strait Islander woman has committed a wrong then women (from the relevant skin group) are more likely to deal with the offending behaviour, prior to it going to any of the other groups. Another example, is if an Aboriginal or Torres Strait Islander male has committed a wrong, it is anticipated that the men (from the relevant skin group) are more likely to deal with the offending behaviour, prior to it going to any of the other groups.

The timeframe

The timeframe for dealing with an Aboriginal or Torres Strait Islander wrongdoer is generally very swift. The intention is to restore peace or harmony to the community as quickly as possible.

The process

The process is not similar to the non-Aboriginal and Torres Strait Islander adversarial system (but the opposite).

Re-integration into the community

Where an Aboriginal or Torres Strait Islander community member is found to have committed a wrong, and sentenced to some form of punishment, a condition of their reintegration into the community is that they must earn the respect of community members. Each community will have a different approach or process for this to occur. For example, a) victim must be satisfied first, then b) the victim's immediate family must be satisfied with the reintegration process, then c) other extended family clan members must be satisfied, and d) the skin group, and e) Community Elders, and Cultural Elders.

An example of the conciliation in operation is the "Knowledge Tree" operating at Bidjandanga Community whereby the role of Community Elders and "truth telling" takes place on-country, and at a place of cultural importance such as the "Lore Tree".

Diagram 5: Hybrid system/mechanism to deal with offending behaviour/wrongdoings, using both Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander processes

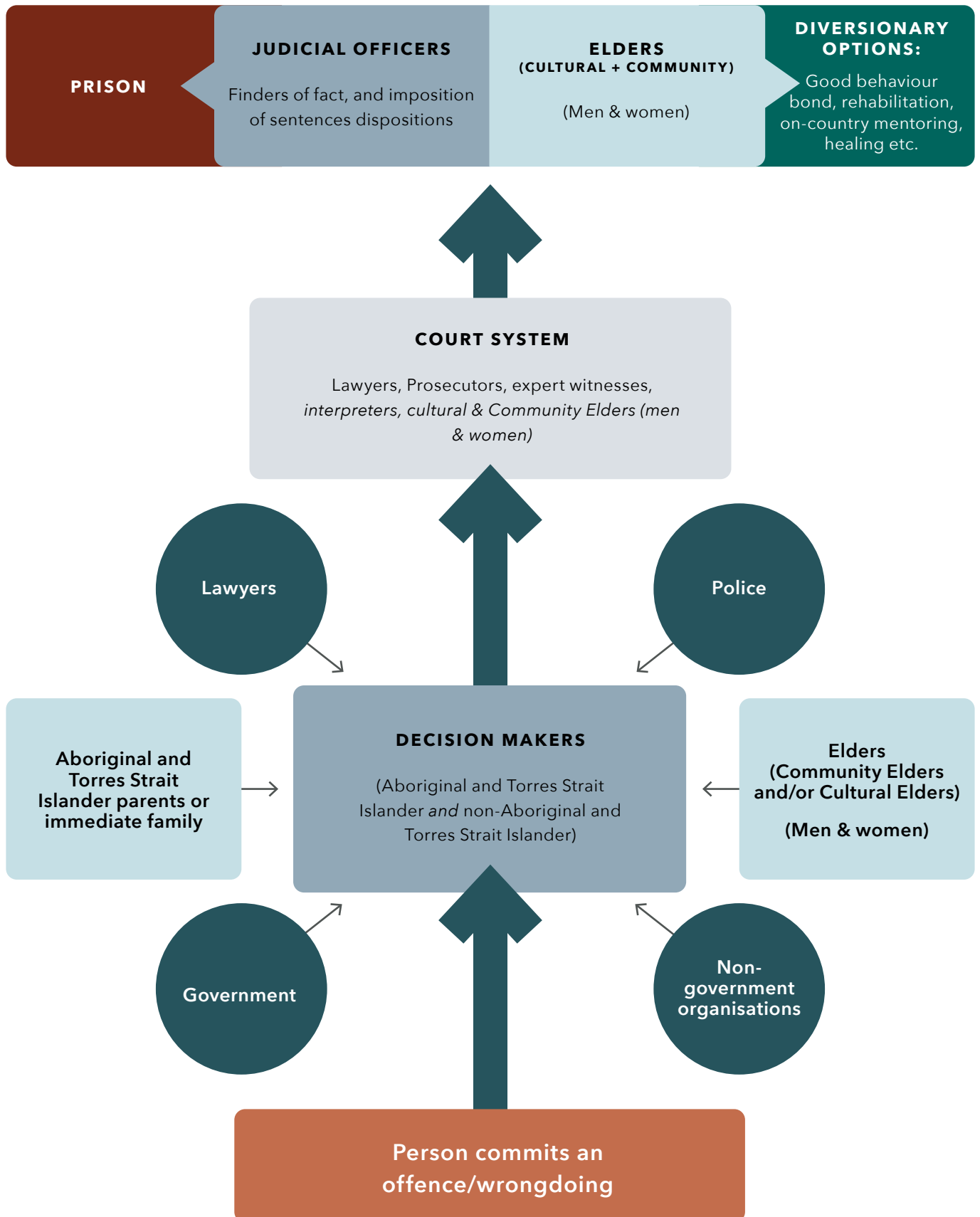
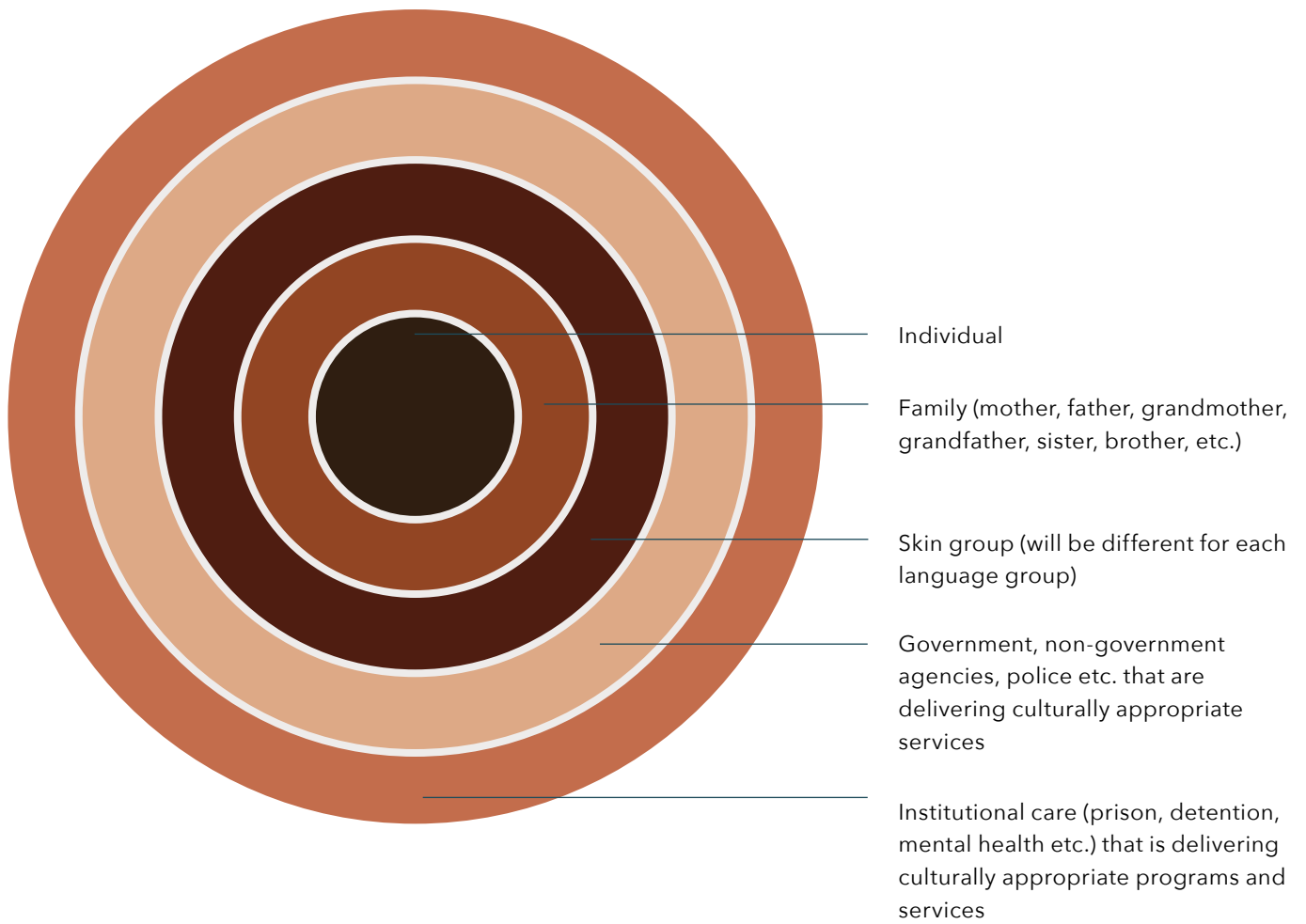


