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From Crisis to Crime: The Escalation of Civil and Family Law Issues into Criminal Matters in Aboriginal Communities in NSW

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Melanie Schwartz and Chris Cunneen

Abstract

The issue of appropriate legal and social supports is critical to the question of Indigenous overrepresentation in the criminal justice system. This article discusses this relationship, arguing that the overwhelming emphasis on communities' criminal law needs distracts from other equally important, though perhaps less urgent, practical concerns. The authors argue that more attention needs to be paid to specific areas of civil and family law, by both legal aid and Aboriginal legal services, to prevent these unaddressed issues from escalating into offending behaviour.

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From Crisis to Crime: the escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW

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There has been very little research conducted into the civil and family law needs of Aboriginal and Torres Strait Islander people in Australia. This is the case notwithstanding the fact that it has been long recognised that Indigenous people in Australia have a high level of complex legal needs¹. The legal needs research that has been conducted has been largely focussed on the area of criminal law. This is due to the degree of over representation of Indigenous people in the criminal justice system; the real sense of urgency that this engenders translates into a prioritisation of issues involving Indigenous communities and crime.

Indeed, the demand for assistance in criminal matters means that Aboriginal and Torres Strait Islander Legal Services (ATSILS) predominantly provide legal aid services for criminal matters (89 per cent of case and duty matters in 2001-2 compared with only 2 per cent family matters and 2 per cent violence protection matters)². Decreasing levels of funding to ATSILS means that they no longer offer civil law services in NSW and provide only limited services in other jurisdictions. And while a growing demand for child protection, civil and family law matters has been identified, ATSILS report being unable to service this demand due to insufficient funding³.

However, an exclusive focus on criminal law issues in research gives rise to a number of significant problems. A sound understanding of the non-criminal law needs of Indigenous people is essential in ensuring access to justice. Inaccessibility of family and civil law services compromises the ability of Indigenous people to realise their full legal entitlements across a range of central arenas such as housing, consumer rights, credit and debt, employment law, negligence and corporations law. Improved access to legal services for Indigenous people, particularly in remote communities, and particularly in relation to civil law, is likely to ultimately assist in the necessary infrastructure for economic and social development. Such developments in community capacity are likely to lead to less offending.

There is also a danger that civil or family law issues can escalate to criminal acts,

¹ See Cunneen, C and Schwartz, M, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', *Criminal Law Journal* Vol 32(1) 38, 42-3.

² Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004): 5.5

³ Senate Legal and Constitutional References Committee 2004: 5.6, 5.14.

resulting in charges and a perpetuation of the cycle of criminal overrepresentation⁴. In research exploring the civil and family law needs of Aboriginal people in NSW conducted across eight communities in 2008⁵, this dynamic - where unaddressed civil and family law problems became criminal law issues - was evident across a range of legal areas. At the heart of the research are the opinions and experiences of focus group members in those communities⁶, and what follows is a brief discussion of five legal spheres where criminal escalation was acknowledged to occur.

Discrimination

Discrimination was nominated in every focus site as an entrenched reality for Aboriginal people. Almost 30 per cent of participants said that discrimination was something that they had faced recently.

You walk into a shop and all of a sudden you hear ‘Security to aisle three’, and you think to yourself, ‘but who’s here? I never noticed anyone, why have they noticed him, unless it’s me...’ That’s young people right through to old people that cop that sort of discrimination (*Aboriginal legal support workers Dubbo*).

Only 17 per cent of those in the focus groups who reported being a victim of discrimination sought legal advice. In many cases it is viewed more as a ‘fact of life’ than as an unlawful act that attracts a right of legal redress. Participants in the focus groups complained that there were no avenues available to seek legal advice even on “small things” like being served last when in a shop. Several expressed feelings of powerlessness (“there’s nothing you can do”) in the face of constant discrimination.

The capacity for ongoing, racist discrimination to provoke a response that can lead to criminal law issues is clear: “Discrimination is one of those things that *becomes* criminal stuff, because we react” (*Aboriginal legal support workers Dubbo*). Participants particularly noted that being told “not to worry about it” when complaints of racial discrimination were made exacerbated the problem for some people.

Well it’s not alright...you’ve still got to walk around every day with that in your head...some people are not as strong as others and they take it to heart, and then they do things to themselves...or others, and then they end up in jail (*Redfern Women’s FG participants*).

⁴ Senate Legal and Constitutional References Committee (2004): 2.41 and 2.23; *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce Commonwealth Attorney-General’s Department September 2009, 143, citing Cunneen and Schwartz above n1.

⁵ See Cunneen, C and Schwartz, Civil and Family Law Needs of Indigenous people in New South Wales: The priority areas, *UNSWLJ* vol 32 (3), pp. 725-745.

⁶ Men’s and women’s focus groups comprising approx 10 participants each were held in Redfern, Mt Druitt, Dubbo, Wagga Wagga, Moree, Walgett, Bourke and Goodooga. The focus communities were chosen to represent varying levels of remoteness/access to services. Legal service providers and support workers in those communities were also interviewed as stakeholders.

