Aboriginal Clients
in the Family Law System

The North Australian Aboriginal Justice Agency (NAAJA) is the legal service chartered to provide high quality and culturally appropriate legal aid services for Aboriginal and Torres Strait Islander people within the Northern Zone of the Northern Territory. NAAJA serves urban and remote areas from north of Elliott right through to the Top End, with offices in Katherine, Darwin and Nhulunbuy. NAAJA attends the bush court circuit and conducts outreach visits to Northern Zone remote communities.

NAAJA has one family law solicitor based in our Darwin office and one family law solicitor based in our Katherine office. A large proportion of our client base are from Darwin and Katherine due to our location and limited capacity.

Some of the main family law issues we regularly encounter are advice on separation, parenting and property settlement, case work on helping clients spend time with their children, orders for parental responsibility for other interested parties (e.g. grandparents), recovery orders and parenting orders which often deal with serious domestic violence.

We welcome the opportunity to provide this submission to the Family Law Council’s Inquiry into how the family law system responds to the needs of Aboriginal clients.

1. Summary and Recommendations

Many Aboriginal people, particularly those in remote communities, have an extremely limited understanding of the family law. There is an urgent need for culturally relevant education to be delivered across the Northern Territory, with a focus on remote communities.

Part of this education campaign needs to break down common misconceptions that link family law with child protection, and that leave many Aboriginal people unwilling to participate in a system they perceive as heavy-handed.
As well as education, there is a critical need for a substantial increase in culturally relevant court, legal and counselling resources to be provided to regional towns and remote communities if the family law needs of Aboriginal people are to be met.

The needs in remote communities are more likely to be for informal mechanisms, such as culturally relevant mediation services that are more aligned to traditional ways Aboriginal people have used to resolve family disputes.

There is also an urgent need for the Family Court to re-commence its Court’s Indigenous Family Liaison Officers Program. The Program operated successfully for many years and represents a best-practice example of how the needs of Aboriginal people can be more effectively met by the family law system.

Drawing from the above, NAAJA makes the following recommendations:

1. Any response by the family law system to Aboriginal clients must take into account the vast differences, and vastly different needs between Aboriginal people from remote communities, regional areas and urban centres.
2. Significant public education resources are needed to break down the link many Aboriginal people have between family law and child protection, and the effect of this on people’s confidence to exercise their rights in this context.
3. The family law system needs to ensure that Aboriginal people have access to services “that are on the same level as them”. That is, services that are culturally relevant, that take account of Aboriginal family and kinship issues, that ensure appropriate family members are part of family decision-making, and that take place in the right physical environment.
4. There is an urgent need for the Family Court and services such as NAAJA to develop and deliver culturally relevant community legal education programs in remote communities. Significant resources need to be made available to support this.
5. Two Way education, utilizing the expertise of elders and community leaders and taking place in appropriate settings, needs to be embraced to ensure that legal education takes place in the right way.
6. There is a need for education to explain to people, especially grandparents, how to formalise their care arrangements where appropriate.
7. As a matter of urgency, family law services need to be made accessible to Aboriginal people, especially in regional and remote areas. This includes access to the courts, legal services, as well as counseling and parenting courses.
8. Family law services need to be culturally relevant, and not demeaning or degrading. They need to respect the cultural ways of families. They need to be able to identify who the appropriate family members to deal with a particular family matter are. Services need Aboriginal workers.
9. There is an urgent need for more funding for family lawyers in the NT. This applies not just for NAAJA, but also for other legal services such as NTLAC so they can properly services all parts of the NT, including remote communities.

10. Emphasis also needs to be placed on ensuring family lawyers, especially young family lawyers, have the professional support and mentoring they need to effectively service clients who live in regional and remote areas. We recommend the extension of the WA Country Lawyers Program to the Northern Territory.

11. Expert evidence from elders needs to be given appropriate weight in assessing a child’s best interests.

12. In relation to mediation:
   a) The availability of FDR or mediation needs to be significantly increased in regional areas and remote communities.
   b) FDR needs to be evaluated to consider whether it meets the needs of Aboriginal people, particularly from remote communities.
   c) Consideration needs to be given to other mediation models such as the NT Community Justice Centre co-mediation model to see whether it would be more suited to family dispute resolution in remote communities.
   d) Aboriginal mediators need to be trained, and based, in regional towns and remote communities.
   e) Sufficient resources need to be provided to mediation services to enable mediators to be personally present for mediations.
   f) FDR mediation intake processes need to be significantly streamlined.
   g) Language used in mediations must be understandable to the parties.

