

ARTICLE

Customary Law and Violence Against Women: Where to From Here?

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In recent years, the mainstream legal systems in Australia and New Zealand have considered how best to recognise and incorporate customary law into their judicial processes. While this is a positive step, caution must be taken to ensure custom is accurately represented, so as to protect traditionally vulnerable victims. This article considers how mainstream courts have misconstrued Aboriginal customary law and tikanga Māori in cases of intra-community violence against women. Legislative and policy steps are needed to make mainstream courts more accessible to Indigenous women victims of such violence.

I Introduction

Indigenous women of Australia and Aotearoa (New Zealand) are suffering at the hands of Indigenous men and their respective justice systems. They are more likely to experience violence by a partner than non-Indigenous women: Māori women twice as likely¹ and Aboriginal women an unfathomable 45 times as likely.² However, reporting rates are low and these figures may underestimate the issue.³ Like many female victims of male violence, Indigenous women struggle with the adversarial system, particularly its ingrained failings to provide justice for victims. Additionally, Indigenous women seeking justice can be faced with their abuser arguing—incorrectly—that customary law condones the abuse.

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1 Khylee Quince “Māori and the criminal justice system in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Auckland, 2007) 333 at 335.

2 A Ferrante and others *Measuring the Extent of Domestic Violence* (Hawkins Press, Sydney, 1996) at 34 as cited in Law Reform Commission of Western Australia *Aboriginal Customary Laws* (Discussion Paper, Project 94, December 2005) at 349.

3 Judy Atkinson “Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward” (2007) 6 ILB 13 at 14.

Often faced with judges who are unfamiliar with customary law, it can be difficult for an Indigenous woman to access justice in the common law system.

In this article, I argue that the legal community needs to respond actively to the unique problems Indigenous women face in seeking justice for the violence inflicted against them. I focus on intra-community violence involving Indigenous offenders and victims and use the term *violence against women* (VAW) to encompass male-on-female violence, particularly intimate partner violence and sexual assault.

The article unfolds as follows. First, I establish what the customary laws of Aboriginal and Māori communities state about VAW. I conclude that the claim that customary law condones VAW has no factual basis. Secondly, I examine the cases in Australia—and, to a lesser extent, Aotearoa—where these arguments have established concerning precedents, effectively silencing victims. I also consider how this misconstruction of customary law has occurred. Finally, I suggest how the mainstream judicial system's approaches to VAW can better recognise Indigenous custom.

II What Does Customary Law Say About Violence Against Women?

The determination of what Aboriginal and Māori customary laws state about VAW must be made within a pre-colonial framework. Custom is able to, and has, developed over time. However, one of the legacies of colonisation is a subservient view of women that serves to normalise male-on-female violence. British colonial society oppressed women legally, economically and socially, and this oppression has been a driving force behind the issues Indigenous communities face today.

In Australia, links have been made between the violence Aboriginal men inflict on Aboriginal women and the violence colonisers inflicted on Aboriginal communities.⁴ Traditional Aboriginal society had roles for women that, whilst different, were not subordinate to men's roles.⁵ Similarly in Aotearoa, Māori adoption of the coloniser culture has been "particularly disastrous" in the context of VAW.⁶ The Law Commission recognises the distortion in Māori perception of women following the contact period, noting that "respect for mana wahine is a traditional Māori value, not a modern development".⁷

A *Aboriginal customary law*

It is well established, by academic and anthropological studies, that Aboriginal customary law does not condone VAW.⁸ These studies have cited Aboriginal women, lawyers and

4 Rene Adams and Yasmin Hunter "Surviving Justice: Family Violence, Sexual Assault and Child Sexual Assault in Remote Aboriginal Communities in NSW" (2007) 7 ILB 26 at 26.

5 Larissa Behrendt "Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse" (1993) 1 The Australian Feminist Law Journal 27 at 28.

6 Khylee Quince "*Mana and Domestic Violence: D v Police*" (1999) 4 ILB 10 at 11.

7 Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001 at 5 as cited in Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001) at [144].

