


Aboriginal Cultural Guide

Second Edition



for the ACT
Family Law
Pathways Network

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Disclaimer

This publication is the second edition of the Aboriginal Cultural Guide for ACT Family Law Practitioners that was produced in 2008 for the ACT Family Pathways Network. This second edition of the Guide is offered in the spirit of meeting that need with updated insights and information.

The updated version of the Guide looks at evaluations of the 2006 Family Law amendments and the outcomes for Aboriginal and Torres Strait Islander families, which unfortunately was not subject to specific review. Also included in this edition are the cultural relevance of including children in mediation and family dispute resolution situations (i.e. 'Child Inclusive Practises'); and a section about the importance of providing 'culturally competent' services (and the difference between 'cultural awareness').

Again, much of it is based on the author's recollections, personal experience, study and research collected over a lifetime which now includes developing, implementing and reviewing Reconciliation Action Plans, work with family relationship providers, as an Aboriginal cultural advocate in the Family Court and developing cultural competence workshops with SNAICC*.

The research includes the recent work by Hugh Mackay ('What Makes Us Tick') and 'The Evaluation of the 2006 Family Law Reforms' (Dec 2009), as well as many others that are listed at the end of this publication. In endeavouring to give credit where it's due, 'quotes' are again paraphrased if I was unable to find the original, as I consider it important to include the sentiments that were conveyed (where I could not locate the exact reference, that is).

As with the previous edition, the intention of this edition is to provide helpful information and useful tips, not be an academic exercise nor a legal textbook full of exact references and authoritative dicta. I have again kept the language non-academic (mostly) to appeal to the widest audience. Please learn and enjoy the journey.

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***We don't have to share
another's enthusiasm for their
culture; we do have to accept
however that it is an integral
part of them as a person.***

*Sharon Payne
May 2011*

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INTRODUCTION

Information versus knowledge

It would be impossible to accurately describe all the aspects of Aboriginal & Torres Strait Islander culture in a single workshop or publication, which, at best, contains mere *information*. *Knowledge* on the other hand is the internalisation of that information. In other words, information is the gathering of data while knowledge is taking that information and understanding it within the context of one's own frame-work or existing knowledge.

The better the sources of information however, the greater the potential for being knowledge-able, so it is advisable to gain a better appreciation of factors that inhibit effective communication and relationships with Aboriginal & Torres Strait Islander clients. Cultural differences do exist, though not to the extent some believe, particularly in most urban settings. Cultural differences (child raising practises e.g.) are important but when looking at barriers to developing effective relationships, these do not tell the whole story. The legacy of history/impact of colonisation is more relevant.ⁱ

Importance of Cultural Competence

The point of being culturally competent is not to become knowledgeable about another's culture, but to accept that we are each brought up in particular cultural settings and this influences behaviours. Indeed it would be unlikely that with today's 'busy-ness' and information overload, people would be able to submerge themselves in another's cultural upbringing to extent that they had the appropriate 'knowledge' levels.

More problematic than lack of knowledge about another's culture however is the assumption that one's own culture one is 'right' or 'normal' and that others just need to 'get on board'. Cultural competence challenges those assumptions; it requires respectful partnerships, not an attitude of 'we know what's best' [for you].

Working from one matter to the next, practitioners are often able to decontextualise their part and ignore the broader impact. The careful practitioner will ensure that all factors, including historical ones, are taken into consideration when acting for or

against the interests of Indigenous children remaining in cultural settings. Claims that 'I am just doing my job' are not acceptable when it leads to the destruction of culture. Lawyers have played a significant part in disenfranchising Aboriginal people throughout history, to score a win for clients, to draft a discriminatory law or to remove children from their culture.

The challenge for today's practitioner then is:

- to be *culturally competent*;
- to *acknowledge and appreciate the impact of the past* which has never been fully understood (i.e. removal of children, slavery, dispossession and assimilation); and
- to keep abreast of legislation and case law principles to frame our approach.

This edition of the Guide will hopefully assist in meeting these challenges and help to create better outcomes when dealing with Aboriginal & Torres Strait Islander clients and/or matters.

1 LEGISLATION, CASE LAW AND REFORMS TO THE FAMILY LAW SYSTEM

1.1 Family Law Act provisions relating to Aboriginal & Torres Strait Islander children and families

Background

In a paper published in the *Family Matters Journal*ⁱⁱ, previous Family Court Chief Justice Nicholson examined ways in which Indigenous customary law *as it affects the family*, can be recognised within the Australian legal system. The recommendations of an Australian Law Reform Commissions reportⁱⁱⁱ, were used as a basis for examining specific issues in the area of the family, namely: marriage, custody issues, child protection and care legislation, and adoption.

The 2001 report, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* also considered that '[t]he current family law system presents particular problems for Aboriginal & Torres Strait Islander people. These problems, which are not experienced by the wider community, affect the ability of Indigenous peoples to access and benefit from the family law system.' ... [it] does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents. The Family Law Act needs to offer guidance as to the importance placed on a child's cultural identity.' The Report recommended, among other things that the Principles section of the Act contain a new paragraph stating that 'children of indigenous origins have a right, in community with other members of their group, to profess and practice their own religion, and use their own language'.

The Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-rearing Practices* (2004), responding to Pathways recommendations rejected the inclusion of 'profess and practice their own religion, and use their own language' because of concern that this could create a presumption in favour of an Indigenous parent, and believed that there should not be such a presumption'. This missed the point – there must be such a presumption to overcome some of the disadvantage and provide the benefits that Aboriginal children gain by being raised in an environment where they take pride in their culture and therefore themselves.

Accessibility

Chief Justice Nicholson also argued in 1986 that the problem of incorporating Aboriginal culture ‘cannot be resolved without addressing issues of access to justice by Aboriginal & Torres Strait Islander people and without the courts themselves taking steps to become aware of Indigenous customs and culture’. There are more than cultural differences that inhibit access however – the internalised oppression and trans-generational trauma that go together with invasion and racial vilification likewise needs to be appreciated if efforts to make the law more accessible are to be successful. The past two hundred years or so have not been a history of bounty and opportunity for Aboriginal & Torres Strait Islander people and this as much as culture operates to inhibit that access

Efforts to develop a family law system that is accessible and relevant to Aboriginal & Torres Strait Islander people are fairly recent, and the extent to which legislative amendments, issues of accessibility and cross-cultural awareness have permeated and/or influenced the decision-making of the courts remains to be seen. While the basic model and intentions are sound, in order to be successful, genuine goodwill and effort on the part of practitioners are vital ingredients. As Behrens says ‘What really counts is how these provisions are applied by players in the system’.

