
FAMILY VIOLENCE: A NATIONAL LEGAL RESPONSE

THE ALRC AND INDIGENOUS PEOPLE – CONTINUING

THE CONVERSATION

by Amanda Alford and Rosalind Croucher

In March 2009, the National Council to Reduce Violence against Women and their Children ('National Council') released *Time for Action*, a report on violence against women in the Australian community. Amongst other things, the National Council found that Indigenous women report higher levels of physical violence during their lifetime than non-Indigenous women, and that they are much more likely to experience sexual violence and to sustain injury.¹

Time for Action included a number of recommendations, including that the Australian Law Reform Commission ('ALRC') should undertake an inquiry into family violence laws in Australia. In April 2009, the Standing Committee of Attorneys-General agreed that the ALRC and New South Wales Law Reform Commission should work jointly on this project. Subsequently, in July 2009, the Federal and NSW Attorneys-General issued the Commissions with Terms of Reference, to consider:

1. the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, State and Territory criminal laws; and
2. the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

In relation to both these issues the Commissions were asked to consider, 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'.

In November 2010, the Commissions published the Final Report, *Family Violence — A National Legal Response*² (the Family Violence Report), a two-volume report that contained 187 recommendations for reform.

Following an Inquiry of this breadth and importance, the ALRC considers that it is useful to reflect on how we went about the task. As part of this, the ALRC

would like to acknowledge the contributions made by many Indigenous organisations and individuals and, in recognition of the ALRC's responsibility to our Indigenous stakeholders and as a means of facilitating an ongoing conversation, would like to report back on the Inquiry. Consequently, this article discusses and reflects on the ways in which the Commissions engaged with Indigenous stakeholders; presents a selection of the key overarching issues and perspectives of particular relevance to Indigenous people that emerged; and outlines the ALRC's work moving forward and the way Indigenous people can be actively involved in the process of law reform.

THE FAMILY VIOLENCE INQUIRY — INDIGENOUS ENGAGEMENT

In the course of the Family Violence Inquiry, the Commissions were conscious of ensuring that the experiences and concerns of Indigenous people were appropriately recognised and addressed.

In light of this, the Commissions adopted an integrated approach to the incorporation of the experiences and concerns of Indigenous people throughout the Consultation Paper and Final Report, raising them throughout the documents rather than potentially 'othering' or marginalising the issues by including a separate chapter on Indigenous concerns. However, the ALRC is aware that this approach caused difficulties for some stakeholders working with Indigenous groups in identifying the particular issues to address and is working on strategies to ensure an appropriate way of dealing with issues affecting Indigenous stakeholders in future inquiries. The ALRC would welcome input from Indigenous communities on ways to achieve this aspiration.

In endeavouring to engage with Indigenous stakeholders the Commissions were also conscious of what has been referred to as 'consultation fatigue', expressed in consultations and submissions as a frustration by Indigenous communities about the frequency with which

individuals and organisations are consulted, without meaningful outcomes or feedback for communities. In addition to recommendations made in the Family Violence Report, the release of a Summary Report, this article and a podcast³ reflect the ALRC's commitment to ensuring that the information and experiences shared by Indigenous people with the ALRC produce meaningful outcomes and stakeholders are aware of the use to which such information has been put.

In terms of the consultation process, from the beginning of the Inquiry, the ALRC sought guidance from its Indigenous Advisory Committee (established as part of the Commission's Reconciliation Action Plan) about consultation strategies and developed an Indigenous Consultation Plan.

The focus of the Inquiry was on the interaction of, and improvements to, legal frameworks and laws in Australia. In line with this, the Commissions' approach throughout the Inquiry (including with respect to consultation of Indigenous people) was to consult with experts and representative organisations that were best placed to comment on the interaction of relevant laws and their operation in practice, rather than affected individuals within communities. The Commissions took this approach for a number of reasons, including the legal framework-based focus of the Inquiry, the relatively short timeframe, available resources and the need to manage stakeholder expectations about what the Commissions could consider and subsequently recommend.