8 See, for example, 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* (Department of Premier and Cabinet, Western Australia, 2002); and Law Reform Commission of Western Australia *Aboriginal Customary Laws: The*

feminists, who emphatically reject assertions that abuse such as VAW reflects Aboriginal values.⁹ There are historical examples of physical and sexual VAW being punished, either by the offender being put to death, speared in the thigh,¹⁰ or banished.¹¹ However, it is unclear whether these offences continue to be punished regularly and consistently by Aboriginal communities in the modern day.¹² The lack of consistency could be because Aboriginal communities have not developed appropriate responses to an issue that did not historically occur on this scale.¹³ Regardless, it demonstrates why it is crucial that Aboriginal women victims can access justice through the mainstream judicial system.

There are some points of conflict between Aboriginal customary law and mainstream Australian law. The first point of conflict is promised marriages between older men and post-menarche teenage girls. In Aboriginal communities, the consummation of these relationships is accepted practice. However, the girls are usually below the legal age of consent, making it a criminal act under mainstream law. An effort to put an end to this practice is needed.¹⁴

The second point of conflict is that traditional punishments, such as thigh-spearing, are often based around physical injury, which may be contrary to international human rights standards. Investigating this conflict is beyond the scope of this report. However, it is relevant to note that these punishments are meted out to women as well as men, and it is important for the dominant legal system not to conflate these sanctions with non-consensual violence.¹⁵

B *Tikanga Māori*

There is some evidence from early Māori societies that women and men played different but equally important roles. For example, te reo Māori uses gender-neutral pronouns and women could—and did—assume leadership roles within the community.¹⁶ Like Aboriginal customary law, VAW is “abhorrent to traditional Māori values”.¹⁷ Physical and sexual

Interaction of Western Australian Law with Aboriginal Law and Culture (September 2006) [*The Interaction*] at 7.

- 9 Larissa Behrendt “Politics clouds issues of culture & ‘customary law’” (2006) 26 *Proctor* 14 at 14.
- 10 Jane Lloyd and Nanette Rogers “Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia” in Patricia Weiser Eastaerl (ed) *Without Consent: Confronting adult sexual violence* (Australian Institute of Criminology, Canberra, 1993) 149 at 150–151.
- 11 Denise M Cull and David M Wehner “Australian Aborigines: Cultural Factors Pertaining to the Assessment and Treatment of Australian Aboriginal Sexual Offenders” in William Lamont Marshall and others (eds) *Sourcebook of Treatment Programs for Sexual Offenders* (Plenum Press, New York, 1998) 431 at 433.
- 12 *The Interaction*, above n 8, at 22.
- 13 Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission “Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory” at [4.2] as cited in *The Interaction*, above n 8, at 22.
- 14 Hannah McGlade “Aboriginal women, girls and sexual assault” Australian Centre for the Study of Sexual Assault Newsletter (September 2006) at 12.
- 15 *The Interaction*, above n 8, at 20.
- 16 See Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 *Wai L Rev* 125 at 126 and 128.
- 17 Rawinia Higgins and Paul Meredith “Ngā tamariki—Māori childhoods—Māori childhood changes” (5 May 2011) Te Ara—the Encyclopedia of New Zealand <www.teara.govt.nz>.

assaults can breach a woman's personal tapu (sacredness)¹⁸ "as the bearers of future generations"¹⁹ and this can affect the mana of the victim and her family,²⁰ requiring utu (reciprocity) to restore it.²¹ Traditionally, punishment would be muru (taking possessions, or minor physical violence)²² or taking the life of the offender (if the victim was killed).²³ By contrast, in the modern day there is no widely operational tikanga Māori justice system²⁴ and the ability of Māori to exercise tikanga continues to be "restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation".²⁵

III How Have Cases Involving VAW Incorporated Customary Law Inaccurately?

