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Access to justice for Aboriginal and Torres Strait Islander people

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Access to justice for Aboriginal and Torres Strait Islander people

Abstract

I would firstly like to pay respect to the traditional and original owners of this land the Mouheneenner people - to pay respect to those that have passed before us and to acknowledge today's Tasmanian Aboriginal community who are the custodians of this land.

There is a preference these days for Aboriginal and Torres Strait Islander peoples to be referred to separately rather than under the umbrella term of 'Indigenous' and I will try and honour that preference as much as I can. However, in some circumstances I will be using the term 'Indigenous' because it better suits the content of the material or because I am referring to specific organisations or professional groups.

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Access to Justice for Aboriginal and Torres Strait Islander People

Professor Elena Marchetti
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Introduction

I would firstly like to pay respect to the traditional and original owners of this land the Mouheneenner people - to pay respect to those that have passed before us and to acknowledge today's Tasmanian Aboriginal community who are the custodians of this land.

There is a preference these days for Aboriginal and Torres Strait Islander peoples to be referred to separately rather than under the umbrella term of 'Indigenous' and I will try and honour that preference as much as I can. However, in some circumstances I will be using the term 'Indigenous' because it better suits the content of the material or because I am referring to specific organisations or professional groups.

In February 2012 the Family Law Council released two reports in response to Terms of Reference issued by the Attorney-General to consider and advise how the family law system can better meet the needs of clients from Indigenous and culturally and linguistically diverse backgrounds. The Report titled 'Improving the Family Law System for Aboriginal and Torres Strait Islander Clients' is an important resource, from which I have drawn a great deal of information for my presentation today. Having said that I am also going to take you on a journey into other areas of the legal system to illustrate how meeting the needs of Aboriginal and Torres Strait Islander people can be achieved in ways that don't necessarily fit neatly into the traditional Euro-centric framework that underpins our courts and the adversarial nature of legal disputes. If implemented properly, culturally inclusive processes can make a great deal of difference to not only what happens within the legal system itself, but also to local Indigenous communities.

In drafting the report, the Family Law Council paid particular regard to a number of a recent policy frameworks and strategies developed by various federal government committees and departments and endorsed by COAG to address problems relating to access to legal services and the justice system for Indigenous Australians, and to reduce violence against women and children.¹ The report acknowledges that working in this area raises complex issues, which are not always easy to identify and resolve.

Many of you may hear this and breathe a sigh of relief thinking that you are immune from such complexities since it is very unlikely that you will come across an Aboriginal or Torres Strait Islander client. However, from my experience, working with Aboriginal and Torres

¹ These policy frameworks and strategies are: the *National Indigenous Law and Justice Framework* (NILJF) – developed by the Standing Committee of Attorneys-General and endorsed by Australian and state and territory governments; the *National Plan to Reduce Violence Against Women and their Children* (the *National Plan*) – four three-year action plans (2010-2022) within FaHCSIA portfolio and endorsed by COAG; the *National framework for Protecting Australian Children* (NFPAC) – within FaHCSIA portfolio and endorsed by COAG (2009-2020); and the *Strategic Framework for Access to Justice in the Federal Civil Justice System* – within Commonwealth Attorney-General's Department. It is hoped that the recommendations from the Family Law Council Report will make a significant contribution to the Closing the Gap agenda which sets out six targets relating to life expectancy, infant mortality, education and employment. The National Indigenous Reform Agreement upon which the Closing the Gap agenda is based, was endorsed by COAG in 2008.

Strait Islander people is an extremely rewarding and interesting line of work and I am hoping that my presentation today may make those of you who are not directly involved in the area, more interested in the possibility of engaging in such work or at the very least, get you thinking about how different groups of people have different needs when it comes to the justice system – one size does not fit all.

To begin I'd like to first of all give you a bit of a snapshot of where Aboriginal and Torres Strait Islander people live in Australia according to the latest 2011 Census and then take you through some statistics relating to their socio-economic status, health and well-being.

According to the 2011 Census:²

- There are 548,370 Aboriginal and Torres Strait Islander people (2.5%) in Australia;
- Approximately 32-33 per cent live in greater capital city areas;
- 44 per cent live in regional areas; and
- 24 per cent live in remote or very remote areas.

The population distribution according to each state and territory is:³

- NSW – 172,624 (but only 2.5 per cent of pop)
- QLD – 155,825
- WA – 69,665
- NT – 56,779 (but largest prop of pop – 26.8 per cent)
- Vic – 37,991
- SA – 30,431
- Tas – 19,625 (second highest prop of pop – 4 per cent)
- ACT – 5,184

In 2010 the Australian Bureau of Statistics reported that:

- Aboriginal and Torres Strait Islander people make up 26 per cent of the total prison population;⁴
- The imprisonment rate for Aboriginal and Torres Strait Islander people is 14 times higher than the non-Aboriginal and Torres Strait Islander population;⁵
- 74 per cent of Aboriginal and Torres Strait Islander prisoners had a prior adult imprisonment history (compared to almost 50 per cent for non-Aboriginal and Torres Strait Islander prisoners);⁶
- Life-expectancy for Aboriginal and Torres Strait Islander people is 16-17 years less than the overall Australia population;⁷
- In 2010 only 46 per cent of Aboriginal and Torres Strait Islander people aged 15 years and over were classified as employed (compared to 63 per cent for the non-Aboriginal and Torres Strait Islander population).⁸

² Australian Bureau of Statistics. (2012). Aboriginal and Torres Strait Islander Peoples - identification by Australia and state/territory (2011 and 2006). *Australian Bureau of Statistics Census Fact Sheet* Retrieved 5 August 2012, 2012, from [http://abs.gov.au/websitedbs/censushome.nsf/home/mediafactsheets/\\$file/Census-factsheet-Indigenous-national.doc](http://abs.gov.au/websitedbs/censushome.nsf/home/mediafactsheets/$file/Census-factsheet-Indigenous-national.doc)

³ Ibid.

