

CIVIL AND FAMILY LAW NEEDS OF INDIGENOUS PEOPLE IN NEW SOUTH WALES: THE PRIORITY AREAS

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I INTRODUCTION

This article sets out the findings of research conducted into the civil and family law needs of Indigenous people in NSW. The research, commissioned by Legal Aid NSW, involved interviews and focus groups in eight Indigenous communities across the State. While there is a body of research seeking to identify the criminal law needs of Indigenous clients, this is the first statewide Indigenous-specific assessment of civil/family law needs. Improved access to legal services for Indigenous people, particularly in relation to civil law, is likely to assist in establishing the necessary infrastructure for improved social conditions and for economic development. The article discusses the nature and extent of a wide range of civil and family law needs, drawing on the statements of Indigenous people from focus groups held as part of the research and supported by the observations of those delivering legal and support services to the focus communities.

II THE LEGAL NEEDS CONTEXT FOR INDIGENOUS PEOPLE IN NSW

It has long been recognised that Indigenous people in Australia have high levels of complex legal needs that are often not met by existing legal services. The 1994 National Aboriginal and Torres Strait Islander Social Survey ('NATSISS') showed that 15 per cent of Indigenous persons aged 15 years and

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over reported using legal services during the previous 12 months.¹ By 2002 this had risen to 20 per cent.² It has previously been estimated that some 31 per cent of Indigenous people in Australia require some kind of legal service, be it criminal, family or civil.³

Research into the legal needs of Indigenous people has been largely focussed on the area of criminal law, due to the over representation of Indigenous people in the criminal justice system. Aboriginal and Torres Strait Islander Legal Services ('ATSILS') predominantly provide legal aid services for criminal matters (89 per cent of case and duty matters in 2001–02, compared with only two per cent family matters and two per cent violence protection matters).⁴ A growing demand for child protection, civil and family law matters has been identified, but ATSILS report being unable to service this demand due to insufficient funding.⁵

Improved understanding and servicing of the legal needs of Indigenous communities across a range of civil law spheres – housing, consumer rights, credit and debt, employment law, negligence, corporations law and so on – will assist in the provision of effective access to authorities currently under-utilised by Indigenous communities. Thus despite the focus on criminal law to date, a sound understanding of the non-criminal law needs of Indigenous people is essential in ensuring access to justice.⁶

A Existing Barriers to Accessing Justice

The existing barriers faced by Indigenous people in accessing legal services have been relatively well identified.⁷ One significant bar is the socioeconomic disadvantage that Indigenous people in New South Wales face in the areas of education, housing, employment, income and health. While there have been some improvements (such as in educational levels), other areas have not changed (for

1 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey* (2002) 4.

2 Ibid.

3 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey* (1994) in Aboriginal and Torres Strait Islander Commission Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program* (2003) 47; no similar calculations have been provided for the 2002 survey data.

4 Senate Legal and Constitutional References Committee ('SLCRC'), *Legal Aid and Access to Justice* (2004) [5.5].

5 Ibid [5.6]; see also [5.14]; the reasons are various: the cost of establishment of a civil law practice is prohibitive; family law is a 'paper driven' jurisdiction requiring time and specialised skills; private practitioners often choose not to service remote communities for civil or family matters thus limiting the possibilities for referral: Joint Committee of Public Accounts and Audit, *Report 403: Access of Indigenous Australians to Law and Justice Services* (2005) [2.20], [2.28]–[2.30].

6 We define 'legal needs' as arising in situations that are generally considered to involve a legal problem (eg family law dispute), in situations that have legal consequences (eg making a will) and in situations that potentially have legal implications or remedies but may not always be recognised as such (eg a payment related dispute with Centrelink).

7 Recent reports include: SLCRC, above n 4; Joint Committee of Public Accounts and Audit, above n 5; Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access' (2008) 32(1) *Criminal Law Journal*, 38.

example, the prevalence of hearing loss): the level of Indigenous disadvantage remains entrenched. Some categories of disadvantage are particularly relevant to clients' needs and the requirements placed on legal representatives. For example:

- Indigenous people are less likely to have the literacy and numeracy skills of the non-Indigenous population. They are less likely to progress beyond Year 9 at school and to complete Year 12, and to have a post-school qualification.⁸
- Hearing loss arising from ear disease is much higher among Indigenous people of all ages up to 55 years. Between 2001 and 2005 there has been no change in the overall prevalence of hearing problems among Indigenous children.⁹ Disability rates are approximately 1.4 times higher for Indigenous people.¹⁰
- Indigenous people are twice as likely to experience high levels of psychological distress than non-Indigenous people.¹¹ Higher rates of self harm, the effects of childhood removal and drug and alcohol issues are all likely to make Indigenous clients a particularly disadvantaged group to work with.¹²
- geographical isolation is also a major inhibitor to access to justice for Indigenous communities. In remote communities, access to justice is 'so inadequate that remote Indigenous people cannot be said to have full civil rights'.¹³

Another barrier to effective access to legal services is the lack of understanding of cross-cultural issues in legal service delivery.¹⁴ These cover a broad range of matters including who has the right to speak, Indigenous kinship relations, gratuitous concurrence, eye contact and temporal and spatial definitions. Cultural awareness is crucial to providing effective legal service to Indigenous people and potential obstacles in this arena were noted by all categories of interviewees in the legal needs research. As one Aboriginal staff member working in Legal Aid NSW expressed to us, 'You'll actually get clients who call up and say, "Do I have to come in to white man's world?"'

Language issues represent another layer of difficulty in accessing legal services. In some Indigenous communities, English is a second, third or fourth language and is not spoken at home. In metropolitan communities, Aboriginal

8 NSW Department of Aboriginal Affairs, *Two Ways Together: Report on Indicators 2007* (2008) 34–42.

9 Steering Committee for the Review of Government Services, *Overcoming Indigenous Disadvantage: Key Indicators 2007: Report* (2007) 5.25.

10 Ibid 12.

11 Ibid 48.

12 See generally, Australian Bureau of Statistics, above n 1; Steering Committee, above n 9.

13 SLCRC, above n 4, [5.120]; see also Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (1980) 11–12; SLCRC, above n 4, [5.136].

