

**CRIMINAL LAWYERS ASSOCIATION
OF THE NORTHERN TERRITORY**

BALI

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**LAW & DISORDER IN ABORIGINAL
COMMUNITIES**

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CLANT members, myself included have over the past 15 years or so decried the Northern Territory's ever escalating indigenous prisoner population.

Although indigenous people amount to 29.9%¹ of the Territory's population they have regularly accounted for more than 80% of the prison population. In 2000 there were 400 indigenous prisoners in the two Northern Territory gaols, in 2010 the average daily number of indigenous prisoners was 912 (82% of the total prisoner population)², an increase of 128%.

The Territory's main prison at Berrimah was originally designed to accommodate 110 prisoners. With ad hoc extensions that capacity has been increased to 670 however the prisoner numbers reached 699 earlier this year.

As part of its re-election campaign in 2008 the Labor Government committed to building a new 1,000 bed Darwin prison. The subsequent political realities of minority Government resulted in a modification of the original proposal and in September last year the Government announced it would be building a new 800 bed prison at Holtze which would be opened in 2014.

Our CLANT President John Lawrence SC criticised the government's decision to build a new gaol. The NT News of 27 January 2011 reported:

John Lawrence is opposed to building the prison. He said so many offenders were being sentenced to gaol that it would be full by the time it was built. He said the Northern Territory government needed other ways to deal with non-violent offenders.

For reasons I will touch on later in this paper I believe that a new prison is urgently needed in the Top End.

However I want to first highlight some of the factors that are contributing to the high rates of indigenous incarceration and then look at what hasn't worked and what might possibly work in holding back this tide of misery.

¹ As at 30 June 2010 per NT DOJ Research & Statistics

² NT DOJ Research & Statistics

DEMOGRAPHICS

As indicated at the outset the Northern Territory is unique within Australia with an indigenous population of almost 30% compared to approximately 2% nationally.

There is a 16 year gap between life expectancy of indigenous and non-indigenous Territorians and we have Australia's highest proportion of people across the board 14 years and younger.³

The overriding demographic of the Northern Territory's indigenous population is high fertility and adult mortality rates leading to proportionally large numbers of children and young adults and progressively fewer older people. This is the complete reverse of the National trend.⁴

EMPLOYMENT

Margaret Mead said about seventy years ago that a society which does not provide employment opportunities for its young men, is destined for trouble. Seventy-three percent of indigenous prisoners were unemployed when received into the Territory's prisons in 2010 and that figure excludes those who had participated in CDEP (work for the dole programs).⁵

ALCOHOL

Whilst there are proportionally more indigenous people who do not consume any alcohol compared to the non indigenous population, eighty percent of indigenous drinkers consume alcohol at hazardous levels.⁶

The per capita alcohol consumption level in the Northern Territory is almost twice the national average.⁷ There is no doubt that alcohol abuse has created untold havoc within indigenous society. The Dry Area legislation affords some respite for the inhabitants of prescribed dry communities; however *grog-running* still occurs despite the high

³ ABS 2006

⁴ Mitchell, Pearce, Stevens, Taylor and Warchwoken 2005. *Indigenous Populations and Resource flows in Central Australia*.

⁵ NT Department of Justice Correctional Services, statistical summary 2001-2010

⁶ Condon J, Warman G and Arnold L 2001 – *The Health & Welfare of Territorians*

⁷ Condon, Warman and Arnold

penalties including forfeiture of any vehicle used to transport alcohol into a dry area.

Whilst it might minimise consumption on those communities, it also leads to transference of the problems associated with alcohol abuse to the regional centres. The drinkers will travel from their dry community to Darwin, Katherine, Tennant Creek or Alice Springs and live with relatives in one of the town camps or in the *long grass*. Children can be left behind at the dry community whilst their parents are binge drinking for extended periods in town and engaging in anti social behaviour in someone else's community.

Tennant Creek is one of our towns that is drowning in the rivers of grog that are causing misery and devastating harm to residents and visitors alike. In his sentencing remarks in *R v Green* (SCNT 20823606) on 20 February 2009 Riley J said:

It seems plain that something must be done to curb the level of alcohol consumption in Tennant Creek. The courts regularly hear evidence of alcohol being consumed in Tennant Creek in quantities beyond comprehension. It seems that the excessive consumption of alcohol continues for so long as alcohol is available.

People drink until they can drink no more and then get up the next day and start all over again. The frequency with which drunken violence occurs is unacceptable and the level of violence is likewise completely unacceptable.

For the good of the town, for the good of the victims, for the good of the offenders and for the good of the innocent children of Tennant Creek, it seems to me obvious that a system must be devised to limit the amount of alcohol made available to the people whose lives are being devastated in this way and to educate and rehabilitate those already abusing alcohol. The people of the Northern Territory cannot sit on their hands and allow what is occurring in Tennant Creek to continue. I accept that it is a complex issue but it is an issue that must be addressed and must be addressed sooner rather than later. Hard decisions must be taken.

Russell Goldflam in his presentation to the last conference and more recently in his *Balance* article *Damming the Rivers of Grog*, has ably advocated the need for reducing the supply of alcohol in Central Australia. He said:

Because if we don't fix up this grog business, whatever else we do to stop the violence, whatever else we do to address my town's social problems, however much money we spend, whatever laws we pass, or

*gaol sentences we impose, or programs we deliver, or houses we build, or theories we devise, or prayers we offer, I know this: if we don't take the hard decisions and fix up this grog business, whatever else we try, will fail*⁸.