Diagram 6: Tiwi Island—support system/s for individual or wrongdoer



Discussion

The research findings bore out many key themes and messages garnered from the literature review. Indeed, there was significant continuity between the literature critical of mainstream, Western feminist approaches to domestic violence and the views, experiences and aspirations of research partners. The literature review highlighted a number of salient factors that taken together compose an explicitly Aboriginal family violence narrative, focused on the “intergenerational impacts of violence as its effects flow in-to and out-of our families” (Atkinson, 1996, p. 5) and the multi-dimensional and multifaceted collective and individual experiences of loss, violence and dispossession, stemming (still today) from settler colonisation. The notion of family violence, in its various manifestations, initiates a dialogue where violence in families is explained—though not excused—by reference to collective experiences of intergenerational trauma and disempowerment.

According to the literature, Aboriginal and Torres Strait Islander peoples have consistently argued for the “opportunity to develop their own solutions to family violence and sexual abuse” (LRCWA, 2006, p. 29) and championed strengths-based responses to family violence that involve Aboriginal justice models and the recognition of Aboriginal Law and Culture (Hovane, 2015). While mainstream models of intervention favour approaches, such as the Duluth model, that explicitly champion increased use of mainstream penalties to leverage men into behaviour change programs, the critical literature suggests that this approach does not work for Aboriginal and Torres Strait Islander families. This is because it advances mono-causal explanations for family violence—patriarchal male power, coercive control, gender inequality—and avoids engaging in difficult debates about colonial violence, collective disempowerment, trauma, alcohol abuse, mental health, and disability; and because Aboriginal and Torres Strait Islander men and women are simply not deterred by the threat of mainstream sanctions (Blagg et al., 2018).

These views were echoed in discussions with partner organisations and in yarning groups. There were forcefully expressed opinions that mainstream forms of justice are not up to the task, and may even be part of the problem. It is not that these communities downplay the significance of violence and disorder in their lives. Indeed, partner organisations

were united in their beliefs that family violence is one of the most significant threats to the future of communities and is tearing family life apart. Rather, they felt that the mainstream response was inadequate, misdirected and one-dimensional: mainstream justice did not deal with the underlying causes; was too “top-down” and “one-size-fits-all”; and employed sanctions that Aboriginal and Torres Strait Islander wrongdoers and victims could not relate to. Furthermore, mainstream approaches did not, *could not*, heal the effects of family violence. In this respect the dialogue with communities confirmed the views presented in the literature.

There was an almost universal belief that a “return to the source” of Law and Culture was the only way forward for communities to take ownership of these issues. Exactly what this “return” might look like would vary from place to place, but there was agreement that it must be “place-based” and involve a process of “co-design”, meaning that Aboriginal and Torres Strait Islander people must lead and be fully engaged in the process. Partner organisations and community members mirrored the views in the literature that Aboriginal and Torres Strait Law and Culture were vital forces in their lives, and the mainstream’s reluctance to support Law and Culture as the basis for new initiatives supports Hannah McGlade’s proposition that “Aboriginal justice models will encourage the revival of our culture and lawful ways that prohibit violence and abuse of women and children.” (ALRC & NSWLRC, 2010, para 23.143) Similarly, participants were anxious to negate the view that violence against women and children was an acceptable part of Aboriginal and Torres Strait Islander Law and Culture, which was in line with Professor Mick Dodson’s (2003, p. 9) assertion that “the violence occurring in Aboriginal communities today is not part of Aboriginal tradition or Culture. It is occurring principally because of the marginalisation of Aboriginal people.” Similarly, the LRCWA (2006, p. 22) stated that

it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted on the extent of violence and sexual abuse in Aboriginal communities.

This was a consistent thread in discussions with communities. Instead, community members stressed the ways Law and

Culture could provide a fair system of justice which was accepted as legitimate by those “bound” by them.

The Elders we spoke to are immersed in Law and Culture as part of their daily lives; they “live and breathe Culture” (Fitzroy Crossing). They are the peacemakers and mediators; they “hold” the knowledge about Law and Culture and ensure that crucial ceremonies are conducted and that knowledge is passed on to future generations, as has been similarly reported in a number of seminal inquiries (see for example ALRC, 1986; LRCWA, 2006). Participants also confirmed the importance of the wider family structure in preventing family violence, caring for victims and punishing offenders, and the duties and obligations inherent in functioning skin relationships, which are the bedrock for social life in these communities. For example, the role of grandmothers and aunts in looking after women and children and creating places of safety for victims (Blagg et al., 2018) was reflected in our discussions, as was the important role of uncles and cousins in warning off abusers and, if necessary, dealing out punishment. These relationship systems remain critical instruments of community governance and form the basis for pro-social norms and values.

There was also a good deal of congruence between the literature on family violence we have presented and the ways communities were working, or would like to work, with the mainstream justice system to create hybrid initiatives that would allow two-way law to be realised. Literature on the role of community justice mechanisms that work to divert offenders from contact with the mainstream justice system into community-owned networks of control was endorsed in our discussions. So too were innovations such as courts where Elders sit with judges and magistrates to hear cases involving Aboriginal and Torres Strait Islander offenders (such as Murri Courts and Koori Courts), particularly where the underlying causes, such as alcohol, disability, mental health, housing and trauma, were handled holistically, for example through on-country healing. To this extent there was considerable agreement between the literature (see Blagg & Anthony, 2019; Blagg et al., 2018; Cunneen, 2018; Fitzgerald, 2001) and the aspirations of many communities. Community-led and -owned initiatives—such as *Ponki* on Tiwi Island (see Diagram 4) which works with the police to

intervene with skin group members who come into contact with the law and find an alternative outcome—reflected a successful iteration of traditional Law and Culture and mainstream justice working together.

