

Aboriginal people and access to civil law remedies

It is well known that Aboriginal people are over-represented in our criminal justice system. What is less-well recognised, or analysed, is the evidence that they do not access civil remedies as often as other Australians. Norman Laing and Larissa Behrendt, two Indigenous members of the NSW Bar, analyse this phenomenon and its implications for the provision of legal services to Indigenous Australians.

A Productivity Commission report, *Overcoming Indigenous Disadvantage 2005*, provides a poignant illustration of the disparity between the living standards of Indigenous and non-Indigenous Australians. Amongst data showing lower levels of education, poor quality housing, higher unemployment and over-representation in the criminal justice system, there was clear evidence that standards of Aboriginal health remain poor. We have a life expectancy that is 17-years less than other Australians, whilst our infant mortality rates are 2-3 times higher.

Given these socio-economic indicators, should we be surprised that civil remedies for social security, housing, consumer credit and discrimination aren't employed more often by this most disadvantaged sector of the Australian community?

An historical context

Misconceptions about Aboriginal people are prevalent in Australian society. There is the belief that most Aboriginal people live in the remote parts of the country (or at least the 'real' ones do). Others include the belief that Aboriginal people living in urban areas have lost their culture; and that the 1967 referendum gave Indigenous people citizenship rights. Of these 'urban myths', the misunderstandings about the effects on the citizenship rights of Indigenous people of the 1967 constitutional amendment seems to be particularly enduring. Those who remember history correctly will recall that the referendum made two changes to the Constitution. The first was to include Aboriginal people in the census, and the second was to give the federal government the power to make laws in relation to Indigenous people.

The 92 per cent of Australian people who voted 'Yes' in 1967 did provide an opportunity for a 'new beginning'. The constitutional amendments gave increased power to the federal government over the sphere of Aboriginal affairs and changed the way in which policy was developed and implemented. For example, in 1968, the government established the Council for Aboriginal Affairs, and then the Office of Aboriginal Affairs. When the Whitlam government came to power in 1972, it upgraded the Office of Aboriginal Affairs to a federal department. But despite this increased power and activity, large disparities still remain in the experiences and opportunities open to an Aboriginal child compared to its non-Aboriginal counterpart.

While the referendum may have given additional powers to the federal government, the changes did little to alter many of the dominant and negative views about Aboriginal people that were pervasive in Australian society at the time of the vote. These attitudes, policies and practices were only brought to light with



Shirley Watson with Senator Reg Bishop holding a badge urging people to vote yes in referendum on whether Aborigines should be counted in census in May 1967. Photo: News Ltd Image Library

the publishing of the *Report of the Royal Commission into Aboriginal Deaths in Custody*. The commission highlighted how the events of the last century continued to influence the lives of Aboriginal people today with the commission ultimately finding that most of the 99 deaths that were investigated were, in fact, caused by 'system failures or absence of due care'. These systemic failures once again indicate an under-utilised role for civil remedies.

Some barriers to accessing civil remedies

In 2004 the Law and Justice Foundation published the *Data Digest*, the first report on its Access to Justice and Legal Needs Program. The report is a compendium of service usage data from NSW legal assistance and dispute resolution services between 1999 and 2002 and identifies a number of interesting points in respect of Indigenous people's access to legal services.

First, it shows that the proportion of enquiries from Aboriginal people comprised four per cent of all those received by duty solicitors at Legal Aid NSW. The equivalent figure at NSW community legal centres was five per cent. Both figures increased steadily between 1999 and 2002. This is disproportionately high for a group that represents just 1.9 per cent of the state's population.

However, inquiries by Indigenous people to the Legal Aid NSW Advice Service were about two per cent of all inquiries, a figure that has not altered significantly since 1999.

The areas of greatest interest with inquiries to the Legal Aid NSW Advice Service were the areas of crime (accounting for 36 per cent of inquiries) and family law (31 per cent of inquiries). However, considering that Indigenous people are over-represented at much higher rates in the criminal justice system and as victims of racial discrimination, Indigenous people should be accessing these services at a greater rate than what these statistics indicate.

In its report on public consultations for the same project, the Law and Justice Foundation identified the following barriers confronting Indigenous people in accessing legal aid services:

- a reluctance to involve outsiders in matters that are considered private;
- a lack of awareness of Indigenous people of the scope and ability of the law to resolve certain types of problems;
- the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal but also significant political, historical and cultural issues;
- the reliance on documentary evidence to substantiate legal claims and its reluctance to accept or rely on anecdotal or oral evidence by Aboriginal people;
- long term distrust of and previous negative experience with the legal system;
- the formality of the legal system and its services;
- lack of cultural awareness, sensitivity and compassion among justice system staff and legal service providers;
- lack of confidence in confidentiality, support and empathy in accessing Legal Aid NSW services;
- lack of Aboriginal personnel;
- lack of relationship between Legal Aid offices and local Aboriginal communities;
- intimidation in approaching legal services;
- lack of awareness of the services of Legal Aid NSW;
- the need to book Legal Aid services;
- location of Legal Aid offices; and
- lack of public transport to Legal Aid's offices.¹

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The Law and Justice Foundation report also identified civil law areas where Indigenous people find it most difficult to access legal assistance and pinpointed the areas relating to native title claims and intellectual property and cultural heritage issues.²

For many Aboriginal Australians, attempts to obtain remedies under the civil justice system have been discouraging. These include high profile cases, such as *Gunner* and *Cubillo*³, where Aboriginal plaintiffs sought to use tort and equity in seeking reparations for the impacts of the policy of removing Aboriginal children from their families (and were unsuccessful); or the limited parameters of anti-discrimination law, which resulted in only nine cases in which orders were made in the 2003-2004 financial year. Their perceived failures have sown a feeling of distrust among those with little or no understanding of the civil justice system.