In one example given by a legal practitioner, a family had bought a stroller from Kmart Bondi Junction and were walking with it in Kmart Broadway. The baby was about 8 days old, and the stroller was snatched away by staff, with the baby in it. The only indicator that the family was engaging in suspicious activity was that they were Aboriginal people with a new stroller. The family eventually got an apology and a store credit – an outcome that the family considered satisfactory. Yet it is easily imagine an escalation to a heated altercation – with potential criminal law intervention, with a less forgiving victim.

HOUSING

The extent and depth of disputes about housing was evident across all focus groups conducted. 41 per cent of focus group participants said that they had had disputes involving their landlords in the last few years.

It's amazing – they owe you money, they don't want to give it to you. But you owe *them* money, 'we're going to terminate your rental here because you're a week behind in your rent' ... and they have the authority to go in and direct debit you, but we can't go and direct debit *them!* (*Redfern women's FG participants*).

Feelings of power inequality between landlord and tenant in the public housing context - where the landlord has the capacity to influence not only eviction but future access to housing - were strongly evident: "I'm grateful I've got my house. I think maybe it's just like a test, to see how much you want your house". (*Mt Druitt Women's FG participant*). Reflecting this, only a quarter of people who had experienced legal issues around housing sought legal advice. This power imbalance, and the frustration and sense of helplessness that it creates, was frequently commented upon in focus groups.

Access to stable housing of an acceptable standard is not only a human right, but lack of it is a factor that can lead to criminal justice issues. Apart from anger directed at housing authorities (but possibly projected elsewhere), over-crowding in housing is a risk factor for sexual assault and domestic violence⁷. Over-crowding is worse in remote communities where the average number of people per house is highest – for example in Wadeye in the NT there were an average of 16 people per house.⁸

There is also a direct correlation between poor access to housing and criminal offending. A 1999 study by the National Crime Prevention initiative found that 72% of young homeless people were on a corrective order and 44% had been in a penal facility or institution at some time⁹. There is consistent evidence that homeless young people break

⁷ New South Wales Aboriginal Child Sexual Assault Taskforce (2006) *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal Communities in New South Wales*, NSW Attorney-General's Department, Sydney. p.265. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage. Key Indicators 2009*. Melbourne: Productivity Commission. p.9.3

⁸ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage. Key Indicators 2009*. Melbourne: Productivity Commission. p.9.4

⁹ Cited in Australian Institute of Health and Welfare (2008). Linking SAAP, child protection and juvenile justice data collections: a feasibility study. Data linkage series no. 5. Cat. no. CSI 5. Canberra: AIHW, 2.

the law more than other young people, for example stealing for food or breaking into premises for somewhere to sleep¹⁰.

Further, lack of suitable accommodation for people coming out of prison has been found to be a significant factor in likelihood of reoffending¹¹. Conversely, stable housing can help releasees break the cycle of offending and re-incarceration.¹²

Education

Of the focus group participants who were responsible for a young person in an educational institution, half reported difficulties with issues like suspension and expulsion. Many of those also reported problems with what they saw as racism in schools which was a factor leading to suspensions. Some just “gave up” sending their children to school. There were perceptions of discrimination and victimisation of Indigenous children within the classroom. One example raised in Goodooga was of a child who broke a ruler and spat at a teacher, and was then prosecuted for assault.

A 50% rate of reporting trouble with school issues is extremely significant because there is a demonstrated connection between an ability to stay in school and the rate of juvenile offending: poor education can undermine the ability of a young person to live crime-free.¹³ The 2002 NATSISS Survey indicated in 2002 that Aboriginal students who complete year 12 at high school had far less contact with the criminal justice system than those who did not achieve this level of education¹⁴.

As discussed by Chapman et al, when young people “drop out of school, or fail to complete it and fail to obtain a job, their frustration coincides with a sharp diminution in the level of supervision and control characteristic of the school and work environment. Those who leave school around the age of sixteen experience this loss of control at precisely the age when they are most prone to involvement in crime”¹⁵.

Credit and Debt

Around forty per cent of focus group participants stated that they had had legal action taken or threatened against them for money that they owe. This only accounts for

¹⁰ Ibid, citing Minkes J 2005. Preventing crime among homeless youth. Montreal, Canada: International Centre for the Prevention of Crime.

¹¹ Baldry, E., McDonnell, D., Maplestone, P. & Peeters, M., 2003, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration for ex-prisoners? Final report*, Australian Housing and Urban Research Institute, Melbourne, i.

¹² Ibid, 23.

¹³ Cunneen, C et al, Evaluation of the NSW Department of Juvenile Justice Post Release Support Program, Institute of Criminology (2005) at 2.5.3.

¹⁴ See D. Weatherburn, L. Snowball & B. Hunter, (2006) “The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey”, *Contemporary Issues in Crime and Justice* 104, NSW Bureau of Crime Statistics and Research, Sydney, 5-6, 11.

¹⁵ Chapman, B., Weatherburn, D., Kapuscinski, C., Chilvers, M. & Roussel, S. (2002) Unemployment Duration, schooling and property crime, *Contemporary Issues in Crime and Justice*, 74, NSW Bureau of Crime Statistics and Research: Sydney, 3.

situations where debt had escalated to legal action being taken, so there is likely to be a far higher number of people who face lower level debt problems that haven't yet reached this level of seriousness.

