



23 May 2011

Kim Howatson
Family Law Council Secretariat
BARTON ACT 2600

RE: Indigenous and Culturally Diverse Clients in the Family Law System

Dear Colleague,

We welcome and appreciate the opportunity to make a submission in relation to the above matter.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd (“ATSILS”) provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for a number of decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Our Comments

Experiences of our clients using the family law system, including issues contributing to disengagement or promoting engagement:

It is acknowledged that family law, in particular where children are involved, is a specialised area of law, with certain attributes that distinguish it from other areas of law. What seems to have made the Family Law approach such a success in general terms is that it entails a coordinated approach of Government through legislation, easy to understand information sources produced by the Court, Government funded services¹, adequate funding and a clear approach as to the pathway to access justice that can be easily understood by practitioners working in all aspects of the area.

Self-help kits are often useful to people although sometimes these kits are not drafted in a way that makes them user-friendly for many of our clients.

In the Foreword to the Queensland Law Handbook² Julian Burnside comments on the difficulty people face in understanding the law:

If lawyers speak candidly, they will admit that when they were undergraduates, all of this looked terribly complex, and much of it still does. It is not difficult to imagine how daunting it might be for those of us with limited education, or limited skills in English. Even those privileged clients who get the red carpet treatment have difficulty understanding the refinements of law and legal procedures. What hope for the disadvantaged?

One of the issues in regard to the family law system for our clients, particularly those living in rural and remote communities is the location of services, including for dispute resolution, Court (Federal Magistrates Court and the Family Court) and legal services. While our organisation provides a service to most rural and remote areas,

¹ Services include: those funded to provide legal advice, education and representation; those funded to mediate; and those funded to provide support for couples and families.

² Trevino, J. (ed), "Queensland Law Handbook: Your Practical Guide to the Law", 9th Edition, 2007, p. iii

issues often arise for the ex-partners of our clients in these communities in respect to gaining legal advice and representation (i.e. where we cannot assist due to a legal conflict of interest). In saying this we also acknowledge that for our clients, more family members than just the biological parents play important roles in the raising of children, this includes the teaching of culture. For mediation and Court processes to work for Aboriginal and Torres Strait Islander peoples it is often important for all relevant family members to be included. Particular relationships also need to be understood and catered for, for example, where certain people cannot be in the same room at the same time, such as avoidance relationships which commonly exist between mother and son in laws.

Many of these services mentioned above are not always accessible in rural and remote communities. In the case of dispute resolution and legal assistance (for parties on the other side of our clients' matters) in family law matters, regardless of where the matter is (urban, rural or remote), the service provider is likely to be mainstream. In saying this, we acknowledge the services provided by the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service, but note that this is limited particularly due to location and service type. In respect to Aboriginal and Torres Strait Islander peoples, services must be culturally competent so that people feel comfortable in accessing them and so that the services meet their needs.

The federal legal system is generally constructed on the basis that those who access it, live in or live close to urban communities. There is a failure to acknowledge that in States such as Queensland there are great distances and costs associated with travel and accommodation which act to deter people from accessing the federal family law system if a matter comes before the Court. These are the hidden personal costs which the user incurs if they wish to access the system. Many people cannot afford the cost of attending Court.

Even when our clients do access mediation services and the Court, they sometimes face issues with the approaches of these services, including inflexibility due to rigid rules and processes, often making them irrelevant and unattractive to our clients. We note that these services try to cater for our clients by employing some Aboriginal and Torres Strait Islander employees. This can work to a certain extent in making

our clients feel more comfortable about accessing these services and informing our clients, however it does not address the structural issues that make these services so daunting for our clients. We note that in other areas of law, such as criminal law, Murri Courts and Circle Sentencing have been developed to make the process more relevant for those accessing Courts. We encourage strategies for the involvement of Aboriginal and Torres Strait Islander peoples in legal processes, such as Courts, as is the process with elders in Murri Court. Although, the elders are not the decision makers in this process, they can provide invaluable input in respect to cultural matters and appropriate orders. Elders also assist clients to feel comfortable with the Court process and are often more willing to engage in the process due to their presence.

Some of our clients have found the Indigenous Family Liaison Officer positions which exist in some Family Courts to be an important resource in terms of the support and information they provide on the Court process, as well as in informing the Court about our clients' needs, as well as cultural considerations.

