JUSTICE AS HEALING

DEVELOPING ABORIGINAL JUSTICE MODELS TO ADDRESS CHILD SEXUAL ASSAULT

by Hannah McGlade

Over the past three years I have been researching the experiences of Aboriginal women and girls who use the legal system in response to child sexual assault. Like many Noongar people, I was shocked and saddened by the death in 1999 of a young Noongar girl, Susan Taylor, who had spoken to police about being sexually abused at the hands of her uncle, who was considered a respected Elder by many at the time. I followed the Coronial Inquest into her death that found that there was widespread and largely unreported sexual abuse of young Aboriginal girls,[1] and I learnt that Susan herself had been found dead just a few weeks after she reported a sexual assault to the police. The Western Australian ('WA') Coroner could not rule on the circumstances leading to Susan Taylor's death because the police had not followed basic rules of investigation.[2] Whether or not the naming of Aboriginal male perpetrators was a factor in Susan's death is unclear, but the serious risks facing young Aboriginal girls cannot be ruled out.[3]

Susan Taylor was a third generation victim of sexual assault – her mother was sexually assaulted, as was her mother. I sat with Susan's grandmother, Miriam, before she passed away last year and learnt from her how she had tried to protect Susan and the other young girls in her family; how she as a survivor of sexual assault knew so well the pain and suffering it caused; her grief at the mistreatment of her children who had been taken from her and placed in the Sister Kate's Home; and how she wanted to see a different future for her family.

From this family and others, I have seen first-hand the need to develop an alternative justice model to address sexual assault; one that is premised on both justice and healing. I borrow from the Canadian Aboriginal people their phrase – 'justice as healing' – to support my understanding that we need to develop and incorporate an Indigenous healing response to the justice system, especially in relation to what is now being recognised as the epidemic of Aboriginal child sexual assault.

The Gordon Inquiry,[4] which was triggered by the Coronial Inquest into Susan's death, revealed the extent of government negligence towards Aboriginal children and made attempts at improving government responses to child abuse. That Inquiry was government-focused and Miriam and her family did not have an opportunity to make their views known to the Inquiry, despite the importance of what they had to say.

Miriam, her daughter and granddaughter all bravely challenged an insidious level of denial surrounding child sexual assault in their families and the wider Noongar community. By coming forward as they did and shattering the lies of one powerful elder and his male family members, they made a path for others to follow; and others have indeed followed. The tragic death of Susan Taylor should never be forgotten. But sadly, her story has been repeated and there have been several deaths of young girls since. In a 2006 case prosecuted against a dangerous repeat offender, the young complainant (who was unsupported) passed away shortly after the case and dismissal of charges. She was vulnerable, homeless, without formal education, of poor health and had a traumatic family background. She is no longer with us and to date there has been no call for a Coronial Inquest into her death.

Although the 2004 Director of Public Prosecutions' ('DPP') prosecution in *R v Bropho*,[5] which concerned Susan's mother, was not a successful prosecution, there is much still that we can learn from this case. It highlights well the way in which the mainstream legal system is able to, and frequently does, distort the experiences of victims of sexual assault; and how little by way of justice may be accorded by the courts, especially to Aboriginal complainants. In this case the defence lawyers introduced expert evidence to argue that Aboriginal DNA was not the same as non-Aboriginal people's DNA, and that the systems used could therefore not be properly relied upon.[6] In this case, the rape had resulted in a child and that was the DNA source evidence in question. Notwithstanding that the testimony of rape was supported by DNA evidence – and according to experts that DNA was 'very convincing' and certainly well past the level that would

be accepted to show paternity by the Family Court of Australia[7] – her complaint of sexual assault was still dismissed as unreliable testimony.[8] The National Institute of Forensic Science ('NIFS') initiated a swift response to the decision, convening an expert committee that included the 'expert' defence witness relied upon in the case. The report of the NIFS was independently reviewed and statistically validated outside of Australia, with a conclusion that ultimately supported the prosecution evidence on DNA in the Bropho case.[9]

After rejecting the reliability of the DNA evidence, Judge Mazza then went on to decide that it would be 'dangerous' to convict on the uncorroborated evidence of the complainant alone. He acknowledged the legal reforms that provide that a 'corroboration warning' is not generally required, but still decided that because the complaint was a delayed one it would be 'dangerous' to convict on the uncorroborated evidence of the complainant.[10]

The fact that Susan's mother first spoke of the rape on the day of her daughter's funeral was perceived by the District Court to reflect negatively on her credibility and suggest that she held feelings of 'blame' towards her uncle. The judge refused to recognise that she may have only spoken of being raped as girl on that day because her own loved daughter had spoken of sexual assault at the hands of the same male family member. This abuse was subsequently considered by the Coroner to have 'played a very important part in the death of Susan'.[11] There are other ways in which the judge hearing the case decided that she was not a credible witness, for example, due to her admission to Graylands Hospital – a mental health facility. A close reading of the case revealed the admission took place on the same day that Susan disclosed abuse to the police, from which charges were subsequently laid. That evidence was instead used by the judge to suggest that Susan's mother's mental illness may have caused her to wrongly nominate the defendant as the perpetrator rather than one of his relatives.[12] The judge chose not to acknowledge the common effect of sexual abuse, such as mental illness,[13] and he failed to show any understanding of her past abuse and trauma and how her daughter's own disclosures could have triggered that hospital admission. Although he is required by law to consider whether there may be good reason for a delayed complaint – and acknowledged that she was a young girl with no responsible adult in her life; her feelings of shame and being 'low and dirty' about the rape; and her not wanting to alienate herself from her family – he completely failed to acknowledge the primary reason that she actually testified to in court: fear of her family.