CANNABIS

Fifteen years ago some amateur social engineers were advocating the introduction of cannabis into aboriginal communities as a less harmful alternative to alcohol. It hasn't turned out that way. Cannabis is now widely consumed by young indigenous men and at such high levels it is resulting in psychotic episodes. Significant amounts of money are being diverted from the purchase of food and other necessities to obtain cannabis. It is reported that the majority of indigenous domestic violence in cross border areas of Western Australia, South Australia and the Northern Territory is linked to cannabis abuse.⁹

In *Daniels v Queen* [2007] NTCCA 9 Martin (BR) CJ and Riley J said:

As with alcohol, it seems that the use and abuse of cannabis has become a way of life for many Aboriginal people. The effect is to contribute significantly to the severe dysfunction found in many communities and within families in those communities. The negative effects of the consumption of cannabis not only impact upon the individuals immediately concerned, but upon the community as a whole.

Research referred to in the report NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse identified a number of individual "community harms" linked to the abuse of cannabis. The identified harms reflect the experience of the Court. Those harms include increased suicide and self-harm, friction and disputes stemming from users seeking money for drug use, young people making demands for money to purchase cannabis and threatening violence or self-harm if money is withheld and a negative impact on participation by users in work, school, sports, culture and other aspects of community life. Cannabis use has led to mental health problems and to the compounding of harms associated with excessive drinking, kava consumption and inhalant abuse.

⁸ Damming the Rivers of Grog – Russell Goldflam Balance Edition 1/2011

⁹ Lloyd J 2004 *The Impact of Cannabis on Indigenous Women* paper presented at *The Australasian Drug Strategy Conference May 2004*

PETROL SNIFFING

Inhalant abuse, in particular petrol, is causing great damage to the lives of young indigenous men and women in some remote central Australian communities. The effects include aggression, extremely irrational behaviour and permanent brain damage.¹⁰ There is an increasing number of young indigenous people with acquired brain injury who are causing mayhem and destruction within their communities. They are extremely dangerous when consuming alcohol and have been responsible for a number of the Northern Territory's most distressing cases of homicide and sexual assaults involving young children and babies, e.g. *R v Shaun Hudson* (SC 98100166) and *The Queen v Inkamala* [2006] NTCCA 11.

Young female sniffers are also highly vulnerable as targets of sexual assault.

EDUCATION

Although both the Territory and Commonwealth Governments have significantly increased the level of funding for Aboriginal education, the outcomes are getting worse. It is all too common for we lawyers to ask Aboriginal parents to interpret for their children the *Little Children are Sacred* Report relevantly stated *if there is to be any hope for any future for Aboriginal people, education is vital. There is a link between education (or lack of it) and manifestations of a disordered society*¹¹

WHAT TYPE OF OFFENDING IS DRIVING THE INCREASE IN INDIGENOUS PRISONER NUMBERS?

Joe Yick, from the NT Department of Justice Research and Statistics Unit has provided me with a breakdown of sentence commencements according to the most serious offence from 2000-01 to 2008-09.

It may be surprising to some that sentence commencements for most offence types have remained relatively constant. Property offences have in the main decreased slightly and although there has been an increase in overall sentences for drug offences, the relatively low fluctuating numbers do not afford a reliable base for comparison and in any event, the indigenous number of offenders is not significant.

¹⁰ Condon, Warman and Arnold

¹¹ Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse para 16.3

TABLE G.1

	1998_99	1999_00	2000_01	2001_02	2002_03	2003_04	2004_05	2005_06	2006_07	2007_08	2008_09
	total	total	total	total	total	total	total	total	total	total	total
Offences (ASOC 97 division and selected groups)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)
06 Robbery, extortion and related offences											
all	19	12	22	11	14	12	13	5	13	6	13
indigenous	9	7	9	5	5	4	5	2	5	3	5
07 Unlawful entry with intent/burglary, break and enter											
all	134	100	118	101	125	97	112	83	82	75	117
indigenous	110	78	100	84	106	83	96	76	74	65	104
08 Theft and related offences											
all	164	130	149	84	49	63	73	65	72	46	66
indigenous	122	91	95	58	32	45	55	53	64	41	53
<i>08_1 Motor vehicle theft and related offences</i>											
<i>all</i>	63	45	55	33	17	30	34	28	28	20	31
<i>indigenous</i>	55	39	44	26	16	25	31	25	28	19	27
<i>08_2 Other theft</i>											
<i>all</i>	101	85	94	51	32	33	39	37	44	26	35
<i>indigenous</i>	67	52	51	32	16	20	24	28	36	22	26
09 Deception and related offences											
all	8	9	5	11	16	11	7	12	3	7	12
indigenous	4	2	0	1	2	2	2	4	0	1	4
10 Illicit drug offences											
all	13	8	26	34	34	36	25	34	36	18	51
indigenous	4	0	6	5	8	13	5	17	15	7	17
11 Weapons and explosive offences											
all	11	9	15	10	18	15	17	11	20	16	25
indigenous	10	8	14	8	14	11	16	11	18	15	23

However the areas where there have been increases in sentence commencements for indigenous offenders have been for those ASOC groups.02 - Acts intended to cause injury - which includes offences of aggravated assault and cause serious harm and14 - Road Traffic Offences which primarily cover the offences of driving whilst disqualified and XD .08 or driving under the influence of alcohol, together with 15 - Offences against Justice Procedure. The sentences under this category relate largely to breaches of suspended sentences imposed in respect of category 2 and 14 offending.

ROAD TRAFFIC OFFENCES

Dealing first with the driving offences.It is appropriate at the outset that I deal with the myth that many indigenous prisoners are serving time for unpaid traffic fines. As at 9 June 2011 there were not any indigenous prisoners serving sentences in respect of unpaid fines.The table shows that in 2008/09,477 of the 489 sentence commencements for driving disqualified and DUI were imposed on indigenous prisoners.

