

Few of us need reminding of the devastation caused to Aboriginal people by the policy that resulted in the removal of so many Aboriginal children from their families. The effects of this policy, established in the 19th century and continuing for far too long throughout the 20th century, still impact adversely on today's Aboriginal Australians.

In this context it is hardly surprising that Aboriginal people have grown to distrust a system that has so damaged their family life and culture. It is also not surprising that they have not felt confident about using the services offered by those courts which deal with the custody of and access to children.

Recognition of Customary Law

One of the most important aspects of the decision in *Mabo v the State of Queensland* (1992) 175 CLR 1 was its recognition that there was a law operating in this country prior to 1788 and that it was entitled to respect and recognition by the Common Law. Although that case was associated with the issue of land, the principle involved was a broader one.

As Deane and Gaudron JJ pointed out, the association of Aboriginal people with the land extended far beyond the traditional European concept of land ownership (p.99-100 [175] CLR). Their Honours said of Aboriginal people that: 'In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession.'

It thus becomes extremely difficult to confine the Mabo decision to questions of land law and property, and impossible to so confine its principles. However, one of the difficulties standing in the way of making any practical use of the principle in the family law area is that the law with respect to marriage, custody, matrimonial property, adoption, child protection and the like is statute law, created by Parliament, rather than the common law established by judicial precedents. Normally, these statutes are expressed in such terms that there is no room for any operation of the Mabo principle, and it follows that the only way in which change can be affected in these areas is as a result of legislative action.

A further complication is the fact that, apart from marriage and divorce and the custody of children, much of the relevant legislation is State and Territory legislation, with all of the associated difficulties associated with persuading the States and Territories to adopt a common approach. Even when this can be achieved, there is always the danger that what is achieved is the lowest common denominator of what *can be* achieved.

There is, however, a sharp distinction to be drawn in relation to the operation of the law as it affects Aboriginal and Torres Strait Islander people, as opposed to non-indigenous people. Section 51(xxvi) of the Constitution gives Parliament the power to pass special laws for people of the Aboriginal race. As the Australian Law Reform Commission (ALRC) pointed out in its 1986 Report, *The Recognition of Aboriginal Customary Laws*, Report No 31, the Commission's recommendations in that report would fall within Commonwealth power.

Indigenous Australian



Picture: Howard Birnstihl

The ALRC report expressed the view, with which I agree, that the welfare of Aboriginal people (and, I would add, Torres Strait Islander people) is a national issue and one that should, as far as possible, be dealt with through a coherent national policy. The report also pointed out that the Commonwealth has a clear legislative responsibility in cases where State and Territory laws do not establish adequate or appropriate rules in responding to the special needs of Aboriginal people.

Further and most importantly, it recommended that the recognition of Aboriginal customary law should be carried through by a federal Act applicable in all States and Territories and relying on the full range of the Commonwealth's constitutional powers.

A troublesome aspect of the reaction to the ALRC report and recommendations is that 18 years have elapsed since the reference was first given and nine years since the report was delivered, and yet, from a

Customary Law and Family Law

In discussion of indigenous customary law the emphasis has been more on land law and criminal law than on the operation of what can be described generically as family law. In the view of ALASTAIR NICHOLSON we should seriously examine ways in which Aboriginal customary law as it affects the family can be given the recognition and respect it deserves within the Australian legal system.

Commonwealth point of view, very little has happened in relation to its recommendations by way of legislation. Not least would appear to be a failure on the part of the Commonwealth to recognise or seek to exert its full range of Commonwealth power.

While one can understand that there may be some reluctance by the Commonwealth to legislate in these areas of traditional State responsibility, the reality is that unless it is prepared to exercise its undoubted power it is probable that little or no progress will be made. There is also a practical difficulty about leaving these matters to the States and Territories and that is that Aboriginal and Torres Strait Islander people are scattered over all States and Territories regardless of particular boundaries.

I have had the experience recently of discussing with Torres Strait Islanders the very real problems that are caused by the law's failure to give legal recognition to their customary adoption practices. A major difficulty has been the identification of which Government to rely upon to obtain some action. While many Torres Strait Islanders live in Queensland, there are sizeable populations in other States and particularly New South Wales, and it is therefore obvious that an amendment to Queensland adoption laws would be only a partial solution.