14 See generally SLCRC, above n 4, [5.108].

English may be spoken, and lack of training in the nuances of this language can mean that understanding between client and lawyer is compromised.¹⁵

These issues impact on the ability to provide legal services. For example, lack of literacy hampers communication by mail; hearing loss requires particular understanding and skill in interviewing. In a 2002 Office of Evaluation and Audit survey, 13 per cent of ATSILS practitioners reported having difficulty in understanding what their clients were saying 'very often/often' and a further 50 per cent had difficulties 'sometimes'. Practitioners also reported problems with the client understanding what the practitioners were trying to convey. The reasons given for these communication difficulties included the clients' shyness or discomfort (65 per cent), their having a disability that hindered communication (51 per cent), their inability to communicate adequately in English (40 per cent) and their lack of comprehension of legal process (77 per cent).¹⁶

III INDIGENOUS LEGAL NEEDS RESEARCH

There have been relatively few large-scale surveys of legal needs in Australia, and none that have concentrated specifically on Indigenous people.¹⁷

One of the few local studies to look specifically at Indigenous legal needs was the 2003 research organised by the Hawkesbury Nepean Community Legal Centre.¹⁸ The purpose of the research was to determine the legal needs of Indigenous people in the area of western Sydney serviced by the centre. The research covered civil, criminal and family law and participants were asked to rank the three most important legal issues for their community. Financial matters (investments, loan applications and agreements, bankruptcy applications and credit and debt) and police matters scored the highest, followed by family matters (divorce, child residency arrangements and property settlements), criminal matters and discrimination matters.¹⁹

Also in 2003, Legal Aid NSW conducted a review of civil law services provided by the Commission. It found that few Indigenous people were aware of the scope of the law and the range of services available for non-criminal problems, particularly in the housing law and consumer areas. 'In fact, most

15 SLCRC, above n 4, [5.102]–[5.103].

16 Aboriginal and Torres Strait Islander Commission Office of Evaluation and Audit, above n 3, [3.6.4.1].

17 See Michael Cass and Ronald Sackville, *Legal Needs of the Poor: Research Report* (1975); Christine Coumarelos, Zhigang Wei and Albert Z. Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (2006); see also the series of reports recently commissioned by the Law and Justice Foundation NSW concerning the legal needs of particular groups, including: Sarah Ellison et al, *The Legal Needs of Older People in New South Wales* (2004); Suzie Forell, Emily McCarron and Louise Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in New South Wales* (2005); Maria Karras et al, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006); Anne Grunseit, Suzie Forell and Emily McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (2008).

18 Beyond Consulting, *Serious Business: An Analysis of the Legal Needs of the Indigenous Communities of South Windsor, Mount Pleasant and Riverstone*, (2003).

19 *Ibid* 33.

people may be unaware that they have a legal problem for which they should be seeking advice.²⁰ A more recent Legal Aid NSW report noted that this lack of knowledge by Indigenous people continued to be an issue.²¹

IV CIVIL AND FAMILY LAW APPLICATIONS FOR LEGAL AID BY INDIGENOUS CLIENTS

Part of the current research involved an examination of Legal Aid NSW data recording the use of civil and family law Legal Aid services by Indigenous clients over a one year period in 2007. It provides an interesting picture of the expressed civil law needs of Indigenous people. Conclusions that can be drawn from the data about general levels of legal need within Indigenous communities are limited, since the data does not take into account unrecognised legal needs. It also does not account for the fact that some Indigenous people may not feel comfortable approaching the Legal Aid Commission, as a mainstream service, for assistance. They may also not know that Legal Aid NSW provides such services, or may live in a community too remote from a Legal Aid office to be able to access these services.

Nonetheless, it is worth noting that the profile of Indigenous applications for grants of aid and for minor assistance differed in various ways from non-Indigenous applications. A striking difference was the gender profile in relation to civil law issues, with Indigenous women being in the majority among Indigenous Legal Aid clients, while men represented the majority among non-Indigenous clients. A second difference for civil matters was in the type of matters for which assistance was sought. For example, mental health matters were more pronounced among Indigenous clients and veteran affairs among non-Indigenous clients. In relation to family law, Indigenous women were much more likely than men to seek assistance about child support, while Indigenous men were more likely to seek assistance in relation to children under the *Family Law Act 1975* (Cth).

The data also revealed that, in 2007, the rate per 100 000 of population of Indigenous applications for civil aid and minor assistance was more than twice the non-Indigenous rate. The most common civil law applications for Indigenous people were, in order: mental health (19.5 per cent), personal injury/accidents (16.6 per cent), miscellaneous civil matters (12.4 per cent) and consumer issues (10.7 per cent). It is worth noting that many of the mental health (forensic patient) and personal injury matters (victim's compensation and civil assault) were generated through crime or contact with the criminal justice system.

In the same year, the rate of Indigenous applications for family aid and minor assistance was more than three times (for applications) and twice (minor assistance) the non-Indigenous rate. Half of the applications for family law aid

20 Dora Dimos, *Civil Law Review* (2003) 31 in Dora Dimos, *Civil Law ALS Outreach Review*, (2008) 5.

21 *Ibid* 5.

made by Indigenous people concerned 'children' (primarily residence and contact) and a further 47 per cent related to care and protection issues. It is also clear from this data that issues involving the intervention of the Department of Community Services ('DOCS') for removal of Aboriginal children into care remain a front-line family law issue for Indigenous people. Care and protection matters comprised 41 per cent of applications for family law aid by Indigenous people, compared with 27.9 per cent of applications by non-Indigenous clients.

V LEGAL NEEDS ASSESSMENT: RESEARCH FINDINGS

Throughout 2008, a series of consultations took place in Indigenous communities and with those who provide services to those communities in eight focus sites: Redfern/Waterloo, Penrith/Mt Druitt, Dubbo, Wagga Wagga, Moree, Bourke, Tabulam and Goodooga. The sites were chosen for geographical spread as well as to represent remote, rural, regional and urban Indigenous communities.