In both countries, customary law is regularly recognised at the sentencing stage of mainstream criminal prosecutions. This is a positive thing for many Indigenous VAW victims. However, given the predominantly oral traditions of both cultures, there is room for evidence to be misconstrued. Academics in Australia²⁶ and the Law Commission in Aotearoa²⁷ caution judges to be sceptical when receiving such evidence. The following cases demonstrate how the courts, particularly in Australia, have failed to heed this warning. The courts' lack of care in ensuring the accuracy of customary law evidence has had devastating results for Indigenous VAW victims.

A Australia

Australian courts have a history of underplaying abuse against Aboriginal women. In *R v Lane* the judge found that "rape is not considered as seriously in Aboriginal communities as it is in the white community".²⁸ Similarly, Millhouse J in *R v Mungkilli* stated "[f]orcing women to have sexual intercourse is not socially acceptable, but it is not regarded with the seriousness that it is by the white people."²⁹ Accepting arguments based on a distorted view of custom has "relegated Aboriginal women to a status lower than

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- 18 Quince, above n 6, at 11; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 46.
- 19 Quince, above n 6, at 11.
- 20 Rangimarie Rose Pere "To Us the Dreamers Are Important" in Shelagh Cox (ed) *Public & Private Worlds: Women in Contemporary New Zealand* (Allen & Unwin, Wellington, 1987) 53 at 57.
- 21 See Quince, above n 6, at 11.
- 22 Mead, above n 18, at 151.
- 23 At 240. There is an example of a man who was found to beat his wife. The man was declared *dead* by the hapū (subtribe) and ignored until he died. Pere, above n 20, at 57.
- 24 As recognised in *Mason v R* [2013] NZCA 310 at [41]. This stands in contrast to the Aboriginal communities which do have customary justice systems operating, but fail to effectively deal with VAW.
- 25 Michael Belgrave "Māori Customary Law: from Extinguishment to Enduring Recognition" (unpublished paper for the Law Commission, Massey University, Albany, 1996) at 11 as cited in Law Commission, above n 7, at [116].
- 26 Heather McRae and others *Indigenous Legal Issues: Commentary and Materials* (4th ed, Thomson Reuters, Sydney, 2009) at 566.
- 27 Law Commission, above n 7, at [18].
- 28 *R v Lane* NTSC, 1980 at 99–100 as cited in Audrey Bolger *Aboriginal Women and Violence: a report for the Criminology Research Council and the Northern Territory Commissioner of Police* (Australian National University, North Australia Research Unit, Darwin, 1991) at 81–82.
- 29 *R v Mungkilli* SASC, 20 March 1991 as cited in McRae and others, above n 26, at 566.

their non-indigenous counterparts”.³⁰ Aboriginal women have not been seen to be “worthy of legal protection”³¹ and the “stereotyping of Aboriginal women as promiscuous, ... alcoholic ... and culturally inferior” abounds in public discourse even today. This attitude is reflected in decisions of the court.³²

The more recent decisions of *Hales v Jamilmira*³³ and *R v GJ*³⁴ play out against this backdrop. Both cases involve a sexual relationship between an older man and an underage teenage girl in the context of a promised marriage. When looking at the victim impact statements in these cases, it is clear there was violence and coercion consistent with rape.³⁵ However, after discussion with the defendants’ lawyers, the sexual assault charges for both defendants were dropped in favour of a statutory rape charge.³⁶

Each defendant successfully pleaded their actions were, as Gerard Byrant explains, “entirely appropriate and morally correct within the traditional parameters” of their respective Aboriginal communities.³⁷ In *Jamilmira*, Gallop J stated that the 15 year old victim “didn’t need protection [from white law] ... She knew what was expected of her. It’s very surprising to me [that he] was charged at all” before sentencing the defendant to 24 hours’ imprisonment.³⁸ This was increased to one month on appeal—still a very short sentence for the charge, especially considering the defendant was accused of slapping and punching the victim, putting his foot onto her neck and nearly breaking her arm before having sex with her.³⁹

