

Aboriginal access to civil law remedies

By Norman Laing and Larissa Behrendt

We already know that Aboriginal people continue to be over-represented in the criminal justice system, a fact confirmed by the Productivity Commission's report, *Overcoming Indigenous Disadvantage 2005*. But in documenting the large disparity between the socio-economic situation of Aboriginal people and other Australians – lower levels of education, higher levels of unemployment and poorer standards of education – the report also suggests that this most disadvantaged sector of the community is not accessing civil law services and remedies that many of us take for granted.

AN HISTORICAL CONTEXT

Many misconceptions about Aboriginal people remain prevalent today. One is that most Aboriginal people live in the remote parts of Australia (or at least the 'real' ones do). Other misconceptions include the belief that Aboriginal people who live 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 are particularly enduring. Those who remember their history correctly will recall that the referendum made two changes to the constitution: to include Aboriginal people in the census and to give the federal government the power to make laws in relation to Indigenous people.

In 1968, the government established the Council for Aboriginal Affairs and, later, 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 remained in the experiences and opportunities open to an Aboriginal child compared to its non-Aboriginal counterpart.

While constitutional change may have given additional powers to the federal government, the changes did little to alter many of the dominant, negative views about Aboriginal people that pervaded Australian society at the time of the referendum. These attitudes, policies and practices were only brought to light with the publishing of the Report of the Royal Commission into Aboriginal Deaths in Custody.¹ The Commission highlighted how the events of the last century continue to influence the lives of Aboriginal people today. It ultimately found that most of the 99 deaths that were investigated were, in fact, caused by 'system failures or absence of due care'.

BARRIERS TO ACCESSING CIVIL REMEDIES

The project undertaken by the Law and Justice Foundation to assess

Indigenous people's access to justice and legal needs in NSW identified several points of interest. In its *Data Digest*, it identified that enquiries from Aboriginal people to Legal Aid duty solicitors and NSW community legal services made up to between 4% and 4.8% respectively, over twice the percentage of Indigenous people living in the state (1.9%). This statistic shows a steady increase in access between 1999 and 2000. However, enquiries by Indigenous people to the Legal Aid Commission NSW (LAC) constituted about 2% of all enquiries – a figure that has not altered significantly since 1999. Enquiries concerning crime made up 36% of all enquiries from Indigenous people, and family law 31%. However, considering that Indigenous people are over-represented at a much higher rate in the criminal justice system and as victims of racial discrimination, they should be accessing these services much more than these statistics indicate.²

In its report on public consultations, the Law and Justice Foundation identified the following barriers confronting Indigenous people in accessing Legal Aid services:³

- a reluctance to involve outsiders in matters that are considered private;
- a lack of awareness about 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 the legal system's reluctance to 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;
- the lack of cultural awareness, sensitivity and compassion among justice system staff and legal service-providers;
- the lack of confidence in confidentiality, support and empathy when

Aboriginal people's negative experiences of the civil law have not encouraged them to explore their legal rights to the fullest extent.

- accessing NSW Legal Aid services;
- the lack of Aboriginal people working in the justice system;
- the lack of a relationship between Legal Aid offices and local Aboriginal communities;
- intimidation in approaching legal services;
- the lack of awareness of the services of Legal Aid NSW;
- the need to book Legal Aid services;
- location of Legal Aid offices;
- the lack of public transport to Legal Aid's offices.⁴

The Law and Justice Foundation report also identified the civil law areas where Indigenous people find it most difficult to access legal assistance: native title claims, intellectual property and cultural heritage issues.⁵

Nor have Aboriginal people's civil law experiences encouraged them to explore their legal rights to fullest extent, or develop any confidence in the system, given the general failure to obtain a remedy (from high-profile cases such as *Gunner and Cubillo*,⁶ where Aboriginal plaintiffs unsuccessfully sought to use tort and equity to seek reparations for the impacts of the policy of removing Aboriginal children from their families, to the limited scope of anti-discrimination law – which resulted in orders being made in only nine cases in the 2003-2004 financial year). >>

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But distrust and a limited understanding of the legal system are just two barriers to overcome when encouraging Aboriginal people to explore their civil law rights. An inherent distrust of governments and their officers, and the lack of, or limited, education of some in the Aboriginal community also inhibit access to the appropriate legal services.

