



# Submissions to the Productivity Commission



Queensland  
Indigenous Family  
Violence Legal  
Service Submissions  
to the Productivity  
Commission

4 November 2013

# **Access to Justice Arrangements**

**Queensland Indigenous Family Violence Legal Service Submissions to the Productivity Commission**

**Dated 4 November 2013**

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## 1 Introduction

The Productivity Commission is undertaking an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law (the *Inquiry*). The scope of the Inquiry is to examine the current costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of, justice.

The Productivity Commission will make recommendations on the best way to improve access to the justice system and equity of representation including, but not limited to, the funding of legal assistance services. The final report is due before September 2014.

The issues of access to justice for Indigenous Australians was not raised as a specific term of reference of the Inquiry.<sup>1</sup> Queensland Indigenous Family Violence Legal Service (**QIFVLS**) would like to ensure that the barriers experienced by, and the possibilities for improving access for, Indigenous Australians are identified and considered in the Inquiry.

QIFVLS is committed to assisting Indigenous Australians who are victims of domestic and family violence and/or sexual assault. QIFVLS does this by delivering culturally appropriate and free legal and support services and community education services. QIFVLS has offices in Far North Queensland, North Queensland, the Gulf, West Queensland and Central Queensland.

This submission will focus on access to justice and legal services for Indigenous Australians in regional and remote areas experiencing domestic and family violence.

## 2 Executive Summary

It is well established that Indigenous Australians in regional and remote communities are deprived of access to justice. Whilst research and government action has largely focused on the interaction between Indigenous Australians' and the criminal justice system, issues of access to justice apply equally to the civil and family law system. Given the disadvantage facing Indigenous Australians today, the severely harmful impacts of domestic and family violence on victims and the broader community, and the link between improved access to justice and improved overall welfare, QIFVLS submits that the Commission ought give proper consideration to the issues and recommendations raised in this submission in its Inquiry.

The access to justice problems faced by Indigenous Australians in remote and regional communities continue to be influenced by Australia's colonial history. The historical context and its present day practical consequences are discussed in section 4 of this submission.

An overview of domestic and family violence in Australia and its devastating impact on victims and the broader community at large, in particular in regional and remote Indigenous communities, is provided in sections 5 and 6 of this submission.

Against this background QIFVLS raises the following issues and challenges in providing adequate access to justice to Indigenous Australians in remote and regional areas, particularly in the context of domestic and family violence:

- (a) **Service delivery:** QIFVLS experiences serious difficulties that inhibit its ability to adequately provide the services needed by victims of domestic and family violence in remote and regional communities. These difficulties include:

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<sup>1</sup> Though QIFVLS recognises that the Issues Paper published by the Productivity Commission in September 2013 notes Indigenous people may constitute a "particular group" in which unmet legal need may be concentrated.

- (i) The sheer isolation of many Indigenous communities in Queensland (in regional, remote and rural areas, known as the 'RRR factor') imposes a significant hurdle to servicing those communities. QIFVLS simply does not have the resources to provide on the ground full-time services to such communities, and victims in those communities can be especially vulnerable.
  - (ii) The use of technology, such as phone and internet, is no substitute for face to face services, nor does it provide the holistic approach that is required. Only by providing ongoing services in person can service providers such as QIFVLS develop the necessary trust and rapport with clients to provide effective legal and support services.
  - (iii) Service providers such as QIFVLS need to have a deep understanding of the cultural sensitivities of Indigenous Australians in regional and remote areas. The ability to train and retain suitably qualified lawyers and support staff is essential, but is an ongoing challenge.
  - (iv) The judicial system is generally not appropriate in dealing with Indigenous people. Court formalities, in particular, can perpetuate the distrust that Indigenous people may have with the legal system.
  - (v) In some Indigenous communities English is not spoken as a first language and sourcing culturally appropriate interpreters can have time, confidentiality and cost consequences.
  - (vi) Indigenous Australians in regional and remote communities have very little knowledge about their civil law rights. QIFVLS finds that this increases the need for ongoing, continuous legal support in those communities. Clients need to be guided through the whole process, which involves ongoing practical as well as legal support.
  - (vii) QIFVLS has experienced Government agencies frustrating access to justice by its clients by applying its bureaucratic process rigidly, for example requiring particular forms.
- (b) **Government commitment:** QIFVLS considers that there has not been enough of a focus from Australian Governments on providing Indigenous Australians in regional and remote communities with access to civil law services. Whilst there has been focus and Government response in relation to criminal matters, this is less true of civil law matters.
- (c) **Obtaining and retaining qualified staff:** Like many not for profit organisations, QIFVLS experiences difficulty in engaging and retaining suitably qualified staff. By its nature the services that QIFVLS provides make it a highly stressful and demanding job for employees. To be effective, employees need a diverse range of skills – both as legal service providers, in terms of cultural awareness and in providing support to victims of domestic and family violence. Problems associated with hiring and retaining staff undermine the ability of QIFVLS to provide services to its clients adequately.

These issues are discussed in more detail in the body of the submission. A summary of QIFVLS's recommendations for dealing with these issues is set out immediately below and more fully in section 10.

- (a) **Increased funding targeting services to remote Indigenous communities:** QIFVLS recommends that the Commonwealth Government address the serious lack of access to justice in civil law matters experienced by Indigenous people in remote communities by providing sufficient funding to legal service providers, after consulting the various stakeholders to determine how this funding is best targeted.

- (b) **Training for legal service providers' staff:** QIFVLS submits that the Commonwealth Government should support increased training and recruitment programs for legal service providers working in regional and remote Aboriginal and Torres Strait Islander communities.
- (c) **Development of community legal education programs:** QIFVLS recommends that the Commonwealth Government develop and support community legal education programs to inform and educate Indigenous Australians (particularly those in regional and remote community) about their civil law rights.
- (d) **Development of community education programs:** QIFVLS submits that the Commonwealth Government should also develop and support community education and support programs for victims and perpetrators.
- (e) **Increased cultural sensitivity in the civil law justice system:** QIFVLS proposes that the Commonwealth Government conduct an analysis of the civil law justice system with a view to increasing the cultural sensitivity and appropriateness of court processes and the civil law justice system more generally.
- (f) **Review of Government Department processes:** QIFVLS recommends that the Commonwealth Government conduct a review of the processes implemented by Federal departments and service providers with the aim of assessing how existing processes may be changed to remove bureaucratic barriers and facilitate greater access to justice for Indigenous Australians.

### 3 Background: Indigenous Australians and access to justice

The existence of significant barriers to Indigenous Australians obtaining effective access to justice is well established. Issues of (a lack of) access to justice and over-representation of Indigenous Australians in the criminal justice system has been well recognised. Yet research into the legal issues of Indigenous people has largely focussed on criminal, rather than civil, law.<sup>2</sup>

However, the access to justice barriers, and more specifically service delivery difficulties, experienced by Indigenous Australians in regional and remote areas apply equally to civil matters as they do to criminal matters.

The primary purpose of QIFVLS is to provide legal and support services to Indigenous Australians suffering from the direct and indirect effects of domestic and family violence and sexual assault; however, victims and potential victims of domestic and family violence are often people who also need to seek access to family and civil law services as well.<sup>3</sup> Through its outreach activities in regional and remote Queensland, QIFVLS experiences first-hand the immense difficulties in providing services to regional and remote communities. These difficulties are particularly pronounced when it comes to providing effective legal services and are a major hurdle to Indigenous people accessing family and civil law justice. It has even been suggested that this problem goes so far in remote areas that remote Indigenous people cannot be said to have full civil rights.<sup>4</sup> This suggestion is consistent with QIFVLS's experience in facing serious challenges in providing adequate information and ongoing legal services to our clients in remote areas.

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<sup>2</sup> Melanie Schwartz and Chris Cunneen 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *UNSWLJ* 725.

<sup>3</sup> Joint Committee of Public Accounts and Audit, *Report 403 Access of Indigenous Australians to Law and Justice Services* (2005), 18.

