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**“Reaching the Hard to Reach: Distance, Multiculturalism”**

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**Introduction**

It could be argued that all legal aid clients are “hard to reach” on the basis that all disadvantaged people face major barriers to accessing justice. However, when distance and multiculturalism are added to the mix, particular groups become even harder to reach. Indigenous Australians are one such group. They are the most disadvantaged group of clients in Australia in terms of access to justice. Their cultural differences and the fact that many live in remote locations, make them a particularly difficult group to deliver legal aid services to and are definitely the most “hard to reach” clients. My paper will therefore try and provide a brief overview of the difficulties in providing legal aid services to indigenous people across Australia and how we have attempted to address some of these difficulties. I am not going to pretend that a 12 minute presentation will do justice to this difficult topic.

The Indigenous people of Australia have the oldest living cultural history in the world - they go back at least 50,000 – 65,000 years. When Europeans arrived, there were about 600 different clan groups or ‘nations’ around Australia with distinctive languages, cultures and beliefs.

Today, Indigenous people comprise around 2.5% of the total Australian population and most live in New South Wales and Queensland. You probably won’t be surprised to hear that they also represent one of the most socially excluded groups of people in Australia. Sadly, this is a characteristic shared by indigenous peoples around the world.

## Background

To give you a snapshot of Indigenous disadvantage in modern Australia I have taken some indicators from our last national population survey in 2006.<sup>1</sup>

A large proportion of the Indigenous population live outside the major cities with 43% in regional areas and 25% in remote areas. I will talk further about this idea of remote in a minute.

The infant mortality rate for Indigenous Australians is three times the rate for non-Indigenous Australians and indigenous Australians life expectancy is much less than life expectancy for non-indigenous Australians.

The rate of Indigenous homelessness was three times the rate for other Australians and was typically as a result of domestic violence and family breakdown.

14% of Indigenous households were overcrowded, with the highest rate of overcrowding in the Northern Territory, where 61% of Indigenous households were overcrowded. Of these, some dwellings were not connected to an organised sewerage system, electricity supply and/or water supply.

The unemployment rate for Indigenous people is over double the rate for non-Indigenous people<sup>2</sup>.

From a law and justice point of view, in 2006:

- about one quarter of Indigenous adults reported being a victim of physical or threatened violence in the 12 months prior.
- 18% of Indigenous people (and 23% of young people) reported that they, a friend, or family member had experienced trouble with the police in the 12 months prior
- One in six Indigenous people reported having been arrested in the 5 years prior to the survey (this figure had reduced from 20% in the last survey)
- 7% reported having been incarcerated in the five years prior.

The most telling statistic of the indication of the disadvantage indigenous Australians face in the justice area is the rate of

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<sup>1</sup> [Source ABS: The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2008] - It has to be acknowledged that many of these figures have improved from the previous census in 2001.

<sup>2</sup> 16% compared with 5%.

imprisonment. While indigenous Australians represent only 3% of the Queensland population, they represent almost 30% of the prison population in Queensland. Nationally, while representing only 2.5% of the total population, indigenous people represent 24% of the total prisoner population.

There have been some encouraging developments at a national level with the new Commonwealth government taking a leadership role to address social disadvantage. For example, in his first Parliamentary sitting on 13 February 2008, the Prime Minister apologised to the "Stolen Generation", the group of Aboriginal adults who had been forcibly and systematically removed from their families as children by child welfare authorities up until the late 1960's.

'Closing the Gap" between indigenous and non-indigenous Australians in some of these areas of disadvantage is one of the Commonwealth government's big policy priorities but the targets under this initiative give you an idea of the severity of the problem. For example, - closing the gap in life expectancy within a generation; halving the gap in mortality rates for Indigenous children under 5 within a decade; halving the gap in employment outcomes between Indigenous and non-Indigenous people within a decade; halving the gap in reading, writing and numeracy achievements for Indigenous children within a decade; ensuring Indigenous 4 year olds in remote communities have access to early childhood education within 5 years; and halving the gap for Indigenous students in year 12 attainment or equivalent by 2020.

### **Delivery of legal aid services to Indigenous people**

The Australian Government provides direct funding to a network of Indigenous Legal Services who provide legal services specifically to Indigenous people.

