

DOES AN INTERSECTIONAL UNDERSTANDING OF INTERNATIONAL HUMAN RIGHTS LAW REPRESENT THE WAY FORWARD IN THE PREVENTION AND REDRESS OF DOMESTIC VIOLENCE AGAINST INDIGENOUS WOMEN IN AUSTRALIA?

Emma Buxton-Namisnyk*

I Introduction

In recent decades domestic violence has gained increasing attention under international human rights law as a form of gender-based discrimination and a violation of women's human rights. This has been expressed through a number of international instruments and measures designed to provide redress and remedy for private sphere violence primarily affecting women, including, but not limited to, the adoption of the *United Nations ('UN') Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')*, and its associated recommendations.¹ Similarly, but comparatively recently, human rights specifically attaching to Indigenous peoples have been increasingly considered by the international human rights community, identifying Indigenous discrimination as warranting special consideration due to the historical dimensions associated with Indigenous dispossession and the legacy of post-colonial discrimination.²

Human rights, as enshrined and protected in UN conventions and declarations have traditionally been expressed along identity lines, nominating specific heads of discrimination to be considered by individual conventions – for example – the 'race' convention, the 'disability' convention and the 'gender' convention. In practice this encourages the prioritisation of a particular characteristic in state reporting procedures to the UN and under Optional Protocols, which results in an aggrieved claimant selecting which convention (and identity strand) to draw upon in asserting discrimination (eg, a disabled woman bringing a claim on the basis of *either* her disability *or* her gender). Although textually there are some identifiable examples where convention drafters acknowledged that particular identity characteristics may intersect to intensify or change the

nature of discrimination (eg, the inclusion of rural women as a group experiencing specific discrimination in CEDAW),³ there has historically been little acknowledgement of the ways in which multiple identity strands interact to produce a specific experience at the intersection of numerous heads of discrimination.

In the last decade or so however, the practice of the UN Committees has been changing, with increasing acknowledgement of the ways in which various identity strands interact to produce a unique experience of discrimination or rights violation ('intersectional' practice). This shift in the operation of the UN convention system opens up a range of new possibilities for addressing rights violations occurring at the intersection and due to the interaction of various forms of discrimination.

This article argues that the increasing intersectional practice of the UN Committees – particularly the CEDAW Committee and the Committee attached to the *United Nations Convention for the Elimination of All Forms of Racial Discrimination ('CERD Committee')* – and the principles enshrined in the recently adopted *United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP')*, open up an important area of accountability for states concerning the specific issue of domestic violence against Indigenous women as a human rights violation requiring specific attention. It is suggested that this intersectional accountability focus be adopted by the international community to facilitate the development of remedial approaches and prevention strategies suitable to both the gender and culture of Indigenous women, and that this additional layer of scrutiny be used to encourage and facilitate the effective partnering of State and community responses to domestic violence.

Part II of this article examines the disproportionate impact of domestic violence on Indigenous women in Australia. Part III examines intersectional discrimination as it manifests against Indigenous women in Australia and the current absence of justice mechanisms appropriate to both the gender and culture of Indigenous women experiencing violence. Part IV examines intersectional understandings of discrimination and rights violations arising from the Committees as well as potential avenues for redress and accountability using international human rights law mechanisms. Part V considers how international human rights law, including through the practice of the Committees, can be used as an effective platform to advocate for access to justice for Indigenous women experiencing domestic violence.

II Domestic Violence against Indigenous Women in Australia

There is a 'crisis' of domestic violence within Indigenous communities in Australia.⁴ Although the terms 'domestic' and 'family' violence are often used interchangeably, 'domestic violence' typically refers to physical, emotional, social, spiritual and psychological abuse, perpetrated by an offender against a current or former intimate partner.⁵ 'Domestic violence' within intimate partner relationships has a specific gender dynamic when compared with other forms of violence between family members, and this form of violence against women shall be the focus of this article.⁶

Indigenous Australians experience domestic violence at significantly higher rates than non-Indigenous Australians⁷ and this overrepresentation as both victims and offenders of domestic violence, has not altered over the past 10 years.⁸

Serious physical violence resulting in involuntary or voluntary service contact, such as engagement with police or medical services, offers one clear indicator of domestic violence prevalence. In Australia's most populous state, New South Wales, the rate of recorded domestic assault against Indigenous women remains over six times higher than the rate of domestic assault against non-Indigenous women.⁹ Indigenous women are also a further 34 times more likely to be hospitalised following a domestic assault perpetrated by their intimate partner than non-Indigenous Australian women.¹⁰ It should be noted, however, that these statistics do not account for the prevalence of non-physical violence indicators such as psychological, emotional or economic abuse.

There are many possible reasons for the higher prevalence of domestic violence in Indigenous communities, and the exploration of these reasons requires a culturally sensitive understanding of the historical factors which have shaped the experiences of Indigenous Australians.

Indigenous Australians comprise approximately 2.5 per cent of the Australian population.¹¹ The majority of Indigenous Australians (90 per cent) identify as Aboriginal, but the group also includes Torres Strait Islanders and those who identify both as Aboriginal and Torres Strait Islander.¹² Domestic violence studies rarely distinguish between Aboriginal and Torres Strait Islander Australians, and for the purposes of this article the term 'Indigenous' will be used to describe the population as a whole.

Indigenous Australians have one of the oldest surviving cultures in the world, based around complex social and extended familial structures, including kinship and tribal networks.¹³ From 1788 onwards, Indigenous culture was interrupted as a result of violent colonisation by the British, involving genocide, dispossession from sacred lands and enslavement. This resulted in the loss of many lives and the severance of important links between Indigenous Australians, their lands and communities. Across subsequent decades overtly genocidal government policies, such as the White Australia Policy, served to ingrain and entrench Indigenous disempowerment, severed existing kinship networks by creating generations of stolen children and irreparably suppressed the agency of Indigenous peoples and 'Indigenous identity'. Despite judicial developments in the 1990s securing limited land rights for Indigenous Australians, Indigenous sovereignty and self-determination has never been recognised in Australia.¹⁴

The history of Indigenous life prior to colonisation is largely unrecorded, and as such it is difficult to assess the ways in which colonisation impacted upon the behaviours of and relationships between individuals within Indigenous communities. However, it is understood that while some violent behaviours existed within pre-colonial Indigenous communities, domestic violence was not a natural part of customary law or practice.¹⁵

As with many other cultures where native populations have suffered violent colonisation or dispossession, Indigenous Australians are, in many ways, disempowered, which has resulted in increased social problems within communities.

