

# Access to justice for Aboriginal People in the Northern Territory

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## **Abstract**

This article discusses research in the Northern Territory on Aboriginal civil and family law needs. It is based on focus group discussions and interviews with legal services providers and other associated organisations. The article argues that key areas of legal need involve discrimination, housing, child protection, social security, credit/debt and consumer law problems. It further argues that welfare conditionality, particularly as embodied in the NT Intervention and subsequent Stronger Futures policies, has exacerbated the need for legal assistance and advocacy for Aboriginal people.

**Keywords:** Aboriginal and Torres Strait Islander people, civil law, family law, access to justice, legal service delivery

## Introduction

Federal government plans to reduce legal aid funding, including to Indigenous legal services, highlight the problem of access to justice for people who are excluded for various reasons from using the private legal market. Existing barriers that Indigenous people face in accessing legal services have been identified in various reports over the years (for example, Senate Legal & Constitutional References Committee 2004; Joint Committee of Public Accounts & Audit 2005; Cunneen & Schwartz 2008). In addition, Indigenous people face well-documented disadvantage in the areas of education, housing, employment, income and health (SCROGSP 2011). These disadvantages are likely to compound both the need for, and problems in access to, legal assistance. Some categories of disadvantage are particularly relevant to the problems that Indigenous people may have in accessing legal services: for example, low levels of literacy and numeracy; higher levels of disability; and higher levels of psychological distress compared with non-Indigenous people (SCROGSP 2011). In addition, higher rates of self harm, the effects of childhood removal, and drug and alcohol issues are all likely to make Indigenous clients a particularly disadvantaged group for legal service providers to work with (Cunneen & Schwartz 2008). Geographical isolation is also a major inhibitor to access to justice for Indigenous communities. In remote communities, access to justice is 'so inadequate that remote Indigenous people cannot be said to have full civil rights' (Senate Legal and Constitutional References Committee 2004, para 5.120). It has been acknowledged that better access to legal services and remedies can play an important role in alleviating economic and social disadvantage (Curran & Noone 2007).

The most comprehensive Australian legal needs survey was conducted by the Law and Justice Foundation of New South Wales (Coumarelos et al. 2012a). In relation to Indigenous people, the research found that Indigenous status was unrelated to the prevalence of legal problems or of 'substantial' legal problems, but that Indigenous people did have increased prevalence of multiple legal problems (Coumarelos et al. 2012a, 178). However, as the authors note, there were significant methodological limitations to this research in specifically assessing Indigenous needs, including among others, sampling size, the use of a telephone survey, and the absence of Indigenous interpreters (Coumarelos et al. 2012a, 178, 236, 311). As we discuss further below, some of these problems were particularly pronounced in relation to the Northern Territory (NT) findings (Coumarelos et al. 2012b, 301).

The research we report on in this article is designed to go beyond the well-documented barriers to accessing justice, and to identify the *specific* civil and family law needs that Indigenous people face in the NT.<sup>1</sup> In addition, we argue that changes in public policy over recent years have increased the prevalence of legal problems for Indigenous people. The shift in welfare policy to principles of *conditionality*, whereby access to welfare is based on the 'responsibilisation' of citizens through ensuring behavioural change and the meeting of certain obligations, has generated a range of specific legal issues,

particularly in social housing, social security, and child protection (for discussion on welfare conditionality and Indigenous policy, see Habibis et al. 2012). These legal problems arise in part because conditionality is governed by increased state regulatory processes, such as tenancy leases, requirements around anti-social behaviour, school attendance, and income management. As we demonstrate through our research, Indigenous people are ill-equipped to respond to these new demands, especially since the introduction of both the NT *Emergency Response* (NTER) or ‘Intervention’ in 2007 and the subsequent *Stronger Futures* policy and legislation in 2012.

## Methodology

One limitation of previous research into legal needs has been the assumption that individuals can identify ‘unmet’ legal need (Curran & Noone 2007). Our research starts from a point of asking people to identify particular problems they might have (e.g., housing, credit and debt, discrimination, employment) without requiring them to identify these problems as legal in nature. We begin with the assumption that Indigenous people may not recognise that their problems have a legal dimension or know of potential legal services or remedies.

A significant methodological constraint for previous legal needs research has been the reliance on household telephone interviews (Coumarelos et al. 2006, Coumarelos et al. 2012a; 2012b). There are methodological limitations to this approach, both in accessing and eliciting information-rich responses from Indigenous people, and it is certainly not useful to understanding Indigenous legal needs in remote areas where there is limited availability of telephones, language differences, and significant housing overcrowding. Accessing Indigenous people through a landline telephone is difficult. Nationally it has been estimated that 60.5 per cent of Indigenous people in remote areas do not have a landline telephone (ABS & AIHW 2010). In the Northern Territory and Western Australia less than 40 per cent of Indigenous people have access to a working telephone and this proportion is even *less* in remote communities (ABS 2005). Further, one might question the value of a household survey in, for example, the Wadeye community (NT) where there is an average of 16 people per house (SCROGS 2011a, 9.5) and the ‘household’ is centred on different systems of kinship and relationality (Morphy 2007), or where an Indigenous language is the first language spoken at home and there is no Indigenous language interpreter (65 per cent of Indigenous people in the NT speak an Indigenous language at home: ABS 2011).

Across Australia, 25 per cent of Indigenous people live in remote and very remote areas compared to two per cent of non-Indigenous people. The issue of remoteness is particularly pronounced in the NT where, of the estimated 34,479 Indigenous people living in the NT as at June 2011, some 20,102 lived in very remote areas and a further 7,542 lived in remote areas, which together comprise 80 per cent of the NT Indigenous population (ABS 2013, Data Cube 3, Table 1).