This is primarily done through the Aboriginal and Torres Strait Islander legal services who provide information, duty lawyer assistance and legal casework in urban, rural and remote areas throughout all States and Territories. Most services are provided in criminal law and all services are provided by salaried lawyers.

The Australian Government also provides funding for Family Violence Prevention Legal Services to assist Indigenous adults and children who are victims of family violence, including sexual abuse. These services deliver legal advice, representation, and counselling for victims; as well as information and referral to mediation and perpetrator programs.

Both the Aboriginal and Torres Strait Islander legal services and the Family Violence Prevention Legal Services are governed by indigenous councils or Boards and these services employ indigenous people to assist legal staff in providing services to indigenous clients. These agencies are acknowledged as the most culturally appropriate and preferred providers of legal services for indigenous people.

Each Australian State and Territory also have statutory based legal aid commissions with a legislative obligation to provide legal services to disadvantaged clients. In light of the high level of legal needs of indigenous Australians, all Legal Aid Commissions also provide extensive services to Indigenous Australians across all areas of law. For example, in Western Australia, 1 in 5 grants of legal aid are provided to indigenous people. These Commissions receive approximately 65% of funding from the State/Territory governments and approximately 35% from the Australian government. State funding includes funding from statutory interest schemes. Services are provided by both salaried and private lawyers.

There is also a network of community legal centres (approximately 200 across Australia) who also provide services to Indigenous Australians. There are a number of specific community legal centres who operate to provide legal services solely for Indigenous women. These services are generally small community based services and focus on legal advice, community legal education and community development in legal issues. These services are funded by both State and Commonwealth governments. Again, State funding includes statutory interest scheme funding.

All legal aid providers in Australia have started working much more cooperatively over the past few years to ensure limited resources available to all providers are used as effectively as possible to address unmet legal needs, particularly in the area of indigenous justice.

### **Indigenous Justice Issues around Australia**

Indigenous Australians face a multitude of barriers in accessing justice.

#### English literacy

There is a very low level of awareness of legal rights among indigenous people requiring the need for a large amount of community legal education to be delivered. Language barriers often mean that these materials must be in the form of DVDs or CDs as

English literacy levels are very low among many indigenous Australians. The Northern Territory Legal Aid Commission have produced some innovative community legal education DVD's and CD's targeted at indigenous people.

### Distance

As I mentioned earlier, 43% of Indigenous people live in regional areas and 25% in remote areas. To give you an idea of what remote means, in Queensland, Indigenous communities are located in the most remote areas of the state right up in the tip of Cape York which is Australia's most northern point. Cairns is 1680 kms or a 22 hour drive from my office in Brisbane and the tip of Cape York is another 935 kms or a 15.5 hour drive if the roads and the wet season permit. Flights to these communities are infrequent unless you can afford charter flights. There are around 20 discrete remote Indigenous communities in Queensland. The distance factor has obvious implications for our legal service delivery to those communities.

These types of distances also require that courts travel to many of the remote communities to deliver justice. This means that prosecutors, defence lawyers, judges, and court staff are all flown to the remote communities and sit over one or two days. The visiting court deals with hundreds of cases in a single day, making it almost impossible for defence lawyers and courts to allocate the time necessary to thoroughly deal with matters. Matters often proceed without proper statements, a full understanding by the defendant and with limited materials collected and witnesses interviewed<sup>3</sup>.

The length of time between the offence being reported and finalisation of a matter can often be long, due to the infrequency of courts sitting in remote communities, matters being adjourned and other problems in obtaining evidence. If a matter has to be adjourned the defendant will often have to wait another month before their matter can be heard again with another long list of defendants on that day. As well, the wet season may mean that flights have to be cancelled and matters further adjourned. These factors all affect the quality of justice.

Many communities are often only accessible by air during the wet season which affects northern Australia for up to 6 months of the year and the weather may interrupt flight plans.

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<sup>3</sup> D M O'Connor, Improving Cape York justice services, Department of Justice and Attorney-General, 30 June 2008.

These factors add significant costs to the delivery of legal services to indigenous people.

