



FAMILY LAW COUNCIL

IMPROVING THE FAMILY LAW SYSTEM FOR ABORIGINAL AND TORRES STRAIT ISLANDER CLIENTS

A report to the Attorney-General prepared by
the Family Law Council

FEBRUARY 2012

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Business Law Branch
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3-5 National Cct
BARTON ACT 2600
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TERMS OF REFERENCE

Aboriginal and Torres Strait Islander clients in the family law system

I request that the Family Law Council consider and advise me by November 2011 on the following issues in relation to Indigenous clients of the family law system:

- i. ways in which the family law system (Courts, legal assistance and family relationship services) meets client needs.
- ii. whether there are ways the family law system can better meet client needs including ways of engaging clients in the family law system.
- iii. what considerations are taken into account when applying the Family Law Act to Indigenous clients.

The Family Law Council should have regard to the National Indigenous Law and Justice Framework developed by the Standing Committee of Attorneys-General.

The Family Law Council should consult with representatives of Indigenous communities.

Acknowledging the significant progress Council had already made toward the finalisation of the reports and Council's desire to incorporate content from late submissions, the Attorney-General granted an extension for the delivery of the reports until 27 February 2012.

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The Family Law Council would like to acknowledge the work of Dr Lixia Qu, a Senior Research Fellow at the Australian Institute of Family Studies, in the production of customised tables produced from the Australian Bureau of Statistics 2006 Census by Census Table Builder. Council is grateful for her assistance.

EXECUTIVE SUMMARY

This report provides a response to the Attorney-General's request that the Family Law Council (Council) consider the extent to which the family law system meets the needs of clients from Aboriginal and Torres Strait Islander backgrounds and strategies for improvement in this area.

The Demographic and Policy Context for the Reference

The question of the interaction between Aboriginal and Torres Strait Islander peoples¹ and the family law system raises complex issues that must be understood in the context of past policies, including policies that relate to the forced removal of children and forced resettlement of communities and contemporary patterns of engagement with criminal justice and child protection systems. As well as the continuing disadvantage experienced by many Aboriginal and Torres Strait Islander families, efforts to improve culturally responsive service delivery must also take account of the diversity of Aboriginal and Torres Strait Islander peoples and the important ways in which family structures and practices may differ from those of other clients of the family law system.

The Aboriginal and Torres Strait Islander population, estimated at 517,000 or 2.5 per cent of the Australian population on the basis of 2006 Census data, is diverse and spread through urban, regional and remote areas.² There are around 145 Aboriginal languages and three main languages (apart from English) spoken by Torres Strait Islander peoples.³ Demographic estimates indicate that the Aboriginal and Torres Strait Islander population is likely to increase to 848,000 by 2031 and will represent 3.2 per cent of the Australian population at that time.⁴ Populations in all the recognised Aboriginal and Torres Strait Islander regions are predicted to rise, with particularly large increases projected for some urban areas such as, Brisbane, Sydney and Perth.⁵ Intermarriage between Aboriginal and non-Aboriginal people is also increasing, particularly in urban areas, with just over half of the Aboriginal respondents to the 2006 Census indicating they were married to a non-Aboriginal person.⁶

Aboriginal and Torres Strait Islander children under 15 years old are more likely than other Australian children to live with one parent (45.3% compared with 17.8%).⁷ The age profile of the Aboriginal and Torres Strait Islander population is significantly different to that of the non-Aboriginal and Torres Strait Islander population. The median age for the Aboriginal and Torres Strait Islander population is 21 years, compared to 37 years for the non-Aboriginal and Torres Strait Islander population.⁸ Aboriginal and Torres Strait Islander children under four years represent 4.92 per cent of the total population in this age group.⁹

A whole of government policy priority for the past decade has been to address the entrenched disadvantage position of Aboriginal and Torres Strait Islander peoples across seven 'building blocks' (early childhood, schooling, health, healthy homes, safe communities, economic participation, governance and leadership). The government has already made significant investment in infrastructure, health, education and employment.¹⁰ However, progress in 'closing the gap' has been slow.¹¹ Aboriginal peoples remain over-represented in the criminal justice and child

protection systems and family violence remains a significant problem. Although the extent of disadvantage suffered by Aboriginal and Torres Strait Islander communities varies, many communities and individuals are recognised to be subject to multiple types of disadvantage with multiple effects.¹²