At the conclusion of the Inquiry, the Commissions had consulted with numerous Indigenous organisations across Australia, as well as participated in key events such as the National Indigenous Legal Conference and National Indigenous Family Violence Prevention Forum. However, the ALRC recognises several elements of the consultation process during the Family Violence Inquiry could be improved, but notes that these are subject to resource and government-imposed timeframe constraints. With respect to Indigenous people, the ALRC is acutely aware of the need to build upon the relationships forged with Indigenous organisations during the Family Violence Inquiry and to foster new relationships with organisations relevant to particular terms of reference in future inquiries.

FAMILY VIOLENCE—INDIGENOUS PERSPECTIVES

In many respects, problems with relevant legal frameworks in the context of family violence affect all people experiencing family violence. However, the Commissions' research and consultations, as well as written submissions

received, revealed a number of common threads with respect to the particular experiences and concerns of Indigenous victims of family violence.

Overall, the Commissions heard that the importance of a historically and culturally-sensitive understanding of the causes and nature of Indigenous family violence, as well as the specific interactions between Indigenous people and the legal system cannot be underestimated. In the context of family violence, there appear to be two key access to justice issues for Indigenous people: first, a number of barriers impede access to assistance; secondly, services and legal frameworks do not adequately recognise and respond to Indigenous experiences of family violence. A more nuanced understanding of family violence in Indigenous communities requires recognition of:

- The cumulative effects of 'poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor education and housing and general disempowerment [which] lead inexorably to family and other violence and then on to sexual abuse...';⁴
- Indigenous peoples' relationship with police, government agencies and courts;
- Cultural, systemic and institutional barriers faced by Indigenous people in seeking assistance, including to adequate and/or culturally appropriate services and facilities;
- The geographical isolation of some Indigenous communities;
- The endemic and intergenerational nature and 'normalisation' of violence;
- The impact of Indigenous concepts of family and community;
- General inadequacies in data collection with respect to Indigenous people; and
- The importance of framing family violence in a human rights context, in particular to ensure that violence against Indigenous women and children cannot be minimised by reference to cultural practices or arguments which supposedly condone violence.

The Commissions were also aware that it was important to recognise that experiences of family violence are diverse and that, if any real outcomes were to be achieved, Indigenous organisations and communities must be actively engaged in discussion surrounding which processes and mechanisms are most likely to assist Indigenous victims of family violence.

The Family Violence Inquiry covered a range of legislative regimes and made numerous recommendations for reform, many of which the Commissions consider will

assist in ensuring justice for all victims of family violence. However, in making recommendations the Commissions also necessarily recognise the limits of law and the need for responses that go beyond legal frameworks in responding to and addressing family violence.

The next section considers examples of the Commissions' approach and the response to Indigenous concerns, as addressed in the Family Violence Report.

FORMS AND DEFINITIONS OF FAMILY VIOLENCE

At the outset of the Inquiry the Commissions identified the need for a common interpretative framework with respect to family violence. This framework necessarily encompasses a broader definition of family violence that would acknowledge the experiences of Indigenous victims in light of current definitional inadequacies. By way of example, Indigenous stakeholders expressed particular concern about the use of economic abuse as a method of power and control, for instance through 'humbugging' — the practice of demanding money from relatives. Similarly, in relation to emotional abuse, some stakeholders noted that threats to commit suicide are sometimes used as a form of coercion — as opposed to as a genuine cry for help — to dissuade victims from taking action.

The Commissions formed the view that adopting consistent definitions of family violence across different legislative schemes sends a clear message about what constitutes family violence. As a result, the Commissions recommended that state and territory family violence legislation as well as the *Family Law Act 1975* (Cth) should provide that family violence is: 'violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful'. The Commissions recommended that such behaviour may include, but is not limited to, a range of things including: physical violence; sexual assault; economic, emotional or psychological abuse; kidnapping or deprivation of liberty; damage to property; and exposure of a child to the effects of family violence.⁵

Further, with respect to emotional and psychological abuse or intimidation and harassment, the Commissions recommended that legislation should include examples illustrating conduct that would affect certain vulnerable groups, including Indigenous persons. For example, a form of abuse that to which Indigenous people may be particularly vulnerable is one involving the prevention of a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices.⁶

