



7 June 2011

Family Law Council Secretariat
3-5 National Circuit
BARTON ACT 2600

By email: naomi@unimail.edu.au

Dear Ms. Rhoades,

FAMILY LAW COUNCIL INQUIRY

INDIGENOUS CLIENTS AND THE FAMILY LAW SYSTEM

1. Women's Legal Services NSW (WLS NSW) thanks the Family Law Council for the opportunity to comment on Aboriginal clients and the family law system.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. WLS has a specialist Aboriginal Women's Legal Program (IWLP). This program delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, community legal education programs and conferences that are topical and relevant for Aboriginal women.
4. An Aboriginal Women's Consultation Network guides the IWLP. It meets every quarter over 2 days to ensure we deliver a culturally appropriate service. The members include regional community representatives, the Coordinator of Wirringa-Baiya Aboriginal Women's Legal Centre and the IWP staff. This network liaises with the WLSNSW Board.
5. WLSNSW established and auspiced the Walgett Family Violence Prevention Legal Service in 2000 and then a few years later the Bourke Family Violence Prevention Legal Service (FVPLSs). The solicitors and staff at the FVPLS worked closely to provide appropriate support, legal advice and representation to clients. The solicitors supported the FVPLS staff with community activities and legal education that was conducted in the remote communities, as transport can be a problem for our clients.



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6. The FVPLSs engaged in ongoing policy and law reform advocacy at a local level to attempt to remedy injustices and improve access to justice for the community. The work of the FVPLS also informed the Aboriginal Women's Consultation Network, the IWLP and WLSNSW in relation to access to justice issues for Aboriginal women that required law reform and policy advocacy.
7. We understand the Family Law Council has staff assigned to undertake detailed research of relevant literature and other material for this Inquiry. We do not review all of this literature in our submission. The IWLP and FVPLS participated in an extensive inquiry by Chris Cunneen and Melanie Schwartz, undertaken on behalf of Legal Aid NSW: *The family and civil law needs of Aboriginal people in New South Wales* (December 2008). We refer the Family Law Council to this Report.
8. Our submission to the Family Law Council identifies practical and cultural issues that relate to Aboriginal women engaging with and utilising the family law system in effective ways, particularly in rural and remote areas.

Accessing the family law system: Aboriginal culture

9. The experience of the legal system for most Aboriginal women has been a negative, confusing and disempowering one. Many women choose not to engage with the family law system as they are concerned that the Department of Human Services they will be involved and take their children away. A partner who is manipulating things for his own benefit or violent may reinforce this concern.
10. The ability of Aboriginal women to access the legal system without professional and ongoing holistic support is limited. Aboriginal women have often had violence inflicted on them by more than one perpetrator, as children and adults. They are particularly vulnerable and generally have moderate to severe post-traumatic stress and associated psychological conditions of varying degrees (eg. depression, severe anxiety, personality disorders). Aboriginal women are also disadvantaged by generally having low literacy levels and experience significant social, economic, geographic and cultural disadvantage. Many women have other family members experiencing similar disadvantage, as well as also being victims of sexual assault and/or family violence.

Local Magistrates-lack of family law expertise

11. Local Magistrates in both rural and metropolitan areas are often not knowledgeable or experienced in family law matters and unwilling to exercise their jurisdiction under the *Family Law Act 1975* (FLA). For Aboriginal communities in rural areas, the only geographically accessible court is the Local Court.
12. Research and our experience shows that it is unusual for Aboriginal people to use the family law system at all. Where both of the parents are Aboriginal people, it is usually the mother who initiates an application and the most likely reason is for a recovery order (often against the paternal grandparents), or where the father is a perpetrator of severe violence, has been away for some time and returned. It is rare for an Aboriginal person and certainly a mother to make an application to the court on her own and these applications are only made where the applicant has seen a solicitor and the solicitor represents them. Where the mother is an Aboriginal person and the father is not, it is more likely that the mother will be involved in the family law system.
13. In rural and remote areas, if an Aboriginal woman has applied to the Local Court for parenting orders, it is generally indicative of there being serious issues relating to the

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welfare and safety of the child and the mother. This should be the starting point for Magistrates dealing with parenting applications by Aboriginal women in the Local Court. Magistrates must be culturally aware, cognisant of the best interest of the child principles and significantly, understand the dynamics of family violence and how that affects the manner in which the matter should proceed.

14. The following case studies demonstrate these fundamental issues.

Case Study No.1

In a small town in remote NSW we acted for an Aboriginal mother who was the victim of severe domestic violence by the Aboriginal father. In both cases the father had been sentenced to gaol for the assaults on the mother and returned to the town after his release from prison. The mother was scared of the father and very worried about the children, with threats being made by him that he would take the children, or want them to stay with him.