<sup>4</sup> Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice Report* (2004), quoting submission of Top End Women's Legal Service.

Access to civil law services is crucial to the welfare of Indigenous Australians. It has been suggested that improved access to legal services for Indigenous people generally, but particularly in relation to civil law, is likely to assist in improving social conditions and facilitate economic development amongst this group.<sup>5</sup> There is also a recognised danger that civil law problems, if left unaddressed, can escalate into criminal law problems,<sup>6</sup> perpetuating the over-representation of Indigenous Australians in the criminal system.

There is an identified growing demand for civil law services amongst Indigenous Australians. Major civil law needs most commonly experienced by Indigenous Australians relate to housing and tenancy (including disputes with landlords), employment issues, child custody and family law, credit and debt and other consumer issues, motor accidents compensation, victims of crime compensation (particularly for victims of domestic and family violence), tort of negligence and wills and estates. Indigenous Australians are also likely to experience racial discrimination, which is commonly viewed by Indigenous Australians as just a fact of life, rather than something unlawful that gives rise to rights of redress.<sup>7</sup>

Given that the overall welfare of Indigenous Australians is affected by failures to address these civil law issues, it is critical that access to civil and family law services be improved so that these increasing demands can be properly met.

## **4 The context: Imposition of colonial law & the destruction of Indigenous 'lore'**

### **4.1 Historically**

Before colonization, 'Indigenous people were guided by a highly sophisticated system of justice based on principles of rights and responsibilities ... which formed the basis of traditional law (*lore*)'.<sup>8</sup> The use of an international law that deemed Australia to be considered as 'no mans land' was the start of a troubling relationship between Indigenous people and police enforcers of British laws and regulations. The laws were designed to 'protect' the original occupiers of the land, but instead 'allowed extraordinary offences against Indigenous Australians to occur, including random dispersals, massacres, rapes, seizure of land, and the subjugation and incarceration of the traditional landowners'.<sup>9</sup>

The law was fundamental in separating people who appeared to be different, and who were considered 'inferior' to Anglo-Saxons.<sup>10</sup> The 1997 'Bringing Them Home' Report found that between one in three and one in ten Australian Indigenous children were 'forcibly removed from their families and communities in the period from approximately 1910 until 1970'.<sup>11</sup> This history remains relevant for victims of family and domestic violence who come into contact with police

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<sup>5</sup> Melanie Schwartz and Chris Cunneen 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *UNSWLJ* 725.

<sup>6</sup> Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *ILB* 18.

<sup>7</sup> Melanie Schwartz and Chris Cunneen 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *UNSWLJ* 725.

<sup>8</sup> Boni Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development, 2000), 182.

<sup>9</sup> Boni Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development, 2000), 182.

<sup>10</sup> Chris Cunneen, 'State Crime, the Colonial Question, and Indigenous Peoples' in Alette Smuelers and Roelof Haveman, eds., *Supernational Criminology: Towards a Criminology of International Crimes* (Intersentia Press, 2008), 159-180.

<sup>11</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997), 31

and child protection services. During and after colonisation, Indigenous people were presented with a set of colonial laws that regarded them as 'sub-human' and were not recognised as citizens until 1967.

Indigenous lore not only governs relationships with country, but also determines family and kinship ties, the resolution of disputes and numerous details of everyday life. The disjunct between Indigenous lore and the Australian legal system, and the ongoing impact on Indigenous Australians of being required to navigate two legal systems, is insufficiently recognised by many lawyers, judges and support staff who work with Indigenous Australians. This reality is crucial to understanding the difficulties experienced by many Indigenous Australians in accessing justice through the Australian legal system and the processes put in place by Australian governments.

## 4.2 Presently

In addition to the historical imposition of colonial legal systems, the current and continued failure to recognise the importance that Indigenous lore and customs has on Indigenous clients needs to be addressed. When considering how to address access to justice issues in a civil law context, regard must be had to the complexities associated with dealing with various communities which are often made up of Indigenous persons from differing family and language groups who may or may not have lores and/or customs in common.

Awareness of the diverse backgrounds of clients within the various communities is of fundamental importance when trying to ensure that legal services are tailored to suit the needs of vulnerable individuals. For example, there may be more than one clan represented within a single community meaning the relevant lores and customs which pertain to certain tribes will differ between clients. This may affect the ability of the client to disclose information to a lawyer of the opposite sex or affect the way in which a particular client views their relationships with others, including victims and third parties who are affected by domestic or family violence.

## 4.3 The Practical Consequences

As a result of colonization, the relationship between Indigenous people and all aspects the legal system is troubling. Socio-economic disadvantage is linked to criminal activity and inevitably contributes to the over-representation of Indigenous people in custody. Statistics show that Indigenous Australians make up over 26 percent of the total prison population, while accounting for approximately only 3.0 percent of the Australian population, an increase of 3 percent when compared to the previous year.<sup>12</sup>

Studies have found that Indigenous people mistrust the justice system and more generally, government agencies. This mistrust acts as a major hurdle in building better relationships between the people in the justice system and Indigenous people. An example of the mistrust that Indigenous people have in the criminal justice system is the 1991 *Final National Report* prepared by the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**). One of its major findings was that the deaths in custody (which it had investigated) were not 'the product of deliberate violence or brutality by police or prison officers'.<sup>13</sup> The primary finding was that Indigenous people were significantly over-represented in custody and that it was because of this over-representation that so many Indigenous people died in custody.

The mistrust that Indigenous people have in the justice system is hardly surprising, particularly given the history of colonization. A challenging relationship continues to exist between Indigenous

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<sup>12</sup> Australian Bureau of Statistics, *Prisoners in Australia*, cat. no. 4517.0. (Australian Bureau of Statistics, 2010), 47

<sup>13</sup> Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Royal Commission into Aboriginal Deaths in Custody: National Report Vol. 1-5* (Australian Government Publishing Service, 1991).



people and Australian law. In order to attempt to lessen the impact of these challenges and build better futures for Indigenous Australians, culturally appropriate legal services that take into account the complexity of Indigenous clients must be provided.

The mistrust of the justice system, and the 'government' in general, affects all aspects of the interaction between Indigenous Australians and access to justice. This includes Centrelink, the Child Safety Services in the Department of Communities, Child Safety and Disability Services (**DOCS**), health, victims of violence and the lack of trust in victims' services and courts (and the lack of applications for family violence orders).

## 5 Domestic and family violence in Australia

In Australia, domestic and family violence is a private civil matter and domestic violence orders are civil orders made by a court. Domestic violence includes assault/personal injury (including sexual assault) and intentional damage to a person's property and threats of such behaviour.<sup>14</sup> While domestic violence occurs in the context of an intimate relationship, 'family violence' encompasses the violence that may occur in the context of complex kinship structures inherent in Indigenous communities.

Domestic and family violence is the most common type of violence and it affects 30 per cent of women worldwide.<sup>15</sup> The cost of domestic and family violence to the Australian economy reached \$14.7 billion this year and this cost is expected to rise to \$15.6 billion by 2021.<sup>16</sup> The impact of domestic and family violence also affects children with one in four young Australians having witnessed violence against their mother.<sup>17</sup>

Domestic and family violence is a significant problem for Australia generally but the statistics of domestic violence in Indigenous communities is also alarming considering that 90% of the violence is not disclosed.<sup>18</sup> Statistics reveal that Indigenous women are significantly more likely to be victims of domestic and family violence than non-Indigenous women.<sup>19</sup>

Indigenous women are 38 times more likely to be hospitalised for assault and 10 times more likely to die from assault than non-Indigenous women.<sup>20</sup> Indigenous people are three times more likely to report domestic or family violence as a neighbourhood or community problem.<sup>21</sup> Further, Indigenous people have higher rates of domestic and family violence order use than non-

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<sup>14</sup> The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia* (Commonwealth of Australia, 2009), 15.

<sup>15</sup> World Health Organisation, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner and non-partner sexual violence* (2013).

<sup>16</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *The cost of Violence against Women and their children* (2013).