In *GJ*, the defendant held a boomerang over the 14 year old victim’s head and anally raped her, causing substantial physical injury. The Crown accepted the defendant’s argument that the he believed such actions were acceptable in the context of a promised marriage.⁴⁰ In the lower court, Martin J sentenced the defendant to prison for one month. In making this decision, the judge did not take into account the full extent of the violence committed against the victim.⁴¹ Meanwhile, local Aboriginal men interviewed by media held the opinion that “[h]e should be ashamed of what he [had] done”, which seems to undermine the defendant’s argument.⁴²

The outraged public and political response to these cases was swift. Unfortunately, rather than recognising that customary law had been mischaracterised, the discourse turned to how savage and uncivilised Aboriginal communities were in condoning child molestation and rape. An article in *The Australian* blamed Aboriginal culture for “endemic

30 Megan Davis “Chained to the Past: the Psychological *Terra Nullius* of Australia’s Public Institutions” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, Hampshire, 2006) 175 at 185.

31 McGlade, above n 14, at 7.

32 At 7.

33 *Hales v Jamilmira* [2003] NTCA 9, 176 FLR 369.

34 *R v GJ* [2005] NTCCA 20, 196 FLR 233.

35 McGlade, above n 14, at 7 and 9.

36 At 7 and 9.

37 Gerard Byrant “Promised Marriages: The Jackie Pascoe Case” (2003) 5(23) ILB 20 at 21.

38 P Toohey “Black, white and blurred” *The Weekend Australian* (12–13 October 2002) at 21 as cited in McGlade, above n 14, at 8.

39 At 21 as cited in McGlade, above n 14, at 7.

40 McGlade, above n 14, at 9.

41 At 9.

42 Murray McLaughlin (reporter) *Sentence sparks outrage across Australia* (Australian Broadcasting Commission, The 7:30 Report, 12 October 2005) as cited in McGlade, above n 14, at 9.

levels of sexual violence against children in central Australia”.⁴³ And many, including then Prime Minister John Howard, argued *one law for all* in reaction to what seemed to be Aboriginal offenders getting off lightly in criminal proceedings.⁴⁴

One legislative response was the Northern Territory National Emergency Response Act 2007 (NTNERA).⁴⁵ Section 91 provides a blanket ban on cultural considerations in all sentencing decisions. This provision stripped judges of their discretion to consider the relevance of custom not only as a mitigating factor but also as an aggravating factor.⁴⁶

In *R v Wunungmurra* the defendant was charged with aggravated assault of his wife.⁴⁷ The defence argued that it was condoned under customary law. However, constrained by s 91, the judge rejected this evidence.⁴⁸ While this is a positive outcome on these facts, by deciding not to limit the section to cases of VAW, the legislation erases the potential benefits of including cultural considerations in sentencing. In this way, it seems that the section is “more about reasserting the whiteness of the law than simply delivering justice for the victim”.⁴⁹

Unfortunately, Aboriginal men continue to advance these arguments. For example, Dennis Nona, a respected Torres Strait Islander artist, was jailed in 2014 for raping 12 and 14 year old girls in 1995. He is currently appealing the conviction on the basis that his community did not teach him that having sex with children was wrong.⁵⁰

B Aotearoa

Aotearoa is not immune from this kind of paternalistic, damaging approach to incorporating customary law in cases concerning VAW. In *D v Police*, a Māori political leader pleaded for discharge without conviction and name suppression for his domestic violence charges.⁵¹ In granting these, Everitt J—despite the defendant making no mention of tikanga Māori—took it upon himself to say a public conviction would seriously affect the defendant’s mana.⁵² The judge suggested a loss of mana would “affect him personally and ... [the] people that he represents”.⁵³ The Māori community was united in its opposition to this decision, as accountability and non-confidentiality are core tenets of tikanga Māori dispute resolution.⁵⁴ While the Pākehā legal community generally defended him, Tuariki John Delamere—MP for the Eastern Maori seat⁵⁵—called Everitt J “a patronising idiot ... who has done incredible damage to the concept of *mana* ... [and] endorsed the concept of

43 See *The Interaction*, above n 8, at 18.

44 See McRae and others, above n 26, at 565.

45 Northern Territory National Emergency Response Act 2007 (Cth) [NTNERA].

46 Sarah Bury “*R v Wunungmurra* and the Operation of Section 91 of the *Northern Territory National Emergency Response Act 2007*(Cth)” (2010) 7(21) ILB 17 at 18.