Conclusion

This has been an exploratory study that has aimed to bring to light some perspectives of Aboriginal and Torres Strait Islander peoples from the Kimberley, Pilbara, Tiwi Islands, Mornington Peninsula and Darwin on family violence, with an emphasis on the positive role Law and Culture plays, and could play, in its eradication. Despite the numerous challenges and obstacles facing Aboriginal Elders and leaders—many of which are caused by non-Aboriginal policies, laws and practices—Law and Culture remain active, and vibrantly present in daily life, providing maps of meaning and sources of dignity and self-worth. For a number of communities fairly representative of northern Australia who participated in this study, the story of family violence is intertwined with the protracted and ongoing violence of colonisation. There was widespread rejection of the official meta-narrative regarding the causes of violence against women and other family members. In stark opposition to the focus on male power, gender inequality and dominance in mainstream feminism—reflected in what has become known as “carceral feminism” (Blagg & Anthony, 2019), where the punitive instruments of the state are deployed to make men less violent—Aboriginal women and men in this study discussed multiple crises in their communities, among which the *powerlessness* of Aboriginal men since colonisation remains a prominent thread.

One of the strengths of the research strategy we adopted was that it maximised local engagement while not draining communities of their resources. The groups we worked with reported that payment for their time injected capacity into their organisations and gave them some additional resources. They also said that the focus on listening to Elders and respected persons in communities recognised their status and gave them an opportunity to impart important messages. Participants brought to the table a critical archive of Aboriginal knowledge. They told us how government and other organisations that constitute the colonial matrix of power bled communities of Aboriginal leadership and imposed white systems of governance, including a system of criminal justice that remains at odds with Aboriginal legal and cultural practices. A limitation of this study was its short time frame, which meant that only one visit to each locality was possible and pushed up into the wet season when people were planning Law business, and when seasonal variations made meetings sometimes uncomfortable.

As Martu Elders told us, “getting men and women and families living together, being together, working together, on-country is the solution for much family violence”. The message was: towns are bad, country is good. People get well on-country, particularly without alcohol.

For those working in, and adjacent to, the family violence arena, the voices of Aboriginal Elders and respected people offer a succinct message: *Listen to us*.

The key recommendations drawn from participants’ input are that:

1. Policy on Aboriginal family violence needs to be *uncoupled* from the domestic violence sector and reconfigured within a set of locally negotiated community safety agreements. The role of government would be to resource and support these agreements and assist in the creation of a range of place-based, on-country options designed to strengthen Law and Culture.
2. Strong Men’s and Strong Women’s groups should be supported and resourced by government in any community that chooses to establish them.
3. Community-owned and place-based Aboriginal organisations should be on the front line of the fight against family violence. Elders know their Culture, country, and community.
4. Aboriginal women are the best source of ideas about how to structure and place shelters and crisis accommodation. They must be empowered to lead decision making.
5. Community Justice mechanisms such as Community Justice Groups should be supported and resourced. It should be normal practice for Elders to sit with magistrates in court and to have a say in local policies on diversion from the mainstream justice system into Aboriginal-owned and -managed alternatives.
6. There was support from partner groups for what are called in Queensland “cultural reports”, similar to “Gladue reports” in Canada, which give sentencing courts greater understanding of the life histories of wrongdoers and victims and include community-owned options, such as temporary banishment or diversion to an on-country healing camp or facility. They should be prepared by

Aboriginal people and supported by Aboriginal legal services.

7. Aboriginal Elders and organisations need to be given more say in local alcohol reduction strategies, including whether there should be blanket bans or restrictions and, in the latter case, how these would work.
8. Elders and respected people stressed that the mainstream imposed its own normative standards as though they were universally applicable. In the case of family obligations, for example, mainstream bodies denied the important roles played by broader kin and skin groups in monitoring behaviour, admonishing wrongdoers and protecting victims. Local Community Justice Groups (or Community Safety groups) could set up processes similar to *Ponki* on Tiwi Island where the right skin group works with wrongdoers.

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- R v Sydney Williams (1976) 14 SASR 1
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Summary of significant cases

| Year | Significance | Summary |
|------|---|--|
| 1829 | Aboriginal persons are not subject to English law for offences committed between Aboriginal persons | <p>R v Ballard or Barrett [1829] NSWSupC26 (formally reported in [1998] 3 Australian Indigenous Law Reporter 410-425)</p> <p>Supreme Court of New South Wales, Forbes CJ and Dowling J 13 June 1829</p> <p>Aboriginal man charged with the wilful murder of another Aboriginal person. The Attorney-General sought direction from the Court as to whether the Court had jurisdiction over offences committed between Aboriginal people. The Court found that it did not have jurisdiction over offences committed between Aboriginal people.</p> <p>Forbes CJ held that, "it has been the practice of the Courts of this country, since the Colony was settled, never to interfere with or enter into the quarrels that have taken place between or amongst the natives themselves". His Honour continued by questioning whether English law should apply as "savages" have their own laws, "which is perfectly agreeable to their own natures & dispositions, and is productive, amongst themselves, of as much good, as any novel or strange institution which might be imparted to them ... the savage is governed by the laws of his tribe-& with these he is content".</p> <p>Dowling J held: "Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such an interference were practicable."</p> |
| 1836 | Aboriginal persons are subject to English law for offences committed between Aboriginal persons | <p>R v Murrell & Bummaree (1836) 1 Legge 72 (formally reported in [1998] 3 Australian Indigenous Law Reporter 410-425)</p> <p>Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ 11 April 1836</p> <p>Aboriginal defendants sought to have their charges of wilful murder of another Aboriginal person dealt with by Aboriginal Laws and customs. Counsel for Mr Murrell argued that Aboriginal peoples are governed by their own Laws and customs, and these recognisable Laws should apply to offences committed between them. Counsel submitted that Aboriginal peoples are not bound by the laws of Great Britain "which afford them no protection" (at 415).</p> <p>Burton J (with Forbes CJ and Dowling J concurring) held that Aboriginal Australians were subject to British law for offences committed between Aboriginal peoples: "The various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own." [211]</p> |

| Year | Significance | Summary |
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| 1841 | Aboriginal peoples should be dealt with under their own Laws and customs | <p>R v Bonjon (formally reported in [1998] 3 Australian Indigenous Law Reporter 410-425)</p> <p>Supreme Court of New South Wales, Willis J</p> <p>16 September 1841</p> <p>Aboriginal defendant charged with the murder of another Aboriginal person. Question was whether the Supreme Court had jurisdiction over crimes committed by Aboriginal persons against Aboriginal persons.</p> <p>Willis J reserved the question of jurisdiction but made the following comments:</p> <p><i>“Thus, according to these statements respecting the Aborigines, it appears that they are by no means devoid of capacity—that they have laws and usages of their own [emphasis in original]—that treaties should be made with them—and that they have been driven away, from Sydney at least, by the settlement of the colonists, but still linger about their native haunts.</i></p> <p><i>“I repeat that I am not aware of any express enactment or treaty subjecting the Aborigines of this colony to the English colonial law, and I have shown that the Aborigines cannot be considered as Foreigners in a Kingdom which is their own. From these premises rapidly indeed collected, I am at present strongly led to infer that the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs.”</i></p> |
| 1975 | Court hands some responsibility for an offender’s behaviour and rehabilitation to the Aboriginal community | <p>R v Iginiwuni [1975] NTCCA 6</p> <p>Supreme Court of Northern Territory</p> <p>12 March 1975, Muirhead J</p> <p>Offender convicted of raping a 2-year-old girl.</p> <p>Muirhead J imposed a sentence of 5 years and 8 months’ imprisonment (with a non-parole period of 2 years), but ordered that the offender be released after 5 months on a 3-year good behaviour bond that required the Aboriginal community to assure his good behaviour and restoration.</p> <p>Muirhead J stated, “Your community is involved with you as aggressor and the child as a victim. Having heard the sworn evidence of [...] a member of the Council, I am influenced by the fact that you will eventually be accepted back amongst your people, who will no doubt give consideration to the order of this Court and the punishment you will already have suffered, and who will I hope, exercise some influence over you in the future. This is not the first time, and it will not be the last, this Court gains some guidance from the views of the Aboriginal community, although there will be cases, especially where the crime goes beyond the particular community, that it is not possible to give full, or even partial effect to the views expressed ... [But] it would be a great mistake also for anyone to assume that the Court will regard violence or crime, be it in accordance with custom or otherwise, committed within an Aboriginal community as something less serious than, or different to what may occur elsewhere. That is not the case as to do so would tend to deprive that community of the law’s protection.” [24-5]</p> |