⁴ Australian Bureau of Statistics. (2010b). *Prisoners in Australia*. Canberra: ABS cat no 4517.0.

⁵ Ibid.

⁶ Ibid.

⁷ Australian Bureau of Statistics. (2011). *Deaths*. Canberra: ABS cat no 3302.0.

⁸ Australian Bureau of Statistics. (2010a). *Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Estimates from the Labour Force Survey*. Canberra: ABS cat no 6287.0.

Whilst acknowledging the fact that there are challenges in collecting data on Aboriginal and Torres Strait Islander families, the Family Law Council reported that:⁹

- Indigenous parents are younger and have more children than non-Indigenous parents (e.g. 58.5 per cent of Indigenous females under 29 years of age have one or more child/children compared to 24.4 per cent of non-Indigenous females in the same age bracket);
- There are more single parent families in Indigenous households (almost 55 per cent of Indigenous children under 15 live with two parents compared to 82.2 per cent of non-Indigenous children in the same age bracket; and 45.3 per cent of Indigenous families with children under 15 years of age are sole-parent headed families compared to 17.8 per cent of non-Indigenous families);
- Intermarriage between Aboriginal and non-Aboriginal people is on the rise with the 2006 Census finding that 52 per cent of Aboriginal males and 55 per cent of Aboriginal females had indicated that they were married to a non-Aboriginal person. This is more prevalent for Aboriginal people residing in urban areas such as Sydney (where the rates are 82 per cent for Aboriginal males and 83 per cent for Aboriginal females), Melbourne, Brisbane and Hobart.

According to data obtained from *Casetrack* (a Commonwealth courts portal entry system) for a report prepared by Stephen Ralph,¹⁰ Aboriginal and Torres Strait Islander people are under-represented when it comes to their engagement in family law litigation.

Table 3:¹¹ Applications for Final Orders in both FCoA and FMC where one/or both parties are Indigenous – number and percentage of total applications

Applications for Final Orders in FCOA and FMC							
	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11*
Non-Indigenous	23 837	23 148	23 273	19 207	19 191	20 132	18 673
Indigenous	359	478	406	230	253	424	291
Total % Indigenous	1.5	2.1	1.7	1.2	1.3	2.1	1.6

*Note: Statistics for 2010-11 do not include June 2011. For a short period statistics on Indigenous status were also not kept.

The family Law system and Aboriginal and Torres Strait Islander people

Aside from criminal matters, there are a couple of other reasons Aboriginal and Torres Strait Islander people usually come into contact with the justice system. One is due to matters involving child protection, where there is evidence that a child has suffered or is likely to suffer significant physical, emotional or psychological harm and the parent or parents of the child cannot for various reasons protect the child from the harm. As you know such issues fall under the ambit of state and territory child protection legislation (and not under the family law scheme). The other reason is in relation to obtaining a protection order against family and domestic violence, which again falls under the ambit of state and territory legislation. Indigenous women (who are often the victims of family and domestic violence) are in fact, often reluctant to seek such orders due to fear

⁹ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 17-18.

¹⁰ This report was prepared on behalf of the Family Court of Australia and the Federal Magistrates Court of Australia with funding from the Commonwealth Attorney-General's Department to determine the experiences of Aboriginal and Torres Strait Islander people when accessing the Family Court.

¹¹ This table and information was replicated from Ralph, S. (2012). *Indigenous Australians & Family Law Litigation: Indigenous perspectives on access to justice* at 10.

of retaliation from their partner and/or his family, due to a fear and distrust of police and other justice and welfare agencies, and due to a fear of their partner being sent to jail.

In their study of civil and family law needs of Indigenous people in New South Wales, Chris Cunneen and Melanie Schwartz, however, found, that 'unaddressed civil or family needs can become criminal in nature', with a legal support worker noting that:

[Family law matters] end up becoming criminal matters because they don't know how to deal with those family law matters, the only way they know how to deal with it is to go out and have a big punch up.¹²

The federal family law needs of Aboriginal and Torres Strait Islander people are usually centred on access to children post separation.¹³ In a number of small cases, such matters will result in the parties having to participate in a family law dispute resolution or mediation process, or attending a Family or Federal Magistrates' Court hearing.

(a) Family Law Dispute Resolution/Mediation – this process is accessed when separating parties are unable to resolve some or all of their disputes with each other. Section 60I of the *Family Law Act 1975* (Cth) requires parties to attempt family dispute resolution prior to filing a court application for a parenting order, unless, one of the conditions under subsection 9 is satisfied, which includes reasonable grounds to believe there has been or there is a risk of abuse or family violence. An accredited independent practitioner or practitioners, who may be private individuals or practitioners working in government or community organisations such as Family Relationships Centres and Legal Aid Commissions, will assist the parties to resolve the disputes in the best interests of their children in the hope that court can be avoided.