Failure to access this group of people properly is especially problematic in analysing legal need and access to justice. We know that Indigenous people living in remote areas are particularly disadvantaged in terms of social, economic and health measures (for example, over-crowded housing, greater hospitalisation rates) and are much less likely to be able to access services (SCROGS 2011b).

We attempted to overcome the limitations of other approaches to researching Indigenous access to justice and legal need by using a qualitative methodology based on men's and women's focus groups. Focus groups were organised by local Indigenous people who were employed to act as coordinators. The coordinators were provided with criteria for the selection of local community people to participate in the focus group. Participants were paid for their involvement. At the commencement of the focus group we asked participants to complete a questionnaire that provided quantitative data on key areas of legal need. Given language and literacy issues, the questionnaire was read aloud and explained. Focus group coordinators and other members of the focus group assisted with interpreting as necessary.

Men and women's focus groups were conducted in the following sites in the NT, with their geographic classification shown in brackets: Darwin (Accessible), Alice Springs, Katherine (Remote), Tennant Creek, Papunya, Wadeye, Alpuururulam, and Bulman (Very Remote).<sup>2</sup> There were a total of 149 Indigenous community members (52.3 per cent female; 47.7 per cent male) in the sixteen focus groups across the eight communities. In addition, over 60 stakeholder interviews were conducted with Indigenous and non-Indigenous organisations providing legal and associated services within the nominated communities to explore the experiences, perspectives and understandings of legal need and access to services.<sup>3</sup> Focus groups and interviews were held during 2011 and early 2012.

The topics covered in the questionnaire included housing and tenancy, neighbourhood disputes, wills and intestacy, victims' compensation, stolen generations and stolen wages, employment, social security, family law and child protection, discrimination, accident and injury, education, credit and debt, consumer issues, and taxation. Participants were asked to indicate whether they had experienced a problem in these areas in the last two years, and a number of subsequent questions on the nature of the problem and whether they had sought legal assistance or advice. The questionnaire items generally followed those used in other Australian legal need surveys (Coumarelos et al. 2006), with additional questions relating to specific Indigenous concerns (for example, stolen generations, stolen wages, Basics Card). The focus group discussions following the completion of questionnaires allowed for a broad range of matters to be canvassed, including issues not covered in the questionnaire but identified as important by participants (for example, police complaints and health care complaints).

## Priority legal issues

We used three sets of data to determine the priority areas of civil and family law for Indigenous people in the NT. These were the responses to focus group questionnaires, an analysis of the focus group discussions, and an analysis of the interviews with stakeholder organisations. The triangulation of these data sources identified the most important legal issues. There was a small number of exceptions where certain issues were not strongly identified in the questionnaire responses, but which were the subject of significant discussion both within the focus groups and by stakeholders. We detail these further below.

Housing and neighbourhood disputes were the most frequently experienced problems identified by focus group participants (identified by 54.1 per cent and 27 per cent of participants, respectively). Housing was also one of the major topics raised in focus group discussions and in stakeholder interviews. Therefore both these issues were identified as priority areas. Problems with discrimination and credit/debt were also frequently identified by participants (22.6 per cent and 18.4 per cent, respectively). They were also widely noted by stakeholders as posing significant problems for Indigenous people. Stakeholders also identified consumer issues as important, although they had not appeared frequently in the focus group questionnaires (12 per cent or less depending on the nature of the consumer problem). However, it was clear from the focus group discussions and the stakeholder interviews that consumer issues were intertwined with debt problems. We return to this interconnection later in the article. Discrimination, credit/ debt, and consumer issues were therefore also identified as priority areas of need.

Some 73 per cent of focus group participants were in receipt of Centrelink payments. Of this group, 29 per cent identified problems with Centrelink. The majority of people receiving Centrelink payments were also subject to income management policies and practices. We identify social security as a priority issue because almost three in four people participating in focus groups were dependent on Centrelink payments, and a significant proportion of this group indicated they had experienced problems in this area.

Legal problems with child protection did not appear in the questionnaire results as frequently as other problems (12 per cent). However, focus group participants identified this area as a priority in discussion, even though they may not have experienced a problem personally over the last two years. There was also significant discussion among stakeholders about this issue, including in relation to an identified lack of legal assistance to parents. In this context, given the stakeholder and focus group discussions on the importance of child protection legal needs, and that the failure to meet legal need in this area can have serious immediate and long-term consequences (the loss of children), we see child protection as a priority area of need.

Legal need and access to justice for Indigenous people is also mediated by gender. In some of the legal issues explored in the research there were pronounced gender differences both in the identification of issues and in the

likelihood of seeking legal advice or assistance. For example, in relation to housing, neighbourhood disputes and Centrelink, Indigenous women were *more likely* to identify an issue or problem but much *less likely* than men to seek assistance. This disparity was particularly pronounced for neighbourhood disputes and Centrelink where, despite more frequent identification of problems, Indigenous women were half as likely as men to seek advice in relation to neighbourhood disputes, and four times less likely than men in relation to Centrelink.

In areas such as victim's compensation, employment, family law and child protection, and credit and debt, Indigenous men were less likely than women to seek assistance. The issue was particularly pronounced in relation to victim's compensation and credit and debt, where men were four times less likely as women to seek victim's compensation, and nearly five times less likely than women to seek advice in relation to credit and debt.

In the subsequent sections of this article we discuss in more detail the specific nature of legal need and access to justice issues that confront Indigenous people in the NT, with a specific focus on housing and neighbourhood disputes, discrimination, credit/debt and consumer problems, Centrelink issues and child protection.