Having regard to the passage of time since the ALRC report and the changes that have ensued, both in the law and community attitudes, it is also important to re-examine and re-consider some of the Commission's recommendations.

In such a re-examination, it is also important to look beyond the view of the Commission and not only examine the ways in which customary law might be incorporated into the general law of Australia, but, at least in traditional communities and in the Torres Strait, also to give it an independent operation of its own, subject to human rights considerations. In this regard customary law should not be thought to have been frozen in 1788. Indeed, in the case of the Torres Strait, there may well be a good argument, if the Torres Strait Islanders wish it, for giving them self-governing commonwealth status, something akin to Puerto Rico in relation to the United States.

I turn now to specific issues in the area of the family, adopting as a basis the Australian Law Reform Commission's recommendations in this area.

Marriage

The Commission recommended the recognition of traditional marriage for particular purposes or functions. It also recommended that recognition should, in principle, extend to polygamous marriages and that there should be no minimum age for recognition.

These recommendations have received very little public discussion or attention. This may be because any political discussion of marriage in our community tends to degenerate into a religious debate or a debate about the erosion of 'traditional family values'. When this occurs, reason flies out the window, as does any prospect of the real issues being addressed.

As the Commission pointed out, what constitutes marriage and the obligations and responsibilities flowing from it may differ widely in different societies. The fact that Anglo-Australian law is based on the concept of marriage as a permanent monogamous union does not make it necessarily applicable to Aboriginal marriages.

The Commission accepted the description of the elements of a traditional Aboriginal marriage referred to by D. Bell, 'Re Charlie Jagamara Limbiara', Report to the Court in *R v Charlie Limbiara Jagamara* (unreported, Northern Territory Supreme Court, May 1984) as follows:

'There is the potential of marriage between certain categories of persons which is further defined by reference to actual kin, country, ritual and historical relations. Such a union is hedged in by certain taboos, including in-law avoidance. It is enmeshed in a complex web of kin obligations and responsibilities. It is underwritten by exchanges which both pre- and post-date any individual marriage. Violations or deviations from the marriage contract attract attention from different classes of persons.' (p. 166)

The Commission pointed out that traditional marriage often involved the betrothal of a younger girl to an older man, but that a man's first marriage may be to an older woman. Marriage in fact occurs when the parties cohabit publicly and take on marital responsibilities including sexual relations, with the birth of the first child cementing the marriage. Polygamy is common in some communities but rare or non-existent in others, and divorce is usually signified by the end of cohabitation.

It is quite obvious that there will be many variations on what constitutes a traditional marriage, of which the above is an extremely general description. As the Commission also pointed out, changes are occurring in traditional marriage and there is an increased tendency to marry across skins, which the Family Court's inquiries in the Alice Springs area suggest has also led to a breakdown in the traditional methods of dispute resolution and thus an increased role for the Court's counselling service.

There is also the difficulty that because we have chosen to treat Aboriginal customary law with such disdain for some 200 years, it may have had less chance to change and develop than would otherwise have been the case had it been accorded the respect and recognition it

deserved. This in turn means that some aspects of it are less acceptable to the predominantly white society.

However, in my view none of these difficulties offers any excuse for Government simply ignoring the issue, as has been the case to date. This is discriminatory and may have detrimental effects upon entitlements such as the right to pensions or to bring actions for damages resulting from the death of a spouse. It may also create difficulties from a taxation point of view or in relation to succession rights, which also occurs in Torres Strait Islander adoptions. Some States and Territories, in particular the Northern Territory, have addressed particular aspects of these problems, but the approach has still been a piecemeal one.

More important than these practical difficulties however, is the issue of principle involved and in particular the insularity and arrogance involved in our law failing to accord as much recognition as is possible to these traditional relationships.

More recently, the question of recognition of traditional marriages was considered by the Queensland Law Reform Commission in its report *De Facto Relationships* (No 31, June 1993).

In a working paper preceding that report, the Queensland Law Reform Commission suggested that the best solution to the dilemma may be for traditional marriages to be recognised under the Marriage Act 1961 (Cwth). In the absence of Commonwealth legislation amending this Act, the Commission tentatively recommended that the proposed de facto relationships legislation be extended to people in traditional marriages.

