

Gender, Drug Use and Criminalisation

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Acknowledgment

I would like to take this opportunity to acknowledge the land on which we meet – the land of the Wurundjeri and people of the Kulin Nations. I pay my respects to their elders, both past and present.

Background

In looking at the agenda of this afternoon – and in particular the speakers and their respective organisations, it seems a telling indication of where we are at this point in time in terms of those who are identified as marginalised, and those who suffer in our society in terms of mental health issues, those in the criminal justice system and those suffering from social disadvantage. There is certainly a consistency and a recurrence of indicators that broadly identify those who live extraordinarily difficult lives. I see that there are addresses by Flat Out, the Vietnamese Women's Association, Harm Reduction Victoria, Fitzroy Legal Service and the Human Rights Law Resource Centre. This isn't a coincidence – and that the Victorian Aboriginal Legal Service joins that agenda also is no accident.

Further, I look at the title of the forum – Gender, Drug Offences and Criminalisation and the general banner under which I speak – discrimination and the law. Again, it is the very coupling of these words that speaks volumes to the nexus at which we can conceive the notion of discrimination and, in my brief, Aboriginal and Torres Strait Islander peoples.

I was wondering where to begin in this talk. Where to start to take a look at what the situation is in this country and I guess from my point of view in particular, in this State. There is almost 250 years of time in which to posit the discussion. Furthermore, there are as diverse as there are far-reaching 'areas' to sit this discussion – whether we look at racial discrimination on a day to day basis, in the international context (in light of UN declarations, conventions and protocols), or in context of the systemic discrimination that my colleagues across the country talk about so painfully. I have just spent two days in Adelaide with Chairpersons, CEOs and lawyers from Aboriginal and Torres Strait Islander Legal Services (ATSILS) across the country and the experiences and stories of discrimination and suffering they see in their daily lives and in the lives of their clients and community members is raw and occurs across each jurisdiction.

And again I question where to centre this discussion. We live in a country where the government can suspend the operation of the Racial Discrimination Act in order to implement policy which directly and (arguably) exclusively impacts on the lives of Aboriginal and Torres Strait Islander peoples in the Northern Territory. One can't dare imagine the impact of that "Emergency Intervention" sitting in

¹ Acknowledgment: Some of the original case study material delivered in this speech has been removed out of respect or at the request of those the case were based upon. VALS is grateful for permission from "Uncle" to share his story.

the relative comfort of Victoria – here in the middle of the city on the other end of the country - the tangible and palpable trauma experienced by our community in the Northern Territory – the anguish in the voices of the Elders as they watch their people suffer at the hands of others, repeated over and over.

This product of government policy continues to reign in the Northern Territory and flies in the face of national and international obligations. It flies in the face of what is reasonable and should be seen as unacceptable by the national community. But this is not my area of expertise and there are people well versed in the Northern Territory Intervention who can talk to this.

So: Discrimination and the Law?

The topic is so broad and in its strictest form in terms of academic or theoretical consideration, again falls well outside of my area of expertise. What I can consider in the Victorian context, and from my position as a lawyer at VALS, is how I see discrimination artfully lying in wait around the criminal justice system and therefore in the daily lives of Aboriginal and Torres Strait Islander peoples in this community.

I can speak to the experiences I have been allowed to share through the stories I have been told and the interplay I have seen when our clients, members of the Aboriginal and Torres Strait Islander community, are captured in time - framed by the criminal justice system. I experience these stories from my position as a non-Aboriginal, middle class person and born and bred in Melbourne. I experience these stories as someone who has not experienced discrimination and who grapples to make sense of the systemic and historical factors which allow it to continue. My experience is of criminal law and of struggle for members of our community – people who populate the most marginalised and disadvantaged places in our communities. I don't occupy those places and I do not suffer from discrimination.

So what is it? What is the daily experience for members the Victorian Aboriginal community? I looked for a definition of discrimination. There are academic definitions, there are dictionary definitions, and there are generally accepted usages of the term. Wikipedia defines discrimination as 'the prejudicial treatment of an individual based on their membership in a certain group or category. Discrimination is the actual behaviour towards members of another group.' There are volumes of work around what is considered discrimination. There are many variations on this definition depending on where we search and the level of analysis undertaken.