1.2 Recent amendments regarding Aboriginal & Torres Strait Islander cultural issues

1996 Amendments - Court to consider- ‘the child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.’

2006 Amendments (Note: author’s emphasis)

Following *B & R* and the 2001 Parliamentary Enquiry¹, the 2006 amendments² provided for the following:

¹ ‘*Every Picture Tells a Story*’ – a report on the Inquiry into Child Custody Arrangements in the Event of Family Separation 2001 Parliamentary Standing Committee on

² *Family Law Amendment (Shared Parental Responsibility) Act 2006 and Jurisdiction of Courts (Family Law) Act 2006* which commenced on 1 July 2006

1. New principle providing the context for decision-making about parenting orders recognising the importance of cultural heritage, with **specific reference to the rights of Aboriginal or Torres Strait Islander children to enjoy their Aboriginal or Torres Strait Islander culture**
2. Best interests additional consideration which refers separately and exclusively to the need of Indigenous children to **maintain a connection with their culture**
3. New requirement for the court to have regard to **kinship obligations and child-rearing practices of the child's Aboriginal or Torres Strait Islander culture**
4. Provision (similar to that in the *Native Title Act*) designed to **reduce cost of adducing evidence as to the culture and traditions of Aboriginal and Torres Strait Islander people** (but in any case the Family Court's less adversarial trial process (LAT) makes this less of an issue because of the relaxation of the rules of evidence)

(NOTE: See ATTACHMENT 1 for Family Law Act amendments specifically pertaining to Aboriginal children/families/culture.)

1.3 Other 2006 Reforms

The 2006 amendments to the Family Law Act including mandatory family mediation and provisions for parenting orders also have special significance when applied to matters involving Aboriginal & Torres Strait Islander people, families and children. Making these accessible and achievable for Indigenous families has been identified as a priority and continues to be a challenge for government and practitioners alike.

Family Law Pathways Networks

The 2001 report, *Out of the Maze* also found that there was a need for better coordination within the family law system. As a catalyst for the formation of networks to address this shortcoming, seed funding was provided in 2003 by the Attorney-General's Department for Family Law Pathways Networks, originally established by organisations in eight local areas. Since then, several more Networks have come on board, with a current total of 36 funded Family Law Pathways Networks operating across Australia.

The Networks are managed by Steering Committees who are responsible for decision making, planning and monitoring in cooperation with the Auspice Agency and with support from Project Officers/Coordinators. Members come from a range of organisations that provide services for separating and separated families, including counsellors, mediators and lawyers specialising in family law, and representatives from Family Court and Law Registries, non-government organisations, and appropriate government agencies.

Family Relationship Centres

Family Dispute Resolution and the creation of Family Relationship Centres, with their ultimate goal of supporting parents and other care givers to develop workable parenting plans³, has been one of the most significant changes in recent years. Family Relationships Centres have been established in all major rural and urban centres. They work closely with Family Law Pathways Networks with a senior representative from each FRC participating in Steering Committee meetings and ongoing joint initiatives.

Other community agencies, private practitioners and legal aid commissions around Australia also provide family Dispute Resolution services.

Child Support

Despite overwhelming quantitative evidence showing that following separation mothers and their children are significantly disadvantaged economically, problems with the Child Support Agency model tend to be ones of compliance rather than with the model itself. However the amendments were not designed to address these problems but rather have tended to follow an ideological argument from (mainly) disgruntled fathers (see below), which would arguably leave children worse off.

Disagreements about amounts of child support are rarely an issue for Aboriginal & Torres Strait Islander people, and issues of compliance are usually associated with:

- transience (mothers and fathers moving back and forth to their extended family settings for instance);

³ Where a parenting plan has not been achieved, practitioners issue Family Dispute Resolution certificates for those clients needing to access the court system.

- poverty (as Aboriginal and Torres Strait Islander adults have the highest unemployment rates and are the lowest paid wage-earners, economic benefits for their children may not be regular nor forthcoming); and
- lack of knowledge about or access to advice and information about entitlements.

(NOTE: the evaluation of the 2006 family law amendments tend to indicate that the problems with Child Support have not been alleviated by the amendments and have actually worked against ‘the best interests of the child’. (See further analysis of ‘the Evaluations of the 2006 Family Law Reforms following.)

1.4 Evaluation of the 2006 Family Law Reforms (Dec 2009)

The driving force behind the 2006 family law reforms was ostensibly the ‘best interests of the child’. According to the Evaluation Summary Report, ‘the 2006 reforms were partly shaped by the recognition that many of the disputes over children following separation are driven by relationship problems rather than legal disputes’. Further, that ‘...[these] disputes are often better suited to community-based interventions that focus on how unresolved relationship issues impact on children’; indeed ‘.... a shift away from litigation and toward co-operative parenting’.

The Evaluation assessed ‘the extent to which, by 2009, the changes had been effective in achieving the policy aims ..’. It was unique in that it ‘provides more extensive evidence base about the use and operation of the family law system than has previously been available ...’. Data was collected from ‘some 28,000 people involved in the family law system .. [as well as] the analysis of administrative data and court files’. It also provided some benchmarks against future developments can be mapped.

The findings of the Evaluation were mixed in that although there was less litigation and court time, the arrangements did not necessarily serve the ‘best’ interests of the child/children involved. Positives included *inter alia* ‘a significant number of parents [being] able to work out their post-separation arrangements with minimal engagement with the formal system’ as evidenced by:

- ‘more use of relationship services
- a decline in filings in the courts in children’s cases; and

- a shift away from automatic recourse to legal solutions in response to post-separation relationship difficulties.'

The Evaluation also found with 'many families affected by issues such as family violence, safety concerns, substance abuse [being] the predominant users of the service and legal sectors' there was still some way to go to achieve better outcomes for children.