However, the Queensland Law Reform Commission's final report did not proceed with this recommendation. It had regard to the reservations expressed by the Australian Law Reform Commission and by the relevant Queensland Department, which were described in this way: 'By recognising traditional marriages, the Commission would afford recognition to customary law. But by subjecting those traditional marriages to the rights and responsibilities imposed by the proposed legislation, the Commission would be subjecting the partners to rights and liabilities either not recognised by or dealt with differently under customary law' (Queensland Law Reform Commission report, 1993, p. 14-15).

The report noted that a submission from the Department had indicated that the matter was of some importance as 1986 census data showed that 40-60 per cent of Aboriginal and Torres Strait Islander couples did not identify themselves as being married under Australian law.

In deciding to make no recommendations in this area the Queensland Law Reform Commission expressed itself as particularly concerned by the following matters:

(1) 'The Commission understands that on breakdown of a traditional marriage, the needs of a spouse are generally met by the family and community support network. More importantly however, knowledge of Aboriginal and Torres Strait Island customary law is incomplete and fragmented. For example, as pointed out by the Department, it can be difficult to determine precisely when a union can be described as a traditional marriage. The Commission has neither the resources nor the brief to make sufficient enquires about existing customary law to bring it to the point where it could make reasoned, substantive recommendations.'

(2) 'Even if a great deal more were known about Aboriginal and Torres Strait Islander customary law, it would still be necessary for the Commission to consult widely with representatives of Aboriginal and Torres Strait Islander groups. The Commission has neither the resources nor the brief to initiate and carry through wide consultations.'

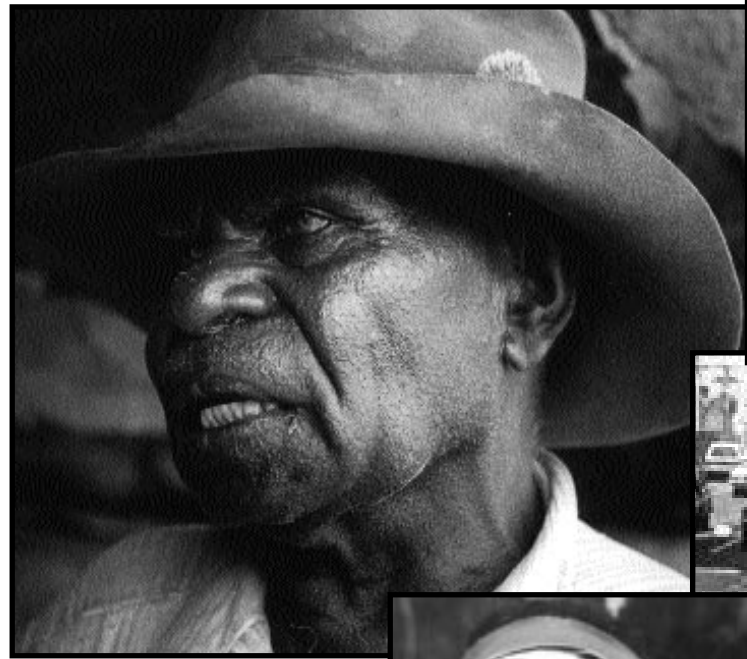
Several comments can be made about these points, without making any criticism whatever of the Queensland Law Reform Commission.

First, it is a sad reflection on our past attitudes to our indigenous people that after 200 years the statement can be made that we do not know enough about their customary law to be able to deal with a problem such as this.

Second, it is quite obvious that there needs to be an extensive process of consultation with Aboriginal and Islander people - first, to improve our knowledge of customary law in this area and, second, to do as the Commission suggests and consult with representatives of the respective communities about their wishes in the matter.

Third, it is quite obvious, for the reasons already given, that this task should be undertaken by the Commonwealth. This is more important now that Queensland has recently agreed to refer powers over de facto property relationships to the Commonwealth.

What is needed is a thoroughgoing review of the situation as envisaged by the Queensland Law Reform Commission and, above all, full consultation with and involvement by the relevant communities in the reform of the law.



Custody Issues

Reference is made elsewhere in this issue of *Family Matters* (see Margaret Harrison's 'News from the Family Court' column) to the Government's acceptance of my suggestion that the Family Law Act be amended to require the Court to take into account the traditional law and culture of Aboriginal and Torres Strait Islander children.

