

THIRD NATIONAL ACCESS TO JUSTICE PRO BONO CONFERENCE

Brisbane 28 August 2010

Plenary Session 1: Closing the gap on access to justice for Aboriginal and Torres Strait Islander peoples
Presenters: Ms Alison Vivian, Professor Chris Cunneen, John McKenzie
Chair: Mick Gooda

Introduction by Mr Gooda

Mr Gooda raised the following points:

1. It is important to start taking a pragmatic approach to human rights, to start understand rights and obligations.
2. A key part of moving on is being accountable for what has been done. It is important that there is accountability of offenders.
3. The Human Rights Commission will be lobbying for targets for incarceration to be reduced and advancing the Closing the Gap Report recommendations in relation to matters such as life expectancy. Its role is and will continue to be to educate the Australian community about issues affecting disadvantaged groups and changing attitudes.
4. In *Roach v Electoral Commission*, the pro bono services provided to the prisoner had ensured that a constitutional right to vote was upheld. In this case, the Federal Government had acted unlawfully and unconstitutionally by preventing prisoners from voting in the federal election.
5. Other examples of where pro bono legal services have been utilised by Aboriginal and Torres Strait Islander people are in the cases of homelessness, disability and incarceration.
6. The referendum to recognise Aboriginal people will be a step in the positive direction for Australia.

Wilcannia – Menindee – Bourke – Lightning Ridge: Different Worlds

Lessons for understanding crime in four NSW Aboriginal communities (Ms Alison Vivian)

Ms Vivian raised the following points:

1. The aim of the pilot studies was to better understand the factors that contribute to significant variations in rates of Indigenous offending in different areas in NSW and to identify whether there are particular characteristics or strategies that may have a positive impact on crime rates in Indigenous communities.
2. The pilot was a qualitative study of two communities with significant Indigenous populations that are geographically and demographically comparable but with contrasting crime rates. It consisted of semi-structured interviews with key community and organisational representatives.
3. Ms Vivian provided the relevant findings in relation to the four communities studied, namely Wilcannia, Menindee, Bourke, and Lightning Ridge.

4. Some of the observations arising from the study are:
 - a. Sorry is not enough, it is important to face up to history and legacies
 - b. There was support for the community initiatives
 - c. Access to land and land rights are highly important
 - d. Aboriginal authority respected
 - e. Reinvigorated cultural authority
 - f. Long term employment strategies
 - g. Educational opportunities with flexible delivery
 - h. Significance of local government
 - i. Community role in determining policies, funding and programs
5. Reactive measures included:
 - a. Increased significance of liaison roles, especially ACLOs
 - b. Local case managers to support fly in professionals
 - c. Local drug and alcohol treatment facilities
 - d. Youth diversionary programs eg Brahminy program
 - e. Safe house/hostel for children and adolescents
 - f. Bail house for juveniles
 - g. Flexible recruitment and tenure
 - h. Cultural awareness training
 - i. Safe and productive activities for kids
 - j. Role of school is critical
 - k. Local mental health facilities

**Assessing the Civil and Family Law Needs of Aboriginal and Torres Strait Islander People in Australia
(Professor Chris Cunneen)**

1. In 2008, Chris Cunneen and Melanie Schwartz conducted research into the Family and Civil Law Needs of Aboriginal People in New South Wales, which was funded by the Legal Aid Commission of NSW.
2. The report addressed two broad research questions:
 - a. An analysis of the civil and family law needs of Aboriginal people in NSW; and
 - b. Legal needs analysis and explore how Legal Aid NSW might improve the services that they provide to Aboriginal clients in the areas of civil and family law.
3. Further research will be conducted assessing the civil and family law needs of Indigenous people in Australia from 2010 to 2013. The Project will build on work done in 2008 for the NSW Legal Aid Commission.
4. The research will be conducted in Queensland, Northern Territory, Western Australia and Victoria.
5. Aboriginal and Torres Strait Islander civil and family law needs are an access to justice issue:
 - a. A Strategic Framework for Access to Justice in the Federal Civil Justice System.
Recommendation 11.4 states that, "The Commonwealth should consider options for

- improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians”.
- b. Analysis of the legal needs of Aboriginal and Torres Strait Islander people has been largely focused on criminal law.
 - c. A growing demand for child protection, civil and family law matters has been identified, but ATSILS report being unable to service this demand due to insufficient funding (Senate Legal and Constitutional References Committee 2004).
 - d. Existing barriers that Indigenous people face in accessing legal services have been identified in various reports (eg Senate Legal and Constitutional References Committee (2004); Joint Committee of Public Accounts and Audit (2005)).
 - e. Indigenous people face well-documented disadvantages in the areas of education, housing, employment, income and health (SCROGSP 2009).
 - f. Some categories of disadvantage are particularly relevant to client’s needs when accessing legal services: for example, low levels of literacy and numeracy; high levels of hearing loss; higher levels of disability; and higher levels of psychological distress compared with non-Indigenous people (SCROGSP 2009).
 - g. Geographical isolation is also a major inhibitor to access to justice for Indigenous communities. In remote communities, access to justice is “so inadequate that remote Indigenous people cannot be said to have full civil rights” (Senate Legal and Constitutional References Committee 2004:5.120).
6. NSW research identified specific areas of legal need particularly in relation to child removal, racial discrimination, housing and tenancy, social security, and credit and debt, as well as significant unrecognised needs in areas like victim’s compensation and wills and estates.
 7. Evidence suggests that family law matters tend to be worked out by the parties without legal assistance.
 8. Children being taken into care was identified as a significant problem, and Aboriginal women were more than twice as likely (22.5%) to identify such as issue than men (9.9%). There was wide ranging dissatisfaction among focus group participants concerning their interactions with DOCS.
 9. Many stakeholders commented on the apparent lack of legal advice or representation for parents in cases where their children are being removed. Although the numbers were small, Aboriginal women were more likely to seek legal assistance than men (23.3% compared to 8.6%).
 10. Racial discrimination has emerged as a major issue in this study, especially in some of the research locations.
 11. More than one quarter (28.1%) of both males and females identified discrimination as an issue they had faced recently.
 12. Of the 41 individuals who indicated a problem with discrimination, only seven (17.1%) sought legal advice.
 13. Although the numbers are small, Aboriginal women were more likely to seek advice than men.
 14. Housing problems emerged as a major issue in the focus groups discussions and interviews with stakeholders. Overall 41.2% of focus group participants identified disputes involving landlords, primarily the conduct of the Department of Housing or Aboriginal housing bodies. The most frequently noted matter was the issue of repairs, followed by rent.

15. Of the 63 Aboriginal people who identified a dispute with a landlord, some 70% of individuals indicated they did not seek legal advice. Aboriginal women were more likely to seek advice than Aboriginal men (28.9% compared to 20%).
16. Some 36% of Aboriginal participants in the focus groups were receiving an Indigenous specific allowance. In addition three quarters of the focus group participants (75.8%) stated they were receiving some other type of Centrelink benefit.
17. Approximately one in three men (32.9%) and one in four women (26.3%) identified having dispute with Centrelink over the last couple of years. 11.6% of those sought legal advice.
18. Some 35% of the participants identified debt-related problems. Telephone bills and Credit Reference Rating were two frequently mentioned problems. Only five focus group participants (three men and two women) indicated they sought legal advice for their problem.
19. Some 28.9% of participants reported being the victim of a violent crime. The proportion of women victimised was slightly higher than men (30.7% compared to 27.0%).
20. The majority (55.8%) of those who reported being the victim of a violent crime did not know about the victim's compensation scheme. Aboriginal women were more likely to be aware of the scheme than men (47.8% compared to 35%).
21. Only one in four victims (26.8%) pursued compensation. Although the numbers are small, Aboriginal women were more likely to pursue compensation than Aboriginal men (33.3% compared to 20%).
22. Only 6.1% of the participants indicated they had completed a will. Twice the number of women compared to men had completed wills.
23. Almost half the men and more than two thirds of the women who had not completed wills would like legal assistance to do so.
24. The Assessment of the Civil and Family law Needs of Indigenous People in Australia (2010 – 2013) research will involve:
 - a. holding men's and women's focus groups in eight Aboriginal communities in each jurisdiction (32 communities and 64 focus groups altogether) and using both questionnaires and semi-structured discussion about legal issues that participants have encountered.
 - b. interview with relevant stakeholders.
 - c. cover urban, regional, rural and remote communities
 - d. an analysis of data provided by partner organisations about the usage of their services by Aboriginal and Torres Strait Islander clients, and/or a review of existing policies in the partner organisations as they relate to servicing the civil and family law needs of Indigenous clients
25. The research will provide a legal needs assessment, an analysis of legal service's policies and existing usage data and will develop strategies for improving access to justice in civil and family law.
26. Combined with the completed New South Wales research, we will have a relatively comprehensive picture of Indigenous civil and family law needs in Australia, given that the proposed jurisdictions cover urban, regional, rural and remote communities, and more than 85% of Indigenous people in Australia live in Queensland, NSW, NT, WA and Victoria.
27. The research partners will include the relevant legal aid commissions and Aboriginal and Torres Strait Islander Legal Services.