<sup>17</sup> Australian Institute of Criminology, *Young Australians and Domestic Violence, No 195* (2001).

<sup>18</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013), 16.

<sup>19</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013), 18.

<sup>20</sup> Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples* (Australian Institute of Health and Welfare, November 2006), 35.

<sup>21</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey*, (cat. No. 4714.0m ABS).

Indigenous people.<sup>22</sup> However they are much less likely to be the person applying for the order; police are the applicants in more than 95% of orders in many remote communities.<sup>23</sup>

While generally exemplary, these the statistics do not reflect that each Indigenous community has its own complexities (be they cultural, social, historical, political or otherwise) and services must be developed in response to the needs of each community.

## 6 Impacts of family violence

### 6.1 Impact on the broader community

Something that is not necessarily always considered in relation to domestic and family violence is the impact on the broader community. While a lot of research and reports focuses on the fact that impacts on victims, families and offenders must be addressed, there is also a broader social cost that is borne by society in rectifying the issues caused by domestic and family violence. The cost of domestic and family violence is not one that is specifically shouldered by victims, rather as Kerr and McLean stated as far back as 1996:<sup>24</sup>

Male violence against women is enormously costly – to the women who experience violence directly, to women generally whose lives are constrained by the fear of violence, and to governments whose expenditures are swollen by responding to some of the consequences of violence. Individual men, including those who are non-violent, also lose as a result of the barriers that are created by violence towards women.

One cost is that related to implementing intervention and prevention programs.<sup>25</sup> This can target specific communities where a prevalence is noted, or go so far as to isolate individuals who are most at risk of carrying out activities of domestic and family violence. Unfortunately as there is no true way to know whether an individual is a high risk offender, this is inexact science and cannot protect the victims or society from having to pay a price.

The other side of the coin is the cost associated with rehabilitation. This might involve the provision of therapy and support services for victims and survivors of domestic or family violence, sometimes extending years after the incident itself (and reflecting the fact that instances of domestic or family violence may continue for years before they are uncovered).<sup>26</sup>

Access Economics, as part of the Australian Government Department of Social Services initiative into *The Cost of Domestic Violence to the Australian Economy*, identified several key costs that society bears because of instances of domestic and family violence, particularly:<sup>27</sup>

- (a) Pain, suffering and premature mortality: covering the years lost to victims of domestic violence and their families and friends because of the acts;

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<sup>22</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013), 16.

<sup>23</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013), 16.

<sup>24</sup> Cited by Lesley Laing, *Australian Studies of the Economic Costs of Domestic Violence* (The Australian Domestic & Family Violence Clearing House, 2001), 1.

<sup>25</sup> Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples* (Australian Institute of Health and Welfare, November 2006), 13.

<sup>26</sup> Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples* (Australian Institute of Health and Welfare, November 2006), 72.

<sup>27</sup> Access Economics, *The Cost of Domestic Violence to the Australian Economy* (Australian Government Department of Social Services, 2004), 4.

- (b) Health costs: specifically the public and private health costs associated with treating the effects of domestic violence (both mental and physical) for the offender, the victim and the children. On top of this, QIFVLS observes the ongoing flow on effects of emotional trauma experienced by those people (particularly children) who witness domestic and family violence. Those people suffer the effects throughout their later life, which has longer term cost implications for the broader community (some of which are noted at point (e));
- (c) Production related costs: particularly for the community, including increased absenteeism, lost productivity of the victim and family, searching, hiring and retraining costs and lost wages, as well as a permanent loss of labour capacity;
- (d) Consumption related costs: including bad debts that the family is not able to pay out and property replacement due to acts of violence, subsequently causing poor economy in the running of the household and family;
- (e) Second generation costs: usually borne directly by the immediate family or by the broader community, and including childcare, school support services, therapy and counselling, child protection services, special or assisted education, increased future use of government services and a saddening increase to juvenile and adult crime from children of offenders;
- (f) Administrative or miscellaneous costs: including legal and forensic work most often funded by the State, temporary accommodation, permanent relocation and identity protection, interpreter services, therapy and counselling, perpetrator programs for dealing with offenders and (in the most unfortunate of cases) funeral services; and
- (g) Transfer costs: directly taken from the State and the broader community through victim compensation, income support, accommodation provision or subsidies, lost taxes, financial assistance to victims and families for lengthy periods of time and child support including foster systems and state care.

While these costs appear theoretical, they translate to real and damaging costs to individuals and society. Domestic and family violence is, of itself, a criminal law matter, however, the repercussions from domestic and family violence are far broader. They include unpaid debts (from phone bills, electricity or SPER debts) which families are subsequently unable to meet and are borne by the public when victims and offenders cannot access the justice system in order to create payment plans or address their issues. Further concerns arise when victims and offenders cannot meet rental payments and are subsequently evicted, placing a greater burden on homeless services and government housing. These are real civil costs of domestic and family violence which rest with the public due to the inability or lack of capacity of victims and offenders to support themselves.

It may appear cold to lay these costs out so blatantly, however, the broader cost that the community suffers must be considered as it is the only way to deal with the issue of family violence. Without these essential services and government aid, many victims of domestic and family violence would suffer irreparable mental harm and many offenders would face no hope of rehabilitation. At the same time these vital State services come at a cost and one that might be prevented if victims were able to receive greater access to an effective justice system to bring their claims and to receive assistance before family violence issues spiral out of control.

Importantly, costs are reduced when action is taken early. The cost of preventing domestic and family violence through training, education programs in troubled areas and therapy from an early stage of an individual's offending is significantly less than that attributable to having to deal with the aftermath of domestic or family violence. If nothing else, the scope of prevention is much smaller; eg, only the offender needs to be counselled and there is generally little to no physical

injuries to be treated. Conversely, when offending reaches a latter stage, the scope of rehabilitation extends to victims, families and children – most importantly therapy for children in order to reduce the risk that they might become offenders themselves.

## 6.2 Impacts on victims of domestic and family violence

Indigenous victims in regional and remote communities are particularly vulnerable as they face additional barriers to reporting domestic and family violence. Disincentives to indigenous victims reporting incidents of domestic and family violence include:

- (a) Victims are often fearful of the consequences of reporting family violence because of the lack of anonymity in Indigenous communities.<sup>28</sup>
- (b) Most victims will not have access to alternative accommodation and generally will stay with the perpetrator to protect their children.<sup>29</sup>
- (c) Due to the important structural and cultural issues in communities, there is a sense of solidarity amongst the community which overrides the interests of one individual.<sup>30</sup> This is a strong consideration for victims in reporting family violence, as victims believe it will bring shame to their children and extended families.<sup>31</sup>
- (d) Victims fear stigmatisation and being ostracised from family and the community members.<sup>32</sup> Shame is often given as a major reason for not disclosing family violence.<sup>33</sup> Further, it is not uncommon for those who do report violence to people outside the family to be criticised by their families and the community, thereby becoming increasingly isolated.<sup>34</sup>
- (e) The small percentage of victims that do report domestic or family violence will generally need to leave their communities because of fear of further violence or 'payback' or other culturally violent retribution.<sup>35</sup>
- (f) It has been found that some victims choose not to report because they do not want the perpetrator to be charged and imprisoned and to be taken out of their community.<sup>36</sup>
- (g) In QIFVLS's experience, victims can be reluctant to report incidents because they fear that it will result in child safety authorities intervening and removing their children.

In addition to the disincentives to report, the following factors make Indigenous victims particularly vulnerable:

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<sup>28</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>29</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>30</sup> Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in Heather Strang and John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge University Press 2002), 211.