TABLE G.2

		1998_99	1999_00	2000_01	2001_02	2002_03	2003_04	2004_05	2005_06	2006_07	2007_08	2008_09
		total	total	total	total	total	total	total	total	total	total	total
Offences (ASOC 97 division and selected groups)		(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)	(no.)
12 Property damage and environmental pollution												
	all	148	130	105	62	51	41	39	36	46	36	55
	indigenous	130	114	93	59	49	36	35	32	42	32	51
13 Public order offences												
	all	79	55	45	30	20	16	36	28	32	21	31
	indigenous	68	50	41	25	18	15	26	16	27	17	29
14 Road traffic and motor vehicle regulatory offences												
	all	224	183	204	185	291	411	433	389	358	420	489
	indigenous	198	166	180	164	263	387	422	383	347	412	477
14_1	<i>Driving licence offences</i>											
	<i>all</i>	78	52	80	92	147	286	261	162	146	200	241
	<i>indigenous</i>	74	52	72	82	132	272	258	159	141	197	237
14_3	<i>Driving under the influence offence</i>											
	<i>all</i>	117	100	89	69	124	105	152	212	199	214	247
	<i>indigenous</i>	105	90	81	59	111	97	144	209	193	209	239
14_5	<i>Other driving/road traffic offences</i>											
	<i>all</i>	29	31	35	24	20	20	20	15	13	6	1
	<i>indigenous</i>	19	24	27	23	20	18	20	15	13	6	1
15 Offences against justice procedures, government security and government operations												
	all	66	58	82	52	96	104	130	202	244	298	164
	indigenous	55	41	68	48	83	86	110	187	216	263	148
15_1	<i>Breach justice order offence</i>											
	<i>all</i>	57	48	69	47	89	97	122	192	230	281	156
	<i>indigenous</i>	47	33	60	44	77	83	105	178	204	258	140
15_2	<i>Other justice type offence</i>											
	<i>all</i>	9	10	13	5	7	7	8	10	14	17	8
	<i>indigenous</i>	8	8	8	4	6	3	5	9	12	5	8

No other State in Australia imprisons traffic offenders at a similar rate to the Northern Territory. However, no other State would be dealing with the same level of repeat offending by drunk and disqualified drivers.

As recently as 6 June an Indigenous offender was sentenced in Alice Springs Magistrates' Court to 8 months imprisonment on a charge of XD .08 (.203) and drive disqualified. The 41 year old offender's record of prior convictions spanned 15 pages commencing with a charge of unlicensed driving at Papunya CSJ in 1992. At the time of sentencing he admitted 23 prior convictions for drive disqualified and 18 for drink driving.

Those of us who have been *to long in the bush*, take a defensive approach to driving especially in Central Australia where there is a lingering if unreasonable fear that, the oncoming troop carrier may without warning stray onto your side of the road. However the reality is that those most at risk of injury or death as a result of drunk driving are indigenous people.

The case of *Queen v Edgar Inkamala* (SC 20733963), a sentence of Mildren J on 13 August 2008 shows the misery that drunken driving can inflict on aboriginal communities.

Inkamala was a 32 year old intoxicated and unlicensed driver. Whilst fleeing a police RBT he rolled the vehicle killing all 6 passengers. The victims included his wife and four nephews.

Apart from the *Rivers of Grog*, other factors which contribute to the high level of traffic offending by indigenous drivers include the lack of public transport in remote communities and the additional difficulties they face in obtaining a licence or getting re-licensed after a period of disqualification due to lack of relevant services outside the regional centres. It is heartening to note that the Territory Government, as part of its New Era for Corrections has indicated a willingness to tackle some of the systemic problems which prevent indigenous people from ever driving legally.

ACTS INTENDED TO CAUSE INJURY

	1998_99	1999_00	2000_01	2001_02	2002_03	2003_04	2004_05	2005_06	2006_07	2007_08	2008_09
Offences (ASOC 97 division and selected groups)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)	total (no.)
01 Homicide and related offences											
all	12	7	11	12	14	11	15	21	13	16	16
indigenous	10	4	7	10	11	9	10	16	10	10	14
02 Acts intended to cause injury											
all	202	185	238	291	470	498	595	722	809	757	935
indigenous	179	171	226	261	449	469	571	685	783	725	891
03 Sexual assault and related offences											
all	22	21	18	19	23	31	34	35	40	29	35
indigenous	17	14	14	12	18	20	23	23	27	19	21
04 Dangerous or negligent acts endangering persons											
all	21	22	20	30	35	31	49	26	44	27	48
indigenous	16	18	12	28	32	29	39	26	39	23	37
<i>04_1 Driving under the influence of alcohol or drugs</i>											
all	9	11	10	12	13	10	16	7	6	11	16
indigenous	8	11	8	12	13	10	15	7	6	10	13
<i>04_2 Other dangerous driving offences</i>											
all	6	2	4	9	7	3	11	6	13	8	20
indigenous	4	1	0	7	5	3	8	6	11	5	14
<i>04_3 Other Dangerous or negligent acts</i>											
all	6	9	6	9	15	18	22	13	25	8	12
indigenous	4	6	4	9	14	16	16	13	22	8	10
05 Abduction and related offences											
all	3	0	1	1	4	1	3	1	2	2	2
indigenous	3	0	1	1	3	1	2	1	2	1	2