Distrust of the legal system is just one barrier to overcome when encouraging Aboriginal people to explore their civil law rights.

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Many do not have adequate education or knowledge of government agencies, whilst others cannot overcome an inherent distrust of public servants.

Facing any legal system and its formalities is a daunting experience for everybody, not just Aboriginal people. However, it becomes yet more frightening for those people who only know of a system involving the police and criminal charges. The fear, and often misunderstanding, by some Aboriginal people that the law is only for responding to police charges leaves our people with many civil law matters being unpursued or unresolved. Civil matters such as welfare rights, housing, discrimination law, consumer rights, credit and debt, employment law, motor accidents compensation, crimes compensation, social security, intellectual property, negligence and family law are just some of the areas of law where avenues for redress are perceived as so far removed from the familiar criminal justice system that they are simply not worth worrying about.

The NSW Legal Aid Commission, community legal centres and the Aboriginal legal services provide a valuable service to our people, often without adequate funding or due recognition. However, when accessing these particular services, Indigenous people are sometimes confronted by a lack of cultural awareness, sensitivity or compassion on the part of the solicitors. Unfortunately, this may get worse before it gets better. It will be exacerbated by the proposed Aboriginal legal services tendering scheme because Indigenous lawyers are under-represented in law firms and community legal centres.

Aboriginal legal services, under-resourced as they are, have necessarily focused their efforts on helping Indigenous people ensnared by the criminal justice system. Many ALS offices simply do not have the requisite knowledge base or resources on hand to assist Aboriginal people in civil law matters - especially in rural and regional areas of the state.

Consequently, an Indigenous family may live with injuries for which they will never be compensated, become involved in unjust financial arrangements, accept racial vilification or suffer under adverse administrative decisions.

Domestic violence, residence and contact disputes and abduction of children are rarely dealt with by the Aboriginal legal services. Whilst the Aboriginal and Torres Strait Islander legal services in metropolitan Sydney employ a family law solicitor from time to time, services in far western NSW and northwestern NSW generally have not had family lawyers and do not usually act in such matters.

At present the Legal Aid Commission has an arrangement with the ALS, whereby LAC officers visit the ALS office at Blacktown to provide advice to clients in civil law matters. These officers attend each fortnight on a Friday and, on average, address inquiries from three Indigenous people per visit.

Unfortunately, these outcomes can be directly attributed to the ALS prioritising their case loads and directing their allocated funding to the high number of criminal law matters that they handle.

A role for civil remedies

Too many Indigenous people simply do not know anything about potential civil remedies. In the past, Indigenous people were subjected to racist and discriminatory treatment and had no alternative but to accept it. Sadly, this acceptance is intergenerational. Many Aboriginal people today are still unaware that they have equal rights and may have civil remedies available to them.

There are a number of ways highlighted by the Law and Justice Foundation through which all lawyers can help to bring some balance into the civil law arena for Aboriginal people. The first is to rebuild trust and confidence in the legal system generally and the profession in particular. One way to achieve this is to employ more Indigenous lawyers at the front line of the Legal Aid Commission, the community legal centres, the Aboriginal legal services and especially in those law firms who are involved in the legal services tendering process. Education of Aboriginal culture and history needs to go further for the legal profession. Most importantly we all need to ensure that Aboriginal people are themselves educated and are aware that there are civil law services in place available to them.

It has been 35 years since a collective body consisting of both Aboriginal and non-Aboriginal people established the Redfern Aboriginal Legal Service. This group founded the ALS in response to the continual police harassment of Aboriginal people and the lack of legal representation afforded to them. After its establishment, the ALS provided an advocate for Aboriginal people and produced a dramatic shift in the dynamics of the criminal justice system. It provided a substantial reduction in miscarriages of justice but more importantly it provided the initial steps towards equality and Aboriginal empowerment in the NSW justice system. This positive change would not have occurred without the support and assistance of volunteer white lawyers and Aboriginal people working together for a common cause. The injustices and disadvantages faced by Aboriginal people in the criminal jurisdiction motivated and inspired those in 1970 to act and bring about a level of equality. The time has come for our generation to continue that legacy and not let civil law be a casualty of that battle.

¹ Law and Justice Foundation of NSW, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW. Stage 1: Public Consultations*. August, 2003, pp.63-64.

² *ibid.*, pp.65-66.

³ (2001) 183 ALR 249.