In each site two focus groups were held: one for men and one for women. A target was set for ten participants per group and in total there were 153 participants out of a possible 160 across all groups. Participants were asked to fill in a questionnaire that identified the legal incidents they had encountered recently in family and civil law. There was then broad discussion about these incidents and about the current level of access to and satisfaction with legal services.

In each focus site, interviews were also undertaken with stakeholders, namely legal practitioners, Indigenous people working as support staff within the legal system and other organisations providing associated services.

What follows is a discussion of the findings of this research in relation to the major civil and family law needs of Indigenous people across NSW.

A Housing and Tenancy

Housing problems emerged as a major issue with focus groups and stakeholders alike. While there were numerous complaints from participants about the conduct of the Department of Housing ('DOH') or Indigenous housing bodies, in some places, like Goodooga, the issues were of an even more basic nature:

Our problem is that we don't know who to pay rent to. There is an Indigenous housing organisation but at the moment it is just sitting there ... we need to find some way of getting housing back under control ... No-one is paying rent right now, as of a couple of months ago. So if something happens to those houses, we would have to fix that ourselves ... Can you help us? Because we don't know how to go about doing these things. (*Goodooga Women's Focus Group participant*).

Focus group participants were asked three questions relating to various housing and tenancy issues. These covered disputes with landlords over matters such as rents, repairs, evictions and relocations; disputes involving supported accommodation such as a hostel, nursing home or a retirement village and covering issues such as fees, services, standards; and whether legal advice has

been required for other housing matters, such as buying and selling and seeking council approval for building applications.

Overall, 41.2 per cent of participants identified disputes involving landlords, 7.7 per cent identified disputes involving supported accommodation and 4.9 per cent identified other legal needs in relation to housing. The percentage of women who identified disputes with landlords was 16.5 percentage points higher than men and constituted nearly half of all women who participated in the focus groups.

1 *Disputes with Landlords*

Some 50 participants provided information on the types of disputes they had experienced with landlords. The most frequently noted matter was the issue of repairs. Feelings of power inequality between landlord and tenant in the public housing context were strongly evident:

It's amazing – they owe you money, they don't want to give it to you. But you owe *them* money: 'we're going to terminate your rental here because you're a week behind in your rent' ... and they have the authority to go in and direct debit you, but we can't go and direct debit *them!* (*Redfern women's focus group participant*).

They intimidate [me]. I'm the weakest link, see, they know where my weak point is. In any case, they're much stronger. (*Wagga women's focus group participant*).

Failure of public housing authorities to carry out timely repairs was also nominated as a substantial area of dispute, coupled with a sense of unfairness about the burden placed on tenants to bear costs at the end of their tenancies:

You move out and then they do it all up. (Dubbo women's focus group participant).

I have thousands and thousands of dollars to repay because of damages to property, but every time I called DOH during the tenancy to have repairs done, I was told that priority repairs had to be done first. We asked for the carpet to be replaced, eventually we lifted the carpet up ourselves, now I've got to pay for new carpet to be put in through the house. (Dubbo women's focus group participant).

Myself and my de facto, we've been living in the house for 13 years. We've only had one renovation done in 13 years. It actually got condemned last year. They've got us another accommodation but we've already been waiting two months and we still haven't been able to move in. (Dubbo men's focus group participant).

Failure to carry out repairs was often referred to by stakeholders as well:

They [DOH] don't fix nothing. They haven't fixed nothing for years in Moree, that's a fact. People pay their rent all the time and if they get behind in their rent they chuck them out, but they're not rushing to do their repairs. They haven't done any repairs in ages. (*Indigenous legal support worker, Moree*).

In Dubbo, many of the issues raised related to the demolition of parts of the Gordon Estate – a largely Indigenous housing estate in Dubbo's west – and the subsequent relocation of DOH tenants:

They've moved us off the Gordon Estate, 'relocation' they called it. We had to fill in these forms, 'transfer forms' they called it, so that 30 years down the track they can say 'you weren't moved from there'. It's the same shit that was going on here years ago, when they rounded up the darkies and moved them to the missions and that – same thing! Same shit, different smell. (*Dubbo women's focus group participant*).

When they decided to demolish the Gordon Estate, there were 250 homes' worth. The facilitator at the meeting had the audacity to say that the Federal Government was demolishing it because there was no money for maintenance. I said, 'What maintenance? They never ever drove a nail into my home ... When I moved into the new estate I was there 45 days and they wanted to come and do a home visit with me and I said, "Piss off, for 23 years I lived over there, that's why the Gordon Estate got into the mess it was in, because you are too lazy to get out of your office"'. (*Dubbo women's focus group participant*).

Of the 63 Indigenous people who identified a dispute with a landlord, only one in four indicated that they had sought legal advice. Of those who did, the majority indicated that it was not satisfactory. In the words of one focus group participant:

I moved out on the Friday, handed the keys in on the Monday and over the weekend the house got damaged [by others]. I went to the tribunal to fight the fine and lost. I was represented through the tenancy service – you'd have thought he worked for the housing commission, not for me; everything they said he agreed with them. I could have done a better job than they did. (*Dubbo women's focus group participant*).

Disputes with DOH emerged from the stakeholder interviews as a major problem, in particular with respect to waiting lists for transfers, forced relocation resulting in people having to return to communities and situations that they had consciously left, evictions, rent arrears, repair waiting time and repayments that were made to DOH but did not show up in the system. Lack of knowledge among Indigenous people about rights in relation to housing was nominated as problematic by stakeholders:

Housing comes up all the time. A lot of people don't have support, so a lot of families want to get transferred. They have a lot of trouble with that. They don't know their rights with housing. (*Legal support worker, Wagga*).

Tenants cause property damage and owe arrears so that the next property they get, they have so much deducted from their pay. If they find that they cannot manage that ... and they get into greater debt, and they have a lot of difficulty with negotiation. (*Indigenous legal support worker, Dubbo*).

Housing is clearly a priority area of legal need. Instead of seeking legal advice, however, tenants overwhelmingly tried to solve these problems directly with the landlord, usually through DOH complaint mechanisms. This is problematic because of the power imbalance between landlord and tenant in public housing, where the landlord has the capacity to influence eviction or future access to housing. This asymmetry of power coupled with the frustration and sense of impotence that it engenders, was frequently commented upon in focus groups.

