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## The Civil and Family Law Needs of Indigenous People Forty Years After Sackville: Findings of the Indigenous Legal Needs Project

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### Introduction: The Role of the Law in the Reduction of Poverty and Disadvantage

In his 1975 Report on Law and Poverty (hereafter the ‘Sackville Report’), Sackville describes being poor as going without basic necessities but also as denial of access to life opportunities and as entrapment of the poor within a cycle of disadvantage through lack of power to ‘influence decisions and processes that affect their daily lives’.<sup>1</sup>

The Report argues that the law has a positive duty to address and the poor have a corresponding right to expect protection against inequalities associated with socio-economic disadvantage. Sackville’s report is concerned with identifying ways in which the law is failing in its duty to the most vulnerable, thereby exacerbating rather than reducing inequity. This inequity manifests as legislation and legal principles of ‘considerable importance to the everyday lives of poor people that are heavily weighted against their interests’.<sup>2</sup> It is also evident in the difficulties they have in accessing the law to ‘enforce their basic rights and to protect themselves against grievous injustice’.<sup>3</sup> He argues for more purposive action on the part of the law to ensure that the legal system is ‘loaded in favour of the weak and exposed’.<sup>4</sup>

The authors of this chapter have recently completed a large-scale study of access to justice - the Indigenous Legal Needs Project (ILNP). This study explored similar issues to those of the Sackville Report but with a specific focus on Aboriginal and

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<sup>1</sup> Australian Government Commission of Inquiry into Poverty, Second Main Report, *Law and Poverty in Australia* (AGPS, 1975) (the ‘Sackville Report’) 1-2.

<sup>2</sup> Ibid 3-4.

<sup>3</sup> Ibid 1.

<sup>4</sup> Leslie Scarman, *English Law: The New Dimension* (Stevens, 1974) cited in Sackville, above n 1, 2.

Torres Strait Islander people and on civil and family law. The Sackville Report provides us with an important point of reference in evaluating how far we have come in improving access to justice over time.

This chapter will firstly set out Sackville's findings about legal need and problems of access to justice, with some focus on those related specifically to Indigenous people. It will then turn to discussion of ILNP research in these areas, highlighting similarities and differences between the two studies, particularly in terms of how civil/family law issues and difficulties in resolving them might be problematic in particular ways for Indigenous people.

The ILNP research reveals that in many respects Indigenous people still encounter the same types of legal problems and face identical hurdles to adequately addressing them as were identified forty years ago. Poor access to justice continues to reproduce, as it did in 1975, disadvantage and other forms of social inequality for Indigenous people. Needless to say, this should be cause for significant concern.

## Access to Justice for the Socially Disadvantaged: 1975

### **Disadvantage, Legal Needs and Access to Justice**

Sackville maps the legal needs of the more marginalised within the community, identifying three categories of legal issues that are especially problematic for them.<sup>5</sup> These are worth detailing here, given that they provide context within which to interpret our more recent analysis of legal need.

The first two categories encompass (i) issues that all persons experience but which those who are disadvantaged will probably find more difficult to respond to (such as motor vehicle accidents, family law disputes) and (ii) problems that affect the poor with greater intensity. Consumer-related debt provides a good example of the latter type of matter.<sup>6</sup> Sackville describes how poverty creates a reliance on credit to purchase basic goods and services. The poor then end up paying more for these goods/services, including because they may not understand the nature and legal effect of credit transactions and/or are likely to have reduced power to bargain for a better deal. They may also be unlikely to challenge debt because they perceive defaulting on credit or harassment by credit providers as 'just how it is'.<sup>7</sup> A third category encompasses legal problems that will be experienced almost exclusively by the poor. These include tenancy, social security and some criminal law matters. This is, to a large extent, because poverty increases exposure to such issues.

Barriers likely to inhibit the poor's access to legal remedies are also discussed. Whilst economic barriers are of importance here, including the prohibitive cost of accessing private lawyers, non-economic barriers are also highlighted. These include not

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<sup>5</sup> Australian Government Commission of Inquiry into Poverty, above n. 1, 25.

<sup>6</sup> Ibid 106-7.

<sup>7</sup> Ibid 120.

knowing when a legal problem has arisen and that legal assistance may be required or where to access it; geographic ‘maldistribution’ of lawyers across different jurisdictions, within jurisdictions and even within cities;<sup>8</sup> and a fear of and lack of trust in the law as having capacity to provide justice, given that prior contact for the poor with the law is likely to have involved unsolicited contact with ‘agents of regulation and punishment’ such as police and debt collectors.<sup>9</sup>

Recommendations are made for strategies that might address these barriers, including better access to lawyers and legal services, described as ‘the means by which the goal of equality before the law will be transformed from an ideal into a reality’.<sup>10</sup> The report calls for increased and more consistent funding of legal and other services and the location of such services in the communities they are intended to serve. It also emphasises the need for increased legal education to address a widespread ignorance of legal rights, amongst other things.