<sup>31</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>32</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>33</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>34</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>35</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>36</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

- (a) The majority do not have independent access to transport and therefore are controlled to the point of feeling imprisoned.<sup>37</sup> They cannot simply travel long distances to regional centres to seek help.<sup>38</sup>
- (b) Most victims are often financially dependent upon the perpetrator and family and do not have access to money.<sup>39</sup> This poverty forces victims to return to violent relationships especially if there are children involved.<sup>40</sup>
- (c) If a victim does have the opportunity to leave the community it can lead to homelessness as they will need to travel far distances to live in other regions, away from their family.
- (d) There is a significant power inequality which provides a strong disincentive for victims to leave an abusive relationship.<sup>41</sup>

### 6.3 Lack of support for victims

Victims do not have enough support in remote communities and victims of family violence often find it difficult to find support to leave a relationship.<sup>42</sup> Remote communities have a lack of emergency assistance (such as police, women's accommodation and crisis shelters).<sup>43</sup> Victims often fear contact with police based on past experiences and this is aggravated by a general distrust of police felt in many communities and the culturally insensitive ways police often respond to victims, if they respond at all.<sup>44</sup>

QIFVLS has found there is often a lack of response when violence occurs in communities in Queensland particularly when police are a number of hours away when a call for help is made. In one recent case involving a QIFVLS client who was the victim of repeated assaults by her former partner, the offender repeatedly breached a protection order that was taken out against him, but the police consistently failed to respond. It was only when QIFVLS sought a variation to the protection order (as a strategy to address the repeated violations) that the Magistrate ordered the police to investigate the past violations.

For some remote communities it is not just the mistrust of the police or the lack of police response that is at issue but the fact that there is no adequate police service and judicial presence to support victims. For example, the remote community of Mapoon has no police station and the nearest police station, which is in Weipa, is not accessible by road during the wet season. Further, in the time between monthly circuit court sittings, matters are dealt with through the Remote Justices of the Peace (Magistrates Courts) Program (**JP Courts**). In QIFVLS' experience, victims are often reluctant to have their matters heard in these JP Courts as the person determining the matter is a local who could very well be related to the defendant. In such instances, victims often do not feel that they will be adequately heard or protected.

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<sup>37</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 87.

<sup>38</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

<sup>39</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 88.

<sup>40</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 88.

<sup>41</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 88.

<sup>42</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>43</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>44</sup> Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' in *Trends & Issues in Crime and Criminal Justice no. 405* (Australian Institute of Criminology, 2011).

It is also difficult protecting confidentiality and privacy of offenders and victims in communities.<sup>45</sup> In QIFVLS' experience, the general reluctance of victims to access support services is multiplied in many communities where the limited number of available service providers are staffed by family members of both victim and defendant. A lack of confidentiality (or perceived lack of confidentiality) often leads to conflicts, as victims feel their story is being spread through the community and beyond. Further, confidentiality is not always practicable in communities where interview rooms are limited and preference for availability of private spaces is given to criminal, not civil, matters. This significantly impedes access to justice for victims and perpetrators; with neither party being able to give instructions in a confidential and safe environment.

In addition, there are limitations on the types of interventions due to programs being generic in focus or not available due to location.<sup>46</sup> There is a lack of financially viable 'perpetrator programs' and education sessions to provide the safety to victims to speak out about the violence and for the peer group to ensure this behaviour is not seen as acceptable.

Victims also experience difficulties accessing shelters in remote communities. Where crisis shelters exist at all, they are located within the community, meaning victims often are subjected to continued abuse and interference from perpetrators simply due to their proximity. Finally, even where effective and functioning supports services exist, many of QIFVLS' clients report feeling overwhelmed by the support and/or follow up requirements imposed on them. For example, DOCS implements case plans for persons subject to child protection orders, which outline the Departments' concerns and require clients to attend programs in order to "up-skill" them to an acceptable level for reunification with their children. In QIFVLS' experience, this negative attitude toward peoples capabilities diminishes their self-esteem and self-worth, making them even more reluctant to engage with legal and support services.

#### **6.4 Victims compensation**

There is limited research on the question of whether increased legal services are effective in deterring future incidences of domestic violence. However, it is recognised that compensation for victims of domestic and family violence provides both symbolic and the obvious financial benefits to victims, and may also increase empowerment and mobility.<sup>47</sup>

In all States and Territories, victims of family violence are eligible to be compensated for both financial loss and non-financial loss resulting from domestic or family violence in accordance with the victims of crime compensation schemes of the relevant jurisdiction. Whilst legal representation is not a pre-requisite to submitting an application, most schemes provide an allowance for legal costs, and representation no doubt helps, especially where victims have low literacy levels.

The value of victim's compensation is well recognised. Not only does it compensate victims for their actual loss, it also sends an important message to victims that the community cares about them and that the harm caused to them is not acceptable. It may also empower the victim by restoring their sense of control and giving them sufficient funds to escape the violent relationship.<sup>48</sup>

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<sup>45</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>46</sup> Dale Bagshaw, et al, *Reshaping Responses to Domestic Violence Final Report* (University of South Australia, April 2000), 86.

<sup>47</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013).

<sup>48</sup> Nous Group, *Family violence Prevention Legal Services- Research and Needs Analysis Report* (Commonwealth Attorney-General's Department, 16 July 2013).

In QIFVLS experience the victims of crime compensation is most effective if it has the flexibility to provide practical compensation, for example to change locks or provide a new washing machine if the victim's one is damaged during an incident.

## **6.5 Additional legal issues arising from domestic and family violence**

In addition to the direct impact that domestic and family violence has on the victim, there are many other legal and quasi-legal issues which arise from the perpetration of family violence including but not limited to those relating to property, children, succession and health.

Whilst the difficulties experienced by victims, which are associated with living in an Indigenous community are somewhat understood, the other legal and quasi-legal issues which may arise due to the occurrence of domestic and family violence are less appreciated. For example, the decision regarding the custody of children who have experienced domestic or family violence may appear relatively straight-forward if one looks at Australian law. However, if the norms and customs of the clan with which the family identifies are considered, this seemingly straight-forward decision may be significantly altered and unforeseen complexities may arise, including due to the way in which family structure is considered by the relevant clan. It is not uncommon for uncles, aunts or even grandmothers or grandfathers of children to be considered as parental figures in many clans, even though these same family members may not have custodial rights under Australian laws. For example, persons who may hold custody and parental rights of children under Kupia Omasker (traditional adoption practices amongst Torres Strait Islanders) are not recognised under Australian law as holding those rights and responsibilities.

Similarly in relation to property, the succession laws in Australia do not necessarily align with the rights accorded to various family members when considering traditional lore and custom of Indigenous people. Again, depending on the clans which are represented in the various communities, there may be more than one system of inheritance or succession rights within a single community. For these reasons, being aware of the background of specific individuals and families is vitally important when dealing with domestic and family violence issues and the associated matters which may arise when family violence issues are addressed. Understanding the different circumstances of individuals is one of the initial first steps, and one which must precede the attempted reconciliation of Indigenous lore and Australian law within the domestic and family violence context.

QIFVLS's experience in assisting Indigenous Australians who are victims of domestic and family violence is that the existing law is inadequate in providing protection and support for victims of domestic and family violence and in particular Indigenous victims. QIFVLS believes that the inadequacies are grounded in both the legislation itself and in the methods of law enforcement. QIFVLS recognises that a review of the relevant domestic violence and criminal laws and their implementation is beyond the terms of reference for this Inquiry and so does not propose to go into any further detail on this topic in this submission. Nevertheless it is the view of QIFVLS that this issue is worthy of its own inquiry and QIFVLS would certainly welcome an opportunity to provide submission in this regard, whether it be to this Inquiry (if the Commission requests it) or a separate one.

## **7 Challenges in service delivery**

The more pressing causes of service delivery difficulties experienced by QIFVLS in seeking to provide services to remote Indigenous communities are described in this section. In QIFVLS's experience, these service difficulties seriously impair the ability to deliver effective and quality legal services in remote communities.