47 *R v Wunungmurra* [2009] NTSC 24, (2009) 231 FLR 180.

48 See [24].

49 McRae and others, above n 26, at 569.

50 Janet Fife-Yeomans “Dennis Nona: Indigenous artist hailed as role model despite convictions for raping 12-year-old girl” *The Daily Telegraph* (online ed, Australia, 18 September 2015).

51 *D v Police* DC Kaikohe, May 1999 as cited in Quince, above n 6, at 10. A complete citation could not be provided for *D v Police* as the case was unreported and the court file was not released. See Quince, above n 6, at 12, n 2.

52 See Quince, above n 6, at 11.

53 At 10.

54 At 12.

55 Note that at the time the “Eastern Maori” seat existed there was no macron in its title.

violence in the home as something that is acceptable”.⁵⁶ Like the cases in Australia, this is an example of white judges misinterpreting custom in a way that underplays the harm done by Indigenous men to Indigenous women.

C How has this misconstruction of customary law occurred?

There are many reasons why these inaccurate portrayals of customary law have been able to play such a role in court processes. The first is that judges often do not have a working knowledge of custom and thus are vulnerable to accepting incorrect evidence put before them. Alternatively, some judges may, as was the case in *D v Police*, simply impose their inaccurate interpretations absent any evidence.

Scholars criticise courts for ignoring or not seeking evidence of customary law given by women. Hannah McGlade argues there is a “disturbing level of ignorance” of Aboriginal women’s culture in the legal profession,⁵⁷ and their views are rarely acknowledged, even in cases directly involving them. Furthermore, Australian judges often do not challenge evidence—given by men—that violence is condoned. In accepting this evidence, judges confirm their own assumptions about Aboriginal culture and normalise the violence.⁵⁸ These assumptions are rarely tested against community consultation and when they are, there is little evidence of consultation with women.⁵⁹ Moreover, when evidence from women *is* put before the court it is often given less weight than or ignored in favour of evidence from men, as it was in *Lane*.⁶⁰ Audrey Bolger argues:⁶¹

Reading many court transcripts relating to cases of rape, murder and assaults on women is like reading the minutes of a male club ... The interests of the victim are often completely forgotten in the efforts of all parties to find excuses for a man’s behaviour. They do not necessarily find him not guilty, but certainly underplay the seriousness of his crime.

This issue has been identified by members of the judiciary as early as 1988 in *R v Narjic*, where Maurice J of the Supreme Court of the Northern Territory stated:⁶²

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

There has, however, been little improvement on this front. When members of the community are called to give evidence on custom, there are concerns they are not experts.

56 *New Zealand Herald* (16 July 1999) as cited in Quince, above n 6, at 12.

57 Australian Law Reform Commission *Equality before the law: Justice for women* (1994) as cited in McGlade, above n 14, at 6.

58 McGlade, above n 14, at 9.

59 See Phyllis Kaberry *Aboriginal Women: sacred and profane* (Routledge, London, 1939) as cited in Wendy S Shaw “(Post)Colonial [1] Encounters: gendered racialisations in Australian courtrooms [2]” (2003) 10(4) *Gender, Place & Culture: A Journal of Feminist Geography* 315 at 327. Kaberry asserted at the time that there is “no evidence of consultation” with women.

60 Bolger, above n 28, at 81.

61 At 81.

62 Transcript for *R v Dennis Narjic* at 24 as cited in Diane Bell and Topsy Napurrula Nelson “Speaking About Rape is Everyone’s Business” (1989) 12 *Women’s Studies International Forum* 403 at 411. A complete citation could not be provided for *R v Dennis Narjic* as the case was unreported and the court file could not be retrieved.