ACCESS TO SERVICES AND FACILITIES

Difficulties with the accessibility and availability of culturally-sensitive and appropriate services and facilities was emphasised by numerous stakeholders throughout the Inquiry. Concerns related to the impact of linguistic and cultural barriers as well as broader access issues, including to: designated services for Indigenous women; legal services and advice; support services; liaison and contact office positions within government and non-government services. Further, in light of the importance of written Family Reports in informing decisions within the Family Court system, Indigenous stakeholders identified the need for accessible and culturally-sensitive Family Report Writers. The Commissions heard, for example, about the cultural and linguistic problems which arise in discussing emotional and psychological injury with Indigenous persons. One particular recommendation was that state and territory governments should ensure that support services are in place to assist persons in need of protection to apply for a protection order without involving police, and that these should include services specifically for Indigenous persons.⁷ Throughout the Family Violence Report, the Commissions emphasised the need for the legal system to be alive to cultural and linguistic diversity and the vital importance of culturally appropriate service provision. In particular, the Commissions strongly suggested or recommended:

- Providing cultural awareness education and training for police, prosecutors, the legal profession, judicial officers, and victim referral and support services;
- Prioritising the provision of, and access to, culturally appropriate victim support services such as legal advice (including specialised legal advice and representation for Indigenous women), counselling and other support services, but ensuring victims are able to choose whether to access culturally-specific services;⁸
- Ensuring the provision of professional translating and interpreting services where required and/or requested; and
- Introducing or re-introducing Indigenous-specific victim liaison, support and advocacy positions throughout the legal system, including within the police, the courts and service providers.

COURT PROCEEDINGS

A key element of the challenge to victims of family violence in accessing legal remedies is the fragmentation of the legal system. For example, a victim of family violence may potentially be involved in legal proceedings in a court with jurisdiction under the *Family Law Act*, a Magistrates Court as well as a Children's Court. As a result, a victim may be required to attend or give evidence in a range of jurisdictions.

In addition to the difficulties faced by all victims of family violence in such circumstances, there are many compounding factors faced by Indigenous people in attending or participating in court proceedings. These include:

- Logistical difficulties, including transportation and movement between communities;
- Fear of giving evidence in open court and thus a preference for the court to be closed on the request of the applicant or protected person as it is a factor in determining whether women are willing to proceed with a hearing;
- Feelings of guilt, blame and privacy concerns associated with not wanting issues publicly aired as well as community/family pressure through presence in court;
- Language barriers and difficulties in giving oral evidence, including judicial attitudes towards the necessity of interpreters; and
- The potential for cross-examination of a victim by a person who has allegedly used violence.

Where possible the Commissions made comments and recommendations as to procedures and services that may assist in ameliorating these difficulties, including provision of: information and assistance; safe rooms and other safety measures; Indigenous Liaison Officers; and interpreters; as well as the use of pre-recorded evidence closed courts.⁹

INDIGENOUS CONCEPTS OF FAMILY AND COMMUNITY

While the term ‘family’ is seldom used explicitly in Australian law, it is apparent that the notion of the nuclear family — comprising a mother, father and their children — still underlies the *Family Law Act* and other legislative regimes. The Commissions heard numerous stories about the unique impact of Indigenous concepts of family and community in a family violence context. For example, Indigenous people may have differently constructed parenting arrangements, where children will be ‘brought up’ by a number of different ‘mothers’ and grandparents may play a significant role.

The Commissions are aware that there is a disproportionate level of family violence among Indigenous communities, and of the particular dynamics of Indigenous family violence such as violence within extended kinship networks. Consequently, the Commissions recommended that persons protected by family violence legislation of each state and territory should include as protected persons those who fall within Indigenous concepts of family.¹⁰

An issue the Commissions examined was whether state and territory family violence legislation should include an express presumption that the interests and protection of victims is best served by their remaining in the home in circumstances where they share a residence with the persons who have used violence against them. The rationale underlying such a presumption was an attempt to minimise disruption and uncertainty faced by victims of family violence, particularly where children are living in the home. However, the Commissions heard that in many instances a number of Indigenous family members will share a residence, or a victim may reside in the home of the aggressor’s family. It was also recognised that often victims of family violence are unwilling to stay in a home rented/owned by the person who has used violence, or known by the latter person who may still have access to the home. Consequently, the Commissions did not make a recommendation in relation to such a legislative presumption, acknowledging that victims should be able to make the choice of whether it is safe for them to remain in the home or flee.