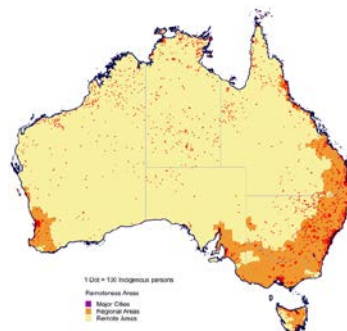
## 7.1 The RRR factor

Indigenous people are sparsely populated over the country, and in Queensland, a high number of Indigenous people live in regional, remote and rural areas (*RRR*). At 30 June 2006:

- (a) 32% (165,800 people) of Aboriginal and Torres Strait Islander Australians lived in major cities
- (b) 21% (110,600 people) lived in inner regional areas
- (c) 22% (113,300 people) lived in outer regional areas
- (d) 9% (47,900 people) lived in remote areas
- (e) 15% (79,500 people) lived in very remote areas.

The Indigenous regions with the highest proportion of Aboriginal and Torres Strait Islander residents, which were outside major population centres, included the Torres Strait Indigenous Region in Queensland (85%)<sup>49</sup> and the Apatula and Jabiru Indigenous Regions in the Northern Territory (80% and 79% respectively). Unique issues arise in the provision of justice in Queensland due to its size, diversity of population and the geographical isolation and remoteness of many Indigenous communities. Ensuring that Indigenous people (who are often quite isolated) are given the same opportunities as those in metropolitan areas to access a culturally appropriate legal system is an on-going challenge. Image 1 (below) illustrates how sparsely populated Indigenous Australians are (and how far apart the communities live, particularly in Queensland). The Australian Bureau of Statistics have recognised that Indigenous people in RRR areas suffer disadvantages in education, work, health and housing when compared to Indigenous people living in metropolitan areas.<sup>50</sup>

**Image 1 – Indigenous Population Distribution and Remoteness Area (2006)<sup>51</sup>**



## 7.2 Use of technology a poor substitute for face to face services

The availability of face to face legal services goes to the very heart of what access to justice is about. This is particularly the case when it comes to providing effective legal services to Indigenous Australians. Face to face services are particularly important when it comes to victims compensation claims for domestic violence and to dealing with secondary issues which may not otherwise be recognised as legal issues.

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<sup>49</sup> According to the ABS, the 'Torres Strait Indigenous Region' is the grouping of Census Collection Districts (CDs), comprising islands in the seas between Cape York and the coast of Papua New Guinea, which make up the 'Torres Strait Indigenous Region' according to the Australian Indigenous Geographical Classification (AIGC). The region's geographical area is equivalent to the former ATSI classification 'Torres Strait Area'.

<sup>50</sup> Australian Bureau of Statistics, *Australian Social Trends* (ABS cat no. 4102.0), 1.

<sup>51</sup> Australian Bureau of Statistics, *Australian Social Trends* (ABS cat no. 4102.0), 1.



Geographical isolation being a significant barrier to access to justice for Indigenous Australians is a well recognised problem. The cost of providing on the ground full-time services to remote communities is prohibitive and beyond the existing resources of QIFVLS.

Unfortunately, this barrier cannot be overcome through the use of technologies such as telephone and internet. Remote services rendered via phone or internet are not an adequate substitute for in person legal services. In QIFVLS experience, some communities actively disengage with technologically provided services. In such circumstances, it is necessary to engage with the community to determine the form of provision of services which is appropriate for their needs and situation. By recognising that the community desires face to face legal services, QIFVLS has been able to increase engagement with the service in certain communities. Unfortunately, QIFVLS' funding and resource position is inadequate to enable it to provide a similar level of face to face legal services across all of the communities that require assistance.

While telephone services that provide legal information are available, they do not provide an effective or culturally appropriate means of giving legal advice to Indigenous Australians. Many Indigenous people in remote communities do not own a telephone or cannot easily access a public phone. Many remote communities may not have reliable mobile phone coverage and some communities have only one shared public phone. The use of public or council phones might not guarantee privacy (or at least that might be the perception of the client) and waiting for return phone calls may involve lengthy time periods.<sup>52</sup>

Even for those who have access to the internet and have sufficient literacy levels, the internet can never improve access to legal services if the services themselves are not actually made more accessible to the remote communities. Given the low literacy rates among Indigenous Australians in remote communities and the overarching lack of knowledge and understanding when it comes to the legal system, the potential efficacy of internet based information is limited.

Aside from the issue of Indigenous people in remote communities having very limited access to phone and internet, services that are provided via telephone or internet will never be an adequate substitute for face to face service. This is particularly the case with Indigenous clients whose cultural customs affect interaction and communications. If services are provided remotely via telephone it is more difficult to foster a relationship of trust with the client, making it more difficult to develop an effective lawyer-client relationship. To build the level of trust required to provide effective legal and support services, QIFVLS has found that it is necessary to have a presence in the community, and not be seen to be merely a 'fly-in fly-out' service. In those instances where QIFVLS has been able to sustain a long-standing relationship with a client (rather than merely provide a one-off advice), QIFVLS has identified and resolved a variety of legal issues that were not readily apparent when the client first engaged with the service.

### **7.3 Lack of culturally appropriate services**

The historical legacies of the white Australia policy, the imposition of colonial law and the destruction of Indigenous 'Lore' has left many Indigenous people 'disconnected' from their cultural community. This, combined with the socio-economic factors, the poor relationship with the justice system and the regional and remote factor means that Indigenous Australians are less likely to access legal services that are designed to assist them. The mistrust of the justice system, and the government in general, affects all aspects of the interaction between Indigenous Australians and access to justice. This includes centrelink, health, child custody, victims of violence and the lack of trust in victims' services and courts (and the lack of applications for family violence orders).

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<sup>52</sup> ARC Centre of Excellence for Creative Industries and Innovation, the Centre for Appropriate Technology and the Central Land Council, *Home Internet for Remote Communities* (2011), 11, available at <<http://www.cci.edu.au/sites/default/files/mcummins/Home%20internet%20for%20remote%20Indigenous%20communities.pdf>>.

A number of the RCIADIC recommendations related to increasing Australian Indigenous participation in the criminal justice system by incorporating 'culturally sensitive practices in the criminal justice systems'.<sup>53</sup> QIFVLS submits that a similar level of cultural sensitivity to that advocated for in the criminal justice system is necessary in civil law proceedings, particularly child custody and protection proceedings, and should be afforded in the civil law justice system more broadly.

Indigenous Australians and their relationship with the law is complex and grounded in a history of violence. As such, assisting Indigenous clients takes time and resources. Currently in Queensland, particularly in regional and remote areas, there are very limited resources dedicated to assisting Indigenous people navigate through the criminal justice system and address associated civil law issues. Service providers need to have a deep understanding of the history of colonisation, its impact on Indigenous people and the importance of building a relationship of trust between Indigenous people and the justice system.

#### **7.4 Indigenous cultural issues pose challenges to effective service delivery**

Cultural awareness is vital to effective communications and the delivery of effective legal services to Indigenous Australians. Communicating with Indigenous people can give rise to unique challenges for non-Indigenous people. Cross cultural issues cover a broad range of matters affecting interactions and relevant to establishing lawyer-client relationships, for example who has the right to speak, kinship relations, eye contact and temporal and spatial definitions. This necessitates cultural awareness and skill in the legal service provider. It also requires legal and support staff to have sufficient confidence to respectfully ask the question about someone's cultural background and how that has impacted the actions taken by the client. As such, the ability to train and retain suitably skilled and qualified lawyers is essential to providing Indigenous Australians with access to justice.<sup>54</sup>

Specific cultural differences between Indigenous and mainstream western values may come up in many ways in the lawyer-client interaction. One example is that Indigenous clients are often not familiar with an 'appointment' model of interaction. That is, owing to their differing concepts of time and space, clients find it difficult to make and meet appointments. Their orientation is to community and country; not to time. This means services need to be readily responsive to clients – particularly in matters where clients need immediate representation.

Beyond the immediate lawyer-client relationship, there are also issues resulting from the inappropriateness of the justice system in dealing with Indigenous people generally. It is well recognised that the mainstream justice system is not suitable for dealing with Indigenous people. Court formalities, in particular, can lead to a distrust of the legal system, which in turn may cause Indigenous Australians to avoid seeking legal services in the first place.<sup>55</sup>

#### **7.5 Language and difficulty obtaining instructions as a barrier to service delivery**

Aside from the inability to meet clients in person, it is also very difficult to contact and to obtain adequate instructions from Indigenous people who live in highly mobile and traditional communities. This is particularly so for legal service providers who do not have local staff available to support the lawyers visiting the area.

