INDIGENOUS WOMEN ACCESSING FAMILY LAW IN AUSTRALIA:
MANAGING SAFETY, RISK AND CULTURE

by Adelaide Titterton

INTRODUCTION

How do Australian family law courts[1] engage with the unique needs of Indigenous women in the areas of safety, risk and culture? Indigenous women often manage conflicting priorities within family and community contexts. Are the unique experiences and needs of Indigenous women acknowledged by family law courts, and are family law courts physically and culturally safe places for Indigenous women?

Two important issues must be addressed when discussing family violence and cultural safety. First, Indigenous women rarely use family law courts to sort out family issues (this is partly explained by the multiple barriers Indigenous people in Australia confront in accessing legal justice). Second, the research on Indigenous engagement with family law (engagement of both men and women) is minimal. Future research to identify and understand the unique yet diverse needs of Indigenous women in the family law context is necessary. In particular, there is a need for primary accounts of Indigenous women's experiences in engaging with family law.

As a non-Indigenous woman, I do not intend to depict the issues confronting Indigenous women engaging with family law as a 'problem to be solved'.[2] To conceptualise access to justice for Indigenous Australians in this way reinforces the power dynamic of coloniser and colonised; white subject and colonial object. The 'solutions' to the issues raised by this paper must be sought by all members of the community through a bottom-up approach, as top-down solutions may only continue to reinforce the inequality between those creating and reforming the law and its institutions and those who are the subjects of its gaze. Power discursively reproduces through domains of knowledge (including law) and functions to create the unequal dynamic of subject/object.[3] Indigenous women should not continue to be examined as objects of the colonial researcher's gaze, and legal institutions, including family law courts, should become more culturally accessible for Indigenous women so as to challenge white normativity within legal domains.

DO INDIGENOUS WOMEN ENGAGE WITH FAMILY LAW?

Evidence suggests that family law issues within Indigenous families tend to be solved without engagement with the family law system or seeking legal assistance.[4] Although statistics on Indigenous involvement in family law litigation are not particularly reliable,[5] in 2015 approximately 3.5 per cent of applicants in Australian family law registries identified as Aboriginal or Torres Strait Islander.[6] In a 2015 Court User Satisfaction Survey, approximately 4 per cent of interviewees identified as Indigenous.[7]

The low numbers of Indigenous engagement with family law is not necessarily indicative of no legal need. Rather, family law needs may be present but *unrecognised* in Indigenous communities due to (among other matters) a lack of community knowledge.[8] For example, between 2007 and 2009 in Victoria, Indigenous women were more than twice as likely than Indigenous men to identify a child support, contact (i.e. custody) and/or residence issue, but had not sought legal assistance.[9] This may suggest that Indigenous women have more family-related legal needs than Indigenous men. That the family law system is underutilised by Indigenous people is concerning, because family law needs, if unaddressed, may transform a family conflict into a child protection or criminal law related matter.[10]

There are, however, no publicly available statistics on the numbers of Indigenous women who apply for family law orders.[11] The lack of data may suggest that the needs of Indigenous women are *invisible* to the family law courts. This interpretation is consistent with critiques of Australian courts functioning as legal institutions that preserve the Anglo-Saxon normative framework and exclude Indigenous perspectives. This statistical gap needs to be remedied so that numbers of Indigenous women engaging in family law processes (or the lack thereof) can be properly identified.

WHAT ARE THE REASONS FOR LOW ENGAGEMENT?

Many barriers to accessing family law confront Indigenous Australians generally. This includes lack of knowledge about

family law, cost, cultural inappropriateness, language barriers, and the length of proceedings.[12] Indigenous women, however, often confront additional difficulties.[13] This paper focuses on two issues that appear to be experienced in *particular and different* ways by Indigenous women:

- Relationship with Courts and White Law; and
- Family Violence and Safety.