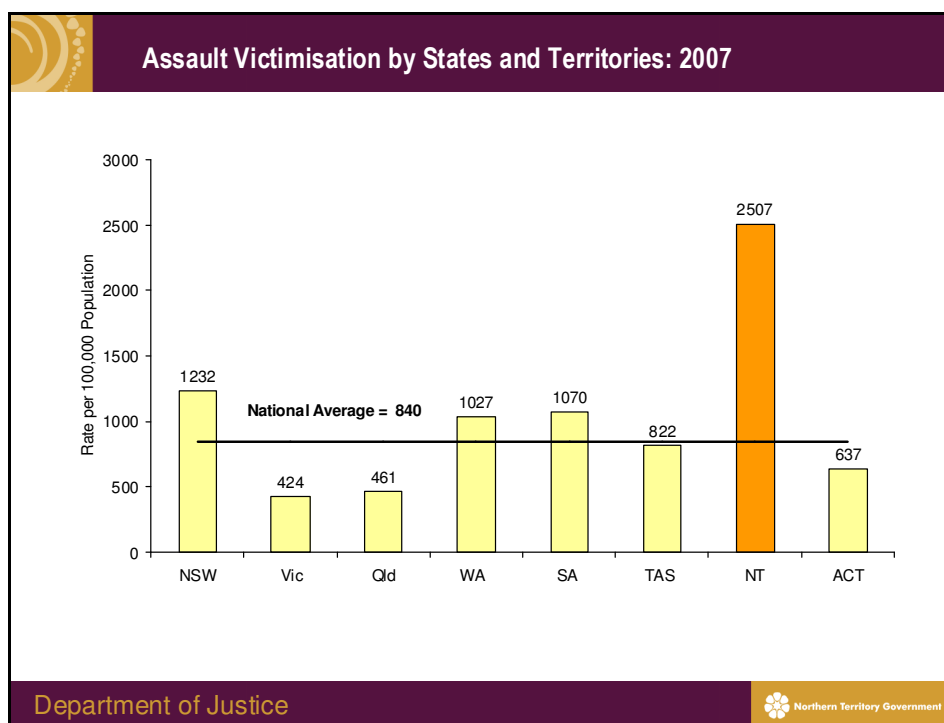
It is clear from the table that in 2008-09, by far the highest number of sentence commencements related to violent offences committed by indigenous offenders. The change since 1998-99 is also greatest for all offence categories. There has been a staggering increase of 400% in the number of indigenous offenders sentenced to prison for serious assaults.

Maybe this is not all that surprising because our newspaper complains daily of alcohol fuelled violence in Darwin's Mitchell Street nightclub strip and the *Action for Alice* residents group is demanding that the Government take action to protect (non-indigenous) residents from drunken Aborigines.

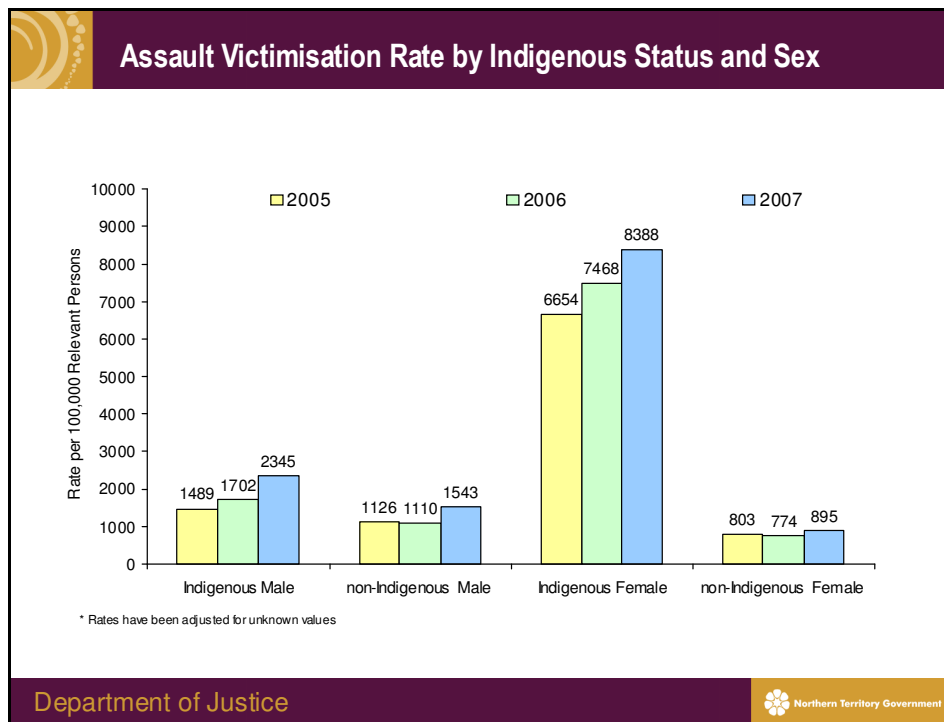
It is therefore instructive to look at the available data to identify the profile of the victims of this increased offending. In this task I have been greatly assisted by a presentation Joe Yick from NT Department of Justice Research and Statistics Unit delivered to the November 2008 ANZSOC Conference in Canberra.

He examined national and NT statistics in relation to victims of violent assault.

The Assault Victimization Rate for Australia States and Territories is shown in Table H.