According to Cripps, social problems which may increase the prevalence of violence in Indigenous communities include unemployment, marginalisation, welfare dependency, mental and physical health problems, increased alcohol and drug abuse and low self-esteem/powerlessness.¹⁶ Indigenous Australians often experience these social issues cumulatively, and at rates far higher than non-Indigenous Australians, contributing to increased stress within the home and recourse to destructive coping behaviours, including violence.¹⁷

The increased prevalence of social issues within Indigenous populations arises as a consequence of cultural dispossession and trauma, as well as ongoing experiences of discrimination that target Indigenous culture. Violence among Indigenous communities worldwide is paradigmatically linked to histories of dispossession, and the situation in Australia is no exception.¹⁸

Domestic violence is defined, at its core, by a power imbalance whereby one party exercises domination and control over another.¹⁹ It is typically perpetrated by a male aggressor against a female victim and as such, is considered to be a gendered crime, reflective of prevalent masculine identities and behaviours.²⁰ An inquiry as to why Indigenous women experience domestic violence disproportionately must be framed in terms of the impact of colonisation on masculine identity; including a loss of social and cultural identity (including fractured kinship relationships), low self-esteem, decreased self-control and increased anger and resentment.²¹ Some commentators have also suggested that Indigenous males may have an increased tendency to adopt abusive conflict-resolution mechanisms due to lower education levels (noting that reduced access to education in itself arises as a consequence of cultural and social marginalisation).²² While not excusing violent behaviours, these explanations are indicative of the complex experiences of Indigenous males and assist in understanding the ways in which such behaviours may impact upon their female intimate partners.

Further, while some argue that domestic violence manifests differently within Indigenous communities – with violence frequently occurring outside of the home and victims of violence allegedly ‘fighting back’ more often – there has been little comprehensive research concerning the dynamics of Indigenous domestic violence.²³ Consequently, attempts to accurately explain experiences of such violence are hampered. More robust research is required in order to

further develop this knowledge and enhance understanding of these issues.²⁴

In addition to experiencing higher rates of violence, Indigenous women are also less likely than non-Indigenous women to report domestic violence or engage with service agencies.²⁵ Low reporting of domestic violence in the general community is attributed to factors including privacy concerns, fear of reprisal, sympathy for the offender and a lack of confidence in police, all of which are considered to impact upon Indigenous and non-Indigenous women in similar ways.²⁶ As domestic violence is characterised by underreporting and low levels of engagement with service agencies,²⁷ the crime itself has reduced visibility in Australia and worldwide, regardless of the racial group or ethnicity of perpetrators or victims.²⁸ This underreporting of domestic violence was reflected in the Australian component of the International Violence Against Women Survey (‘IVAWS’) conducted between 2002-2003, which found that while more than a third of all women surveyed (34 per cent) had experienced physical or sexual violence from a former or current intimate partner, only one in seven had reported the most recent incident to the police.²⁹ Due to the nature of the IVAWS (primarily conducted via telephone interviews which may not have been as accessible to Indigenous women) only 92 Indigenous women were interviewed, and as such, no significant conclusions could be drawn in relation to the reporting behaviours of this group.³⁰

It is widely acknowledged however, that the already low levels of reporting for domestic violence in Australia are even lower for Indigenous women.³¹ Indigenous women rarely report such crimes to the police and are often reluctant to engage police assistance for reasons including: intimidation; fears of experiencing community shame; resistance to engage with judicial processes and with the police; and fears that the perpetrator will be sent to prison.³² Many of these fears reflect the historic treatment of Indigenous Australians by police and criminal justice systems.³³

Indigenous Australian women not only experience domestic violence with greater frequency than non-Indigenous Australian women, but also have reduced access to culturally appropriate remedies to address these experiences. As most primary domestic violence intervention in Australia is convened by the police in the context of a ‘crisis’ (such as at the scene of an assault or altercation), this affects Indigenous Australians’ willingness to engage services. Due to historical

violence throughout Australia's post-colonial history perpetrated by police services, and the high prevalence of Aboriginal deaths in police or corrective services custody, Indigenous Australians often do not trust or engage with primary responders to domestic violence such as the police.³⁴ This accords with the commentary of former UN Special Rapporteur for Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy, who notes that:

Indigenous women or women from racially or ethnically marginalized groups may fear State authority, if the police have traditionally used coercive and violent means of criminal enforcement in their communities.³⁵

One consequence of this fear of authority is that Indigenous women are more likely to endure domestic violence, as concerns for the safety of their partners through criminal justice systems, and community pressure, outweigh their fears for their own safety and wellbeing in the home.

This issue is further complicated by concerns around police responses to domestic violence in Australia and perceptions that police fail to adequately address such violence.³⁶ There have been numerous reviews of police responses to domestic violence in Australia, and while it has been noted that approaches are improving, there remain a number of key areas requiring attention, including under-resourcing, geographical restrictions, police apathy or repeat offender/victim fatigue.³⁷

Despite significant improvements in the delivery of police services to Indigenous clients in recent decades – including the creation of specialist Indigenous support officer positions within the police force – there remains limited engagement and retention of Indigenous Australians through criminal justice systems.³⁸ The post-colonial imposition of 'criminal' understandings of violence has imported a punitive attitude to dealing with domestic violence. This conflicts with pre-colonial systems, where violence was traditionally addressed within Indigenous communities through restorative justice mechanisms.³⁹ Research has shown that Indigenous women continue to strongly favour community-led rather than state convened responses to domestic violence, including restorative justice based mechanisms.⁴⁰ According to Heather Nancarrow, this preference for community-based restorative (and holistic) domestic violence justice mechanisms is rooted in Indigenous women's understandings of the importance

of locating justice within a self-determinative framework, rather than relying on state 'owned' justice processes.⁴¹

It is acknowledged that many traditional justice mechanisms have been lost in Indigenous communities and consequently, any reconstruction of historical Indigenous justice mechanisms may now be largely artificial. However, it is necessary to encourage the active involvement and participation of Indigenous peoples in the development of new and culturally appropriate justice solutions. The impetus for this shift will be discussed later in this article.

In addition to suffering domestic violence differently to non-Indigenous women, Indigenous women suffer from reduced access to justice due to a lack of culturally appropriate remedies in relation to domestic violence. It is fundamental to understandings of human rights that all people possess such rights by virtue of their humanity, regardless of other factors such as their race, religion or gender. Approaching the issue from this premise, and acknowledging that these issues are indicative of the fact that Indigenous women are suffering a human rights violation, Part III of this article will consider the nature of this discrimination as an issue arising at the intersection of gender and Indigenous identity.

III Intersectionality, Feminism and Domestic Violence

A The Theory of Intersectionality

In recent decades, the international human rights community has increasingly recognised human rights violations in abuses commonly experienced by 'women', including domestic and sexual violence and the gendered denial of economic, social and cultural rights.⁴² Although the recognition of forms of abuse commonly perpetrated against women as human rights violations represents a significant step forward in the elimination of discrimination and the promotion of equality for women worldwide, there remain concerns that focusing on collective notions of gender may obscure other important identity shaping characteristics – such as race, sexual orientation and class. This gender focus may sideline the experiences of many of the world's women, unintentionally privileging the experiences of a particular 'woman' (middle-class, heterosexual and white).⁴³ The lives of minority women are often shaped not simply by their gender, but by issues including race, ethnicity, class, religion and sexual

orientation. A sole focus on 'gender' can therefore further marginalise these women.