The Ralph study canvassed responses to questionnaires from both Indigenous and non-Indigenous family law litigants who had matters that were finalised in the Family or Federal Magistrates' Courts between July 2007 and December 2009. After a number of attempts to locate and obtain the responses from Aboriginal and Torres Strait Islander litigants, the research team managed to collect 35 completed questionnaires.¹⁴ Fifty-four completed questionnaires were obtained from the non-Indigenous cohort.¹⁵ The study found that the Indigenous participants were more likely to have attended a Legal Aid conference in an attempt to resolve the dispute before going to court, as opposed to a Family Relationship Centre conference, which was completely opposite to the situation of non-Indigenous participants. The satisfaction levels of the Indigenous participants with the dispute resolution services they had used was fairly evenly distributed between being satisfied (41%) and dissatisfied (47%). The main reason matters were not resolved at this stage for the Indigenous group was due to non-attendance by the other party, which of course raises issues relating to the engagement of Indigenous litigants in dispute resolutions processes.¹⁶

(b) Child custody

In 2006 amendments were introduced to the *Family Law Act 1975* (Cth) that included sections 60B(2)(e), 60B(3), 60CC(3)(h), 60CC(6) and 61F. These amendments encourage 'a more thorough consideration of a child's Aboriginal and Torres Strait Islander culture in the assessment of their best interests', which means a court must consider 'the *right* of a child to enjoy and

¹² Cunneen, C., & Schwartz, M. (2009). Civil and family law needs of Indigenous people in New South Wales: The priority areas. *University of New South Wales Law Journal*, 32(3), 725-745 at 744.

¹³ Ibid at 741.

¹⁴ Ralph, S. (2012). *Indigenous Australians & Family Law Litigation: Indigenous perspectives on access to justice* at 14-15.

¹⁵ Ibid at 16.

¹⁶ Ibid at 23-24. The main reason cited for the non-Indigenous group was entrenched communication issues.

explore their culture and develop a positive appreciation of it' by also taking into account 'kinship obligations and child-rearing practices in the child's culture'.¹⁷ The previous provision (s 68F(2)) simply recognised the need of the child to maintain a connection with his/her culture; now a court needs to consider a broader range of cultural issues and connection to culture is framed in a stronger and more far-reaching manner.

There is now more of a tendency for a court to canvas the views of local Elders or Indigenous academic experts in determining the precise cultural needs of a child, rather than simply relying on anthropological evidence. Appropriately, the Full Court of the Family Court in *Hort v Verran* (2009) FamCAFC 214 acknowledged that (at [121]):

Whilst there may be cases where anthropological evidence is of assistance, we question the extent to which that could realistically be so when, as occurred in this case, there is available expert opinion evidence from an Elder of a particular Indigenous group or society. ... Thankfully, it is now generally accepted in Australia that Aboriginal peoples can speak for themselves, particularly in relation to their own culture and traditions. The potential for non-Aboriginal Euro-centric impressions or interpretations to usefully inform Courts in relation to Aboriginality must now be limited in ways it was not in earlier times.

In a few cases, questions have arisen in relation to the impartiality of Elders who have appeared as witnesses and who were closely associated with the child or their family.¹⁸ In *Sheldon v Weir* (2011) FamCAFC 212 one of the grounds of appeal by the Aboriginal father against orders that the child live predominantly in Ireland (the mother's country of origin) was that the trial judge had 'erred in finding that it was "possible" for the child to enjoy her "rights as an Aboriginal child as outlined in s 60CC(h) from outside of the Aboriginal community"' without having obtained independent expert evidence from Aboriginal academics or Elders from the community (at [94]). The Full Court of the Family Court found against the father on this ground of appeal based on the fact that he bore the onus of proving his case, which included adducing such independent expert evidence. According to the Full Court the father had had ample opportunity to organise the presentation of such evidence to the court, but had failed in his obligation to do so.

There are many cases, which have considered the application of the abovementioned provisions of the *Family Law Act*, however, due to time constraints I will only be able to refer to a small number of them in order to highlight some of the issues that have arisen when courts have needed to make determinations about what is in the best interests of a child with an Indigenous cultural background.

On the issue of family structures, the Full Court in *Donnell & Dovey* (2010) FamCAFC 15 noted (at [321]):

[W]e consider that an Australian court exercising family law jurisdiction in the twenty first century must take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. This is not to say that the practices and beliefs of indigenous people are uniform, since it is well known that they are not. However, it cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous children, even those who may have been raised in an urban setting.

Donnell's case was an appeal from a Federal Magistrates' Court decision that the child live with his father in the Torres Strait following the death of his mother, an Aboriginal woman, in a motor vehicle accident. The appellant was the child's half sister who sought an order that the child live

¹⁷ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 71.

¹⁸ See for example *Hort v Verran* [2009] FMCAfam 1 where the Federal Magistrate (at 244) decided that although the expert evidence from the maternal grandmother (a Tiwi Elder) that the children could only properly pursue their cultural connection if they were totally immersed in a Tiwi community, must be 'respected', she could not be 'regarded as an impartial witness'.

with her and her husband. The basis of the half sister's application was that since the mother and father of the child had separated in 2002, the father had had little to do with the child because he had moved back to the Torres Strait Islands. The appeal was allowed and a re-trial ordered.