Negative outcomes included:

- Parents (usually fathers) were seeking additional time with children NOT in their (the child's) interests, but to reduce the amount of child support payable. Others (usually mothers) were resisting the additional time, seeing it as a ploy to avoid financial responsibility.
- The assumption that equal responsibility meant a right to equal time so that parents used this to argue about their 'rights' rather than what was best for the children.
- Children were more likely to be in high conflict situations than before as 'equal access' was given more weight than factors of domestic violence or other safety concerns.
- The disruption to children's lives particularly living arrangements, as they strive to meet the 'rights' of their parents .

Overall it would appear that the changes to the Family Law Act have been co-opted by self-interest of parents rather than the best interests of children. The immaturity that characterised family dispute resolution prior to the 2006 reforms cannot be legislated away. [Note: it was also remarkable in the different responses or opinions between legal practitioners and the others in the system. Their self-interest in winning cases with little or no regard to the impact on children was for most part unchanged. Those who did embrace the reforms, including their spirit and intention as well as the dispute resolution services, were more likely to report more positive outcomes for all parties.]

Finally it is disappointing that the impact of the reforms specifically on Aboriginal and Torres Strait Islander families was not reviewed or reported on. Given the author's own experience and the ongoing requests/need for information, advice and training

on dealing with Aboriginal or Torres Strait Islander clients, it is clear that the position for Indigenous families has not changed.

1.5 Child Inclusive Practice (CIP) and Child Focussed Practice (CFP)

Background

As discussed, the reforms to the family law system in recent years were supposed to change the focus to what will serve the interests of children (according to the United Nations 'Convention on the Rights of the Child'). Underlying assumptions about children 'needing' to be with biological parents, arguments that they have 'a right' to be in contact with them or that biology guarantees appropriate care are continued to be used to defend the 'rights of parents' as the priority however. As the evaluation found, despite the rhetoric, the trend has been towards less protection and far more complex lives for the children involved.

Even though it is well understood that high conflict situations are far more detrimental to a child's emotional and intellectual development than divorce or parental separation *per se*, the conflict is being perpetuated. As legislative changes in themselves have little impact on family law contested matters, such measures as *child inclusive* and *child focussed* approaches have been encouraged to ensure better outcomes for children.

(NOTE: See ATTACHMENT 2 for an analysis of the application of the 2006 amendments in a matter involving an Aboriginal child's right to 'grow up in culture'.)

Child Inclusive and Child Focussed Practices

A number of studies and reviews have found that there are significantly more benefits where the views of the child are heard, rather than merely relying on a 'child-focussed' dispute resolution. For instance, in one four year follow-up study about the two different approaches, it was found that '[c]ompared to the Child Focussed intervention, the statistically significant outcomes identified for Child Inclusive families four years after mediation were:

- Less legal action over care and living arrangements
- Lower rates of return to mediation
- Higher rates of overnight contact with fathers
- Greater stability of care and contact arrangements

- Higher satisfaction with living arrangements (fathers and children)
- Greater reduction in parent acrimony, for both mothers and fathers
- Greater confidence of fathers in their parenting capacity
- Better management of parenting disputes when they occurred post-mediation
- Lower impact of fathers' new partner on parenting disputes
- More reports by parents of having learned something about their child
- Lower conflict between parents as perceived by children
- Children feeling less caught in the middle between parents
- Children feeling less distressed by their parents' conflicts
- Children feeling closer to their fathers
- Lower level of conduct disturbance in children⁴

Further, parents in the studies admitted that they did not realise the impact of their behaviour on the mental health of their children; that they were surprised by how much the children had 'witnessed' or weren't fooled by assurances about their future. This was particularly so during the immediate post-separation time where conflict and acrimony levels can leave permanent scars. As the parties in the child focussed mediation sessions do not hear about their children's feelings/responses made during the independent clinician interviews, the effect on parental decision-making was much diminished.

Apart from the number of studies and reviews that indicate the effectiveness of CIP, there are a number of psychological factors which underscore the soundness of including the child/children's voices in decisions that affect them and their future. These include demonstrating:

- that their (the children's) opinions are important/that they are taken seriously; and
- that they have some 'ownership' of the process (which inspires trust and ownership in the outcome).

⁴ Children in Focus – Fourth Wave, Apr 2009 Family Transitions at 91

Aboriginal Cultural Perspective

The place of children in Aboriginal culture has always been in stark contrast to that of children in western culture. The emphasis on controlling the environment rather than controlling the behaviour of the child illustrates this difference very clearly. Aboriginal children were and are expected and encouraged from the earliest age to be part of decisions and activities that impacted on their lives. Unfortunately the degradation and corruption of the environment since colonisation has led to not only unfair assumptions about parenting styles (hands off equals neglect e.g.) but to assumptions that controlling the child [for the convenience of adults] is the norm.

Child inclusive practice is not only the most suitable form of mediation in terms of the findings of evaluations and studies; culturally speaking it is very similar to Aboriginal models of mediation. With all views of those who are affected by decisions being equally important in Aboriginal culture, it is usual to include children's views and feelings in any and all dispute resolution about their futures, their parenting arrangements and their home life. This includes feelings about contact with siblings, [extended] family members and other significant people who will be affected by the parent's decisions.

There are instances where parents' behaviour may warrant more intervention particularly where there has been violence towards the child/children. Even in those cases however, where the child's point of view is known, such as by providing statements from the child to both parents, the impact tends to lead to more positive outcomes.

Conclusion

In most literature or program design, CFP and CIP are treated as different (similar but equal) approaches, but in reality they are two different things entirely. That is:

- The aim of the mediation/conciliation is to achieve a child focussed outcome so that the best interests of the child are served.
- Child inclusive practice on the other hand, is the most effective method or way of achieving a child focussed outcome.

In other words, one is actually a goal and the other is the best way to achieve the goal.

2 ASPECTS OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE

Culture is largely acquired automatically as a result of growing up in a particular social setting, and thus not often the subject of scrutiny or appraisal. All people have a culture, even if we are never called on to define or describe it. As Mick Dodson said, 'it is not something we practise on Sunday afternoon while sipping chardonnay, listening to classical music; it circumscribes patterns of behaviour, values and even our world view, the detail as well as the outline'.