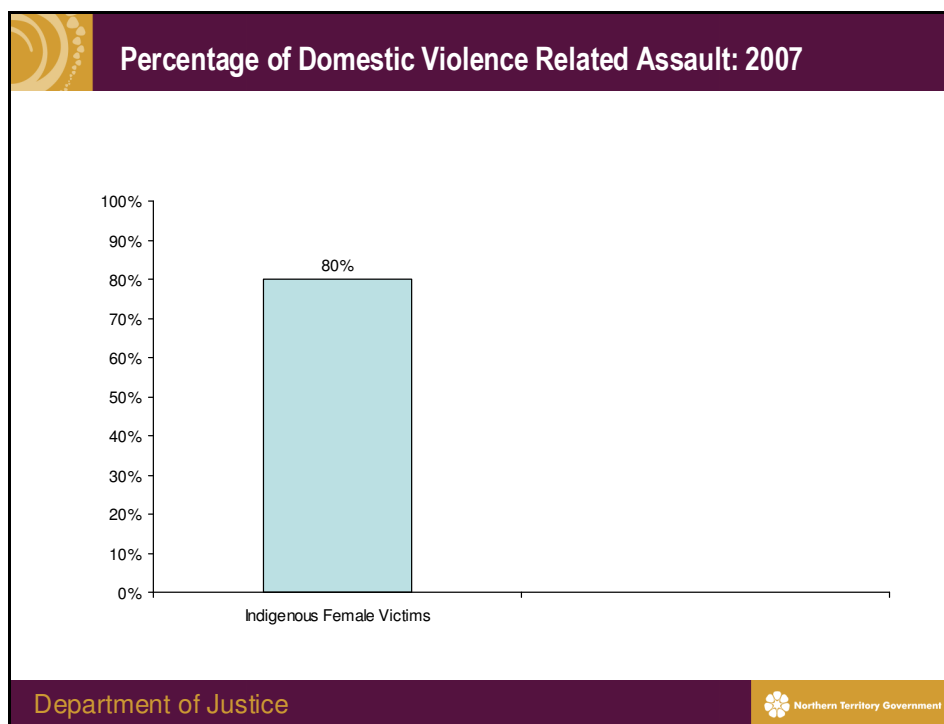


The Assault Victimization Rate by Indigenous Status and Sex is shown in Table I. It is also relevant to note that indigenous female victims of violence are 35 times more likely to be hospitalised than non-indigenous women¹².



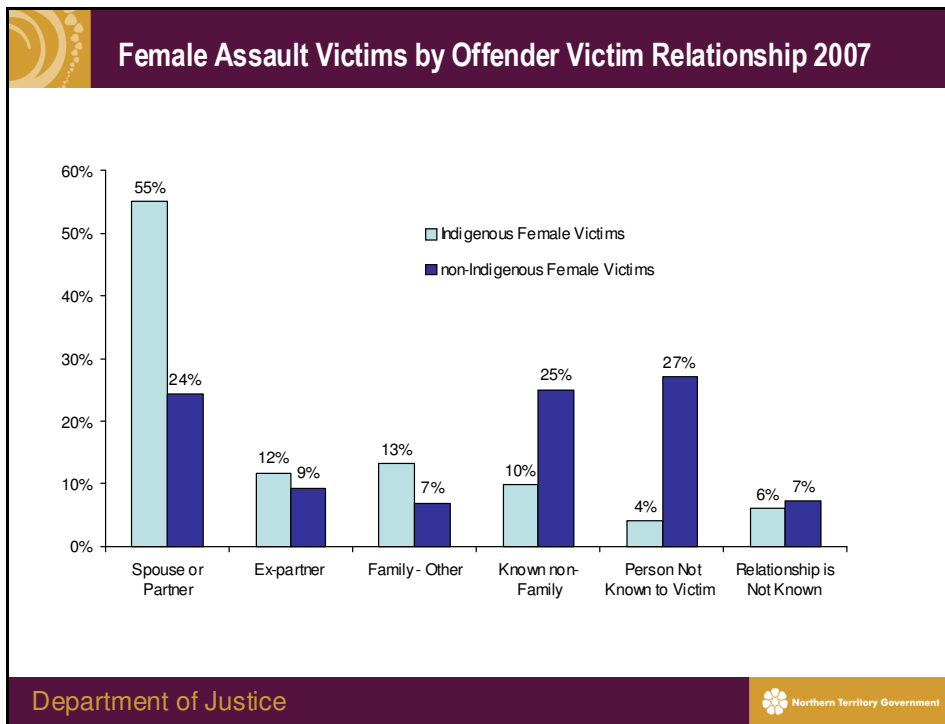
The cohort of female victims was further broken down to capture the percentage of female victims whose assault could be categorised as *Domestic Violence Related*.

Table J depicts those findings.

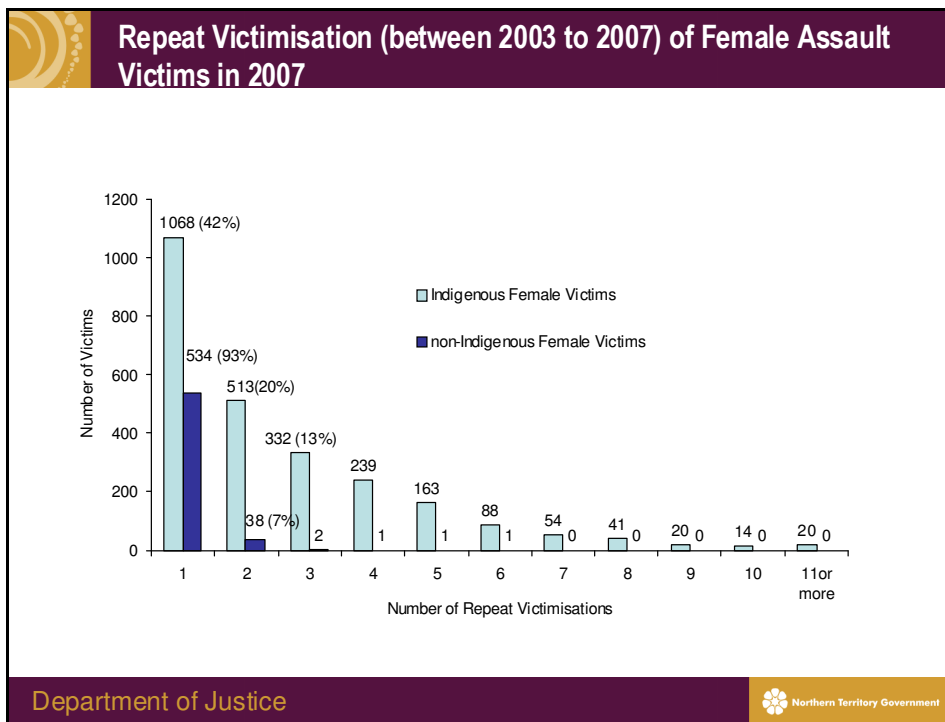


¹² Melanie Schwarz *The potential for Justice Reinvestment in reducing offending in Australian Indigenous Communities*.