| Year | Significance | Summary |
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| 1976 | Court suspended sentence of imprisonment on entry into bond, a condition of which was that he be "ruled and governed by tribal Elders" | <p>R v Sydney Williams (1976) 14 SASR 1</p> <p>Supreme Court of South Australia, Wells J 14 May 1976</p> <p>Aboriginal man charged with the murder of an Aboriginal woman. The Court accepted a plea to the lesser charge of manslaughter because of provocation of mentioning things forbidden under Aboriginal Law and custom. The Court heard that the Elders planned to punish the offender according to Aboriginal Law.</p> <p>Wells J was of the view that Aboriginal justice should be reinforced where possible rather than simply replaced by European conceptions of justice, and that this would not represent an abdication of the role of the Supreme Court. His Honour imposed a suspended sentence on condition the offender enter a bond which included conditions that that the offender shall be, for a year, "ruled and governed by the Tribal Elders and shall in all things obey their lawful orders and directions". Wells J made no mention of traditional punishments.</p> <p>His Honour said: "I am going to send you straight back to your tribe and have you handed over to the Old Men. You must behave yourself for 2 years and not get into any trouble. You must do what the Old Men tell you to do for 1 year. You must not drink wine or beer unless the Old Men allow you to. If you do any bad or wrong things or if you do not do what the Old Men tell you to do, you will go to gaol here in Adelaide for 2 years."</p> |
| 1976 | Aboriginal peoples are subject to mainstream law, and the Court has jurisdiction over whether the victim and/or offender is an Aboriginal person | <p>R v Wedge [1976] 1 NSWLR 581</p> <p>Supreme Court of New South Wales, Rath J 25 June 1976</p> <p>Aboriginal man charged with murder. Defence argued that Court had no jurisdiction as the defendant was Aboriginal. This argument was rejected, and the Court affirmed <i>R v Murrell</i>.</p> |

| Year | Significance | Summary |
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| 1978 | Court held that sentence should be made without consideration of tribal punishments which would probably occur outside the law | <p>R v Larry Colley (Unreported, 1978)</p> <p>Supreme Court of Western Australia, Brinsden J 14 April 1978</p> <p>Aboriginal man charged with murder of his traditional wife. He was convicted by a jury of manslaughter. Defendant felt obliged to punish her following a domestic argument because of Aboriginal Law.</p> <p>Evidence at trial by community Elders that defendant would be accepted back into the community and there was the possibility of some traditional punishment, but he was generally seen as a good person and a job would be provided for him.</p> <p>Counsel for defendant relied on <i>R v Sydney Williams</i> arguing that he should be released on probation to avoid double punishment, and that his punishment by the community was a special circumstance to be taken into account. This position was strongly opposed by the Crown. The Crown submitted, "For our law to be respected as distinct from tribal law [...] the consequences of [homicide] ought to be punishment by our law in the appropriate manner [...] [otherwise] the respect for our law as such—which, it is clear, Aboriginal people have; that our law does punish offenders appropriately—would be lost."</p> <p>Brinsden J sentenced the offender to 3 years imprisonment, with a non-parole period of 3 months, stating: "I must sentence you to a term of imprisonment because I think the law I have to enforce requires it at this stage. I believe it is possible that you will be punished also. I do not know the form of punishment. It is said by the Crown that I should not take it into account because it will most probably be unlawful. It may not be. I do not know. I have given some credit to that in fixing the minimum term." [Transcript, 35-36]</p> |

| Year | Significance | Summary |
|--------|---|--|
| 1981/2 | Court released defendant on bail to receive tribal punishment from community while awaiting trial. At trial, still found guilty and sentenced to prison regardless of tribal punishment inflicted. Position confirmed by Federal Court of Australia | <p>R v Joseph Murphy Jungarai (1981)</p> <p>Aboriginal defendant charged with murder of Aboriginal man, while suffering from alcohol-induced amnesia. Bail refused by magistrate.</p> <p>Bail application reported (1981) 9 NTR 30</p> <p>Supreme Court of the Northern Territory, Forster CJ</p> <p>Forster CJ ordered release on bail so that the defendant could receive tribal punishment while awaiting trial. (Transcript of proceedings 2-3)</p> <p>Reasons for sentence, unreported, 2 November 1981</p> <p>Supreme Court of the Northern Territory, Muirhead J</p> <p>At trial, Crown accepted plea of guilty to manslaughter. Muirhead J recognised that tribal punishment had been inflicted, however rejected Counsel's submission for a suspended sentence. His Honour said: "The court pays regard [...] to tribal lore and customary punishments but the Australian law is designed to protect all Australians and I fear, if I ignore matters such as this—matters which occur between Aboriginal people—it can be said that the law does not extend to the protection of the black people." [Transcript of proceedings 2-3]</p> <p>Appeal from sentence, unreported, 4 June 1982</p> <p>Federal Court of Australia, Toohey, McGregor, Sheppard JJ</p> <p>Toohey J: "The question whether courts may and should have regard to forms of punishment imposed or likely to be imposed against Aboriginal people by their own communities is a difficult one. But in the present case the Crown made no submission that the learned trial judge should not have regard to the actions of the community. Nothing that his Honour said suggests that he gave any question of tribal punishment insufficient weight. We are of the opinion that he gave all matters before him due weight and that the sentence and the non-parole period were each well within the exercise of a sound discretion."</p> |
| 1982 | The Court commented that a judge who takes into account the likelihood or inevitability of future traditional punishment as a matter of fact does not condone it | <p>Jacky Anzac Jadurin v R (1982) 44 ALR 424</p> <p>Federal Court of Australia, St John, Toohey and Fisher JJ</p> <p>27 October 1982</p> <p>Appeal against the severity of sentence imposed by the Northern Territory Supreme Court following conviction for manslaughter on the basis, inter alia, that the offender would receive further tribal punishment.</p> <p>The Court commented, at para 429, "In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution: it is to recognise certain facts which exist only by reason of that offender's membership of a particular group."</p> |