13. The Family Court’s Indigenous Family Liaison Officers Program needs to be immediately recommenced and expanded to provide additional reach to service remote communities and regional areas.

14. Possible options including the establishment of a Family Community Court should be considered, to increase the accessibility and relevance of family court proceedings for Aboriginal people.
1. **Defining Aboriginal and Torres Strait Islander clients**

We consider that an examination of the interaction of Aboriginal clients in the family law system needs to commence with acknowledging the danger of using the term ‘Aboriginal clients’.

It be must be remembered that all Aboriginal clients are not the same. There are vast differences between Aboriginal people from remote communities, regional areas, and urban centres.

Within those broad categories, there are also substantial differences, for example between Aboriginal people who live in one remote community or region, as compared to Aboriginal people who live in another remote community or region.

It is imperative that language and cultural differences, as well as specific issues in each community be separately accounted for. Responses by the family law system might be meaningful and useful in one community, or in one region of the Northern Territory, but they may be inappropriate and irrelevant for Aboriginal clients in another community, or in another region of the Northern Territory.

**Recommendation:**

Any response by the family law system to Aboriginal clients must take into account the vast differences, and vastly different needs between Aboriginal people from remote communities, regional areas and urban centres.

2. **Do Aboriginal clients want to resolve family law disputes without the involvement of the family law system?**

It is important to also acknowledge that some Aboriginal clients, especially those living in remote communities, may wish to resolve family law disputes without the involvement of the family law system. It may be that people in remote communities, even if aware of pathways within the family law system, would opt not to utilise them.

This relates particularly to Goal 1 of the National Indigenous Law and Justice Framework, and goes to the key question of how Australian justice systems can comprehensively deliver on the justice needs of Indigenous peoples in a fair and equitable manner.

Whilst some Aboriginal people may wish to not resolve disputes with the involvement of the family law system, there may be other cases where Aboriginal people wish to utilise conventional family court processes. This may, for example, occur where a party wishes to apply for a recovery order. A lack of awareness of the availability of conventional family law processes can have serious and sometimes devastating consequences in cases such as this.
3. Disengagement from the Family Law System

Many Aboriginal people are so disengaged from the system that they are simply not in a position to use it. Many Aboriginal people have had negative prior experiences with courts and conventional justice processes. NAAJA encounters many Aboriginal people who would rather give up rather than trying to exercise their rights through court.

In relation to family law, many Aboriginal people think of family law through a child protection framework. Many people do not understand the difference between child protection and family law. Past negative experiences with the child protection system lead many Aboriginal people to shun family law processes.

It is the perception of many Aboriginal people that child protection authorities have operated in a heavy-handed way over many years. This has led people to feel that they are not on the same level as the services that supposed to be there to assist them in times of need. It means many people will resist using mainstream services.

There are also other factors that lead Aboriginal people to become disengaged from the system, including lack of knowledge or confusion about family law process and how to exercise their rights, the way delays in and lack of support offered throughout family court proceedings. These are described in further detail below.

Recommendations:

Significant public education resources are needed to break down the link many Aboriginal people have between family law and child protection, and the effect of this on people’s confidence to exercise their rights in this context.

The family law system needs to ensure that Aboriginal people have access to services “that are on the same level as them”. That is, services that are culturally relevant, that take account of Aboriginal family and kinship issues, that ensure appropriate family members are part of family decision-making, and that take place in the right physical environment.

4. Understanding of the Family Law System

In our experience, Aboriginal people in remote communities have little if no understanding of the family law system. One of NAAJA’s Board of Directors recently commented, ‘We don’t really use this system.’ This is, at least in part, because people have had limited exposure to family court processes.
Unlike criminal courts, the family court does not sit in remote communities. There is little if any education about family law that makes it to remote communities. It is not surprising that if people do not understand how the family law operates, that they do not participate in the family law system.

There needs to be significant resources to support educators from the Family Court, and legal services such as NAAJA, to go out to regional towns and remote communities.

As an example, NAAJA has two Community legal Educations solicitors to service the entire Top End of the NT. It simply not possible with our limited resources to do this. NAAJA needs additional resources to be able to provide comprehensive and detailed family law education across the Top End of the NT.

Education should target elders, Stolen Generation members and grandparents. Equipping these groups with the knowledge will mean that it filters throughout the community.

