



## OUTLINE OF EVIDENCE OF PETER HOOD AND TESSA THEOCHAROUS DECEMBER HEARINGS 2022 (CRIMINAL JUSTICE)

14 DECEMBER 2022

### I BACKGROUND: PETER HOOD

1. My name is Peter Hood. I am a proud Kurnai man with connections to Yorta Yorta, Bangerang, Taungurung and Wurundjeri ancestry through my Mum, and traditional ties to Gunditjmara through my Dad.
2. I live in Gippsland, Victoria.
3. Since 2008, I have been the Managing Consultant of the Kurnai Legal Practice, which specialises in Indigenous justice and policy.
4. I have also been involved in Indigenous affairs in the Gippsland area since 1987.
5. I am presently a member of the First Peoples' Assembly of Victoria, for the South-East Region.
6. I have previously worked in the following roles:
  - (a) an Aboriginal Educator in Morwell;
  - (b) the Juvenile Justice worker for the Central Gippsland area;
  - (c) a Field Officer for the Victorian Aboriginal Legal Service (**VALS**); and
  - (d) the Program Manager for the Kurnai Aboriginal Youth Crisis Support Centre program with the Victorian Aboriginal Child Care Agency (**VACCA**).

### II BACKGROUND: TESSA THEOCHAROUS

7. I am the Principal Solicitor at Kurnai Legal Practice and have been since its inception in 2008
8. I previously worked as a criminal defence lawyer elsewhere in the private sector and in the community legal sector, including at VALS.
9. I have proudly worked as a defence lawyer for First Nations people for almost 20 years

### III ESTABLISHMENT OF KURNAI LEGAL

10. We (Tessa and Peter) established Kurnai Legal in 2008.
11. We set up Kurnai Legal Practice with a second-hand laptop and a lot of ideas.
12. We had a lot of people coming to us who wanted legal representation, and we have made it work through effort and good will.
13. We now have a lot of people around us, including other lawyers and an administration team.

#### ***Reasons for establishing Kurnai Legal***

14. In Tessa's previous legal roles, she found it difficult having a list of 20 to 30 clients in a day. She felt as though she could not do justice to them.
15. Tessa also found it difficult first meeting clients on the day at Court. She found it is hard to build trust, rapport and to fully understand the circumstances of a client, where she met them

immediately before their hearing. She also found it hard to hold a proper conference at Court when there is no privacy, and the police are running in and out of the building.

16. In that model, you don't have time to have a cup of tea with your client and to chat for as long as you and they need, before the client is comfortable and ready to go to Court. Tessa wanted to be able to give more time to her clients and to build a stronger relationship with them.

#### **IV KURNAI LEGAL PRACTICE**

17. Kurnai Legal's practice is all private revenue-based. We have never received any government funding. We rely largely on legal aid funding for the clients that we assist. We also run a lot of our cases pro bono.
18. We have recently appeared in courts in Warrnambool, Geelong, Broadmeadows, Latrobe Valley, Dandenong, Horsham and Melbourne. Our practice is unusual for a firm of this size in that it is genuinely state wide. Within those regions we regularly appears within the Magistrates' Court, Children's Court and County Court jurisdictions.
19. Due to conflict issues, we generally do not work in the child protection space. There are enough conflicts just within criminal practice, but it becomes very problematic in child protection practice.
20. A number of our matters demonstrate how the criminal justice and child protection systems interact.
21. For example, in recent years, we represented a young Aboriginal child with experience with the child protection system in an appeal before the Supreme Court of Appeal in 2021. To the best of our knowledge, this is the only appealed bail decision for a child. This decision is now used by lawyers for all children in bail applications.
22. The appeal was successful – the Court of Appeal decided that bail should be granted to the child, because they did not pose an unacceptable risk.
23. We are proud of the outcomes that we obtain for our clients.

#### ***Flexibility in our model***

24. Given that Kurnai Legal operates in a private practice model, and can do things like physically pick up clients and accompany them to court.
25. During the early years of our practice, Peter would go out to public housing areas in Richmond to ask if any of the Aboriginal community members had court coming up. Peter knew a lot of these people and they trusted us to help.
26. Peter still goes out to meet with clients wherever they are, such as Reservoir or Broadmeadows, in order to connect them with Kurnai Legal's services and accompany them to court.
27. One of our lawyers had a 14-year-old boy that had court, and the Koori Youth Justice worker said that they could not get the boy to come to court. However when Peter went around to the boy's house and sat down to have a chat to him, the boy said he was happy to go to court.

