Productivity Commission Inquiry into Access to Justice Arrangements

November, 2013

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

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NATSILS would like to thank Ashurst Australia for their assistance in preparing this submission.

1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

NATSILS welcomes the opportunity to provide this submission to the Productivity Commission in relation to their inquiry into access to justice arrangements in the civil law system. This submission will focus on highlighting overall national trends in relation to access to justice for Aboriginal and Torres Strait Islander peoples and will be complimented by a range of submissions from individual ATSILS who will provide a more localised analysis of specific issues. The information and analysis contained herein will focus on the level of need for legal assistance services amongst Aboriginal and Torres Strait Islander peoples, whether this need is effectively being met and hence, whether Aboriginal and Torres Strait Islander peoples are afforded equitable access to justice in the civil law system.

3. Recommendations

Recommendation 1

Provision of sufficient funding for ATSILS to expand their civil and family law services and meet demand, without diminishing funding available for legal assistance services for criminal matters.

Recommendation 2

Provision of sufficient funding for FVPLS to meet demand and expand service delivery to metropolitan areas.

Recommendation 3

3.1 In consultation with the Stakeholder Reference Group, increase the provision of Aboriginal and Torres Strait Islander interpreter services through the implementation of the national framework prescribed in the National partnership Agreement on Remote Service Delivery.

3.2 Implement strategies to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters.

3.3 Provide adequate training and funding to relevant service providers and agencies involved in the civil justice system to promote and accommodate the use of interpreters.

Recommendation 4

In coordination with State and Territory governments, development of a plan for the expansion of culturally competent approaches to family and statutory child protection services for Aboriginal children and young people, including increased delegation of authority to Aboriginal and Torres Strait Islander community-controlled services.

Recommendation 5

That the Commonwealth and State and Territory Governments establish nationally networked Aboriginal and Torres Strait Islander dispute resolution and conflict management services throughout urban, rural and remote areas of Australia.

Recommendation 6

Increased investment in the expansion of culturally competent court, legal assistance, alternative dispute resolution, interpreter and other justice related services to regional and remote areas.

4. Legal need amongst Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander peoples experience higher levels of legal need compared to non-Aboriginal and Torres Strait Islander peoples and often experience clusters of legal needs. There is not a large amount of comprehensive nation wide data available in regards to Aboriginal and Torres Strait Islander peoples' civil law needs. However, researchers from James Cook University have recently embarked on the Indigenous Legal Needs Project[1] which will explore the civil and family law needs of Aboriginal and Torres Strait Islander peoples across 5 jurisdictions. The research will cover urban, regional, rural and remote communities. To date the final reports on two jurisdictions, New South Wales (NSW) and the Northern Territory (NT) have been completed. The evidence contained in these two reports, in conjunction with the on the ground experience of NATSILS' members, can provide a realistic view of the current situation across Australia. Below is a description of

[1] See http://www.jcu.edu.au/ilnp/

the most common types of legal needs experienced by Aboriginal and Torres Strait Islander peoples.

4.1 Lack of awareness and understanding of civil law issues

It is NATSILS experience that there is a significant lack of awareness and understanding amongst Aboriginal and Torres Strait Islander communities in relation to their civil law rights and the avenues that are available to realise them. This means that there is not only a high level of unmet need but also a high level of unidentified need.

There is a fundamental issue with the low levels of understanding of what constitutes civil law. Without knowledge of what civil law is, and what avenues of redress might be available for these issues, the prospects of realising legal entitlements are very low.[2]

The effects of such a lack of understanding about the civil and family law system among Aboriginal and Torres Strait Islander peoples is also exacerbated by resistance to engagement with, and even fear of, civil and family law system services. In the context of the past history of forced removal of Aboriginal and Torres Strait Islander children and the contemporary extent of non-voluntary engagement with the criminal justice and child protection systems among Aboriginal and Torres Strait Islander peoples, there is significant resistance to voluntary engagement with government and justice system services.

There is a critical need for development of civil and family law community legal education and outreach programs that are developed at the regional level, in response to identified local issues and targeted to the needs of Aboriginal and Torres Strait Islander peoples.

4.2 Social Security

Historically, Aboriginal and Torres Strait Islander peoples have been over-represented in the social security system. In 2008, 40.4 per cent of Aboriginal and Torres Strait Islander peoples reported government cash pensions and allowances as their main source of personal income, compared to 13.8 per cent of non-Aboriginal and Torres Strait Islander people.[3] Despite this over-representation, research in some jurisdictions has found that social security is an area that has a comparatively few number of civil matters being brought by Aboriginal and Torres Strait Islander peoples.

For example, in NSW it was recently found that only 1.2 per cent of matters brought by Aboriginal and Torres Strait Islander applicants related to social security, compared to 4.7 per cent of matters brought by non-Aboriginal and Torres Strait Islander peoples.[4] This is interesting given the over-representation of Aboriginal and Torres Strait Islander peoples receiving government cash pensions and allowances in comparison to non-Aboriginal and Torres Strait Islander peoples. One possible explanation for this is the lack of awareness amongst Aboriginal and Torres Strait Islander communities in regards to civil law rights, as outlined above.

Specific social security regimes in some jurisdictions however, generate their own set of civil law issues for Aboriginal and Torres Strait Islander peoples. The income management regime that exists in the Northern Territory for example, disproportionately affects Aboriginal and

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[2] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 125.
[3] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (2011) 8.4
[4] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 42.

Torres Strait Islander peoples and can impact upon their civil law rights. A recent study found that:

> Issues with Income Management, and the Basics Card in particular in the NT, represented around 27.1 per cent of all identified social security disputes. Problems concerning underpayments or overpayments are interwoven with dissatisfaction about the Income Management regime and about the level of customer service provided by Centrelink more generally. All of these dynamics point towards a priority area of need, where effective legal services are extremely important. This has been supported by legal service providers.[5]

4.3 Housing and Tenancy

Aboriginal and Torres Strait Islander peoples are confronted by housing and tenancy problems on a regular basis. Poor quality housing, overcrowding, cost of housing and shortages of affordable housing are all frequently experienced by many Aboriginal and Torres Strait Islander peoples. Economic interests, such as mining and industry have increased rent prices in many communities, making housing in these communities beyond the reach of many Aboriginal and Torres Strait Islander peoples.

More specifically, the major civil law issues experienced relate to disputes with landlords in regards to repairs, rent payments, overcrowding and eviction. However, despite the high number of housing and tenancy issues experienced, the rate at which Aboriginal and Torres Strait Islander peoples seek legal assistance for such is low. For example,

- In a NSW focus group of Aboriginal and Torres Strait Islander peoples 41.2 per cent said they had disputes with landlords. Out of those that identified such a dispute, some 25.4 per cent of participants indicated that they sought legal advice. Overall, 69.8 per cent of participants that had housing and tenancy problems indicated they did not seek legal advice.[6]

- In an NT focus group of Aboriginal and Torres Strait Islander peoples 54.1 per cent said they had a dispute in relation to housing in the last two years. Only 34.2 per cent of people who said that they had experienced problems with their landlord sought legal advice in relation to those disputes.[7]

4.4 Credit and Debt

Aboriginal and Torres Strait Islander peoples experience extensive yet varied credit and debt problems, covering matters such as personal debts, utilities, mobile phone contracts, high pressure sales for items like computers, used cars and associated finance, funeral funds, bankruptcy and others.[8] Yet again, it is not common for Aboriginal and Torres Strait Islander peoples to seek legal assistance for such matters. For example, a focus group of Aboriginal and Torres Strait Islander peoples in NSW found that 34.9 per cent identified as experiencing debt-related problems yet only five out of 149 participants indicated they sought legal

[5] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 136.
[6] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 69.
[7] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 133.
[8] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 90.

advice for their problem.[9] Issues of this nature were said to be connected to levels of financial literacy more generally, which in turn are related to access to levels of effective (non-legal) services in this area.[10] It is positive that consumer credit legislation (*National Consumer Credit Protection Act 2009* (Cth)) has been strengthened in the recent past to require greater accountability of lenders in terms of ethical lending arrangements to protect consumers. However, if consumers are unaware of these safeguards and avenues for recourse, the legislation may be ineffective unless there is high level monitoring of credit providers to ensure compliance.

