JUSTICE IN FAMILY LAW: THROUGH THE EYES OF
ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN

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INTRODUCTION

The impact of colonisation on Aboriginal and Torres Strait Islander Australians has been well documented. The resulting dispossession and disruption to families and communities with the consequent ongoing social, economic and emotional effects have been highlighted by the Royal Commission into Aboriginal Deaths in Custody,1 Bringing Them Home,2 the Aboriginal and Torres Strait Islander Women’s Task Force on Violence,3 and has been recognised by the Full Court of the Family Court of Australia in B v R.4

The Aboriginal and Torres Strait Islander Women’s Legal and Advocacy Service (‘ATSIWLAS’) in Brisbane, provides services for Indigenous women. Both writers were employed as solicitors at ATSIWLAS. Indigenous women are arguably the most marginalised and disadvantaged group in Australian society. Indigenous women’s issues have been given less prominence in contemporary Indigenous discourse with an apparent differential access to available avenues for justice. In the Australian Law Reform Commission Report, Equality Before the Law: Justice for Women, it states:

Aboriginal and Torres Strait Islander Legal Services do not currently benefit women and men equally. This is the result of the combined effect of two common practices. First, most services implement a policy of not acting for either party in a matter between two indigenous clients. Second, most legal services give priority to defending criminal cases over other matters. On their face these practices appear gender neutral, but their effect is to indirectly discriminate against indigenous

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2 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Bringing Them Home (1997).
3 Boni Robertson, Aboriginal and Torres Strait Islander Women’s Task Force on Violence Report (1999).
4 [1995] FamCA 104.
women...... Because of the barriers of cost, language and cultural alienation which discourage most Aboriginal and Torres Strait Islander people from using mainstream legal services, indigenous women who can obtain no assistance from their own legal services are left without legal recourse.\(^5\)

The disadvantage that Indigenous women suffer as a result of this inequity is particularly evident in the practice of family law. ATSIWLAS provides advice and referral for Indigenous women and assistance to self-represent where they have been unable to obtain legal aid or other representation. In the course of our work we have undertaken direct consultation with many Indigenous women about their experiences in, and perceptions of, the family law system. It is apparent from this consultation that Indigenous women involved in family law matters experience particular and identifiable problems and disadvantages, which appear to be exacerbated by practices and procedures in key agencies. These disadvantages can be seen in:

1. Barriers in accessing legal aid;
2. Lack of appropriate support mechanisms for Indigenous women in key agencies;
3. Lack of cultural sensitivity and awareness of professionals working in family law; and
4. Outcomes for Indigenous women in the Family Court.

One particular outcome of these disadvantages which we believe needs to be addressed through a review of procedures and appropriate research, is an emerging pattern of Indigenous women losing residence of their children to non-Indigenous partners.

Our research of the literature has indicated that this has previously been identified as an issue in a paper by Kate Burns, ‘Indigenous Women and Family Law’\(^6\). Our search of the literature has revealed that there has been little research in this area, however our discussions with Indigenous women and with other legal services who work with Indigenous women in family law, have also raised this issue as a concern. In her article, Kate Burns discusses a sample of mainly unreported decisions of the Family Court, which in her view are statistically significant:

…of the 14 single instance decisions where residence was contested between an indigenous mother and a non-indigenous father or a non-indigenous relative, the indigenous mother obtained a residence order in four cases (approximately 29%)……. In the seven residence disputes where both parents were indigenous, the mother was successful in three cases (approximately 43%).\(^7\)

Although this paper will address only those situations where the father is non-Indigenous, we include the second statistic for the sake of completeness, as we believe it raises further issues of concern that may be addressed at a later


\(^{7}\) Ibid.
time. We believe that this statistic may reflect the differential access to services and resources available to Indigenous women.

The difficulties associated with researching these matters thoroughly arise because the Family Court does not collect statistical data about Indigenous clients and does not make provision for self-identification. In addition, difficulties arise because of the confidential nature of Family Court proceedings.