#### ***Other services provided by Kurnai Legal***

28. Kurnai Legal provides non-legal services to its clients. For example:
  - (a) Kurnai Legal provides clients with appropriate clothes for court, which many would otherwise not have;
  - (b) Community members often drop-in to Kurnai Legal when travelling, such as when they are on their way to funerals, and Kurnai Legal can provide them with money for fuel;
  - (c) Tessa personally put up bail surety for a client a few years ago, to enable a client to return home; and
  - (d) Kurnai Legal has also bought a fridge for one of its clients.
29. For us, it is very important to be present for community all the time. Community knows we are here. As far as we are concerned, these services are what we part of what we do, aside from our criminal justice work. As far as we are concerned, it is all one.

30. Community drop in at our office all the time. They know that they can come in and speak to us, about anything, either Peter or one of our support staff.
31. Even if they can't have a conference with us immediately, we can provide the time and space to meet with them.

## **V AVOIDING WARRANTS**

32. Our team at Kurnai Legal invest a lot of energy in locating and accompanying clients to Court to avoid a warrant being issued.
33. A large part of the punitive treatment that Aboriginal people face is that they miss their Court date, have a warrant issued against them, and then are charged with failing to appear while they are on bail. This makes it hard for them to apply for bail in the future.
34. For example, we have a young First Nations lawyer who was able to track down a client who had not attended Court, through his connections. That lawyer drove over and picked the client up, and as a result, that young man did not get a warrant for non-appearance.
35. We also use social media to send messages to family members of our clients and help track them down for court appearances and appointments with Corrections. Other Legal Aid funded organisations cannot do that and are hampered by their rules and policies, which impacts the outcomes that they can achieve for their clients.

### ***COVID-19 related proceeding***

36. We represented an Aboriginal man in an urgent Victorian Supreme Court hearing during the COVID-19 pandemic .
37. Our client had been bailed by the Melbourne Magistrates' Court for some fairly minor offences. He had been told by the Court that he would not need to appear before the Court, because hearings were being adjourned administratively due to the COVID-19 pandemic.
38. However, the police prosecutor sought a warrant and a Magistrate issued a warrant for his arrest. He was found asleep on a bench in Collingwood because he had homelessness issues. They arrested him and he was presented before the Magistrates' Court over the weekend. He represented himself at the hearing and applied for bail, which the police opposed. He was remanded in custody and bail refused.
39. Tessa urgently sought another hearing for an application for bail, which the police opposed again. The Magistrate did not make a decision on bail and remanded our client in custody for a further 12 days.
40. That same day, Tessa filed an application in the Supreme Court. Once we got to the Supreme Court hearing, the police backflipped on their position and advised the Court that they no longer opposed bail being granted. The Supreme Court then granted bail to our client.
41. The police continued to oppose bail, until the Supreme Court hearing itself, even after they were made aware that the warrant should never have been issued in the first place.

## **VI JURIES**

42. We have recently been confronted with the issue of how to effectively represent Aboriginal clients in front of all-white juries. Kurnai Legal has had an increased number of jury trials for its clients in the past 6-12 months.
43. To be selected for jury duty, a person has to be on the electoral roll.
44. We know that a lot of Indigenous people won't enrol to vote because they are disenfranchised, so they can't be chosen for juries. Choosing juries from people enrolled to vote only is problematic for Indigenous accused.
45. In her 20 years of legal practice, to the best of her knowledge, Tessa has never seen an Indigenous person on a jury.

46. In his 30 years of work supporting Aboriginal people interfacing with the criminal justice system, to the best of his knowledge, Peter has never seen an Aboriginal person on a jury.
47. Kurnai Legal recently had a lengthy criminal trial involving a jury. We had an amazing team on the case, including a good barrister. We didn't sleep for weeks and the trial was very stressful. We had our administration team running things across to Court on a minute's notice. With our cases, the whole office is involved.
48. We successfully persuaded the Court that our client was not guilty. When the Court decided that our client was not guilty, everyone burst into tears, including his family outside. It was a moment of exuberance and relief.
49. Against the odds and despite years of injustice, the system worked and our client was vindicated.