2 Neighbours

Focus group participants were asked whether they had experienced any disputes with neighbours in the last couple of years over such things as fences or boundaries, noise, privacy or animals. 26.8 per cent of the participants identified neighbourhood disputes as an issue. Indigenous women were more likely than men to identify a neighbourhood dispute as having been an issue for them (32.4 per cent compared to 21.3 per cent of men).

Participants were asked how the dispute was resolved. Those who had not sought advice (which was two thirds of those who reported having an issue) generally had more negative outcomes including a criminal conviction, an apprehended violence order, and at least four cases where the participant had moved out of the residence.

Discussion in focus groups confirmed that neighbourhood disputes were often resolved in the absence of legal advice:

We just talk it out, and argue and argue until it's finished or the police get called in. (*Tabulam women's focus group participant*).

B Education

One third of focus group participants nominated that they were responsible for a young person in education. A further half of this group reported problems with suspension or expulsion, bullying or harassment, or Higher Education Contribution Scheme or other fees. The percentage was particularly high among women (61.3 per cent) who had responsibility for a young person in education. Suspension and expulsion were clearly identified as the most pronounced problem:

There is racism up there at that school [that my sons attend]. Every time my boys go to school they always come back suspended for two, three weeks. So I just give up, stop sending them to school. (*Tabulam women's focus group participant*).

For some participants, the behavioural problems of their children were linked to perceived discrimination or victimisation of the child within the classroom. One example raised was of a child who broke a ruler and spat at a teacher and was brought to court on three charges of assault:

They make him feel bad in the class, as if it is his fault when anything happens. Last year he didn't have a chance to go on any of his excursions. They would set him up and say 'you can go, you can go', but then when the time came he couldn't go. The mother tried to complain to the police but they were no help. She tried to complain via the education department but didn't get very far. (*Goodooga women's focus group participant*).

Problems with suspension and expulsion were also identified by some stakeholders.

Huge amount of suspension, and Indigenous children are much more likely to be suspended for the same behaviour [also exhibited by non-Indigenous students]. Also, the behaviour leading to the suspension may be the Indigenous child responding to racism, direct or indirect. (*Indigenous legal support worker, Dubbo*).

I didn't even know there was anything you could do about suspension/expulsion. I thought you just had to cop it on the chin. It is a big problem around here. (*Indigenous legal support worker, Bourke*).

C Employment

Employment related legal needs were identified by some stakeholders as a priority area for Indigenous clients:

Employment is a huge issue. There are a lot of people who might enter into very casual work arrangements ... and you've got very little redress in those sort of

situations if the employment falls through, or if you get injured or something like that. People get discouraged from pursuing the issue or they don't know how to do it ... and it is something that seems to fall through gaps in the system at the moment. (*Indigenous Legal Service staff member*).

Focus group participants were asked whether, over the last couple of years, they had experienced any disputes in their work over things like pay, superannuation, unfair dismissal, working hours, award conditions, leave, union membership, bullying, harassment or other working conditions. 20.9 per cent of participants indicated that they had experienced such disputes, with the proportion of men identifying employment issues slightly higher than the proportion of women.

The most common type of employment problem related to disputes over pay, followed by bullying, harassment and intimidation in the workplace. Other issues included hours, conditions and unfair dismissal. In some areas like Tabulam and Goodooga, employment conditions under Community Development Employment Projects ('CDEP') were a particular problem.

Most people are working on CDEP here. People don't know about leave, about annual leave. (*Tabulam men's focus group participant*).

D Stolen Wages and Stolen Generations

Focus group participants were asked whether they had been directly affected by Government policies relating to Stolen Wages, Trust Funds or Stolen Generations. 15.6 per cent of participants indicated that they had been directly affected by these policies. The proportion of Indigenous women affected was higher than Indigenous men (19.2 per cent compared to 12.2 per cent), which was partly influenced by the older age of Indigenous women participants.

Participants were asked whether they had received any advice relating to the Aboriginal Trust Funds Repayments Scheme ('ATFRS').²² The vast majority of participants (92.9 per cent) had not received advice concerning the ATFRS. Some comments from focus group participants highlighted the lack of information and perceived lack of support in lodging claims in some communities:

Never heard of Stolen Wages. (*Dubbo women's focus group participant*).

They came out here to let people know about the Stolen Wages. But they pick one organisation and that organisation doesn't let the community know that they are here. There was no one there. Everyone missed it. (*Moree men's focus group participant*).

I don't think many knew about it. Because no one came out here and talked about it. There was [only] something in Lismore. (*Tabulam women's focus group participant*).

Stolen Wages was not an issue addressed by many of the stakeholders, which probably reflects the similar lack of knowledge of remedies displayed by focus

22 The Aboriginal Trust Fund Repayment Scheme is a NSW Government initiative which was established in 2005 to repay to Aboriginal people and their descendants money from wages or child endowments that was put into Trust Funds from the late 1890s until 1969 and never repaid.

group participants. Given the cut-off date to lodge claims under ATFRS was the 31 December 2008, the lack of community knowledge about the scheme again demonstrated the inability of Indigenous people to exercise their legitimate legal rights. While the cut-off date for lodging a claim was extended to 31 May 2009, this is unlikely to have changed the situation in the absence of extensive provision of community information.

E Discrimination

Racial discrimination emerged as a major issue in the research. Many interviewees spoke of discrimination as a kind of 'fact of life' that Indigenous people had come to expect:

The main problem is race discrimination. We are seen as a lower form of the community. They see us as people who are more likely to commit a crime, as not reliable. I see that a lot in the employment sector. And in the supermarkets. (*Wagga men's focus group participant*).

The rednecks run this town ... I've been discriminated in many places around here because of my colour. I just ignore them and think, 'Well, that's your problem not mine'. (*Dubbo women's focus group participants*).

Discrimination? I could take you over to the cemetery now and show you: the blackfellas this side, whitefellas that side. Whitefellas up the top, blackfellas down the bottom. (*Tabulam men's focus group participant*).