Aboriginal & Torres Strait Islander people are often called upon to articulate, describe and defend aspects of our culture. We are required to have a level of self-awareness, called on at a moment's notice to advise and educate with an expertise that usually required of an expert. Failure to confidently respond with an encyclopaedic barrage of information can lead to claims of 'not really being Aboriginal'.

It is too often the case, that non-Indigenous people assume that because Aboriginal & Torres Strait Islander people no longer hunt with spears or practise a lifestyle, as it was prior to the arrival of the British, that we have lost our culture. That is non-Indigenous people assume that Aboriginal & Torres Strait Islander people have been assimilated to non-Indigenous culture. The longevity of Aboriginal & Torres Strait Islander cultures however demonstrates its dynamic nature, an ability to adapt without losing the basic traditions of sharing, shaming and autonomy with a deep attachment to 'country' – Australia as a whole or just one part of it.

Cultural Awareness vs Anthropology

During the 1990s, the Aboriginal cultural museum was commissioned to be located at Yarramundi, once the National Museum of Australia (NMA) had relocated to Acton Peninsula. At the time of writing, it is undergoing extensive renovations and will re-open to display Nggunawal and other Aboriginal & Torres Strait Islander cultural materials and depictions representing the diversity of the Indigenous population in the ACT. While this is worth a visit, as well as the displays of the Gallery of First Australians at the NMA and the Australian Institute of Aboriginal & Torres Strait Islander Studies, these will not provide any real understanding of Indigenous culture

to the average viewer. Learning *about* other cultures provides little more than entertainment value or superficial knowledge.

A process of cross-cultural awareness on the other hand, gives insights that cannot be gained by attending a lecture or reading a textbook. If we are to deal effectively with people from other cultures, we must first understand something of our own. This way we learn something of the assumptions that underpin our perceptions about the world. Cultural awareness questions the very notion that our own cultural expressions are *normal*, something those who advocate a mono-cultural society are unable to appreciate. Comparisons made to the detriment of the other cultures or quaint notions of cultural superiority likewise demonstrate a lack of insight.

2.1 Land and Country

Land and country and sea are at the heart of Aboriginal & Torres Strait Islander cultures with many practices deriving from an understanding and appreciation of the land and its resources. Ceremonies are (were) held regularly to honour and regenerate the land and give thanks for its bounty. For instance, women in the red desert country still honour the work of sand worms with dances and body paintings that trace the ancestral journey and activities of this nematode so important to their environment. In the desert further west around Wiluna, remote communities come together to clean out the creeks in readiness for the rains, settle disputes, share stories, dance dances and sing songs of reverence for their surroundings. The ceremonies of people of the Torres Strait demonstrate gratitude for the gifts from the sea, combining this seamlessly with their embrace of Christianity.

Like language, where we come from defines us as a people and caring for our country so that future generations have the same opportunities, gives Aboriginal & Torres Strait Islander people meaning and purpose to life. This love of country is not like that of a farmer's or a suburban homeowner's when surveying their piece of Earth. As Governor Phillip noted in 1790, the natives around Sydney Cove became quite tearful and actively pined for their home country when away, the way others might speak longingly of seeing their mother. Losing their connection with land, as well as living in a society that has a differing cultural view of land and its resources, has had a devastating and long-term impact on Indigenous people.

2.2 Family Matters

For Aboriginal & Torres Strait Islander people, family is the most important unit. Family connections are usually mentioned first when meeting other Aboriginal people except in those parts of Australia when 'skin names', land and family relationships are part of introductions. Contrast this with non-Indigenous introductions where a person's job is the main indicator of or response to 'who you are/what do you do'. It is usually only as an aside that someone's occupation will be disclosed in Indigenous introductions. It is not really something for further comment or even interest unless it is relevant to the discussion.

In traditional social settings, family relationships are (were) formalised and categorised each with clear levels of reciprocity and responsibility as well as avoidance and liability. With some groups in the Northern Territory, north and western Queensland, Western Australia and South Australia, traditional relationships still guide every aspect of the lives of Aboriginal communities. For instance 'poison cousin' and 'in-law' avoidance relationships are absolute and can make taking statements from clients rather interesting. [For practitioners in the ACT, this will rarely if ever be an issue but, given the number of Aboriginal & Torres Strait Islander people in the ACT who have moved from other places, clients with these relationships may be encountered.]

Extended and blended families are still common in urban or contemporary Aboriginal social settings. Uncles and aunties, grandmothers, grandfathers and even cousins can have considerably more to do with children than is usual in non-Indigenous or modern family structures. Formal 'adoptions' are still practised in the Torres Strait Islander community with the authority of care-givers replacing that of the biological parents for all intents and purposes. The conscientious practitioner should enquire about all the relationships that Indigenous children are part of and who, apart from the obvious nuclear family or step-family members, may be involved or affected by Family Court decisions.

A basic principle of Aboriginal culture is that each person in a language group can identify their connection to every other person in that group. The family is enlarged to embrace the whole group (i.e. an 'extended family'). This is not done by extending the range of relationship terms but by using the same term and including more people under each term. This is known as the 'classification system of kinship'.

2.3 Children and Kinship

Child rearing practises are central to the development of the individual and the society at the same time. The way we raise our children reflects the values, interests and, it could be said, the maturity of a society. All cultures share a genetic imperative to procreate and protect offspring so that they can then do the same.

The impact on the environment since colonisation began, the breakdown of family and community dynamics and relationships has meant that traditional Aboriginal & Torres Strait Islander models of child-rearing have had to adapt, usually with little advice, information or support to do so. This is significant when considering the differences in parenting styles between Aboriginal and non-Indigenous people. What is often misinterpreted as 'neglect' on the part of Aboriginal parents is the result of values and practices that emphasise the collectiveness of child-rearing, a social responsibility as much as a parental one.

The emphasis on material comfort, a nuclear family, educational outcomes and job prospects as evidence of successful child-rearing, underpins the many presumptions in British (now Australian) law. This, coupled with ignorance about Aboriginal & Torres Strait Islander cultural values and practices, results in real disadvantage to Aboriginal & Torres Strait Islander clients and, more importantly, to our children.