RELATIONSHIP WITH COURTS AND WHITE LAW

Many Indigenous women in Australia fear that their children will be removed from them by child protection authorities and other legal institutions.[14] This fear is entrenched and a direct result of Australia's colonial history, which includes a history of the state deeming Indigenous women to be 'unfit' mothers,[15] and forcibly removing children from their families.[16] The impact of the Stolen Generations has affected successive generations of Indigenous people. This fear extends to family law courts, despite the fact that family law outcomes rarely include the removal of Indigenous children from their families.[17]

The fear of children being removed by the state is felt in particular ways by Aboriginal and Torres Strait Islander women. Indigenous women were denied the privilege of *being mothers* under colonial policies.[18] Aborginality itself epitomised neglect; actual neglect did not need to have occurred for the relevant authorities to legally justify removal of an Indigenous child from their family.[19] Indigeneity, and womanhood, were in some instances reason alone to justify the removal of Indigenous children from their mothers. The transgenerational impacts of the Stolen Generations reveal some reasons why Indigenous women may be reluctant to engage in family law proceedings to determine residency issues to do with their children.

Indigenous women may also worry that the Court will impose Western ideas of 'family' and child-rearing practices without appropriate consideration of Indigenous perspectives and cultural values. In a 2012 focus group survey, less than one third of Indigenous participants felt that the Family or Federal Magistrates Court had displayed respect for the value of Aboriginal and Torres Strait Islander cultures and its importance for Indigenous children.[20]

It is unclear whether Indigenous perspectives are visible in family law proceedings where non-Indigenous Anglo-Australian perspectives dominate. Despite reform to the *Family Law Act 1975* (Cth) in 2006, requiring judicial officers to consider Indigenous cultural issues including child-rearing practices in family law matters involving children,[21] judicial officers may still tend to privilege biological parents and nuclear family structures over kinship carers and Indigenous child-rearing practices.[22]

The tendency of judicial officers to prefer nuclear family structures is problematic, if not detrimental for Indigenous women. Indigenous women often care for Indigenous children who are not biologically their children:

> The mother is not necessarily the biological mother, but grandmothers, aunties, sisters, cousins, nieces, all women assume the role and responsibilities of mothering a child of their community. All mothers are the carers of children, regardless of whether or not they have been the bearers of children.[23]

As such, there is a tension between Indigenous norms around child-rearing practices and Western child-rearing practices which prioritise a nuclear family structure as the normalised version of 'family'. Indigenous family relationships 'are generally based on a collectivist view of family and social life'.[24] Extended family and kinship groups play a significant role in caring for Indigenous children, and often child-rearing is 'a shared responsibility amongst women'.[25] The failure of family law courts to value Indigenous perspectives of family and the role of women in child-rearing is a barrier to accessing family law that affects Indigenous women in particular ways.

Another barrier for Indigenous women in family law contexts is the need to engage with white men and institutions predominantly managed by white men. As Robertson, Demosthenos and Demosthenos explain, within the colonial culture Indigenous women were 'disempowered, denigrated and deprecated by white men'; Indigenous women were raped and abused by white men.[26] Indigenous children who were removed from their families were also subjected to exploitation, physical and sexual abuse.[27] These practices have had transgenerational impacts on Indigenous women and leave a continuing historical legacy. As such, Indigenous women may associate white men and/or white institutions, including the family law system, with disempowerment, abuse, denigration and discrimination.

Understanding the context of Indigenous engagement with and subjection to the Australian state and its governments, law and institutions since colonisation, is essential to understanding why Indigenous women may be reluctant to engage with family law courts to deal with private family matters. Acknowledgement of Indigenous family and cultural norms is one crucial aspect of making the family law system more accessible for Indigenous women.