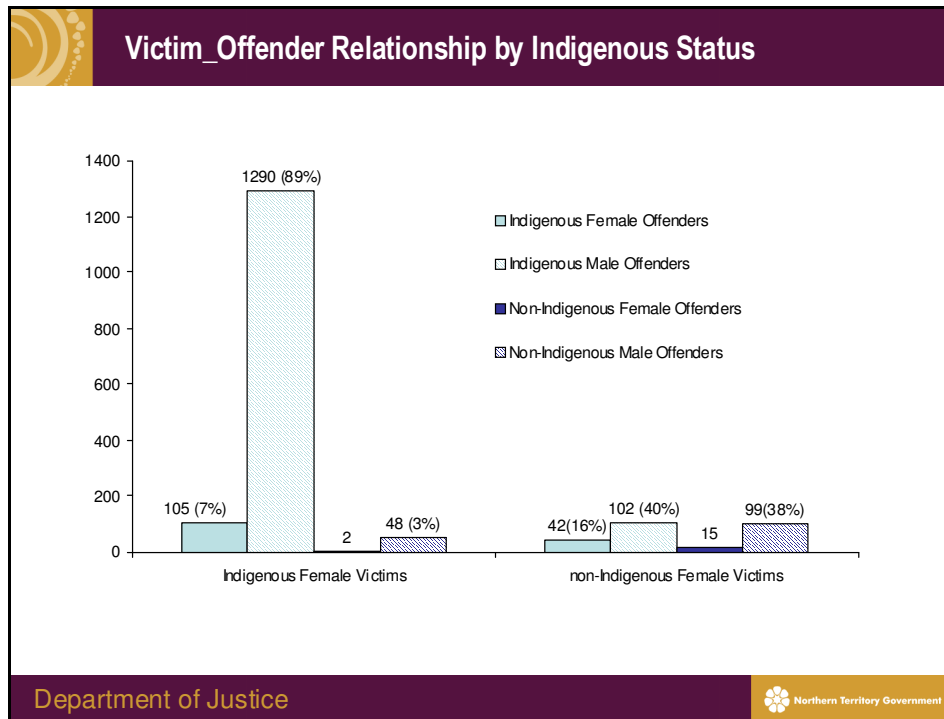
The relationship between indigenous and non-indigenous female victims and their offenders is further broken down in Table K.



The research was also able to detail the extent of repeat victimisation of indigenous and non-indigenous female victims over the period 2003 to 2007 and the results are shown in Table L.



The researchers were able to match 91% of victims to offenders using a number of different data bases and Table M shows Victim Offender Relationship by Indigenous Status.



Whilst non-indigenous female victims were at a slightly greater risk of assault from indigenous male offenders than by non-indigenous males (40-38%) almost 90% of indigenous female victims were assaulted by indigenous males.

RESEARCH FINDINGS

The data clearly shows that the offenders increasingly sentenced to prison are a cohort of indigenous males who have assaulted a female victim with whom they have had a domestic relationship.

MORE OFFENDING OR JUST BETTER POLICING?

When the increase in violent offending first garnered political interest there was a suggestion on the part of Police that it may all be due to better policing and that the incidence of offending hadn't really increased.

Having worked in the field for 30 years and having witnessed on a daily basis the increasing level of compounding damage to the faces of the aboriginal women who congregate at my local Parap Road Store - my instinct is that it is getting worse.

Even if more police are contributing to the higher number of convictions I would be surprised if anyone was suggesting that these current

numbers were an accurate reflection of the extent of violence being visited upon aboriginal women.

Any survey aimed at identifying the level of unreported victimisation within the Territory's indigenous community is extremely problematic for obvious reasons. However some excellent work has been done by Matthew Willis a researcher with Australian Institute of Criminology who confirmed that there were high rates of non-disclosure of violence in Indigenous communities.

As part of his *Trends and Issues Paper*¹³, Willis included a *fictional* case study based on his extensive research of accounts of violence against aboriginal women living in remote communities which creates a context for the under reporting issue.

The Case study involving the fictional *Selina* is not dissimilar to a number of cases my office would prosecute in Central Australia once the level of violence increases to such an extent that the victim is medivaced out of the community having sustained serious injury or death.

Selina is 19 years old and is a victim of domestic violence by her 24 year old boyfriend, Taylor, who has an outstanding warrant for violence against a previous partner. They live in his family's home in a remote community with eight other people. There is no telephone in the house and the public phone is broken. As Taylor's father is the community council Chairperson, Selina feels Taylor's father would stop her if she tried to use the phone at the community council to seek help.

Selina has no family or social support in the community. Selina's mother was murdered by her father when she was three years old. She had no formal care and no primary attachment to an adult following her mother's death. She regularly travelled between communities, crossing jurisdictions. Taylor's parents are also often absent from the home and community.

Taylor is jealous of Selina's job at the local store and controls her keycard and money, using it to buy cannabis. Once Taylor accused her of infidelity and struck her with an iron wheel brace while she was at work. Selina suffered facial and back injuries but did not attend the clinic. No one in the store reported the assault to the police. Selina has not been back to work, or to the store since.