Focus group participants were asked whether over the last couple of years, they had experienced any problems with racial discrimination or other types of discrimination. More than one quarter (28.1 per cent) of both males and females identified discrimination as an issue they had faced recently.

Three quarters of those who indicated discrimination as an issue also provided information on the nature and/or the location of the discrimination. Focus group participants spoke of discrimination in shops, clubs and hotels as commonplace:

You walk into a shop and you hear 'security to aisle one or two'. I just turn around and walk out. (*Dubbo men's focus group participant*).

There are problems with discrimination, especially with the clubs up here – the bowling club. The bowling club is the main one that is a problem. Whitefellas go straight in. It's the same with jobs around. The whitefellas get them. With the Shire, they employ their family. (*Bourke men's focus group participant*).

Supermarkets – being tagged on walking into a shop and followed by the security guard. These are now private spaces – you can be banned from a shopping centre where the Medicare office is or the cheap supermarket or the chemist, because you were manifesting a level of anxiety due to your mental illness, and they decided you were likely to be shoplifting, and then it escalates. (*Legal practitioner, Redfern*).

Supermarkets is another one where we face discrimination all the time ... They follow you around. I've been to Coles on a Sunday afternoon in my weekend clothes ... and the person in front of me never got their bag checked, but they've pulled every item out of my bag and cross-checked it with my docket ... I never argue, I just think 'whatever' ... but that sort of thing, or when you are in a shop and you are being served later ... that discrimination is entrenched in the system, there is nothing you can do about it. (*Indigenous support workers, Dubbo*).

Discrimination in the private rental market was of great concern in some focus group locations:

Real estate agents are very bad ... You go round and look at 50 or 100 houses, you won't get one ... You can spend five or six months looking for a place. (*Dubbo women's focus group participant*).

There is discrimination in the private rental market. As soon as they look at you, if you are a blackfella, they won't accept [the standard] three references. (*Wagga men's focus group participant*).

Discrimination in employment was raised as an issue:

Go round Dubbo and count how many Indigenous people are employed. None! You can count them on your fingers. (*Dubbo women's focus group participant*).

When seeking employment, if you have a dark skinned person and a light skinned person, the dark skinned person can have all the credentials, the *best* credentials, but chances are they are not going to get employed ... Or when it is an Indigenous position that is being advertised, they ask that you have a good driving record – well, I've been asked you know, you must have a drivers' licence, but never a clean driving record. How can you verbalise that that is discrimination? (*Indigenous legal support workers, Dubbo*).

A Goodooga woman spoke of the frustration she experienced in the face of perceived discrimination when seeking employment as a teacher:

I've got my certificates, I've got my experience. I've been around children all my life; I've taught children with autism, children with severe cerebral palsy – why can't I even get an interview to find out what experiences I've had? I'm the only person in town with a qualification and I can't get a job! I feel like I'm being discriminated against but I can't put my finger on how. To me, it is personally a great insult. (*Goodooga women's focus group participant*).

Thus despite the high occurrence of discrimination, in many cases it is viewed more as a 'fact of life' than as an unlawful act that attracts a right of legal redress. In this respect, because people may not identify incidents of discrimination as actionable, it may represent an unrecognised legal need within communities.

I reckon discrimination is just an everyday event for every one of us women sitting here ... and when you go and speak to someone about it they think you're just crying 'blackfella'. They tell you, 'Don't worry about it, it will be alright'. Well it's not alright ... You've still got to walk around every day with that in your head ... Some people are not as strong as others and they take it to heart, and then they do things to themselves ... or others, and then they end up in jail. (*Redfern women's focus group participants*).

There's no real avenue to seek legal advice on small things. So if you're in a shop and someone serves you last, it's not something you can really go, 'Hey, I'm going to sue you' – there is no legal avenue, there's nothing you can do because it's so minute, but it is constantly there. (*Mt Druitt women's focus group participant*).

Of the 41 individuals who indicated a problem with discrimination, less than one in five sought legal advice. 'It seems like discrimination all over again. They don't listen to you.' (*Mt Druitt women's focus group participant*). Only one person indicated that she was satisfied with the advice received.

F Social Security and Centrelink

Nearly 36 per cent of the focus group participants were receiving an Indigenous specific allowance, such as such as ABSTUDY, CDEP or the Indigenous Cadetship program. The proportion was higher among males (42.7 per cent) than females (28.4 per cent). In addition, three quarters of participants stated they were receiving some other type of benefit.²³ The proportion was higher among females (85.1 per cent) compared to males (66.7 per cent).

Approximately one in three men (32.9 per cent) and one in four women (26.3 per cent) identified having a dispute with Centrelink over the last couple of years. The survey results and focus group discussions indicate that few people seek legal advice in relation to these disputes:

[The] general approach seems to be to ignore it and hope it goes away or try to deal with it yourself with the relevant agency. There are very varying relationships with Centrelink from town to town – sometimes when there is an effective Indigenous staff worker this makes a big difference to people's ability to resolve issues. (*Indigenous legal support workers, Dubbo*).

Where advice is sought it is often from Centrelink itself:

People get pressured into saying that they are still living with someone to maintain that person's payment (eg rental assistance), and then get into trouble with Centrelink. People go to Welfare Rights in Sydney or the CLC [Community Legal Centre] to get help. But often people go to Centrelink and are told that they have to pay a certain amount of dollars per week and they accept that. (*Indigenous legal support workers, Dubbo*).

In some areas isolation and lack of transport is a cause of problems with Centrelink:

The problem with social security is getting into town. If you miss an interview they cut you off. We still have to go in for interviews even though we are on CDEP. People here don't have transport to get into town. (*Tabulam men's focus group participant*).

G Credit and Debt

Issues of financial literacy and consumer debt were identified as high priorities of legal need for Indigenous persons across New South Wales, with more than one in three Indigenous people identifying recent debt-related problems. Service providers posited that

People are targeting Aboriginal communities because they know there are problems of financial literacy. (*Legal practitioner, Lismore*).