### **The Specific Circumstances of Indigenous People**

A single chapter in the Sackville report focuses on the particular circumstances of Aboriginal people. Sackville suggests that perhaps more so for Aboriginal people than for other disadvantaged sectors of society the law ‘magnifies rather than redresses injustice’.<sup>11</sup> This occurs because areas of substantive law likely to affect the poor are especially problematic in Aboriginal communities, given that they are ‘substantially more likely to be’ and are more ‘visibly’ poor than the general population.<sup>12</sup> In addition, certain criminal<sup>13</sup> and civil laws<sup>14</sup> discriminate against or otherwise negatively and disproportionately affect Indigenous people. There is also an obvious disparity between levels of Aboriginal contact with the criminal as opposed to the civil justice system. Indigenous people, Sackville claims, have much less contact with legal services for civil law matters than non-Aboriginal people and are much more likely to seek help from an Aboriginal Legal Service for a criminal than a civil law issue, partly because like disadvantaged *non*-Aboriginal people they often know little about non-criminal law. This should not be seen as indicative of levels of civil law need, however, ‘since there are countless examples of exploitation of Aboriginals, particularly in country areas’.<sup>15</sup> In this regard, discrimination is identified as an issue of particular relevance to Aboriginal people.

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<sup>8</sup> Ibid 31.

<sup>9</sup> Ibid 33.

<sup>10</sup> Ibid 1.

<sup>11</sup> Ibid 262.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 267. Sackville discusses, for example, public drunkenness laws. He suggests that Indigenous people are disproportionately sanctioned under such laws, including as they are more likely to be drinking in public for a range of reasons.

<sup>14</sup> Mostly protective or control (control of movement, etc) laws in various jurisdictions such as the Northern Territory *Social Welfare Ordinance* 1964-1975 and Regulations under the *Community Welfare Act* 1972-1975 (SA).

<sup>15</sup> Australian Government Commission of Inquiry into Poverty, above n.1, 269.

The Report acknowledges the ‘political subjugation and alienation of Aboriginals and the destruction, over many years, of Aboriginal culture’,<sup>16</sup> which means that the legal system will be likely to only ‘strike at the symptoms of the problems experienced by Aboriginals rather than at the causes’. Reform, Sackville argues, is required outside of the law in order to restore Aboriginal dignity, to end discrimination, to undo the psychological damage arising from their subjugation and to transfer power to Indigenous people.<sup>17</sup> There is discussion of the establishment of a hub or centre that might achieve more strategic reform for Aboriginal people than will be attained through representing individual litigants.<sup>18</sup>

Sackville also points to the importance of Aboriginal legal services to Indigenous justice. These services, established in the early 1970s, provide some measure of Indigenous control, as well as a focus ‘for complaints against government bodies, the courts and the police, and for discussion of the legal and social problems faced by Aboriginals’.<sup>19</sup> It is noted that the ‘special legal and social problems of Aboriginals, brought about by a long history of oppression and neglect, require legal aid schemes that go further in the range of assistance provided and activities undertaken than more conventional services.’<sup>20</sup> Mainstream legal aid services too ‘need to pay special attention to overcoming Aboriginal reluctance to approach institutions and facilities which cater for the general community’.<sup>21</sup> The report points out that before the establishment of Aboriginal-specific legal services few Aboriginal people sought assistance from existing legal aid schemes because of ‘distrust of white institutions’, and ‘a fear of approaching them’.<sup>22</sup>

## The Indigenous Legal Needs Project

### The ILNP

The ILNP is the first large-scale study specifically focussed on Indigenous legal need and access to justice in *non*-criminal areas of law in Australia. The study aimed to analyse Indigenous civil and family law need in order to generate better responses to it, particularly by legal services.<sup>23</sup> The project commenced in 2011, was completed in 2015 and was preceded by a smaller project finalised in New South Wales (NSW) in 2008 and funded by Legal Aid NSW. The ILNP was funded through an Australian Research Council linkage grant, with Aboriginal and Torres Strait Islander Legal Services (ATSILS), Legal Aid Commissions (LACs) and Indigenous Family Violence Prevention and Legal Services in the Northern Territory (NT) as project partners.

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<sup>16</sup> Ibid 288.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 286-7.

<sup>19</sup> Ibid 285.

<sup>20</sup> Ibid 287.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 285.

<sup>23</sup> Further information on the ILNP is available at James Cook University, *Indigenous Legal Needs Project* (2016) <[www.jcu.edu.au/indigenous-legal-needs-project](http://www.jcu.edu.au/indigenous-legal-needs-project)>.

The ILNP interviewed Aboriginal and Torres Strait Islanders people about their legal needs and how they might be addressed, travelling to communities to speak directly with both community members and those that work with them. In total, the ILNP visited 40 remote, regional and urban Indigenous communities across five jurisdictions: NSW, the NT, Victoria (VIC), Queensland (Qld) and Western Australia (WA). Data was collected from around 800 Indigenous focus group participants through a questionnaire and group discussions designed to identify types of non-criminal legal issues commonly experienced and efforts made to resolve them, particularly through the legal system.<sup>24</sup> Close to 350 interviews were also conducted with relevant services and organisations, including legal services, welfare agencies and Indigenous community organisations. This fieldwork yielded data for the five jurisdictions in which nearly 90% of all Indigenous people in Australia reside, providing the most comprehensive picture to date of Indigenous civil/family law need and of issues relating to and strategies likely to improve Indigenous access to civil/family law justice.

