

Specific considerations - Aboriginal and Torres Strait Islander people

Due to social and cultural influences unique to the lives of Aboriginal and Torres Strait Islander people including gender-specific cultural roles and protocols, and experiences of colonisation, dispossession, racism, assimilation and the Stolen Generations, the broader understanding of domestic and family violence applied in other Australian contexts may not fully reflect the experience of **Aboriginal and Torres Strait Islander people** [Blagg et al 2015].

Aboriginal and Torres Strait Islander people may delay reporting or be reluctant to report, assist prosecution authorities or seek help for the domestic and family violence they experience as they may fear retribution from the perpetrator or the perpetrator's family; they may fear the child protection agency will remove their children; they may distrust or fear the police [JCCD, *The Path to Justice (ATSI) 2016*], criminal justice system and mainstream services where they themselves have a record of violence or offending; they may fear the perpetrator will be jailed or that he will die in custody; or they may fear gossiping and shaming by members of the local community. Some **Aboriginal and Torres Strait Islander** women with children, feeling a duty to keep the family together, may prefer that the violence stops to leaving the perpetrator whom they may continue to feel empathy for and committed to.

Aboriginal and Torres Strait Islander people may experience a range of complex factors such as a loss of traditional culture, fragmentation of kinship systems, discrimination, poverty, unemployment, homelessness, drug and alcohol misuse, and a decline in traditional gender roles and status.

In the context of deciding an appeal against sentence involving an Aboriginal and Torres Strait Islander man's manslaughter of his Aboriginal and Torres Strait Islander defacto partner the High Court in *Munda v Western Australia* [2013] HCA 38 (2 October 2013) observed that while mitigating factors such as social disadvantage need to be afforded appropriate weight in sentencing, this cannot result in the imposition of a penalty which is disproportionate to the gravity of the offending. In particular, the joint majority of the High Court (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) noted at [53] – 'to accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity' and 'Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.' The Court also addressed the argument that general deterrence has less significance in relation to crimes which are not premeditated in the context of social disadvantage. In dismissing this assertion, the Court noted that the criminal law is not limited to the 'utilitarian value of general deterrence' and stated that the obligation of the State is 'to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence' (see at [54]). The joint majority of the High Court (at [42]) approved the following remarks of McLure P in *Western Australia v Munda* [2012] WASCA 164: 'While the role of the criminal law in deterring the commission of violent acts is problematic, and particularly so in relation to Aboriginal communities, it is important to indicate very clearly that drunken violence against Aboriginal women is viewed very seriously.'

In some jurisdictions imprisonment of Aboriginal and Torres Strait Islander offenders is currently the most common form of punishment in domestic and family violence related matters, however researchers and judicial officers have observed that, while incarceration may give the victim some respite from the violence, it may not be effective in deterring the offender or like-minded offenders from violence in the future or in positively changing offender behaviours [Blokland 2016]. Aboriginal and Torres Strait Islander women victims may not report violence so as to avoid the prospect of incarceration of the offender [Blagg et al 2015]; instead they may express a preference for restorative justice responses to the types of offending behaviour they believe the community can appropriately manage [Nancarrow 2006].

Restorative justice principles applied in the Aboriginal and Torres Strait Islander context are focused on healing and the restoration of relationships, taking into account cultural sensitivities, and provide opportunities for self-determination [Blagg et al 2015]. For example, circle sentencing is practised in some New South Wales courts where community members sit with the Magistrate in a circle to discuss the offender, the offence, and the appropriate sentence. In the Murri Court in Queensland, coupled with suitable punishment, probation orders can include regular meetings with community Elders or Community Justice Groups, attending counselling through the Indigenous Healing Centre, or attending substance misuse programs with Aboriginal and Torres Strait Islander health organisations [Hennessy & Willie 2006]. An Australian study examining the use of Aboriginal and Torres Strait Islander sentencing courts, where Elders and community representatives participate as moral and cultural guides, found that offenders considered the process fairer and more supportive than the mainstream criminal justice system, while also more challenging due to the sense of shame they experienced in having to face and account to respected members of their community [Marchetti 2015].