Focus group participants were asked whether over the last couple of years they had faced any problems paying a bill or loan or other debt where the lender had threatened or taken legal action. over one third of the participants identified debt related problems., and the percentage was similar for both males and females.

Interviews with stakeholders confirmed that credit and debt problems were extensive and varied, covering matters such as:

23 Such as sickness or disability allowances, age pensions, etc.

- personal debts;
- utilities;
- mobile phone contracts;
- high pressure sales for items like computers;
- used cars and associated finance;
- funeral funds;
- bankruptcy;
- credit problems that have become insurmountable because of a failure to deal with them due to letters not being opened, changes of address and literacy issues; and
- cars registered in the name of a person other than the driver who has then incurred fines.

There was also a cultural dynamic associated with the accumulation of some debt:

The sharing of family properties and identities, and support for one another, and 'what's yours is mine' and things of that nature, which means that people have fines arising for a vehicle they have never driven. They have never had a licence, but the vehicle is registered in their name, and so they'll have this raft of fines that they could not possibly have incurred, but they have never responded, never sent in the documents saying I wasn't the driver. (*Legal practitioner, Redfern*).

Many of the debts are longstanding, which creates a particular range of issues:

A lot of the older fellas that got into debt when they were younger, they still can't get their drivers' licence because of their debts. (*Indigenous legal support workers, Walgett*).

Some of the fines occur over many years and some clients don't understand that they can still be pursued for fines incurred a long time ago. People may not know what to do and given all the other issues in their lives, what we've observed is that debts and fines tend to be at the bottom of the pile. They're just one more thing they just can't deal with, it's not the most immediate thing to deal with ... Because of fluctuating addresses, or jail terms, fines lurk for years and people may not even know about them until years later. (*Legal practitioner, Redfern*).

The main problems identified by focus group participants in relation to credit and debt included telephone bills, credit reference rating disputes and threatened legal action over late payments. One stakeholder noted that:

Because people may have bad credit ratings they can't go to major retailers and get products, so they are vulnerable to 'you beaut' offers where people pay exorbitant interest over a long period of time. TVs, washing machines, computers. Centrelink have cancelled a lot of direct debits and the Office of Fair Trading are taking an interest in it. Centrelink are being proactive in this because of an Indigenous worker in Centrelink. (*Indigenous legal support worker, Moree*).

It was also noted that there was an inequity with fines because of the general poverty in which Indigenous people live:

If I get a parking fine, I pay it – that's the cost of parking in the city ... It hurts, I don't want to do it, but hey, it's not going to cause me to not eat this week. On the other hand, if this group of clients get a fine, it *would* mean not eating, it *would* mean not being able to get medication, so the degree of penalty is so much harsher. (*Legal practitioner, Redfern*).

Only five focus group participants (three men and two women) indicated that they sought legal advice for their problem. Three indicated that the advice was sought from Legal Aid NSW, the Indigenous Legal Service and a private solicitor.

A lot of people just let it go – they don't get legal advice. They get these loans and there's no way they pay it back. (*Dubbo men's focus group, participant*).

Unaddressed debt issues have far reaching impact, influencing, among other things, credit reference ratings and the ability to maintain a driver's license. Many Indigenous support workers offer informal assistance drafting letters to the State Debt Recovery Office to arrange payment plans.

H Consumer Issues

Some 19.9 per cent of focus group participants experienced a dispute involving accessing superannuation or a dispute with a bank or financial institution (for example, over account balances, bank fees or other matters). The percentage was slightly higher for women than men. Participants were also asked whether over the last couple of years they had problems with any 'scams' involving activities such as funeral funds or door-to-door sales. 13 per cent reported a problem of this nature. Indigenous men were more likely than women to indicate a problem with 'scams' and many identified ongoing problems with Indigenous funeral funds.

Yeah, I had a problem with the funeral fund. They sent me the letters and I had about AU\$15 000 in the fund. I missed a couple of payments and then they cut me off. I asked for the AU\$15 000 – where's that gone? They won't tell me where that went. We got no rights about it. We know people that have passed away that have been paying in for years and years and they reckon they got no records of this. They couldn't give the family the money to cover the people who had passed on. (*Tabulam men's focus group participant*).

I had a problem with the Indigenous funeral fund. They wouldn't pay for my sister's husband. He was in it for 10 years and he died of cancer. They wouldn't pay for anything. They said he missed one payment. (*Mt Druitt men's focus group participant*).

A lot of people in Moree have been in the funeral fund. If you get off the dole and then miss your payment – that's it. Doesn't matter if you have been in it for four or five years. That's it, you're gone. (*Moree men's focus group participant*).

Funeral funds were also identified as an issue by stakeholders in Lismore:

The funeral benefits scheme is very active up here and a lot of people get into trouble with that. It specifically targets Indigenous people. It is a rip off. It is exploiting Indigenous people because of the cultural importance of burial. (*Legal practitioner, Lismore*).

I Victims Compensation

Focus group participants were asked whether over the last couple of years they had been the victim of a violent crime, and 28.9 per cent of the participants reported being victimised. The proportion of women victimised was slightly higher than men (30.7 per cent compared to 27.0 per cent). However, knowledge about victims' compensation was not as widespread as might be expected with the majority (55.8 per cent) of those who reported being the victim of a violent crime not knowing about the victims compensation scheme. Women were more likely to be aware of the program than men (47.8 per cent compared to 35 per cent). As focus group participants noted:

A lot of people don't know how to go about it ... They think they just leave it for the police, in the courts. But police don't give them that kind of information. (*Goodooga women's focus group participant*).

None of us knows how to go about the compensation. Most people aren't aware of victims' comp. (*Tabulam men's focus group participant*).

Stakeholder interviews confirmed a lack of awareness of victims compensation:

The majority of people probably wouldn't know about the scheme. Only if you have been through the court system, otherwise you wouldn't know. (*Indigenous legal support workers, Dubbo*).

Focus group participants who had been the victim of a violent crime were also asked whether they pursued victims' compensation. Only one in four victims pursued compensation. Although the numbers are small, Indigenous women were more likely to pursue compensation than Indigenous men (33.3 per cent compared to 20 per cent).