In the matter of *Lawson v Warren* (2011) FamCA 38 the Family Court had to consider parenting arrangements for a child who at the time of the hearing was living with his paternal non-Aboriginal grandmother in Newcastle, but whose maternal Aboriginal great-grandmother was seeking orders that the child live with her in South Australia in order that he be immersed in his Aboriginal culture. The mother and father of the child had long histories of drug abuse and anti-social behaviour. This case illustrates some of the complexities involved in determining what is in the best interests of the child, when carers and/or parents do not live in close proximity with each other and when issues relating to the rights of a child to be able to participate in and enjoy their Indigenous heritage and culture are present. Neither the paternal grandmother's nor the maternal great-grandmother's parenting capacity was at issue. Ultimately the Court decided (at [233]) that the paternal grandmother was 'the party best able to meet the child's continuing emotional and psychological needs', that she was 'respectful of the child's Aboriginal heritage' and that with the child's continual involvement with the maternal great-grandmother, he will, even if he was living with the paternal grandmother, 'have a good appreciation of his Aboriginal heritage and participation in Aboriginal life'.

Unlike *Lawson v Warren* the parties in *Dunstan v Jarrod* (2009) FamCA 480 were all Aboriginal. The applicant father had not known about the existence of the child until approximately four years after she was born. Not long after the child was born the mother relinquished care of the child, and the child was placed in the care of Indigenous foster carers (the respondents). There was no dispute on the evidence that the care provided by the respondents was nothing short of exemplary. The applicant and respondents both sought orders that the child live with them and orders detailing how much time the child would spend with the other party to the proceedings. The Family Court considered the provisions relating to the presumption of equal shared parental responsibility (under section 61D of the *Family Law Act* 1975) and whether it should be applied to parties who were not parents. Murphy J concluded that it would be 'erroneous to seek an order that a number of persons which includes one or more non-parents, have "equal shared parental responsibility"' unless they were able to rebut the presumption of equal shared parental responsibility under section 61DA (2) or (4) and 'then contend that an order that parental responsibility be allocated equally between the parties' (at [81] and [82]). In this case the Court concluded that the presumption of equal shared parenting between the mother and father was rebutted and that it therefore needed to consider the extent to which parental responsibility be allocated between the applicant father and the respondent foster carers. The applicant father contended that the child needed to live with him in order that she experience and 'absorb' her G Tribe culture (which was different to the cultural groups to which the foster carers belonged). In determining what was in the best interests of the child, Murphy J (at [128] and [129]) quoted from an article authored by Stephen Ralph (an Indigenous family law consultant) stating that in contrast to an Anglo-European notion of social and family organisation, Aboriginal people are more likely to hold the view that children can effectively attach themselves to a number of carers during their childhood. After considering all the evidence Murphy J decided to share parental responsibility in relation to various aspects of the child's life between the applicant and respondents, giving the applicant father the sole responsibility for the child's 'cultural education'. This decision exemplifies how a court can be innovative in relation to how parenting orders are structured.

Obviously cases have also had to consider the relevance of non-Indigenous culture when determining the best interests of a child with both Indigenous and non-Indigenous parents. Two cases which can be contrasted in this regard are *Simons v Barnes (No 2)* [2010] FMCAfam 1094 and *Luckwell & Herridge* (2011) FamCA 52. In both cases the children were of Aboriginal descent through their mother and in both cases the mothers had made claims of domestic violence against the fathers of the children. The decisions reached in relation to the mothers' credibility and the importance of their Aboriginal culture were significantly different, mainly due to the fact

that the mother in *Simons v Barnes* was ultimately considered a more reliable witness than the mother in *Luckwell & Herridge*, where Justice Cohen noted (at [37]) that he regarded the mother 'as being an exaggerator and habitual liar, and as being exceptionally willing and able to manipulate situations to her perceived advantage, especially by using politically correct do-gooders and people who have a duty to deal with social problems and the like, but not the time, inclination or ability to distinguish truth from fiction'. In considering the evidence from one of the clinical psychologists, Federal Magistrate Kelly (a [162] and [163]) in *Simons v Barnes* found that despite the expert's conclusion that one cultural background cannot be prioritised to the exclusion of the other, that was not the case in reality since Indigenous children would automatically 'grow up immersed in the dominant anglocentric culture of mainstream Australia' (at [163]) even if they were ordered to live with the mother in her local Aboriginal community. Instead, Justice Cohen in *Luckwell & Herridge* was of the view that the children in that case were descendants of Aboriginal people but also descendants of 'white settlers' and were therefore 'to a great degree, of that heritage' (at [240]). He ultimately decided that to deny 'the reality that they are also of European or Anglo-Celtic background, especially since their appearance conforms to the stereotype for such a background, could also cause them emotional problems in the long term' and that they should therefore 'be exposed to both cultures and to people who share one or other with them' (at [240]).

In Queensland, courts have had to consider the practice of Kupai Omasker, a Torres Strait Islander customary adoption practice, which involves the birth mother placing a child in the care of extended family or close friends to be raised as their own. Reasons why this customary practice continues are to maintain bloodlines and inheritance of traditional land, and for more equal distribution of the sexes among families.¹⁹ The current practice is for the Family Court to make consent parenting orders to formally recognise the parental rights and responsibilities of the 'receiving parents' as adoptive parents for the purposes of various state and commonwealth legislation.²⁰ In its report, the Family Law Council recommended that if the Queensland Government does not legislate to formalise the practice, the Commonwealth Attorney-General give the Council a reference to consider whether amendments can instead be made to the *Family Law Act*.²¹

Why Aboriginal and Torres Strait Islander people may not access the family law system

(a) Justice processes and services are not culturally appropriate and 'safe' – The physical surroundings in which hearings take place, the language used and the manner in which things are communicated, and whether certain cultural protocols and values are observed, such as respecting and accommodating gendered cultural norms, approaches to child-rearing and kinship ties, are important in influencing whether or not Aboriginal and Torres Strait Islander people consider utilising family law services or proceedings.²²

Family Court premises are unappealing and 'non-Koori friendly environments' to Aboriginal and Torres Strait Islander communities. The rigid rules and processes are alien and irrelevant to Aboriginal and Torres Strait Islander people. Family Relationship Centres (FRCs) (and the mandated pre-hearing process offered by the FRCs) can be inappropriate because they are

¹⁹ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 78; Bibby, P. (2012). Court upholds islander practice to give up baby. *The Sydney Morning Herald (Online)*. Retrieved from <http://www.smh.com.au/nsw/court-upholds-islander-practice-to-give-up-baby-20120402-1w8se.html>

²⁰ See for example, the recent case of *Beck and Anor & Whitby and Anor* [2012] FamCA 129.