Someone suggested that I "pick an area of law where I see discrimination and talk to that". I could do that, quite easily but rather than talking about the discrimination that some believe to start and stop with single incidents, I am interested in the insipid and historical torrent that flows beneath the lives of Aboriginal and Torres Strait Islander people in this country and the continued disadvantage that arises as a result. It is too easy to identify individual and isolated incidents of discrimination. Until we look at the whole of the picture we will not go forward. For each isolated incident of discrimination and for each 'are of law where I see discrimination' that we speak to, we tend to distance ourselves from the systemic network of discrimination that provides the opportunity for these individual instances. And as long as we focus on the individual instances we don't acknowledge the role we all play in doing too little.

This is a poem I discovered by an Aboriginal poet named Colin Johnson (Mudrooroo Nyuoongah) born in 1938. It was written in 1986.

*A youthman was found hanging in his cell
On Nadoc day when everywhere the Aborigines
Were dancing, everywhere the Aborigines were marching.
'They're just like us', was the quaint refrain,
'They like balls and footy and songs and beer':
They ignored our call for Landrights!*

*On Nadoc day a youthman strangled in a cell:
Who killed him, who were his murderers?
'Not I,' said the cop, 'I only took him in.'
'Not I,' said the town, 'I never spoke his name,
It's no fault of mine that he had to die
We treat them as we would our own,
There's no racism in our town.'²*

RCIADIC

A Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was announced in 1987 after a spate of Aboriginal deaths in prison and police custody and in response to a growing public concern that such deaths were too common and poorly explained. Hearings began in 1988 and the final report was submitted in April 1991.

The Royal Commission looked at all the different factors which impact on why Aboriginal and Torres Strait Islander people may have contact with the police or end up in prison – including poverty, drug and alcohol use, history and police racism. The report found that being Aboriginal “played a significant and in most cases a dominant role” in why a person may be in custody and die in custody. The report found that Aboriginal and Torres Strait Islander peoples were between 7 and 22 times more likely to die in custody than non-Indigenous Australians.³

Of the 339 Recommendations of the Royal Commission, No 92, ‘Imprisonment as a Last Resort’ states: “That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort”. This key recommendation is often talked about, but not wholeheartedly practised by State and Territory authorities. So the imprisonment rates of Aboriginal and Torres Strait Islander peoples have continued to rise.

Is that a product of discrimination? “the prejudicial treatment of an individual based on their membership in a certain group or category. Discrimination is the actual behaviour towards members of another group”?

The Royal Commission identified specific demographic pointers as to why it was that Aboriginal and Torres Strait Islander peoples came before the notice of the Courts and then were incarcerated. The

² Colin Johnson, ‘Song Twenty-Seven’, in *The Song Circle of Jacky, and Selected Poems*, (Melbourne, 1986), p. 40.

³ <http://reconciliation.org.au/nsw/education-kit/justice-and-police/#custody>

recent analysis arising from RCIADIC of where we have come tells us that numbers of Aboriginal and Torres Strait Islander people dying in custody has dropped but numbers of Aboriginal and Torres Strait Islander people in custody has not.

Why do Aboriginal and Torres Strait Islander people come before the courts? Why do they end up in custody?

What is the history that we can point to when we know that for tens of thousands of years there were communities in this land living their lives differently? What is the legacy of colonisation and criminalisation that has created an environment of such gross over-representation of Aboriginal and Torres Strait Islander peoples and with such dire and harmful consequences to communities and to individuals?

Intergenerational trauma, legacies of the stolen generation, over-policing, health, drug and alcohol issues, housing; these are all interconnected. The number of Aboriginal and Torres Strait Islander peoples suffering from homelessness or transience, mental health issues, substance abuse issues and lack of formal education increase the likelihood of coming before the criminal justice system. Statistical analysis tells us that the numbers are stacked against Aboriginal and Torres Strait Islander people. The confluence of poverty, poor health, mental health, homelessness, lack of access to education, incarceration are the hallmarks of a history riddled with discrimination. There is a legacy of government policy and policing that has scarred this community and created challenges for us which urgently need addressing.

Our experience tells us what issues people are dealing with when they present before the courts. And the statistics support that experience.

Education

- 2001 – 13% of Aboriginal and Torres Strait Islander population completed yr 12 as compared to 32% of non-Aboriginal and Torres Strait Islander completed year 12.

Life expectancy

- In the period 2005-2007 nationally, Aboriginal and Torres Strait Islander males were dying 12 years younger than non-aboriginal males; and Aboriginal and Torres Strait Islander women were dying 10 years younger than non-aboriginal women.

Family/ Community

- According to the ABS National Aboriginal and Torres Strait Islander Social Survey (2002a), 46 per cent of Aboriginal and Torres Strait Islander people (aged 15 years and older) in Victoria reported they or a relative had been removed from their natural family. Of those aged 35 years and over, 16 per cent said they themselves had been removed.