### **ILNP Findings about Indigenous Civil and Family Law Need**

Much of existing discussion and debate relating to Indigenous legal need and access to justice has focussed on criminal law matters. To some extent, Sackville had a similar approach. The ILNP findings, however, demonstrate the necessity of expanding our focus to include non-criminal legal need in Indigenous communities.<sup>25</sup>

The ILNP identifies substantial levels of unaddressed civil and family law need in Indigenous communities. In particular, seven priority areas of need are highlighted: housing (tenancy), discrimination, credit and debt and associated consumer law, social security, child protection and wills and estates. Other than wills and estates, these areas of priority need overlap with those identified in the Sackville Report as especially problematic for the poor, with racial discrimination also recognised as an issue of particular relevance for Indigenous people.

Almost all of these priority issues are *quantitatively* significant in terms of their impact within the ILNP focus communities; that is, a proportionately large number of focus group participants identify having experiencing a problem or dispute in these areas. Tenancy, for instance, was by far and away *the* most common issue for participants in every jurisdiction, categorised as a problem by 41.2% to 60.1% of all participants across the different jurisdictions. In some communities *every* participant reported difficulties in this area. As an illustration of the way in which Indigenous legal need varies according to gender, Indigenous women in all jurisdictions were also

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<sup>24</sup> The topics covered in the questionnaire included housing and tenancy, neighbourhood disputes, wills and intestacy, victims' compensation, stolen generations and stolen wages, employment, social security, family law and child protection, discrimination, accident and injury, education, credit and debt, consumer issues, and taxation. Participants were asked to indicate whether they had experienced a problem in these areas in the last two years. A number of subsequent questions were posed on the nature of these problems and whether they had sought legal assistance and advice.

<sup>25</sup> These findings are set out in five ILNP jurisdictional reports, available on the ILNP website.

more likely than Indigenous men to experience a tenancy issue. In WA, almost three quarters (72.8%) of female participants had come up against a tenancy issue compared with 45.8% of male participants.

Percentages of participants experiencing problems in other priority areas were also relatively high. Up to 40.9% of participants had encountered (generally race-based) discrimination in areas such as housing and interaction with government agencies, including police. Credit/debt related issues concerning bills or loans affected between 18.4% and 34.9% of participants, depending on the state or territory. Of those on social security benefits, 22.6% to 33.3% had experienced a problem or dispute, most frequently around access to and being cut off benefits and overpayments resulting in debt. Wills and estates are quantitatively significant as a priority area of *unrecognised*, unmet legal need; that is, where there is little recognition that a particular issue has the potential to be or give rise to a legal matter. It is not uncommon for Aboriginal and Torres Strait Islander people to experience a dispute after a death (about burial, for instance), but there were very few legal problems arising specifically in relation to wills as so few Indigenous people have a will (5.7% to 13.1% of participants across the different jurisdictions). Legal need is prioritised in this area because the majority of participants (from 56.5% to 63.7%) expressed a desire to access legal help to draw up a will.

All priority issues are also *qualitatively* significant; that is, stakeholder and focus group participants have highlighted the substantial hardship and distress matters in these areas cause. Of note, generally the percentage of participants experiencing a child protection related problem was not as high as in other priority areas.<sup>26</sup> However, the ILNP uncovered enormous concern about the negative immediate *and* inter-generational impacts of child removal on Indigenous individuals, families and whole communities.

Participants were also asked if they had sought legal or other help in relation to a civil/family law problem. Responses to this question varied in the different jurisdictions, areas of law and by gender. Overall, the (at times overwhelming) majority of participants reported not having had any assistance with or not having experienced satisfactory resolution of civil and family law disputes or problems. For example, 88.4% of participants in Victoria and 78.6% of participants in the NT had not sought help or otherwise tried to resolve an incident of discrimination. And in NSW, the NT and Victoria, close to 90% of participants had not accessed assistance for social security related issues.

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<sup>26</sup> Statistics ranged from 6.8% of participants in the NT to 25.5% in QLD, though these figures are higher where just measuring the incidence of problems in this area for women. For example, 30.9% of female participants in QLD identified a child protection issue.

There are some broad similarities between the findings of the Sackville Report and the ILNP, including in terms of identified priority areas of need. Sackville found that certain legal issues were more prevalent for the poor because disadvantage increases potential exposure to such issues. This is confirmed by the ILNP research. That the prevalence of social security related issues, for instance, is relatively high in Indigenous communities is in part due to the reliance of many Indigenous people on welfare benefits. Around three quarters of all ILNP participants in each jurisdiction reported receiving benefits, inevitably increasing the incidence of social security related disputes.

Disadvantage can impact on the nature and extent of legal need in other ways. Sackville spoke of the poor commonly suffering difficulties because they are ‘at the mercy of expectations and judgements by those in authority.’<sup>27</sup> He also identified that Aboriginal legal services often assist Indigenous people with complaints against government bodies. Many ILNP priority legal issues arise in the context of government interaction with Indigenous people in areas such as child protection, social security and housing. One reason this occurs is that poverty creates a dependency on welfare services, which leads to far greater scrutiny by government to ensure compliance with obligations it has imposed as a condition of receipt of such services. This has been referred to as ‘welfare responsabilisation’.<sup>28</sup> In contrast, according to Sackville, the rich are able to live a much more ‘secluded and spacious’ life, shielding ‘many of their activities from public gaze and from law enforcement machinery’.<sup>29</sup> ILNP research revealed that many of the legal issues Indigenous people experience transpire because of actual or perceived non-compliance with such conditions, which is then often dealt with in a punitive manner.