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<sup>53</sup> Elena Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody* (VDM Verlag Dr. Müller Aktiengesellschaft und Co. KG, 2009), 137

<sup>54</sup> Melanie Schwartz and Chris Cunneen, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) 32 *Crim LJ* 38.

<sup>55</sup> National Pro Bono Resource Centre, *ATSILS Pro Bono Guide* (2009), 115.

In some Indigenous communities, English is a second, third or even fourth language and is not spoken at home. This presents obvious difficulties in communicating effectively and providing effective legal services. The direct link between language difficulties and miscarriages of justice is well established.<sup>56</sup>

Where English skills are poor, interpreters become crucial to accessing justice. However, in remote communities, it can be close to impossible to access an interpreter. If an interpreter can be found, it can be time consuming and obviously impacts on service provider's resources.<sup>57</sup>

These types of communication difficulties may be able to be overcome by consultation with individual communities. For example, by speaking with members of a particular community or non-Indigenous personnel who have constant interaction with communities, suitable community members may be able to be identified who are willing to act as translators or liaisons. Such arrangements may address communication difficulties and assist in building trust in communities when dealing with a legal service provider.

On the other hand, QIFVLS has experienced difficulties with the use of locally based interpreters, with clients being concerned about divulging confidential information to a fellow community member. For cultural reasons clients may also be reluctant to disclose confidential information to an interpreter of the opposite sex. QIFVLS has found that in such cases, using a Client Support Officer (**CSO**) together with the solicitor has alleviated the need for an interpreter as the CSO is able to communicate with the client in broken-English, while understanding the need to respect confidentiality.

## 7.6 Knowledge about civil law rights in Indigenous communities

There is almost a universal void of knowledge amongst remote and regional Indigenous Australians in relation to their civil law rights. It has been found that very few Indigenous people are aware of the scope of the law and the range of services available for non-criminal problems, particularly in the housing and consumer law areas. It follows that Indigenous Australians will most likely be unaware that they have a legal problem for which they can and should seek legal advice.<sup>58</sup>

This lack of knowledge is a serious problem. It has been suggested that unaddressed civil law needs can progress into criminal law problems.<sup>59</sup> Given that, and the already significant over-representation of Indigenous Australians in the criminal system, substantially more resources are needed and justified in improving knowledge and access to justice in civil law matters for Indigenous Australians. Victims of domestic and family violence are also uninformed of the options available to them.<sup>60</sup> Victims commonly have a lack of awareness of legal concepts and often do not identify the acts committed against them as assaults.<sup>61</sup> Further, victims often do not identify the acts committed against them as being unacceptable.

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<sup>56</sup> Melanie Schwartz and Chris Cunneen, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) 32 *Crim LJ* 38.

<sup>57</sup> Melanie Schwartz and Chris Cunneen, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) 32 *Crim LJ* 38.

<sup>58</sup> Melanie Schwartz and Chris Cunneen 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *UNSWLJ* 725.

<sup>59</sup> Melanie Schwartz and Chris Cunneen 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *UNSWLJ* 725, 744.

<sup>60</sup> Aboriginal Family Violence Prevention Legal Service Victoria, *Strengthening on-the-ground- service provision for Aboriginal and Torres Strait islander victims. Survivors of family violence and sexual assault in Victoria* (2010).

<sup>61</sup> Aboriginal Family Violence Prevention Legal Service Victoria, *Strengthening on-the-ground- service provision for Aboriginal and Torres Strait islander victims. Survivors of family violence and sexual assault in Victoria* (2010).

For example, victims are commonly unaware that they have a right to be on the Victims Register and have a say in court during certain proceedings such as parole hearings. QIFVLS recently assisted one of its clients (a victim of domestic violence) to make submissions to the parole board considering the release of the perpetrator of the domestic violence. QIFVLS was able to inform the client about this option and assist in the client making the submission because of the ongoing relationship with the client. Absent QIFVLS ongoing involvement and relationship with this client, they would not have been aware that this option was available to them.

Other examples of matters where Indigenous people might not recognise that they have legal rights are matters concerning stolen wages, stolen generation and abuse in care cases, victims' compensation, discrimination claims, motor accident claims and wills and estates.

Increasing knowledge amongst Indigenous Australians regarding their legal rights and where they can access legal representation or assistance is crucial as, in QIFVLS' experience, persons who are unrepresented often do not receive adequate response from government departments regarding their concerns and issues. A recent example of this has arisen in circumstances where a grandmother was originally deemed suitable by DOCS to care for her grandchildren, but the children were subsequently removed from her care. Prior to the grandmother seeking assistance from QIFVLS, she had, on numerous occasions over a nearly 18 months period, attempted to contact DOCS to discuss their reason for removing the children from her care, with no response received.

In QIFVLS' experience, many people who enquire about their services are surprised to learn that they are entitled to legal representation and often have not been informed about their ability to access legal assistance. This is of course not always the case, and there are many instances in which Government Departments or others alert QIFVLS to a potential client who requires assistance and representation prior to proceedings being commenced.

In light of the above, QIFVLS submits that Indigenous communities would benefit if there was more promotion of, ongoing legal support for, and community legal education about, civil law – what it is, and how the resolution of civil law matters can be beneficial to individuals and the community.<sup>62</sup>

## **7.7 Need for ongoing relationships and holistic services**

As highlighted by the example provided in section 7.6, QIFVLS finds that in regional and remote areas there is a need for ongoing legal support, rather than a one-off provision of services. Indigenous clients need to be guided and supported through legal processes; it is not sufficient to merely point them in the right direction at the beginning and expect that they will follow through the process without further assistance. Further, absent a holistic approach to case management, it is often difficult to keep a client engaged. This involves ongoing practical support, not just legal support.

One way that QIFVLS addresses this need for ongoing legal support and a "whole-of-client" approach is by linking QIFVLS' legal practitioners with Client Support Officers (**CSOs**) (who are Aboriginal or Torres Strait Islanders). This model ensures that a client is treated holistically, in that their practical and welfare needs are addressed in addition to their legal needs. This approach also provides for a culturally appropriate service, with the CSO working with the client and the solicitor to ensure any language and/or cultural barriers are reduced. This in turn ensures that the client's instructions are properly understood and acted upon by the solicitor.

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<sup>62</sup> Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *ILB* 18.

QIFVLS is aware that victims of family violence and/or sexual assault are in a vulnerable state and this area of law is often complex, emotionally charged and accompanied by current or past trauma. QIFVLS considers the team approach (CSO and solicitor) beneficial to the client as it provides a supportive environment so the client feels safe to tell their story and provide the history of their matter. Similarly, QIFVLS' often finds it helpful for a Family Intervention Support Worker to attend client appointments along with the legal team so that we can work through all of the clients' issues from the various perspectives involved.

## **8 Barriers in government, administration and the judiciary**

### **8.1 Bureaucratic barriers to accessing legal services**

There are simple measures that Government departments and agencies could take to improve access to justice in civil law matters for Indigenous Australians. As a general principle, departments and agencies should strive to reduce red tape and bureaucracy that hinders the provision of legal services, and they should strive to facilitate legal representation at every opportunity.

It is the practice of some Government departments and agencies, such as Centrelink, Medicare, the Australian Prudential Regulation Authority, the Australian Tax Office and the State Penalty Enforcement Registry, to require individuals to complete standard forms to authorise legal representatives to speak on their behalf. This can be difficult when clients are located in remote areas. Providing written authorisation forms should not be necessary; a simple notice in writing or a verbal instruction from the client, informing the department or agency of the lawyer-client relationship and the lawyer's authority to act, should suffice. Verbal authorisation will reduce difficulties associated with obtaining written correspondence from clients in remote communities, where scanning and internet facilities may not be available and mail may be interrupted by the wet season.