We advised the client to apply for urgent interim parenting orders in the Local Court. We drafted the application, filed it and represented the client in the Local Court. The Magistrate told the parents on the first mention date to "work out contact between them" until there was mediation. This was totally inappropriate.

We had another case with very similar facts and the same approach by the Magistrate.

Case Study No.2

We represented a client in the Local Court in a small remote NSW town in an application for parenting orders. We drafted the orders using the correct Family Law Act terminology of "live with, communicate with and spend time with the child". When making interim parenting orders the Magistrate asked us what orders we wanted and we stated the orders using the above terminology. The Magistrate said words to the effect: "I don't know what you are talking about and anything about that. The mother has custody of the children and the father access as agreed".

Recommendation 1

Local Court Magistrates must undertake comprehensive and ongoing training in family law and family violence that includes practical training about how to apply the family law jurisdiction in the Local Court according to best practice principles.

Lack of family law practitioners in remote areas

15. In many rural and remote areas there are few family law practitioners to undertake family law work and if they are available, there are conflicts of interest because they have acted for the other party in criminal proceedings.
16. Whilst the Aboriginal Legal Service (ALS) in NSW provides duty solicitors for Local Court circuits, the ALS does not undertake family law work. Legal Aid NSW (LA) does not provide duty solicitors for family law work in remote courts. Many Aboriginal people do not distinguish between ALS and LA so that they will think they have no options.
17. Aboriginal men and women are very unlikely to follow through with a cold referral to a private solicitor. They will immediately think this is extremely costly and not be aware that Legal Aid may be available. They also will not contact a Legal Aid office by telephone and offices are not in local towns. Transport costs and lack of transport will prohibit travel to regional LA offices.
18. Where there are Aboriginal Family Violence Prevention Legal Services it is more likely that an Aboriginal woman will have the opportunity to obtain advice about parenting matters (and property division if applicable). However the FVPLSs only operate in a few towns and there are areas in NSW that are not covered by an FVPLS. In most cases Aboriginal women come into contact with the service as a result of family violence where the FVPLS solicitor has been at the Local Court on a list day for Apprehended Violence Orders, or she has been referred by local services for assistance.
19. The IWLP at WLS operates a state-wide 1800 legal contact line for Aboriginal women. The service is promoted through targeted community legal education and special project work. Aboriginal women call this advice line for advice about family violence, care and protection and family law. In relation to family law, there is usually a substantial amount of minor case assistance provided to organize warm referrals for LA solicitors or private solicitors paid by LA and other direct assistance with documents for court.

Lack of community knowledge about family law and the system

20. Our experience is that Aboriginal women have very little knowledge about family law or the family law system, particularly in rural areas. There is rarely an understanding of the difference between care and protection matters and family law matters.

Case study No.3

An Aboriginal client in a rural area wanted to divorce her husband after many years of family violence. She did not think she could get a divorce because he did not agree and that it would cost a lot of money to get a divorce in these circumstances.

21. Aboriginal peoples experience of the legal system in Australia is negative. They do not see a court as being a place that will enforce their rights or benefit them or their children. This apprehension about being involved in the family law system goes beyond the normal concerns of parents in the family law system and arises from their experiences of dispossession and treatment in the legal system. If Aboriginal women are aware of the Family Law Courts they will be reluctant to engage with them against this background. Exacerbating this issue is the real worry of many Aboriginal women that “DOCS will take the kids”, even where they are in family law proceedings.
22. We have seen many young Aboriginal mothers who are not empowered to say no to the children being with a violent father (including where there have been convictions for assaults on the mother and serious, repeated abuse). The young women think “his Dad owns him” and there is nothing they can do. These clients have come into contact with our solicitors generally through the FVPLSs as a result of family violence matters in the Local Court.
23. For most of these young women, they have a strong case for supervised or even no time with the father because of violence or other significant risks to the children. We advise them of this and a client says “So I can say no because it is not safe” but we also have to advise them about what the risks are in taking the matter to the Family Law Courts, given the existing shared parenting laws. So, the clients want orders but because it will “open a can of worms”, they will not take action and unsafe arrangements for them continue. They feel completely disempowered by family law itself (just as are many mothers who are victims of family violence). Aboriginal communities are small and there can be significant repercussions for an Aboriginal woman making applications for parenting orders. This is a significant impediment to their seeking advice (if they know where to go for it), or following through with the advice.

Inappropriateness of equal shared parental responsibility and shared parenting laws.

24. WLS is a member of Women's Legal Services Australia (WLSA). WLSA has prepared and distributed widely a Position Paper on the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (the “2011 Bill”). The Position Paper discusses the issues around family violence, equal shared parental responsibility and

shared parenting. The Position Paper can be found at www.safetyinfamilylaw.com

25. WLSA recommends in the Position Paper (amongst other things) the following:

- remove the presumption and concept of equal shared parental responsibility, or delete the reference to “equal”
- repeal the reference to time considerations
- remove the link between time considerations and parental responsibility
- remove the requirement on the court to consider any particular arrangement for time children spend with their parents.