A further important context for Council's consideration was the development of a number recent policy frameworks and strategies which intersect with the family law system, notably, the *National Indigenous Law and Justice Framework* (NILJF),¹³ the *National Plan to Reduce Violence Against Women and their Children* (the *National Plan*),¹⁴ the *National Framework for Protecting Australian Children* (NFPAC)¹⁵ and the *Strategic Framework for Access to Justice in the Federal Civil Justice System* (the *Strategic Framework*).¹⁶ The objective of the NILJF is 'providing Aboriginal and Torres Strait Islander peoples in urban, regional and remote settings with access to services that are effective, inclusive, responsive, equitable and efficient'.¹⁷ This objective sits alongside recent calls for consideration of how access to justice services for Aboriginal and Torres Strait Islander peoples¹⁸ can be improved. The *Strategic Framework*, developed by the Australian Government, provides an agenda for reform to support access to justice for all Australians while recognising the diversity of people seeking assistance from the legal system. Together these frameworks emphasise the need for inter-governmental, 'ground-up' approaches to developing policies and programs in consultation with Aboriginal and Torres Strait Islander peoples and provide new opportunities for thinking holistically about policy responses in the family law context.

Approach to addressing the Terms of Reference

Council's approach to this reference was oriented towards generating an understanding of the issues faced by Aboriginal and Torres Strait Islander peoples in accessing and using the family law system. This process has highlighted the diversity of experiences among Aboriginal and Torres Strait Islander peoples and communities and the complexities involved in designing and delivering services that effectively meet their needs. Given the limited timeframe for this work, Council sought to garner information from as many sources as possible. It invited submissions from Aboriginal and Torres Strait Islander-specific organisations and services, within the family law system, conducted consultations, examined the existing literature and collected and analysed published judgments involving Aboriginal and Torres Strait Islander parties. Although the Terms of Reference required Council to consult with representatives of Indigenous communities, scope to do this was fairly limited, given the time required to build trust and rapport in an environment where Aboriginal and Torres Strait Islander communities are over-burdened with requests to engage with government officials.¹⁹ However, Council made concerted efforts to engage with Aboriginal and Torres Strait Islander-specific organisations and Aboriginal and Torres Strait Islander peoples working within mainstream services, recognising the understanding of community that these organisations and individuals contribute to the discourse. Many complex issues were raised with Council during this process. The focus of this report is on those issues deemed most pressing and important by the individuals and organisations that engaged with Council.

The Family Law System

Six years ago, the Australian family law system underwent significant reforms, including the establishment of 65 Family Relationship Centres (FRCs) that provide advice, referrals and family dispute resolution (previously called primary dispute resolution) to separated parents.²⁰ As part of those reforms, the provision of family dispute resolution services was consolidated in the community sector and was no longer considered the responsibility of the family law courts (the Family Court and the Federal Magistrates Court of Australia). Under the *Family Law Act 1975* (Cth) (*Family Law Act*), people are required to attempt family dispute resolution prior to lodging a court application in parenting matters, except in certain circumstances, which include family violence and child abuse.²¹

There is a range of legal and relationship support services across the family law system that attempt to support Aboriginal and Torres Strait Islander families in different ways. Notably, there are networks of Aboriginal and Torres Strait Islander-specific legal services (the Aboriginal and Torres Strait Islander Legal Services and the Family Violence Prevention Legal Services) as well as other government funded legal services (Community Legal Centres and Legal Aid Commissions) with programs and strategies intended to assist Aboriginal and Torres Strait Islander clients. However, discussions with some stakeholders suggest that the main priority areas in the development of Aboriginal and Torres Strait Islander-specific legal services have been criminal law, family and domestic violence and child protection law.

There is also a range of programs offered in the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs-funded Family Support Program. Twelve of the 65 FRCs are specifically funded for Indigenous positions while some other Family Relationship Centres have Indigenous positions that are not specifically funded. Across these services, outreach, liaison, parenting after separation and family dispute resolution programs are operating or being developed in ways intended to meet the needs of Aboriginal and Torres Strait Islander clients.