Presentation by John McKenzie

1. The issue of interpreters, or lack thereof, in some cases is more important than the right to legal representation. In some cases, this can have an extremely serious effect on access to justice by Aboriginal people. This is the case in not only rural, regional and remote areas but also in metropolitan areas.
2. We need to clearly keep in mind that rules of kinship are not negotiable in traditional societies. It is important that we do not act as a further damaging factor for traditional societies.
3. At a recent meeting of ATSILSs, some of the aspects of the NT Emergency Response were considered. Some of the feedback received included:
 - a. those people from NT who work in ATSILS see it as having a negative impact on their people;
 - b. "Other people are constantly minding our business";
 - c. people are being forced to enter into leasehold agreements as a result of rebuilding and building of new houses and there is an urgent need for a tenancy advice service;
 - d. provides a mandate to be racist;
 - e. happening through the NT;
 - f. great and urgent need for more assistance in anti-discrimination advice;
 - g. income management is going to further impact on people;
 - h. new form of deciding whether someone will become a vulnerable welfare payment recipient;
 - i. people will be without any advice what the issues and dangers are for them;
 - j. huge increase in the number of traffic offences;
 - k. juveniles in detention are a serious problem. Juveniles comprise less than 5% of the actual population, yet account for 48% of incarcerated population;
 - l. over 50% chance in ending up in jail.
4. ATSILSs are the best service providers and desperately need increase in the funds. ATSILSs are wholly funded by the Federal Government which is unsatisfactory given that State governments have passed legislation which affect types of matters handled by the ATSILSs.
5. Coronial reform is on the agenda.
6. Given the history of Aboriginal Australia since occupation, is it realistic to expect any confidence in this current project when the appalling incarceration figures did not even get a mention in the building blocks in that scheme?

Questions

1. *Do you have any thoughts where we take this research now?*

Ms Vivian noted that if anyone is going to be serious about closing the gap, some serious rethinking needs to be done. The view of some Aboriginal people is that "if we hear from the Government one more time that we are going to change something, we are going to scream. We have tried your way and

it has not been successful.” Non-Indigenous Australia needs to recognise that there is an Indigenous way which can offer solutions.

There is evidence from North America, Canada, New Zealand and Australia which highlights the importance of the engagement of the community.

Professor Cunneen noted that the purpose of the research is to provide a systematic understanding in the areas which might not be immediately obvious to legal practitioners.

2. Will you be looking at the difference across the jurisdictions in the 2010-2013 study?

Professor Cunneen noted that it will important to look into the commonalities across the jurisdictions.

3. Are there particular community legal education initiatives which have been more successful than others?

Professor Cunneen noted that decisions about what should be learnt out there should not be made by those in capital cities. It is important that local people are consulted otherwise any initiative will fail.

Ms Vivian noted that the research in NSW certainly reflects that. It is important to study the communities and determine what their needs are. People going into an Aboriginal community should know the community they are going into. Proper, respectful engagement is important. Mr Gooda noted that the difference in places like Redfern is an example of the importance of consulting with the community.

Summary by T ea Paris
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