Most of the housing related issues discussed in the ILNP research concern public housing tenancies. Australian Bureau of Statistics (ABS) data referred to in the ILNP jurisdictional reports indicates that Indigenous people are social housing tenants at disproportionate levels, rather than private tenants or owners (or mortgagees) of their own home.<sup>30</sup> Whilst Sackville discussed the inherent bias of legislation and legal principles that discriminate indirectly or directly against the disadvantaged, government policy and its implementation can operate in a similarly negative fashion. Given that Indigenous people are more likely to rent a home from public housing providers they are also policed to a greater degree for non-compliance with relevant housing provider policies. These include the ‘three strikes policy’, now in place across a number of jurisdictions, which leads to eviction from a tenancy if a tenant is

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<sup>27</sup> Australian Government Commission of Inquiry into Poverty, above n.1, 3-4.

<sup>28</sup> See Chris Cunneen et al, ‘Access to justice for Aboriginal people in the Northern Territory’ (2014) 49(2) *Australian Journal of Social Issues* 21.

<sup>29</sup> Australian Government Commission of Inquiry into Poverty, above n.1, 197.

<sup>30</sup> See Chris Cunneen et al, *The Civil and Family Law Needs of Indigenous People in Queensland* (James Cook University, 2014) 60.

found to have engaged in ‘disruptive’ or ‘anti-social behaviour’.<sup>31</sup> Whilst on its face the policy appears neutral, it has a disproportionately adverse impact on Indigenous people. It contains certain assumptions about what constitutes a ‘good’ as opposed to a ‘bad’ tenant – assumptions that fail to take adequate account of particular aspects of Indigenous culture, as the following quote from an Indigenous legal service provider suggests.

We estimate that over 2000 Aboriginal children have been made homeless in the last three years under the three strikes policy [in WA]. It’s for cultural reasons. Aboriginal families tend to visit each other a lot. [They] tend to have a lot of comings and goings ... Just normal day-to-day life can be disruptive in a street where they are the only Aboriginal family. I am convinced [the policy]... has a disproportionate impact on any big families but most Aboriginal families tend to live that way.... There are certainly more Aboriginal people homeless in the parks and the streets than there used to be.<sup>32</sup>

As further demonstration of how poverty affects legal need, ILNP research also highlights that there are certain legal issues *less* likely to arise for Aboriginal and Torres Strait Islander peoples - also because of socio-economic disadvantage. Employment is not identified as a priority area of need in our research. ILNP participants indicate that the main problem occurring in this area is *not getting a job* rather than difficulties with conditions of employment, unfair dismissal or similar.<sup>33</sup> Unless the reason for denial of work involved fairly blatant discrimination (which was generally identified as a discrimination matter) ILNP participants could identify no *legal* issue associated with the high rates of unemployment experienced in their communities for which they might seek legal redress. Not having a job is thus framed as a social and economic rather than a legal issue – and it is a problem that clearly relates to the longstanding disadvantage (including poor levels of education) experienced by Indigenous people.

## The ILNP and Indigenous Access to Civil and Family Law Justice

The ILNP demonstrated that Indigenous people regularly experience a range of civil and family law problems and disputes. Despite this, they are broadly under-represented in civil/family law systems, at least in terms of initiating legal action. They do appear, however, to be pulled into these systems involuntarily for (and are unlikely to defend themselves against) certain types of matters, such as social security debt, tenancy evictions and child removal.

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<sup>31</sup> See Fiona Allison et al, *The Civil and Family Law Needs of Indigenous People in WA* (James Cook University, 2015) 33ff, 90ff.

<sup>32</sup> *Ibid* 36.

<sup>33</sup> Employment-related issues did arise for some Indigenous people. See Melanie Schwartz et al, *The Civil and Family Law Needs of Indigenous People in VIC* (James Cook University, 2013) 167ff.



Four decades later we identify similar barriers to accessing justice to those discussed in the Sackville Report, with so little appearing to have changed in the intervening period. Sackville has suggested more recently that there have in fact been a number of initiatives introduced to address these barriers, including implementation of recommendations in his own report. These include industry dispute resolution schemes in banking, insurance and telecommunications and anti-discrimination laws.<sup>34</sup>

Why then are we still talking today about the need to enhance access to justice? Sackville answers that this is partly because there have been ‘too many ad hoc, repetitive and ineffectual inquiries’ in this area. He believes that attempts to detail and respond to problems of access to justice have been fragmented, with insufficient evaluation over time of the success of relevant access to justice strategies.<sup>35</sup> In addition, measures of what constitutes effective access to justice are largely undefined and constantly shifting, making it difficult to know what we are actually striving for. In the context of Indigenous people, one might add that there has also been very little Indigenous-specific research and analysis conducted to date in relation to access to justice. This is a significant omission that the ILNP has sought to address, particularly through prioritising Indigenous voices. Our findings are as follows.

## Changing Legal and Other Service Responses to Indigenous Civil and Family Law Need

### **Increasing legal service delivery around Indigenous Civil and Family Law Need**

The ILNP has focussed, for the most part, on improving legal service delivery around Indigenous civil and family law need. Whilst there are some problems with limiting access to justice in this way, discussed below, legal services play a crucial role in enhancing Indigenous justice outcomes, providing a vital link to what for most Indigenous people is still seen as a largely hostile and ‘foreign’ system of law.