In my argument for change I put to the Attorney General the proposition that Aboriginal and Islander customary law existed prior to 1788 and that the High Court's Mabo decision had made it clear that such law was entitled to respect and recognition. It was accordingly entirely consistent that the Family Law Act should be amended to reflect this position, which was a special one relating to indigenous communities and should not necessarily flow on to other groups.

The amendment to the Family Law Act is only a beginning, albeit an important one, in the process of granting recognition to the law and



custom of Aboriginal people as part of the law of Australia. It will, however, make it clear that in cases under the Family Law Act at least, it will be very relevant, for example, to pay account to the traditional adoption practices of the Torres Strait Islanders or the placement of Aboriginal children in the care of aunts or grandmothers.

Reference is also made in this issue's 'News from the Family Court' column to the Court's power to take issues of identity, heritage, and culture into account in coming to a decision about what is in a child's best interests, and to the recent decision in *B and R and the Separate Representative* (1995) FLC 92-636.

In cases involving Aboriginal and Islander children it would normally be appropriate to appoint a separate representative for those children. The Court currently has the power to do so, but funding must come from Legal Aid Commissions who are demonstrating themselves to be increasingly unwilling in this regard because of their own critical funding position. Again, such representation is of little value unless there are trained people able and willing to undertake it, of whom there is a shortage in the Northern Territory and North Queensland. Properly trained separate representatives of children would provide an invaluable conduit for gathering and presenting to the Court in a neutral way evidence of customary law. Accordingly, action is needed by Government to ensure the proper funding of separate representatives in all cases and, because of the difficulties involved and the importance of the Court



Pictures: Howard Birnstihl

being properly informed as to cultural matters, particularly in cases involving Aboriginal and Islander children.

An issue does arise as to proof of customary law in custody proceedings, and I have recommended to the Attorney General that Australia should follow the lead of the United Kingdom and New Zealand and permit the calling of hearsay evidence (information given out of court by someone else) in all such proceedings.

Child Protection and Care Legislation

This subject matter is the legislative province of each State and Territory Parliament and individual cases fall to be decided by the Children's Courts of each jurisdiction. There are, however, Family Court matters where protection and care issues arise, and there are occasions when the Court can and does decide these issues on a cross-vested basis (for example, *Re Karen and Rita* (1995) FLC 92-32).

As I have said on numerous occasions, it is unsatisfactory that Australia has a fragmented approach whereby each State and Territory

has its own child and adolescent protection legislation. For Aboriginal and Torres Strait Islander children, my criticisms are amplified by the differing provisions (or lack thereof) in relation to indigenous children.

In the area of child care legislation, most State and Territory Governments have recognised the special position of Aboriginal children. For example, section 87 of the New South Wales Children (Care and Protection) Act 1987, deals with the placement of Aboriginal children with Aboriginal families and in the first instance the child's extended family. Another positive statutory illustration is section 119 of the Victorian Children and Young Persons Act 1989 which places an onus on the State Welfare department to involve members of the Aboriginal community in decision-making processes about children and young people who have been abused and/or neglected.

Aboriginal and Torres Strait Islander children are over-represented in State and Territory protective systems, particularly in notifications of suspected abuse. In 1991-92 Aboriginal children comprised 8 per cent of substantiated cases of abuse and neglect yet they are only 2 per cent of the population. This is undoubtedly in part symptomatic of the legacies of our previous policies. The case analysis research of David Thorpe into Western Australian welfare practice found that the most likely outcome after substantiation of a notification was substitute care, whereas for other children such measures were least likely (Thorpe, D. (1994), *Evaluating Child Protection*, Open University Press, p. 159).

Perhaps most significant is Thorpe's contention that traditional Eurocentric 'child protection' eyes see neglect in customary practices, such as the close attention paid to the *physical care* and attention of small children by biological parents while, thereafter, care of children becomes a communal responsibility within the context of the kin network.

Adoption

As with child protection legislation there is some express recognition of Aboriginal peoples in the area of adoption. Section 50 of the Victorian Adoption of Children Act 1984 contains specific restrictions on the adoption of Aboriginal children; and in Queensland, section 18A of the Adoption of Children Act 1964 contains specific provisions relating to the placement of children with an 'indigenous or ethnic background'.