## **VI BEHAVIOUR OF POLICE**

50. We have observed instances of the police being openly racist towards our Aboriginal clients.
51. Now that the police wear body cameras, we have seen clear evidence of racist treatment of Indigenous people by police, including:
  - (a) the use of racial slurs; and
  - (b) overuse of tasers.

### ***Example #1***

52. There was a recent arrest of a young intellectually-disabled Indigenous man in South West Victoria. The young man was tiny, would have only weighed around 40 kilograms, wringing wet. The police pulled him over in a car and almost immediately tasered him, without warning.
53. His mother, who was also in the car, was screaming because she thought her son had been shot. The police swore at her and told the young man to get out of the car as they repeatedly tasered him.
54. After they arrested him, the way that the police officers were interacting with each other was really troubling. They were asking each other if they were alright and almost congratulating each other, while the young man was barely breathing and the mother was screaming, thinking they had killed him.

### ***Example #2***

55. We also have footage of the police jumping over a fence to arrest one of our Indigenous clients. He was tasered repeatedly, dragged onto the footpath and beaten.
56. There were four to five police officers assaulting this young man. He couldn't move and he lost control of his bladder.

### ***Example #3***

57. For one of our non-Indigenous clients, we saw police body camera footage of him passed out cold from drug use on the boot of a stolen car. To us, it looked like the police almost lovingly woke him up and cradled him.
58. When you contrast that with the way that we see our Indigenous clients get treated when they are arrested, there is a big difference.

### ***Example #4***

59. A single Aboriginal mother was in a supermarket carpark in the Latrobe Valley and backed into another car. The mother went to the police station and tried to report what had happened, but they would not take her report, so she went home. That evening, that police turned up at her house with a tow truck to impound her car.
60. There were 10 - 12 police officers banging on her door to impound her car and arrest her. She has a background of family violence and trauma, so she was worried about being dragged out of

her house by all of these male police officers. She also has a young son with a serious medical condition.

61. The mother rang us at 9pm that evening, and she was very upset.
62. Peter went to the house and immediately put his hands in the air when he exited the car , explaining he was there to help. It was that intense.
63. The police took the mother's car and charged her with ridiculous offences, including making threats to kill. Kurnai Legal did pro bono work for the mother to help her get the car back and to get the charges dropped.
64. We rang the sergeant at the police station and said that the mother would attend the station the next day by appointment.
65. Notwithstanding this, the police later said that the family was "uncooperative" with police.

#### ***RAJAC – strip searches***

66. We identified from our work an issue whereby Aboriginal kids were commonly being strip-searched every time that they were taken into custody.
67. Our concerns were raised with the police and youth justice workers, but it was only when we raised the issue in the Regional Aboriginal Justice Advisory Committee (**RAJAC**) that Kurnai Legal sits on in the Latrobe Valley (Gippsland), that others had the opportunity to share a concern that they were also seeing this in their work.
68. This resulted in a review by police, and a state-wide policy change. All because we raised the issue locally, and stuck to our guns.
69. We think that Kurnai Legal should be invited to be part of the Aboriginal Justice Caucus and the Aboriginal Justice Forum, where Kurnai Legal is doing work all across the State. We have important things to contribute.

## **VII BAIL LAWS**

70. Legal representation is so important for every person as soon as they are taken into custody. Taking away someone's liberty should be at the very end of the spectrum.
71. When police are confronted with an Aboriginal person, they often remand them for trivial reasons, rather than bailing them. The police oppose bail for our clients in nearly every case filed with Court.
72. Twenty years ago, most of Tessa's clients would be bailed at the police station, or you could negotiate for them to be bailed. However, Tessa has not had the police consent to bail for one of her clients at Court for the last five or six years.
73. First Nations people are much more likely to be confronted by homelessness, drug and alcohol issues and mental health issues, giving the police a reason to tick the box not to grant bail.
74. Tessa often reminds police officers when she goes to police stations that they are able to grant bail, such as when she sits in on records of interview with clients that are particularly vulnerable.
75. Following the high-profile case of James Gargasoulas, our observation is that there is a lot of trepidation on the part of police about being the decision-maker that grants bail, in case this leads to some kind of disaster. The police often use this as an excuse to make decisions not to bail someone or to send the matter to Court. A client is rarely assessed at first instance as having 'exceptional circumstances'.
76. For our clients, this means that they are relying on the Magistrate to make the correct decision on bail, without then having to appeal to the Supreme Court.