Given the essential contribution legal services make to effective responses to civil/family law problems, gaps in Indigenous-focused legal service delivery inevitably increase levels of Indigenous non-criminal legal need. These gaps are for the most part, though not exclusively, attributable to under-resourcing of legal services, which are currently not sufficiently funded to meet the needs of those who walk through their doors let alone to assist the countless others who do not get that far. As one Indigenous legal service stated: ‘There is a good service being provided but it’s the tip of the iceberg... It’s still a big unknown exactly how much work is out there’.<sup>36</sup> It is worth noting too that contact between Indigenous people and private

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<sup>34</sup> Ronald Sackville, ‘Access to Justice: towards an Integrated Approach’ (2011) 10 *Judicial Review* 221, 223ff.

<sup>35</sup> *Ibid* 235.

<sup>36</sup> *Ibid* 139.

lawyers around civil and family law issues is not common, including because of cost, accessibility and lack of cultural understanding. Indigenous people are therefore almost entirely dependent on the public legal assistance sector for legal help.

The ILNP has identified in each jurisdiction an urgent need for increased and more stable funding for legal services. This applies to *all* legal services. However as Sackville pointed out in 1975 it is important to acknowledge the essential role of *Indigenous* legal services as the primary providers of legal and other advocacy to Indigenous communities and the necessity of funding them accordingly.<sup>37</sup> As one woman participating in the ILNP focus group in Cairns suggests:

We're Indigenous people. We rely on our ATSILS. If we go somewhere else they're going to talk about money. How are we going to afford that? We need ATSILS. ATSILS will always be the first preference to us Indigenous people.<sup>38</sup>

Given that much of Indigenous priority legal need arises within the context of government interaction (in relation to housing, social security, etc.), it is arguably an injustice for government to then fail to properly resource legal service assistance relating to relevant issues. An Indigenous legal service provider participating in the ILNP highlights that ATSILS step in 'quite often when there's been a failure of a state-based institution to provide the service that it's promised to provide, effectively'.<sup>39</sup>

To some extent, gaps in Indigenous civil and family law legal service delivery are attributable to the continuing predominant focus of legal services, particularly ATSILS, on criminal law work. Sackville indicated that Indigenous people were much more likely to visit an Aboriginal legal service for a criminal law matter than any other issue. This is still the case.

Whilst to some degree this focus is seen as necessary, given the continuing high rate of contact of Indigenous people with the criminal justice system, it inevitably leads to less resources for civil and family law related work and therefore to under-servicing of need in these areas. An *equal* focus on non-criminal legal need is required, without decreasing legal work in the criminal law sphere.

### **Non-Indigenous Legal Service Engagement with Indigenous Communities**

Whilst the ILNP research identifies the importance of Aboriginal legal services it also strongly recommends that *non*-Indigenous legal services, including Community Legal Centres (CLCs) and Legal Aid Commissions (LACs), improve their engagement with

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<sup>37</sup> For discussion of issues relating to funding of ATSILS see Chris Cunneen and Melanie Schwartz, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19.

<sup>38</sup> Cunneen et al, above n 30, 47.

<sup>39</sup> Allison et al, above n.31, 245.

Indigenous communities so as to better address civil and family law need. It cannot be assumed that every Indigenous person will want to engage with an Indigenous specific service for assistance in responding to legal disputes or problems. They must have genuine choice about where they access legal help.

Some non-Aboriginal legal services are working well with Indigenous clients around non-criminal law. However most report that they are not seeing anywhere near as many Indigenous clients as they would expect for civil and family law issues. Indigenous people too identify that they are unlikely, in general, to approach a non-Indigenous legal service for advice, including because it is seen to represent the 'white man's world'.<sup>40</sup> This creates major gaps in legal service delivery to, and presents as a significant barrier to accessing justice for, Indigenous people.

Specific barriers to effective engagement between Indigenous and non-Indigenous legal services have been identified in our research as including inflexible and bureaucratic systems, such as form filling or strict appointment systems. More generally, there may be a cultural divide that is difficult to cross. Non-Indigenous legal services just do things 'differently'. 'I just don't think Legal Aid is the most appropriate service provider. Aboriginal people have special needs.' 'It's a different sort of culture,' states one Indigenous legal service provider.<sup>41</sup> Non-Indigenous legal services, indeed any non-Indigenous mainstream services working with Indigenous people around civil and family law issues, are often also negatively branded as 'government', which can lead, for example, to a suspicion that personal information is being shared, for instance, with child protection agencies or with Centrelink.

The ILNP has made suggestions for ways to improve engagement, such as employing more Indigenous staff, taking on issues that are of higher priority or relevance to Indigenous people and strategic planning, including working to a formal Reconciliation Action Plan or similar.

### **Working More Strategically Around Civil and Family Law Issues**

Both the ILNP's and Sackville's analysis of access to justice points to a more strategic role for the law in redressing inequality. This involves engaging in litigation likely to have greatest beneficial impact, as well as in legislative and policy reform.

Sackville noted that it is important that the disadvantaged have a 'chance to press their claim in the courts just as more powerful people do'. This, he claimed, will assist in 'changing legal principles to reflect shifts in social circumstances and community standards'.<sup>42</sup> The ILNP also identifies that lawyers improve access to justice by assisting with individual casework, advice and representation, particularly where there is opportunity for certain cases to 'go the whole way' so as to establish relevant legal

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<sup>40</sup> Chris Cunneen and Melanie Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW: Final Report* (UNSW Press, 2008) 105.