### **Housing, tenancy and neighbourhood disputes**

As indicated above, over half of the 149 Indigenous people who participated in the focus groups indicated they had problems with housing over the last two years. The primary area of dispute arising in tenancies related to repairs and maintenance (identified in more than half of responses). Rental payments and, to a lesser extent, overcrowding and evictions, also emerged as key issues of concern.<sup>4</sup> Focus group participants queried why they were required to pay rent when repairs and maintenance were not being carried out or when they were living in substandard dwellings, sometimes without water. They also queried why they should be held financially liable for certain repairs:

When you move out, they hit you. I'm still paying off my bill ....  
They do no work on it ... but when you move out they come  
and hit you for a big ass bill for the things they wouldn't fix up  
while you were living there. I can't get a house now, until I pay  
that off ... and then you got a five year wait after that  
(*Tennant Creek Men's Focus Group Participant*).

Overcrowding also led to tenancy-related problems (such as eviction), as well as other legal issues (such as debt). For example, evictions due to anti-social behaviour were linked to overcrowding:

Anti-social behaviour is a huge one because if somebody gets  
evicted for that reason, it effectively bars them from public  
housing. The rules say that you can't get back onto the list for  
two years after you've been evicted .... And the problem with  
anti-social behaviour is that it's usually other family members

coming into the house, but whoever is on the lease is the one who suffers – and they are usually elderly or frail and can't control their family members

*(Indigenous Legal Service staff 4).*

Indigenous women were much more likely than Indigenous men to identify neighbourhood problems (38.5 per cent compared 14.3 per cent). Noise was most commonly identified as the cause of the dispute, then fences/boundaries – or the absence of fences – and animals, particularly dogs. Focus group discussions indicated that many of these problems were exacerbated by overcrowded housing. Overcrowding is a particular problem in the NT, where it is estimated that 61 per cent of Indigenous people live in overcrowded conditions (Fien & Charlesworth 2012, 21). Overcrowding is also a key determinant of other indicators of disadvantage (Fien & Charlesworth 2012, 20).

### **NTER and housing**

Indigenous legal problems around housing have been exacerbated since the NTER. Prior to the NTER, housing services on remote communities were generally provided by Indigenous Community Housing Organisations (ICHOs). ICHOs set rents, and repaired and allocated houses. Local community councils generally operated as ICHOs. Since 2007 the National Partnership Agreement on Remote Indigenous Housing (NPARIH) has been in operation (COAG 2007). The NT Department of Housing manages remote housing in the communities prescribed under the NTER. The post-2007 change represents a significant move from Indigenous community housing to a public rental model.

Consistent with the broader move to conditionality in welfare provision, remote public housing tenants are now required to sign a tenancy agreement with the Department of Housing and are subject to, and covered by, the *Residential Tenancies Act 1999 (NT)* as well as the *Remote Public Housing Tenancy Rules (n.d.)*. Amounts of rent payable upon such properties are aligned with rent payable under public housing in urban areas, and represent an increase from rents payable pre-NTER (Department of Housing 2012). According to the Department of Housing, payment of 'fair rent' is linked with completion of repairs and maintenance and provision of other support services (Department of Housing 2013). Yet repairs and maintenance were precisely the key problem identified in our focus groups.

According to the Department of Housing, 'improvised dwellings' should not incur rent and 'legacy dwellings' in most cases should not incur higher rents than previously. Residents of these two types of housing do not need to sign tenancy agreements with Territory Housing, but those residing in 'legacy dwellings' must sign an occupancy agreement (Department of Housing 2012). At the time we conducted the research, neither of these dwellings were subject to the *Residential Tenancies Act*.<sup>5</sup>

Interviews with legal service providers directly linked problems in housing with post-NTER policy changes, including the signing of leases without understanding documents or being able to obtain advice.

Housing and tenancy is becoming a bigger problem and that's largely because of the changes following the NTER, now that we've got actual leases on remote communities and town camps. That's turning into a big change for everybody. For most, it's probably the first time they've had any involvement with leasing (*Indigenous Legal Service staff 4*).

One interviewee noted that complaints coming into his office indicated people in remote communities were signing leases without checking the house before moving in, only to find broken windows, broken pipes, and problems with sewerage (*Statutory Authority staff 3*). Policies of the Department of Housing were also seen as exacerbating legal problems:

Housing and tenancy is a massive issue in the Territory... since the Intervention. There are still a lot of people who live in sheds. So they'll have a corrugated roof, no water, no nothing. That's called an 'improvised dwelling' under the legislation. And some people are being charged rent for these little shacks when they shouldn't be (*Legal Aid staff 1*).

Legal aid staff indicated that, at least in some instances, the Department of Housing was not providing receipts for rent payments, which then made it more difficult to demonstrate that individuals were wrongly being charged rent for improvised dwellings, or to understand how and why debts were incurred.

One in three of the focus group participants who had identified a tenancy related dispute or problems with neighbours sought legal advice. Indigenous women were less likely than Indigenous men to seek advice in relation to tenancy issues (31.7 per cent compared with 37.1 per cent) or neighbourhood problems (26.7 per cent compared with 55.6 per cent). Advice was generally sought from Councils or Shires, and to a lesser extent from the Department of Housing. Only a handful of participants sought independent advice from an Aboriginal legal service or Legal Aid office.

## **Discrimination**

Nearly a quarter of all focus group participants (22.6 per cent) identified having experienced discrimination over the last two years, with Indigenous men and women reporting at a similar rate. Almost unanimously, discrimination was identified as based upon race rather than upon any other ground. Interviews with stakeholders also focused upon racial discrimination as an issue, rather than any other type of discrimination.



Employment and health care were the most common areas of discrimination identified by participants. Other contexts for discrimination included police and shops. Racial vilification also arose as an issue in focus group discussions. For example, many of the Katherine focus group participants agreed during the discussion that various forms of racism in the town were common, and that verbal racism was especially pronounced.