A recent example of government formalities preventing access to justice or unnecessarily increasing the difficulties experienced by QIFVLS clients is the situation of Client A, who was medically evacuated out of her community after being the victim of a domestic assault. As a result of being evacuated and hospitalised, Client A could not make her Centrelink appointment and her payments were cut-off. The midwife that treated Client A provided her with a medical certificate but because it was not the in 'correct form' Centrelink would not accept it and discontinued her payments until a medical certificate in the correct form was provided.

### **8.2 Sensitivity and awareness of the judiciary**

The lack of culturally appropriate legal services available to Indigenous Australians in remote and regional areas has already been discussed in paragraph 7.3 above. In addition to the void of services, QIFVLS also considers that access to justice for Indigenous Australians is further frustrated by the lack of familiarity and awareness of some judges to the cultural sensitivities of, and difficulties experienced in providing legal services to, Indigenous Australians in regional and remote areas. This makes it difficult for QIFVLS' clients to engage with judges and increases their mistrust of the judicial system. It also makes it more important for our clients to receive ongoing support.

One example of this lack of awareness amongst the judiciary is Client B, who's proceeding was scheduled for a mention in Brisbane. The client instructed QIFVLS to seek an adjournment. Because the court would not allow QIFVLS to appear at the mention by phone or videoconference, QIFVLS had to engage a local town agent at a significant hourly cost. This is an example of QIFVLS incurring unnecessary expenses because of the court applying its processes rigidly (and thereby taking resources away from other QIFVLS' clients). This situation could easily have been avoided had the court taken a more flexible approach.

### 8.3 Changing governments and lack of commitment to particular areas of concern

From QIFLVS experience and available information regarding funding for access to justice in Indigenous communities, it is clear that the major focus for the provision of legal assistance to Indigenous people is in the context of criminal law matters. Although some priority is given to family law matters (for example QIFLVS itself), little attention is paid to providing civil justice assistance.<sup>63</sup> QIFLVS understands that this has eventuated because of the over-representation of Indigenous people in the criminal justice system (especially in regional and remote areas), which has become the corresponding focus of the provision of legal services to Indigenous Australians. Despite the significant and growing demand for assistance with child protection, family and civil law matters, legal service providers are unable to service clients due to insufficient funding for these areas.

QIFLVS considers that this lack of focus on family and civil law matters is brought about a misunderstanding by governments as to those issues that are of concern for Indigenous Australians. On the one hand, the connection between unresolved civil law issues and criminal offending is not properly recognised. Conversely, the fact that criminal offending generates civil law issues does not receive sufficient attention. Focusing all government funding and service provision on the criminal system (and ignoring the associated civil law issues) does not provide Indigenous Australians with the legal services that they require (and, in some cases, leads to further criminal offending).

There is also an unrealistic expectation of domestic and family violence being reduced by the provision of increased funding. The same expectation does not appear to be held in relation to the reduction of criminal offending and recidivism. QIFLVS considers that there needs to be realistic expectations regarding the various challenges associated with addressing domestic and family violent behaviour and associated impacts, as well as a recognition that merely providing additional financial resources is not sufficient.

In light of the above considerations, QIFLVS submits that governments need to change the way funding is allocated for the provision of legal services to regional and remote Indigenous communities. Governments need to consider the disadvantages that Indigenous Australians face due to a lack of access to civil and family services and ensure that assistance is directed toward not-for-profit organisations and community legal centres (**CLCs**) servicing these issues. Without that direction, the funding will continue to only bolster provision of criminal justice services for Indigenous Australians and ignore the vital need for holistic access to justice.

In addition to increasing the attention paid to the provision of civil law services to Indigenous Australians in regional and remote areas, further must be done to increase community awareness about civil law matters and the options available to them. Simply providing access to services for civil and family law matters in Indigenous areas does not address the general lack of knowledge that Indigenous people have about civil and family law and the rights and options available to them.<sup>64</sup> Community education initiatives are needed to increase awareness about civil and family law within Indigenous communities and ensure that those services which are provided are fully utilised.

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<sup>63</sup> National Pro Bono Resource Centre, *ATSILS Pro Bono Guide* (2009), 7.

<sup>64</sup> Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *ILB* 18, 23.

## 9 Staffing concerns

### 9.1 Obtaining and retaining high quality staff

Many not-for-profit legal service providers suffer from funding deficits or under resourcing and the inability to employ highly skilled staff is a major concern. Although these organisations provide essential services to underprivileged individuals, the quality of those services is hampered by the inability to attract highly educated or experienced personnel.

The result of this is that not-for-profit legal service providers are often forced to recruit underskilled or inexperienced staff (or, at best, recent graduates) who require significant levels of supervision and training from within the organisation. When dealing with the caseload level that the majority of these not-for-profit legal service providers deal with, investing time and resourcing in training inexperienced staff is costly to the quality of service that experienced staff can provide. On the other hand, not training these new recruits presents precisely the same problems, as the quality of service provided by those individuals does not improve without attention and development. In all senses, this issue presents the quintessential 'catch-22': training new recruits degrades the service provided by high level staff, not training new recruits degrades the service provided by the organisation as a whole. This lack of experienced staff (and the likely resulting poorer service) has flow on effects which arguably affect Indigenous clients (due to an already existing unfamiliarity with legal system and the significance of cultural and historical issues) more than non-Indigenous clients.

The Productivity Commission itself has already looked into the problems associated with not-for-profit organisations attracting and retaining quality staff. In its 2010 report on the Contribution of the Not-for-Profit Sector, the Productivity Commission noted that three of the major issues associated with staffing of these organisations were:<sup>65</sup>

- (a) difficulties attracting and retaining employees due to low wages;
- (b) high levels of employee turnover; and
- (c) a lack of career paths and training opportunities.

While these issues sadly reflect on the profile of not-for-profit organisations, in the case of family violence prevention legal services such as QIFLVS (and for CLCs) they spell disaster for the chance of individual victims to receive appropriate access to the Australian justice system.

Further, there is a difficulty in building and sustaining diversity in these organisations in order to employ staff who can relate to all clients received by the organisation. The Productivity Commission report found that approximately 87% of employees in the not for profit sector were female, with an average age of 41 and who have capacity to work around 30 hours per week.<sup>66</sup> This is a specific type of employee who might not have the skills developed (or immediate trust) of clients from extremely varied backgrounds. This concern was the focus of the Voice of Non-profit Talent review into the perceptions of diversity in the workplace.<sup>67</sup>

In particular, the conclusions of this report showed that not only was the service offering of an organisation increased by diversity of employees, but that the retention of the organisation was increased as employees were better suited to addressing the issues raised by clients and, therefore, more often able to connect and generate a positive outcome for those clients. This

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<sup>65</sup> Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector* (2010), Chp 10, 260.

<sup>66</sup> Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector* (2010), Chp 10, 261.

<sup>67</sup> While this was an American report, it addresses the same issues of diversity that might be faced by not for profit employees attempting to provide services to victims of family violence from extremely varied backgrounds, including the numerous Indigenous Australian cultures faced by QIFLVS.

feeds back to the fulfilment and work ethic of the individual employees and increases their overall job satisfaction with these often difficult roles.

Additionally, due to the Indigenous cultural concepts of 'men's' and 'women's' business, the lack of representation of males in the sector creates further complexities when dealing with often sensitive issues within and between Indigenous communities and families. For example a male client may feel embarrassed about or may be prohibited from disclosing certain details pertaining to a matter to a female lawyer due to cultural norms and customs. Adding to this issue is the fact that these cultural norms and customs may vary widely amongst different Indigenous groups which may exist within a single community.