Adequate redress for human rights abuses suffered by women worldwide therefore requires an understanding of the ways in which socio-economic, cultural, sexual and other factors shape and define their experiences. This requires study of the points at which various kinds of discrimination intersect to produce a unique experience, individuated based on the characteristics of the aggrieved party. This is known as the theory of 'intersectionality' and was developed in the late 1980s and early 1990s by a number of eminent social theorists including Kimberlé Crenshaw, who popularised the use of the term.⁴⁴ The theory of intersectionality recognises that people's lives are shaped and affected by factors which operate in addition to, and concurrently with, their gender. Experiences of discrimination such as racism, classism or discrimination on the grounds of sexual orientation will affect men and women differently.⁴⁵ Similarly, sexism, classism and discrimination on the grounds of sexual orientation will affect Indigenous and non-Indigenous people differently. Thus, the theory of intersectionality seeks not only to recognise differences and highlight those areas where structural categorisations fail, but also to use the experiences of those located at the intersection of various kinds of discrimination to enrich feminist, anti-racist and social theories.⁴⁶

Intersectionality has been used to critique the structure and the regulation of human rights through non-government organisations and laws at both a state level and at an international level.⁴⁷ The division of human rights regulation along lines such as race/racial discrimination or gender in isolation or under individuated conventions,⁴⁸ can produce an analysis of human rights abuses that may marginalise the experiences of individuals located at the intersection.⁴⁹ For example, the regulation of racial discrimination through race-specific legislation may unintentionally minimise the role of gender in racial discrimination experienced by women, or the specific sites of discrimination where sexual orientation and racism intersect. Similarly, gender specific legislation may unintentionally minimise the role of race in gender discrimination experienced by women in ethnic and cultural minorities. In this way, dividing regulation along substantive lines can also result in an abuse being characterised as *neither* gender nor race discrimination, and can limit the availability of redress or remedies for victims. As Crenshaw notes in her intersectional analysis of the experiences of 'colored' women:

[B]ecause of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.⁵⁰

Any pervasive structural dialogue which fails to recognise the nuanced experiences of individuals has the flow on effect of relegating their stories to 'a location that resists telling'.⁵¹

Recognising that women may become marginalised as a consequence of multiple layers of discrimination, Crenshaw in particular has been at the forefront of a growing literature concerning the experiences of women who suffer race, class and gender discrimination, including in relation to domestic violence. According to Crenshaw's study concerning domestic violence shelters located in minority communities of Los Angeles, the challenges that confront shelter workers are not confined to addressing acts of violence that have been perpetrated against victims - the most recent act of violence being only 'the most immediate manifestation of the subordination they experience'.⁵² Instead, what workers are confronted with is a multitude of barriers including poverty, a lack of job skills and obligations in relation to children - all of which combine to limit the ability of abused women to exercise power and agency over their lives.⁵³ Crenshaw draws further attention to the cultural barriers which may limit the ability of immigrant 'women of color' to seek redress for domestic violence behaviours perpetrated against them.⁵⁴ Such barriers may include: language differences impacting the ability of immigrant women to liaise with authorities; dependence on abusive spouses for visa status updates and/or sponsorship; and increased vulnerability due to the fear of deportation should their relationship with their spouse disintegrate.⁵⁵

What these analyses reveal is that 'women of color' may suffer a multitude of hardships and barriers when dealing with and experiencing domestic violence, which may not necessarily be visible in an analysis focused solely on gender discrimination. As such, where we rely on a collective notion of gender in order to identify the relevant issues and the adequacy and availability of services for women experiencing domestic violence, we may obscure other important factors which produce the hardship experienced by women located at the margin: a margin that Indigenous women, amongst others, occupy.

B An Intersectional Analysis of Domestic Violence Responses in Australia

The intersectional analysis provided by Crenshaw creates a useful tool for examining responses to Indigenous women experiencing domestic violence in Australia. However, it should be recognised that, as Stubbs and Tolmie note, the term 'women of color' does not have the same meaning in Australia as it does in North America, and much work has been done to resist conflating the experiences of Indigenous Australian women with other 'women of color', including immigrant women, both in Australia and elsewhere in the world.⁵⁶

As illustrated in the introduction to this article, Indigenous Australian women experience domestic violence during their lives with greater frequency than non-Indigenous women. According to Cripps and Davis, the research produced so far suggests that while there is no single reason for the high levels of family and domestic violence in Indigenous communities, high levels of violence can be attributed to multiple factors related to histories of dispossession and trauma.⁵⁷ In no uncertain terms Cripps and Davis attribute the 'crisis' of domestic violence in Indigenous communities to issues of racism and class inequality, and at no point – despite the well-documented disproportionate impact of domestic violence on Indigenous women⁵⁸ – is domestic and family violence attributed to gender discrimination or conceptualised primarily as a 'gender issue'.⁵⁹ This in itself is interesting as it departs significantly from the 1995 observations of Stubbs and Tolmie, which indicated that, until that time at least, much of the literature concerning male violence was written without reference to issues of race.⁶⁰

Despite the specific race and class issues identified as contributing to Indigenous domestic violence, Cripps and Davis nonetheless note that cases involving an Indigenous victim or perpetrator of domestic violence are typically treated in the same way as non-Indigenous domestic violence cases, where the focus is primarily on police responses and remedies through the criminal justice system in combination with shelter and emergency accommodation for women and children.⁶¹ In such cases, the available remedies for Indigenous perpetrators and victims not only fail to take into account the specific conditions that lead to Indigenous domestic violence, but also sideline specific cultural values and challenges arising within that population.

Mainstream responses fail to adequately address the specific dynamics of Indigenous domestic violence due to significant differences between both Indigenous and non-Indigenous experiences of violence, and remedial approaches favoured within those communities. As noted previously, Indigenous women are often fearful or reluctant to engage with police as, according to Willis, Australia's post-colonial history has 'engendered, for many Indigenous Australians, a deep distrust of mainstream authorities and justice systems that in the past have operated as agents of oppression rather than as agents of justice'.⁶² Furthermore, due to limited resourcing or information sharing and a lack of culturally-specific training within primary domestic violence responders including the police, there can be reduced access to justice for Indigenous perpetrators or victims of such violence who engage with such processes but meet cultural or other resistance.⁶³ Where existing systems fail to account for the differences between non-Indigenous and Indigenous domestic violence, intersectional discrimination continues; limiting access to justice for both victims and perpetrators and effectively obscuring the very conditions which create the original injustice.