The provision of legal advice by videoconferencing has been used extensively to attempt to overcome distance issues but with limited success.

### Staffing

Due to the above problems and the general lack of resourcing for legal aid service providers, services are also experiencing difficulties recruiting quality staff to provide services in remote areas. Staff have large workloads and the work itself is challenging. This often means that junior, inexperienced advocates find themselves in court arguing complex legal matters. The Commonwealth government has now funded a number of programs to encourage lawyers to work in regional areas. The WA Country Lawyers program and the Regional Solicitor Program are examples of such schemes.

### Language and communication

One of the biggest issues facing the delivery of justice to Indigenous people is the lack of interpreting services available in Indigenous languages. At the time of European settlement, there were several hundred Indigenous languages and dialects in Australia and while many of these are now extinct, there are still a considerable number of Indigenous people who have English as their second, third or even fourth language. Unlike other non-English speakers in Australia, there are very few Indigenous language interpreters trained to the necessary level who are available and this presents a significant access to justice issue.

The Northern Territory Aboriginal Interpreter Service (NTAIS), was established in 2000 to supply and co-ordinate interpreters and translators of Indigenous Aboriginal languages throughout the Northern Territory, particularly in health and legal issues. The service currently has interpreters for 105 Indigenous languages with the core of 15 major languages.

The need for this type of service is by no means isolated to the Northern Territory and represents a huge problem for other states such as Queensland, Western Australia and South Australia in the delivery of justice to Indigenous people. There are no indigenous interpreter services in these States.

### Incarceration rates

As indicated earlier, one of the most significant barrier to justice for Indigenous people is the alarming high rates of incarceration for Indigenous people. WA, NSW and QLD and the NT have the

unenviable honour of having the highest rates of imprisonment of Indigenous people. To give you an example in Western Australia there are 19.8 indigenous prisoners to each non-Indigenous prisoner, in the Northern Territory, it is 13.2 Indigenous prisoners to each non-Indigenous prisoner and in New South Wales, it is 12.5 Indigenous prisoners to each non-Indigenous.<sup>4</sup>

The over-representation of Indigenous young people relative to non-Indigenous young people in detention is also incredibly high. Indigenous young people were 21 times more likely than non-Indigenous young people to be in detention at 30 June 2006.<sup>5</sup>

What does this mean? It means that a large number of Aboriginal and Torres Strait Islander people have either been in jail, have family in jail or can expect to have contact with police and the prison system at some time in their lives. It also explains why a large percentage of limited resources provided for indigenous legal aid is provided in the criminal law area.

#### Police

As outlined above, many indigenous people live in discrete communities with high numbers of police based in those communities. The clean up rate of offences in these communities is much higher than in the wider population. The effect is that indigenous people in remote communities who have committed offences will almost certainly be charged with those offences. The rate at which indigenous people accumulate prior convictions is therefore much higher than for non-indigenous people. This is a major factor which contributes to the high rate of indigenous imprisonment.

Distance issues make it very hard to provide legal advice to indigenous people in remote locations at police stations.

#### Alternative justice approaches

To attempt to address some of these issues, there have been some positive developments with the establishment of Indigenous courts and justice practices across Australia. Informal participation in sentencing by indigenous people in remote communities has occurred for some time but this was replicated to the major urban areas in 1999 when the Nunga Court began in South Australia.

Since then, specific courts such as the Koori Courts in Victoria, the Murri courts in Queensland, Circle Sentencing in New South Wales

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<sup>4</sup> Source: "Prisoners in Australia", Australian Bureau of Statistics, 2008

<sup>5</sup> AIC 2007, Natalie Taylor, "Juveniles in detention in Australia, 1981 – 2006" *Technical and Background Paper*, No 26

and Community Courts in the NT have been established to sentence Indigenous offenders.

The aim of the courts are to make court processes more culturally appropriate, to gain more trust between Indigenous communities and the justice system and to allow more informal court processes. Indigenous elders, community members, family members and kin group members are encouraged to participate in the sentencing process to provide judicial officers with more insight into the circumstances of the offender, the relations between victim and offender and to provide a further layer of accountability on the offender by their community.