2.4 The Stolen Generations

It is not possible to understand the dynamics and nuances that govern contemporary Aboriginal & Torres Strait Islander family life on the ACT without some reference to the so-called Stolen Generations.^{iv} Most, if not all Indigenous families have been affected to some degree either by their own experiences or by the ensuing trauma which is transmitted to each subsequent generation as surely as the benefits of colonisation have been handed down to non-Indigenous generations. As Rob Riley told *the Bringing Them Home Enquiry*, 'when you break up families, you break the font of knowledge of what it means to be a parent'. The model of nurturing which replaced this traditional knowledge has been shown to be deficient in raising healthy secure people. Many Aboriginal people still bear the emotional scars.

The refusal of the previous government to offer a formal apology on behalf of the Australian people and instead undertake community infrastructure projects provided

to others as a matter of course, in the guise of 'practical reconciliation' caused even more frustration and resentment on the part of those who continue to carry the burden. The recent actions of the current Prime Minister, Mr Kevin Rudd, in opening the first sitting of the Parliament of the new government with a 'Welcome to Country' ceremony (based on those so long ago when surrounding clans gathered for ceremonies) along with giving a personal and national apology to the 'Stolen Generations' as the first order of business,^{vi} means that many of them have now been able to relinquish the burdens they have carried for so long. A sense of pride has replaced the shame.

2.5 Family Violence

Over the past twenty years or so there have been a number of publications, research projects and government studies about the high incidence of 'aboriginal family violence'. This has included research based on criminal justice or health statistics, Aboriginal women speaking out about their circumstances, supported by mainstream women's and victims' groups. It has also been littered with media outbursts driven by government ideology and misinformation campaigns, and characterised by a lack of voice by those most affected, Aboriginal & Torres Strait Islander women, children and men.

For example, much of the literature, media stories and advice from government is characterised by what is termed 'Aboriginal violence'. This suggests that both parties, and if not both then certainly the perpetrator, are Aboriginal. Even more insidious is the underlying assumption that the violence is part of 'Aboriginal culture' rather than the result of trans-generational trauma. Aboriginal women are depicted as the passive victims of aggressive Aboriginal men acting out their frustrations with traditional methods.^{vii}

Over the past 200 years, as physical appearances make clear, an increase in the non-Indigenous population coupled with a corresponding decrease in the Indigenous population has resulted in many Aboriginal & Torres Strait Islander people having a non-Indigenous parent. Indeed what much of the literature has failed to appreciate is that Aboriginal women, at least in urban or rural settings, are more likely to suffer violence at the hands of a non-Indigenous partner. Under traditional law, the blood of

women is sacred, and those spilling it or causing it to be spilled face serious consequences.^{viii}

For ACT practitioners, many if not most Aboriginal children, will be from blended families with one parent from a non-Aboriginal background. This brings a different layer of complexity to the Family Law directive that Indigenous children should be ‘more than merely encouraged to [have contact with their culture and those who practise it]’ than in the case where both parents are Indigenous as in *M & L*.

2.6 Indigenous people and Mediation

Mediation is the favoured method for resolving disputes between Aboriginal & Torres Strait Islander people, albeit with significant differences to the western model of mediation where practitioners are supposed to be independent with no knowledge of the parties or their background. Indeed it is similar to ‘restorative justice’ practises where the desired outcome is restoring the situation to what it was before the dispute. Mediators are required to have detailed knowledge of the parties, even being related to one or the other or both, with the authority to enforce decisions and ensure no further discussion is entered into.

The following outcomes from the Darwin Family Pathways Network, Indigenous Family Mediation Showcase^{ix} illustrate this.

“What Stood Out”

- Importance of harmony of the community as a whole as opposed to a focus on the individual or nuclear family.
- Role of mediator in small Indigenous community encompasses far more than the facilitation of one dispute – requires living the part of the peacemaker 24/7.
- Importance of forums such as this to combat sense of isolation by providing support and connection.
- Impartiality of mediators is different when mediating in Indigenous communities as relationships are vital - impartiality is gained through fairness of process.
- The importance of ritual and ceremony (not just singing and dancing) in all of the models developed by Indigenous communities.

3 PROTOCOLS, STANDARDS AND GUIDELINES

Over the past twenty years or so, a number of agencies have developed a number of devices to assist or guide their interactions with Indigenous people. It is in the interests of all agencies who have dealings with Indigenous people to consider how they can improve relationships and that all members of the agency are aware of and use. The following is taken from the Department of Employment and Workplace Relations (Cth), Employment Services Toolbox and provides an excellent guide for dealing with Indigenous clients.

‘Indigenous Australians are as diverse as any other group in the community and so it is important not to make assumptions about individuals on the basis of generalisations.’

- Be aware and open to challenging your own beliefs and perceptions.
- Get to know your clients so you can learn about their particular experience and background.
- Be conscious when discussing issues affecting Indigenous people that there is a wide diversity of opinion about those issues within Indigenous communities and that you cannot assume every Indigenous person will hold the same view.
- Be aware that Indigenous people's experiences vary from strong family support backed by experience and connections, to those with no experience or contact with family/community and marked by inter-generational trauma.
- Be aware of whom you are dealing with — if you do your homework you will be able to establish more productive relationships and meet the client's particular needs more effectively.
- Find out as much as you can about your local Indigenous community.
- The multiple barriers faced by many Indigenous people may require a range of service providers such as health, housing, community support and education. (You may need to be aware of these services and how to access them as a range may be required when considering the best interests of Indigenous children and their ability to connect with culture.)

Many Aboriginal and Torres Strait Islander people find approaching a mainstream service or agency very intimidating. This is particularly so if the person has a traditional upbringing. Bear this in mind when making appointments.

A few measures you might consider:

- Seek some advice from your local ICC or Aboriginal organisation.
- Provide extra time for the interview to allow sufficient time to engage with your client.
- Suggest they bring a friend with them.
- Consider employing an Indigenous liaison officer, particularly when you are in areas of high Indigenous population.

