Care and protection and family law issues

AN ALS PERSPECTIVE

By Rebecca Smith

Traditionally, Aboriginal legal services have dealt primarily with criminal work. Increasingly, however, many – if not the majority – of clients also have family law and/or care and protection issues.

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Irrespective of whether familial problems have led to clients' involvement with the criminal justice system or vice versa, the point is that these areas of law are inextricably linked: real results can be achieved only where clients' socio-legal problems are addressed holistically.

This article aims to describe some of the family law and care and protection issues encountered by the Canberra office of the Aboriginal Legal Service (ALS).[1]

The relationship between ALS clients and the care and protection regimes in the ACT and NSW is often problematic. Often, in fact, it is an interaction between two entirely disparate cultural and social groups – a fact not clearly expressed in the law or its operation. Understanding between the two groups is often incomplete; even more often, it is influenced by a lack of cultural awareness.

Putting aside the problems posed by clients when they actually make it into the office (or, equally commonly, when we make it to their homes), actual awareness of legal rights and obligations and the legal institutions that enforce them is uncommon among the Aboriginal community.

Just recently, we've encountered several instances where officers of the NSW Department of Community Services (DOCS) have advised people to get lawyers. In one case, by no means an unusual one, a woman's custody of her children relied upon effective legal representation. However, she didn't have a high level of literacy and had almost no knowledge of the law or lawyers.

The ALS is often – in fact almost always – able to help people in this situation. But it is impossible to calculate the impact of the lack of basic legal knowledge in the Aboriginal community as a whole, given the great likelihood that we will come into contact with only a minority of such cases.

As well as our drop-in and appointment services, the ALS supplies various brochures and booklets that explain relevant law in simple terms. This is a strategy intended for those who >>

don't know their legal rights – but we are yet to develop a strategy for dealing with those who don't even know they *have* legal rights.

LACK OF CULTURAL SENSITIVITY

Even before lawyers become involved in a situation, the law's lack of cultural sensitivity may prejudice a client's interests.

A recent matter involved an Aboriginal woman who had fairly traditional Indigenous cultural views, and who was pregnant. Her five children had been removed by DOCS and placed with various foster carers. Our client was being assessed by DOCS to determine whether her baby – still in utero – should also be removed from her care.

Our client's male caseworker attempted to carry out a random visit at her home. Observing the cultural tradition that a pregnant woman cannot be alone in the presence of a man who is not her husband, she would not let him in.

The DOCS caseworker documented that the woman had been unco-operative.

This lack of cultural awareness extends far beyond face-to-face interactions. The dissonance between the kinship payment regime in the *Family Law Act* 1975 (Cth) is one area where the lack of understanding, and of a uniform approach, are most evident. Both the *Children and Young Persons (Care and Protection) Act* 1998 (NSW) (the NSW *Children's Act*), s13 and the *Children and Young People Act* 1999 (ACT) (the ACT *Children's Act*), ss14-15 set out an 'indigenous placement principle'. Applying that principle in care and protection jurisdiction often leads to problems, in fact and in law, in the family law jurisdiction.

DOCS' involvement with children provides one example. Commonly, DOCS will place children with a relative, most often a grandparent. The grandparent then collects kinship payments, which are normally substantial. Often, after DOCS assesses that the new family situation is stable, pressure is placed on the grandparent to seek family court orders for parental responsibility. After DOCS stops being involved, therefore, kinship payments stop entirely. This can affect the ability of the grandparent to provide for the child.

Another common problem arises where DOCS seeks protection orders for children. In one recent matter, DOCS had sought orders from a regional Children's Court to place three children in their father's care until they were 18. However, the final orders actually read that the children were to reside with the father, and to have contact with the mother 'at [the father's] discretion'. Our client, the children's mother, had therefore not seen her children for nine months when she first came to us.

In the current statutory framework, mistakes of this nature are both problematic and expensive. Under the NSW *Children's Act*, s90, our client would have to clear what has been interpreted to be a very high bar – a 'change in circumstances' since the orders were made – to have them altered.[2] Because that is the test, the ALS and Legal Aid are often extremely reluctant to fund litigation, as the matter will almost always have poor prospects.

> There is a bad fit between the law as it stands and Indigenous culture.

We attempted to negotiate a contact arrangement for the mother with DOCS, but it was unwilling to assist. Having obtained the court orders it sought – orders that gave parental responsibility to the father until the children attained 18 years of age – DOCS had washed its hands of the matter.

The only way we could see out of this situation was to use s69ZK of the *Family Law Act*. That section allowed us to seek the DOCS minister's consent to make an application to the Family Court or the Federal Magistrates Court to seek an order for contact. Section 69ZK is not used often; but here it proved the only potential way to reverse a serious, though basic, mistake.