Aboriginal people are understandably nervous about adoption law, given the appalling past history to which I have already referred and given that it remains the province of State and Territory Governments and their Court systems, with all the diversities of approach that this entails.

The ALRC report concluded that so far as the Aboriginal community was concerned, there was no need for a change in the law relating to adoption, since Aboriginal custom did not recognise a concept of adoption as it is understood in the white community, although there were distinctive types of care which required protection. Whether this recommendation should still be followed needs further consideration.

More recently, the New South Wales Law Reform Commission issued a discussion paper, *Review of the Adoption of Children Act (1965) NSW*, which canvasses questions as to whether any adoption of Aboriginal children should ever be permitted and if so, what sort of limitations should be placed upon it. This paper also referred to distinctive types of care, and the possibility that these be given legislative recognition.

One problem to which the Commission adverted, but with which it did not deal because its terms of reference did not extend to them, is the problem of traditional adoption practices amongst Torres Strait Islanders. It is important to remember that in addition to the 5000 or so Islanders still living in the Torres Strait, there are over 25,000 living on the Australian mainland and they are to be found in all States in varying numbers. There are still close links between mainland and the Torres Strait communities and their culture and practices are very much alive. Also, they are a distinctive people from Aborigines, with a different history and culture.

I visited the Torres Strait in September 1994 to acquaint myself with problems in the area of Family Law affecting communities there and had the privilege of meeting and consulting with a number of representatives of the local people. The discussions highlighted the particular difficulties that Torres Strait Islanders have because of the law's failure to recognise their traditional adoption practices.

The following is a brief description of problems experienced, and I apologise in advance to any Torres Strait Islander who may read this paper if I do less than justice to what is a most important aspect of their culture.

One of the difficulties involved in discussing this and many other customary law issues is that once the term 'adoption' is used, we tend to place ourselves in something of a mental straitjacket by applying ordinary legal concepts. In fact, Torres Strait Island adoption bears some relationship to white adoption practices but bears a much deeper spiritual meaning than non-Torres Strait Islanders would normally attach to it. (See the article by Paul Ban in *Family Matters* No. 35, August 1993, pp. 16-21.)

There is a well established custom for children to be 'given' to siblings or other blood relatives which may mean a third or fourth cousin by blood, as well as much closer relatives. So far as the Islander Community is concerned, such children become, for all purposes, the child of the recipient; they are brought up as the child of that person and the fact of adoption is normally kept secret from the child. There seemed to be a strong consensus of opinion that these adoptions should receive legal recognition.

A similar practice has also developed outside traditional blood lines and opinion was divided as to whether this type of adoption should receive the same legal recognition, if recognition was to be granted.

There was a third common, different and much more loose arrangement where children would be left in the care of particular people for sometimes indefinite periods, which may or may not need some form of legal recognition. The failure to recognise the first and perhaps the second type of adoption has given rise to considerable difficulties over issues such as inheritance, who appears on birth certificates, and it sometimes gives rise to subsequent custody proceedings in relation to children.

Inheritance and ownership of land is of particular importance to Torres Strait Islanders, particularly in their traditional lands, and the absence of any legal recognition of their right to inherit particular lands because of the non-recognition of their traditional adoption practices is a cause of much distress.

Islander people recognise that there may be difficulties associated with the proof of these arrangements, but they have suggested something along the lines of the keeping of a Register, not dissimilar to that suggested by the Australian Law Reform Commission in relation to Aboriginal traditional marriages.

Similarly, they recognise that there may be issues relating to child welfare which need to be addressed and have suggested safeguards, which also might be associated with such a process of registration.

The important thing is that once the decision to recognise such customary law practices is made, the process of consultation with the people concerned is likely to produce solutions to the problems that are anticipated. The problems should not become a reason for not doing anything at all, as seems to have been the case to date.

I again emphasise that the matter of customary adoption should be seen as a national one and not one for the individual States and Territories, unless they are able to develop some cooperative approach.

Aboriginal Access to Justice

The problem of the incorporation of Aboriginal and Islander customary law cannot adequately be solved without addressing the issues of access to justice by Aboriginal and Islander people and without the courts themselves taking steps to become aware of the customs and culture of indigenous people.