Education sessions need to take place in the right way. For women, they should happen in confidential places for women, such as women’s safe houses. Similarly confidential settings need to be identified for men.

Recommendations:

There is an urgent need for the Family Court and services such as NAAJA to develop and deliver culturally relevant community legal education programs in remote communities. Significant resources need to be made available to support this.

Two Way education, utilizing the expertise of elders and community leaders and taking place in appropriate settings, needs to be embraced to ensure that legal education takes place in the right way.

5. Informality of Care Arrangements

Many Aboriginal families put in place informal arrangements for the care of children. Most commonly, this will be where grandparents have care of children with no court orders in place.

This can raise problems in the absence of court orders, where the presumption that parents have the parental rights applies. In this situation, grandparents may need power to make decisions about non-emergency medical issues, travel approvals or other matters that cannot be made in the absence of orders.

Recommendation:
There is a need for education to explain to people, especially grandparents, how to formalise their care arrangements where appropriate.

6. Access to Services

NAAJA’s experience is that the *Family Law Act* appropriately addresses the needs of Aboriginal people. Our concern is more with the lack of resources and capacity to support the criteria specified in the legislation.

It remains the case that mainstream services do not look after the regional and remote areas. The 2009 Senate Inquiry into Access to Justice noted the discrepancies in service provision that exist in regional and remote parts of Australia.

There is a serious lack of services on the ground in regional areas and remote communities. This includes access to court services, legal services, mediation services, counseling services and education services.

There is no court presence outside Darwin. This means that the family law system is simply not accessible to people. People are left to their own devices to resolve family disputes. In most cases people work things out for themselves. But where they cannot, there are no alternative ways to sort things out, such as where there is a relationship breakdown between the parents, or where they are not in regular contact, and tragically this is where heightened conflicts sometimes arise.

**Case Study**

NAAJA are about to commence proceedings for a client who lives in a remote community which has been without a telephone line for some months. The other party moves around regularly between communities. We have significant concerns about the ability of either party to meaningfully participate in the upcoming court proceedings in Darwin. It is for this reason that the family has not previously engaged with the family law system, and is very hesitant about the upcoming proceedings.

There is very limited access to family law services, especially in regional and remote areas. This service gap is especially pressing for men. For example, whilst there are dedicated legal services for Aboriginal women, these do not exist for men. If the female goes to NAAJA first, NAAJA will be conflicted and cannot assist the male.

Issues also arise due to the fact that only NAAJA services remote communities. It is essential that the NT Legal Aid Commission have sufficient funding to revel to and service clients in remote communities.

NAAJA are only funded for 2 family law solicitors for the entire top end; the Katherine solicitor has both a family law and civil law case load, effectively
meaning that is only a part time family law position. To provide representation to indigenous top enders there needs to be an increase in the funding of culturally appropriate solicitors.

Whilst the legislation takes into account the issue of aboriginality when determining the best interests of the child, the court does not receive the appropriate information to make those decisions if there aren’t solicitors with cultural understanding or who can assist specifically indigenous clients.

There are similar difficulties in relation to courses. Parenting courses may technically be available, but not accessible because courses are cancelled where there are not enough numbers for them to run.

However, it is not simply about Aboriginal people in regional areas and remote communities having access to mainstream services. It is equally important that these services be culturally relevant. Many people do not have the confidence to access mainstream services.

Aboriginal people, especially those from remote communities, need access to services that are not demeaning and degrading.

Recommendations:

As a matter of urgency, family law services need to be made accessible to Aboriginal people, especially in regional and remote areas. This includes access to the courts, legal services, as well as counseling and parenting courses.

Family law services need to be culturally relevant, and not demeaning or degrading. They need to respect the cultural ways of families. They need to be able to identify who the appropriate family members to deal with a particular family matter are. Services need Aboriginal workers.

There is an urgent need for more funding for family lawyers in the NT. This applies not just for NAAJA, but also for other legal services such as NTLAC so they can properly services all parts of the NT, including remote communities.

Emphasis also needs to be placed on ensuring family lawyers, especially young family lawyers, have the professional support and mentoring they need to effectively service clients who live in regional and remote areas. We recommend the extension of the WA Country Lawyers Program to the Northern Territory.

7. Family Court Proceedings
NAAJA’s experience is that Family Court proceedings are often alienating and do not meet the cultural needs of Aboriginal clients.