Taylor locks Selina in their room where he smokes cannabis and abuses her. He threatens to harm himself, harm and douse her in

¹³Trends & Issues in crime and criminal justice No. 405 AIC January 2011. Non-disclosure of violence in Australian Indigenous communities

petrol and set her alight if she tries to leave or report him to the police. Taylor's mother has tried to intervene without success. None of the adult males in the house will intervene. Taylor's family pressure Selina to stay with him and she understands she would be held responsible if Taylor was harmed in any way. She presented at the health clinic once, but was reluctant to disclose the details of her injuries, though she told the nurse she wanted to leave the community. When the clinic nurse attempted to follow-up with Selina, Taylor threatened the nurse with violence.

Kinship System

In a 2005 study Dr Nan Rogers (current Assistant Director NT ODPP) looked at particular cultural factors which were contributing to the non-disclosure of violent offending in Central Australia. She believes that the Kinship system is still very much a factor of indigenous life in the Northern Territory.

It defines and regulates behaviour between individuals as well as classifying or naming people. Social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships – and largely dictates the way people behave to each other, prescribing dominance deference, obligation or equality as the basis of the relationship. Kinship ties can also dictate family allegiance to an offender which may override the safety and welfare of a victim.¹⁴

There are of course many other societies where familial ties still play an important part in community life but clan loyalties in the Territory's indigenous communities contribute to violent perpetrators not being held accountable for their actions and victims being left unsupported by their people.

Witnessing

The other factor which Dr Rogers saw as creating difficulties for police and prosecutors was the concept of *witnessing*.

If a person is physically present or close by at the time an offence is committed, then that person might be blamed for not having either looked after the victim; or having prevented the offender from committing the offence. In other words, the witness is responsible for the commission of the offence as if he or she were the perpetrator. The family of the victim apportions blame to the witness and often threatens the witness, verbally or physically. Sometimes the threats are carried out. This obviously presents a problem for the successful

¹⁴Rogers N – *Child Sexual Assault and Cultural Issues* – paper delivered at the Police Commissioners' Conference October 2005, Sydney

prosecution of the offence. Assuming that a statement was supplied to police by the eye witness, it is sometimes incredibly difficult to get witnesses to court, keep them at court and get them to adhere to their story once they are in the courtroom.¹⁵

To avoid punitive reprisals indigenous people will often look to outside agencies to take the responsibility for what has occurred. Outside agencies are invariably staffed by non-indigenous people or indigenous people from a different State who are not linked in social relationships to the offender or the victim.¹⁶

Mathew Willis'¹⁷ recent research found that there continues to be significant under reporting of violent crime in indigenous communities. He concluded:

A number of inquiries and reports cited in this paper show that violence and abuse are so prevalent in some communities that they are seen as inevitable, as something to be tolerated and not disclosed. People in all communities have a fundamental right to live without the expectation that they or those around them will be violently victimised. Moving past this to an expectation that victimisation is atypical and intolerable is undeniably necessary.

The other great human cost to the high levels of domestic violence is the impact on the children of those fractured relationships. The poor educational outcomes for indigenous children are too often the result of a dysfunctional family life. Children need a safe and secure environment if they are to develop their full educational potential. In my view the level of violent crime in Aboriginal communities is not merely a symptom of a dysfunctional society – it has now become one of the contributing causes of that dysfunction. The criminal justice system has a fundamental role to play in making indigenous communities safer.

HOW ARE OUR COURTS RESPONDING?

As the former President of the Queensland Court of Appeal, Justice Fitzgerald said in *Daniel* [1998] 1 Qd R 499 at 530.

The criminal law is a hopelessly blunt instrument of social policy and the courts cannot deal with the root problems of violence in indigenous communities.

¹⁵Rogers N – *Child Sexual Assault and Cultural Issues* – paper delivered at the Police Commissioners' Conference October 2005, Sydney

¹⁶Rogers N – *Child Sexual Assault and Cultural Issues* – paper delivered at the Police Commissioners' Conference October 2005, Sydney

¹⁷ Willis M. AIC Trends & Issues No. 405

I believe that, subject to those limitations the Northern Territory's courts have, over the past 10 years, been sending the correct message to indigenous women and children. Namely that just because you are from a deprived community does not mean that you will be deprived of the laws protection.

In allowing a Crown appeal against sentence in *The Queen v Inness Wurrarama* [1999] 105 A Crim R 512 at 520, the Court stated:

Courts in the Northern Territory, and elsewhere in Australia, have been consistently expressing concern as to the level of violence occurring in some Aboriginal communities. The type of violent offending to which the respondent pleaded guilty in this matter is all too familiar to those involved in the administration of justice in the Northern Territory. Often the violence is, as in this case, extreme in its nature involving the use of offensive weapons. It frequently results in death or, as here, life-threatening injuries. The assaults are often by a male upon a female, but on many occasions they are directed at children and other persons who are, for one reason or another, weaker members of the community. Objectively viewed the incidents are often extremely disturbing. For the victims they must be horrifying.

*The courts have been concerned to send what has been described as **the correct message** to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.*

In *The Queen v GJ* 2005 NTCCA 20 of the Court of Criminal Appeal reaffirmed the decision in *Wurrarama* and further stated, per Southwood J at para [69]

Implicit in such pronouncements of the Courts of the Northern Territory is recognition that such violence has an extremely deleterious effect on the mental and physical integrity and dignity of women. That it may well have the consequence, if women are not protected, of maintaining them in subordinate roles and preventing them from the equal enjoyment and exercise of their positive human rights and freedoms.

Those same principles were applied by the Northern Territory's CCA in the cases of *The Queen v Inkamala* [2006] NTCCA 11 delivered 7 June 2006 and *The Queen v Riley* [2006] NTCCA 10 delivered 7 June 2006. Both were Crown appeals, where the sentences were significantly increased in respect of two child sex offenders.