There is variation between jurisdictions but generally the magistrate retains sentencing power, they sit at eye level with the offender usually at the bar table rather than the bench, with a local elder or respected member of the local community. The elder's participation ranges from briefly addressing the offender about their behaviour to having a significant role in determining their sentence and monitoring their progress after they are sentenced.<sup>6</sup>

Most of these indigenous court initiatives remain as pilot programs in most States and have not been rolled out to all indigenous communities despite some very promising initial results in the reduction of recidivism rates etc.

Various state governments are also now implementing alcohol diversion programs which are aimed at providing culturally appropriate services to indigenous communities to attempt to reduce alcohol abuse in indigenous communities which in turn leads to increased offending.

#### Various welfare reforms

In recent years, there have been attempts by the Commonwealth government to address alcohol abuse, welfare reform, housing and education issues in several jurisdictions. I will briefly discuss the Queensland reforms and my colleague Suzan Cox will comment on the reforms specific to the Northern Territory.

In Queensland, the Family Responsibilities Commission has been established to monitor Indigenous and non-Indigenous welfare recipients who reside in four Cape York welfare reform communities.<sup>7</sup> People can be brought before the Commission if:

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<sup>6</sup> "Indigenous courts and justice practices in Australia", in Indigenous Australians and the Law, Issues in Society, Volume 248, The Spinney Press 2007.

<sup>7</sup> Aulukun, Coen, Hope Vale and Mossman George



- Their child has three absences in a school term without reasonable excuse or a child is not enrolled in school without lawful excuse, or
- They are subject to a child welfare notification, or
- They are convicted of an offence in a lower court, or
- They breach their public housing tenancy agreement.

Once one of these triggers occur a parent or party is served a notice to attend a conference at the Commission which is convened by a magistrate and local community members. They may also have contact with various welfare agencies to work on the issues affecting their family. If improvement is not seen in the person's behaviour and parenting, then they can be brought back before the Commission and as a last resort, the Commission can stop people getting their welfare payments (up to 75% of the benefits).

I understand that there has been very little, if any, information and education provided to the members of the participating communities about this reform project and that this has been a problem for the participants. Very few people who are appearing before the Commission have received legal advice about their rights and responsibilities under this welfare reform measure and this is concerning given the nature and effect of the decisions made. The legal service providers who visit these communities do not have the resources to provide legal assistance in this new area of legal need and no specific funding has been provided for this purpose.

The program has only been in operation for a few months and has yet to be evaluated as to whether it has improved attendance at school, health outcomes or any reduction in offending behaviour.

### **Legal aid commissions**

As mentioned before, Legal Aid Commissions are also providing extensive legal services to indigenous people.

Most of the services provided by the Aboriginal and Torres Strait Islander Legal Services in remote communities are in the criminal law area. This is largely as a result of limited resources provided to these agencies. Legal conflict problems also largely prevent them addressing legal needs for civil and family legal assistance which may have arisen from criminal matters where they have acted for the offender. Indigenous women and children are often left with limited legal services available to meet their legal needs.

Last year Legal Aid Queensland fashioned a new strategy to meet these legal needs. We have established a new program of service

delivery in 7 communities in far North Queensland and 3 communities in North Queensland. Community Liaison officers who are Indigenous women are employed in the regional centres and they visit the remote communities once a month and, with a solicitor, provide legal advice and community legal education. Indigenous women from the community are employed as Indigenous Liaison officers for 10 hours per week and provide legal information and referral when LAQ is not visiting. The results to date are promising and have shown a marked increase in the number of indigenous women who are receiving legal advice and assistance in family and civil law matters in these communities.

In conclusion, indigenous Australians face overwhelming legal needs and legal aid service providers face huge challenges to meet those legal needs and to provide legal services to indigenous Australians.

Many of those challenges relate to lack of resources available to provide legal services. Even if there was a huge increase in resources to legal aid service providers, the continuing social disadvantage faced by indigenous people and the systemic problems they face in accessing justice will continue unless Governments focus on addressing these systemic issues. New initiatives such as the indigenous justice courts are a good start but the emphasis on exploring alternative solutions to the huge disadvantage facing indigenous people in access to justice must continue and must be increased.

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