In recent years, recognition of these shortcomings within police and justice response systems has resulted in significant reform.⁶⁴ Reform has included the development and implementation of: Indigenous specific support services;⁶⁵ Indigenous Sentencing Courts, which facilitate the participation of Indigenous elders and respected persons in criminal sentencing of Indigenous offenders post-conviction;⁶⁶ Indigenous Mediation Programs; culturally specific awareness-raising campaigns (such as the 'Mildura Family Violence and Sexual Assault Campaign' and the 'Aboriginal Women Against Violence Project in Urban Sydney');⁶⁷ and composite campaigns such as Indigenous law camps and community healing programs.⁶⁸ There has also been a move towards increasing Indigenous participation in the development of remedies for domestic violence, such as the introduction of Indigenous liaison officers in state police services.⁶⁹

The success of these reforms has been restricted, to a large extent, by inadequate funding and the limited geographical reach of programs.⁷⁰ For example, while there are over 50 operational Indigenous sentencing courts, comparatively low numbers of Indigenous Australians are processed through these courts. Instead, most continue to be processed via mainstream justice systems for reasons including limited access to Indigenous courts and restrictions on the offences

that may be heard.⁷¹ There has also been little evaluation of many Indigenous initiatives, and it is therefore difficult to assess the success or otherwise of different programs in addressing the specific inequalities and issues identified within the group.

There also remain valid concerns that justice initiatives such as Indigenous Sentencing Courts and Indigenous Mediation Programs are inappropriate when offences concern violence against women.⁷² All Australian jurisdictions using Indigenous Sentencing Courts exclude sexual offences, and domestic and family violence offences are excluded in Victoria and restricted in the Northern Territory.⁷³ In all other states, domestic violence offences may still be heard in Indigenous Sentencing Courts. Given that domestic violence is characterised by a gendered power imbalance, the use of mediatory or alternative models of justice, such as Indigenous Mediation or the Indigenous Sentencing Courts may contribute to the ongoing marginalisation of women in the justice system and may perpetuate violence against them.⁷⁴ As Marchetti notes, in light of the male and race-centric model of inquiry employed in the Royal Commission into Aboriginal Deaths in Custody in the late 1980s, legal processes can be 'ill-equipped' to deal with intersectional problems of race and gender, as by focusing on race, such processes can render 'racialised women...invisible'.⁷⁵ Marchetti argues that legal processes tend to embrace liberal legal ideology, which inadvertently privileges male experience over female experience.⁷⁶ With initiatives such as Indigenous Sentencing Courts, which incorporate aspects of Indigenous culture, it can be argued that such processes may contribute to the further marginalisation of women, who may already be marginalised within their racial group.

In addition to the substantive inequality produced by the inadequacy of systems, outcomes and procedures in dealing with Indigenous domestic violence, Australian laws – specifically those operating in the Northern Territory under the Northern Territory Emergency Response ('NTER') – continue to formally discriminate against Indigenous Australians.

Although this article does not purport to consider the NTER in any detail, it must be noted that initiatives, including mandatory domestic violence reporting for Indigenous Australians, have been implemented as part of this reform and these initiatives have a disproportionate impact on Indigenous women.

The NTER commenced in August 2007 with the implementation of the *Northern Territory National Emergency Response Act 2007* (Cth), which suspended the *Racial Discrimination Act 1975* (Cth). This was done in order to remove anti-discrimination laws and in doing so, established laws in relation to prescribed regional areas of the Northern Territory, to facilitate the protection of children and promotion of safety in communities.⁷⁷

Perhaps in support of this response, and with the intention of promoting the safety of women and children, on 12 March 2009 amendments to the *Domestic and Family Violence Act 2007* (NT) commenced, requiring all citizens to report domestic violence to the police where such violence was suspected.⁷⁸ Failure to report suspected domestic violence would result in a penalty notice being issued. According to the Australian Law Reform Commission, the problems with initiatives such as mandatory reporting is that they disempower victims of domestic violence by discouraging self-reporting to friends or family, or seeking medical or other help.⁷⁹ This may impact on the health and wellbeing of women as victims of domestic violence and reduce the visibility of domestic violence in Indigenous communities.⁸⁰

As domestic violence is typically experienced by women, race-specific (but ostensibly gender-neutral) laws, such as those operating in the Northern Territory, can create the very conditions which facilitate the ongoing denial of human rights to Indigenous women. What may originate as overt discrimination against the Indigenous community as a whole, may impact disproportionately upon female members of that community.

C Overview

Frontline responders to domestic violence including police are trying, but failing, to deliver appropriate services that take into account the gender and culture of Indigenous women. Despite recognising that culturally appropriate treatment is required, current remedies do not adequately account for the cultural barriers which impede access to justice for Indigenous women. Justice solutions which take into account culture – such as Indigenous Sentencing Courts – can fail to provide gender-appropriate solutions for Indigenous female victims. Indigenous women may therefore be indirectly discriminated against and disempowered as a result of culturally and gender inappropriate remedies, even in cases where laws do not overtly discriminate against them. In this

way Indigenous women at the intersection of both racial and gender-based discrimination are marginalised.

In recognition of the inadequate responses to the failure of domestic law and justice to respond to the intersections of race and gender in the experiences of domestic violence, Part IV of this article will consider the crisis of domestic violence in Indigenous Australian communities in the context of international human rights law. Australia has ratified a number of international conventions and is therefore subject to some governance under international law. Where Australia fails to meet its obligations under international human rights law, human rights bodies can, using a number of avenues, reiterate the need for alignment with international human rights standards. In fact, the very issue of domestic violence against Indigenous women in Australia has attracted attention from the International community, including from the CEDAW Committee,⁸¹ and the CERD Committee in 2010.⁸² Part IV will therefore consider the ways in which international human rights law promotes intersectional analysis and how this apparatus can be used to better examine redress for Indigenous women's experiences of domestic violence, in order to promote and effect real change in Australia.

IV Intersectionality, International Law and Reducing Violence against Indigenous Women

The regulation of discrimination within states can often obscure experiences or consequences of discrimination which occur at the intersection of various sites of oppression. By focusing on structural analyses of race, gender and class and dividing the regulation of discrimination into specific laws concerning, for example, racial discrimination, gender discrimination and discrimination on the basis of religion, individual experiences of oppression which result from multi-stratum discrimination can be minimised or obscured by existing frameworks. This is certainly the case with Indigenous female victims of domestic violence in Australia, for whom existing remedies and processes are, for the most part, culturally inappropriate and counterproductive to achieving access to justice.

Historically, similar criticisms have been leveled at the mode of international governance adopted by regulatory bodies such as the UN.⁸³ According to theorists such as Johanne E Bond, the structure, practice and foundation of organisations such as the UN has historically resisted 'a nuanced

human rights analysis' that accounts for intersectional discrimination.⁸⁴ According to Bond, the UN's focus on individual conventions, which have been created along 'rigid' and 'substantive' lines, such as racial discrimination or gender discrimination, has resisted an adequately intersectional international legal system.⁸⁵

Today however, Bond's criticisms have less bearing on the actual way in which the UN conventions and their various committees and other agencies operate. Since the 1990s, the UN has increasingly adopted an intersectional understanding of discrimination, resulting in many committees making general recommendations and adopting processes which recognise intersectional discrimination and resolve to take it into account.