| Year | Significance | Summary |
|------|---|---|
| 1982 | Court ordered community banishment as a term of good behaviour order | <p>R v Mamarika (1982) 5 A Crim R 354</p> <p>Federal Court of Australia, Northrop, Toohey and Sheppard JJ</p> <p>Appeal against the severity of sentence imposed by the Northern Territory Supreme Court following conviction for manslaughter on the basis, inter alia, that the offender received tribal punishment.</p> <p>Community submitted letter signed by 20 community members asking that the offender be banished from the community for 3 years or more.</p> <p>The Court ordered the remainder of the offender's sentence be suspended upon him entering a 4-year good behaviour bond, a condition of which was that he be banished from the community for 3 years, recognising that community banishment was "an effective form of restraint" that accorded with the terms of a good behaviour bond [358-9].</p> |
| 1984 | Court refrained from imposing a punishment as offender had already received punishment in the community | <p>R v Jacky Jagamara (Unreported, 1984)</p> <p>Supreme Court of the Northern Territory, O'Leary J</p> <p>24 May 1984</p> <p>Aboriginal man charged with murder of another Aboriginal man. He had received punishment in the community.</p> <p>O'Leary J in sentencing the offender remarked: "It was an offence that was committed in an entirely tribal and traditional Aboriginal setting, and the prisoner has received very severe traditional punishment by way of payback at the hands of the deceased man's family. In my opinion it is not an offence that calls for any deterrent or retributive punishment by this court. He is in no sense a threat to the community at large. There is no reason to fear he will offend again in this way in the future, and I think that in all the circumstances he ought not to be subjected to any further punishment beyond the severe punishment he has already received." [Transcript, 17]</p> |
| 1984 | Court refrained from imposing punishment, having complete regard for Aboriginal Law and punishment imposed by community | <p>R v Charlie Limbiari Jagamara (Unreported, 1984)</p> <p>Supreme Court of the Northern Territory, Muirhead J</p> <p>28 May 1984</p> <p>Aboriginal man charged with murder of another Aboriginal man, and received punishment from his community.</p> <p>Muirhead J: "There are some cases, I don't necessarily say there are many of them but there are cases where I consider complete regard should be had for Aboriginal custom and tribal law. This is one."</p> |

| Year | Significance | Summary |
|------|---|---|
| 1990 | Supreme Court supervised Aboriginal punishment after court imposed sentence, as prerequisite for offender being afforded leniency | <p>The Queen v Berida [1990] NTSC, unreported</p> <p>Supreme Court of the Northern Territory 5 April 1990</p> <p>Aboriginal person convicted of manslaughter. The Court ordered supervision by the Aboriginal community so that banishment could remain effective. Court supervision included surveillance of physical forms of punishment, where the community had promised that it would occur at the conclusion of the court-imposed sentence. The Court sought assurances from corrections officers that it took place according to Aboriginal Law. This was a prerequisite for the offender being afforded leniency.</p> |
| 1992 | Aboriginal Law punishment capable of co-existing with mainstream punishment due to its role in restoring the community and offender | <p>R v Minor [1992] NTCCA 1</p> <p>Court of Criminal Appeal, Northern Territory, Asche CJ, Martin and Mildren JJ 11 October 1991 and 13 January 1992</p> <p>Crown appeal from sentence imposed by trial judge for counts of manslaughter, grievous harm and aggravated assault. The basis for the appeal included that the sentencing judge had erred in providing an automatic release date so the offender could receive “payback” (which the judge regarded as inevitable) as soon as possible, and that this involved the Court sanctioning unlawful violence.</p> <p>Considering the issue of payback, Asche CJ said:</p> <p>“As I understand it, payback, in certain circumstances, which must be carefully delineated and clearly understood, can be a healing process; vendetta never. It would be a serious and impermissible abrogation of the court’s duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If, however, it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the Court could countenance any really serious bodily harm. But, as Mildren J has pointed out, the action contemplated may not in fact come within the prohibitions of the criminal law. In some cases the payback is purely symbolic [...] The concept of payback however must not be seen as something to be automatically or even generally considered to apply to all Aboriginal people.” [3-4]</p> |
| 1994 | Sentence suspended on offender entering bond with condition that he attend a meeting to bring about peace in a “traditional Aboriginal way” | <p>Munungurr v The Queen (1994) 4 NTLR 63</p> <p>Court of Criminal Appeal, Northern Territory, Martin CJ, Angel and Mildren JJ</p> <p>Appeal against sentence on the basis that it is manifestly excessive. The Court substituted the original sentence on appeal, and ordered that the sentences be suspended after 3 months upon the offender entering a bond that included the condition that he attend a community reconciliation meeting between two clans for sealing the peace in the traditional Aboriginal way [77]. The Court requested the Director of Correctional Services to report the outcomes of the meeting and permitted the Director to change the terms of the recognisance in the event “that the meeting does not take place within a reasonable time” [77].</p> |

| Year | Significance | Summary |
|------|---|--|
| 1994 | Court made spearing the punishment for manslaughter, supervised by Department of Corrective Services | <p>The Queen v Walker [1994] 46 NTSC 1</p> <p>Supreme Court of the Northern Territory, Martin CJ</p> <p>The Court made the punishment of spearing a precondition for releasing the offender on a 2-year good behaviour bond for manslaughter. Court requested Department of Corrective Services supervise the spearing and report back to the Court within 6 months, confirming that it occurred [10].</p> <p>Martin CJ stated that “the first thing the Court has to do in this case, and maybe others, is to try and work out a regime whereby it can be informed as to whether what is expected has happened or not” [9].</p> |
| 1994 | Australian criminal law does not accommodate Aboriginal Law | <p>Walker v State of New South Wales (1994) 182 CLR 45</p> <p>High Court of Australia, Mason CJ</p> <p>16 December 1994</p> <p>Mason CJ held at para.6:</p> <p>“Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In Mabo (No.2), the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in Mabo (No. 2) to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.”</p> |
| 1996 | Supreme Court recognised the role of the community in dispute resolution and rehabilitation of offender, releasing an offender as Aboriginal Law had resolved the issue | <p>R v Miyatatawuy (1996) 87 A Crim R 574</p> <p>Supreme Court of the Northern Territory, Martin CJ</p> <p>24 October 1996</p> <p>Intoxicated Aboriginal woman stabbed husband in chest. Assault was in breach of a recognisance to be of good behaviour, imposed for an earlier conviction of assaulting husband. Victim sought to have matter availed from Anglo-Australian legal system because the perpetrator had already been dealt with under customary law and he feared it would destroy the marriage in the eyes of the Aboriginal community. The victim said in a statement that “the issue is finished” and proceeding with prosecution would “discredit our decision to deal with our own problems according to our cultural law” and result in the defendant being “tried twice” [577].</p> <p>Court also received a statement signed by 140 community members expressing support for the defendant and claiming that the matter had been “settled in the traditional way” [578]. The offender had to face the victim’s “clans and families” at organised meetings “under distressing conditions” [577].</p> <p>Martin CJ held that the offender had been rehabilitated while in exile from her community [577]. Released the offender on good behaviour bond, noting that the wishes of the community are a relevant mitigating factor [578]. Martin CJ was confident in the community’s role in settling the dispute and rehabilitating the offender.</p> |
| | Community wishes relevant mitigating factor in sentencing | |