Prior to 2006, the Family Court of Australia (the Family Court) employed Indigenous Family Liaison Officers whose role was to assist the court in meeting the needs of Aboriginal and Torres Strait Islander clients.²² These positions no longer existed in the court after the 2006 changes, although a small amount of resourcing for an Indigenous Family Consultant is currently being deployed in the Cairns Registry. The Family Court of Western Australia has, at different times, employed Indigenous Family Liaison Officers. One such position currently exists at the Court and is funded until 30 June 2012. The Federal Magistrates Court of Australia does not employ Indigenous Family Liaison Officers, but can call upon the Cairns-based Indigenous Family Consultant for support.

Aboriginal and Torres Strait Islander clients using the family law system: Barriers and impediments

Resistance to engagement, lack of knowledge about the system and limited capacity for outreach

The available evidence suggests that family law system services are under-utilised by Aboriginal and Torres Strait Islander families for a number of reasons. Council's consultations and the submissions it received indicate that two of the most significant reasons are (1) a lack of understanding about the family law system among Aboriginal and Torres Strait Islander clients and (2) resistance to engagement with, and even fear of, family law system services. A point repeatedly made in consultations was that in the context of the past history of forced removal of Aboriginal children and the contemporary extent of non-voluntary engagement with criminal justice and child protection agencies among Aboriginal peoples, there was significant resistance to voluntary engagement with government and justice system services. The consultations and submissions suggest that this resistance has meant that post-separation relationship problems are often left unaddressed until a point of crisis, perpetuating conflict and sometimes resulting in family violence.

Outreach, community education, and liaison functions are currently undertaken by some of the government funded legal services and FRCs with Indigenous Advisors. However, the material before Council suggests that there is significant unmet need in this regard, with some services indicating they struggle to service the populations in their catchment areas, which sometimes involves vast distances in regional and remote areas.

Indigenous specific and culturally competent mainstream services

A further dimension of access is the availability of culturally responsive services. An overarching issue in this context is the notion of 'cultural safety'. It encompasses the idea of services operating in a way that supports and affirms Aboriginal and/or Torres Strait Islander cultural identity.²³ Physical environments, modes of service delivery, respect for cultural norms relating to gender and verbal and non-verbal modes of communication are all relevant to delivering culturally appropriate services. More substantively, such services need to respond appropriately to Aboriginal and Torres Strait Islander notions of kinship, which are based on collectivist principles, and be prepared to involve a range of relevant people, for example extended kin networks, in the resolution of a parenting dispute.

Material before Council supports the need for Aboriginal and Torres Strait Islander peoples to have access to both Indigenous-specific services and culturally appropriate mainstream services, so that a greater choice of services is available. Apart from issues relating to equality of access, there are some practical considerations underlying the need for choice. For example, particular services may not be appropriate for clients in some circumstances due to community or family connections with employees at a service. In a legal context, conflicts of interest may eliminate some service choices.

Throughout the consultation process, Council has been informed that one of the greatest barriers to access for Aboriginal and Torres Strait Islander families is the relatively low number of Indigenous-background professionals working in the system. Council heard that for this reason, the family law system is often not regarded as a place for Aboriginal and Torres Strait Islander families to seek help. Addressing this barrier is complex, given the diversity of Aboriginal and Torres Strait Islander communities. This is particularly acute in large urban areas, such as Western Sydney,

where widespread migration by Aboriginal and Torres Strait Islander peoples from across Australia has occurred. Moreover, any strategy to recruit Aboriginal and Torres Strait Islander professionals to work in family law system programs will face the significant barrier of insufficient numbers of Indigenous background professionals with the required qualifications, competencies and experience appropriate for work in this area. A range of strategies will be needed to overcome this. Council was also urged to consider in its recommendations the need for family law services to recruit both men and women, because of the influence of gender on specific protocols around who should speak to whom.