Levels of discrimination are likely to be under-reported. At play is a sense of acceptance or resignation in relation to discrimination:

It's that really insidious stuff. You can walk down the street and see it every single day, every single minute. But to be able to point at particular things and say, 'That's racial discrimination', that's quite difficult

*(Indigenous Legal Service staff 2).*

A lack of knowledge about rights, and difficulties in actually 'naming' an incident as discrimination also affects reporting:

Most Aboriginal people, the homeless ones, most of them, they just put up with it ... they just think there's nothing they can do. They don't know that you can go to the law and take 'em up for discrimination and whatever. They don't know about them things

*(Katherine Women's Focus Group Participant).*

Focus group participants rarely raised instances of indirect discrimination in either the questionnaire responses or in discussion, and it would appear there is little awareness of this type of discrimination. Further, whilst indirect discrimination provisions at a Federal level would apply to relevant incidents in the NT, significantly, the *Anti-Discrimination Act 1992* (NT) does not cover instances of indirect discrimination.

### **The NTER and racial discrimination**

Focus group participants and stakeholders identified that the NTER had almost certainly increased levels of discrimination experienced by Indigenous people. Some identified the NTER as itself discriminatory. One focus group participant explained,

Discrimination is happening for everybody .... And the Intervention is the worst one. They have taken over the rights of black people ... every right that we have'

*(Darwin Men's Focus Group Participant).*

Another stated,

Those big blue signs outside of all our communities that got 'no alcohol, no pornography', I never seen those signs outside Canberra .... It's discrimination

*(Tennant Creek Men's Focus Group Participant).*

There is little contention that the NTER breached Australia's international human rights obligations, particularly in relation to the racially discriminatory aspects of income management, alcohol and pornography restrictions, the special powers of the Australian Crime Commission, and other matters (Anaya 2010, 45–49).

Many of our stakeholder interviewees suggested that the broader social and political context had changed with the NTER, which allowed discrimination to become more blatant and to go unchecked:

People think they can say what they like to Aboriginal people without having any recourse. I have been away a short period and I have come back and it's [like it is] peoples' god forsaken right to do what they feel like to Aboriginal people. It's a bit of a worry

*(Statutory Authority staff 1).*

The changed regulatory environment in relation to alcohol sales and consumption was also seen to have increased discrimination at retail outlets and by police. The introduction of laws in the NT that required identification to be sighted prior to sale of alcohol to customers had increased the potential for both direct and indirect discrimination.<sup>6</sup> The legislation disproportionately affects Indigenous people because they are less likely to have identification. It has also resulted in direct discrimination:

You know how you have to have ID to buy alcohol in the Territory. Indigenous people would approach the liquor store, and security guards would bar their way and say 'do you have ID?' If a white person rocks up, they get let straight through, then you make your selection or not, and when you get to the counter *then* you get asked for ID. Aboriginal people weren't even allowed into the store .... There is a lot of discrimination that goes on that is just nasty undermining stuff. It's not huge, but it's embarrassing to be checked before you have even entered the store

*(Legal Aid staff 1).*

The discriminatory enforcement of alcohol restrictions, particularly police stopping and checking Aboriginal people in public places, was also seen as problematic:

If you have a carton in your car then nobody asks, but if you are walking down the street because you don't have a car, suddenly the cops have a right to hassle you about it. Cops would actually take alcohol from people who weren't even drinking it, they were just carrying it off to a place where they *could* drink it, but police would intervene and say, 'No, this is a public place, you can't *have* alcohol'

*(Legal Aid staff 1).*

Nearly four fifths (78.6 per cent) of focus group participants who identified discrimination as an issue had not sought legal advice or help. There was no difference between the proportion of Indigenous women and men seeking assistance.

## Child protection

Family law problems generally centred on matters involving children, in particular child protection issues arising with the Child Protection Branch of the NT Department of Children and Families. A total of 6.8 per cent of focus group participants indicated a problem or issue with child removal over the last two years, with four times the number of women (10.4 per cent) reporting this as men (2.8 per cent). Focus group participants felt that the NTER had brought an increase in child removal – a view corroborated by the rapid rise in child protection notifications and substantiated cases between 2007/08 and 2009/10 (Northern Territory Government 2010, 21). The historical continuity with the Stolen Generations was seen as self-evident.

Since the Intervention, they've taken all our kids. It's like stolen generation again. That's what it seems like'

*(Katherine Women's Focus Group Participant).*

The history of the stolen generations was also seen as impacting on current relations with child protection agencies:

Looking really big picture, you're working with people who have the history of the stolen generation and who are very distressingly compliant with welfare agencies. These are incredibly, incredibly disempowered people

*(Indigenous Legal Service staff 2).*

Legal service and court staff noted that child protection matters constituted a substantial workload for courts. However, access to justice in the court process was also widely acknowledged as limited:

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

*(Indigenous Legal Service staff 3).*

On the child protection list this month we had six families in and three were represented – so half. The other parents weren't even present in (Katherine) court

*(Indigenous Legal Service staff 2).*

Inadequate representation for Indigenous people was a repeated theme in stakeholder interviews, including lack of access to legal advice to parents prior to their court date. Problems in understanding the legal process were also a major concern:

There is no real interface often between the Department of Child Protection and the parents. Parents are given applications with no interpreters, they are spoken to without interpreters, they're just given a chunk of paper and they don't understand what they are to do with it

*(Indigenous Legal Service staff 1).*

Given the history of forced removals of Aboriginal children, the contemporary problems which Aboriginal families face in accessing legal advice, legal representation, or even in having the opportunity to appear in court at the time of a hearing into matters affecting their children's future are especially poignant. The absence of access to justice for Indigenous parents means that courts are making decisions affecting Aboriginal children without the views of parents being taken into account, and without parents understanding the process that has been put in place. In addition to these problems, the NTER has resulted in significant focus by various welfare and criminal justice agencies on child protection. It would appear that the Child Protection Branch itself has significant problems, being previously described as demoralised, understaffed, under-resourced, and overwhelmed by demand (Bamblett et al. 2010). Within this context Aboriginal parents' rights in the process seem to have been sacrificed.