BARRIERS TO ACCESSING LEGAL AID

a) The Merit Test for Legal Aid

From our experience, the women that we see fail the merit test applied by Legal Aid Queensland on the basis that they have little prospect of success. However, the application of the merit test entrenches middle class values because of the consequence this has in failing to challenge existing law. If there is to be any challenge or change to the existing law and its incorporation of appropriate cultural considerations, Aboriginal and Torres Strait Islander women must have the opportunity to be represented in Court proceedings to ensure that cultural issues are raised in the Court. This is necessary to ensure the development of law along culturally appropriate lines.

b) The Procedures in Accessing Aid are Bureaucratic and Alienating

The process for accessing Legal Aid is bureaucratic and alienating for many Indigenous women, particularly given the distrust that Indigenous people have of government and bureaucratic institutions based on the historical interactions of Indigenous people with governments and bureaucracies. Legal Aid application forms require applicants to write out their legal problem, however many Indigenous women have difficulty writing about their situation. Our experience from working with Indigenous women in the practice of family law, is that many Indigenous women are reticent when discussing personal issues. Many women feel 'shame' about discussing issues of violence and that difficulty is even greater where there is a requirement to write about those issues. Failure to write all relevant facts in the Legal Aid application can result in Indigenous women failing the merit test.

c) Lack of Training of Grants Officers and Preferred Suppliers

Grants officers and preferred suppliers who are not experienced in dealing with Indigenous women and who may be unaware of specific issues relevant to Indigenous women, may not be in a position to identify and address the specific needs of Indigenous women. In one instance an Indigenous woman applied for legal aid and was granted aid for a legal aid conference. The woman's first two languages were Indigenous and English was her third language. Her solicitor, a preferred supplier, failed to explain that legal aid was
granted for the legal aid conference only and that the client would have to re-
apply for aid for the interim hearing. The woman attended the interim hearing
fully expecting that she would be represented by the preferred supplier and
believed that the preferred supplier had mistakenly failed to attend the interim
hearing. The woman was required to represent herself in this proceeding and
her distress, her lack of understanding of formal court language and her
ignorance of the Court process contributed to orders being made in favour of
the non-Indigenous father who had brought the application. It was only after
attending at a Community Legal Centre (‘CLC’) that the woman was advised
that she should have reapplied for aid for the interim hearing.

The woman had identified in the legal aid application as an Indigenous
person. It would have been preferable if, in this instance, the grants officer had
made the preferred supplier aware that the client was an Indigenous woman.
The preferred supplier may then have been more aware of the need to fully and
clearly explain the requirement to obtain further aid after the conference.
Cultural training for grants officers and preferred suppliers would, in our view,
address some of the problems Indigenous women have in accessing Legal Aid.
Adequate cultural training would ensure that grants officers and preferred
suppliers are aware of differences in communication methods of Indigenous
people and that Indigenous people may not be as sophisticated as non-
Indigenous people in using, accessing and understanding the justice system and
Legal Aid.

In another instance, a traditional woman from Central Australia was
granted Legal Aid. The woman was living in Queensland but had to return to
her traditional country for a funeral. The woman informed her solicitor, a
preferred supplier that she had to return to her country. The woman's solicitor
was unable to contact the woman while she was away from Queensland and as
a result the grant of aid was withdrawn. The woman later explained to the
writers that she was required to return for 'sorry business' and that in her
community, members of the tribe are required to 'face it', therefore she had to
return to her country. In this situation the grants officer should have liaised
with the preferred supplier to take into consideration these particular
circumstances. Cultural awareness training could prevent situations of this type
from occurring again.

d) Time Delays

For Indigenous women there are several consequences of any delay in
granting legal aid. One consequence is that if the children are residing with the
father when the application for aid is made, that situation will continue for the
duration of the delay until the matter is heard by the Court, providing the father
with a basis for seeking to maintain the status quo at the hearing. Another
consequence is that the applicant may decide not to proceed. That decision may
be attributable to either a change in the woman's support networks during the
period of delay or the woman's perception, based on the delay, that aid will not
be granted.
The need for timely processing of legal aid applications can be seen in the following story reported by one woman. An Indigenous woman was severely physically disabled as a result of domestic violence committed by the father of her children, with whom she was no longer in a relationship. The children had resided with the father for one year prior to the incident and continued to do so after it. The woman's mother sought legal advice from a CLC on the woman's behalf and as a result, the woman was assisted to complete a legal aid application for residence while she remained in intensive care. The urgency of the matter was raised in a letter that accompanied the legal aid application. In the week following the application being made, the CLC telephoned the legal aid office to determine the status of the application. The CLC was advised that no information could be disclosed because they were not on record as representing the woman. However, it could be advised that the application was 'in the system'. The problem with the approach taken by legal aid in this situation is that the woman, as a result of her severe physical disability, was unable to telephone the legal aid office on her own behalf.