This section will focus on intersectionality under international human rights law, particularly as it relates to the domestic violence experiences of Indigenous women, considering the content and operation of those conventions which purport to deal with racial discrimination, gender discrimination and Indigenous rights. This section will consider the ways in which international human rights law is presently equipped to assist Indigenous female victims of domestic violence in Australia to achieve redress. Most importantly, this section will consider the UNDRIP, a declaration that purports to consolidate and develop international rights for Indigenous peoples, including Indigenous women.

A Intersectionality under International Human Rights Law

(i) CEDAW: Violence and Human Rights for Women

Until the 1980s, there were few specific provisions related to women's rights under international human rights law. Those provisions that did, only related to rights arising in specific and limited circumstances, for instance: protective rights related to employment and maternity provisions, and safety around evening work for women under the International Labour Organisation ('ILO') Conventions 3 and 89.⁸⁶ In 1948 the *Universal Declaration of Human Rights* ('UDHR') was put forward by the UN, operating as a non-binding agreement requiring equality and equal rights for all humans without distinction.⁸⁷ The UDHR, by virtue of the political and social climate from which it evolved, was designed to promote equality through the creation of general, aspirational norms, designed to apply to all humans irrespective of their race,

colour, sex, language, religion, political or other opinion, national or social origin or other status.⁸⁸ However, feminist critique suggests that the UDHR does not adequately deal with human rights violations which occur within the private sphere, beyond the purview of the state or international law.⁸⁹ This is primarily because when the UDHR was drafted, human rights as a whole were largely considered internal matters to individual states and as such were not within the scope of international law.⁹⁰ Furthermore, issues remained (and in some senses continue to remain) as to the validity of 'horizontal' violations of human rights under international human rights law – meaning, the duties of non-state actors in relation to human rights.⁹¹

While there were numerous instruments that concerned women's rights, it was not until CEDAW entered into force in 1981 that human rights abuses commonly experienced by women were codified in a gender-specific international legal instrument.⁹² The text of CEDAW outlines binding provisions which not only specifically reflect women's experiences, but address discrimination on grounds that are largely specific to women, including: pregnancy,⁹³ family planning,⁹⁴ maternity,⁹⁵ patriarchal discrimination,⁹⁶ and prejudice and customs⁹⁷ which produce inequality between men and women.⁹⁸ CEDAW recognises that the experiences of women are different to those of men, and hence, also considers both civil and political rights and economic, social and cultural rights for women; addressing many feminist concerns that the stronger obligations under the ICCPR compared with the ICESCR⁹⁹ prioritise human rights for western males over those rights important for non-western women.¹⁰⁰

However, while CEDAW represented a significant step forward in the recognition of human rights for women, it remained limited in scope for a number of reasons. Firstly, CEDAW at the time of drafting contained no reference to violence against women in the text of either the Convention itself or the (preceding) *Declaration on the Elimination of Discrimination against Women* ('DEDAW').¹⁰¹ This apparent oversight reflected the institutional understanding of violence against women at the time, where it was considered to be an issue more accurately characterised as a domestic issue of 'crime prevention and justice', rather than one falling within the purview of international human rights law.¹⁰² The omission of violence in CEDAW is a further indicium of the general 'late entry' of violence against women into the international human rights agenda.¹⁰³

This omission was addressed in 1989, with the adoption of General Recommendation 12 which recommended that parties include, in state reports, information in relation to legislation and other measures implemented to protect women against violence within the workplace, social life or within the home.¹⁰⁴ This was further expanded upon in 1992 with General Recommendation 19 which outlined the ways in which gender-based violence concepts interact with each article of CEDAW – thus 'reading in' violence to the text of CEDAW.¹⁰⁵ General Recommendation 19:

asserts that gender-based violence against women is a form of discrimination within Article 1 of the Convention, despite the omission of any explicit article on the subject.¹⁰⁶

In doing so, General Recommendation 19 characterises gender-based violence as a violation of human rights requiring international legal attention.¹⁰⁷

By identifying violence against women as gender-based sex discrimination, General Recommendation 19 brings such violence into the 'the language, institutions and processes of International Human Rights Law.'¹⁰⁸ Furthermore, following on from General Recommendation 19, in December 1993 the UN General Assembly adopted the *Declaration for the Elimination of Violence against Women* ('DEVAW'), a legally non-binding declaration which reinforces that violence against women is incompatible with human rights and human dignity.¹⁰⁹ Unlike General Recommendation 19, which only applies to State Parties to CEDAW, DEVAW is a 'consensus statement' which applies to all Member States of the UN.¹¹⁰ Both General Recommendation 19 and DEVAW compel states to adhere to a high standard of due diligence in the investigation, prevention and redress of violence against women, including where such violence is experienced by women in their homes and perpetrated by non-state actors.¹¹¹

In 1994, the UN appointed a Special Rapporteur for Violence against Women, its Causes and Consequences. The mandate of the Special Rapporteur included investigation of abuse and working closely with others within the human rights framework to identify and rectify instances of violence against women. This mechanism strengthened UN responses to violence against women, reiterating the position of international human rights law in relation to such violence.

The powers of the CEDAW Committee were further strengthened in 1999 when the General Assembly adopted the Optional Protocol to CEDAW which established a two-arm communications mechanism for violations of the Convention.¹¹² The Optional Protocol, entered into force on 22 December 2000, not only allows for communications made by or on behalf of individuals but also implements a procedure which facilitates committee-initiated inquiries into human rights abuses affecting women, within signatory states to CEDAW. Australia acceded to the Optional Protocol of CEDAW in December 2008, facilitating complaints to be brought under this protocol following the exhaustion of domestic remedies.¹¹³

Since the Optional Protocol to CEDAW entered into force, numerous individual communications have been brought before the Committee concerning state obligations in relation to domestic violence. These are discussed later in this section.