## **Social Security**

Nearly three quarters of focus group participants identified being in receipt of some type of Centrelink payment, with the proportion of Indigenous women receiving benefits higher than Indigenous men (82.1 per cent compared with 63.4 per cent). Most Aboriginal people receiving Centrelink benefits were also subject to income management (69.4 per cent). The proportion of Indigenous women with their benefits income managed was higher than Indigenous men (76.2 per cent compared with 60 per cent).

Problems with Centrelink payments were a major issue for many people who participated in the focus groups. Overall, 29.1 per cent of participants receiving Centrelink payments identified having experienced a dispute or problem in this area over the last couple of years. The type of problems identified in the focus groups and also in the stakeholder interviews included underpayments, overpayments, suspension of benefits, Centrelink debts, the Basics Card and income management, and the level of customer service provided by Centrelink. The proportion of Indigenous women in the focus groups identifying disputes or problems was higher than men (31.7 per cent compared with 25.5 per cent). However, the vast majority of those who identified a Centrelink problem did

not seek legal advice or assistance. Only 11.1 per cent of participants sought assistance, with Indigenous women much less likely to do so than Indigenous men (5.6 per cent of women compared with 22.2 per cent of men).

Changes brought about by the NTER have increased the need for legal assistance in relation to social security matters. The Basics Card was introduced into the NT as part of the NTER's income management measures in 2007. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* provided for quarantining of at least 50 per cent of government allowances payable to welfare recipients initially located on 73 Indigenous communities. The quarantined portion of benefits could only be expended upon priority items such as electricity bills, food and health. From mid-2010, income management applied Territory-wide, including in Alice Springs and in Darwin.

In relation to income management and the Basics Card, focus group discussions indicated various views about its effectiveness. However, for those who reported problems, the issues that arose included the limited number, location and type of stores in which the Basics Card could be used; the stigma attached to using the card, sometimes at designated check-outs in stores or at public machines in shopping centres; and the problems associated with managing finances *after* income management was introduced.

When the Intervention arrived, and suddenly 50 per cent of everyone's welfare payments were quarantined overnight, people suddenly said 'Well how am I going to pay for that car loan, how can I pay for this consumer loan I've got for the fridge I purchased ....The Intervention threw up a lot of issues like this (*Statutory Authority staff 2*).

The linking of receipt of welfare benefits with school attendance in the NT also raised potential legal problems.<sup>7</sup> Focus group participants in both Papunya and Wadeye had experienced reduced payments because schools had reported absenteeism. The potential legal issue identified by legal services related to duty of care when parents were sending their children to school (for example, dropping them off at school, or putting them on the school bus) and the child then truants. In these situations it is not clear that parents bear responsibility for ensuring that their child remains at school.

Centrelink debts were seen as a significant problem:

[We deal with] lots of Centrelink debts. If you have somehow misinformed Centrelink about your situation and you've racked up this massive big debt, how the hell are you ever going to pay that debt? And is it a justified debt? Is Centrelink right that you are responsible for accruing that debt, that you were mistaken and not them? That often happens because there are often communication problems between Centrelink and communities (*Legal Aid staff 1*).

Suspension of Centrelink benefits for not fulfilling criteria related to applying for jobs is an example of the difficulties associated with compliance, particularly in remote communities. A legal service provider discussed the limited employment opportunities on remote communities and the requirement that some recipients actively look for work as a condition of payment of benefits:

Centrelink will cut people's money if they don't attend enough job appointments. It's absurd because you live in a community where there are 20 identified jobs, and many, many, many, many, many people living in the community. Not everybody in that community will be able to get one of those jobs. You have to apply for three jobs a fortnight. It's a big fat waste of time. People get disillusioned; people don't apply for those jobs. The money's cut. They still have kids to feed

*(Legal Aid staff 1).*

Problems arising from the ineffectiveness of Centrelink's engagement and communication with Indigenous recipients were also raised:

You can imagine if you've got a language barrier ... if English is your third or fourth [language], and anything to do with Centrelink you've got to get on a phone. Now you imagine trying to explain all that when you're second or third English speaker .... So if you have an acquired brain injury or you're an alcoholic or whatever your problem is, where do you go?

*(Statutory Authority staff 2).*

One [Centrelink] letter read: 'Dear Sir, you have been identified as a disengaged youth'. And I thought, 'Well, you've lost him already!' So communication is a difficulty given that people don't speak English all the time and don't necessarily read it even if they speak it well

*(Legal Aid staff 1).*

While some issues with Centrelink including debt, the work test, engagement, and communication problems are not directly associated with the NTER, other changes, including the introduction of income management and school attendance requirements, have increased the need for legal assistance for Aboriginal people. Welfare conditionality has imposed regulatory requirements and complexities that further inhibit the assertion of rights where people are already marginalised and lack access to legal assistance.

### **Credit, debt and consumer issues**

Credit/debt and consumer issues are an important area of legal need. Overall, 18.4 per cent of focus group participants said that they had legal action threatened against them in the last two years for failure to pay a bill or repay a loan. Indigenous women were more likely than men to have been threatened with legal action against them (22.1 per cent compared to 14.3 per cent).

Unaffordable loans, and difficulties in repaying loans coupled with problems of financial literacy were major issues:

If we can see real legal problems with the formation of the contract we can deal with that, because of language issues or financial literacy. A good example is a client who spent most of his life in jail, got out and thought ‘where do I get money for a car?’ and walked into a bank and they gave him a loan for about \$25K. He has very low English and no financial literacy skills. So after a bit of a fight we got that waived

*(Indigenous Legal Service staff 4).*

Mobile phone debts were often mentioned by stakeholders and focus group participants, including debts as great as \$15,000 (*Statutory Authority staff 2*). One affect of these debts is that many people have their credit record ruined. Poor credit ratings cause further financial exclusion for Indigenous people, and compel them to rely on practices such as book-up, pay-day lending and loan services with high interest rates – which further compound debt. Women focus group participants in particular identified problems with their credit reference rating or bankruptcy.