²¹ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 96.

²² Ibid at 41.

'focused on the nuclear family model and Anglo Saxon family raising practices'.²³ Mediation and dispute resolution is often not aligned with Aboriginal and Torres Strait Islander values.

Despite a belief that Aboriginal and Torres Strait Islander people only want to access Indigenous services, some may prefer non-Indigenous specific services, mainly due to concerns relating to privacy. I've often been told that that 'Koori grapevine spreads like fire'. As a result, Aboriginal and Torres Strait Islander clients need access to both Indigenous and non-Indigenous service providers.

Developing a relationship of trust is essential when working with Aboriginal and Torres Strait Islander people – for good reason, they can be very suspicious of 'well-meaning' white folk, particularly anyone associated with government or police. Gaining their trust is something that requires a lot of time and effort, but is also something that reaps many rewarding experiences.

(b) Lack of knowledge about services (lack of legal literacy) – Unfortunately, Aboriginal and Torres Strait Islander people know more about the criminal justice system than the family law system. Help for family law matters is often sought at the point of crises, such as when an order is sought for the return of a child.²⁴

(c) Fear of courts and services – Aboriginal and Torres Strait Islander people have a fear of giving evidence in court due to the issues discussed in part (a) above, and their distrust of the justice system as a result of the history of colonisation²⁵ and a fear of children being removed if they involve the legal system and services when it comes to family disputes. Their fear of accessing family law services extends to Family Relationship Centre mediators because they are perceived as being government agents and authority figures, which can intensify feelings of powerlessness over decisions that are made.²⁶ Aboriginal and Torres Strait Islander people can also have concerns relating to issues of privacy, particularly when community or extended family members are free to sit through hearings, and with being subjected to cross-examination by a violent partner or former partner.²⁷

(d) Fear of post-separation violence due to relationship problems being left unaddressed and a fear that disclosing family violence might result in retribution from family and community members. For example the Aboriginal Family Violence Prevention & Legal Service Victoria submission to the Family Law Council Report noted that:

[A] number of our clients have made it through the dispute resolution process because they have not disclosed family violence. Staff who do not receive cultural awareness training are not trained to ask the right questions that help overcome some of the complex cultural issues that contribute to a general hesitancy to disclose family violence within Aboriginal Communities.²⁸

(e) Lack of Aboriginal and Torres Strait Islander people or people with adequate knowledge about the needs of Indigenous clients, working in the system – This results in those working within the court system or in other agencies having little regard, respect or knowledge of the impact culture can have on a client. There is only a superficial understanding of these issues

²³ Ibid at 50.

²⁴ Ibid at 40.

²⁵ Alford, A., & Croucher, R. (2011). Family Violence: A National Legal Response the ALRC and Indigenous People - Continuing the Conversation. *Indigenous Law Bulletin*, 7(22).

²⁶ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 50.

²⁷ Alford, A., & Croucher, R. (2011). Family Violence: A National Legal Response the ALRC and Indigenous People - Continuing the Conversation. *Indigenous Law Bulletin*, 7(22) at 5.

²⁸ Aboriginal Family Violence Prevention and Legal Services Victoria. (2011). *Submission to the Victorian Law Reform Commission - Family Violence: Improving the Family Law System for All*. Collingwood: Aboriginal Family Violence Prevention and Legal Services Victoria at 10.

which means they are dealt with inappropriately. An example of this, cited in the Aboriginal Family Violence Prevention & Legal Service Victoria submission, was a family report recommending that a 'child's cultural connections could be met by the non-Aboriginal parent taking the child to NAIDOC week activities once a year'.²⁹ Similarly, Stephen Ralph's study of the experiences of Aboriginal and Torres Strait Islander clients of the family law courts found that 'a majority of the participants in the Indigenous group were critical of the family report writer on all aspects of the family report, but particularly the report writer's ability to deal with Indigenous cultural issues'.³⁰ A similar response was canvassed from the practitioners who were surveyed in that study.³¹ A lack of cultural knowledge can often mask itself in the form of systemic bias whereby the opinions of non-Indigenous experts are favoured over the advice and evidence of community Elders, particularly where one party is non-Indigenous.

(f) Lack of literacy, language and communication barriers, and geographical barriers – The Family Law Council reported that 'in 2005, 11 per cent of the Indigenous population over the age of 15 years spoke an Aboriginal or Torres Strait Islander language as their main language at home',³² and that there was also a high incidence of hearing impediments in Aboriginal and Torres Strait Islander communities, factors which impact on the way in which information is understood and absorbed by an individual.