Criminal Justice System

- Aboriginal and Torres Strait Islander people are 10 times more likely to be identified for public order offences;
- Aboriginal and Torres Strait Islander people are 17 times more likely to be identified for aggravated burglary offences;

- Aboriginal and Torres Strait Islander people are 8 times more likely to be identified for homicide;
- In 2006 – Aboriginal and Torres Strait Islander people are 12.8 times more likely to be in prison nationally than non-Aboriginal and Torres Strait Islander people and 9.6 times more likely in Victoria.
- In 2010 – Aboriginal and Torres Strait Islander people are 14.2 times more likely to be in prison nationally than non-Aboriginal and Torres Strait Islander people and 11.2 times in Victoria.
- In 2002 only 5% of atsi youths were cautioned by police – compared with 36% of non-Aboriginal and Torres Strait Islander youth.
- In 2007/8 Aboriginal and Torres Strait Islander young people made up 5% of the population yet 40% of young people under supervision were Aboriginal and Torres Strait Islander.
- An Aboriginal and Torres Strait Islander young person is 16 times more likely than a non-Aboriginal and Torres Strait Islander youth to be under a supervision order.
- On a daily basis, over half the number of young people in detention on average are Aboriginal and Torres Strait Islander.
- [GRAPH] – detention rates per 100,000 population show Aboriginal and Torres Strait Islander juveniles to be 28 times higher than non-Aboriginal and Torres Strait Islander juveniles.

It is 20 years since RCIADIC and reports are continuously being gathered to create an analysis of where we have come to. There were rafts of recommendations which specifically sought to address the over-representation of Aboriginal and Torres Strait Islander peoples in custody and to therefore reduce the likelihood of Aboriginal and Torres Strait Islander being at risk and dying in custody.

Deaths in custody

- 2.3% of the population were of Aboriginal and Torres Strait Islander decent.
- 32% of women died in custody 1980 – 2000 were Aboriginal and Torres Strait Islander.
- 18% of men who died in custody were of Aboriginal and Torres Strait Islander decent.

And for every single statistic – every number and every gasp that these numbers exist, there is a person behind the statistic and that person lives in your community.

“Uncle”

I met with an Elder of the community earlier this year. He is an amazing man with stories of a lifetime drawn from his 62 years. He is kind and reserved and I have met him a number of times now – once when he pushed a man he thought was taking his money from the ATM and once recently.

Uncle was stolen as a child, as were all of his siblings, of which there are many. He was removed from his family and from his community as part of government policy. He was raised for part of his life in a boys home where he suffered ongoing physical and sexual abuse – such quantifiable statements of experience. He also suffered the unimaginable trauma and abuse inherent in the removal from family and the fracturing of family and of community and of place. He made his way alone after that and sought to connect with his people, with his family and with his community.

Uncle made his way, as so many members of his generation did, to Collingwood and Fitzroy – known places to congregate and to find family and place. He spent years drinking and using drugs and coming into contact with Victoria Police. He spent a lot of time in prison. He tells me he has ‘retired from that life’ now. He is an amazing man who has suffered immeasurably for one lifetime.

I spoke with him recently as he was charged with criminal damage and witnesses for the police talked so flippantly of this man. They talked of him ranting and about him being upset about land rights, etc. They described him as “ranting”. He broke a bottle in a bar after being refused service. He then left and ‘continued ranting’. I asked him why he was so upset and as soon as I had said the words I kicked myself. Why was he so upset?!!

Well, he said, calmly and gently – I sometimes just get overwhelmed by everything I have seen and all the bad things that have happened. I was just overwhelmed. He was taken into custody and searched and the story was oh so familiar to him – he knew the routine and knew what he had to do. And they released this angry man.

And so at 62 he is banned from Collingwood and he is banned from Fitzroy. The police arranged this and released him from custody conditional upon that exclusion. When the Courts were asked to recognise the unfairness of this and to have regard to the Bail Act, let alone the Victorian Charter of Human Rights. The courts supported the exclusion.

Imagine his life for just a moment and tell me this – is this fair? Is this discrimination? *Is that a product of discrimination? “the prejudicial treatment of an individual based on their membership in a certain group or category. Discrimination is the actual behaviour towards members of another group”. ?*

Is it over-policing? Is it a legacy of discriminatory policies that continue to ripple through our community as people deal with trauma and with inter-generational trauma and struggle with life?