Even with strategies to significantly increase the number of Aboriginal and Torres Strait Islander professionals across all parts of the family law sector, Aboriginal and Torres Strait Islander families will often still be assisted by non-Indigenous professionals in the family law system. On occasion they may prefer to access a mainstream program or staff member. Consequently, all parts of the service sector need to become more culturally competent so that Aboriginal and Torres Strait Islander families can better access these programs. Increased cultural competence among staff in the family law sector will ensure that the small but growing number of Indigenous professionals do not bear a disproportionate responsibility for meeting the needs of Aboriginal and Torres Strait Islander families, and that an appropriate approach to culture is applied within and across services.

Literacy, language and geography

A range of other barriers to effective access and use of the family law system are also relevant for Aboriginal and Torres Strait Islander peoples. Barriers involving literacy and language were identified as potentially pertinent to many. This was in the context of lower than average educational attainment and English being a second or even third language for some. Consultations also indicated there was limited access to interpreters. Another significant barrier concerns geography. The consultations and submissions suggest that many people who are resident in regional and remote communities are unable to access cars or public transport, while the significant distances mean that programs and courts have limited capacity to service client needs in these areas.

Family Dispute Resolution and Courts

A number of difficulties were cited in consultations and submissions in relation to accessing family dispute resolution and court services. These included challenges arising from the drawn out and multi-step processes involved in these settings for Aboriginal and Torres Strait Islander clients, who may face significant difficulties attending appointments and hearings for logistical reasons or because of the challenges of experiencing difficulties on multiple fronts (health, housing, family violence, finance). Other issues raised with Council related to the approaches in these settings being based on Western notions of child-rearing, kinship and family, and concerns as to whether they operated in a culturally safe way. Lack of access to such services is a significant problem for many communities in regional and remote areas.

Promising and effective practice

In recent years, a body of literature based on empirical evidence, case studies and practice analysis, has identified the elements of effective practice in delivering services, including dispute resolution services, to Aboriginal and Torres Strait Islander peoples.²⁴ Key principles in this area include the need to:

- develop services and initiatives in partnership with the communities whom they serve
- recognise the need for trust to be developed
- implement mechanisms that allow the involvement of Elders or community leaders in governance, processes and decision making
- recognise and respect Aboriginal and Torres Strait Islander cultures and ways of doing things
- address barriers (such as those referred to in the preceding section), and
- adopt flexible practices and funding models that accommodate the complexities involved in servicing the needs of Aboriginal and Torres Strait Islander peoples, whether this complexity arises from the need to accommodate cultural issues or from the multiple potential sources of disadvantage.

A number of initiatives consistent with these principles were drawn to Council's attention. These include the development of Aboriginal-specific models of mediation, community engagement strategies and community legal information materials and the creation of specialist Aboriginal services units within mainstream family relationships services. Examples include:

- an Aboriginal model of mediation developed by the Alice Springs FRC
- an Aboriginal Building Connections Program being developed by Interrelate Family Centres
- a DVD incorporating dreamtime stories for use with Aboriginal families by the Port Augusta FRC
- the development of a DVD called 'Super Law' by the Central Australian Family Legal Unit, which uses culturally appropriate language and imagery to inform Aboriginal people experiencing family violence how 'government' law can protect them, and
- Jaanimili Aboriginal Services and Development Unit for UnitingCare Children, Young People and Families that provides cultural knowledge, advice and leadership to guide service delivery and acts as a support network for Aboriginal staff within the organisation.

Several innovative outreach and communication strategies also exist. For example, Aboriginal Family Violence Prevention and Legal Service Victoria collaborates with other organisations to run an annual 'Sister's Day Out' (in multiple locations to reach different communities) with an analogous 'Brutha's Day Out' auspiced by Relationships Australia and the Mullum Mullum Indigenous Gathering Place. Each of these events is designed to introduce Aboriginal communities to a range of legal and support services in the context of a culturally appropriate and appealing set of activities.