When it comes to modes of communicating, an Aboriginal or Torres Strait Islander person who does not understand what is being asked or who wants to please the recipient of the information may say 'yes' to every question that is put to them.³³ According to an Aboriginal Project Officer who works in the NSW Circle Courts, Aboriginal and Torres Strait Islander people do this in order to ensure that you don't think they are stupid or because it simply means 'I think that if I say "yes" you will see that I am obliging and socially amenable and you will think well of me, and things will work out between us'.³⁴ Silence can also be misinterpreted by non-Aboriginal and Torres Strait Islander workers to mean insolence or a break-down in communication, when in fact it may mean that the client didn't understand what was being asked or that they are reluctant to answer the question due to cultural reasons. In the Aboriginal and Torres Strait Islander culture, avoiding eye contact is actually a sign of respect (rather than a sign of guilt or simply being rude).

There is also limited (or no) transport available from small regional or remote communities to service providers.

(g) Life getting in the way of seeking help and court delays contributing to a lack of confidence in the legal system – In its submission to the Family Law Council the Top End Women's Legal Service noted that

[i]t can take 3 months to participate in Family Dispute Resolution. Court processes can take even longer. In the end it can be perceived as easier to just walk away from the process and acquiesce to whatever the husband or paternal grandparents want. This is particularly so where there is a power imbalance – which is not unusual.³⁵

²⁹ Ibid at 5.

³⁰ Ralph, S. (2012). *Indigenous Australians & Family Law Litigation: Indigenous perspectives on access to justice* at 32.

³¹ Ibid at 37.

³² Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 40.

³³ McRae, H., Netheim, G., Anthony, T., Beacroft, L., Brennan, S., Davis, M., et al. (2009). *Indigenous Legal Issues: Commentary and Materials* (4th ed.). Pyrmont: Thomson Reuters at 540.

³⁴ Wallace, G. (undated). *Working Effectively with Aboriginal Clients*. Nowra: Department of Justice and Attorney-General at 4.

³⁵ Top End Women's Legal Service Inc. (2011). *Submission from Top End Women's Legal Service*. Darwin: Top End Women's Legal Service Inc at 2.

Examples of other culturally appropriate court-based models and access to justice initiatives

Over the past decade, there have been a number of culturally appropriate initiatives introduced in other areas of the law or in relation to the provision of legal services that have made (and are making) a difference to the legal experiences of Aboriginal and Torres Strait Islander people.

(a) Indigenous sentencing courts

Currently there are over 50 adult and children's Indigenous sentencing courts in Australia, operating under varied legislative frameworks and with differing eligibility criteria. Indigenous sentencing courts arose first in Magistrates' or Local Courts, but are now part of the youth (or Children's) courts in Queensland and Victoria, and the County Court in Victoria. A form of the practice (which is an expansion of the South Australian Nunga Court), called an Aboriginal Sentencing Conference, can now be convened at any court level in South Australia.³⁶ Their purpose is often described as being to address the overrepresentation of Indigenous people in the criminal justice system; to increase the participation of Indigenous people in the justice system; and to complement Justice Agreements, which have been entered into in some Australian states and territories.³⁷ Despite the fact that primarily, the stated aims or goals of the courts have a criminal justice focus, Magistrate Chris Vass established the first court in Port Adelaide to 'gain the confidence of Aboriginal people ... and encourage them to feel some ownership of the court process'.³⁸

Practices among the courts vary but in all courts the judicial officer retains the ultimate power in sentencing the offender. An offender must have entered a guilty plea or have been found guilty in a summary hearing, and must consent to having the matter heard in the Indigenous sentencing court. In all except Northern Territory courts, the offender must be Indigenous or, in some courts, Indigenous or South Sea Islander. The charge must also be one that falls within the jurisdiction of the mainstream court of equivalent level. The courtroom setting is quite different from mainstream courts, with most jurisdictions having remodelled or built new courtrooms to house the courts. There is more focus on dialogue, resulting in most judicial officers sitting in a circle or at an oval bar table with the offender, their support person (if one has attended), Elders/Respected Persons, the prosecutor and defence lawyer. The involvement of the Elders or Respected Persons varies between courts, but in all courts they speak frankly with the offender. All courts now employ Indigenous court workers, within their own court administration or via the

³⁶ This relatively new practice has statutory legitimacy by virtue of s 9C of the *Criminal Law (Sentencing Act) 1988 (SA)*. It has in fact been utilised by District and Supreme Courts in South Australia when sentencing Aboriginal and Torres Strait Islander offenders (see for example *R v Wanganeen* (2010) 108 SASR 463).

³⁷ Auty, K. (2004). 'Growing Up' the Koori Court (gerund), Shepparton: Development discourse and innovation in courts of summary jurisdiction. *Journal of Australian Indigenous Issues*, 7(4), 18-27, Blagg, H. (2008). *Crime, Aboriginality and the Decolonisation of Justice*. Sydney: Hawkins Press, Briggs, D., & Auty, K. (2003). *Koori Court Victoria – Magistrates Court (Koori Court) Act 2002*. Paper presented at the Australian and New Zealand Society of Criminology Conference. , Hennessy, A. (2006). *Indigenous Sentencing Practices in Australia*. Paper presented at the International Society for Reform of the Criminal Law Conference: Justice for all - Victims, Defendants, Prisoners and Community. , Magistrates' Court of Victoria. (2003). Koori Court. Retrieved 27 June, 2007, from <http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Specialist+Court+Jurisdiction+s-Koori+Court?OpenDocument&1=40-Specialist+Court+Jurisdiction&2=20-Koori+Court&3=~>, Mcasey, B. (2005). A critical evaluation of the Koori Court Division of the Victorian Magistrates' Court. *Deakin Law Review*, 10(2), 654-685, Potas, I., Smart, J., Brignell, G., Thomas, B., & Lawrie, R. (2003). *Circle Sentencing in New South Wales: A Review and Evaluation*. Sydney: Judicial Commission of New South Wales.