No response was received from the legal aid office for some five weeks, despite repeated messages being left at the legal aid office, and after the five week delay the CLC was finally advised, after further inquiries, that the application had been approved. During the five week period of delay the woman's mother had to return to her home in another state due to financial constraints, and as a result the woman no longer had the support of her mother at the hospital every day. The father then began visiting the mother at the hospital every day accompanied by the children, who remained in his care. When the legal aid officer visited the woman at the hospital six weeks after the application for legal aid was made, the woman advised that she no longer wished to proceed and is currently considering reconciliation, although she had previously been adamant that she wished to proceed.

**LACK OF EFFECTIVE STRUCTURES IN KEY AGENCIES TO MEET THE NEEDS OF INDIGENOUS WOMEN**

Indigenous consultants employed by the Family Court are based in Darwin, Alice Springs, Cairns and Townsville. The Brisbane Registry of the Family Court is assisted by the consultant in Darwin. There are no interpreters available for Indigenous languages and there appears to be no structure in place to obtain an interpreter for Indigenous people when required.

Communication methods in the Family Court and in Legal Aid conferences are often not suited to Indigenous people. Indigenous women have reported that the environment in which legal aid conferences and family court counselling occurs is alienating and intimidating. From our experience in family law practice, Indigenous women often require an extended time period to disclose information and sometimes matters such as domestic violence or sexual assault may not be disclosed until after several meetings.
LACK OF CULTURAL SENSITIVITY AND AWARENESS OF INDIGENOUS ISSUES BY FAMILY REPORT WRITERS

As Abela and Borg have stated:

…the Justice System is a dominant white Anglo-Saxon system derived from the United Kingdom, it is adversarial and of necessity, institutionalised. There are accepted hierarchies, patterns of behaviours and strict boundaries in relation to what is acceptable and unacceptable conduct and it acknowledges, supports and entrenches the positions, behaviours, hierarchies that it recognizes and understands.8

In our experience this entrenchment of ‘white Anglo-Saxon’ values significantly translates into a lack of cultural awareness and sensitivity of Aboriginal and Torres Strait Islander culture and values in many family reports prepared by counsellors or social workers for submission into evidence in the Family Court. The impact of family reports in interim hearings in the Family Court is a critical factor in determining the final outcome of these hearings. Once orders have been made for interim residence, matters often do not proceed to trial. Where they do, the maintenance of the status quo in minimising disruption to children is a significant factor taken into account in final determination.

Many of the women we have seen who have not gained residence of their children have reported a perceived lack of sensitivity and awareness of Indigenous issues by family report writers. Some of the women were unaware of the significant impact that these reports would have on Court decisions. Their concerns are based around the following:

a) Time

Family report writers spend limited amounts of time in assessments. The women feel that inadequate amounts of time are spent with them to assist them to feel comfortable in disclosing very personal aspects of their lives.

We are privy to several instances where Indigenous women have disclosed limited or no details to report writers of past domestic violence directed towards them by their non-Indigenous partner. This non-disclosure is based on the ‘shame factor’ discussed earlier in this paper. In every instance, however, the non-Indigenous partner identified the woman as having problems with negative behaviours towards him and the children. In each report it appeared that the report writer accepted the non-Indigenous partner’s ‘version’ of violence in the relationship and several report writers commented favourably on the man’s openness in discussing these issues.

In our experience we have identified how difficult it is for Indigenous women, for whom the maintenance of the family unit is so significant, to discuss violence in their relationships. As a result our consultations are often lengthy and sometimes run into several hours or several appointments before disclosures are made and we obtain all the information we require. The limited time spent with Indigenous women by family report writers is inadequate to establish a confidential relationship that encourages disclosure of sensitive personal information.