The unintended impact of fines on Aboriginal and Torres Strait Islander peoples is an area of particular concern. In NSW, a survey found that 40 per cent of the Aboriginal and Torres Strait Islander community had outstanding debts with the State Debt Recovery Office.[11] Despite the fact that at first look, the fines enforcement system seems to treat Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples the same, due to the high levels of disadvantage faced by Aboriginal and Torres Strait Islander peoples they are in fact disproportionately impacted by it.[12]

The common law principle is that an offender should not be fined a sum which s/he has no means of paying.[13] However, courts often do not have complete information about income, debts, family obligations and community expectations.[14] In particular, judicial officers may be unaware of unpaid fines, as they are not routinely provided with this information by fines enforcement agencies.[15] Even where information is available about the defendant's means to pay, a judicial officer may have to impose a fine that the defendant is unable to pay, either because legislation sets out a minimum penalty, or because there is no other sentencing option available. A survey of NSW magistrates revealed that 44% of respondents sometimes or often impose a fine knowing that the defendant cannot or will not pay, usually because it was the only sentencing option available.[16] Furthermore, many agencies empowered to issue fines do not have any discretion to caution, warn or refer to a diversionary program or community service, and do not have a procedure for internal review where a penalty is contested or special circumstances are demonstrated.[17]

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[9] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 89, 91.

[10] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 111.

[11] Elliot and Shanahan Research, *Research Report: an investigation of Aboriginal driver licensing issues* (2008) http://www.rta.nsw.gov.au/publicationsstatisticsforms/downlaods/aboriginal_licensing_report171208.pdf .

[12] M. Spiers Willaims and R. Gilbert, 'Reducing the Unintended Impacts of Fines', *Indigenous Justice Clearinghouse Current Initiatives Paper 2*, January 2011, 1.

[13] See *R v Rahme* (1989) 43 A Crim R 81.

[14] M. Spiers Willaims and R. Gilbert, 'Reducing the Unintended Impacts of Fines', *Indigenous Justice Clearinghouse Current Initiatives Paper 2*, January 2011, 1.

[15] Ibid.

[16] K. McFarlane and P. Poletti, *Judicial perceptions of fines as a sentencing options: a survey of NSW magistrates for NSW sentencing* (2007).

[17] New South Wales Sentencing Council, *The effectiveness of fines as a sentencing option: court-imposed fines and penalty notices: interim report* (2006).

If a fine is not paid within a certain time period, enforcement fees of between $21 and $65 are added to the penalty.[18] In some jurisdictions, the enforcement fee is imposed for each fine rather than each client, meaning the debt can increase quickly.[19] Where fines are not paid due to poverty, these fees amount to a further penalty for those who can least afford it. In practise, fines act to punish further than the defendant. Fines can act to punish a defendant's family, including dependants, and in particular, children. Fines can affect a family's access to essentials such as food. Families often assist by sharing money as part of cultural obligations, however, when a number of people are required to pay fines, a large amount of money is taken out of this pool of funds.

In additional to the inability to pay a fine, an additional complicating factor must also be recognised in that the service of both court-ordered and on-the-spot fines by post poses particular problems for Aboriginal and Torres Strait Islander fine recipients who are homeless, itinerant, or transient, and for those who live in remote communities or town camps without a regular mail service.

One ATSILS staff member described the situation to the Indigenous Legal Needs Project as:

> We are seeing fines not just double but triple and quadruple over a period of time. I just think that is an issue of a systemic injustice, there has to be a cap on how much an individual fine can increase, and there have to be meaningful waiver systems as well. There is a real difficulty in terms of converting to community work. In Victoria they have a system with a special circumstances list, where certain court ordered fines can be waived on the basis of homelessness, mental health…here, although there is an exceptional circumstance provision, it is virtually ignored.
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> It's such a big issue, but again the fact that people are so disempowered by the process means they continue to accrue fines; they have no means of actually getting their fines sorted out... When we are in bush courts, we can do some CLE around fines to raise awareness about how you can just get your fines sorted out. Recently the fines recovery unit went to Port Keats on the day of court, it made such a big difference, so that they don't keep accruing.[20]

Aboriginal and Torres Strait Islander people often do not apply for arrangements to pay by instalments likely due to the fact that they are unaware that this is an option, because in some jurisdictions this process only becomes available once the fine is overdue and penalties have already been applied and/or because the process can require the provision of an onerous amount of information as to income, expenses and assets.[21] If fine default continues, most jurisdictions will suspend the fine recipient's driver's license and/or vehicle registration, even where the original fine was unrelated to driving. A survey of 300 Aboriginal and Torres Strait Islander people in NSW found that half of all license holders had

[18] M. Spiers Willaims and R. Gilbert, 'Reducing the Unintended Impacts of Fines', *Indigenous Justice Clearinghouse Current Initiatives Paper 2*, January 2011, 3.
[19] Ibid.
[20] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 113-114.
[21] New South Wales Sentencing Council, *The effectiveness of fines as a sentencing option: court-imposed fines and penalty notices: interim report* (2006).

had their license suspended or cancelled and for 59 per cent of these the reason was unpaid fines.[22]

Suspension of a person's driver's licence needed for work will only exacerbate their level of disadvantage. In communities where no public transport is available, suspension of a person's driver's licence may also negate their access to health services, shops, and extended family. In Aboriginal and Torres Strait Islander communities, when a person's driver's license or a car's registration is suspended, the whole community can be affected if another licensed driver or registered vehicle is not available. Often cars are shared in communities and heavy reliance by other community members is placed upon those with licenses. If alternative transport is not available for essential services and travel, such as to work, health services or grocery shops, then a person is likely to drive unlicensed and unregistered, placing themselves at risk of convictions for more serious offences and imprisonment. In some remote communities where the nearest services can be hundreds of kilometres away, this is not an easy choice to avoid. In some circumstances it may also be a breach of customary law for a person to refuse a request to drive another person with whom they have a particular kinship relationship.