The Family Court is very much aware of the particular access to justice issues facing Aboriginal and Torres Strait Islander peoples in

the area of family law. For too long there was too little understanding by people within the Court of the problems facing them. Although staff may have been well-meaning, serious mistakes could have been and may well have been made as a result of such ignorance.

Historically, indigenous peoples have had little contact with the Court and have been reluctant to seek out the Court's services, even in circumstances where their traditional methods of resolving disputes have failed. When contact has occurred, it has usually been in the context of so-called mixed marriages, and in such circumstances Aboriginal people often felt disadvantaged in dealing with a 'white institution'.

Awareness committee

In the knowledge that Aboriginal people were not coming to the Family Court to resolve disputes and use the court's counselling services, I convened an Aboriginal and Torres Strait Islander Awareness Committee to embark on a consultation with indigenous communities throughout Australia.

It was never the intention of the Court to impose itself upon Aboriginal people; rather it was to ask their advice about the relevance of the Court's services to their needs and, if they were not relevant, to ask them how the situation might be improved.

It is also not the Court's objective to encourage anyone to engage in litigation, but we felt our techniques of conciliation and mediation might be of use to the Aboriginal and Islander communities. In addition, there are disputes leading to litigation where the Court's services are required, and it is essential that those concerned with dispute have an understanding of Aboriginal and Torres Strait Islander culture.

Since its inception the Court's Committee has consulted with a wide range of Aboriginal and Torres Strait Islander organisations throughout many regions of Australia, both metropolitan and provincial. These contacts have invariably resulted in the establishment of forums to assist in the exchange of information between the Court and the community about services and needs.

Cross cultural training

It is planned that Judges and Court staff will participate in a program conducted in the Top End and Centre of the Northern Territory in March 1996, designed to raise awareness of Aboriginal culture. In addition, all Judges from the Northern Region of the Court have recently attended a seminar on Aboriginal and Torres Strait Islander cultures and issues, together with Judges of the District Court of Queensland that has been developed by the Aboriginal and Torres Strait Islander Studies Unit of the University of Queensland in August 1995.

A further identified need is the preparation of specific audio visual materials that provide information to Aboriginal and Torres Strait Island peoples in a format more readily identifiable to them and, in appropriate cases, translated into local languages. This will be done after the format and content have been settled with those with whom we have been consulting. It is also the Court's plan for Aboriginal and Torres Strait people to be involved in the actual production of these materials.

Initiatives in Alice Springs and Darwin

The Court has created four targeted positions for Aboriginal Family Consultants for two pilot projects, one in Darwin and one in Alice Springs. The pilot projects arose from our widespread and intensive consultation with Aboriginal groups in Darwin and in Alice Springs about the communities' needs. They identified the need for a bridge between the Court and the communities as a priority.

The options suggested by the groups could be broadly described as falling into two models:

- the employment of Aboriginal people within the Court to provide assistance to the Court, to provide assistance to individual litigants, and to provide information in the community about the Court;

- an outreach service by negotiating with existing agencies to provide staff dedicated to work of the nature already described.

The preponderance of opinion was for Aboriginal people to be employed *within* the Court, attached to the Court Counselling service, and to work as 'Family Consultants'. The Aboriginal Family Consultants will have an educative role in relation to both Court staff and the Aboriginal communities, assist with the Court's interface with the Aboriginal Communities, and work with and assist the Counsellors when Aboriginal peoples are involved.

The model for the Darwin region consists of two Family Consultants – one male and one female (to respond to cultural needs associated with women's business and men's business). The consultants will be attached to the existing Counselling service within the Registry. Their area of work will encompass the whole of the Top End and extend down to Katherine, and they will be employed from January 1996.

The Alice Springs model will begin at about the same time. At present the Counselling service at Alice Springs is provided by the Darwin registry staff via monthly visits. This has been shown to be insufficient and a permanent counselling service position has been created for Alice Springs. Culturally appropriate premises have been selected with the assistance of local Aboriginal representatives. The Alice Springs Family Consultants – again, one male and one female – will be responsible for the broader geographic region of Central Australia, extending into northern South Australia and south-western Queensland.