**b) Communication Style**

One young woman reported that she felt intimidated by the direct questioning style of the report writer, which reflects the inability of the report writer to communicate in a culturally appropriate way. Lack of willingness to disclose sensitive personal information also reflects the entrenched distrust many Indigenous women have towards agencies that impact on the placement of children, for well documented historical reasons. This reluctance to communicate with report writers is apparent in the significantly larger proportion of some of the reports dedicated to issues raised by the non-Indigenous father.

**c) Subjectivity of Reports**

From our analysis of the reports there appears to be a high degree of subjectivity which has operated in favour of the non-Indigenous partner. For example, in one report the writer commented favourably and extensively on the father’s provision of material goods such as toys for the children, whereas the writer referred to the lack of these items in the mother’s home. We suggest this emphasis reflects the lack of understanding of Indigenous culture where a stronger reliance is placed on interaction within the extended family group rather than on the availability of material possessions. However, in another report the mother’s contribution in providing clothing and other items for the children’s care, in spite of her own limited economic circumstances, received little emphasis.

In a further example, one report writer commented unfavourably and extensively on the instability of the mother’s earlier accommodation history. In another report a similar pattern of accommodation by the non-Indigenous father appeared as only a passing reference.

**d) Family Involvement**

In some reports it was noted that although family members of the Indigenous woman were invited to be interviewed by the report writer, they did not attend. The reasons for such non-attendance, we believe, and this is supported by the women to whom we have spoken, is again the historical distrust and alienation Indigenous people feel in dealing with bureaucracies.
The practical outcome is that there is a perception by the report writer that there is more family support for the non-Indigenous father’s position.

A feature of the reports that receives little emphasis by the Court is the employment history of the parties. Many of the women we see report that they have worked throughout the relationship and that their non-Indigenous partner has ‘never worked’, or did not do so in the course of their relationship. Many women report that they do not want their children to be caught in the ‘welfare cycle’ and that they are endeavouring to further their education, or to remain in employment to improve their economic circumstances, and to present a positive role model for their children. This is consistently raised as a concern by the women we have seen and the father’s availability to care for the children during the day has been a factor in the outcomes of residence applications. Many Indigenous women suspect, rightly or wrongly, that their non-Indigenous partner’s motivation for seeking to retain residence of the children is to obtain the parenting benefit. In one instance, it was reported that after obtaining residence of the Indigenous children the non-Indigenous partner proceeded to obtain a housing loan on favourable terms from ATSIC.

e) Ethnocentric Stereotyping

In analysing the reports we identified an apparent preference by report writers for interactions and environments for children who reflected the ‘white Anglo-Saxon’ values discussed by Abela and Borg. There was a clear tendency to comment favourably on the material wellbeing the children would experience while in the non-Indigenous partner’s care and to focus extensively on interactions which are commonly considered to be favourable, such as the child responding to a father’s more directive parenting style. Differing child rearing practices and lack of emphasis on material possessions favoured by Indigenous cultures received no weight.

The issue of children maintaining links with their Indigenous culture was dealt with in only a limited way by all report writers. The requirement to include this element as part of the report appears to be met by the report writers merely commenting on the importance of children maintaining their culture and links with their Indigenous parent. There appears to be a lack of understanding by report writers of how culture is transmitted. It was also noted favourably in the reports that some non-Indigenous fathers had involved themselves in teaching Indigenous culture to the children. Any suggestion that this would be sufficient for the children to maintain their culture is in our view flawed.

From our observations it appears that there is an urgent need for cross-cultural training of report writers. There seems to be a lack of understanding by report writers of the impact on children of dislocation from Indigenous culture. In our view, the overall wellbeing of the child needs to be assessed in light of current research and the historical context as has been recognised by the Family Court in the decision in B v R.\textsuperscript{9}

\textsuperscript{9} [1995] FamCA 104.
e) Outcomes for Indigenous Women in the Family Court

In 1995 the *Family Law Reform Act* amended section 68F(2) of the *Family Law Act 1975* (Cth), requiring the Court to consider Indigenous culture in determining the best interests of the child. However as Abela and Borg have noted:

> Without appropriate consideration of culture, the Court aided by the various professionals, may disrupt their children’s lives and their lives, and attack basic cultural values and worth.  