The use of evidence by the Family Court can sometimes lead to unfair outcomes. For example, courts may place significant weight on the expert evidence by psychologists when assessing the best interests of a child, but not place similar weight upon the evidence of Aboriginal elders in making that determination.

This is especially evident where one party is Aboriginal and the other is non-Aboriginal. In that situation, cultural divides sometimes become apparent.

Case Study

NAAJA recently acted for a client from a remote community. Her non-Aboriginal partner lived in suburban Darwin. Subjective matters, such as the quality of the mother’s dwelling in the remote community as against the father’s dwelling in Darwin were given substantial weight in deciding the best of interests of the residence needs of the child as against the cultural benefits of living with the mother.

A second, related issue flows from the 2009 case of Hort and Verran which acknowledges the appropriateness of elders providing expert evidence on issues of Aboriginality. This needs to be further explored by practitioners and Judges/Federal Magistrates hearing cases.

It also requires specific legal skills from legal practitioners in adducing expert evidence. This includes being able to locate and put before the court relevant expert evidence, such as from Aboriginal elders in Family Court proceedings to counter-balance other expert evidence put before the court.

Recommendations:

Expert evidence from elders needs to be given appropriate weight in assessing a child’s best interests.

8. Investing in Family law responses that will work for Aboriginal people

A different response is needed for Aboriginal people in urban areas, as compared to Aboriginal people in regional areas, as compared to Aboriginal people in remote areas

People in remote communities will not readily come forward with family law issues. It is essential for all services working in remote communities to build strong relationships of trust with those communities.
NAAJA’s experience is that it is only by returning on several occasions to the same community that people will come forward with particular family law issues. Until and unless a relationship of trust is built, Aboriginal people may not feel comfortable to disclose personal and sensitive information.

The needs in remote communities are more likely to be for informal mechanisms, such as culturally relevant mediation services that are more aligned to traditional ways Aboriginal people have used to resolve family disputes. They may not see the need to use the family court because they do not know what it can offer them.

But it must be emphasized that one-size-fits-all options are unlikely to be successful. Responses must take account of different cultural practices that exist and flourish in different communities and regions.

Service providers need to be aware of these different cultural practices, and tailor their services to be appropriate for the local community they service. In this regard, service providers need to employ cross-cultural experts (ie. Aboriginal educators, mediators) who can work across both realms.

Three options that should be pursued are locally accessible mediation, recommencing the Family Court’s Court’s Indigenous Family Liaison Officers Program and introducing Family Community Courts.

(i) Mediation

Family Dispute Resolution (FDR) is not accessible in most parts of the Northern Territory. It is not good enough to have a mediation service based in Darwin and to expect people in regional towns and remote communities to access it by telephone.

In Katherine for example, the Darwin-based Family Relationships Centre travels to Katherine every 4-6 weeks. However, they are not always able to travel even with this infrequency, and they do not provide services to remote communities.

Where FDR does occur in the Katherine region, they typically occur by phone. FDR mediators rarely travel outside of Darwin, and do not travel to remote communities. This is highly unsatisfactory. In a remote community context, it will literally mean that one party will be standing by a pay phone to participate in the mediation.

Phone mediations greatly impair the effectiveness of the mediation process. Interpreters cannot be used in a three-way phone conference. We have also had experience of mediators describing how they are writing things on the whiteboard, which the parties cannot obviously see.
But even in Darwin, we have had serious difficulties engaging with FDR services. One of the reasons for this is the extremely lengthy intake process, which can be between 3-4 months. This may include one month for the intake of the first party, 28 days for the other party to respond, followed by a further 28 day period to respond, followed by a further month for the intake of party two. This protracted intake has obvious implications in terms of client disengagement from the process.

In our experience, simply advising a regional or remote client that they need to telephone an FDR service at a later time carries a high likelihood of disengagement.

**Case Study**
We recently applied for mediation for one of our clients on 23 February 2011. We have been calling frequently to see if any progress has been made. In mid April, intake had still not been completed. By early May 2011, the other party had not been contacted by the FRC. By late May 2011, the FRC began attempting to contact the other party. The delay as explained to us by the FRC has been in part due to the absence of an Aboriginal Liaison Officer at the Centre.

We also have concerns about the FDR process itself. NAAJA’s experience is that complex language is often used in FDR proceedings. Many of our clients leave mediations with limited understanding of what transpired in the mediation.