After this point, agencies can utilise a further range of measures to recoup unpaid fines including the seizure of property and wages and the conversion of unpaid fines to a work or treatment order.[23] Failing this, imprisonment remains a sanction of last resort. In some jurisdictions a fine defaulter can be imprisoned for non-payment of the fine where as in others, a community service order will be imposed on a fine defaulter and the penalty for breaching that order is imprisonment.[24]

Of concern is the likelihood that many Aboriginal and Torres Strait Islander people are imprisoned for secondary offending, that is offending associated with fine default such as unlicensed or unregistered driving. In 2009, 5.5 per cent of Aboriginal and Torres Strait Islander prisoners in Australia, or 408 people, had as their most serious offence "traffic and vehicle regulatory offences".[25]

4.5 Family Breakdown

Access to children is a major issue for Aboriginal and Torres Strait Islander peoples when facing family breakdown, either in terms of residence and contact arising from partner separation, or in relation to removal of children by child protection agencies.[26] There is a common perception amongst Aboriginal and Torres Strait Islander peoples that there is a lack of legal advice or representation for parents in cases where their children are being removed.[27] The Indigenous Legal Needs Project found that:

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[22] Elliot and Shanahan Research, *Research Report: an investigation of Aboriginal driver licensing issues* (2008) http://www.rta.nsw.gov.au/publicationsstatisticsforms/downlaods/aboriginal_licensing_report171208.pdf .

[23] M. Spiers Willaims and R. Gilbert, 'Reducing the Unintended Impacts of Fines', *Indigenous Justice Clearinghouse Current Initiatives Paper 2*, January 2011, 5.

[24] Ibid.

[25] Australian Bureau of Statistics, *Prisoners in Australia* (2009).

[26] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 61.

[27] Ibid, 63.

- 17.2 per cent of NSW participants identified an issue relating to custody or access to children and 16.2 per cent identified an issue relating to care matters.[28] Of these, very few sought legal advice in relation to the issues around family law and child protection matters (14.9 per cent);[29] and

- 12.2 per cent of NT participants identified a child support, contact or residence issue. A recurring theme was a sense of inapplicability of the system to Aboriginal and Torres Strait Islander clients. The difficulties are compounded by remoteness, cultural dynamics and inadequate levels of legal service provision.[30]

The low number of people seeking legal advice and assistance for their family law issues can arguable be attributed to two factors, a lack of knowledge about the family law system and a lack of access to legal assistance services. A Legal Aid staff member from the NT described the situation as follows:

> The family law system doesn't appear to be addressing the needs of community clients and therefore they don't seek assistance from the Family Court. It's all too slow, it's all too far away, and it's just not an Indigenous way of handling things. Having said that, children and family matters are massive, and in my opinion there needs to be much more representation of people in those sorts of matters (Legal Aid staff).[31]

Extremely structured family law processes are often not suitable to Aboriginal and Torres Strait Islander peoples. The requirement of obtaining a *s 60I Family Law Act 1975* (Cth) certificate from a family dispute resolution centre such as Family Relationships Centres takes people through an extremely structured inflexible and drawn out process. This process fails to consider Aboriginal and Torres Strait Islander cultures and is often a deterrent for Aboriginal and Torres Strait Islander peoples attempting to gain assistance to resolve family law disputes. It is yet another example of a mainstream process applied to Aboriginal and Torres Strait Islander peoples without cultural considerations.

4.6 Care and Protection

Aboriginal and Torres Strait Islander children are vastly over-represented in the child protection system. In 2011-12, they were subjected to child protection substantiations at a rate of 41.9 per 1000,[32] nearly eight times that of other children.[33] They are also ten times more likely to be in out-of-home care comprising 31 per cent of all children in care,[34] despite

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[28] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 62.
[29] Ibid, 64.
[30] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 89-90.
[31] Ibid, 13.
[32] Australian Institute of Health and Welfare (AIHW) (2013), Child Protection Australia 2011–12, in AIHW (Ed.), Child Welfare Series no. 55. Canberra: AIHW, p 17.
[33] At 5.4 per 1,000 children. Australian Institute of Health and Welfare (AIHW) (2013), Child Protection Australia 2011–12, in AIHW (Ed.), Child Welfare Series no. 55. Canberra: AIHW, 16.
[34] Australian Institute of Health and Welfare 2011, Fact Sheet: "*Child protection and Aboriginal and Torres Strait Islander Children" viewed 01 March 2013* <http://www.aifs.gov.au/cfca/pubs/factsheets/a142117/index.html.

making up only 4.2 per cent of the population of all children.[35] This shows that there is a large number of Aboriginal and Torres Strait Islander peoples engaged in contact with care and protection systems which begs the questions of whether they are receiving adequate assistance in navigating these systems and realising their rights.

The importance of adequate legal advice in these situations is clear. For example, in the NT there is widespread concern among legal service providers about the frequency with which orders are made in the absence of parents:

> A lot of parents are signing temporary protection agreements…you can sign an agreement with the Department that the child go into care for two months and that can be renewed a further three times. So you can end up with a kid in care for 6 months… and they never recommend that people get legal advice. I have never had a parent come to me and say 'the department wants me to sign this, can you explain it to me', but I have had an awful lot of parents at the end of 6 months, when they go to court because the agreement has expired, and I say to them well the kid has been in care for six months and they say 'yeah we signed a temporary protection agreement'. I say 'can you tell me what that means?' 'Nup'. Nothing. That's a huge issue because by then you have had a child in care for 6 months and it is very hard to fight in court (Indigenous Legal Service staff).[36]

Recent State inquiries into child protection systems in Queensland and Victoria have also raised concerns about the appropriateness and effectiveness of broader child protection agencies and child protection systems to meet the needs of Aboriginal and Torres Strait Islander children and families. The Victorian Inquiry found that:

> Outcomes for vulnerable Aboriginal children and their families are generally poor and significant improvement is required in the performance of systems intended to support vulnerable Aboriginal children and families. There is a need to develop specific Aboriginal responses to identify different ways to improve the situation of vulnerable Aboriginal children in Victoria.[37]

And the recent child protection inquiry in Queensland found that:

> Over-representation is being driven by a complex array of interrelated factors, compounded by the intergenerational effects of past child-removal policies that have seen successive generations of families becoming involved in the child protection system. Systemic factors such as an over-reliance on tertiary responses, a lack of meaningful collaboration between the department and Aboriginal and Torres Strait Islander agencies, and restrictions on referrals to family support services are adding to the problem.[38]

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[35] Australian Bureau of Statistics (ABS), *2011 Census Counts — Aboriginal And Torres Strait Islander Peoples*, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011 (accessed 7 February 2013).

[36] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 14.

[37] The Honourable Phillip Cummins et al, Report of the Protecting Victoria's Vulnerable Children Inquiry (2012) 272.

[38] Honourable Tim Carmody, Taking Responsibility: A Roadmap for Queensland Child Protection (2013) 386.