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We do not believe that the reference to the consideration of culture in section 68F(2) provides enough guidance to the Court in the consideration of cultural issues. We believe that this is reflected in the outcomes for Indigenous women in the Family Court, however, these outcomes are difficult to quantify.

The Court does not presently ask Indigenous people to self-identify, thus precluding the collection of accurate statistical information. Significantly, the staff at the Family Court Registry in Brisbane and at Legal Aid Queensland have advised us that few Indigenous people utilise their services. In our experience this is not in fact the case.

The lack of Indigenous Family Court consultants to assist the Indigenous community in the Brisbane Registry creates significant problems. The logistical difficulties in providing court support to clients in Brisbane from the Darwin registry needs no explanation. We suggest that if there is no mechanism for self-identification of Indigenous clients and no visible court based Indigenous consultants available to provide support then the special needs of this group cannot be identified and addressed by the Court. We see many Indigenous women and assist many Indigenous women who self-represent in the Family Court. Many are frustrated by their experiences and the procedures they are required to undergo. We believe that if statistics were collected by the Family Court the number of people who self-identify would indicate a significant need for support services in the Brisbane Registry.

In our day to day work we have been confronted by many sad and difficult cases involving the loss of residence by Indigenous mothers to non-Indigenous fathers. For many women our service is a service of last resort. The women we see who have lost residence of their children at the interim hearing are often unable to obtain a grant of aid to pursue the matter further. However, these women genuinely believe that it is not in the best interests of the children to remain with the father for a number of reasons. Some common features in these matters are emerging. Firstly, all women have alleged domestic violence against their non-Indigenous partner. In five recent matters, this allegation has been ignored or actively disbelieved by the Court. In each case the non-Indigenous partner has alleged that the Indigenous woman is psychiatrically unstable, violent and aggressive, or the non-Indigenous partner has tapped into

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10 Abela and Borg, above n 8, 3.
cultural stereotyping, such as that the mother is dirty and untidy and is unable to care for the children. In four out of five of these matters it is the non-Indigenous parent who has initiated the court action, which we believe is reflective of not only the Indigenous woman’s historical distrust of bureaucratic institutions, but also her desire to ‘work things out’ in a more culturally appropriate manner and attempt to avoid the more adversarial nature of the court system. We suggest that it also reflects a greater sophistication by the non-Indigenous partner in dealing with bureaucratic agencies.

The delay of one woman who had been a primary caregiver of the children, coupled with allegations of emotional instability made against her by the husband, resulted in interim orders being made in favour of the non-Indigenous partner. The susceptibility of some judges in readily accepting cultural stereotypes has, in the view of the women we see, resulted in residence being granted in favour of non-Indigenous partners.

It is not our intention in this paper to review the decided cases in this area but merely to report the perceptions of, and experiences in the Family Court of the Indigenous women who make up our client base. It is however important and appropriate to make reference to the important case of B v R.11 In that case the custody of a two year old girl was at issue. At the time of trial the child had resided with the father for approximately fifteen months. The mother had very little contact with the child in the intervening period.

At the trial the separate representative sought to adduce evidence of the experiences of a number of Aboriginal children raised in non-Aboriginal environments and in particular the difficulties which were commonly encountered by these children, and the damage to identity and self esteem which they suffered. The trial judge did not regard that evidence as relevant and sought to restrict its adduction and did not refer to it at all in his reasons for judgment.12 The trial judge’s decision was overturned on appeal. The reasons for the decision of the Full Court provide detailed guidance for courts and for separate representatives in dealing with residence matters between Indigenous and non-Indigenous parties. It is clear from this decision that the Full Court supported the admission of evidence as described above. In addition, the Court considered whether the admission of such evidence would ‘allow some form of discrimination or preferential treatment’. The Court’s view was that this was not the case.