(ii) International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'): Racial Discrimination and Violence

Just as CEDAW was implemented to provide binding international obligations in relation to the elimination of discrimination based on gender, in 1969 (prior to CEDAW) ICERD entered into force, imposing binding obligations in relation to racial discrimination on signatory states.¹¹⁴ ICERD (like CEDAW), encompasses a state reporting mechanism as well as individual complaints mechanisms, both of which entered into force in 1982 and are contained in Article 14.¹¹⁵ Just as CEDAW builds upon those rights contained in the UHDR, by outlining binding obligations in relation to formal and substantive equality for women, ICERD contains a specific distillation of civil and political rights and economic, social and cultural rights in addition to rights to both substantive and formal equality for racial and ethnic minorities. In General Recommendation 23, ICERD also expressly and specifically recognised racial discrimination against Indigenous populations.¹¹⁶

Unlike CEDAW, the text of Articles 4 and 5 of ICERD specifically condemn racial violence,¹¹⁷ however, other than a general reference to discrimination on the grounds of 'sex' in the preamble to the Convention, the text of ICERD does not specifically recognise intersectional discrimination experienced by women who are a racial minority. The CERD Committee 'officially' recognised the disproportionate

impact of racial discrimination on women in 2000 with General Recommendation 25.¹¹⁸ General Recommendation 25 recognises that women experience racial discrimination differently to men and notes that women may experience specific forms of racial discrimination – for instance, sexual violence, rape or forced sterilisation - which occur as a consequence of both their race and their gender.¹¹⁹ In General Recommendation 25, the CERD Committee also noted that its practices would benefit from:

developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.¹²⁰

Accordingly, in General Recommendation 25, the Committee resolved to incorporate gender considerations into its methodology when considering state reports, developing Concluding Observations, requiring urgent action procedures, and making general recommendations.¹²¹ There is a substantial body of evidence that this approach has been incorporated into the practice of the CERD Committee, and indeed any perusal of the universal human rights index will reveal copious references.¹²²

It should of course be noted that another avenue wherein Indigenous domestic violence in Australia has been the focus of international attention has been through the reports of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, James Anaya. In his 2010 report concerning Indigenous peoples in Australia, Anaya makes a number of recommendations which attempt to address the underlying reasons for increased domestic violence in Indigenous communities (such as dispossession and a lack of self-determination), and also considers domestic violence in some depth.¹²³

(iii) Intersectionality and the CEDAW and CERD Committees

One primary criticism of CEDAW is that, on its text, it does not provide an adequate intersectional analysis of different women's experiences. The text of CEDAW only identifies and isolates one vulnerable group of women; rural women, in Article 14; whose experience of womanhood differs

distinctly from the 'urban' women otherwise contemplated by CEDAW.¹²⁴

Although CEDAW does not expressly reflect intersectional experiences of discrimination, like the CERD Committee, it has been the practice of the CEDAW Committee to consider the experiences of women in an intersectional context in its interpretation of state obligations and reporting.

In relation to gender-based violence, Chinkin notes that the CEDAW Committee has recognised a significant number of situations where intersectional discrimination may increase the likelihood of violence occurring and may 'heighten its adverse consequences when it occurs'.¹²⁵ Some of the conditions that the Committee has recognised as affecting experiences of violence include: legal and social marginalisation; identification as belonging to a specific racial, ethnic, religious or Indigenous minority; age; disability; and social status.¹²⁶

In the state reports submitted by Australia to the CEDAW Committee, the experiences of Indigenous women were expressly considered. According to the Concluding Observations relating to Australia's 2010 CEDAW Committee Report, the Committee notes that Aboriginal and Torres Strait Islander women remain extremely disadvantaged in Australia and experience violence at 'unacceptably high levels'.¹²⁷ Consequently, the Committee recommended that Australia:

adopt and implement targeted measures, including temporary special measures...to improve Indigenous women's enjoyment of their human rights in all sectors, taking into account their linguistic and cultural interests.¹²⁸ Furthermore, the report of the Committee urges Australia to: implement specific strategies within the National Plan to address violence against Aboriginal and Torres Straits Islander women, including funding culturally-appropriate Indigenous women's legal services in urban, rural and remote areas of Australia...[and] recommends that the State party pay particular attention to ensuring access to quality education, including post-graduate education, vocational training, adequate health and social services, legal literacy and access to justice.¹²⁹

Interestingly, the CEDAW Committee makes no comment in relation to mandatory reporting and other racially discriminatory provisions that continue to disproportionately

impact upon Indigenous women in Australia, and makes no specific comments in relation to the NTER.

The CERD Committee in its Concluding Observations in relation to Australia's most recent state report from 2010, specifically recognises the disproportionate impact of racial discrimination on women in a number of circumstances, including the high incarceration rates of Indigenous women in Australia.¹³⁰ To address this, the Committee encourages Australia to adopt a 'justice reinvestment strategy', whereby increased resources are allocated for the development of Indigenous specific justice solutions, courts, strategies and conciliation mechanisms.¹³¹ Despite Australia's report to the CERD Committee containing many references to Indigenous family violence and the different measures that have been put in place to combat the issue, this is not specifically addressed in the Concluding Observations of the Committee. Furthermore, the Concluding Observations of the CERD Committee in relation to the state report prepared by Australia do not address the need to develop justice solutions tailored to address the experiences of Indigenous female victims of domestic violence, given the gendered power imbalance characteristic of such violence.

It is clear from the ways in which the reporting process works for conventions such as ICERD and CEDAW, that there is some 'double-handling' between the conventions by virtue of their intersectional reading of racial and gender-based discrimination. Perhaps it is unclear where the issue of Indigenous domestic violence ought to fit. The omission of any references to the disproportionate impact of domestic violence against Indigenous women in the CERD Committee's Concluding Observations for Australia is remarkable, but given that the CEDAW Committee's report – released the same year – considers the issue in some depth, perhaps the omission reflects a characterisation of such violence as a gender-based issue rather than one related to race.

In any event it is critical that Indigenous domestic violence remains on the international legal agenda. While there may be scope to encourage greater streamlining in reporting processes through mechanisms such as the Universal Periodic Review (and certainly the Report of the Working Group on the Universal Periodic Review of Australia in 2011 appears to bring heads of intersectional discrimination together somewhat effectively)¹³² questions of review or reform of existing reporting mechanisms under international

human rights law will not be considered in any greater detail in this article.

(iv) Communications Procedures under ICERD and the Optional Protocol to CEDAW

The way communications mechanisms operate under ICERD and CEDAW are considered to strengthen state obligations in relation to the elimination of racial discrimination and gender discrimination. Such complaints procedures are certainly considered to be powerful mechanisms by which international human rights law can condemn violations and promote change within individual signatory states.

Many individual communications under CEDAW have concerned the issue of gender-based violence, including domestic violence and state obligations in relation to such violence.¹³³ Individual communications have also included cases where the victim of domestic violence has been killed,¹³⁴ cases where the victim has been an immigrant,¹³⁵ and in other cases where the victim has experienced vulnerability as a consequence of factors operating in addition to her gender.¹³⁶

In one case, *Ms A.S. v Hungary*, a woman brought an individual complaint in relation to forced sterilisation – a complaint that arose as a consequence of both gender discrimination and her Roma ethnicity.¹³⁷ It is interesting to note that despite similar complaints mechanisms being available under ICERD, and successful discrimination claims for Roma peoples having been previously brought under the complaints procedure for ICERD, the communication in *Ms A.S. v Hungary* was made under CEDAW.¹³⁸ Although not a domestic violence case, this was clearly an example of state party obligations at the intersection of racism and gender-based discrimination which the aggrieved party elected to bring under CEDAW.