³⁸ Marchetti, E., & Daly, K. (2007). Indigenous sentencing courts: Towards a theoretical and jurisprudential model. *Sydney Law Review*, 29(3), 416-443 at 434.

related justice agency, who organise Elders or Respected Persons to appear at the hearings, liaise between the offender, prosecutor and victim (if they agree to participate), and sometimes monitor an offender's progress after the hearing.

A number of evaluations have been conducted of the courts, but it is not easy to compare findings since the studies are mostly jurisdiction-specific, and because they have all identified limitations in the manner in which the data were either collected or analysed. However, by focusing generally on criminal justice and community-building aims, some comparisons or conclusions are possible. Generally speaking, the evaluations have found that the Indigenous sentencing courts have improved court appearance rates, but they have not had a significant impact on recidivism.³⁹ In relation to the community-building aims, the evaluations found that the Indigenous sentencing courts provide a more culturally appropriate sentencing process that encompasses the wider circumstances of offenders' and victims' lives, and that they facilitate increased participation by the offender and the broader Indigenous community in the sentencing process.⁴⁰

(b) Care Circles in NSW and Victorian Aboriginal Family Decision Making

Care Circles sit within the NSW Children's Court division and are an initiative introduced by the NSW Department of Attorney-General and Justice and Community Services (the agency responsible for child protection in NSW) to 'encourage more culturally-appropriate decision-making in care proceedings involving Aboriginal children and young people'.⁴¹ The first Care Circle was convened in Nowra in November 2008 but has recently been expanded to Lismore. The Care Circle model combines principles of both family group conferencing and Circle Sentencing Courts. A matter will be referred to a Care Circle when parents of a child or children do not agree with the arrangements sets out in a Care Plan prepared by Community Services. In the mainstream system, the parents would usually be given the opportunity to reply to the proposed Care Plan and a family conference usually mediated by a Children's Court Registrar is held in an attempt to resolve the matter. If no resolution is reached it would normally then be determined by a hearing before a Children's Court Magistrate.⁴²

With a Care Circle process, each matter generally requires two Care Circles to be convened in a community setting to discuss and formulate care plans (that involve issues such as where a child should live and who they should be in contact with, or what services a family may require to look after the child)⁴³ that are more culturally appropriate and better suited to the needs of Aboriginal

³⁹ Fitzgerald, J. (2008). *Does Circle Sentencing Reduce Aboriginal Offending?* Sydney: NSW Bureau of Crime Statistics and Research, Morgan, A., & Louis, E. (2010). *Evaluation of the Queensland Murri Court: Final report*. Canberra: Australian Institute of Criminology.

⁴⁰ Cultural & Indigenous Research Centre Australia. (2008). *Evaluation of Circle Sentencing Program: Report*. Sydney: NSW Attorney General's Department, Harris, M. (2006). "A Sentencing Conversation": *Evaluation of the Koori Courts Pilot Program October 2002-October 2004*. Melbourne: Department of Justice, Morgan, A., & Louis, E. (2010). *Evaluation of the Queensland Murri Court: Final report*. Canberra: Australian Institute of Criminology, Parker, N., & Pathe, M. (2006). Report on the Review of the Murri Court (Publication no. <http://www.justice.qld.gov.au/courts/pdfs/murricourtreport/pdf>). Retrieved 13/03/2007: , Potas, I., Smart, J., Brignell, G., Thomas, B., & Lawrie, R. (2003). *Circle Sentencing in New South Wales: A Review and Evaluation*. Sydney: Judicial Commission of New South Wales, Tomaino, J. (2004). *Information Bulletin: Aboriginal (Nunga) Courts*. Adelaide: Office of Crime Statistics and Research.

⁴¹ Hannam, H. (2010, 7 May 2010). *Care Circles: What are Aboriginal Care Circles?* Paper presented at the Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne.

⁴² Ibid at 2-3.

⁴³ NSW Department of Justice and Attorney General. (2012). Care Circles: Children's Court Care Circles for Aboriginal Kids and their Families. Retrieved 8 August, 2012, from

children and their families. The child or children must be Aboriginal and unless everyone involved in the matter consents to the process a Care Circle will not be convened. The Children's Court Magistrate (not the Local Court Magistrate), 2-3 community members, the parties and their lawyers, the lawyer for the child/children, other support people (such as extended family), some service providers and the Care Circle Project officer will attend the Care Circle. The process is less formal than a mainstream court proceeding and all attendees are encouraged to participate in the dialogue that ensues.