What we have sought to demonstrate is that any argument that seeks to prevent the adduction of the type of evidence sought to be called in this case, or the attachment of any weight to such evidence, through a resort to principles of equality or non-discrimination, relies on a flawed and discredited understanding of those concepts. With respect to the trial judge, if there is evidence led or sought to be led, which illustrates that there is a set of experiences and difficulties which is peculiar to the Aboriginal people of this country, it is factually incorrect to say, of Aboriginality, that there ‘is nothing

12 Ibid 82-389.
different’ or ‘nothing special about it.’ 13

In the judgment it was noted that:

In New Zealand the Court has power to appoint a cultural adviser to assist the Court in its appreciation of cultural issues which the case may involve.14

In relation to the role of the judge the Full Court said:

…we think that in future cases involving the custody of an Aboriginal child it would be expected that these issues would be explored and evidence provided, especially about their significance in the particular case. We do not consider that a matter such as this should be decided on the basis of the general, more personal, views and experiences of the judge in question.15

The Court went on to say that:

Consequently in such cases it would be expected that a separate representative would be appointed at an early stage and that one of the responsibilities of the separate representative would be to examine these issues and ensure that all relevant evidence and submissions are placed before the Court…. It is obviously a matter which goes to a central aspect of the separate representative’s role in a case like this and it would need to be approached in that way. 16

From this decision it is clear that the Full Court has given very specific guidance to separate representatives acting for children in matters where one parent is Indigenous. We believe it is essential that separate representatives be made aware of the importance of this judgment and take into consideration these issues at an early stage of the proceedings. We also believe that it is essential that cultural information be made available to judges to provide guidance to members of the judiciary in coming to their decision.

From our experience in working with Indigenous women in urban areas there appears to be a view by professionals that many of them are not ‘really Aboriginal’ and therefore cultural issues are given a limited priority in the preparation of family reports and in submissions to the Court. This misconception is inconsistent with the test of Aboriginality as decided by the Federal Court and in our view results in inequitable outcomes.

As we have stated earlier in this paper, when Indigenous women lose residence of their children at interim hearing, they often feel a sense of disillusionment and in our experience, do not wish to pursue the matter further because of the negative effect of the proceedings on their children and themselves. We suggest that this unwillingness to continue also has a historical basis as referred to previously. The women we see have said that they feel they have no power to change decisions made by ‘the system’. Further, once an interim decision is made in favour of one party, or a separate representative is

13 Ibid at 82-414.
14 Ibid at 82-411.
15 Ibid at 82-414-5.
16 Ibid at 82-415.
appointed by the Court, women often find it difficult to obtain legal aid to pursue the matter further and many are unable to finance further proceedings themselves. If the matter of culture is not raised at interim hearing, the relevance of these cultural issues may never be placed before the Court.

g) Recommendations

Based on the information that we have gathered we have made the following recommendations:

- Specialised Legal Aid grants officers to process applications by Indigenous clients;
- Priority funding by Legal Aid to be given to Indigenous women in family law matters;
- Implementation of more culturally appropriate procedures for counselling, mediation and legal aid conferencing;
- Cross cultural training of all professionals dealing with residence and contact issues, but particularly family report writers, separate representatives and legal aid preferred suppliers;
- Indigenous consultants to be employed in every Registry of the Family Court;
- Amendments to the Family Law Act requiring input into proceedings by a cultural adviser where an Indigenous child is involved;
- Establishment of more Indigenous Women’s Legal Services;
- Provision for Indigenous people to self-identify in the Family Court; and
- Collection of statistical data to facilitate research on outcomes for Indigenous people in the Family Court.

CONCLUSION

We believe that the history of the removal of Indigenous children in Australia presents the legal profession with a significant role to play in ensuring that current legislation and practice does not replicate the sins of the past, either directly or indirectly. Some of the recommendations that we have made are mirrored in the Report of the Family Law Pathways Advisory Group, ‘Out of the Maze’. If these recommendations are implemented positive changes may result which may impact on some of the issues we have raised. It is our hope that CLCs can assist in playing a role in firstly monitoring whether positive change occurs and secondly, whether the ‘Pathways’ recommendations go far enough.

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POSTSCRIPT

Since the presentation of this paper in 2001 there have been some attempts by the Family Court and Legal Aid Queensland to address the concerns raised by advocacy groups, however many of the issues identified in this paper remain current. Anecdotal information from the staff currently employed at ATSIWLAS indicates that little material progress has been made and that Indigenous women continue to be disadvantaged in the family law system for many of the reasons highlighted in this paper.