#### ***Deaths in custody***

77. When Peter attended the first sitting of the First Peoples' Assembly of Victoria, he recalls having asked the Premier and Minister Jennings about bail laws, and the Premier saying that he would get back to him.

78. Approximately three weeks later, a young Indigenous girl, Veronica Nelson, passed away in jail on a shoplifting charge. She had been refused bail. Peter knew Veronica and her family personally
79. Veronica went into remand, having been unrepresented in that first decision, as to whether to grant of bail.
80. To Peter, Veronica's case highlights the importance of specialist lawyers such as Kurnai Legal providing timely legal representation to First Nations people impacted by unnecessary remands, and risk-averse bail decisions.

### ***Experience in bail application before Magistrate***

81. In one matter that we can recall, we were representing a young Indigenous client going before a Magistrate in regional Victoria, regarding their application for bail.
82. Tessa had done some great work on the matter, including organising referrals to support services, which effectively forced the Magistrate to grant bail.
83. Despite the positive outcome, we were shocked when the Magistrate warned our client *"next time you come before me, you won't be able to play the Indigenous card"*.

## **VIII ROLE OF KOORI COURTS**

84. In our work, we consider Koori Courts are generally an improvement on the mainstream Court system, particularly when the judicial officer is the right person. It can achieve good outcomes.
85. However, Indigenous people have to plead guilty to go to the Koori Court, which is a barrier.
86. We think consideration should be given to the justice system having a cultural model generally, rather than only being able to access the cultural model when pleading guilty.
87. We recently did a plea in the Koori Court for a woman with mental health difficulties, who was facing imprisonment. It was the judge's first Koori Court sitting. It was a really good sitting.
88. The main Elder at the hearing knew the woman facing imprisonment and her family very well, had seen her grow up. This meant that there were real connections to the family, knowledge and history.
89. The sentencing conversation and the attitude of the judge was positive.
90. In this example, the Koori Court worked wonderfully, particularly in comparison with the experience through the mainstream Courts.
91. There was also a media application for documents in this proceeding, including the Defence submissions. However, there were very sensitive cultural matters in the Defence submissions that went to Sorry Business. The judge did not allow access to the documents for those reasons.
92. To us, this case demonstrates that positive cultural changes are slowly happening. But we think is important that change happens across the justice system more broadly, not just where a plea is being taken.

## **IX IMPORTANCE OF CULTURAL KNOWLEDGE IN PROVIDING LEGAL SERVICES TO FIRST NATIONS PEOPLE**

93. The expansion of Koori Courts means that the cultural information that the system requires from us is ever-expanding. It is often difficult to get the breadth of the cultural knowledge that the Courts require, such as genealogy information and cultural mapping.
94. The Courts are expecting lawyers and law firms to have access to cultural knowledge that they do not have access to.
95. Due to the impact of the Stolen Generations and disenfranchisement, clients have often lost a lot of that information themselves. They do not know the names of their grandparents or where their tribal links are.

96. At Kurnai Legal, Peter brings cultural knowledge to the role of the lawyers. Tessa has never seen the kind of cultural knowledge that Peter provides in another law firm.
97. It also sometimes feels inappropriate to have non-Indigenous lawyers sit down with their clients and ask for cultural information, so Tessa often brings Peter into these conversations with Kurnai Legal's clients.
98. When Koori Court officers call Kurnai Legal with questions regarding an individual's Aboriginality and connections, Tessa often tells them to speak with Peter.
99. Tessa wonders how the justice system will deal with the increasing level of detail of cultural knowledge that Courts expect will be able to be provided.

## **X OTHER POSITIVE OUTCOMES FOR CLIENTS OF KURNAI LEGAL**

100. Peter is proud to see a few of Kurnai Legal's former clients working in Gippsland with First Nations Traffic Management.
101. They all have jobs now and they wave to Peter when he goes past. They have come through the system successfully. They've made multiple rehabilitation attempts and bail applications, and now they are earning a wage and supporting a family.
102. It is critical for men to have employment opportunities, earn income and support their families. It gives them a sense of purpose. There a few Indigenous women working in the area now as well. To see First Nations people working publicly makes Peter really happy.