FAMILY VIOLENCE AND SAFETY

Indigenous women also experience particular physical and cultural safety concerns in family law contexts. While family law matters increasingly involve complex risk issues, including family violence, mental health issues, substance abuse and ongoing

conflict between parents,[28] it is unclear whether family law courts provide adequate assistance to Indigenous women managing family violence and safety concerns.[29]

Family violence is committed more often, and more acutely against Indigenous women than against non-Indigenous women.[30] Indigenous women have often been the victims of family violence occasioned by more than one perpetrator in both their childhood and adulthood.[31] As a result, Indigenous women may experience a range of mental health and psychological issues including post-traumatic stress disorders, depression, anxiety and personality disorders.[32]

Indigenous women may also experience unique social and cultural pressures while managing multiple and conflicting priorities including 'kinship, familial, community and cultural responsibilities together with safety'.[33] The disruption of family violence to relationships with family and community may be more keenly felt by Indigenous women, for whom leaving their partner may attract ostracism or alienation from the community, further violence, or inter-family conflict and retribution.[34] When an Indigenous woman leaves her partner she may also feel that she is leaving (and therefore losing) her community *and* her culture.[35] Indigenous women may therefore experience community pressure to tolerate family violence because leaving would 'shame' their family and community.[36] Of course, as noted above, an Indigenous woman may also choose not to report family violence for fear that her children will be removed. The fear of child removal instigated by the reporting of family violence is a fear that is 'particularly acute' for Indigenous women.[37]

Indigenous women often experience a range of pressures to not speak out about family violence. Indigenous women experiencing family violence may be more focused on the rehabilitation of the perpetrator and the restoration of relationships within family and community than on leaving the relationship.[38] The multiple pressures on Indigenous women may prevent them from seeking family law intervention, as such action may provoke retaliation from their partner, family and/or other community members.[39] Indigenous women may also have safety concerns when attending court, including the small size of waiting areas, high visibility, lack of privacy and safety of children.[40]

Another critically important aspect of safety for Indigenous women is *cultural safety*. Cultural safety refers to the idea that services operate in a supportive and affirmative way in relation to Indigenous identities.[41] Cultural safety requires institutions have an understanding of the 'multiple and complex barriers' to accessing family law services affecting families with Indigenous backgrounds.[42] Legal processes that do not incorporate cultural safety mechanisms can be culturally intimidating and unresponsive to Indigenous worldviews.[43]

Ensuring the safety of Indigenous women requires family law courts provide culturally appropriate support for Indigenous women.

The failure to promote cultural safety mechanisms for Indigenous women is evident in policies of family law courts. The Indigenous Access Plan of the Family Court, while acknowledging that lack of cultural safety may explain the underutilisation of family law by Indigenous families, does not mention how the needs of Indigenous women will be addressed.[44] Similarly, while the Reconciliation Action Plan of the Federal Circuit Court acknowledges the 'endemic nature of family violence within sectors of the Aboriginal and Torres Strait Islander community',[45] it fails to mention issues affecting Indigenous women. The Family Court of Western Australia does not have an equivalent Reconciliation Action Plan, and although it does have a Family Violence Policy, this document also fails to mention Indigenous women.[46]

It appears there are currently no family law policy objectives that focus on meeting the particular needs of Indigenous women. This is troubling. Family law is underutilised by Indigenous clients and poor management of family violence issues in family law contexts can have more pronounced effects for Indigenous women.

CONCLUSION

Ensuring the safety of Indigenous women requires family law courts provide culturally appropriate support for Indigenous women. Family law reform could include re-appointing Indigenous Liaison Officers and engaging Indigenous support staff, comprehensive cultural competency training for family law professionals, providing enhanced cultural safety mechanisms, and greater liaison with family violence services.[47] However, these recommendations will not alone challenge the fundamental structural barriers that are preventing Indigenous access to family law, nor the entrenched principles that tend to privilege Western nuclear family structures and child-rearing practices in family law. The difficulties confronting Indigenous women in accessing family law are multiple and complex. It is critical for family law courts to acknowledge these complexities and provide culturally appropriate support and physical and cultural safety guarantees.

Future research should focus on how family law domains can meet the specific needs of Indigenous women, men and children, particularly those experiencing family violence, in order to inform policy responses. Empirical research identifying the family law needs of Indigenous women and men could allow for greater access to family law remedies and improve Indigenous access to legal justice more generally.[48]

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1 The 'family law courts' are the Family Court of Western Australia, the Family Court of Australia and the Federal Circuit Court of Australia (previously, the Federal Magistrate's Court).