Facing the legal system and its formalities is a daunting experience for everybody, not just Aboriginal people. However, it is a lot more frightening for people whose only contact with a system involves the police and criminal charges. The fear, and often misunderstanding, by some Aboriginal people – that the law is only for responding to police charges

– means that many civil law matters remain 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 so far removed from the familiar criminal justice system that they are simply not pursued.

The Legal Aid Commission (LAC), Community Legal Centres (CLCs) and members of the Aboriginal Legal Services (ALSs) provide an under-funded and often unappreciated service to our people. But what continues to face Indigenous people when accessing these services is the lack of cultural awareness, sensitivity and compassion among the solicitors. This situation, it appears, may get worse before it gets better: most Aboriginal legal services are being publicly tendered; and Indigenous lawyers are under-represented in most law firms and CLCs.

The ALS has historically been focused on criminal law; it is work that is always under-resourced, leading to an endless and frustrating cycle. Although specialists in criminal law, ALS solicitors are sometimes asked to undertake Aboriginal civil work. Sadly, however, many of those enquiries come up against the harsh reality that the ALS lacks a dedicated civil service, and often the requisite knowledge base or resources to assist Aboriginal people in the civil law arena.

Issues such as family violence, residence and contact disputes, and the abduction of children are rarely dealt with by the ALS. While the Aboriginal and Torres Strait Islander Legal Services in Sydney and western Sydney employ a family law solicitor from time to time, services in far western and north-western NSW generally do not have family lawyers and do not usually act in family law matters.

A civil law service is therefore basically non-existent in ALS offices in rural and regional areas of NSW. Due to the lack of civil representation by the ALS, families will more often

than not incur unwelcome debts, live with injuries for which they will never be compensated, become involved in unjust financial arrangements, accept racial vilification and suffer adverse administrative decisions. Unfortunately, these outcomes can be directly attributed to the ALS prioritising its caseloads and directing its allocated funding to the high number of criminal law matters that it handles.

At present, the LAC has an arrangement with the ALS, where LAC officers visit the ALS office at Blacktown to advise clients in civil law matters. These officers attend Fridays each fortnight and, on average, address enquiries from three Indigenous people per visit.

A ROLE FOR CIVIL REMEDIES

It is well-known that Indigenous people are over-represented in the criminal justice system. The civil law and its potential remedies, on the other hand, is something many Indigenous people simply do not know anything about. In our history, Indigenous people were subjected to racist and discriminatory treatment and had no alternative but to accept it. Sadly, this acceptance is intergenerational, with many Aboriginal people today still unaware that they have equal rights and may have civil remedies available to them.

The Law and Justice Foundation highlighted a number of ways in which all lawyers can try to restore the balance in the civil law arena for Aboriginal people. One would be to rebuild trust and confidence in the profession and in the legal system overall by increasing the number of Indigenous lawyers at the front line in the LAC, the CLCs, the ALS, and especially in those law firms tendering for legal services. Another would be to better educate the legal profession about Aboriginal culture and history. Most importantly, we all need to ensure that Aboriginal people are themselves educated and aware that civil law services are there to help them.

It has been 35 years since a collective body of both Aboriginal and non-Aboriginal people established the ALS at Redfern in response to the continual

police harassment of Aboriginal people and the lack of legal representation available to them. The ALS has been an advocate for Aboriginal people and has produced a dramatic change in the dynamics of the criminal justice system. It has substantially reduced 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 35 years ago to act and bring about a greater level of equality. The time has come for our generation to continue that legacy and not let Aboriginal people, and their access to civil law, be a casualty of that battle. ■

Notes: **1** Tabled in May 1991. **2** S Scott, A Eyland, A Gray, A Zhou and C Cumarelos, *Data Digest: A Compendium of Services Usage Data from NSW Legal Assistance and Dispute Resolution Services 1999-2002*, Law and Justice Foundation of NSW, Sydney, 2004. **3** L Schetzer and J Henderson, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for People in NSW – Stage 1: Public Consultations*, Law and Justice Foundation of NSW, Sydney, 2003. **4** 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, pp63-4. **5** *Ibid*, pp65-6. **6** *Cubillo and Gunner v Commonwealth of Australia* (2001) 183 ALR 249, full court of the Federal Court, 31 August 2001.

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