Under ICERD, there have been no admissible claims in relation to domestic violence, and only one – *Adan v Denmark* ('*Adan*') – which related to an issue specifically concerning women – female genital mutilation.¹³⁹ Even in *Adan*, the case did not turn on the substantive harm of female genital mutilation but rather the issue of effective investigation. No individual complaints have been brought under CEDAW against Australia as a state party and only one successful individual communication has been

heard by the CERD Committee in relation to Indigenous Australians (although unrelated to violence and brought by a male applicant).¹⁴⁰

Ultimately, the jurisprudence arising from the complaints procedures under CEDAW and ICERD presently favour domestic violence related claims being brought under CEDAW, even where other heads of discrimination such as race are also apparent. However, as such communications mechanisms are subject to the intersectional approaches of the Committees, the recent adoption of the UNDRIP may change this.

B Indigenous Rights: A Way Forward

It is clear from the above discussion that both racial discrimination and gender discrimination are governed separately in specific conventions, but there is a great deal of overlap between them – meaning that Indigenous domestic violence falls within the purview of international human rights law. These conventions create due diligence obligations for states and communications mechanisms which theoretically cover the field in terms of complaints and reporting. However, when considering Indigenous Australian women's experiences of domestic violence it is unclear how these mechanisms could and should be utilised to bring about the best redress for victims, and whether redress should be pursued via ICERD or CEDAW.

Given the intersectional practice of both the CEDAW and CERD Committees, the recent adoption of UNDRIP also brings the experiences of Indigenous women even further to the fore of human rights. UNDRIP considers the rights and experiences of Indigenous peoples, and it is the first international declaration developed by Indigenous peoples for Indigenous peoples.¹⁴¹ UNDRIP was adopted by the United Nations General Assembly on 13 September 2007 and the Australian Government declared formal support for the declaration on 3 April 2009. The declaration itself contains, *inter alia*, rights to self-determination, land and resource rights, participatory rights in decision-making processes, rights to development and treaty recognition and rights to restitution.¹⁴² Although it follows other, arguably stronger, rights for Indigenous peoples such as those contained in ILO Conventions 107 and 169,¹⁴³ UNDRIP, as a consensus statement, has the potential to reach beyond the limited scope of existing rights instruments.¹⁴⁴

UNDRIP bolsters notions of collective rights, and as such, represents a new and exciting step in the recognition of Indigenous rights under international human rights law. In particular, it recognises the rights of Indigenous women, including the right to be free from discrimination.¹⁴⁵

Although the strength of a declaration is considerably less than that of a convention, the normative resonance of the UNDRIP throughout the work of UN convention bodies including the CERD and CEDAW Committees is anticipated to be significant.¹⁴⁶ Most importantly for the issue at hand, Article 22(2) of the UNDRIP requires states to take measures 'in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination'.¹⁴⁷

C Summary

Intersectional theory has in many ways infused the work of the UN in recent decades and has resulted in increased crossover between the major conventions – including, in this example, ICERD and CEDAW. However, this increasingly intersectional approach has resulted in some 'double handling' of human rights abuses, or in some cases, created a situation whereby an issue is marginalised despite its relevance to the discrimination alleged.

This is certainly the case with the state reporting mechanism under ICERD and CEDAW where the Concluding Observations of both conventions considered, to different extents, the issue of domestic violence and its disproportionate impact upon Indigenous Australian women.

While it is certainly preferable for the issue to have more attention than to be sidelined by both conventions, the problem with exposure in this way is that neither convention seems adequately equipped to deal with the specific considerations relevant to the example.

However, it is possible that the articulation of normative standards in relation to Indigenous human rights espoused under UNDRIP may go some way towards a solution for Indigenous women and may impact positively upon the work of the Committees in this area. Although UNDRIP's force is primarily normative, the declaration itself revolutionises the conception of Indigenous and collective rights under international human rights law and expressly brings specific

rights for Indigenous peoples, including Indigenous women, into the international legal agenda.

V How Utilising International Human Rights Law Can Facilitate Improvements in Responses to Indigenous Women Experiencing Domestic Violence in Australia

Although there have been many attempts to develop justice solutions that address the needs of Indigenous Australians, there remains a lack of remedies for Indigenous women experiencing domestic violence that are appropriate to both their culture and gender. As the Australian government formally assented to the standards espoused in the UNDRIP in 2009, the declaration is expected to – in coming years – formally infuse the policies and laws of the nation. To date this has been slow to develop, however, the potential remains to incorporate understandings of rights and norms from UNDRIP into policy and practice in Australia and use the agenda to formally empower Indigenous peoples, including both perpetrators and victims of domestic violence. This approach certainly accords with the observations of the Special Rapporteur on situation of human rights and fundamental freedoms of Indigenous Peoples, James Anaya, who urges Australia to address the causes of Indigenous dispossession and disempowerment, rather than dealing simply with the apparent manifestations of this deeper issue.¹⁴⁸

The UNDRIP must be used to inform the national agenda in dealing with domestic violence in Indigenous communities. It must be used to develop strategies which encourage decision-making and participation by affected parties – in particular women under Articles 21 and 22 – and it must be used to facilitate empowerment within communities.¹⁴⁹

If the UNDRIP does not effectively influence policy in Australia, it is incumbent upon the Committees, in particular the CEDAW and CERD Committees, to press the UNDRIP agenda to facilitate these outcomes, including through the development of Concluding Observations and General Recommendations. This use of the UNDRIP accords with the intersectional approaches adopted by these Committees and will assist both in analysing the extent of the problem of domestic violence in Indigenous communities in Australia and in developing solutions. It would also be appropriate to use communication processes to bring the issue of Indigenous domestic violence and inadequate systemic responses, to the attention of the Committees.

A Indigenous Women, Collective Rights and Encouraging Community Voices

There are many ways in which Australia should incorporate the UNDRIP agenda in policy and decision-making processes, including the recognition of Indigenous rights. In relation to domestic violence, UNDRIP should be used to promote self-determination and participation in legal and political systems for all Indigenous peoples. Furthermore, UNDRIP should be used to adopt targeted measures which encourage participation in and ownership of processes by Indigenous women. Both uses address the social disempowerment of Indigenous peoples which lead to destructive behaviours such as domestic violence. Whereas existing mechanisms such as Indigenous Sentencing Courts may reach some way into these avenues, the UNDRIP provides the impetus to develop – through processes led by Indigenous victims of domestic violence – remedies that are both culturally appropriate and appropriate to the gendered nature of this crime. While commentators such as Marchetti lament the lack of appropriate justice solutions for Indigenous women, including both non-Indigenous and Indigenous mechanisms (such as Indigenous Sentencing Courts), they encourage the development of new solutions by Indigenous women which will foster their engagement with justice systems.¹⁵⁰

Indigenous women's rights have been historically leveled as an argument against enabling Indigenous communities to control their own affairs (self-determination) on the basis that any power based on collective Indigenous rights may further marginalise the rights of women.¹⁵¹ However, an understanding of collective rights is, in many ways, foundational to any understanding of the role of cultural factors in the oppression of women in this context.¹⁵² As such, empowering communities – and specifically women in those communities – to become self-determining is an important step in the healing and empowerment process.