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3 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (Penguin, 1977) 3-31.

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5 See Family Court of Australia, *Family Court Indigenous Action Plan 2014-2016* (2014) 5.

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7 Family Court of Australia and Federal Circuit Court of Australia, *Court User Satisfaction Survey* (2015).

8 Cunneen and Schwartz, above n 4, 744.

9 Schwartz, Allison and Cunneen, above n 4, 69.

10 Cunneen and Schwartz, above n 4, 744.

11 Family Court of Australia and Federal Circuit Court of Australia, above n 7.

12 Schwartz, Allison and Cunneen, above n 4, 86, 196; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 41, 43, 51-53.

13 Stephen Ralph, 'Addressing the Needs of Indigenous Women in the Family Court' (2004) 6(1) *Indigenous Law Bulletin* 20, 20.

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18 Cripps, above n 15, 28.

19 Boni Robertson, Catherine Demosthenos and Hellene Demosthenos, 'Stories from the Aboriginal Women of the Yarning Circle: When Cultures Collide' (2005) 31(5) *Hectate* 34, 40.

20 Stephen Ralph, *Indigenous Australians & Family Law Litigation: Indigenous Perspectives on Access to Justice* (Commonwealth of Australia, 2012) 32.

21 See *Family Law Act 1975* (Cth) s 61F.

22 Keryn Ruska and Zoe Rathus 'The Place of Culture in Family Law Proceedings: Moving Beyond the Dominant Paradigm of the Nuclear Family' (2010) 7(20) *Indigenous Law Bulletin* 8, 8, 11.

23 Robertson, Demosthenos and Demosthenos, above n 19, 37.

24 Ralph, above n 13, 21-22.

25 Cripps, above n 15, 28.

26 Robertson, Demosthenos and Demosthenos, above n 19, 39.

27 Human Rights and Equal Opportunity Commission above n 16, 142, 229.

28 Helen Rhoades, John Dewar and Nareeda Lweres, 'Can Part VII of the Family Law Act Do What Is Asked Of It?' (2014) 4 *Family Law Review* 150, 156.

29 Ralph, above n 13, 20.

30 Australian Law Reform Commission, above n 14, 336; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report – June 2016 (Terms 3, 4 & 5)* (Commonwealth of Australia, 2016), 94 ('*Family Law Council Final Report*').

31 Family Law Council, above n 12, 49.

32 Ibid.

33 Cripps, above n 15, 30.

34 Suellen Murray, '"Why Doesn't She Leave?": Belonging, Disruption and Domestic Violence' (2008) 31(1) *Women's Studies International Forum* 65, 67; Bess Nungarrayi Price, "I Have Seen Violence Towards Women Every Day Of My Life': Australia, 2009' (2009) 30 *Australian Feminist Law Journal* 149, 149.

35 Murray, above n 34.

36 Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21 *International Journal of Children's Rights* 59, 69.

37 Australian Law Reform Commission, above n 14, 957.

38 Douglas and Walsh, above n 36, 69.

39 Ralph, above n 13, 20.

40 *Family Law Council Final Report*, above n 30, 101.

41 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report – June 2015 (Terms 1 & 2)* (Commonwealth of Australia, 2015) 4 ('*Family Law Council Interim Report*').

42 *Family Law Council Final Report*, above n 30, 100.

43 Ibid, 146.

44 Family Court of Australia, above n 5, 5-6.

45 Federal Circuit Court of Australia, *Reconciliation Action Plan 2014-2016* (2014) 8.

46 Family Court of Western Australia, *Family Violence Policy* (June 2015).

47 *Family Law Council Interim Report*, above n 41, 107; *Family Law Council Final Report*, above n 30, 79, 100, 148.

48 Cunneen and Schwartz, above n 4, 745.