TRAINING, EDUCATION AND AWARENESS

It is clear there is a need to ensure regular and consistent training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from vulnerable groups such as Indigenous people.¹¹ More specifically, in order to ensure the experiences and needs of Indigenous people in those systems are adequately acknowledged and addressed, there is also a need for training and education in relation to:

- Indigenous culture and familial norms/dynamics;
- Local Indigenous communities and local issues and circumstances;
- Indigenous experiences of, and responses to, family violence;
- Interviewing and working with Indigenous people; and
- Indigenous child sexual assault dynamics, indicators, impacts and reporting.

LIMITED ACCESS TO THE FAMILY LAW SYSTEM

Finally, several stakeholders noted that statistics indicate and/or their experiences are that the numbers of Indigenous people accessing the family courts are low. Generally, lack of involvement of the family court may be because separation and parenting matters are not an issue in every case, or may be resolved between the parties. However, it may also be as a result of difficulties in accessing family courts — for example because the costs of legal proceedings or geographic remoteness make access to courts impractical. In addition, the Commissions heard

that the low rate of Indigenous use of the family courts may in part be attributed to the failure to identify people as Indigenous, and in part to accessibility issues and the failure of systems to be relevant, accessible or responsive to the needs of Indigenous people.

THE ALRC AND THE INDIGENOUS COMMUNITY — THE FUTURE

Building on the work done by the ALRC in implementing its Reconciliation Action Plan (RAP) and in engaging with Indigenous stakeholders throughout the Family Violence Inquiry, we acknowledge that more can be done to ensure the experiences and concerns of Indigenous Australians are reflected in the work done by the Commission.

In part, the ALRC can address this through internal strategies, further implementation of the RAP, the involvement of a newly-appointed Indigenous legal officer, and the implementation of an Indigenous internship program. However, the ALRC also needs the support and involvement of Indigenous communities.

As foreshadowed earlier, in 2009 the ALRC established an Indigenous Advisory Committee (IAC) to assist in building stronger relationships with Indigenous peoples, and to ensure that the concerns and perspectives of Indigenous communities are more effectively integrated into the federal law reform process. The ALRC is currently reviewing the structure and functions of the IAC with a view to ensuring it can be more actively involved in the law reform process and would welcome expressions of interest from people interested in becoming involved. The ongoing involvement of Indigenous individuals and organisations in the work of the ALRC is vital to ensuring inquiries adequately reflect the experiences, needs and concerns of Indigenous people. The ALRC invites Indigenous communities to engage in an ongoing conversation in order to shape law reform for the benefit of all Australians, but particularly the most vulnerable and disadvantaged members of our society. To paraphrase some comments by our foundation chairman, the Hon Michael Kirby AC CMG, the ALRC is conscious that ‘we are not “there” yet. But we are “here”. And “here” is closer to...’¹² where we were when this conversation began. We look forward to continuing the conversation.

ALRC Report 114/NSWLRC Report 128 and the podcast ‘Indigenous issues and consultation in the Family Violence Inquiry’ are available at: <http://www.alrc.gov.au>

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- 1 National Council to Reduce Violence against Women and their Children, *Time For Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 9.
- 2 ALRC Report 114, NSWLRC Report 128.
- 3 Australian Law Reform Commission, Podcast: Indigenous issues and consultation in the Family Violence Inquiry, 17 December 2010, <http://www.alrc.gov.au/news-media/alrc-news/podcast-indigenous-issues-and-consultation-family-violence-inquiry>.
- 4 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) *Ampe Akelyernemane Meke Mekarle “Little Children Are Sacred”*: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government: Darwin, 6.
- 5 ALRC Report 114, Recs 5–1 and 6–4.
- 6 ALRC Report 114, Rec 5–2.
- 7 ALRC Report 114, Rec 9–3(a).
- 8 The need for separate legal services operated by and for Indigenous women was recognised in ALRC Report 114 (Rec 29–4) and previously by the ALRC in *Equality Before the Law: Justice for Women* (ALRC Report 69).
- 9 See for example: ALRC Report 114, Recs 26–2, 26–6, 28–5.
- 10 ALRC Report 114, Rec 7–6.
- 11 ALRC Report 114, Rec 31–1 and 26–3.
- 12 Michael Kirby, ‘Are We There Yet?’ *The Promise of Law Reform* (2005), 448.