In April 2004 the Family Court of Australia implemented a new data collection model that allows clients to identify as Aboriginal and/or Torres Strait Islander. It is hoped that the new model will assist in gaining accurate statistical information in relation to Indigenous clients in the family law system to identify and address relevant issues and gaps in services. There is clearly a need for a comprehensive evaluation of outcomes for Indigenous clients in the Family Court and it is hoped that this can occur with the new data collection model.

The Chief Justice of the Family Court has indicated that the Court is exploring funding options to expand the Indigenous Family Consultant program to other registries,18 however to date any attempts have been unsuccessful. While it is acknowledged that the program has been quite successful in those registries where Consultants are employed, it is unfortunate that Family Consultant services continue to be very limited for those clients accessing other registries of the Court.19 Another issue that continues to be of concern is the lack of interpreters for Indigenous clients.

Since 2003 Legal Aid Queensland has provided ATSIWLAS with an identified grants officer to assess aid applications made for ATSIWLAS clients. This has proven to be beneficial and in our experience has resulted in more applications for aid being successful due to the grants officer’s greater understanding of cultural issues. It is not known whether the provision of an identified grants officer has been extended to other Indigenous agencies or clients but it is certainly an approach that should be considered.

Legal Aid Queensland employs four community liaison officers, based in Rockhampton, Townsville, Mount Isa and Cairns, and two legal officers based in Cairns and Townsville, to assist Indigenous clients in those areas.20 While this initiative should provide improved access for some Indigenous clients, it is likely that the extent of the assistance provided will be limited by the small number of officers employed for the large Indigenous population in North Queensland. Unfortunately the assistance provided is limited to

Indigenous people living in the rural and remote areas listed above and does not extend to clients in South East Queensland.

The other issues identified in this paper in relation to legal aid continue to arise for Indigenous clients - the merit test; the bureaucratic and alienating processes (particularly for those clients who have not sought assistance from an Indigenous or community agency and are attempting to navigate the system on their own) and training for grants officers and preferred suppliers.

It should be noted that a new family law system was introduced in 2006. One of the changes is that the FLA in section 60B now includes in the principles and objects the right of a child to enjoy his or her culture. For Aboriginal and Torres Strait Islander children that right is said to include the right to maintain a connection with that culture and to have the support, opportunity and encouragement to explore the full extent of that culture and develop a positive appreciation of that culture. The former section 68F(2) of the FLA, which required the Court to consider Indigenous culture in determining the best interests of the child, has been replaced by section 60CC(3)(h). This section requires the Court in determining the best interests of the child to consider as one of a number of factors the child’s right to enjoy his or her culture (including to enjoy that right with other people who share that culture) and the likely impact of any proposed parenting order on that right. Section 60CC(6) then repeats what is included in section 60B objects and principles, that an Aboriginal or Torres Strait Islander child’s right to enjoy his or her culture includes the right to maintain a connection with that culture and to have the support, opportunity and encouragement to explore the full extent of that culture and develop a positive appreciation of that culture.

Section 60CC(h)(3) is not significantly different to the old section 68(f)(2) provisions, however section 60CC(6) and the section 60B objects and principles should provide more guidance to the Court. It remains to be seen how the Court will interpret and apply section 60CC(3)(h) in light of the provisions in section 60B and section 60CC(6) and how the new provisions impact on the consideration of cultural factors by the Court.

Another change to the FLA is the introduction of a presumption of equal shared parental responsibility where it is in the best interests of the child. If the presumption applies, the Court is required to consider whether an order for equal time or substantial and significant time with each parent is appropriate if such an order is in the best interests of the child and is reasonably practicable. The new family law system also requires parties to attend mediation prior to filing an application for parenting orders. It remains to be seen what impact these changes will have on the outcomes for, and experiences of, Indigenous clients in the family law system.

22 Family Law Act 1975 (Cth) (FLA) Section 60B(2)(e).
23 Ibid Section 60B(3).
24 Ibid, Section 61.
25 Ibid, Section 65.