<sup>41</sup> *Ibid* 113.

<sup>42</sup> Australian Government Commission of Inquiry into Poverty, above n. 1, 11.

precedent. Law and policy reform is very important to effective access to justice, particularly in an Indigenous context given the broad-ranging negative impacts of government policy and legislation on Indigenous communities.

For me, I think challenging some (policies) at their source—for example.... actually [being able to] challenge the Office of Housing policies around debt, around those things. That then means that we are not spending heaps of time trying to negotiate [on behalf of clients] using their [problematic] policies (Indigenous community organisation).<sup>43</sup>

Though it has generally been focused on criminal law issues, having a body such as the National Aboriginal and Torres Strait Islander Legal Service (NATSILS) to coordinate this kind of strategic work is as important now as it was when Sackville recommended establishing such a structure in 1975.

### **Increasing Service Provision Outside Capitals and Other Centres**

Geographic location is a significant barrier to Indigenous access to civil and family law justice. Sackville too highlights this, noting that distance has important implications for provision of legal services to the more marginalised as they are often ‘least mobile and least able to afford the cost of travelling to a lawyer’s office some distance away’.<sup>44</sup> It is important to note that it is not just legal services that are absent in some locations but *any* services, as well as forums for dispute resolution such as courts.

With our remote clients, the courts generally don’t hear any civil matters when they go out bush. So for child protection matters the parents are out bush but we’re here (in Darwin) dealing with all the court matters, so they are not participating in that process and not understanding what’s going on.<sup>45</sup>

This issue is likely to be especially problematic for Indigenous people because of the extent to which they reside in areas outside cities. Even in more central locations, however, the ILNP has seen that many Indigenous people will not have transport, phones or other means of making contact with even a comparatively local legal service.

Though legal services work hard in each State and Territory to stretch current resources to address need in the regions, it is clear that a significant amount of civil and family law work is undertaken in and/or from capital cities. There are sometimes large areas of states and territories with no or very little access to non-criminal legal assistance, even in smaller jurisdictions such as Victoria. NSW female focus group participants remarked: ‘No one comes out here. We’ve never had any lawyers out

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<sup>43</sup> Schwartz et al, above n 36, 192.

<sup>44</sup> Australian Government Commission of Inquiry into Poverty, above n 1, 31.

<sup>45</sup> Allison et al, above n 31, 92.

here.’ ‘Only when they go to court; that’s the only time they see [lawyers]’.<sup>46</sup> Legal services sometimes have an office located in the regions providing civil and family law help, with or without a permanent lawyer. At other times, servicing of the regions is undertaken through outreach. However, in some jurisdictions the areas to be covered by either method can be so vast as to be effectively unserviceable.

Greater coverage and regularity of outreach services and having a larger number of permanent offices in the regions is likely to help address this ‘tyranny of distance’. Servicing more remote locations is very expensive, however, and in the absence of additional funding legal services must think carefully about how best to use their limited resources to address what is a significant barrier to effective access to justice. ILNP recommendations have included, for example, establishing strong links with local services already well engaged with relevant communities, which will not only provide a connection to the communities in question outside of outreach visits (as these local services may be a good source of referrals), it will also serve to increase community engagement with legal services *during* such visits.

### Increasing Access to Information about Civil and Family Law

There is limited awareness in most Indigenous communities of civil/family law processes, rights and obligations and of where to access civil/family law assistance. This inhibits effective Indigenous access to civil and family law justice. ‘A lot of the blackfellas around here don’t know what legal aid does’ with respect to non-criminal law issues, claims a male focus group participant in NSW.<sup>47</sup> Many other participants also spoke of a need to know more about civil and family law issues. It is again difficult to identify any change in this regard in recent decades.

Indigenous people identified feeling ‘paralysed’ when they have little awareness of even very first steps to take when a problem or dispute arises or is likely to arise, including where to go for information or assistance. Better knowledge of civil and family law would help to avoid disputes or problems in the first place, and would enable Indigenous people to make informed decisions about dealing with matters appropriately and as early as possible.

A related issue is that there is much greater understanding of criminal law in Indigenous communities than of other areas of law largely due to the high level of contact Indigenous people have with the criminal as opposed to civil and family law justice systems, including in their interactions with legal services. Legal services, the legal system and the law are strongly associated for most Indigenous people with criminal charges, police and prison - seldom with issues such as discrimination or access to superannuation. The ‘courts are seen as a one way street... It’s when you’re accused of doing something wrong, that’s where you’ll end up... [It’s] seen from a negative way as opposed to a place where you can get your rights acknowledged’,

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<sup>46</sup> Cunneen et al, above n 30, 112.

<sup>47</sup> Ibid.

claims an ILNP Statutory Authority stakeholder.<sup>48</sup> Legal services report still seeing most Indigenous clients for civil/family law matters where they are responding to negative interaction with government agencies. As one CLC suggests: ‘They’re coming because they’re responding to something. They’ve either been charged or the child protection agency comes knocking and says, “We want to take the kids off you”.’<sup>49</sup>

Community legal education (CLE) about civil/family law is one obvious way of increasing awareness. Suggestions for its improvement include using culturally appropriate and more accessible methods of sharing information (eg, social media forums, audio-visual material) given literacy and language issues in Indigenous communities. Some ILNP stakeholders also identified the benefits of empowering select individuals in Indigenous communities to be ‘educators’. These persons are then able to ‘triage’ relevant issues and refer or liaise accordingly. The fact that they are a permanent presence in the communities in question and therefore more ‘approachable’ than a legal or other service, particularly where it is fly-in fly-out, is highlighted.