26. We endorse WLSA's recommendations in this submission to the FLC. The Position Papers sets out the basis for the above recommendations. The problems and difficulties the current parenting laws present for victims of family violence are even more substantial for Aboriginal mothers, particularly those mothers who have moved to towns with the father away from their communities.

Case study No. 4

An Aboriginal woman in small remote town had family law orders requiring her to stay in that town if the children were to live with her. This was not her country, she had no family or other community support. The father was violent to her. He and his family harassed her in town. She had been told to be “nice to him” because if she did not he could say she was not being helpful-a “friendly parent”.

27. If it is not the Aboriginal woman's own community she is isolated and left without support. This allows the ex partner to continue to intimidate and harass her. If she is unable to avoid the ex partner she may become housebound for her own safety. This impacts on her children as she is unable to attend the local school or community functions. The woman is at risk of developing serious emotional problems.

28. Orders made in parenting matters can be very difficult to meet for Aboriginal clients. For example, if there is an order for counselling and it is not in the local town or area and there is no private transport, the client will not be able to attend. Courts and practitioners need to be aware of the daily practicalities for Aboriginal people in how and when they can attend court ordered programs and other services.

29. We have previously mentioned that there are many issues around many topics to deal with on a daily basis so priority is given to an issue when it reaches a crisis point. It is difficult for Aboriginal women to stay engaged with the family law system for a long period of time as other issues may reach crisis point and therefore become a priority.

Inadequate and inaccessible mediation services

30. Many Aboriginal men and women have no idea about Family Relationship Services (FRCS). Not all FRCs have Aboriginal workers and our understanding is that Aboriginal people rarely use them. One reason for this is likely to be that the FRC is seen as “Government” and feared. Another reason is that FRC's are very mainstream services and focused on the nuclear family model and Anglo Saxon family raising practices

31. Whilst FRCs are located in large regional centres, they are not in most small towns or anywhere close to where Aboriginal people live. The lack of private and public transport and costs of travel and accommodation mean attending these services is impossible. Additionally, the long process involved in FRCs from intake to a family dispute resolution session and the way the information about the process is provided in mandatory sessions is alien to Aboriginal people, even if they do manage to travel to a regional centre.
32. We have unsuccessfully attempted to organise legal aid conferencing (mediation) for clients in remote towns where the mediator travels to the town. This is impracticable due to the costs involved and sometimes the uncertainty of whether the clients can attend on the day (eg. if there is funeral). Telephone conferencing is available, but is not culturally appropriate, particularly where the solicitor is not with the client in person, but also on the telephone.

Recommendation 2

Develop a specific family law mediation training model that is more culturally appropriate and trains local Aboriginal people as mediators. This training should adapt the current accredited family law mediation training and provide subsidised access. It is imperative that Aboriginal community people be accredited to facilitate the resolution of local family issues in culturally appropriate ways.

Judicial training in Aboriginal cultural awareness

33. Face to face communication is best for Aboriginal people as their own language is based on non verbal communication. They need time to be able to process all the information received before agreeing to something. At the moment Aboriginal women are making legal agreements without fully understanding what they have agreed to do. They are not confident to disagree, are worried about being seen as uncooperative and fear their children will be taken away by the Department of Human Services.
34. Lack of transport and long distances without public transport affect the ability of Aboriginal people to attend court.
35. A funeral takes priority over any other event. This will also affect attendance at court and court ordered programs. As the individual is an important part of his/her community any funeral in the community affects each person.

Recommendation 3

All Judicial officers in the Family Law Courts must undertake regular Aboriginal cultural awareness training that focuses on issues limiting Aboriginal peoples access and engagement with the family law system.

Recommendation 4

The Family Law Courts need to be more user friendly. This is a very scary process for those not familiar with the law. Aboriginal women need more information about why it is beneficial to use this system right from the time of separation.

Recommendation 5

All services involved in the Family Law system need cultural awareness training so that they can provide more timely and clearer information to Aboriginal women. Aboriginal women need information on steps they can take before a recovery order is needed.

Recommendation 6

The Department of Human Services should provide more family friendly information on steps to take when using the Family Law System. This would show they support this process and reassure Aboriginal women that they are not putting their children at risk of being taken if they engage in the process.

If you would like to discuss any aspect of this submission, please contact Donna Hensen, Indigenous Women's Legal Program Coordinator or Dianne Hamey, Supervising Solicitor Indigenous Women's Legal Program on 02 8745 6900.

Yours faithfully,

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