Many Aboriginal and Torres Strait Islander people are not used to or comfortable with disclosing information about themselves. In some cases their history of interaction with non-Indigenous society has made them very wary of such disclosure. Respect their privacy and be prepared to meet them more than once to get to know them.

When conducting an interview:

- listen carefully
- be respectful
- adjust your use of language to suit the individual
- Bear in mind that initial eye contact with some Indigenous people, particularly those from more traditional backgrounds, can be very impolite. Be aware that, in turn, your client may not keep eye contact with you during the whole meeting and this may be consistent with appropriate and polite behaviour
- be aware that not all Indigenous people will have access to documents such as birth certificate, drivers licence, marriage certificates, passports or other forms of identification

Don't assume that everyone will be able to fill in forms. Offer assistance if help is required or seek assistance from the client's friend if one is present.

CULTURAL CHECK LIST¹

- Accept that your own behaviours stem from a set of cultural values.
- Accept that your perceptions stem from a set of concepts and attitudes developed by your cultural group. They are biased and subjective.
- Understand that other cultures are not necessarily trying to achieve the same things as you.
- Understand that other cultures are trying to achieve the same things as you, but may do so in a different way.
- Other cultures may have a different predisposition to uncertainty avoidance.
- Other cultures may see the relationship between the individual and the collective differently from you.
- Other cultures may have a different perspective on 'power relationships' – between bosses and workers, or between professionals and clients e.g.
- Remember that cultures manage their bodies differently, requiring different behaviours and imposing different constraints on physical actions.
- Acknowledge that your language is not better (more precise, more complex, more beautiful) than other languages.
- Above all don't assume that your way is THE WAY – be prepared for difference.

BARRIERS TO EFFECTIVE COMMUNICATION

Language

Aboriginal & Torres Strait Islander people in the ACT tend to be very effective communicators in English. For many, traditional languages (or the knowledge of them) have been lost, apart from a few words from a variety of sources. Some however have grown up in remote communities, and or can speak or understand up to five different Australian languages, as well as English.

There is also within the Aboriginal community, a distinct and different communication, a form of 'Aboriginal English' interspersed with non-verbal but well understood symbols.^x People from Perth to Cape York, from Broome to the Gippsland Lakes know this language and use it when communicating with other Indigenous people.

This different form of English, coupled with a natural disinclination to discuss personal matters means that communication with Indigenous clients can prove challenging for practitioners. Extra care must be taken to ensure that clients are able to disclose all relevant facts.

Acknowledge that your language is not better (more precise, more complex, more beautiful) than other languages.

Body language

Traditionally Aboriginal & Torres Strait Islander people have used body language as much as spoken language to communicate, especially over long distances; picture the grand gestures of a figure silhouetted against the skyline calling the family together or silently pointing out prey to fellow-hunters. Today the tradition continues with unspoken gestures still forming a major form of communication between Aboriginal & Torres Strait Islander individuals.

As a result, Aboriginal & Torres Strait Islander people tend to be very conscious of body language and consider that what is not being said is as important as what is being said. This coupled with a legacy of mistrust and cynicism about 'whitefellas' motives, means that practitioners have to be very aware of their own body language and non-verbal communication.

Remember that cultures manage their bodies differently, requiring different behaviours and imposing different constraints on physical actions.

Eye Contact

Differences in cultures can mean differences in physical expressions of common human values. For instance, making and maintaining eye contact when talking to someone from a western culture is considered a mark of respect,^{xi} while the same may be interpreted as disrespectful in other cultures or as a challenge to autonomy. In other words clients may become uncomfortable with too much 'eye contact' with the result that they are unable to articulate their views.

This should not be confused with the dropping of the head which is a universal expression of 'shame'. Many Aboriginal & Torres Strait Islander people have deep-seated feelings of shame and low self-esteem. Indeed it is the most pervasive consequence of colonisation – to be characterised as too low in the social scale to have your property rights recognised, to be counted with the flora and fauna and subject to the casual cruelty and neglect of the missions where those with light coloured skins were taught to be ashamed of their darker family members while still maintaining their own lowly position. (see further discussion below)

Shame and social conditioning

As mentioned previously, the notion of 'shame' and its role in motivating certain human behaviours is critical to understanding barriers to communication. Traditional Aboriginal society knew well the value of shame as a form of social control, more powerful than physical punishment or incarceration. Indeed it is one of the three main tenets of Aboriginal culture, the others being 'sharing' and 'autonomy'.^{xii} Even today it is used to ensure that egalitarian principles are adhered to. To be singled out or effusively praised, to take all the credit is considered not culturally appropriate or 'shameful' to those receiving the praise.

Today largely through the work of the Sylvan S Tomkins Institute, we are gaining a better understanding of the dynamics of shame, how it can be used to isolate people from, as well as reintegrate them back into society.^{xiii} The latest approaches to

addressing criminal offending, including restorative justice practises such as victim/offender mediation, circle sentencing, youth diversion panels and so on, are based on this understanding.

Practitioners and mediators should have some understanding of the different types of shame and the impact it can have on effective communications. The shame associated with being racially vilified, discriminated against and treated with disdain due to a physical characteristic effectively stifles openness and trust.

Racism

It is important to note that racism is learned behaviour, not a natural or instinctive human reaction. Researchers such as Hollingsworth *et al* have identified the rise of the phenomenon in 18th century England where a relatively innocent word, 'race', used to describe people from a particular locale (e.g. 'a race of Londoners') became something entirely more insidious. Disparate interests and groups throughout Britain with little in common beyond geography started to define themselves not so much by who they were, but by who they were not, (as in 'we may not know who we are, but at least we're not *them*'). By grouping others through a common characteristic, like skin colour, choice of food or country of origin, it is not only possible but permissible to assert all manner of negative attributes (arrogance, laziness, violence, ungodliness and so on) to the other group, while ignoring the existence of the same attributes in one's own.

The physical affect of racism is actually 'dissmell' which like 'disgust' (taste) is a primitive response that enables us to avoid poisonous foods or unhealthy situations. It is no co-incidence that one of its earliest expressions of racism was against people who smell 'funny' - 'garlic-eaters, curry-eaters' etc – with turning up the nose clearly displaying the viewer's aversion. Likewise it is no co-incidence that perfumes and the current array of products to hide smells plays on our human need for acceptance (or conversely, not to be rejected) on this very elemental level.