4.7 Family Violence

Aboriginal and Torres Strait Islander females and males are 35 and 21 times as likely to be hospitalised due to family violence related assaults as non-Aboriginal and Torres Strait Islander females and males.[39] Consequently, there is a significant number of Aboriginal and Torres Strait Islander peoples experiencing legal issues associated with family violence. Such issues often involve over-lapping legal systems including, family law issues, criminal justice proceedings, applications for personal protection orders, victims of crime assistance applications, and potentially child protection proceedings.[40]

A key factor to consider here is the general tendency within Aboriginal and Torres Strait Islander communities to disclose family violence. Distrust of police and justice agencies, fear that disclosure may lead to further violence between families and ostracism from the wider family and community are all factors relevant to this pattern of non-disclosure. Illustrating their clients' experiences in such situations, FVPLS Victoria provided the following information to the Family Law Council:

> [A] number of our clients have made it through the dispute resolution process because they have not disclosed family violence. Staff who do not receive cultural awareness training are not trained to ask the right questions that help overcome some of the complex cultural issues that contribute to a general hesitancy to disclose family violence within Aboriginal communities.[41]

4.8 Discrimination

Aboriginal and Torres Strait Islander peoples face racism of varying degrees every day and many are unaware of the legal remedies available to them. Tragically, it has become considered a kind of "fact of life" that Aboriginal and Torres Strait Islander peoples have come to expect.[42] The Indigenous Legal Needs Project found that:

- 28.1 per cent of NSW participants[43] and 22.6 per cent of NT participants[44] identified discrimination as an issue they had faced recently;
- Only 17.1 per cent of NSW participants[45] and 21.4 per cent of NT participants[46] sought legal advice in relation to discrimination matters;
- Discrimination on the basis of race was the main type of discrimination experienced, with discrimination being experienced predominantly through employment, health care, housing, shops and supermarkets and social venues;[47] and

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[39] Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators* (2009), 24.
[40] Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012)46.
[41] Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission to the Family Law Council: Improving the Family Law System for All* (2011) 10 in Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 46.
[42] Indigenous Legal Needs Project, NSW Report, 80; Indigenous Legal Needs Project, NT Report, 102.
[43] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008)80
[44] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 96.
[45] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008)84.
[46] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 101.

- The first significant hurdle to accessing legal advice in this area may be identification of discrimination as a legal issue for which there is a legal remedy.[48]

By way of example, one group of Aboriginal women noted in a stakeholder meeting:

> [There is] discrimination by Centrelink staff and real estate agents on the basis of Aboriginality and sexual preference [example provided of a gay couple with a child trying to access payments]… Supermarkets is another one where we face discrimination all the time…they follow you around. I've been to Coles on a Sunday afternoon in my weekend clothes…and the person in front of me never got their bag checked, but they've pulled every item out of my bag and cross-checked it with my docket… I never argue, I just think 'whatever'… but that sort of thing, or when you are in a shop and you are being served later… that discrimination is entrenched in the system, there is nothing you can do about it…[49]

And

> Real estate agents are very bad…you go round and look at 50 or 100 houses, you won't get one. Every time you go to have a look there are about 6 white families that go along and one little black one, me… you can spend five or six months looking for a place.[50]

Insidious and ingrained racism of this type has become a common experience for Aboriginal and Torres Strait Islander peoples, so much so that many often do not identify it as a legal issue and pursue it as such.

4.9 Wills and Estates

Many Aboriginal and Torres Strait Islander peoples are unaware of civil law arrangements around wills and estates. Very few Aboriginal and Torres Strait Islander peoples have wills as there is a general perception that wills are only useful where there is significant amount of money or property to be distributed.[51] The value of having a will for clarifying other posthumous wishes (such as burial place, guardianship of children or transfer of intellectual property rights) may not be well understood.[52] Complex extended family relationships and cultural obligations can further complicate matters. The Indigenous Legal Needs Project found that:

- Only 6.1 per cent of NSW participants[53] and 10.1 per cent of NT participants[54] indicated they had completed a will; and

- Close to 60 per cent of participants across both jurisdictions who had not completed a will said they would like legal assistance to do so.[55]

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[47] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 97; C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008)13, 81.
[48] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 102.
[49] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008)80.
[50] Ibid,82.
[51] Ibid, 100.
[52] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 71.
[53] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 101.
[54] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 71.

Without further community legal education and increased awareness, as well as access to legal and/or appropriate other help to assist in the completion of wills, Aboriginal and Torres Strait Islander peoples may not identify their existing legal need, and in turn seek appropriate assistance in the completion of a will.

5. Unmet need and access to justice

From the above evidence it is clear that the level of legal need faced by Aboriginal and Torres Strait Islander peoples is high and consequently, the demand for services to assist people in addressing and resolving these issues is also high. This level of demand combined with the chronic underfunding of a range of culturally competent legal assistance services results in Aboriginal and Torres Strait Islander peoples being unable to realise the full potential of their legal entitlements and a lack of access to justice. Below is an outline of the key areas in which investment is needed to ensure Aboriginal and Torres Strait Islander peoples' right to access to justice.

5.1 Culturally competent legal assistance services

5.1.1 Aboriginal and Torres Strait Islander Legal Services (ATSILS)

ATSILS are the preferred legal assistance service provider for Aboriginal and Torres Strait Islander peoples. Solely funded by the Commonwealth Attorney-General's Department, ATSILS are however, chronically underfunded, in civil and family law especially, and could have an increased positive impact on the level of access to justice experienced by Aboriginal and Torres Strait Islander peoples if they were adequately resourced to do so. The Commonwealth Attorney-General's Department agrees:

> The availability of culturally appropriate legal assistance services for Indigenous people with family and civil law problems is limited and this compromises the ability of Indigenous Australians to realise their full legal entitlements. It also introduces a danger that civil or family law issue scan escalate to criminal acts resulting in charges and a perpetuation of the cycle of over-representation in the criminal justice system.[56]

And

> The Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.[57]

The critical aspect of ATSILS service delivery that sets them apart from other legal assistance services is their focus on, and ability to, provide culturally competent services to Aboriginal and Torres Strait Islander peoples. Cultural competency is essential for effective engagement, communication, delivery of services and the attainment of successful outcomes. Cultural competency is more than just cultural awareness. Cultural awareness, on its own, has not led to changes in behaviours and attitudes necessary for the delivery of

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[55] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 102; Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (2012) 72.
[56] Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 143.
[57] Ibid, 144.

adequate services to Aboriginal and Torres Strait Islander peoples.[58] Cultural competency is much more than awareness of cultural differences, as it focuses on the capacity to improve outcomes by integrating culture into the delivery of services, it requires commitment to a 'whole of organisation' approach.[59] Hence, while ATSILS can be said to be a culturally competent service model as Aboriginal and Torres Strait Islander community-controlled organisations which has Aboriginal and Torres Strait Islander cultural needs at its core, mainstream organisations which have cultural liaison mechanisms built into their organisations may still not be culturally competent as these mechanisms exist within a wider organisation approach that reflects the needs of the mainstream population rather than Aboriginal and Torres Strait Islander peoples specifically. The fact that cultural competency is directly related to locality in that the cultural needs and particularities of Aboriginal and Torres Strait Islander communities differs greatly, will impede the usefulness of attempts to develop national or state/territory cultural competency frameworks for use in mainstream organisations. While the benefits of culturally competent service delivery are clear, the additional cost that is involved with providing such a service is difficult to quantify.

When clients know that they have a problem, they often do not however, understand which area of law applies. When interviewing clients, it is regularly found that they have more than one legal problem, sometimes in each area of law (civil, family and criminal). Each ATSILS is able to act as a one stop shop for clients with different solicitors responding to each problem and coordinating an approach to prioritise their legal issues. This is extremely important because Aboriginal and Torres Strait Islander peoples are less likely than mainstream clients to follow through with referrals, especially to mainstream organisations or organisation with which they are unfamiliar. Also ATSILS are flexible in terms of cultural considerations, not being rigid with clients meeting appointment times and being aware of communication protocols.