## The Complexity of Indigenous Legal Need

### **Non-Legal Issues (Including Poverty) and Legal Need**

The ILNP has identified a high degree of complexity within Indigenous legal need. One aspect of this is the inter-connection between *non-legal* issues and access to justice issues. These include illiteracy, disability and mental health issues, substance abuse and trauma, as well as poverty. All of these are commonly experienced within Indigenous communities and are often associated with disadvantage.

We have noted that these issues increase the incidence of problems relating to social security and (public) housing and decreases that of others, such as employment rights. The ILNP has seen such issues exacerbate legal need in other areas, such as child removal, credit/debt and consumer law. As noted by one Statutory Authority interviewee, ‘you have Aboriginal communities having their children removed and in many cases it would be the consequence of disability’.<sup>50</sup>

These types of non-legal problems also make it harder to resolve legal matters once they occur. Being unable to afford a bus fare or buy credit for your phone is but one example of how poverty, for instance, will make it more difficult to engage with legal or other services for assistance with legal problems. Sackville also picked up on this point by identifying problematic legal issues which are not exclusively experienced

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<sup>48</sup> Allison et al, above n 31, 266.

<sup>49</sup> Ibid 245.

<sup>50</sup> Schwartz et al, above n 36, 74.

by the poor (such as consumer-related debt) but that are likely to be ‘intensified’ for them, including because of difficulties they have in resolving them.

### **Interconnection Between Different Legal Issues**

The ILNP has also identified that in addition to *non*-legal issues travelling alongside legal issues, many Indigenous people experience multiple *legal* issues simultaneously.<sup>51</sup> The ILNP has referred to this as ‘snowballing’, where one unresolved issue soon becomes two, three and so on. In relation to tenancy, for instance, eviction of Indigenous people from public housing tenancies due to rental arrears leads to homelessness. This then feeds into issues of overcrowding, debt and further tenancy problems (non-payment of higher utility bills, eviction) in those Indigenous households that try to accommodate the homeless. There are numerous examples too of an escalation of unaddressed civil and family law issues to criminal law matters, and vice versa. The criminal law issue of family violence, for example, frequently intersects with non-criminal legal issues.

If they have no housing, they might have to go out and do a little something to eat that night or whatever.... I see the connection between civil and crime quite dramatically really. Yeah, you can see that connection because you’ve got debts and people who can’t [afford stuff], so [getting] money is a motivator there (Indigenous legal service).<sup>52</sup>

### **Cultural Difference and Colonisation**

Indigenous people continue to experience significant levels of poverty. Whilst this poverty does have some effect on the nature and extent of Indigenous legal need and problems of access to justice, cultural difference and colonisation also have an impact.

Culture and colonisation increase the incidence of specific civil and family law issues. Race-based discrimination is an example of this, identified in both the ILNP and by Sackville as a priority area of need for Indigenous people because of its pervasiveness. Significantly, this is an issue that can affect Indigenous people irrespective of their socio-economic position. ‘Whether it’s housing, police, private rental, wherever you go... Racial discrimination is bad every day and every night’, states a male participant in the Perth focus group.<sup>53</sup> It is a legal problem that runs through so many others, precluding Indigenous access to opportunities in employment, leading to a range of adverse outcomes (such as over-policing, racial vilification or bullying at school) and embedding itself within government policy and practice.

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<sup>51</sup> Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 178.

<sup>52</sup> Cunneen et al, above n 33, 198.

<sup>53</sup> Allison et al, above n 34, 41.

These issues also affect Indigenous capacity to deal with legal problems. Indigenous experiences of colonisation, for instance, impact on how contemporary legal issues are interpreted. Child protection today is commonly seen as a protraction of earlier Stolen Generations policy, for example. This is likely to mean that because Indigenous people have been so disempowered in their relationship with child protection agencies over time they may be more easily compelled to consent to orders for removal. An Indigenous legal service provider states: ‘Looking really big picture, you’re working with people who have the history of the Stolen Generation and who are very distressingly compliant with welfare agencies. These are incredibly, incredibly disempowered people’.<sup>54</sup>

Language issues, which often sit beside that of literacy, also add to complexity in this area for Indigenous people. Just like illiteracy, it can give rise to and make it harder to respond to legal issues, including because of the absence of use of interpreters at various stages of contact with the legal system.

I’ve had quite a few clients whose English is a second or third language and they’re being asked to sign [consent orders]. I had one where the [child protection] case- worker rang me up... “I’ve got Joe here, I’ve got the order in front of me...Can you just give him some advice for 5 or 10 minutes?”... I had a bad feeling about it from the start but as soon as I spoke to him I realised.... he [couldn’t read]... couldn’t know what was going on (Indigenous Legal Service).<sup>55</sup>

## Why Does Improving Indigenous Access to Civil and Family Law Justice Matter?

### **Link Between Unmet Civil and Family Law Need, Social Exclusion and Offending**

Sackville advocated for the law to play a greater role in assisting the poor with their legal problems as a means of combatting social inequality. The ILNP too argues that increased Indigenous access to civil and family law justice is crucial because of the adverse legal *and* social outcomes that result from failure to resolve legal problems. Enhanced access to justice is likely to improve social outcomes within Indigenous communities, which in turn can reduce Indigenous disadvantage and social exclusion. Conversely, continuing poor levels of access to justice for Indigenous people reproduces disadvantage.