Also, they are often subordinate to the accused in the community. Thus, they could be wary of contradicting the accused's account of the law.⁶³

Even with these evidential concerns, prosecutors do not seem to challenge these accounts of the law.⁶⁴ And as in the cases of *Jamilmira* and *Gj*, prosecutors often fail victims in not pursuing sexual assault charges.⁶⁵ Consequently, Indigenous women can be discriminated against by individuals at every stage of the court process, whether consciously or unconsciously—even by individuals who are supposed to be acting for them.⁶⁶

Another problem seems to be a paternalistic sympathy for Indigenous offenders. In the mid-1900s, Australian courts were often compassionate towards apparently uncivilised Indigenous offenders as “their backwardness meant that they were not sufficiently developed to comprehend legal norms”.⁶⁷ This attitude could play a continuing role in judges'—and the general white public's—interactions with Indigenous people.⁶⁸

The adversarial system—which is dominant in both Australia and Aotearoa—means it is possible for defence lawyers to advance and succeed with arguments hinging on inaccurate conceptions of custom.⁶⁹ The adversarial system poses problems for sexual violence cases generally, but the added issues of custom-based arguments make it more difficult for Indigenous women to achieve justice.

Finally, the mainstream justice system shows a pattern of underplaying VAW more generally. Female victims of sexual abuse and domestic violence generally struggle to be heard in courts and receive satisfactory outcomes.⁷⁰ This attitude, which seems to be inherent in the mainstream judicial system, has made it easier for courts to frame and accept arguments that reduce the seriousness of the offence.

D *What are the effects of this misconstruction of customary law?*

The misconstruction of customary law has served to silence and failed to protect Indigenous women. The victim is “rendered mute”, first by the legal system's privileging of the offender's perspective, and again by the predominantly male cultural narrative it tells.⁷¹ In cases like *Jamilmira*, the judge paid little attention to the victim impact report and instead “imagined a cultural story for her”.⁷² Indigenous VAW victims are not only silenced by the system but they are spoken on behalf of by the judiciary, experts and the prosecution.⁷³

63 Heather Douglas “‘She Knew What Was Expected of Her’: The White Legal System's Encounter with Traditional Marriage” (2005) 13 *Feminist Legal Studies* 181 at 193.

64 At 193.

65 McGlade, above n 14, at 7 and 9.

66 At 11.

67 Thalia Anthony “The Punitive Turn in Post-Colonial Sentencing and the Judicial Will to Civilise” (2011) 19 *Wai L Rev* 66 at 68.

68 Paternalism is evident in *D v Police*, where the judge did not seek evidence to support his interpretation of tikanga and raised it even when the defendant did not mention it himself. See *D v Police* as cited in Quince, above n 6.

69 See Campbell, Goldsworthy and Stone, above n 30, at 185.

70 See, for example, “Statistics: Sexual Violence in Aotearoa New Zealand” Rape Prevention Education <www.rpe.co.nz>.

71 Douglas, above n 63, at 183.

72 At 187.

73 At 200.

Khylee Quince argues that *D v Police* “is an unsafe [decision] that fails to protect those whom the laws of [Aotearoa] purport to protect”.⁷⁴ This statement can be applied to the Australian cases too. Little thought is spared for the victim’s safety when her abuser returns to the community.⁷⁵ Decisions like these also make it less likely that other Indigenous women will go to the mainstream justice system when they are victimised. Why would they when they know they will not get the justice they are seeking? In the words of a Cape York woman: “[i]f a white woman gets bashed or raped here, the police do something. When it’s us they laugh. The fellow keeps walking around, everybody knows but nothing is done.”⁷⁶

These cases also exemplify the success of colonisation in oppressing Indigenous women.⁷⁷ Colonialism and patriarchy have pervasive ongoing effects in many of Australia’s and Aotearoa’s institutions, including the justice system.⁷⁸ The settlers introduced their conceptions of women as inferior, systematically destroyed traditional dispute resolution systems—thereby making their system the only avenue of recourse for victims—and then structured their justice system in a way that makes it exceedingly difficult for Indigenous women to access said justice.