It is acknowledged that the intersection of gender and Indigenous status is complex. According to Xanthaki, even in the drafting of the UNDRIP, there was a marked reluctance to engage with issues of women's rights in the declaration – a reluctance shared by Indigenous female representatives.¹⁵³ However, an important message arising from the UNDRIP is that Indigenous peoples 'must have control over the matters that affect them'.¹⁵⁴ This includes the participation of women and men in relation to domestic violence. Real

participation must be the goal, and such participation will help identify and ameliorate some of the problems affecting the community, including interaction with service agencies and other primary responders, such as police. What is currently missing from the literature, are influential voices in relation to domestic violence experiences from within the group. Such voices need to be encouraged, but on the terms of those individuals whose voices we seek to hear. Although in recent decades Indigenous advocates have become increasingly vocal, it is important that the Australian government listens to these positions and afford them the seriousness and respect they deserve.

There are real concerns that any self-determination processes in relation to domestic violence may be stymied by a number of obstacles including: that the processes may be marred by gender imbalances – leading to male decision-making and the disempowerment of women; and further, that decisions arising from participation in the group may not necessarily accord with the views held by the broader community.¹⁵⁵

There are also concerns that ongoing structural conditions resulting from marginalisation – including a lack of education, lack of healthcare, lack of resources and poverty – will affect the ability of the community (including women) to participate effectively in decision-making processes.

However, UNDRIP pushes for the acknowledgement of structural conditions that lead to disempowerment of Indigenous peoples and in doing so, outlines the role of states in continuing to improve these conditions and assist Indigenous peoples in the realisation of their rights. Improving these conditions will alleviate discrimination against women in Indigenous communities, and will also assist Indigenous peoples to find their voice and take control over addressing and eliminating discrimination within their communities.¹⁵⁶

B Intersectionality, UNDRIP, CEDAW and ICERD

If the Australian government does not effectively incorporate the work of the UNDRIP into the development of enhanced solutions for Indigenous women, it will fall to the international legal community to press the UNDRIP agenda.

As Thornberry notes, 'in the absence of a wholly dedicated monitoring body for the Declaration (UNDRIP), the work

of the treaty bodies assumes importance in providing a necessary edge to secure the application of its principles in State practice'.¹⁵⁷ It is therefore expected that the UNDRIP will continue to influence the operation of the CERD and CEDAW Committees, as well as other monitoring bodies.

Although ICERD and CEDAW were not drafted with the benefit of the UNDRIP, as discussed above, both Committees have considered Indigenous peoples within Concluding Observations in line with their intersectional foci. In fact, it is clear that Indigenous peoples have been the focus of CERD Committee discussions for many years and this was communicated through General Recommendation 23, which outlined a number of Indigenous rights and concepts including 'informed consent'.¹⁵⁸

It should also be noted that Article 22(2) of the UNDRIP specifically recognises the needs of Indigenous women and children in relation to domestic violence, forging in many ways another relationship with CEDAW.¹⁵⁹ Although intersectional discrimination is considered by the CEDAW Committee, including within the context of violence against women; the UNDRIP – insofar as it brings to the fore Indigenous human rights without the benefit of a monitoring body – should continue to inform the agenda of CEDAW, as it has indeed for many years.

Ultimately, there is great potential for the conventions to be informed by the work of the UNDRIP and the Concluding Observations of the Committees must take the rights of Indigenous peoples – specifically female victims of domestic violence in Australia – into account. The implementation of this will not be without conceptual complexities, particularly in relation to the conflict between collective and individual rights. Further interpretive work is therefore required at both the national and international levels, and this should continue to inform the agenda and the way forward in dealing with this pressing social issue.

Finally, the potential remains for an individual complaint to be brought to either CEDAW or CERD Committees by or on behalf of an Indigenous victim of domestic violence who continues to suffer discrimination. In cases where domestic remedies are exhausted, this complaint mechanism remains a potential avenue for directing international attention to this critical social issue and could be taken up by groups seeking to promote Indigenous women's human rights.

VI Conclusion

Domestic violence is, in many ways, symptomatic of broader social issues within Indigenous communities including historical dispossession, disempowerment and a lack of self-determination. Thus, in order to improve responses to Indigenous domestic violence and reduce its incidence, attention must be given to developing solutions that empower victims and address perpetrators by examining and responding to underlying social problems affecting communities.

While there are no immediate solutions to this endemic social problem, what must be encouraged in Australia is greater participation and involvement of Indigenous peoples in legal processes and systems which deal with domestic violence. Promoting ownership of, and involvement in, legal and judicial processes will encourage self-empowerment and self-determination for both Indigenous women and men, and this in turn will impact upon the prevalence of violent behaviours. Although this approach has been increasingly adopted in Australia in recent decades through the development of culturally specific justice mechanisms, its importance is more broadly reiterated under the UNDRIP. What is required to further promote and facilitate these changes, is an increasing partnership between the state and the community, based on understandings of, and a commitment to, human rights.

What is needed is further involvement of Indigenous peoples – and specifically Indigenous women – in the development of crisis and non-crisis intervention remedies for domestic violence. This accords with normative standards outlined in UNDRIP and must be incorporated into Australian practice and procedure in order to effectively address this issue.

Further, in the event that Australia does not take the initiative to promote self-determination and rights under the UNDRIP through state policy and procedures, monitoring bodies such as the CEDAW and CERD Committees must inform the development of Concluding Observations and General Recommendations which align with the normative agenda outlined under the UNDRIP. This approach accords with the intersectional foci of these Committees.

Finally, it ought to be noted that while the UNDRIP holds great promise for advancing the rights of Indigenous peoples – including the rights of Indigenous women – the standards it espouses remain declaratory rather than binding. Although

this article does not purport to consider the benefit, or otherwise, of including the standards of the UNDRIP within a binding convention, this would, undoubtedly, impact upon its traction on Australian law. While it seems unlikely that any binding convention concerning Indigenous status will be implemented at an international level in such close proximity to the declaration, particularly given the nature of the obligations it may entail, this issue warrants ongoing discussion.

The normative standards that the UNDRIP sets must be taken seriously and must influence the reform agenda within Australia for Indigenous female victims of domestic violence, located at the intersection of various forms of discrimination. Reforms in relation to domestic violence must be incorporated into broader changes facilitating increased self-determination and self-empowerment for Indigenous peoples (including women). These changes must be advocated for at both a national and international level. Only then will the 'crisis' of domestic violence within Indigenous communities in Australia truly begin to subside.

* Emma Buxton-Namisnyk holds a BA(Hons)/LLB(Hons) from Macquarie University and a Masters in International Human Rights Law (Distinction) from the University of Oxford. She works in legal research, specialising in homicide studies, women's rights and domestic violence.

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DOES AN INTERSECTIONAL UNDERSTANDING OF INTERNATIONAL HUMAN RIGHTS
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