| Year | Significance | Summary |
|------|--|--|
| 1997 | Judgement discusses relevance of payback to sentencing | <p>R v Daniel [1997] QCA 139</p> <p>Court of Appeal, Supreme Court of Queensland, Fitzgerald P, McPherson JA, Moynihan J 30 May 1997</p> <p>Appeal against severity of sentence. Appellant pleaded guilty to three offences of rape. Relationship between the offender and victim “in Aboriginal terms” was that of uncle and niece. Trial judge took into consideration that the infliction of payback would result.</p> <p>Court of Appeal refused leave to appeal against sentence. Fitzgerald P said: “The reason why payback punishment, either past or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to all material facts, including those facts which exist only by reason of the offender’s membership of an ethnic or other group.</p> <p>“It is desirable to confirm the importance of considerations personal to the offender in the sentencing process. While the principle is of general application, it might have special significance in relation to Aborigines, or some Aboriginal groups.”</p> |
| 1998 | Aboriginal Culture does not permit family violence | <p>Amagula v White [1998] NTSC 61 (Unreported 7 January)</p> <p>Supreme Court of the Northern Territory, Kearney J</p> <p>Appeal against severity of sentence for aggravated assault. Sentenced to 6 months prison, he must serve 2 months with remaining months suspended for 18 months on conditions.</p> <p>“The presence of family violence in Indigenous communities has provided grounds for the Supreme Court to suggest that violence is culturally sanctioned [...] however it has been strongly asserted that Indigenous culture does not permit family violence [...] Indeed family violence is antithetical to Indigenous cultures and is a product of the violent processes of colonization.” (Anthony, 2013, pp. 83-84)</p> |
| 1999 | Court rejected submission for traditional punishment due to lack of evidence of it | <p>Parmbuk v Garner [1999] NTSC 108 (Unreported, 14 October)</p> <p>Supreme Court of the Northern Territory, Bailey J</p> <p>Appeal against sentence. Appellant a juvenile at date of offences and of sentencing. Appellant submitted that he would receive “traditional punishment” from his family and community.</p> <p>Bailey J rejected the submission as no evidence was tendered about “the form of traditional punishment” [20].</p> |

| Year | Significance | Summary |
|------|---|--|
| 2003 | First opportunity for the NTSC to consider customary marriage and its significance in sentencing | <p>Jamilmira v Hales [2003] NTCA 9 (15 April 2003)</p> <p>Court of Appeal, Northern Territory, Martin CJ, Mildren and Riley JJ</p> <p>Appeal against sentence for conviction of unlawful sexual intercourse with a person under 16 years and discharging a firearm. The offender successfully appealed against the sentence imposed by the magistrate on the basis, inter alia, the magistrate failed to give due weight to Aboriginal Law related to marriage.</p> <p>The Crown successfully appealed to the Court of Appeal. Martin CJ: "It should be made clear that whenever there is a direct conflict between the law of the land and Aboriginal customary law, the law of the land must prevail: see <i>Walker v The State of New South Wales</i> (1994-5) [1994] HCA 64; 182 CLR 45. However, that does not deny that social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs are not relevant to moral blame and therefore to sentencing. The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives." [52]</p> |
| 2003 | <p>Views of victims are only considered in sentencing when they reflect the "ideal victim"—one which resonates with the moral character of the universal white victim</p> <p>Refusal of bail to prevent Aboriginal Law punishment</p> | <p>The Queen v Webb [2003] NTSC (Unreported, 21 February)</p> <p>21-year-old defendant convicted of manslaughter of an Aboriginal man and two counts of aggravated assault of Aboriginal females in Alice Springs.</p> <p><u>Victims</u></p> <p>Via a victim impact statement, the deceased's sister stated that the offender had visited central Australia to receive Aboriginal punishment when released on bail for 6 days. Deceased's sister on behalf of family expressed satisfaction with the punishment and felt the offender should not be imprisoned [4]. The victim's family and community also believed offender should not go to prison [8]. Sentencing SC questioned the disciplinary role of Aboriginal punishment. Held that it could not be used in lieu of a prison sentence because the Aboriginal punishment was equivalent to a private retribution between families. Evidence of Aboriginal punishment was disputed.</p> <p>Bailey J: "I am not satisfied that the wishes of a victim of an offence in relation to the sentencing of an offender can usually be relevant. The criminal law is related to public wrongs, not issues which can be settled privately." [6-7 quoting <i>R v Miyatatawuy</i>]</p> <p>As Anthony (2013, p. 130) highlights, a victim's views are only incorporated where concordant with the Court's sensibility. The relevance of the victim impact statement to the sentencing outcome was dismissed as the victim did not voice the concerns of the "ideal" victim—whose moral character resonates with the universal white victim.</p> <p><u>Bail</u></p> <p>Bailey J held that the Court should prioritise the "applicant's need for physical protection" by continuing his detention in custody [593, 598]. He stated that "the interests of the applicant would not be served by facilitating his release to be unlawfully stabbed and bashed" [597].</p> <p>See issue of bail refusal in Anthony (2013, pp. 132-135).</p> |

| Year | Significance | Summary |
|------|--|---|
| 2005 | Key case in consideration of statutory rape within customary marriage prompting significant legislative reforms in sentencing and Northern Territory Indigenous communities more broadly | <p>The Queen v GJ [2005] NTSC (Unreported, 11 August)</p> <p>The Queen v GJ [2005] NTCCA 20</p> <p>Aboriginal man pleaded guilty to unlawful assault and sexual assault against a child under the age of 16 years.</p> <p>Sentencing judge held that the offender’s moral culpability was reduced because he believed that his actions were permitted under the Aboriginal Law of his community—the victim was promised to the respondent as his wife.</p> <p>On appeal, Martin CJ held that the offender’s culpability was reduced because he believed his actions were permissible and justified under Aboriginal Law. While Aboriginal Law did not condone the offence, nor did the Court condone this Law, the defendant’s view was “a factor relevant to sentence” [4].</p> <p>Martin CJ delivered his sentencing remarks in the community of Yarralin to convey a message about the wrongfulness of the cultural practice of customary marriage. Anthony (2013, p. 8) highlights, “These judicial interactions are compelling metaphors for the control of the Court over Indigenous communities.”</p> <p>On appeal to the Court of Criminal Appeal, the sentence was increased. Protecting Aboriginal peoples from their Laws relating to customary marriage was a significant rationale for a more punitive sentence on the offender. The Court of Criminal Appeal held that Martin CJ’s lighter sentence would not deter “others who might feel inclined to follow their traditional laws” [241].</p> <p>Mildren J stated that Aboriginal Law carried “less weight” because the offender was not “under any pressure” to act in the way he did [240]. His belief that he was acting in accordance with Aboriginal Law was taken as a lack of remorse [239]. Mildren J stated that victims require protection from older male offenders “taking advantage of the immaturity of the young in order to justify their lust”—a departure from his view in <i>Hales v Jamilmira</i> (2003) where he held that the defendant’s cultural belief meant that it was not an offence based on lust. Mildren J stressed the need to teach Aboriginal people in the defendant’s community to conform to criminal law [241].</p> <p>Supreme Court seeks to deter and eradicate Culture by referring to its harmfulness and the superiority of non-Aboriginal ways [238, 241]. This deficit approach neglects the strengths of Law and Culture, including in maintaining peace in communities (Anthony, 2013, p. 108).</p> |