Mistakes also arise from DOCS' misunderstanding of some points of family law. For a child to fall into the care and protection regime of either the ACT or NSW, there must be a prevailing element of danger in his or her current situation.[3] When there is no danger, but DOCS nevertheless wants to seek orders – for example, to solidify a foster or mentoring situation – it normally applies to the Family Court for a residence order.

That process involves consulting with *all* parties which, in turn, often inflames the situation and leads to protracted negotiation and legal processes. What DOCS does not often realise, either from a practical or a legal point of view, is that such a situation does not call for the type of orders sought; in most cases, the *Family Law Act* urgent recovery order regime would be sufficient.

These practices strongly suggest a scarcity of resources on both sides of the family law and care and protection transaction. But even more importantly, however, they indicate the anomalies between family law and care and protection jurisdictions. The area is often reformed – but the most recent reforms frequently cause the most significant problems for our Aboriginal and Torres Strait Islander clients.

MANDATORY MEDIATION UNDER THE *FAMILY LAW ACT*

One of the clearest examples of that problem is the new family law mediation requirement, which has been in force since 1 July 2007. To bring a case in the Family Court, parties now need a certificate that states, in essence, that they have attempted or participated in mediation.[4]

Although the relevant part of the *Family Law Act* is yet to be tested, we have already encountered various problems in relation to it. One involved a custody dispute between an Aboriginal father and a non-Indigenous mother. The father wanted to have various members of his extended family at the mediation, and was prepared for her to have the same. She refused to come to the table if the family would be there. He refused to come to the table if he could not bring his family. Whether this constitutes an unsuccessful mediation is not clear – what is clear is that it shows a poor

understanding of the nature of Aboriginal and Torres Strait Islander family life.

FAMILY VIOLENCE ORDERS

Another example of the lack of understanding of Indigenous family groups concerns various family violence orders. It is routine in both ACT and NSW care and protection agencies for an agency to require a mother to take out an order prohibiting a father from contacting the mother or the children while they are staying with her, most often because of past violence.

The mother's dilemma then becomes whether to keep the children from seeing their father, or to risk the children being removed from her care. This type of social exclusion runs very much contrary to Indigenous culture. It is very alien to most Aboriginal and Torres Strait Islander people to restrict their own family from social visitation. Given the ultimatum placed on mothers, it is perhaps unsurprising that many more Aboriginal and Torres Strait Islander men breach their AVOs or DVOs than those from other cultures.

'BEST INTEREST' PRINCIPLE

The 'best interest principle', found throughout the provisions of the *Family Law Act*, is yet another example of the bad fit between the law and Indigenous culture.

This principle is clearly based on the notion of the nuclear family, or a family situation resembling a nuclear family as closely as possible. This model ill-serves the Aboriginal and Torres Strait Islander community in general; their children, who are subject to orders under the principle, suffer accordingly. The law in this area has been slow to recognise the very important differences between Western and Indigenous conceptions of family, the differing priorities of which are not recognised by the 'best interest principle' as it is currently applied.

In practice, we often come across examples of 'best interests' orders being made, very much contrary to the best cultural and social interests of the child concerned. At worst, the law and the orders made under it are destructive of cultural identity; at best, they again fail to recognise fundamental cultural differences.

The final issue is a very practical one: it is often very difficult for us to take instructions from Aboriginal or Torres Strait Islander clients. While it is not uncommon for us to make at-home visits to clients, our care and protection area of responsibility covers a huge geographical area – from Eden to the Central Coast to Wagga – so this is not always possible.

TAKING INSTRUCTIONS FROM INDIGENOUS CLIENTS

Taking instructions from clients with literacy or substance-abuse problems is made more difficult by encountering them long-distance or through the intermediary of a field officer. Often it is also necessary to consult a client's family group to get a full picture of the factual and legal problems that need to be addressed. In short, the nature of our practice means that fitting lawyer:client relationships within the norms of legal practice is difficult, if not impossible.

While, of course, too brief to cover the whole range of problems faced by Indigenous people when they come into contact with family or care and protection law, this article has hopefully given some insight into the day-to-day nature of our work: ours is a difficult and often frustrating role, but an essential one, especially given the law as it stands. ■

Notes: **1** The family law/care and protection section of the ALS Canberra office exists because of a collaborative arrangement between the Legal Aid Office of the ACT and the ALS. **2** In *Re Nerida* [2001] NSWCS 1196, a mother was granted leave to make a s90 application on the basis that her cancer was now in remission (when the care application had first been made by DOCS she was only expected to live for a 'short period of time'); this constituted a significant change in circumstances. In *Re Edward* [2001] NSWSC 284, evidence of a much improved (and now 'good') relationship between the mother and father, a safe home and clear drug screens did not, however, constitute a significant change of circumstance. **3** See NSW *Children's Act*, s36(1)(a); ACT *Children's Act*, s156. **4** Section 601, *Family Law Amendment (Shared Parental Responsibility) Act* 2006.

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