These statistics and these stories are not isolated. These are not remarkable stories in their uniqueness. Our clients almost without exception have suffered from intergenerational trauma, and live lives riddled with uncertainty and with endemic problems around housing, mental health, drug and alcohol issues and interaction with the criminal justice system.

Looking back to the point of “gender drugs and criminalisation” I see women who are mothers without children, who are mentally unwell, fractured from community and suffering in custody or to break a cycle of offending that is intrinsically linked to disadvantage. That disadvantage is squarely posited within their Aboriginality.

I see men who are fathers and who are disempowered within their own communities and ostracised within the broader community. I see grandfathers parenting in their 40s the children of the children they couldn’t parent in their 20s. Why? Because they tried to survive in an environment that tore away the strength of Aboriginal communities and that enforced environments where trauma continues.

Is this fair? Did this family suffer discrimination? Where does this story fit? And if it sits outside of a ‘definition’ of discrimination does it take away from the lived experience of this mother, this daughter, this member of your community? Does it tear at the fabric of our sound and reasonable society?

My experience

I have learnt more than I can convey about disadvantage and trauma. About members of my community and yours who occupy the fringes and are forgotten, who are our most disadvantaged members of community. The scars that exist in our community are deep. And they won't heal without change.

I have also learnt of incredible and unimaginable strength of community and resilience of spirit which humbles me daily. I have experienced overwhelming generosity and patience and a trust and acceptance that I treasure. I am amazed almost daily at the people I meet and the stories I hear. For those reasons I urge you today – make it your responsibility to look at how this discrimination continues to occur and why. It is unacceptable that members of this community are treated in this way and experience hardship in the way they do. And it is the responsibility of us all. I call on all of us to acknowledge the racism in the policies of our governments and the discrimination in the legacies left to this community.

In November last year Roberta Sykes passed away. She was an inspirational Aboriginal woman who challenged the system and wrote the words that were for many, unpalatable. I will leave you with her powerful words.

Who Am I - Roberta B. Sykes / Aboriginal Poet

Who Am I?

I am every black woman who has ever been raped,
I am every black woman who has ever been murdered,
I am every black woman who has ever been called a "nigger",
I am every black woman who has ever been called a "slut".

But racism is not as sexually specific as you might imagine. When the racists are out there, they're not too worried about gender. And my response to that is,... well, it's probably predictable. When you see me, you ought to know I am also -

Every black man who's ever been whipped and beaten
Every black man who's been strung up in a cell
Every black youth turned down for a job
And every black boy conforming all the closed doors

I am every black boy who has seen his mother raped, I am every black girl who has seen her father arrested and humiliated, I am every black child taken away from their family.

But that's not all I am, I am not only the victim that white society has made me.

I am every black woman who has ever been loved -
Lain the night through in sensual caring arms -
And every black girl who has ever flirted,
And has danced, and known the wind and the rain

On her skin and in her hair.

I am the woman of mystery at night.
My eyes, too, peep from under the brim of my pert hat
Silk swirls loose and colorfully around me
The scent of flowers lingers in my footsteps.

My low cut black negligee is worn from use -
And see my scabby knees from climbing trees
The fine-tooth comb dragged nits from my hair
And my back is bent from scrubbing floors

I am every black man come in from a successful hunt
- bought joy and survival to my family in need -
Have carried my woman across water too dirty/too deep
And every black man in communion with God

I have known both lust and passion
And murderous deeds I have done
I have caught the blood-wet baby as it fell
From its safe place in the womb

I am not merely who you want - or need - me to be. Racism does not shape my every
movement, does not prevent me from feeling trickling sand move beneath my feet or sun
beating warmly on my shoulders.

I am humble
I am every black person who has ever been wrong,
Who has ever said "sorry", who has ever felt stupid,
Who has lost their way home/forgotten where they parked their car/or arrived at the shop and
not remembered what they came for.

I am every black parent
My child has won his race/come top in her exam/been the beauty queen at the ball
Or become a yuppie professional.

Of course, my child has also - been arrested/overdosed on drugs/been found hanging in a
cell/been shot in his bed/come home unwed and pregnant - but that's not all I am!

I have seen the lights, the min-min lights,
I have spent a lifetime around a campfire,
Huddled intimately over candle-lit dinner,
And watched bushfire eat trees and people.

I am a successful liar - I have to be

In order to be a politician
And a successful thief - to steal back
That which has been stolen from me.
I am a land rights advocate,
And an equal rights supporter,
A global citizen and a human rights endorser.

And I've been alive long enough to know
That - to be all these things, and *live*...

I have also had to be black and proud and strong.

- Roberta Sykes