Some submissions to the Productivity Commission in that 2010 review focused on the fact that a large number of employees and volunteers in the not-for-profit sector were not involved for financial gain, and so the issues of low pay and career opportunities were not of particular a concern. For example, citing the Anglicare Australia submission, the Productivity Commission stated that:

Just as the rationale of the organisation is not to make money, financial self-interest is less important for individual employees than their decision to make a contribution to some conception of social benefit.<sup>68</sup>

While this might be true of a large number of volunteers, QIFLVS still notes that problems associated with hiring and retaining high quality staff undermines its ability to provide an adequate service to Indigenous victims of domestic or family violence. Furthermore, and in any event, the fact that employees in the not-for-profit sector do not typically enter the field for financial gain does not justify poor or inadequate remuneration.

Ultimately, whether or not certain individuals are interested in obtaining personal benefit is secondary to whether the organisation itself has access to the broadest possible base of employees to provide the highest quality justice service for its clients. As such, QIFLVS believes that issues surrounding staffing are particularly damaging to the ability of Indigenous Australians to access the justice system.

## **9.2 Geographical distribution of staff**

Unfortunately, riding on the back of the overall staffing issues for not-for-profit organisations is the concern that some of the most underprivileged and difficult clients are located in regional and remote areas. As staffing location is generally premised on the experience and qualifications of the individual staff member, the more valuable employees tend to be located in areas that the staff find more preferable. These areas are generally closer to cities and major centres where access to services of all kinds is greater.

Unfortunately, this does not necessarily correlate to the most efficient use of highly experienced or educated employees. In QIFLVS' particular service area, the issues that require staff with the greatest experience and qualifications tend to arise in remote areas of Queensland where QIFLVS does not have large numbers of employees. In order to staff these remote areas, services are required to send inexperienced, new and sometimes underqualified staff to remote areas so that there is at least some level of service provision. This does not adequately deal with many of the issues arising in those remote areas as more junior staff (who, while dedicated, often lack the necessary skills or background) are forced to cope with major issues that realistically require the attention of senior experienced employees. For QIFVLS, engaging and retaining staff in regional areas of Queensland so that those staff can properly service the needs of the local Indigenous communities – in terms of legal and other support services – is an ongoing challenge.

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<sup>68</sup> Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector* (2010), Chp 10, 262.



This is also a cause for concern for QIFVLS clients themselves. While the staff might not be experienced at dealing with the major issues of clients, some of the most vulnerable clients are also located in regional and remote areas of Queensland. These clients are often unable to escape horrific domestic situations or see a way through their concerns because of how removed they are from assistance. While they understand that QIFVLS can provide some assistance (at the very least, access to a staff member) they become increasingly aware that the services that they are receiving are not adequate to deal with their problems. This undermines confidence in the organisation and the Australian justice system as a whole. Not only do clients need access to adequate legal services as a basic human right, they are also in need of broader ongoing support services to assist them in their often dire circumstances.

Providing greater bonuses and transfer systems as incentives for staff in regional and remote areas could go a long way to rectifying this concern. While this might appear to be an issue to be addressed by individual organisations, it is also a matter for government policy. Recognising that regional and remote areas have particularly vulnerable clients who require the attention of experienced and properly qualified individuals is the first step to redirecting government funding of the justice system and CLCs toward these troubled areas. In particular, any government policy that can focus the attention of qualified individuals on regional and remote areas as an attractive working environment (either for bonuses or transfer benefits) takes the first step toward attracting the right staff.

It is not simply a question of more funding (although that is a necessary step) but also how the funding that is allocated to organisations such as QIFVLS is distributed so as to provide adequate services most efficiently where they are needed most. QIFVLS considers that there is room for improvement in the Government mapping of regional and remote Indigenous communities in Queensland. For example, Australia's largest indigenous community is Yarrabah, located approximately 50km east of Cairns. However, despite its relative proximity to Cairns and the QIFVLS office there, it was not allocated by the Government as a community serviced by QIFVLS, which has funding implications for QIFVLS' services.

## **10 Recommendations**

QIFVLS submits that the following recommendations will improve access to the justice system for Indigenous people in remote communities experiencing domestic or family violence and other civil matters.

### **10.1 Increased funding targeting services to remote Indigenous communities**

QIFVLS recommends that the Commonwealth Government address the serious lack of access to justice in civil law matters experienced by Indigenous people in remote locations. This can only be achieved if sufficient funding is received by the legal service providers. It is recommended that the Government allocate increased funding, on the basis of assessed needs, to QIFVLS and other Indigenous legal and support service providers for the provision of non-criminal legal services to Indigenous Australians in regional and remote communities. Greater resources are needed to support the expansion of these service providers to enable them to effectively provide legal services to those in need. Providing sufficient resources would help address many of the difficulties that currently obstruct delivery of legal services to remote Indigenous communities.

In implementing this recommendation, the Australian Government should consult and work closely with QIFVLS, other Indigenous legal and non-legal service providers and Indigenous elders from various communities, to determine how the funding would be best targeted.

## **10.2 Training for CLC staff**

QIFVLS submits that the Commonwealth Government should support increased training and recruitment programs for legal service providers working in Aboriginal and Torres Strait Islander communities, particularly in regional and remote areas. Such programs may include increased cultural awareness training by community members themselves and/or relevant anthropologists or sociologists. This training should cover the particular aspects of Indigenous lore which may arise in the context of the CLCs' services as relevant to the different groups present in the community.

Initiatives to support recruitment may include establishing internship opportunities similar to those available through the Aurora program. The Aurora program focuses on the development of staff for Native Title Representative Bodies through the placement of university students as interns in a number of organisations. QIFVLS considers that a similar program could be implemented for the placement of staff with civil law legal services operating in Indigenous communities.

## **10.3 Develop community legal education programs**

QIFVLS recommends that the Commonwealth Government develop community legal education programs to inform and educate Indigenous Australians – particularly in remote communities – to enhance their understanding about their civil law rights.

In implementing this recommendation, the Government should consult and work closely with Indigenous legal service providers, Indigenous persons from communities and non-Indigenous personnel who provide support services to Indigenous persons and who interact with Indigenous communities on a daily basis. Any education programs which are developed should reflect feedback and recommendations received from the various parties who are consulted and the programs should be responsive to the needs of the various communities involved.

## **10.4 Develop community education programs**

In addition to the need to develop and provide community legal education programs, QIFVLS submits that there is also a need to provide community education and support programs. Such programs seek to provide a forum in which community members can discuss the personal and social impacts stemming from legal matters. It is through such relationship building that community capacity to support and deal with violence and associated legal issues is developed. In addition to community education programs focused on victims and the broader community, programs also need to be made available to and accessible for perpetrators of domestic and family violence.

Unfortunately, it is often financial considerations which prevent victims and offenders from accessing vital programs, particularly healing programs. Programs such as the Red Dust Healing program, which focus on spiritual healing and re-connecting with Country are of great benefit to persons impacted by domestic and family violence. For these programs to be of greater effect, they need to be made available and accessible (financially) to more people. QIFVLS proposes that the Commonwealth Government consider providing funding and/or grants for victims and perpetrators to attend specific healing programs.

## **10.5 Increased cultural sensitivity in the civil law justice system**

QIFVLS recommends that the Commonwealth Government conduct an analysis of the suitability of the civil law justice system for dealing with civil law matters of Indigenous Australians, involving Indigenous legal and support service providers, legal aid commissions, generalist community legal centres and interested bodies. In particular, the analysis should seek to determine ways of making mainstream civil court processes, and the civil law justice system generally, more culturally appropriate to, and sensitive of, the challenges faced by Indigenous Australians.

QIFVLS further recommends the implementation of further support for victims of domestic, family violence and/or sexual assault in the civil and criminal justice system. For example the changes from a reactionary legislation to be more pro-prosecution i.e. the Tasmanian Safe At Home program and Family Violence legislation.

#### **10.6 Review Government department process**

QIFVLS recommends that the Commonwealth Government conduct a review of the processes of various Federal departments and service providers that interact most commonly with Indigenous Australians in relation to the legal matters (and encourage State Governments to conduct similar reviews). The aim of the review being to assess how those departments and service providers might be able to change their existing processes to mitigate the difficulties faced by remote Indigenous Australians in dealing with them and, ultimately, to facilitate greater access to justice for Indigenous Australians.

## Schedule 1

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