Practitioner client relationships

Indigenous culture and society does not compartmentalise relationships and clients may see the service provider as more than someone 'just doing their job'. Non-Indigenous clients realise that when lawyers etc say they will do 'whatever it takes', they mean "professionally". For many Aboriginal people, there is no such distinction – you will be seen as though you have made a personal promise or formed a personal relationship in non-Indigenous terms.

The egalitarianism that is still a pervasive influence in contemporary Aboriginal society also means that 'position' does not carry the same sense of authority, and certainly nowhere near say, the importance of 'family' connection to establish status. Being a lawyer or police officer, school teacher or prime minister is of no consequence in itself, with personal trust having to be established rather than a given due to one's professional standing.

This can be a source of tension in many cross-cultural exchanges where non-Indigenous people expect that by virtue of their position, they are (or should be) perceived as trustworthy or credible. Taking the time to get to know Aboriginal & Torres Strait Islander clients on a personal level on the other hand, by sharing similar experiences, talking about childhood experiences etc^{xiv} will pay far greater dividends than trying to convince them of your worth based on your number of years of study and work experience.

To be a truly effective communicator the careful practitioner will

- Acknowledge cultural difference and different versions of history;
- Understand the impact of their own language including body language;
- Consider how shame and desocialisation, racism and discrimination influence behaviours;
- Allow for some flexibility; and
- Take time to develop trust.

ATTACHMENT 1

FAMILY LAW ACT provisions dealing specifically with Aboriginal and Torres Strait Islander children

1. S60B (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests)
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)
- (3) For the purposes of subparagraph (2) (e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right to:
 - (a) maintain a connection with that culture, and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture
2. S60CC (3)
 - (h) if the child is an Aboriginal or Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal & Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact of any proposed parenting order under this Part *will have on that right* (my emphasis)

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of S60B(2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture (S60B(3))

3. S61F Application to Aboriginal or Torres Strait Islander children

In:

- (a) applying this Part to the circumstances of an Aboriginal or Torres Strait Islander child; or
- (b) identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child, the court must have regard to any kinship obligations, and child-rearing practices of the child's Aboriginal or Torres Strait Islander culture.

4. S69ZX(3) The court may, in child-related proceedings:

- (a) receive into evidence the transcript of evidence in any other proceedings before:
 - (i) the court; or
 - (ii) another court; or
 - (iii) a tribunaland draw any conclusions of fact from that transcript that it thinks proper; and
- (b) adopt any recommendation, finding, decision or judgement of any court, person or body of a kind mentioned in any of subparagraphs (a) (i) to (iii)

Note this subsection may be particularly relevant for Aboriginal & Torres Strait Islander children

ATTACHMENT 2

Application of the Family Law Act Amendments

It is not always easy as noted in *Re CP*^{xv} where the Tiwi mother with the full support of the extended family, appealed against a residence order with a non-Tiwi Indigenous carer. As the Full Court noted '[T]his case highlights difficulties in the applicability of the Family Law Act to cultural systems of family care which like the Tiwi way, contemplate circumstances where the child will live and be cared for within a kin network'. Further, the Court stated that 'for formal legal purposes, the many non-biological mothers of a Tiwi child are invisible to the law'.

More recently the Full Court has grappled with how to interpret the amendments under the FLA. In *M & L*^{xvi}, two of the three judges of the Full Court of the Family Court allowed an appeal on the basis that the Federal Magistrate had erred by giving too much emphasis to the cultural considerations of one party over another.^{xvii}

Declaring that attachment to 'traditional culture' does not define who is 'an Aboriginal' is at odds with what the FLA amendments are trying to achieve. For instance, those Amendments refer to the 'right to enjoy culture, ... maintain contact with that culture', *not* the right to enjoy contact with Aboriginal family members.

It is disturbing then that their Honours should find that the lifestyle of a fringe dweller in an urban setting may be defined as 'cultural', or equivalent to living on country and using language and learning ceremonies. The legislation is intended to protect the latter – that is the child's right to enjoy 'with others who share that culture'; not the former which has little to do with 'Aboriginal culture' and more with acquiring one characterised by substance abuse, violence, mental and physical health issues and other features of dysfunctionality and trauma.

Their Honours also found that there was no basis for the Federal Magistrate to find that the children had been raised 'collectively' up to that point in their lives, that the evidence suggested they were primarily cared for by their mother (albeit with the assistance of others, including paternal parents and grandparents which would suggest that they were being raised collectively at some point). As being raised collectively is a *key* feature of Aboriginal culture, a correct reading of the legislation would arguably require this to *be* a key consideration when determining such matters, and not whether or not the children *had been* raised collectively.

As was found, the children would be well-cared for in an extended family in a 'dry' household where culture was the main influence on lifestyle, with western educational opportunities and material benefits as appropriate. Notwithstanding this their Honours believed that attachment to mother was the paramount consideration when determining the best interests of the child. In rejecting the 'cultural arguments' the Court effectively reversed efforts to achieve recognition of Aboriginal & Torres Strait Islander culture under the family law. In other words, nothing much has changed; there is still little understanding of Aboriginal culture, and the connections to that culture which the legislation was designed to support continue to be eroded.

The issues for supporting the cultural aspirations of Aboriginal & Torres Strait Islander children in these circumstances include:

- identifying those things that are the expressions of Aboriginal culture (including collective child-rearing, property interests and responsibility for 'country');
- having secure arrangements for children to maintain connections to culture;
- being able to articulate the challenges faced by Indigenous children to maintain their connection to culture; and
- the principles and history underlying the amendments to the FLA to support legal arguments.