J Wills and Estates

Very few Indigenous people have wills. It is an issue which is perhaps not prioritised for individuals but which can result in considerable family and community tension. There was a perception among focus group participants that wills are only useful where there is a significant amount of money or property to be distributed. The usefulness of a will for clarifying other posthumous wishes such as burial place or guardianship of children was generally not understood:

I got nothing to leave anyway. I'm right. (*Dubbo women's focus group participant*).

First in, first served! (*Dubbo women's focus group participant*).

Indigenous people like us we really haven't got a lot. When someone in the family dies people more or less share. No need for a will I don't think. (*Goodooga women's focus group participant*).

However, this was not a uniform view:

I've got no money to give them but there are certain things that I'd like some of my kids to have ... then there's no arguments. (*Redfern women's focus group participant*).

That was a big dispute with Uncle, went on for two or three weeks. He didn't have a will. He said he wanted to be buried here in Moree. His mum was buried here. He wanted to be buried with his mum. The community said he should be buried out there. It split a lot of the family here. (*Moree men's focus group participant*).

Focus group participants were asked whether they had completed a will. 94 per cent had not. Women, irrespective of age, were more likely to have completed a will than men.

Almost half (47.9 per cent) of the men and more than two thirds of the women who had not completed wills indicated that they would like legal assistance to do so. Stakeholder interviews confirmed that there was a clearly identified legal need in this area:

People would fill out wills if they could do it for free. If they knew how to do it. That would be a good course to run in the community. If you could help people fill it out, you'd probably get half the community to come and do it. With DOCS the way they are you are better off having it in your will where your kids should go. (*Wagga men's focus group participant*).

You would get some interest in filling out a will if someone came out and helped. No-one really understands all about the wills, or the legal way about it. (*Tabulam men's focus group participant*).

I'm worried about that. It's a huge issue, a huge issue, and we know nothing about it. If people had information and assistance they would do one. It could be part of what happens when people sign up for a funeral fund. Especially if people have children from different marriages. (*Indigenous legal support workers, Dubbo*).

Stakeholders also identified the need for information to be provided about wills, but emphasised the need for this information to be appropriate for the particular community:

There are fights over who gets what property and money, and people say it would be better if there was a will to sort it out. We want to set something up here but the courthouse isn't the right place, people don't feel comfortable here. We'd like a legal service to come out and do information sessions and provide help. (*Indigenous legal support workers, Bourke*).

There is a need to look at cultural criteria that may be important to Indigenous people but that don't fit into the mainstream approach to wills. Births Deaths and Marriages did a birth certificates drive which was very successful – 300 people in a couple of days. (*Indigenous legal support workers, Dubbo*).

K Family Law and Department of Community Services Related Needs

The research indicated that children's matters, especially those involving DOCS, were among the most important for Indigenous people:

[Care and protection is] one of the highest priorities of representation needed and proactive assistance for clients, otherwise we are going to have another Stolen Generation, and another one after that, and another one after that. (*Legal practitioner, Redfern*).

The family law needs of Indigenous people in NSW were centred strongly around issues concerning children. The two major areas of concern for Indigenous people are residency and contact with children arising from partner separation, and issues in relation to removal of children by DOCS. The evidence suggests that family law matters tend to be worked out by the parties without legal assistance.

A significant issue reiterated by focus group participants and stakeholders alike was the lack of knowledge and access to family law:

Some of the main issues I see particularly with family law is that we don't access it ... which then gives not many of our people legal status in family law... I guess

we mostly keep our family business internal as well ... In family breakdowns, mum and dad just decide among themselves, which isn't appropriate, because dad may decide he'll just come and take the kids. Or the old people step in if the parents aren't doing well, and then they've got no legal support, and basically the child has no legal status. (*Indigenous legal support worker, Dubbo*).

If we have a dispute [with family law] we try to work it out ourselves. We don't want to bring in lawyers because it costs money. Where are these blackfellas going to get money for lawyers? (*Tabulam men's focus group participant*).

I think Aboriginal people have lost a lot of our children to family law, because we just haven't gone to court. If it is against a non-Aboriginal person, they're more powerful, they've got more money, so we've lost our children, and then it appears that we didn't really want our children. (*Indigenous legal support workers Dubbo*).

They come to us but we don't really know much about it. Because it is a touchy subject, isn't it? Criminal law stuff, we spin out a lot of that stuff because we do it all the time. (*Indigenous legal support workers, Walgett*).

Our clients find it difficult understanding the forms, difficult understanding the process. (*Indigenous legal support workers, Dubbo*).

Analysis of the focus group surveys indicated that very few people sought legal advice in relation to the issues around family law and DOCS associated matters (14.9 per cent). Although the numbers were small, Indigenous women were more than two and a half times more likely to seek legal assistance than men.

L Children

Focus group participants were asked whether over the last couple of years, they had any problems concerning residence (custody) or contact arrangements (access) in relation to their children or grandchildren. Overall, 17.2 per cent of participants identified an issue relating to custody or access. Indigenous women were more likely (20.8 per cent) to identify these issues than men (13.5 per cent).

Focus group participants were also asked whether they had experienced any problems in relation to children being taken into care, or problems concerning fostering, adoption or guardianship. Overall, 16.2 per cent of participants identified an issue relating to care matters. Indigenous women were more than twice as likely (22.5 per cent) to identify such as issue than men (9.9 per cent).

Both focus group participants and stakeholders identified profound inequalities in the matters relating to child protection agencies and Indigenous families – often in situations where the family had no timely legal advice and the results might lead to the removal of a child. There was wide-ranging dissatisfaction among focus group participants concerning their interactions with DOCS:

I'll get a bomb and put it underneath them and blow them up. (*Dubbo women's focus group participant*).

I think they forget who they give the kid to sometimes! (*Dubbo women's focus group participant*).

Stakeholder interviews indicated that the removal of children by DOCS was a major concern in various communities:

Since I returned to Walgett, all I'm hearing is that DOCS are taking kids. (*Indigenous legal support worker, Walgett*).

DOCS remove the children far from the family, and family find [it] too hard to get to the child by public transport – in remote places there is no direct route. (*Indigenous legal support worker, Bourke*).