I am not suggesting that longer sentences are in themselves the answer, rather it is more about the courts' saying this behaviour is not going to be excused just because you come from a dysfunctional community. This type of offending, against the most vulnerable in the Australian community, diminishes us all and I believe we are doing Aboriginal people a disservice if the perpetrators of these crimes are not held properly accountable for their actions.

WHAT HASN'T WORKED?

Mandatory Sentencing

In October 2001 the incoming Labor government repealed the CLP's controversial mandatory sentencing provisions for property offences. However it retained s.78BA of the *Sentencing Act* which requires a court to impose a term of actual imprisonment for a charge of aggravated assault causing physical harm. As to the deterrent effect of those *tough on crime measures* one only needs to return to Table G.1 and note that levels of property crime actually declined following the repeal of mandatory sentencing whilst crimes of violence have flourished despite the prospect of a mandatory sentence.

Gaol

The unfortunate reality is that gaol, for many young indigenous offenders, provides a significant improvement in their material standard of living. It is also a chance to catch up with family and other clan members. Although not seen as a rite of passage, juvenile detention and imprisonment are not deterring young indigenous men from offending.¹⁸

However, time spent in prison is time away from country and these young prisoners miss out on important ceremonial duties and funerals whilst they are incarcerated which leaves them further disempowered when they return to their communities.¹⁹

Prisons in the Northern Territory had been traditionally run on the *warehousing* philosophy with little focus on sentence planning and targeted rehabilitative programs. However in 2003 the Government engaged Olle Ingstrup the noted Danish/Canadian prison reformer to conduct a review of the Territory's Adult Custodial Institutions.

¹⁸ Van Zyl Allan - The custody of indigenous youth and young men, a rite of passage? 2001

¹⁹ O'Connell S National Indigenous Times

He made 78 recommendations at reducing recidivism through changes to work practices and innovative programs.²⁰ Although funding was provided to introduce the reforms, the prison population increased at such a rate over the following two years that the sheer weight of numbers swamped the reform process. It also proved impossible to introduce the *Living Units* rehabilitation model because of design limitations within Berrimah Prison.

Although the Northern Territory Prison system may have done little to deter or rehabilitate violent indigenous offenders, in the eyes of many of the victims;

It's about protecting the victim, it gives them some respite, their family respite, and ultimately its going to incapacitate the offender from committing another assault in that period²¹.

WHAT MIGHT MAKE A DIFFERENCE

Proposed New Prison & Work Camps

As indicated at the outset of this paper I believe that the Northern Territory does need a new prison. The existing facilities at Berrimah Prison are substandard and not geared to providing appropriate rehabilitation and education programs.

The New Era in Corrections program has a number of exciting initiatives which is clearly aimed at diverting offenders from prison and could yield positive outcomes. A further enhancement to the program could be an amendment to the *Sentencing Act* to allow a home detention order to be combined with a partially suspended sentence. This would allow a court the flexibility of suspending a sentence after a period of imprisonment on condition that the offender undergo a period of home detention.

Alcohol Reforms

The Government's *Enough is Enough* alcohol reforms come into force on 1st July. The suite of measures include a requirement that photo ID is produced to purchase take away liquor, a banned drinkers register, an increase in treatment services and a new therapeutic SMART court which will be empowered to deal with chronic problem drinkers in a similar manner to the way in which *drug courts* operate elsewhere.

²⁰ Ingstrup O and Crookall *A Path to Good Corrections* 2003

²¹ Jane Lloyd – NPY Womens Council ABC National Law Report 6 June 2006

These are radical reforms which will hopefully have a beneficial impact on alcohol fuelled crime. It is shameful if not surprising that some of the most vocal opposition to the measures is coming from one of the licensees in Alice Springs.

Indigenous Men's Health Group

On Tuesday 7 June traffic came to a stop in downtown Katherine as 300 Aboriginal men marched down the main street as part of a pro-active campaign to improve the lives of men by combating alcohol abuse and domestic violence. The march was the culmination of a weeklong summit on men's health attended by indigenous men from the Territory, WA, Queensland and South Australia.

The summit had been facilitated by the *Strongballa* group which is part of the Wurlli-Wurlinjang Health Service in Katherine. Aboriginal men spoke openly on the need for them to take control of their lives and to take a pro-active approach to stopping violence.

This is a positive development within the indigenous community and should be supported by Government and agencies such as CLANT. It has to be our best hope for the future.

CONCLUSION

When I first began working in the field thirty years ago, aboriginal suspects who could not read and only spoke English as a fourth language were being convicted of serious crimes on the basis of a typewritten record of interview conducted by a police officer without the assistance of an interpreter. There have been advances and there are now real safeguards in the investigative process for an indigenous accused.

However, for the reasons identified earlier, we are too often not getting indigenous witnesses to follow through with evidence in court and therefore we are not providing justice for the indigenous women and children who are enduring the worst effects of this transitional period that Aboriginal society is experiencing.

We need to listen to them and support them through better witness and victim assistance services by improved aboriginal interpreter services and by well resourced culturally sensitive child protection services. If there is to be a lasting solution, more Aboriginal men need to take a pro-active approach to stopping the lawlessness and violence which is victimising their women and children.

The type of lawlessness that currently exists in many indigenous communities would never have been tolerated in traditional society. However the means by which traditional leaders asserted their authority are no longer available to them. They need the assistance of the dominant culture's police and legal system to maintain order within their society in transition.

This will only work to their benefit if the dominant system is responsive to their needs, and if they are prepared to stand up and speak out against the violence and injustice being visited upon the most vulnerable in their communities.

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