ATTACHMENT 3

FURTHER READING AND REFERENCES

Aboriginal and Torres Strait Islander Law and Justice Services in the ACT – a Practical Guide, August 2010

ACT Aboriginal Justice Agreement (AJA) 2010, Department of Justice and Community Safety

Child Focussed Practice and Child Inclusive Practice in the Family Relationships Services Program – A briefing paper written in consultation with the sector, February 2006

Children Beyond Dispute: a four-year follow-up study of outcomes from Child Focussed and Child Inclusive post-separation family dispute resolution, La Trobe University, April 2009

Culturally Responsive Family Dispute Resolution in Family Relationship Centres: Access and Practice, University of Western Sydney, June 2010

I Want to be Heard: An Analysis of needs of Aboriginal and Torres Strait Islander illegal drug users in the ACT and regions for treatment and other services – Community Report, February 2008

Voices from the Campfire: establishing the Aboriginal and Torres Strait Islander Healing Foundation 2009

Working and Walking Together: Supporting Family Relationships Services to Work with Aboriginal and Torres Strait Islander families, Secretariat for National Aboriginal & Islander Child Care (SNAICC) 2010

Australian Institute of Aboriginal & Torres Strait Islander Studies (AIATSIS), Action Peninsula 02 62461111. (Also in the same location – the Aboriginal Studies Press with various publications)

Local Aboriginal and Torres Strait Islander community organisations:

- Winnunga Nimmitjah Aboriginal Health Service
- Gudan Gulwan Youth Aboriginal Corporation
- The connection (young Indigenous IV Users)
- Ngunnawal Local Aboriginal Land Council (Queanbeyan)
- Aboriginal Justice Centre
- NSW/ACT Aboriginal Legal Aid Service (Canberra Office)

ENDNOTES

ⁱ When studying psychology at Uni in 1974, I came across the work of the Jewish psychologist Bettelheim who had been incarcerated by the Nazis and described the behaviours of his fellow prisoners as a result of what they were being subjected to, which as we know was horrific. It was as if I was reading about my own relatives and so I realised that certain behaviours, which I had often been told were 'Aboriginal' were in fact symptoms of psychosis resulting from the effect of brutal de-socialisation. This was particularly so for Aboriginal people after slavery was effectively outlawed in the late 19th century following the American Civil War and the 'Aboriginal protection' acts and the missions were established to gather a new crop of unpaid labour.

ⁱⁱ No 42 Spring/Summer 1995

ⁱⁱⁱ 'The Recognition of Aboriginal Customary Laws', report no.31 1986

^{iv} Note that the phrase 'stolen generations' originally referred to the recognition that removing Aboriginal children from their community/family meant all the generations following (i.e. their descendants) would have had their culture stolen from them. The current [mis]use of the phrase as stealing generations of Aboriginal children is the result of confusion contained in advice to John Howard, the Prime Minister at the time.

^v 12 February 2008

^{vi} 13 February 2008

^{vii} Kirinya Khamstone, June 2004 *'Development of a model of engagement with Indigenous women as victims of family violence who are applicants or potential applicants for protection orders in the ACT'* Report prepared for the ACT Legal Aid Office'

^{viii} This was affirmed in a traditional Yolgnu law ceremony held at Galiwinku in September 2005 which 'law people' from the Top End including the author, the Chief Justice of the NT Supreme Court and the Chief Magistrate were invited by message stick to witness the ceremony.

^{ix} 17/18 April 2007

^x Words like "gubber" (from the English word 'governor') used widely in the ACT for non-Indigenous people generally (or the more popular shortened form "gub") not only indicate a common patois, they illustrate the historical relationship between the cultures. Likewise the word 'bullyman' for policeman speaks volumes about that relationship.

^{xi} Interestingly this is based on the notion that we can tell if someone is lying by looking at their eyes. While looking down to the left is said to denote that the teller is not being entirely truthful, a better way is to look at the mouth from where the untruth is actually issuing.

^{xii} An excellent outline of this is contained in a publication by the Centre for Aboriginal Economic Development Research at the ANU by Schwab et al who were studying the 'success and failure of education' in a remote NT community. They found that notwithstanding the apparent failure according to formal standards (20% attendance etc), the facility met the cultural aspirations of the community (or as one community member on learning that they were having a meeting to hear about the government's education policy, put it *'that education mob gotta learn our policy'*.)

^{xiii} According to psychologists such as Nathinson who devised a 'compass of shame' to explain the four main responses to shame/embarrassment/humiliation/mortification etc, society condones different responses at different times throughout history. Currently the socially acceptable responses are 'denial' and 'attacking others'.

^{xiv} One of the worst mistakes that many (well-intentioned) people make is to recite all their experiences of dealing with *other* Indigenous people. Personal means personal whatever culture or social setting, and by starting with the phrase 'I hope it's ok to ask you this?', most people are happy to talk about themselves. This is different to letting someone rave on about their personal heartaches (which you will hear about anyway) – it's about establishing rapport and trust.

^{xv} (1997) FLC 92-741; 21 Fam LR 486

^{xvi} FamCA 396 (4 May 2007)

xi The author was the CEO of the Aboriginal Legal Service (NAAJA) who handled the matter and thus has certain insights and knowledge of the facts and legal argument. This includes the reasons to take the case, namely to test the application of the amendments about what actually constitutes 'Aboriginal culture' and whether the courts have any intention of giving it priority.

xii The word appears to be made from two words 'ngunna' meaning 'here' and 'wal' a generic prefix meaning 'from' (among other things), indicating the speaker, thinking s/he was responding to a query about where s/he was from, replied that s/he was 'from here' or that s/he was 'ngunnawal'.

xiii The discovery of the skeletal remains of what is imaginatively called 'Lake George man' at some 38,000 years old debunked the theory that Australia had been populated by a smaller, more gracile race who had travelled from Asia during the last great Ice Age around 25,000 years ago and were hunted to extinction by larger, aggressive newcomers the ancestors of today's Aboriginal people.

xiv The district 'Belconnen' comes from Ngunnawal words meaning 'I don't know', indicating that the speaker was probably saying they had no idea what was being said to them. A number of place names around Australia have been so named by well-meaning English speakers enquiring about the name of a particular location.

xv Note that the phrase 'stolen generations' originally referred to the recognition that removing Aboriginal children from their community/family meant all the generations following (i.e. their descendants) would have had their culture stolen from them. The current [mis]use of the phrase as stealing generations of Aboriginal children is the result of confusion contained in advice to the previous Prime Minister.

xvi 12 February 2008