The case of *R v Bropho* is useful in reflecting white male judicial bias and the limitations of the court in addressing sexual assault. In her book, *Court Licensed Abuse*, Dr S Caroline Taylor has shown how defence narratives and judicial rulings rely on deeply held stereotypes and social myths about women, children and sexual offences. *R v Bropho* also shows that for Aboriginal women and girls, the patriarchal constructions of Aboriginality that have been shaped within a colonial history of rape and sexual abuse violence, can quite easily result in a denial of justice within the criminal justice system.[14] In rejecting the complainant's credibility the judge confirmed the status of the defendant and also discouraged other Noongar women and girls from using the law as a response to childhood sexual assault.

Susan's mother was a very brave Noongar woman and one of few who have actually come forward and used the court system as a response to child sexual assault. She was not supported by the Aboriginal Legal Service whose government-dictated policy of priority to criminal representation of defendants means that Aboriginal girls who are most vulnerable and impacted by sexual assault generally do not receive the support they need. It is not clear how comprehensively the DPP prepared the case which was said to have been 'handballed around the DPP office'[15] and was criticised by the judge on the basis of their failure to provide DNA evidence excluding the so called 'possible alternative offenders'.[16] The DPP did not appeal the case even though the decision relied on very controversial DNA evidence; evidence that was later rejected by the scientific community.

To this day, I do not believe that Susan's mother has yet been recognised and treated as a person impacted and violated by child sexual assault. We should try hard to comprehend what it must feel like to walk in her shoes. There has been little justice for her and her family.

In 2006 the NSW Aboriginal Child Sexual Assault Taskforce recommended that an Aboriginal model of addressing child sexual assault be considered.[17] In making this recommendation the Taskforce considered[18] the Community Holistic Circle Healing ('CHCH') model of Hollow Water, Canada, which was formed in 1987 as the community began to learn that sexual victimisation and intergenerational sexual abuse was at the core of the poor wellbeing of many individuals and families.[19] From their experience, the non-Indigenous adversarial legal system could not understand the complexity of this issue and what was needed for a community to break the cycle of abuse that impacted upon so many of its members. They

developed the model in an effort to take responsibility for what was happening in their community, to work to restore balance and make their community a safe place for future generations. In developing their model, they considered that:

a. Victimisers are created and not born;
b. The vicious cycle of abuse in communities must be broken – and now; and
c. Given a safe place, healing is possible and will happen.[20]

Hollow Water does not support the incarceration of offenders:

> What the threat of incarceration does do is keep our people from coming forward and taking responsibility for the hurt they are causing. It reinforces silence and therefore promotes, rather than breaks, the cycle of violence that exists. In reality, rather than making the community a safer place, the threat of jail places the community more at risk.[21]

Within the CHCH process, offenders are instead held directly accountable to those most affected by the victimisation: the victims, families and the wider community.

Hollow Water's CHCH program uses principles that were traditionally used to deal with victimisation.[22] These principles allow the community:

1. To bring it out into the open.
2. To protect the victim, so as to minimally disrupt the family and community's functioning.
3. To hold the victimiser responsible for his or her behaviour.
4. To offer the opportunity for balance to be restored to all parties of the victimisation.

The CHCH model entails the development of a 'healing contract' that offenders must agree to be bound by; healing circles held separately with the victims and perpetrators and their families; the sentencing circle in which victims, victimisers, families and the wider community are brought together and in which a non-custodial sentence is imposed on the offender; and a final 'cleansing' ceremony held to acknowledge the offender's participation within the program and their reintegration back into the community.

Through healing circles the CHCH team share their own histories and understandings as both victims and victimisers as they confront abusers and coax them from the anger, denial, guilt, fear, self-loathing and hurt that surrounds sexual assault and which must be faced.[23] They also work closely with victims to assure them that the abuse was not their fault, to support their family in coming to terms with the abuse, to being able to directly confront their abuses, and to work towards healing from the harm caused by sexual assault.[24]

As Aboriginal people beginning the important task of considering the development of our own models of addressing child sexual assault, we should also recognise the concerns highlighted in relation to Hollow Water and other Aboriginal Justice responses. Professor Emma LaRocque has rejected models such as CHCH, arguing that they are oriented towards offenders; they promote leniency for the offender who is treated as a 'victim'; they pressure victims to 'forgive'; and are detrimental to victims' overall wellbeing.[25] LaRocque argues that although healing circles are said to be based on Aboriginal tradition, the models appear influenced instead by Christian and new age concepts and are not consistent with traditional punishments which were quite often severe.