CASE Study 1

CAALAS were acting for a number of people at a remote community where there had been a serious conflict between two families. It related to a death in Alice Springs and resulted in numerous charges of riot and assault being laid. CAALAS continued to service the remote court but it was very tense and members of both sides of the conflict were bailed or summonsed to attend court on the same dates which brought them into further conflict. One of CAALAS' Field Officers who is a Walpirri woman and has excellent knowledge of the community liaised with the court and went through the list identifying the family connections and arranging for the list to be split between two days so that people could attend court separately and in a peaceable manner. This is a good example of how CAALAS' knowledge of community and cultural responses to particular situations impacts directly on service delivery and adds value to the effectiveness of the justice system.

[58] Universities Australia, *National Best Practice Framework For Indigenous Cultural Competency In Australian Universities* (2011)1.
[59] Ibid.

Case Study 2

After working with Aboriginal people and clients at the ALS NSW/ACT for more than 9 years I recently had a conference with an Appeal Client. I undertook a careful, considered introductory conversation about his background and mine - and developed trust about the process and understanding of his cultural and familial issues - he revealed a series of tragic issues to do with family relationships. He had seriously assaulted someone in gaol after being parole refused. The underlying reason was that he had not re-integrated to lawful life - because his relationship with his sister had broken down and he had no external sponsor for weekend leave (training for the outside world). The tragedy of this family background was not revealed earlier. The evidence will be important to the appeal and his ultimate parole process (and for PTCU to assist in follow up). The relationship of trust was founded on mutual recognition of background and proper recognition of the importance of family and community.

ATSILS are not only needed because their culturally competent service model is more effective, they also occupy an important space within Aboriginal and Torres Strait Islander communities. Given the history between Aboriginal and Torres Strait Islander peoples and Australia's legal system it is vitally important that Aboriginal and Torres Strait Islander peoples have their own distinct voice in the justice space.

Within the ATSILS context, the interaction between funding for criminal law services and civil and family law services is particularly complicated as relevant funding agreements with the Commonwealth Attorney-General's Department require ATSILS to prioritise their service delivery to assist those at risk of going to jail. However, it is not simply the case that those resources which are left over after criminal law services are covered determines the level of resources allocated to the provision of civil an family law services. If this was the case, given the level of demand for criminal law services, it could be argued that ATSILS do not have any resources to spare in relation to the provision of services in any other area of law. However, given the high level of community need for civil and family law services, and in recognition of how unresolved civil and family issues can escalate to criminal matters, ATSILS have had to make the decision to direct a limited amount of resources towards services in these areas. Despite best efforts, there are simply insufficient resources to cover the level of services needed. For example, until very recently ALSWA has been unable to provide civil law services outside of Perth. ALSWA is currently trialling a civil law circuit in regional and remote areas, which has only been possible due to a one-off grant from the Commonwealth Government. However, without ongoing funding, it will not be possible to continue this service. ALSWA has reported that for the most part, Aboriginal people in regional and remote areas are almost entirely unaware of their civil law rights, and even for those people who are aware and wish to assert their rights, access to civil law services in regional and remote WA is extremely limited. Similarly, NAAJA was forced to suspend its family law services in early 2012 due to a 50 per cent increase in demand for child protection matters and an increased complexity of those matters arising from a change in court procedure. It was only with one off funding that family lawyers were able to be employed. That funding expires in 2015 and without continued and adequate funding, family law clients may again be referred to mainstream legal aid or go unrepresented.

The convergence of chronic underfunding and a high level of unmet legal need amongst Aboriginal and Torres Strait Islander communities places ATSILS in an untenable position whereby funding for services in different areas of law compete for priority and where difficult compromises which ultimately affect people's access to justice have to be made. A

further increase in the level of ATSILS civil and family law service delivery without additional funding for such would necessarily come at the expense of criminal law service delivery, and given that the demand in this area is only growing and the serious consequences that cut backs in this area would have, such is not an option for ATSILS. Additional funding must be provided in order to put a stop to this inherent competition which causes detriment to both the community and the justice system as a whole.

In addition to the need for increased investment in civil and family law services, an increase in the ability of ATSILS to extend the reach of their community legal education programs is another issue of particular importance given the clear evidence of low levels of awareness and understanding about civil and family law rights among Aboriginal and Torres Strait Islander communities. Again, the cultural competency of services delivered in this area is key to ensure effective communication, as are the relationships that ATSILS have built over the last 40 years with the communities they serve. Community Legal Education plays a key role in prevention and early intervention as it provides people with the necessary information and skills to prevent the development of civil and family law issues and/or advice and information about ways to resolve such issues where they have developed. It can also play a significant role in preventing relatively minor civil issues from escalating into criminal matters. Civil issues such as debt, driver's licenses and social security issues are increasing bases for Aboriginal and Torres Strait Islander peoples' contact with law enforcement, including arrest, detention and ultimately sentencing. Even minimal early intervention in these circumstances might resolve these issues without escalating to the criminal jurisdiction.

By having wide reaching community legal education programs we can increase the chances of prevention, decrease the chances of issues escalating until they are more complex and more expensive to resolve, and ultimately make savings 'further down the track'. Such would be directly in line with the Government's focus on increasing investment in prevention and early intervention. For example, the Commonwealth Attorney-General's Department's 2009 '*A Strategic Framework for Access to Justice in the Federal Civil Justice System'* report states:

> Resources need to be directed to the most efficient and effective means of resolving legal problems and disputes. Ensuring that more legal assistance funding is directed to prevention and early intervention will enable more people to get the assistance they need at an early stage, so that their legal problems do not become entrenched and require costly court intervention. Failing to intervene early to prevent legal problems and disputes from escalating is not only costly in terms of resource usage, but affects individual and community well-being by embedding disadvantage and limiting capacity to participate fully in the economy and society.[60]

And

> Disadvantaged or remote communities access information services less than others, and have less access to telephone and internet services. The experience of ATSILS shows that the most effective way to educate Indigenous communities about legal issues and legal services is through direct contact…there is scope to build on existing service networks in the development of outreach programs, including those established by ATSILS, legal assistance

[60] Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 146.

services and relevant non-legal services such as family relationships services, which have a strong geographical presence across Australia.[61]

Case Study 3

A community legal education session was requested by a Cape York community in Queensland on the relevant Alcohol Management Plan (AMP) for that community. Despite the AMP being in place for a number of years there was confusion about its application in some areas. For example, the carriage limit was one carton of light or mid-strength beer and some people thought that they could carry a carton for each person in the car, whereas the limit was one carton for each car. There was also confusion about the right of police to search cars beyond the AMP boundary. Such searches are lawful, if conducted to prevent prohibited alcohol being transported into the community. Effectively communicating this information enables community members to properly understand the legislation and inform themselves of the risks of bringing more than the carriage limit into the community. Also, by communicating this information, it may prevent individuals incurring obstructing police charges when police inform individuals that they are taking the alcohol and charging the person for it and when they stop people to search their car outside the AMP boundary.

Recommendation 1

Provision of sufficient funding for ATSILS to expand their civil and family law services and meet demand, without diminishing funding available for legal assistance services for criminal matters.