Similarly, Family Report Writers play an important role in family law matters. Ideally family report writers who work with Aboriginal and Torres Strait Islander peoples should be Aboriginal and/or Torres Strait Islander, however, we acknowledge the difficulties involved in recruiting qualified people. Therefore, if the person is not an Aborigine and/or a Torres Strait Islander, then they should have extensive experience in working with Aboriginal and Torres Strait Islander peoples and flowing from this, an understanding of cultural issues. Aboriginal and Torres Strait Islander peoples are often uncomfortable in being questioned by and conversing with a Family Report Writer where the two have nothing in common with each other and report writers often fail to understand our clients' cultural ways. This can have negative outcomes for our clients, given the importance of Family Report Writers and the reliance placed on their reports, often as the only independent "objective" piece of evidence. Another way to resolve this issue is to have present an Aboriginal or Torres Strait Islander (depending on the client) Social Worker, to assist with the communication and to try to make the client feel more comfortable. This role should not simply be tokenistic, the two workers should be working in unison and

the Social Worker should also have their views recorded, particularly where they conflict with those of the Family Report Writer's.

In regard to the above, the same might be said in regard to Independent Children Lawyers. Again, it is difficult to recruit Aboriginal and Torres Strait Islander legal practitioners for the role, however, practitioners from our organisation; and other social justice organisations such as Legal Aid Queensland, are more likely than private legal representatives to understand cultural sensitivities in matters involving Aboriginal and Torres Strait Islander peoples. We suggest cultural training be a requirement for those Independent Children Lawyers who work in matters involving Aboriginal and Torres Strait Islander peoples.

Following on from the above, training should be provided to judicial officers in regard to working with Aboriginal and Torres Strait Islander peoples. An option to a Murri-style Court could be a specific list for Aboriginal and Torres Strait Islander clients where those involved are aware of cultural issues.

As mentioned above, Court case management principles can be quite rigid, setting timeframes for the gathering and filing of information. Flexibility within Court Rules and processes is integral in terms of factoring in cultural nuances and power imbalances between parties, where Aboriginal and Torres Strait Islander peoples are involved.

The overly formal traditional nature of these institutions can be intimidating to many who are entitled to access them. One of our clients found the Court proceedings too confronting when the other party's allegations were read out, as our client felt that they were mostly inaccurate and he felt belittled and insulted by them. Further to this, the Federal Magistrate made comments regarding our client's behaviour, which furthered our client's feelings of being unsettled. This client refused to attend the Court on later dates, due to this experience. Another client who is a grandmother in a current matter has said she would prefer the matter to be dealt with in a Murri Court format where "Aboriginal people can understand Aboriginal people, the language is simpler and more to the point". This client felt that the Federal Magistrate did not want to deal with the matter (the Federal Magistrate transferred

the matter to the Family Court and was reluctant to make basic interim orders).

One of the results of the above is that Aboriginal and Torres Strait Islander peoples feel pressured to resolve legal issues informally and this may include a decision to not even pursue matters, particularly where there has been communication breakdown, or Domestic Violence Orders exist. One example is that a father and his parents have not seen their son and grandson for 13 years, because they live in a remote community and did not know what to do to see their son and grandson. The father advised that he had contacted the mother in the past and she denied him any contact with his son. The father recently received Court documentation in regard to child protection proceedings; his parents through their local Community Justice Group contacted our service for assistance.

Even though parties may choose to resolve a legal matter, or be required to attempt at first instance to resolve a matter through mediation, it does not mean that they forego their right to legal advice. In order for justice to be realised the parties must be aware of their rights and the options and outcomes available to them, including what is likely to occur if the matter was to be decided by a more formal dispute resolution process. It is also important for the client to have the relevant mediation process explained to them. This assists the client in making an informed decision as to whether they wish to pursue this option, as well as empowering them to participate in the process and to understand what may be derived from the process.