During the initial 12-month period, which will be followed by an evaluation, the service in each centre will have the assistance of a Reference Group composed of representatives self-selected from the various Aboriginal organisations which the Court has consulted during the project. These Groups will both alert the Court to the need for any changes to ensure that the service meets the needs of the Aboriginal communities and will provide community support for the Aboriginal workers employed by the Court. They have also been involved in defining the role of the Family Consultants, and have assisted with drafting the job description, the selection criteria and the advertisement, and will be involved in the selection.

It is recognised that the model currently used by Counsellors is not necessarily suitable for discussion with people from Aboriginal communities. They may wish to involve extended family members in discussions and may have difficulty in discussing private family details with non-indigenous Court Counsellors. Through the work of the Family Consultants it is hoped to develop a range of suitable models.

Legal services in the Torres Strait

It was of concern to find an almost complete absence of legal services to these islands. The Magistrate's Court sits on Thursday Island only and deals with any Family Law matters, but it is obviously difficult and expensive for people from the outlying islands to have access to it. The nearest Family Court sits in Cairns, which is over an hour's flying time from Thursday Island. This effectively means that residents of the Torres Strait are deprived of access to justice, so far as Family Law is concerned. While it was heartening to observe recent initiatives by the Queensland Government to appoint Islanders to deal with local matters on the various islands, this does not appear to extend to the Family Law area.

Following my visit I made strong representations to the Attorney-General to set up a visiting counselling service to the Torres Strait and the Access to Justice Program funded the Court to employ an additional Counsellor for this purpose. Interviews are completed and that person is expected to be appointed very shortly. Before the service is actually set up there will be extensive consultation with Torres Strait Island peoples in order to determine the best way to go about it.

The Court's Counselling Service in North Queensland and the additional counsellor in particular, will have the special responsibility of establishing links, through liaison, with a wide range of Aboriginal and

Torres Strait Islander organisations in the general area. Dual lines of communication between the Court and these two communities will ensure that information about the nature and scope of the Court's services are available to them and that those services are relevant to the resolution of disputes of individuals within them.

We see this as only a beginning and we would also like to extend counselling services to the communities on Cape York and the Gulf of Carpentaria.

In this regard, it was particularly pleasing to see the proposal in the Government's Justice Statement which will enable the Court to employ four Family Consultants in North Queensland and the Torres Strait in 1996–97. These people, who will be Aborigines and Torres Strait Islanders, both male and female, will enable the Court to provide much more relevant services to the people of the area from those communities.

Judges too will travel, if required, to the Torres Strait and other communities in North Queensland and the Northern Territory, so as to obviate the necessity for people to travel unreasonably long distances to avail themselves of the services of the Court. Last year, arrangements were put in place to convene a sitting on both Thursday Island and Saibai in order to deal with a case involving Torres Strait Islander people, but the matter was resolved in counselling prior to the sitting taking place.

However, it must be appreciated by Government that these services are costly and the Court is presently ill-equipped to provide them at the level that is required.

Courtrooms

In August 1994, the Attorney-General re-opened the former Northern Territory Supreme Court building as the Commonwealth Law Courts. In connection with this project, representatives of the Court held discussions with Aboriginal community representatives about designing a more 'user friendly' Court Room for cases involving Aboriginal people. That project was eventually allotted by the Government to the Federal Court and it is expected that the work on it will commence shortly.



A spirit of collaboration and respect is driving the Court and the communities in planning the provision of services. Its dividend has been a sense of optimism and goodwill which will be essential as we embark on the stage of actually delivering the promise of culturally relevant and sensitive services.

We realise that this will not be an easy task but we believe as a result of our consultations that an approach which takes advice from the grass roots up rather than the top down can work. The Court is also aware that Aboriginal people have often heard the rhetoric of change and the promise of relevant services before and have sadly been so often let down. This Court is committed to working with the Aboriginal and Torres Strait Islander people to ensure that their communities can access justice in a way most other Australians take for granted.

Such programs will, in my opinion, be an essential concomitant of the recognition of Aboriginal and Islander customary law, for without a reasonable degree of understanding on the part of the Courts such recognition will amount to little more than empty rhetoric.

The Hon Alastair Nicholson is the Chief Justice of the Family Court of Australia. This paper is an edited version especially for Family Matters of his address to the Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995.