Finally, these false accounts of customary law threaten the future valid incorporation of custom.⁷⁹ This is evident in s 91 of NTNERA which provides the blanket ban on cultural considerations in all sentencing decisions.

IV Where to From Here?

Unlike in Australia, there is no indication that VAW has been condoned under tikanga Māori. This means that it is highly unlikely a case like *Jamilmira* could happen in Aotearoa. Also, because Māori rarely live in isolated communities, as many Aboriginal Australians do, there is little room for argument that offenders did not know their actions were criminal. Despite these differences, the actions each country should take from here are similar.

In Australia, a legislative provision expressly excluding the possibility of arguing that customary law condones VAW would be welcome. This has been suggested by Indigenous women⁸⁰ and some politicians.⁸¹ However, the response was a broader blanket ban on customary law evidence.⁸² While this ban has had some positive outcomes, it is ultimately “an inappropriate and misdirected response to criminal offending in remote Aboriginal communities” and should be limited to violence against women and children to ensure it does not unjustifiably impinge on judicial discretion.⁸³

Both countries have a judiciary unfamiliar with customary law. As the Law Commission in Aotearoa puts it: “through no fault of their own, [judges] are being called upon to assess the mores of a society still largely foreign to them”.⁸⁴ By training judges in the basic

74 Quince, above n 6, at 12.

75 Bolger, above n 28, at 83.

76 Atkinson, above n 3, at 14.

77 See Quince, above n 6, at 12.

78 McGlade, above n 14, at 9.

79 Shaw, above n 59, at 328.

80 Behrendt, above n 9.

81 McGlade, above n 14, at 8.

82 NTNERA, s 91.

83 Bury, above n 46, at 17.

84 Law Commission, above n 7, at [16].

concepts of the custom relevant to their jurisdiction and encouraging more Indigenous people into the profession, rudimentary misunderstandings, such as those demonstrated in *D v Police*, can be avoided.

Naturally, judges are not expected to know the finer details of custom in every circumstance. Expert evidence is often necessary but this process has not been working effectively. Existing structures do not make it easy for Indigenous women's voices to be heard. Accordingly, those in the criminal justice system ought to actively seek out Indigenous women's voices and make room for them.⁸⁵ Hearing evidence from both men and women, particularly elders and scholars, is critical in forming an accurate picture of custom.⁸⁶ Without this evidence, courts should treat such arguments based on customary law with suspicion.⁸⁷

It is fairly clear that neither Māori nor Aboriginal people are regularly punishing VAW in their communities in accordance with traditional laws. Reviving traditional processes ought to be encouraged. Advocating for existing Aboriginal justice systems to deal with VAW and rebuilding tikanga Māori justice systems will allow for more culturally sensitive processes and outcomes. These initiatives will also foster individual and community self-determination.

Indigenous dispute resolution systems tend to have a greater focus on accountability. They also often allow victims to have a more prominent and direct voice than they would have in mainstream justice systems. Both features are beneficial to the offender, the victim and the whole community.

The Crown has a responsibility to support this rebuilding—but for its colonial conquest these Indigenous systems would still be operating today.⁸⁸ It will take time and effort,⁸⁹ but its benefits will outweigh its costs.

Kim Workman gives an example of an offender being dealt with under tikanga Māori in relatively recent years.⁹⁰ A man admitted to incest with his teenage daughter. At a community meeting he took the opportunity to speak and listen to the testimonies of his daughters, wife, and elders in the community. It was decided that the man would be stripped of his elder status and speaking rights on the marae, and expected to sleep outside the family home. His full rights were restored when his youngest daughter left home, and the community had no further issues with him.

While the re-establishment of traditional justice systems should be encouraged, this should not limit Indigenous VAW victims from accessing justice through the mainstream system.⁹¹ The judiciary has recognised this in *R v Daniel*.⁹²

Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection ... they are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.

85 Douglas, above n 63, at 200.

86 *The Interaction*, above n 8, at 25.