There also remains room for improvement in the mediation process in respect to matters that involve Aboriginal and Torres Strait Islander peoples. Providers of mediation services for Aboriginal and Torres Strait Islander peoples must be culturally appropriate and flexible to suit the participants' needs and expectations. The training and support of Aboriginal and Torres Strait Islander peoples to work as mediators, to complement their existing knowledge and skills would go a long way in making mediation accessible and relevant to Aboriginal and Torres Strait Islander peoples. This has many run-on effects, as Aboriginal and Torres Strait Islander peoples are more likely to feel comfortable in approaching a service where the workers understand cultural matters, information exchange can occur in an appropriate and comprehensible manner for those involved, outcomes and

agreements can be made in a way that suit the parties.

The National Alternative Dispute Resolution Advisory Council in their report titled: "Indigenous Dispute Resolution and Conflict Management"³ point out that many dispute resolution models fail to meet the needs of Aboriginal and Torres Strait Islander peoples. They also pointed out the inequality that Aboriginal and Torres Strait Islander peoples face when they engage in a western dispute resolution process with a non-Aboriginal or Torres Strait Islander party.

From what has been said above it can be seen that many existing mediation services are not in tune with Aboriginal and Torres Strait Islander peoples' cultural values; ways of resolving matters; and lack the flexibility required to meet the needs of Aboriginal and Torres Strait Islander peoples. For example, the process requires clients to adhere to structured timeframes, involving an initial assessment, watching a DVD and then setting up of a conference. Also, Family Relationship Centres are only available in urbanised areas; therefore those in rural and remote communities are unable to access the service.

Access to services for all is imperative in assisting Aboriginal and Torres Strait Islander people to resolve family law issues. Flexibility of services is integral to successful outcomes and would mean that different approaches may be used in different communities, or even within communities with different people. Consultation with Aboriginal and Torres Strait Islander peoples in each community at the commencement of designing and development stages is essential for the building and implementation of relevant dispute resolution services. We are aware that in the past Legal Aid Queensland trained community members in the discrete Aboriginal community of Yarrabah to be mediators for all manner of disputes in that community, including family law disputes. We are aware that there were some positive results from this service; however the service no longer exists.

On occasions, Community Justice Groups provide mediation services for matters within the community. With appropriate funding, training and support, Community Justice Groups or another similar style of organisation might be able and willing to

³ January 2006, p. 3. www.nadrac.gov.au

perform further services relevant to resolving family law disputes. We note that family law matters are outside Community Justice Groups general scope of work and that Community Justice Groups are often overburdened due to the high workload produced by the numbers in the criminal justice system and other work placed on them by organisations and people.

Local services, such as Community Justice Groups and even Aboriginal and Torres Strait Islander Health Services are often the first port of call in communities when people have a legal issue. It is important for staff of these services to be able to identify the issue and relevant services and refer clients to those services.

Involvement of local organisations is integral to the success of assisting people to progress the resolution of their matter. Local organisations are often accessible in both physical and cultural terms. Such organisations often have the trust of the community members and usually hold a wealth of knowledge about community members' families.

In some instances where parties have seemingly resolved their matter by reaching an "agreement", they might require further and ongoing assistance, in particular in regard to communications with the other party, in order to implement or build upon the outcome. This can occur through general support from an existing service that the person is familiar with.

It is important to acknowledge and support the role that non-legal entities play in assisting Aboriginal and Torres Strait Islander peoples access to the family law system. This is particularly the case where a role is external to that for which these entities are funded. Identification of these entities, along with training, resourcing and support is required to assist them in continuing the important role that they are playing. Although working at making existing legal services more approachable is important, if there are entities that people feel comfortable in approaching then they should be utilised and appropriately supported. This is especially the case in rural and remote communities where legal services may not be present or accessible at all times. This approach also goes some way in acknowledging that a purely legal response is not always in a person's best interest and that they might require further

support or assistance from other services.

We acknowledge that there is a long way to go for services to be truly accessible for Aboriginal and Torres Strait Islander peoples; but also acknowledge that efforts have been made in the past to make the system more accessible and user-friendly for Aboriginal and Torres Strait Islander peoples – indeed, processes such as this indicate the intention to continue into the future with those efforts.

Once again I thank you for the opportunity to make a submission in this area and wish you well in your deliberations. I also take this opportunity to acknowledge my appreciation for input into the first draft of our submission by one of our Law Reform practitioners, Ms Fiona Campbell.

Yours faithfully,

Shane Duffy

Chief Executive Officer