The practice of ‘book-up’ was noted in a number of locations in the NT and the potential for abuse identified:

You get a lot of small shop owners who let Aboriginal people from community book up money and the shop owners take their key cards and they get their pin numbers and take as much money as they want out of these key cards ... I could name three shops around the corner who are doing it

*(Darwin Indigenous Community Organisation worker 8).*

Debts incurred through fines were also seen as a significant problem, particularly when unpaid fines can ultimately result in imprisonment. Indigenous legal service staff noted cases where

fines not just double but triple and quadruple over a period of time

*(Indigenous Legal Service staff 4).*

It’s such a big issue ... the fact that people are so disempowered by the process means they continue to accrue fines. They have no means of actually getting their fines sorted out

*(Indigenous Legal Service staff 3).*

In addition, there was no NT equivalent of the Victorian special circumstances court list, where certain court-ordered fines can be waived on the basis of homelessness, mental health, addiction or disability.

Consumer law problems can be directly linked to debt where Indigenous people enter into contracts without understanding the full costs of the goods or services:

A lot of people don't identify their problems as legal problems. With consumer stuff we find we have a lot of unconscionable contracts .... People just know that they are getting bills from Telstra or Austar, but they don't identify that as a legal problem  
(*Indigenous Legal Service staff 2*).

Prevalent consumer issues included mobile phones, funeral funds, used car sales, photographic deals and other types of high-pressure sales. Certainly some legal service providers were of the view that Indigenous people and communities were being targeted by some companies. Our research uncovered examples of people signing mobile phone contracts without understanding the full costs or indeed without reception available in the remote communities where they lived. Some companies chose names and/or images that suggested they were an Indigenous company offering services for Indigenous people. In these circumstances contracts were entered into in the belief that it would be of benefit to the consumer. Overall there was a view among stakeholders that Indigenous consumer legal needs were a significant problem and were not being met.

### **Aboriginal access to justice in the NT**

In general the majority of Aboriginal people in the focus groups indicated that they did not seek assistance for their various problems, although this varied somewhat depending on the nature of the issue and the gender of the participant.<sup>8</sup> Broadly speaking, the problem of access to justice falls across two areas: an absence of knowledge about legal rights and entitlements within civil and family law; and significant gaps in the ability of legal service and other providers to respond to the legal needs that Indigenous people have.

Focus group participants and stakeholders raised the fundamental issue of the low levels of understanding of civil and family law and potential legal remedies:

I reckon the people in this community don't know nothing about these issues .... There needs to be whole community awareness  
(*Tennant Creek Women's Focus Group Participant*).

These problems were evident across the spectrum of legal needs, from housing to consumer issues, from discrimination to child protection:

Unless and until you can increase Aboriginal people's understanding of what the civil law system is all about and how it works, it is going to be very difficult to really improve access .... How can you access something if you don't know what it does and how you can use it and how it can help you?  
(*Court Registrar 1*).

Similar comments about the lack of knowledge of civil law were echoed by both Aboriginal and mainstream legal service providers:



People don't realise a lot of the time, aren't able to spot or work out where the avenues of address might be, or do it in a timely fashion

*(Indigenous Legal Service staff 1).*

Without some knowledge of rights and the avenues of potential assistance, the prospects of realising legal entitlements are obviously very low. For many people the legal system is not seen as a process that might assist in enforcing rights and providing redress:

A lot of Warumungu people don't know about what legal aid services are there for. They think the only thing those services are there for are the courts, for fighting, or when you are in trouble with the police .... They don't know that there's other stuff there that you can see Legal Aid about

*(Tennant Creek Men's Focus Group Participant).*

Taking into account the low levels of knowledge around civil law, it is clear that legal education is a priority. Legal education needs to be focussed both directly at the community level, and to Aboriginal service providers who take a role in advising or advocating for community members. It was clear from our research that service providers themselves may have limited knowledge of civil and family law.

Both the need for, and the difficulties involved in the provision of community legal education, were identified by providers. These include resourcing, funding agreement requirements that focus on criminal matters, and the problems associated with the delivery of community legal education into remote areas (see also Senate Legal & Constitutional References Committee 2004, paras 5.6, 5.14; Cunneen & Schwartz 2008).

I think the service delivery is vastly inadequate. I mean honestly, we could be going to every one of our communities weekly or fortnightly [for non-criminal law work], and we would have a regular stream of people...

*(Indigenous Legal Service staff 3).*

These types of limitations not only affect direct legal service providers such as the Aboriginal legal services, Legal Aid and Indigenous family violence prevention legal services. Agencies such as the NT Anti-Discrimination Commission also find effective community engagement difficult because of restricted budgets to travel outside of larger centres in the NT.

Many participants, both in focus groups and stakeholders, identified serious gaps in civil and family law service provision. It was suggested that if there was capacity to commit resources more effectively and consistently to addressing Indigenous civil and family law needs, lawyers would have many more clients coming forward for help in these areas than is the case now:

It keeps coming back to a well-resourced Aboriginal legal aid service that can do civil work ... because without that, the walls are just too thick and too high. And that is very much reflected from where I sit where the number of Aboriginal litigants from remote communities are pretty well none .... There is no doubt that Aboriginal people are well and truly over-represented in the criminal law system ... and I would say well and truly under-represented in the civil law system

*(Court Registrar 1).*

Indigenous people need assistance in negotiating the often formal, paper-driven and complex civil and family law system. Lawyers may need to provide non-legal assistance to help with this 'negotiation' process, including administrative-type work such as filling in forms and with difficult bureaucratic systems such as Centrelink or Department of Housing. Access to legal assistance is made more complex because of language and cultural differences and low levels of English literacy in Indigenous communities. 'Cold' referrals to other agencies are often not appropriate:

Many of our clients ... don't understand our role in the process, they don't understand the role of government agencies and have difficulty understanding how all those institutions work. And that means we are starting from a much lower base in terms of assisting our clients to engage, and also assisting our clients to effectively take control and responsibility for their own legal needs. So it's much harder to do a simple referral. In other circumstances you might say 'Ok, that's a matter you should go and see the Ombudsman about' and that would be the end of your involvement. Whereas I think there is a much greater need for heavily assisted referrals

*(Indigenous Legal Service staff 3).*

It was apparent from the focus group discussions that Indigenous people may not feel sufficiently comfortable in approaching legal services and lawyers for assistance. As one Indigenous woman stated,

Actually there are a lot of people who are terrified of talking to a lawyer, because they don't know what to say

*(Alice Springs Women's Focus Group Participant).*

Communication breakdowns between lawyers and Indigenous clients can occur because of the complexity of the law and because some lawyers are not able to interpret this complexity effectively, especially given language differences and client problems with English literacy:

You got a community where English is people's second language. They're flat out trying to understand English, let alone the law system

*(Tennant Creek Men's Focus Group Participant).*

## Conclusion

We have identified in this article the primary areas of civil and family legal need for Aboriginal people in the NT: discrimination, child protection, housing, social security, debt and consumer law. There were other areas that were also clearly important but did not rank as highly across the interviews and questionnaire data, including access to victim's compensation, wills and intestacy, and legal issues arising from employment and from accident and injury. In most cases Aboriginal people do not seek legal assistance and, in addition, legal services and other service providers are not in a position to provide either community legal education or direct assistance and advocacy.

Looking at the longer historical relationship between Indigenous people and the non-Indigenous legal system in Australia, it is perhaps not surprising that Indigenous people lack access to legal redress and advocacy as a solution to their problems. One might expect that systemic discrimination in access to civil rights (for example, in accessing various social security benefits, workplace protections, or in controlling bank accounts) that placed Indigenous people as second-class citizens without equal civil and political rights (Chesterman & Galligan 1997) has had longer-term consequences, evidenced today in a lack of knowledge, of access or trust in potential legal remedies to various problems. To the extent that the 'law' has been used in relation to Indigenous people it has been to their detriment through, for example, criminalisation, the removal of children, and the limiting or denial of rights.

However, we also argue that shifts in recent years to welfare conditionality have exacerbated the civil and family law problems of Aboriginal people in the NT. It was clear from our research that the NTER has generated a raft of new legal problems for Aboriginal people across all the areas where we have identified priority legal need. In July 2012 the *Stronger Futures* legislation replaced the NTER. It was widely condemned as a continuation of previous policies, and reflected a continuing lack of consultation with communities affected by the legislation (Parliamentary Joint Committee on Human Rights 2013). While our research was conducted prior to the introduction of *Stronger Futures*, we would reasonably expect that the same legal issues remain, particularly in housing, social security, child protection and discrimination.

Welfare conditionality by definition imposes greater obligations on citizens. These obligations involve increased systems of regulation and surveillance as a condition of receiving social services. It has been argued that conditionality is unfair, paternalistic, discriminatory, intrusive, ineffective, punitive and further marginalising of vulnerable social groups (for discussion, see Habibis et al. 2012, 3). We would argue that the increased legal regulation underpinning welfare conditionality has specifically further marginalised Aboriginal people through lack of access to legal advice and advocacy. As Wacquant (2009, 288) has noted, social welfare has come to be informed by the same values and

philosophies as criminal justice: deterrence, surveillance, stigma and graduated sanctions. At the same time, Indigenous people are denied even the limited access to legal assistance they receive in the criminal justice sphere.

## Endnotes

1. The NT study is part of a broader, longer-term study of Indigenous legal needs in NSW, Victoria, Queensland, Western Australia and the NT. The research is funded by the Australian Research Council (LP 100200455). NT partners to the research are the Northern Territory Legal Aid Commission, the North Australian Aboriginal Justice Agency (NAAJA), the Central Australian Aboriginal Family Law Unit (CAAFLU), and the North Australian Aboriginal Family Violence Legal Service (NAAFVLS). For the full NT report see Allison et al. (2012).
2. See the Accessibility/Remoteness Index of Australia Plus (ARIA+) classifications: <http://www.spatialonline.com.au/aria/default.aspx>
3. The complete list of all stakeholders interviewed can be found in Allison et al. (2012).
4. The legislative responsibilities of landlords and tenants are outlined in the *Residential Tenancies Act 1999 (NT)*.
5. The Department of Housing has three categories of housing on remote communities: *improvised dwellings* (makeshift dwellings); *legacy dwellings* (un-refurbished dwellings, considered habitable); and *remote public housing* (refurbished, rebuilt or new housing stock, considered compliant with the *Residential Tenancies Act 1999 (NT)*). The Department claims improvised dwellings and legacy dwellings are not subject to the *Residential Tenancies Act*, but a number of legal services do not endorse this view and the issue remains unresolved in law.
6. Since July 2011, photo identification is required in order to purchase alcohol. See the NT Government's alcohol reforms, *Enough is Enough Alcohol Reforms*, at: <http://www.justice.nt.gov.au/justice/alcoholreformnt/enough-enough-alcohol-reforms/index.html>.
7. From January 2009, a number of NT communities were part of a trial of the Commonwealth's *Improving School Enrolment and Attendance through Welfare Reform (SEAM)* initiative. SEAM originally commenced in six communities in the NT, but was expanded to further communities in 2011. (See <http://www.deewr.gov.au/schooling/programs/pages/seam.aspx>; Cowling 2009; and Macklin 2011). The SEAM initiative has continued since 2012 under the *Stronger Futures* policy.
8. Unfortunately we were not able to assess how effective legal assistance may have been for the minority of people who did access advice.