| Year | Significance | Summary |
|------|---|---|
| 2006 | <p>Devaluing of community submissions that jealousy should mitigate length of sentence</p> <p>Aboriginal context treated as an aggravating circumstance due to the helplessness of victims and the prevalence of jealousy</p> | <p>The Queen v Bara (2006) NTCCA 17</p> <p>Court of Appeal, Northern Territory, Martin CJ, Angel and Southwood JJ 18 August 2006</p> <p>Cohered with Court's approach in <i>R v Dylan Jagamarra Charles</i> [2004] NTSC (Unreported, 26 May)</p> <p>Offender and victim lived together, offender attacked victim with knife causing serious wounding after she made him jealous. Victim and offender reconciled and victim made statement to the Court that she did not want offender to go to prison. Community Elders told the court they would discuss the offence as part of "men's business" which would include a period of isolation in a male-only environment [11].</p> <p>The Court said that the wishes of the victim and Elders for a non-custodial sentence were not a significant consideration [12]. Rather the Court needed to send a "message" to "men in Aboriginal communities that the wishes of a victim, be they freely given or given under some form of duress, will not prevail in the face of serious criminal conduct" [19]. The Court did not support the Aboriginal communities' interests to discipline and rehabilitate the offender 16-17. The Court focused on the "objective circumstances" of the crime and the need for harsh punishment to deter offences in Aboriginal communities that arose from the "common motivation" of jealousy [17]. The Court emphasised the vulnerability of victims in remote communities who "lack the support mechanisms that are available in many of sections of the community" [18].</p> |
| 2006 | <p>Court aligned its sentence with the interests of the victim's community, rejecting the offender's claim to reduce culpability based on jealousy</p> | <p>The Queen v Linda Nabarula Wilson [2006] NTSC (Unreported 19 May)</p> <p>Source: Anthony (2013, p. 107)</p> <p>Warlpiri woman stabbed husband, killing him, after verbal argument where he was "jealousing" her. The Supreme Court focused on need to "assuage the anger of the community" where the victim's family lived [4]. Victim's family made threats to defendant [3-4]. The Court stated that the sentence must "stress the need for denunciation, retribution and deterrence both general and personal in this case" [4]. The Court mobilised the interests of the victim's community in alignment with its punitive response, dismissing the defendant's claims to reduced moral culpability.</p> |

| Year | Significance | Summary |
|------|---|--|
| 2007 | Court acknowledged that promised marriages will not exist forever, imposing sentence for sexual offence against a child in customary marriage to deter others and express the Court's disapproval | <p>The Queen v Redford [2007] NTSC (Unreported, 26 March)</p> <p>Source: Anthony (2013, pp. 104-105)</p> <p>Aboriginal man convicted of unlawful sexual intercourse with his 14-year-old wife. The defendant believed that it was an offence under mainstream law, but chose to follow Aboriginal Law and custom due to pressure by family to fulfil his "cultural responsibilities" and to meet certain expectations in relation to the marriage.</p> <p>Defence argued that the cultural arrangement reduced the moral culpability of the offender.</p> <p>At sentencing, Mildren J reviewed evidence on customary marriages and stated it was still a strong tradition and was linked to "important cultural ceremonies" and "responsibilities to the land" [4]. While the Court noted expectations placed on the offender to comply with cultural obligations, it stated that promised marriages will not exist forever and "things are changing" in Aboriginal communities [4]. Imposed a 12-month prison sentence to deter others and express the Court's disapproval of sex with minors in customary marriage [6].</p> |
| 2007 | Community violence is unacceptable and will not be tolerated by the Courts | <p>Amagula v Chambers [2007] NTSC 59</p> <p>Supreme Court of the Northern Territory, Olsson AJ</p> <p>9 November 2007</p> <p>Young offender pursuing "payback" against members of another clan, sentenced to prison for damaging five cars and carrying a wooden pole.</p> <p>Harsh penalty for young offender with no previous convictions on grounds of sending strong deterrence message to the community that this "mayhem and anarchy" will not be accepted 15, 18-19.</p> <p>Supreme Court affirmed the sentencing remarks of the magistrate that the criminal justice system will intervene to uphold the view of the "wider community" that "such activity is not to be tolerated" [33].</p> |
| 2009 | Evidence of Aboriginal Law and Culture prohibited regarding "lessening or aggravating the seriousness of the criminal behaviour" but not in relation to other sentencing purposes | <p>R v Wunungmurra [2009] NTSC 24</p> <p>Supreme Court of the Northern Territory, Southwood J</p> <p>9 June 2009</p> <p>Aboriginal Elder charged with seriously assaulting wife. He intended to plead guilty and sought to read an affidavit from a senior Aboriginal woman stating that his actions were in accordance with Aboriginal Law.</p> <p>Southwood J held that the prohibition on the use of evidence of Aboriginal Law or cultural practices applied only in "lessening or aggravating the seriousness of the criminal behaviour" and not in relation to other sentencing purposes.</p> <p>The Supreme Court identified aspects of sentencing where Aboriginal Law and Culture may be taken into account other than in relation to determining the objective seriousness of the offence, including whether the offender had the predisposition to commit the crime, is of good character, and is likely to reoffend or be rehabilitated.</p> |

| Year | Significance | Summary |
|------|---|--|
| 2010 | <p>Administering physical forms of collective punishment is criminalised under mainstream law</p> <p>Sending offender to prison undid any restoration within the community that had been achieved through traditional punishment</p> | <p>Police v Dickenson & Ors [2010] Alice Springs Court of Summary Jurisdiction (Unreported, 1 December, Magistrate Bamber)</p> <p>Source: Goldflam (2013, pp. 75-76)</p> <p>Following killing of a Warlpiri man, his family attempted to apply traditional punishment on another group of Warlpiri families. Police stepped in and riot erupted. During the riot, the mother of one of the offenders offered to be hit by the mother of the deceased. She accepted and was struck with a nulla nulla. The perpetrator was charged with assault. The deceased's mother told the Court "now I have no feeling of anger against her" and she felt satisfied that the matter was now finished for her. Despite this, the perpetrator was sentenced to 5 months imprisonment, to be suspended after serving 2 months. On her release, it was reported that sending her to prison undid any restoration that had been achieved. Violence in the community lasted a further 2 years.</p> <p>The magistrate made clear in his sentencing remarks that there is no place for violence for payback: Aboriginal punishment should be discarded and consensual violence is "nonsense". Elders "should be concerned with changing their law" and "the days of payback with violence must end". "The message, if it is not clear, needs to be made clear" that "whitefella law" applies and "old punishments are prohibited".</p> |
| 2011 | <p>The Court aims to both protect and condemn the Aboriginal community for giving rise to a crime problem through cultural practice—and to protect Aboriginal communities from both themselves and their own culture (Anthony 2013, p. 108)</p> | <p>The Queen v Turner [2011] NTSC (Unreported, 8 April)</p> <p>23-year-old and 13-year-old living in a customary marriage having a sexual relationship.</p> <p>Supreme Court imposed 9-month prison sentence and focused on the interests of the "ideal victim" who needed the court's protection, even though the couple were married "in an Aboriginal sense" and continued to be living together 4 years after the offence at the time of the trial.</p> <p>Court made general comments about customary marriages and young victims, stating that the criminalisation of sex with minors in customary marriages is "designed to protect young girls" who will be "deprived of educational, employment and other opportunities by entering motherhood at a young age" [3] (Anthony, 2013, p. 106).</p> |
| 2012 | <p>Contempt for traditional Aboriginal punishment</p> | <p>The Queen v Sims & Walker [2012] NTSC (Unreported, 27 February)</p> <p>Court continues to signal to Aboriginal communities its contempt for punishment outside its judicial system.</p> |

| Year | Significance | Summary |
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| 2012 | Court empowering communities to be involved in supervision of offenders in lieu of state supervision | <p>R v Yakayaka and Djambuy (2012), (Unreported)</p> <p>Supreme Court of the Northern Territory, Riley CJ 17 December 2012</p> <p>Riley CJ ordered the custodial sentence be suspended on condition of supervision by the Aboriginal community (as opposed to the Northern Territory Department of Corrections, which his Honour said was not “necessary, or indeed appropriate”). The offenders were under Elder supervision for 8 months.</p> <p>Riley CJ stated, “I am told he will be under strict supervision (under Yolngu law) within the community by community members for a significant period and that would seem to me to be an adequate response to any need for supervision in his circumstances.”</p> <p>Riley CJ emphasised that this did not breach the sentencing prohibition on considerations of Aboriginal Law and Culture because it was not relevant to the seriousness of the offence, but rather to the consequence of the offending behaviour.</p> |
| 2016 | Traditional punishment on release does not impact on sentence because of length of sentence | <p>R v Ferguson (2016)</p> <p>Supreme Court of South Australia, Vanstone J 13 October 2016</p> <p>Aboriginal man found guilty of the manslaughter of his partner. Vanstone J was told that the offender had agreed to traditional punishment on his release from prison. Her Honour is reported in the media (SBS, 2016) as saying, “So much time will have passed before you are released that I do not consider that this can affect my sentence.”</p> |

APPENDIX B:

Participant information sheet and consent forms



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Participant Information Sheet

Project Title: *Understanding the role of law and culture in Aboriginal and/or Torres Strait Islander communities in responding to and preventing family violence*

Researcher(s): Professor Harry Blagg, Dr Tamara Tulich, Professor Victoria Hovane, Donella Raye, Thomas Worrigal, Suzie May

What is the project about?