During the first Care Circle, community members will ask the parents about what is going on in their life in order to understand why their child or children has ended up requiring care. There will also be a discussion about any interim placement options in a case where the parents are seeking restoration of the children, in which the community members will suggest options that Community Services may not have been aware of (such as the child or children being placed with extended Aboriginal family group members or kinship group). Issues that may need to be addressed in order for the parents to eventually have the care of the child or children restored to them or the framing of undertakings to be given by parents in relation to the safety and well being of the child or children are also discussed and determined at the first Care Circle. Former NSW Children's Court Magistrate, Hilary Hannam notes that 'participation in care circle is not a "soft option" for parents, as although the community members will make recommendations where appropriate to support parents, they will not recommend restoration where it is clearly inappropriate'.⁴⁴ At the end of the first Care Circle the Magistrate will summarise the discussion and recommendations, giving directions to Community Services to file a Care Plan. The second Care Circle is then held approximately one to two months later, in order for Community Services to explain how the recommendations made at the first Care Circle were or were not incorporated into the Care Plan. This process hopes to assist parents to better understand and therefore accept the Care Plan that is eventually put in place by the orders made by the Magistrate. If the parties do not agree to the terms of a proposed Care Plan at this second Care Circle, the matter will be referred back to the Children's Court for determination in the usual manner.⁴⁵

Victoria has a similar process for accommodating the special needs of Aboriginal families that come in contact with the child protection system. The Victorian Department of Human Services and the Victorian Aboriginal Child Care Agency have worked together to implement a multi-layered strategy that involves family and community members in finding solutions for child protection matters. One of the processes that has been implemented is the Aboriginal Family Decision Making session which in many ways mirrors the NSW Care Circles, although a judicial officer is not directly involved in the conferencing meeting.⁴⁶

(c) Culturally appropriate mediation services and modes of communication

Relationships Australia operates a Family Relationship Centre in Alice Springs that conducts mediations based on a 'non-linear' and 'organic' model that involves cycles of visiting family members, finding out more information about what is going on in the family, and exploring the roles and responsibilities of various members of the family. The pre-mediation stage involves educating the parties about mediation to make sure that they understand they are responsible for the outcome. The information gathering stage of the process can involve, not only the immediate family members but also extended family and others in the community who may be relevant to the dispute. Although the process is more time consuming it builds a relationship of trust

http://www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_care_protection_law#ACC

⁴⁴ Hannam, H. (2010, 7 May 2010). *Care Circles: What are Aboriginal Care Circles?* Paper presented at the Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne at 4.

⁴⁵ Ibid.

⁴⁶ Family Law Council. (2012). *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. Barton: Commonwealth of Australia at 67 and 68.

between the mediator and the parties to the dispute, which is essential when trying to work with Aboriginal and Torres Strait Islander communities (it is really essential in any cultural context). The mediator keeps the focus on achieving the best possible outcomes for the needs of children and the parties to the dispute are reminded of this throughout the process. Other considerations are also taken into account, such as ensuring the physical location is acceptable and comfortable for both parties, allowing enough time for travel from distant locations and for parties to be able to afford to attend the mediation, organising interpreters to be present if needed, and regard for to cultural issues such as avoidance protocols.⁴⁷

The Mawul Rom Project based on Mawul Rom conflict resolution ceremony is now available as an accredited course at Charles Darwin University. It teaches participants about traditional and contemporary mediation practices; family, social and economic relationships; cross-cultural communication skills; and cross-cultural knowledge about dispute resolution and decision-making mechanisms. More information about this program can be found at <http://mawul.com/>. Other initiatives seeking to improve community engagement and the dissemination of legal information have been developed by various Family Relationship Centres and Aboriginal Legal Units.⁴⁸ One example is the development of DVDs that incorporate Aboriginal imagery and culturally appropriate language to explain how white man's law can assist with family disputes.⁴⁹

(d) National ATSI practitioner network

Family Relationship Services Australia (FRSA) has developed a national online forum for Indigenous and non-Indigenous practitioners who work with Aboriginal and Torres Strait Islander families to share ideas, information and resources. It is an initiative that emerged from the FRSA Reconciliation Action Plan. More information can be obtained by emailing communications@frsa.org.au.

Future Directions

Access to justice is not simply about redefining laws so that in theory they reflect the lived experiences of Aboriginal and Torres Strait Islander people. Access to justice also requires changes to practice so that Aboriginal and Torres Strait Islander people feel confident and comfortable with using the family law system to resolve family law disputes. Their under-representation as clients of family law services will only change if the system changes to accommodate their needs.

Some possible avenues for change are:

- First and foremost, funding needs to be reinstated for the reemployment of Aboriginal and Torres Strait Islander family liaison officers. The liaison officers provided support and assistance to Aboriginal and Torres Strait Islander disputants who came into contact with the Family Court system by connecting them with appropriate services and generally offering support. The liaison officers assisted with identifying when interpreters were required and attended mediations for cases involving Aboriginal and Torres Strait Islander people. Funding for this service in the Family Court ended in 2006, although the Cairns Registry of the Family Court continues to access a small amount of funding for such a position.
- Greater effort needs to be made to ensure that shared collaboration and understanding between different agencies exists in order that Indigenous and non-Indigenous family law service providers are familiar with each other's functions.

⁴⁷ Ibid at 61-62.

⁴⁸ Ibid at 6.

⁴⁹ Two examples of such DVDs are 'Super Law' which was developed by the Central Australian Family Legal Unit and 'Child Focused Dreaming' developed by the South Australian Family Law Pathways Network, Centacare Catholic Family Services, the Catholic Diocese of Port Pirie and the South Australian Film Corporation.

- Indigenous sentencing courts, NSW Care Circles and the Victorian Aboriginal Family Decision Making Service illustrate that interventions that involve Aboriginal and Torres Strait Islander people and that adopt traditional dispute resolution approaches can be implemented and can make a difference. All that is required is the desire to try something different and an open mind.
- Holding meetings in accessible locations, allowing sufficient time to develop a trusting relationship with Aboriginal and Torres Strait Islander clients, and implementing cultural awareness and competence training of non-Indigenous staff are a few 'simple', yet important adjustments that can be implemented at every level of the family law system with little effort and expense.

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