## References

- ABS (Australian Bureau of Statistics) (2005) *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2005*, Cat. No. 4704.0.
- (2011) *Census of Population and Housing: Basic Community Profile, 2011 Second Release*, Cat. No. 2001.0.
- (2013) *Estimates of Aboriginal and Torres Strait Islander Australians June 2011*, Cat. No. 3238.0.55.001.
- ABS (Australian Bureau of Statistics) & AIHW (Australian Institute of Health and Welfare) (2010) *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2010*, Cat. No. 4704.0.

- Allison, F., Cunneen, C., Schwartz, M. & Behrendt, L. (2012) Indigenous Legal Needs Project: Northern Territory Report, Cairns, James Cook University, viewed 6 May 2014, [http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical\\_report/jcu\\_113496.pdf](http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_113496.pdf)
- Anaya, J. (2010) The Situation of Aboriginal Peoples in Australia, New York, United Nations Human Rights Council, viewed 6 May 2014, <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>
- Bamblett, M., Bath, H. & Roseby, R. (2010) Growing Them Strong Together: Promoting the Safety and Wellbeing of the Northern Territory's Children, Darwin, Northern Territory Government.
- Chesterman, J. & Galligan, B. (1997) *Citizens Without Rights*, Melbourne, Cambridge University Press.
- Council of Australian Governments (2007) National Partnership Agreement on Remote Indigenous Housing (NPARIH), [http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/indigenous.aspx](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/indigenous.aspx)
- Council of Australian Governments (2007) National Partnership Agreement on Remote Indigenous Housing (NPARIH) , viewed 6 May 2014, [http://www.federalfinancialrelations.gov.au/content/npa/housing/remote\\_indigenous\\_housing/NPARIH\\_IP\\_NT.pdf](http://www.federalfinancialrelations.gov.au/content/npa/housing/remote_indigenous_housing/NPARIH_IP_NT.pdf)
- Coumarelos, C., Wei, Z. & Zhou, A.Z. (2006) Justice made to measure: NSW legal needs survey in disadvantaged areas, Sydney, Law and Justice Foundation of NSW.
- Coumarelos, C., Macourt, D., People, J., McDonald, H., Wei, Z., Iriana, R. & Ramsey, S. (2012a) Legal Australia-Wide Survey. Legal Need in Australia, Sydney, Law and Justice Foundation of NSW.
- (2012b) Legal Australia-Wide Survey. Legal Need in the Northern Territory, Sydney, Law and Justice Foundation of NSW.
- Cowling, S (2009) 'Suspending welfare payments to promote school attendance: strange logic, unlikely outcomes and a better way', Paper presented at ACOSS National Conference on 2–3 April 2009, viewed 6 May 2014, [http://www.childrenyoungpeopleandfamilies.org.au/info/social\\_justice/research/?a=41463](http://www.childrenyoungpeopleandfamilies.org.au/info/social_justice/research/?a=41463)
- Cunneen, C. & Schwartz, M. (2008) 'Funding Aboriginal and Torres Strait Islander legal services: issues of equity and access', *Criminal Law Journal*, 32 (1), 38–53.
- Curran, L. & Noone, M.A. (2007) 'The challenge of defining unmet legal need', *Journal of Legal and Social Policy*, (21), 63–89.
- Department of Housing, Northern Territory (2012) Remote Rent and Other Charges, viewed 6 May 2014, [http://www.housing.nt.gov.au/remotehousing/information\\_for\\_remote\\_tenants/remote\\_rent\\_and\\_other\\_charges](http://www.housing.nt.gov.au/remotehousing/information_for_remote_tenants/remote_rent_and_other_charges)

- (2013) Remote Public Housing Management Framework, viewed 6 May 2014, [http://www.housing.nt.gov.au/remotehousing/managing\\_and\\_maintaining\\_housing](http://www.housing.nt.gov.au/remotehousing/managing_and_maintaining_housing)
- Habibis, D., Memmott, P., Phillips, R. & Moran, M. (2012) 'Conditionality, recognition and Indigenous housing policy', *Theorising Indigenous Sociology: Australia Perspectives*, Workshop Proceedings, University of Sydney, 19–20 July 2012, 1–12.
- Joint Committee of Public Accounts and Audit (2005) *Access of Indigenous Australians to law and justice services*, Report 403, Canberra, Commonwealth of Australia.
- Macklin, J. (2011) 'Building Stronger Futures for Children in the Northern Territory' Media release, 14 November 2011, Department of Families, Community Services and Indigenous Affairs, Canberra, viewed 6 May 2014, <http://www.formerministers.dss.gov.au/13658/building-stronger-futures-for-children-in-the-northern-territory>
- Morphy, F. (2007) 'Uncontained subjects: "population" and "household" in remote Aboriginal Australia', *Journal of Population Research*, 24 (2), 163–184.
- Northern Territory Government (2010) *Growing Them Strong Together*, Summary Report of the Board of Inquiry into the Child Protection System in the NT, Darwin, Northern Territory Government.
- Parliamentary Joint Committee on Human Rights (2013) *Stronger Futures in the Northern Territory Act 2012 and Related Legislation*, Canberra, Commonwealth of Australia.
- Senate Legal and Constitutional References Committee (1998) *Inquiry into the Australian Legal Aid system – Third Report*, Canberra, Commonwealth of Australia.
- (2004) *Legal aid and access to justice*, Canberra, Commonwealth of Australia.
- Steering Committee for the Review of Government Services (2011a) *Overcoming Indigenous Disadvantage – Key Indicators 2011*, Melbourne, Productivity Commission.
- (2011b) 'Overcoming Indigenous Disadvantage – Key Indicators 2011', Fact Sheet Remote Areas, Melbourne, Productivity Commission.
- Wacquant, L. (2009) *Punishing the Poor. The Neoliberal Government of Social Insecurity*, Durham, Duke University Press.

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