Social problems such as homelessness, poor educational outcomes or poverty are often not identified as being associated with non-criminal legal issues. For this reason, they are generally seen as resolvable through political or economic rather than legal

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<sup>54</sup> Allison et al, above n 34, 137.

<sup>55</sup> Allison et al, above n 34, 200.



solutions. Our research indicates, however, that often at some point these social issues contain a legal element. If this legal element were better addressed through available legal remedies as and when it arises, the incidence of social problems is likely to decrease. Where unresolved, however, disadvantage is exacerbated, which compounds and escalates legal need and perpetuates cycles of disadvantage. The ILNP and Sackville both see the law as important to breaking this cycle.

Sackville also suggests that access to legal remedies provide some check on government power, of particular importance to the poor and socially disenfranchised.<sup>56</sup> This is also important to halting the cycle of disadvantage. The necessity for the law to ensure some measure of accountability in the government's relationship with Indigenous people is demonstrated by looking at what commonly occurs in relation to child protection issues in Indigenous communities. Lack of access to legal information and assistance in this area is seen as increasing rates of child removal. One Indigenous legal service provider in Victoria states: 'half of our clients do not get legal advice [about child protection]. Many of our clients do not understand all the factors'.<sup>57</sup> This same legal service alleges that their clients 'are often tricked into signing documents'. 'They don't know their legal rights and the options are very limited... There's a big void there'. As an indication of the essential role of the law in imposing reasonable restraints on government power it is recommended that child protection workers should be mandated (through legislation) to refer families involved in the child protection system to legal advisors who could 'take up the fight for them'.<sup>58</sup> Adequate assistance to legal assistance is identified here as critically important to leveling the playing field between government and significantly disempowered members of society.

## Limitations of Access to Justice

Sackville has more recently called for injection of a 'note of realism' into our discussions of access to justice.<sup>59</sup> The ideal of access to justice, he explains, rests on both a principle and an implicit promise. The principle is that all should be equal before the law. The promise is that the law and the legal system will achieve access to justice 'if not in the short term then ultimately', thereby 'ameliorating the unjust legal consequences of inequality within society'.<sup>60</sup> He suggests, however, that there is now a 'greater willingness to acknowledge that there will always be a substantial gap

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<sup>56</sup> See Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85, 97.

<sup>57</sup> Schwartz et al, above n 36, 43.

<sup>58</sup> *Ibid.*

<sup>59</sup> Australian Government Commission of Inquiry into Poverty, above n 63, 85.

<sup>60</sup> *Ibid.*, 86.

between the ideals implicit in the concept of access to justice and the ability to realise those ideals'.<sup>61</sup>

Given how little the landscape of Indigenous civil/family law need and access to justice appears to have altered over the last forty years, a more cautious approach to our understanding of the role of the law in bringing about genuine social change is clearly required. And so, whilst the law *is* important to addressing the broader social issues faced by Indigenous people it is also essential to acknowledge its limitations in this regard.

These limitations arise, in part, because the law does not operate in a vacuum. Social issues often do have a legal element, as stated, but they are not always about the law. The law can assist with tenancy-related problems, for instance, but it will be more restricted in its influence on government decisions relating to the construction of more affordable, accessible housing. The legal system is constrained because it functions against a larger social, economic and political backdrop. Constraints emerge, for instance, because of insufficient political will to address access to justice issues. Rather than expecting increased funding for legal services, Sackville suggests that we cannot take it for granted that government will continue to fund them even at current levels.<sup>62</sup> During the life of the ILNP there have been a number of threats to or reductions in legal service funding, which has meant discontinuation of services being provided and/or consumption of valuable resources in making a case for retention of funding. Given this, a multi-pronged approach is required to improve the circumstances of Indigenous people and other similarly disadvantaged groups - definitely involving but encompassing more than the law.

Indigenous people and other disadvantaged groups share similar problems in accessing justice. There are, however, also differences for Indigenous people, based around culture and Australia's history of colonisation. Any strategy designed to improve Indigenous access to justice will only succeed if it accounts for this difference and successfully incorporates Indigenous specific perspectives of justice issues: what justice means and how it might be attained. The ILNP has attempted to give voice to these perspectives, but in some respects within a framework that for the most part is constructed by non-Indigenous society. Our research to date emphasises the role of mainstream law and formal legal remedies in access to justice. It has done this, however, mindful of the necessity to locate solutions to the broad social exclusion of Indigenous people *outside* the law and to also give specific consideration to how justice might be defined within a wholly Indigenous domain. How, for instance, do we incorporate within our conceptualisation of access to justice Indigenous law, culture, knowledge and methodology? In what ways can an Indigenous right to self-determination also be effectively written into this

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<sup>61</sup> Australian Government Commission of Inquiry into Poverty, above n 38, 233.

<sup>62</sup> Australian Government Commission of Inquiry into Poverty, above n.63, 104-5.

conceptualisation? These and similar questions will be addressed in future research we hope to conduct in this area, in collaboration with Indigenous people.