Many stakeholders commented on the apparent lack of legal advice or representation for parents in cases where their children are being removed:

DOCS sends a letter to a mother to come to court and she appears without representation, not realising that she is there to answer an application to take her kids. She has no legal support then in that proceeding. (*Indigenous legal support worker, Bourke*).

It would be good if there was an Aboriginal liaison officer here so the family could come and tell them, 'There's an aunty who can take the kid', to avoid children being moved to a different town. Otherwise there is no alternative presented to the Magistrate other than the recommendation by DOCS about what should happen. (*Indigenous legal support worker, Walgett*).

What we need is if we can get people aware of their rights and get some advice from a solicitor beforehand. Instead, what happens is that the kids are going into care with very little fight. There is no-one there to stand up for the mother to say, 'Yes, I've made mistakes, but how about some support services to help me become a better mother?' (*Indigenous legal support worker, Bourke*).

There was a view that parents do whatever DOCS tell them:

They accept what's going on, they are very much in the dark ... We as Aboriginal people still regard DOCS as a power that we can't reckon with. We as a group of people are still scared of DOCS and we won't take them on. (*Indigenous legal support workers, Walgett*).

When people are dealing with DOCS, because of the intimidation factor, a lot of people just don't know where they can go if they believe something went wrong there, because DOCS is an organisation that is like, 'Well, this is the way it's going to go'. They are not aware that they have the right, if need be, to fight the decision that has been made. Regardless of the outcome, people should be aware that they have the right to question the decision. (*Indigenous legal support workers, Penrith/Mt Druitt*).

A number of focus group participants expressed frustration at the lengthiness and outcomes of custody proceedings, although this did not necessarily translate into dissatisfaction with their legal representative:

I'm seeking custody of my five grandchildren through DOCS. They're slow ... very slow. I've been to court five or six times, trying to get more visit rights at the moment. (*Dubbo women's focus group participant*).

I got a court order. My son died and I had to fight my daughter-in-law for access to my grandkids. She's a white girl. And I got my court order that I have them every second weekend and part of school holidays. She took off 15 months ago and I've had no contact with the children ... We've just found her and I went to court in January asking for a recovery order. They refused me, the Magistrate. If that had been a blackfella and they had breached an order they would be behind bars ... two Christmases have come and gone and I still have gifts sitting there. It's very very slow. (*Dubbo women's focus group participant*).

VI CONCLUSION: TRANSLATING LEGAL NEEDS RESEARCH INTO IMPROVED ACCESS TO CIVIL AND FAMILY LAW REMEDIES

One of the most pressing issues to emerge from the research is the general lack of community knowledge about civil and family law:

There needs to be a lot more awareness in the Indigenous community about family and civil law issues. I'm having difficulties myself learning here, trying to fit it in between doing my role; if anyone asks me about family law, I really don't know. Because you don't have the proper training, and most people wouldn't have a clue what happens in those family law matters or the civil – or where they can go. (*Indigenous legal support worker, Dubbo*).

See, these are new things to me – education and consumer issues and Stolen Wages, and people could have those issues but not know that we can deal with them. (*Indigenous legal support worker, Bourke*).

Indigenous people currently working in legal support or referral agencies do not necessarily know themselves what civil law covers or what redress may be available. Legal education is thus required at two levels: community legal education and basic legal advocacy education for Indigenous service providers.

There needs to be more promotion of what civil law is, and what it can do for the community. 'Civil' – you might as well be talking in Chinese! I think a lot of the time people find themselves in situations that, if they had known what to do about it in the first instance, they wouldn't have found themselves in X, Y, Z situation. (*Legal Aid Commission Indigenous staff member*).

One of the ramifications of lack of community knowledge and of lack of availability of services is that unaddressed civil or family needs can become criminal in nature:

[It's] sheer desperation, as far as family and civil law matters go. They have nowhere to go for any legal advice ... [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 ... They don't realise what their rights are in civil law; they don't even know what that is. (*Legal support worker Wagga*).

If the family and civil problems aren't addressed they turn into a criminal problem. They always do. Especially when it comes to the family stuff, about the kids, then it turns into someone is going to flog someone else. (*Legal Aid Commission Indigenous staff member*).

Another consequence of lack of community knowledge is that some issues are unrecognised as legal needs, although the need may be present. Three examples of this are matters concerning Stolen Wages, victims' compensation and wills: although there was no articulated urgency in relation to these areas, this was due to a lack of knowledge among participants of the advantages of entitlements that may accrue to them. Wills, for example, were not considered a priority where there was no substantial property to bequeath; but the benefits of wills for stipulating the care of dependants or burial wishes were not known. Similarly, low levels of knowledge about victims compensation or the ATFRS may result in a low level of articulated need, although the potential level of need may be much higher.

The identification of the nature and extent of civil/family law needs of Aboriginal people provides knowledge that, if harnessed strategically, could substantially improve the access that Indigenous people have to remedies in these spheres.

The issue is not a peripheral one, although it may not be as immediately pressing as Indigenous overrepresentation in the criminal justice system. Lack of accessibility to family and civil law services compromises the ability of Indigenous people to realise their full legal entitlements. Improved access to legal services for Indigenous people, particularly in relation to civil law, is likely to assist in creating the infrastructural capacity necessary for improved social conditions and for economic development. On the other hand, failure to adequately address civil and family law needs introduces a danger that these issues can escalate to criminal acts, resulting in charges and a perpetuation of the cycle of criminal overrepresentation.²⁴

Legal needs research of the kind that has now been conducted in NSW can be used by legal service deliverers (particularly Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services to whom the bulk of this type of work falls) to create focused, needs-specific services for Aboriginal clients.²⁵ Understanding civil and family law needs can thus serve as a foundation for redressing inequity in access to justice for the communities for whom this need is most urgent.

24 SLCRC, above n 4, [2.41], [2.23].

25 It is important to add that the ability of legal aid providers to adequately address the identified diverse needs depends on them being sufficiently funded/resourced to do so: see generally Chris Cunneen and Melanie Schwartz, above n 7.