5.1.2 Family Violence Prevention Legal Services (FVPLS)

FVPLS assist Aboriginal and Torres Strait Islander adults and children who are victims of family violence, including sexual assault, or who are at immediate risk of such violence. FVPLS are solely funded by the Commonwealth Attorney-General's Department and are based in regional and remote areas on the rationale that unlike in metropolitan areas there are likely to be no alternative services in such areas that victims can access. Like other legal assistance services, including ATSILS, FVPLS are chronically underfunded and could have an increased impact on improving Aboriginal and Torres Strait Islander peoples' access to justice if adequately resourced to do so.

There is a dearth of funding and programs for a holistic approach to addressing family violence. There are examples of programs that could be used as a model or that could be funded to refer clients to, including red dust healing, and programs such as those used in Canada for first nations peoples, which provide a holistic approach to family violence could be developed in Australia by funding local Aboriginal and Torres Strait Islander community organisations.

Recommendation 2

Provision of sufficient funding for FVPLS to meet demand and expand service delivery to metropolitan areas.

[61] Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 81.

5.2 Aboriginal and Torres Strait Islander interpreter services

Central to the effective engagement of, and provision of quality services to, Aboriginal and Torres Strait Islander peoples is effective communication. For a proportion of Aboriginal and Torres Strait Islander peoples, this will be unachievable without the assistance of an interpreter. However, there is a shortage of Aboriginal and Torres Strait Islander interpreter services around Australia to meet this need.

NATSILS has previously undertaken research in relation to this issue, which we will not seek to reproduce in full here. Rather our previous report entitled *The Right to a Fair Trial: the expansion of Aboriginal and Torres Strait Islander interpreter services* is available at http://www.natsils.org.au/PolicyAdvocacy.aspx for further reference. This report was in response to a lack of progress by those Australian Governments party to the National Partnership on Remote Service Delivery who in 2008 committed to the development of a national framework for the provision of Aboriginal and Torres Strait Islander interpreters.[62] Little action had been taken to bring such a commitment to life and our report was designed to kick start the process by providing information as to what the needs of Aboriginal and Torres Strait Islander people are, what consequences a lack of interpreters can have, and what kinds of services are needed. Our main findings were:

- There is a massive unmet need for more and more highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages;
- In addition to interpreters in traditional Aboriginal and Torres Strait Islander languages, there is also a need for interpreters of Aboriginal English. While more traditional Aboriginal and Torres Strait Islander languages may be easily identified, many people are not aware that Aboriginal English exists and often mistake it for proficiency in Standard Australian English (for a guide to Aboriginal English see Appendix A from NATSILS submission *The Right to a Fair Trial: the expansion of Aboriginal and Torres Strait Islander interpreter services*);
- Language difficulties often exist in conjunction with even greater cultural differences which can further muddy the waters of effective and accurate communication;
- There is also a need for greater awareness of the need for interpreters for hearing impaired Aboriginal and Torres Strait Islander peoples. Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss this is an issue that must be addressed;
- Only a handful of Aboriginal and Torres Strait Islander interpreter services exist and those that do exist are insufficiently resourced to operate beyond limited geographical areas or provide interpreters in all necessary situations. This is an unacceptable situation given that in comparison the Commonwealth Government provides twenty four hour seven days a week interpreter services for hundreds of foreign languages and dialects through the Translating and Interpreting Service;

[62] COAG, *National Partnership Agreement on Remote Service Delivery* (2008) [19 (g)].

- There is a critical need for the increased development of professional level accreditation testing for Aboriginal and Torres Strait Islander languages to ensure that interpreters are qualified to work in the legal arena; and

- Greater awareness needs to be created amongst service providers in the justice system of how to identify when an Aboriginal and Torres Strait Islander person needs an interpreter as well as how to engage and work with an interpreter.

Following our report, in 2012 NATSILS was invited to be part of the Australian Government's Stakeholder Reference Group in relation to the development of a national framework for the provision of Aboriginal and Torres Strait Islander interpreters. NATSILS is pleased to report that this process has been very productive, with a draft national framework being settled with the Stakeholder Reference Group in early 2013. Our understanding prior to this year's federal election was that all relevant governments had endorsed the national framework aside from the Queensland Government. Post-election, it remains unclear what the new Commonwealth Government's position in relation to this project will be.

Recommendation 3

3.1 In consultation with the Stakeholder Reference Group, increase the provision of Aboriginal and Torres Strait Islander interpreter services through the implementation of the national framework prescribed in the National partnership Agreement on Remote Service Delivery.

3.2 Implement strategies to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters.

3.3 Provide adequate training and funding to relevant service providers and agencies involved in the civil justice system to promote and accommodate the use of interpreters.

5.3 Culturally competent child protection services and practices

The over-representation of Aboriginal and Torres Strait Islander children in contact with the child protection system and the consequent high level of demand for services in this area has been outlined above. The importance of cultural competency within service provision to Aboriginal and Torres Strait Islander peoples has also been outlined above. The critical need for culturally competent child protection services has recently been explored throughout child protection inquiries in Victoria and Queensland.

The Victorian Inquiry found that:

- The impact of disadvantage on a child's development and the history of forcible removal of Aboriginal children has resulted in Aboriginal families being suspicious of health and welfare services. This means that services designed to assist Aboriginal people must pay close attention to how Aboriginal people use the services and provide those services in a culturally competent manner;[63]

[63] The Honourable Phillip Cummins et al, Report of the Protecting Victoria's Vulnerable Children Inquiry (2012) 296.

- Culturally competent approaches to family and statutory child protection services for Aboriginal children and young people should be expanded;[64] and

- The adoption of a comprehensive 10 year plan for delegating the care and control of Aboriginal children removed from their families to Aboriginal communities is also recommended. Such a plan will enhance self-determination and provide a practical means for strengthening cultural links for vulnerable Aboriginal children.[65]

And the Queensland Inquiry found that:

- Aboriginal and Torres Strait Islander adults are less likely than non-Indigenous adults to use mainstream services such as preventive health, antenatal and early childhood services;[66]

  In their submission the Townsville Aboriginal and Islander Health Services has told the Commission that:

  > Many of the current programs/resources that are available e.g. violence prevention, parenting, budgeting, hygiene etc. etc. etc. are not delivered in ways that are appropriate to Aboriginal and Torres Strait Islander culture but more importantly, many of these programs don't even recognise the lived experience of Aboriginal and Torres Strait Islander people.[67]

- The Commission has also been told that keeping children out of the system is made more difficult by departmental officers having a poor understanding of Aboriginal and Torres Strait Islander cultural and family practices. Some officers are even said to be interacting with families in ways that are insensitive or offensive. In the Commission's survey of the Child Safety workforce, 84 per cent of respondents felt confident that they had the skills to work effectively with Aboriginal and Torres Strait Islander children and families, but only 22 per cent of their Aboriginal and Torres Strait Islander colleagues agreed;[68] and

- Agencies controlled by Aboriginal and Torres Strait Islander people have a central role to play in improving the quality of statutory services for Aboriginal and Torres Strait Islander children and families, and reducing their over-representation in the system. All else being equal, child protection services are more likely to be effective if they are delivered through Aboriginal and Torres Strait Islander–controlled

[64] The Honourable Phillip Cummins et al, Report of the Protecting Victoria's Vulnerable Children Inquiry (2012) 272.
[65] Ibid.
[66] Honourable Tim Carmody, Taking Responsibility: A Roadmap for Queensland Child Protection (2013) 356.
[67] Ibid, 357.
[68] Ibid, 361.

agencies because these agencies are familiar with local circumstances and have the requisite cultural competence.[69]

However, despite such findings, including that such services would have an impact on reducing over-representation, there is a lack of culturally competent Aboriginal and Torres Strait Islander child protection services around Australia, and where they do exist, a lack of coordination between the relevant government departments and such services.