Also, some parties leave mediations confused as to the role of the mediator, thinking that they were the ‘decision maker’. Some parties, particularly fathers in matters where there are untested criminal allegations involving domestic violence, have told us after a mediation that they felt the mediator had made comments suggesting they were a ‘bad person’ or had taken the mother’s side (such as referring to them as a perpetrator).

Finally, we have concerns about the mainstreamed nature of FDR services. NADRAC’s, ‘Solid work you mob are doing: case studies in Indigenous dispute resolution and conflict management in Australia’ (2009) highlights the importance in the context of working with Aboriginal people of ‘individual ownership of processes, careful preparation, and working with each party to design processes which can meet each parties’ procedural, substantive and emotional needs.’

One of the most effective means of achieving this is through Indigenous mediators. The report, which calls for the establishment of a national Indigenous dispute management service, suggests developing regional panels of mediation experts and providing consistency in standards and training on a national level.

There is a serious need for Aboriginal mediators to be trained to ensure that mediation services are culturally relevant. Appropriate elders exist in
most, if not all communities. It is simply that resources need to be put into training Aboriginal FDR mediators in remote communities.

In addition, there are models currently in operation of how this could be done. One example is the Ponki mediation model, currently being supported by the NT Community Justice Centre and NAAJA. The Ponki model uses a hybrid mediation model combining traditional Tiwi and contemporary mediation. It also uses a co-mediation model, utilising Aboriginal and non-Aboriginal mediators to ensure cultural relevancy of mediations where Aboriginal clients are involved with the non-Aboriginal mediator also offering a layer of separateness from the parties to the mediation.

**Recommendations:**

The availability of FDR or mediation needs to be significantly increased in regional areas and remote communities.

Further to this:

a) FDR needs to be evaluated to consider whether it meets the needs of Aboriginal people, particularly from remote communities.

b) Consideration needs to be given to other mediation models such as the NT Community Justice Centre co-mediation model to see whether it would be more suited to family dispute resolution in remote communities.

c) Aboriginal mediators need to be trained, and based, in regional towns and remote communities.

d) Sufficient resources need to be provided to mediation services to enable mediators to be personally present for mediations.

e) FDR mediation intake processes need to be significantly streamlined.

f) Language used in mediations must be understandable to the parties.

**(ii) Family Court Indigenous Family Liaison Officers Program**

NAAJA considers that the Family Court’s Indigenous Family Liaison Officers Program needs to be immediately recommenced.

The Program operated successfully in the NT for many years and ceased upon the introduction of the Family Relationship Centres.

The Indigenous Family Liaison Officers staff had several roles. They were employed in Darwin, Alice Springs and Cairns. They were gender balanced teams and would do presentations on processes of Family Law, mediation, and litigation pathways.
One former employee told NAAJA, ‘I believe that it needs to be set again as a lot of our people on the communities are living in heartache because they don’t know their rights.’

The Indigenous Family Liaison Officers that were part of the Family Law project were also trained as mediators, and acknowledged by the Family Court as mediators. They also mediated non-Aboriginal matters if required.

It is our strong conviction that there is an urgent need for the recommencement of the Indigenous Family Liaison Officers Program to travel to remote communities and regional towns.

If the Indigenous Family Liaison Officers Program is to be recommenced, the program needs to be expanded to employ more Indigenous Family Liaison Officers. The Family Court needs to have a significant pool of Aboriginal Liaison Officers who can assist and support Aboriginal clients through family court proceedings, undertake community legal education, and conduct mediations.

Recommendation:

The Family Court’s Indigenous Family Liaison Officers Program needs to be immediately recommenced and expanded to provide additional reach to service remote communities and regional areas.

(iii) Family Community Courts

A Community Court model, similar to that used for some criminal matters in the NT, could be developed to deal with family court matters in remote communities.

Community Courts use a panel of elders to sit with the presiding magistrate when determining the appropriate sentence to impose in relation to a particular offender. A Community Court is about facilitating dialogue between the offender, community representatives, and the victim with a view to exploring how the offender can make good their harm done.

This model may have some application in family law proceedings. In relation to matters involving children, it could provide a more accessible forum for all relevant matters to be considered when assessing the best interests of a child.

In relation to the conduct of the court, it may be that a Federal Magistrate could facilitate family matters in a similar manner to facilitating disputes involving property.

Recommendation:
Possible options including the establishment of a Family Community Court should be considered, to increase the accessibility and relevance of family court proceedings for Aboriginal people.