87 Law Reform Commission of Western Australia, above n 2, at 359.

88 Valmaine Toki "Tikanga Maori in criminal law" (2012) 11 NZLJ 357 at 357.

89 As recognised by Moana Jackson, giving evidence in *Mason*, above n 24, at [39].

90 Kim Workman "Restorative Justice: Victims, Violators and Community—The Path to Acceptance" (presentation to the International Conference and Workshops of Restorative Justice, Human Rights and Peace Education, Tainan, 6 March 2012).

91 *The Interaction*, above n 8, at 22.

92 *R v Daniel* [1997] QCA 139, [1998] 1 Qd R 499 at 531.

Indigenous women still face many barriers to access mainstream justice. Like non-Indigenous victims, Indigenous VAW victims can expect a traumatic trial in reliving the assault and a low chance of conviction. In addition, Indigenous women are often subjected to questioning from young white policemen and lawyers who interrogate them about their sexual histories and suggest that “a ‘rough up’ is part of Aboriginal love making”.⁹³ Especially in rural Aboriginal communities, women sometimes know these policemen to have abused them or their family.⁹⁴ Police stations can often be two hours away and Aboriginal legal services are critically underfunded.⁹⁵ These barriers must be addressed for Indigenous women to achieve justice.

There are many Indigenous people speaking out against family violence in their communities. This activism should be supported as answers to these undeniable problems must come from within. Otherwise, proposed solutions risk being and appearing paternalistic and culturally inappropriate.

The mainstream justice systems have been making good progress in incorporating customary practices—examples include the Rangatahi and Koori Courts, and discretionary powers allowing for hearings to be held on a marae.⁹⁶ It has been acknowledged that some major aspects of tikanga Māori, notably its inquisitorial—rather than adversarial—style, are inconsistent with mainstream justice practices.⁹⁷ However, there are many practices that would not threaten the core adversarial values of the mainstream justice system and there is certainly room for these to be included more effectively. Such practices include a focus on restorative justice and a wider acceptance of Indigenous language and protocol in the courtroom, such as allowing kaumatua (elders) to address the court in pre-trial proceedings.⁹⁸ This would ideally make the mainstream justice system feel less foreign and more accessible to Indigenous victims, hopefully resulting in better outcomes for offenders too.

V Conclusion

The incorrect application of customary law in Australian cases concerning VAW has been a serious issue. Aboriginal women victims have effectively been re-victimised by a justice system purporting to protect them. While this has not been a problem to the same extent in Aotearoa, the countries share a system of predominantly white male judiciaries unfamiliar with custom. In both countries, Indigenous VAW victims do not have a fully operational traditional dispute resolution system to turn to and must instead face a justice system built to serve victims very different to them. This may help to explain the particularly low reporting rates for physical and sexual violence experienced by Indigenous women.⁹⁹

This article has proposed a number of ways the justice systems of Australia and Aotearoa can better serve Indigenous VAW victims, from specific legislative action to further incorporation of custom into the mainstream system. These recommendations

93 Atkinson, above n 3, at 14.

94 Adams and Hunter, above n 4, at 27.

95 At 27.

96 See Law Commission, above n 7, at [211].

97 Paul Heath “‘One Law for All’—Problems in Applying Māori Custom Law in a Unitary State” (2010–2011) 13–14 Yearbook of New Zealand Jurisprudence 194 at 197.

98 At 202.

99 Atkinson, above n 3, at 14.

should be adopted alongside an effort within Indigenous communities to condemn VAW and rebuild internal structures to address these crimes.

Former New Zealand Principal Youth Court Judge Andrew Becroft has said that “[a] test of any justice system is how well it deals with [its] indigenous peoples”.¹⁰⁰ This should not be confined to Indigenous *offenders*. The voices of Indigenous women *victims* are struggling to be heard, and they must be heard if the mainstream legal system is serious and sincere about serving justice.

100 Andrew Becroft, Principal Youth Court Judge (speech at the launch of the Manurewa Marae Youth Court, 23 September 2009) as cited in Workman, above n 90, at 15.