Notwithstanding her critique of CHCH, LaRocque still believes that measures based on tradition and healing may be adopted, such as native practices, therapies, and the involvement of elders within an alternative rehabilitative institution established to protect victims and restrict offender movement. Such an institution may combine historical and cultural education as well as consciousness raising on the nature and devastating effects of colonisation and sexual violence, as well as adopting modern therapies.[26]

While there is clearly a great deal that can and should now be learned from Hollow Water, it is also timely in Australia to heed LaRocque's warning that 'healing' cannot be the sole means of dealing with violent sexual offenders and we should take an uncompromising stand against sexual violence.

> In the hasty quest for something different than what has been, we seem to have increased the risk of abandoning victims of violence. And in the drive for self-determination, we risk using victims of assault as test cases for alternative models.[27]

In Australia, we are now very much aware that Aboriginal child sexual abuse has been 'normalised' and that we cannot afford to allow any more 'minimisation' of child abuse. There are too many Aboriginal victims who have been silenced and who don't receive the support they need as they seek both justice and healing from child sexual assault. In talking about a different way of addressing child sexual and the development of our own Aboriginal models, we must always make sure that we are committed

to walking with the victim survivors, and remembering that there is no healing without justice for them.

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1 Office of the State Coroner (WA), R*ecord of Investigation into a Death – 'Inquest into the Death of Susan Ann Taylor'* (2001) 30/01, 29.
2 Western Australian Coroner , *2001 Annual Report* (2001) 27.
3 Ibid 28.
4 Sue Gordon, Kay Hallahan, and Darrell Henry, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2001).
5 [2004] WADC 182 (unreported).
6 Ibid 24 and 47: According to the State, the analysis of DNA profiles of the child, the complainant and the accused revealed a match within a probability index of 3,134. In other words, it is at least 3, 134 times more likely that the child is of the complainant and the accused that if he is the biological child of the complainant and another man unrelated to the accused and randomly selected from the Western Australian Aboriginal subpopulation.
7 Simon Walsh (Forensic Biologist) in ABC, 'Indigenous DNA Testing in Doubt', *7.30 Report*, 26 August 2004, <http://www.abc.net.au/7.30/content/2004/s1186080.htm> at 27 November 2007.
8 *R v Bropho* [2004] WADC 182 (unreported) 55.
9 'Case Report: *R v Bropho* – A Challenge to the Use of DNA Statistics in Cases Involving Indigenous Australians', *The Forensic Bulletin* (Summer 2005) 12.
10 *R v Bropho* [2004] WADC 182 (unreported) 50.
11 Office of the State Coroner, above n 1, 23.
12 *R v Bropho* [2004] WADC 182 (unreported) 45 and 53
13 Judith Herman, *Trauma and Recovery: The Aftermath of Violence – from Domestic Abuse to Political Terror* (1997) 96-114.
14 See further, Hannah McGlade, 'Aboriginal Women, Girls and Sexual Assault: The Long Road to Equality Within the Criminal Justice System', *AWARE* (The Australian Centre for the Study of Sexual Assault) Newsletter No 12 (2006) 6.
15 Personal communication between Hannah McGlade and a staff member of the Western Australian Department of Justice, September 2004.
16 *R v Bropho* [2004] WADC 182 (unreported) 45.
17 NSW Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future* (2006) 17 (Recommendations 5 and 7).
18 Ibid 282.
19 Aboriginal Corrections Policy Unit, *The Four Circles of Hollow Water* (1997); Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (2006); Rupert Ross, 'Aboriginal Community Healing in Action: The Hollow Water Approach' in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005) 184-189.
20 Hollow Water, 'The Sentencing Circle: Seeds of a Community Healing Process' in Wanda D McCaslin (ed), *Justice as Healing: Indigenous Ways* (2005) 190.
21 Rupert Ross, 'Aboriginal Community Healing in Action: The Hollow Water Approach' in Wanda D McCaslin (ed) *Justice as Healing: Indigenous Ways* (2005) 187.
22 Hollow Water, above n 20.
23 Ibid.
24 Ibid, 189.
25 Emma LaRocque, 'Re-Examining Culturally Appropriate Models in Criminal Justice Applications' in Michael Ash (ed) *Aboriginal and Treaty Rights in Canada* (1997) 75-96.
26 LaRocque's suggestion appears consistent with the establishment of healing lodges throughout Canada in conjunction with Corrections Canada and incorporating traditional practices and culture in order to achieve rehabilitation and healing for offenders. See further, Hannah McGlade and Victoria Hovane, 'The *Mangolamara* Case: Improving Aboriginal Community Safety and Healing' (2007) 6(27) *Indigenous Law Bulletin* 18.
27 Emma LaRocque, above n 25, 92.