Many of the debts are long standing:

Some of the fines occur over many years and some clients don't understand that they can still be pursued for fines incurred a long time ago. People may not know what to do and given all the other issues in their lives, what we've observed is that debts and fines tend to be at the bottom of the pile. They're just one more thing they just can't deal with, it's not the most immediate thing to deal with... Because of fluctuating addresses, or jail terms, fines lurk for years and people may not even know about them until years later (*Legal practitioner Redfern*).

Accumulated debt reinforces levels of poverty and inequality which are themselves associated in general terms with increased likelihood of contact with the criminal justice system.¹⁶ One of the arenas where debt issues can escalate more specifically to criminal issues is where the non-payment of fines leads to cancellation of drivers' licenses, which can then result in serious driving offences where the cancellation is not understood or not otherwise observed.¹⁷

Coming out of jail with debt is also understood to be a risk factor for recidivism.¹⁸ Thus the line between debt and crime can be quite direct.

Care and Protection

Removal of a child into care increases their likelihood of poor outcomes across a range of issues, including the risk of criminal offending. In a survey of young people in juvenile detention by Pritchard & Payne, almost half of those surveyed reported being the victim of some form of abuse or neglect during childhood.¹⁹

The clear correlation between the breakdown of Aboriginal families, involvement of children in the protection and care system and subsequent contact with the justices system was also noted in the Victorian Aboriginal Justice Agreement: "Child abuse and neglect are also predictors of the future contact with the criminal justice system".²⁰ Child abuse

¹⁶ Braithwaite, J. (1989) *Crime Shame and Reintegration*, Cambridge University Press, Cambridge.

¹⁷ See Clarke, S; Forell, S; McCarron, E (2008) "Fine but not fair: fines and disadvantage," *Law and Justice Foundation of New South Wales Justice Issues*: Paper 3, 8. Motor traffic offences are also a significant reason for Indigenous court appearances and incarceration. Fitzgerald, J. (2009) 'Why Are Indigenous Imprisonment Rates Rising?' *Crime and Justice Statistics*, Paper 41, NSW Bureau of Crime Statistics and Research: Sydney, 5.

¹⁸ Baldry, E., McDonnell, D., Maplestone, P. & Peeters, M., 2003, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration for ex-prisoners? Final report*, Australian Housing and Urban Research Institute, Melbourne, 14.

¹⁹ Pritchard J & Payne J 2005. Alcohol, drugs and crime: a study of juveniles in detention. Canberra: Australian Institute of Criminology.

²⁰ Department of Justice Victoria, (2004) *Victorian Aboriginal Justice Agreement 2000: Phase 1*, State Government of Victoria: Melbourne, 15.

and neglect also add to the severe social strain under which many Indigenous people live.²¹

DOCS matters were nominated across all focus sites as among the highest priority for Aboriginal people. There was wide-ranging dissatisfaction among focus group participants about their interactions with DOCS: “I’ll get a bomb and put it underneath them and blow them up” (*Dubbo Women’s FG participant*). There were complaints that DOCS remove children significant distances from their family, and that as a result families (particularly from areas like Bourke, Goodooga and Brewarrina) find it difficult to visit their children and especially so if they are reliant on public transport.

Remote placement of children from family creates a risk of the breakdown of family ties, which is a risk factor for offending in young people.

Further, the potential for escalation of family law disputes into criminal issues was widely acknowledged. The failure to address family law matters, particularly around children can result in criminal offending. “Someone is going to flog someone else”, as one Aboriginal legal aid worker put it.

Conclusion

One of the most important findings of the legal needs research was the almost universal lack of understanding about what civil law is – not just among Indigenous communities but among the legal support workers in the communities. There was widespread recognition that there needs to be more promotion and community legal education of what civil law is, and how the resolution of civil law matters can be beneficial to the community. As one Aboriginal legal aid worker noted, “I think a lot of the time, people find themselves in situations that, if they had known what to do about it in the first instance, they wouldn’t have found themselves in X, Y, Z situation”.

Other noted the “sheer desperation” as far as identifying and resolving family and civil law matters. The lack of education to be able to identify legal remedies for civil law matters combined with the absence of services for legal advice was clearly seen in the context of a failure to ensure civil rights. In family law matters it was clearly identified that because Aboriginal people do not know how to deal with the legal system “the only way they know how to deal with it [the issue] is to go out and have a big punch up” (*Legal support worker Wagga*).

The lack of a deep (or even passing) knowledge about civil and family law is partly because the need to address criminal issues is so acute that it leaves very little time and resources for anything else. But building of positive futures for communities **relies** on building a foundation of well addressed non-criminal needs.

²¹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage. Key Indicators 2009*. Melbourne: Productivity Commission. pp.4.115-4.117

At a policy and funding level, government and other agencies would do well to recognise that only attempting, inadequately, to address the blinding problem of over-representation is not an investment in the future. The future will depend on the serious investment in non-criminal issues, and in NSW the priorities - at least the legal dimensions of them – have now been identified.