Practices within the child protection system can also be inhibiting. For example there is little recognition of the extent to which Western notions of immediate family impact upon Aboriginal and Torres Strait Islander children and families. This should be identified as a major issue for Aboriginal and Torres Strait Islander clients, as many services do not incorporate wider family structures into their service model and hence, can lock out important family members. This often means that Aboriginal and Torres Strait Islander clients are limited by the services they are accessing, in relation to who can attend, which then means that the outcomes produced often do not suit them or their children. While provisions have been made for the inclusion of significant others within processes, it is an issue that the inclusion of "other" family members is viewed as an exception rather than the norm.

Furthermore, NATSILS are concerned as to the narrow view of the rights of the child that is most often adopted within the child protection system. In the cultural context of Aboriginal and Torres Strait Islander clients, children have the right to have cultural knowledge passed on to them (on a continuous basis, day to day and over longer periods depending on what knowledge is to be passed on), as well as information on the obligations they owe to others based on their kin relationships. This knowledge and these obligations will require the inclusion of many different family members at different stages of the child's life and therefore, such family members should be involved when major decisions are being made about that child.

Recommendation 4

In coordination with State and Territory governments, development of a plan for the expansion of culturally competent approaches to family and statutory child protection services for Aboriginal children and young people, including increased delegation of authority to Aboriginal and Torres Strait Islander community-controlled services.

5.4 Culturally competent alternative dispute resolution services

NATSILS has previously undertaken research in relation to this issue, which we will not seek to reproduce in full here. Rather our previous report entitled *Joint ATSILS Proposal to the Commonwealth Attorney - General for the Establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service* is available at http://www.natsils.org.au/PolicyAdvocacy.aspx for further reference. This report was in response to the need for increased provision of culturally appropriate alternative dispute management services to Aboriginal and Torres Strait Islander peoples in order to achieve equal access to justice for members of these communities. The report examined how mainstream Western styles of dispute resolution and conflict management can be culturally

[69] Honourable Tim Carmody, Taking Responsibility: A Roadmap for Queensland Child Protection (2013) 369.

alienating and inaccessible to Aboriginal and Torres Strait Islander peoples, the need for the establishment of a national network of locally developed Aboriginal and Torres Strait Islander dispute management services and how such a network should be developed. Some the report's key findings are outlined below.

It has been highly documented that the Western style of dispute resolution and conflict management can be culturally alienating towards Aboriginal and Torres Strait Islander peoples.[70] Also, evaluations of mainstream dispute resolution and conflict management services have shown that Aboriginal and Torres Strait Islander peoples avoid such services, especially when they do not have Aboriginal or Torres Strait Islander peoples on staff.[71] As reported by the Productivity Commission, economic disadvantage means that while Aboriginal and Torres Strait Islander peoples are dependent on government provided services, mainstream services often do not meet their needs.[72]

A lack of culturally competent service delivery in this area acts as a significant barrier to the early and effective resolution of disputes.

Such lack of engagement can be explained by the numerous barriers faced by Aboriginal and Torres Strait Islander peoples in accessing mainstream dispute resolution and conflict management services. These include, but are not limited to:

- The cultural differences and lack of experience that Aboriginal and Torres Strait Islander peoples have had with dispute resolution processes means that such concepts may not make sense to members of these communities.[73] Furthermore, there is often a lack of understanding amongst Aboriginal and Torres Strait Islander peoples that a mediator is neutral, and they are left feeling that they are in a pseudo-judicial system where the "judge" is on the side of the other party;

- Communication barriers relating not only to difficulties with speaking, reading and understanding Standard Australian English, but also in regards to correspondence. Aboriginal and Torres Strait Islander peoples are more likely to be in rental accommodation or experience overcrowding at home and hence, may experience difficulties in accessing reliable and private telephone, mail and internet services;[74]

- Financial constraints experienced by many Aboriginal and Torres Strait Islander peoples. Many of the people for whom these services may be deemed appropriate are dependent on CentreLink entitlements. They often do not own or have access to a motor vehicle. In cases of family law matters, they often have several children whom they may not be able to find alternative care for;

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[70] L Behrendt, *Aboriginal Dispute Resolution* (1995) 53-67.
[71] B White, *Evaluation of the Alice Springs Counselling Service and Reengagement of Aboriginal Family Consultants in Alice Springs and Darwin* (1998) cited in National Alternative Dispute Resolution Advisory Council, above n 2, 9.
[72] National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_IndigenousDisputeResolutionandConflictManagement> at 3 November 2009, 9.
[73] Ibid.
[74] Ibid.

- Many Aboriginal and Torres Strait Islander peoples are reliant on public transport to get to dispute management services. Sometimes, without other arrangements for travel it may seem too overwhelming and people will not show up for their appointment;

- Time and place issues. Different understandings of time may cause confusion and difficulty in regards to the setting and keeping of appointments. Physical spaces may be intimidating, and due to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, certain environments may remind individuals of previously negative experiences with the formal justice system;

- The complexity of Aboriginal and Torres Strait Islander disputes means that mainstream services may not be equipped to deal with such characteristics and mainstream processes may not fit. For example, Aboriginal and Torres Strait Islander disputes often involve many parties and numerous overlapping issues, evolve over a longer period of time and involve the process of 'healing' relationships rather than just settling the definitive dispute at hand. Aboriginal and Torres Strait Islander peoples are also far more likely to live in multi-family households[75] and family relationships may also include people who are not biologically related;[76]

- Services may not be readily available due to the fact that a large number of Aboriginal and Torres Strait Islander peoples live in remote or very remote areas of Australia; and

- The traditional principles which inform mainstream mediation such as, the neutrality of the mediator, confidentiality and voluntary attendance can be inconsistent with Aboriginal and Torres Strait Islander customs and values.[77]

It is clear that mainstream dispute resolution services are not being utilised by Aboriginal and Torres Strait Islander peoples. The reason for this is not that Aboriginal and Torres Strait Islander peoples reject alternative dispute resolution as a means to deal with conflict, but rather, that purely Western models of dispute resolution often clash with, and do not meet the needs of, contemporary Aboriginal and Torres Strait Islander peoples.[78] In fact, evaluations have shown that the presence of Aboriginal and Torres Strait Islander mediators

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[75] Social Justice Commissioner, *Statistical Overview of Aboriginal and Torres Strait Islander People in Australia* (2004) Australian Human Rights and Equal Opportunity Commission <http://www.hreoc.gov.au/Social_Justice/statistics/index.html#App2_3> at 15 December 2009.

[76] Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report* (2004) Attorney-General's Department <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~28+FEB+ATSI+22+Dec+04.pdf/$file/28+FEB+ATSI+22+Dec+04.pdf> at 5 November 2009, 30.

[77] M Suavé, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 3(81) *Aboriginal Law Bulletin*, 10-12, 10.