The aim of the research is to understand the strengths of traditional Aboriginal and/or Torres Strait Islander law and culture to address family violence. The reason we are doing this is to identify aspects of traditional law and culture that may be used to promote the safety of women and their children in Aboriginal and Torres Strait Islander communities.

We will be looking, in particular, at remote communities across Western Australia, Queensland and the Northern Territory where law and culture remain strong. We have formed partnerships with local Aboriginal and Torres Strait Islander organisations in each community.

Who is involved in the project?

This research project is being conducted by Harry Blagg and Tamara Tulich who work for the University of Western Australia. The research team includes Professor Victoria Hovane, the project's Senior Cultural Advisor, two Aboriginal researchers and a project manager. The team will be supported by Aboriginal members of the Centre for Aboriginal and Torres Strait People and Community Justice, who will act as a Research Advisory Group.

The research is funded by ANROWS (Australia's National Research Organisation for Women's Safety) for the period of October 2018 to February 2020.

Why have I been invited to participate?

You have been invited to participate because you are a respected member of your community.

This study has the potential to benefit your community, and other Aboriginal and Torres Strait Islander communities, by understanding how Aboriginal and Torres Strait Islander law and culture can have a positive role in reducing violence against women and children, and how 'on-country' programs work to reconnect men and boys to culture. The study also has the potential to contribute to policy development and implementation of place-based family violence interventions Aboriginal and Torres Strait Islander peoples.

You can withdraw at any time and it won't change your relationship with the researcher(s) or anyone else.

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What will the researchers do and when?

The researchers will hold focus groups with Aboriginal community members and organisations. These meetings will not be recorded.

The research will happen around *[date]* in *[location]*.

It will require the following time commitments from you: 3 hours (including breaks for food).

While we will have general points to discuss regarding the strengths of traditional Aboriginal and/or Torres Strait Islander law and culture to address family violence, your input will guide the discussion. Our general points for discussion will be developed with the Research Advisory Group with input from our Aboriginal partners. Questions you might be asked are:

- How does Aboriginal law/lore regulate behaviour in communities?
- How would violence and related problems (humbugging, jealousy, etc) be responded to under Aboriginal law/lore?
- In what instances might law and culture Elders prefer mainstream law to take its course (as has happened in the Kimberley following murders) rather than Aboriginal law/lore.
- What kinds of sanctions might communities use against wrong doers? What can Aboriginal law and culture offer for victims of violence to be safe?
- What mechanisms exist to heal conflict and trauma after non-lore sanctioned violence?

There will be focus groups made up of Aboriginal men and groups made up of women to deal with potentially gender sensitive issues. The relevant (female or male) Aboriginal researcher would facilitate such groups. An interpreter would be available to assist communication, and researchers will be available after the meeting should you wish to communicate further information.

What will happen to my information?

Your information will be used to create a report for ANROWS, a summary 'key themes' report, as well as academic publications. The report will be made public. Anyone can read the Report that comes out of this research, and that even people on the other side of the world might see it, maybe on the internet. The researchers will recognise the significant contribution that cultural knowledge has made to the research process, and our Aboriginal partners and contributors will be attributed in all reports and publications.

The researchers will provide you with an opportunity to give feedback on their findings. You will get a copy of the 'key themes' report and/or the final report.

Any information that is obtained in connection with this research project and that can be identified with you will remain confidential unless otherwise permitted by you, or as required by law. The procedures for ensuring the confidentiality of your information during the collection phase and the later publication of results are: you will not be identified by name in notes taken during the focus groups, and all notes will be stored securely on a password protected computer.

Culturally restricted information

No secret or sacred information will be collected by the researchers.

What are the potential risks?

We will not ask you about your experiences with family violence. However, a potential risk we foresee for you is that you may have or you may know someone who has experienced family violence and may end up reflecting on past experiences in ways that might lead to distress. We will provide you with a safety net of professionals who can provide support if this occurs. *[In consultation with our Aboriginal and Torres Strait Islander partner organisations, we will identify credible Aboriginal and Torres Strait Islander counselling services in each community and list their names here].*

Given that the study is conducted in specific regions, there is a risk that this research may inadvertently identify those who have contributed to the research, even if they are not identified by name, or reveal culturally sensitive information. Copies of written materials will be distributed to our partner organisations to ensure that culturally sensitive information is not included and that they endorse the publication. If you have any questions or concerns about this, please contact Harry.

Data storage

During the project, the data will be stored on a password protected computer. Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission, except as required by law.

The information will be kept for 7 years after the project finishes.

Contact

If you have any questions, or are worried about the research, please contact Harry Blagg at harry.blagg@uwa.edu.au or on 08 6488 2842.

Complaints

You can make any complaints about this research to the Human Ethics office at UWA on (08) 6488 4703 or by emailing to humanethics@uwa.edu.au.

Ethics Committee Clearance

The ethical aspects of this research project have been approved by the UWA Research Ethics Committee.

Sincerely,

Professor Harry Blagg

Approval to conduct this research has been provided by the University of Western Australia with reference number RA/4/1/xxxx, in accordance with its ethics review and approval procedures. Any person considering participation in this research project, or agreeing to participate, may raise any questions or issues with the researchers at any time. In addition, any person not satisfied with the response of researchers may raise ethics issues or concerns, and may make any complaints about this research project by contacting the Human Ethics office at UWA on (08) 6488 4703 or by emailing to humanethics@uwa.edu.au. All research participants are entitled to retain a copy of any Participant Information Form and/or Participant Consent Form relating to this research project.



THE UNIVERSITY OF
**WESTERN
AUSTRALIA**

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Participant Consent Form

Project title – *Understanding the role of law and culture in Aboriginal and/or Torres Strait Islander communities in responding to and preventing family violence*

I have read the Participant Information Sheet provided [or someone has read it to me in language I understand] and I agree with it.

I agree to participate in the research. I know that I do not have to participate in it if I don't want to. I made up my own mind to participate and nobody is making me do it. I know that I can withdraw at any time and it won't change my relationship with the researchers or anyone else.

I understand that my name will NOT be mentioned in any reports that come out of this research, and that people won't know who I am from reading the report, unless I have consented to this. The only exception to this principle of confidentiality is if this information is required by law to be released.

Signature: _____

Date: _____

Approval to conduct this research has been provided by the University of Western Australia, in accordance with its ethics review and approval procedures. Any person considering participation in this research project, or agreeing to participate, may raise any questions or issues with the researchers at any time.

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ANROWS

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AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY

to Reduce Violence against Women & their Children