[78] National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_IndigenousDisputeResolutionandConflictManagement> at 3 November 2009, 3.

and staff has led to usage by Aboriginal and Torres Strait Islander peoples of services which they had previously avoided.[79]

Dispute resolution and conflict management services have been established as an alternative to the Court system as a better and more appropriate means through which justice can be more effectively served in certain types of cases. However, Aboriginal and Torres Strait Islander peoples are being denied this alternative because such services are often culturally alienating to them. At present, in order to access the Family Court of Australia disputants have to first obtain a certificate from a Family Relationships Centre (FRC) stating that they have attempted mediation, unless they qualify for an exemption, as they are the only body recognised by the Court to do so. Due to the fact that such centres are often not culturally appropriate or accessible to people in remote and regional areas, Aboriginal and Torres Strait Islander peoples can be discouraged from accessing them, and hence are obstructed from accessing the Family Court of Australia.

As stated in the foreword to the Commonwealth Attorney-General's Department Report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, "the critical test is whether our justice system…provides effective early intervention to help people resolve problems before they escalate and lead to entrenched disadvantage."[80] Effective and culturally appropriate dispute resolution and conflict management services are paramount to Australia's justice system passing this test.

Recommendation 5

That the Commonwealth and State and Territory Governments establish nationally networked Aboriginal and Torres Strait Islander dispute resolution and conflict management services throughout urban, rural and remote areas of Australia.

5.5 Service provision in regional, rural and remote areas

Much has been said in recent times about the idea of 'justice by geography' in relation to the criminal justice system, and the same can be said in relation to the civil justice system. Every day ATSILS see the impact that a lack of service provision in multiple areas including, legal assistance services, alternative dispute resolution services, and interpreter services in regional, rural and remote areas is having peoples' ability to be aware of their rights, assert their rights and effectively resolve civil disputes. In many areas, ATSILS are the only legal assistance service provider and hence, in the absence of another legal assistance provider to refer conflicted matters to, only one party to a dispute from that community will be able to access assistance from ATSILS.

In remote communities, access to justice has been described as "so inadequate that remote Indigenous people cannot be said to have full civil rights".[81]

The Family Law Council's report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* found that:

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[79] Mandala Consulting, *Review of the Dispute Settlement Centre of Victoria Koori Programme* (2002) Australian Institute of Aboriginal and Torres Strait Islander Studies <http://ntru.aiatsis.gov.au/ifamp/events/pdfs/Koori_Program.pdf> at 27 November 2009.

[80] Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) ix.

[81] C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 31.

It is clear that many Aboriginal and Torres Strait Islander peoples have no or limited access to legal, relationship support, family dispute resolution and court services. Consultations and submissions indicated that this is particularly acute in the more remote parts of Queensland, the Torres Strait, Western Australia, New South Wales, Northern Territory and South Australia, where there is no federal family law courts circuit and the publicly funded legal services that service those areas have limited capacity to provide family law support.43

NAAJA provided the following case example to illustrate these concerns:

> [the agency] is about to commence proceedings for a client who lives in a remote community which has been without a telephone line for some months. The other party moves around regularly between communities. We have significant concerns about the ability of either party to meaningfully participate in the upcoming court proceedings in Darwin…the family is very hesitant about the upcoming proceedings'.

In regional areas, consultations indicated that physically accessing court and other services was difficult for many Aboriginal and Torres Strait Islander people, who may not have access to cars and live in areas not serviced by public transport. Other factors inhibiting travel include seasonal flooding, travel time and exorbitant travel costs, whether for fuel or taxi fares. In particular, women in such areas with children experiencing relationship breakdown against a background of family violence may face insurmountable difficulties. In some areas, limited access to telecommunications may mean that people who wish to seek telephone advice and make appointments may have to do so from a public telephone in a public area such as a hotel or post office. In these circumstances their privacy may be compromised and information relevant to their dispute be spread into the wider community including their family, associate and the other party to the dispute.[82]

In relation to Family Relationship Centres (FRC) the Family Law Council also found that:

A number of submissions indicated that geographical barriers hinder the ability of Aboriginal and Torres Strait Islander families to access FRC services. In particular, the submissions noted that transport, travel and accommodation costs associated with accessing FRC services prohibited the attendance of Aboriginal and Torres Strait Islander clients living in regional and remote areas. Women's Legal Services NSW, for example, said:

> Whilst FRCs are located in large regional centres, they are not in most small towns or anywhere close to where many Aboriginal people live. The lack of private and public transport and costs of travel and accommodation mean attending these services is impossible.

NAAJA suggested a reliance on telephone mediation to service non-Darwin based clients in the Top End was inadequate, for a number of reasons:

> [I]n a remote community context, it will literally mean that one party will be standing by a pay phone to participate in the mediation. Phone mediations greatly impair the effectiveness of the mediation process. Interpreters cannot be used in a three-way phone conference. We have also had the experience of mediators describing how they are writing things on the whiteboard, which the parties cannot obviously see.

[82] Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*(2012) 43-46.

Recommendation 6

Increased investment in the expansion of culturally competent court, legal assistance, alternative dispute resolution, interpreter and other justice related services to regional and remote areas.

6. Impact on civil justice system

The high level of need amongst Aboriginal and Torres Strait Islander peoples and the under-resourcing of culturally competent services to meet such need has significant impacts upon the civil justice system, including:

- Aboriginal and Torres Strait Islander peoples are not able to realise their full civil law rights and have equal access to justice;
- Opportunities are being missed to prevent the development of legal issues in the first place;
- Opportunities to identify and intervene in legal issues at an early stage are also being missed. Consequently, the opportunity to resolve issues at a lower cost to the system are also being missed;
- Unresolved civil law issues also have the potential to escalate into criminal matters which consequently furthers the perpetuation of the cycle of over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- Such missed opportunities place unnecessary additional pressure on the civil justice system, particularly at the more formal end of the system.

7. Conclusion

It is evident that Aboriginal and Torres Strait Islander peoples experience a high level of unidentified and unmet legal need in the areas of civil and family law. It is also evident that Aboriginal and Torres Strait Islander peoples often experience multiple and overlapping legal issues, or "clusters" of legal issues. This is a result of the disproportionately disadvantaged status of many Aboriginal and Torres Strait Islander peoples, a lack of awareness and understanding about civil law rights and available remedies and a lack of access to appropriate services to assist in asserting such rights. Such has resulted in a situation where many Aboriginal and Torres Strait Islander peoples are unable to realise their full civil law rights and have equal access to justice.

Critical to addressing these issues is increased investment in the provision of culturally competent legal assistance services, including ATSILS. The importance of cultural competency to effective service delivery to Aboriginal and Torres Strait Islander peoples has been proven time and time again and in terms of the justice system, it is directly related to the level of access to justice afforded to Aboriginal and Torres Strait Islander peoples.

The increased expansion of such services, in addition to court services, to regional, rural and remote areas is another critical element of access to justice for Aboriginal and Torres Strait Islander peoples. The idea of justice by geography cannot be acceptable practice Australia.

The impact of such issues on not only Aboriginal and Torres Strait Islander peoples, but the civil justice system itself is significant. Opportunities to prevent the development of legal issues in the first place, to resolve disputes early and at the lowest cost, and to prevent disputes escalating to criminal matters are all being missed. This not only robs Aboriginal and Torres Strait Islander peoples of equal access to justice but also places an unnecessary burden on the civil justice system as a whole.