Legislation and cases

Recognition of culture under the 2006 amendments to the Family Law Act

In December 2004, Council responded to Recommendation 22 of the Family Law Pathways Advisory Group's Report, *Out of the Maze*.²⁵ In its response, Council made a number of proposals regarding amendments to Part VII of the *Family Law Act*. All of Council's proposals for legislative change were implemented by the amendments to the *Family Law Act* in 2006.²⁶ The relevant amendments are sections 60B(2)(e),²⁷ 60B(3),²⁸ 60CC(3)(h),²⁹ 60CC(6)³⁰ and section 61F.³¹

Prior to the enactment of these provisions, only section 68F(2), the precursor to section 60CC(3)(h), dealt with Aboriginal and Torres Strait Islander culture. It was included under the consideration of culture and phrased as '(including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders)'. The 2006 amendments encouraged a more thorough consideration of a child's Indigenous culture in the assessment of their best interests. As a result, the family law courts are required to consider the right of a child to enjoy and explore their culture and develop a positive appreciation of it. The Courts are also specifically directed to consider kinship obligations and child-rearing practices in the child's culture.

Council's research identified 55 relevant judgments available on Austlii that were decided between 2007 and 2011. In 12 of these cases, both parties were identified as being Aboriginal or Torres Strait Islander. In the remaining cases, one party was identified as Aboriginal or Torres Strait Islander. Council's analysis of the decisions suggests that over time the Courts' consideration of Aboriginal and Torres Strait Islander culture has become more prominent and better informed. Anthropological evidence is commonly utilised. Reflecting a greater awareness of the diversity of Aboriginal and Torres Strait Islander cultures, the cases revealed an increasing emphasis on evidence specific to the child's particular cultural group. Family consultants have commonly interviewed community Elders, or community Elders have become witnesses in Court. The judgments also suggest a growing judicial appreciation of the importance of the child's cultural identity needs, encouraging immersion in their Aboriginal or Torres Strait Islander culture where limited engagement with identified activities is insufficient to support their cultural connections.

However, some concerns about the Courts' approach to cultural issues remain. In particular, Council's survey of cases suggests continuing problems with the way in which matters involving Aboriginal and Torres Strait Islander parties are litigated, and with the approach to cultural issues taken in some family reports. These concerns were also raised in the submissions of Indigenous-specific legal organisations. Council's review of the judgments also shows that while some of the amended sections of the *Family Law Act*, such as section 60CC(3)(h), have received considerable judicial attention, others, such as section 60CC(6), are used infrequently.

Responses to Kupai Omasker practices within Torres Strait Islander communities

A further issue relating to Torres Strait Islander families concerns legal recognition of

a customary ‘adoption’ practice known as Kupai Omasker. Council's consultations revealed a concern for certainty and security of parenting responsibility for children adopted under Torres Strait Islander custom. The Family Court for many years responded to this need by making consent parenting orders in favour of receiving parents (ie the parents with whom the child is placed). Council notes that the Queensland Government is currently conducting consultations with Torres Strait Islander communities with a view to possible legislative recognition of the practice of Kupai Omasker. This may provide security for children and families affected by this practice without the need to seek orders from the family law courts.

In the event that the review by the Queensland Government does not result in legislative reform to address this issue, Council would welcome a reference from the Attorney-General to consider whether reform to the *Family Law Act* is needed to meet the best interests of children affected by Kupai Omasker arrangements.

Conclusions and Recommendations

Council has made a range of recommendations aimed at strengthening the family law system’s response to Aboriginal and Torres Strait Islander families. In Council’s view, the prevalence of sole-parent headed families and the age profile of relevant communities create significant imperatives to improve access and responsiveness for the generations that will imminently require support, as well as those that already do so. The approach taken to these recommendations is in accord with recently developed policy frameworks, notably the NILJF, the *National Plan*, the NFPAC and the *Strategic Framework*.

The recommendations in this report respond to a range of needs and issues identified by stakeholders and in the material before Council. Council emphasises that their implementation should be informed by the effective practice principles identified in earlier significant reports³² and with an awareness of the diversity of Aboriginal and Torres Strait Islander communities. Practice and policy responses should also be developed following an analysis of the specific needs of the communities who they are intended to benefit, conducted in partnership with those communities.

Material before Council demonstrates that positive efforts to respond effectively to the needs of Aboriginal and Torres Strait Islander clients are already underway in the family law system, and its recommendations are intended to recognise and build on this work. Central to Council’s recommendations are the need to address resistance to the use of the family law system’s support services through community outreach, engagement and education strategies, and to support these strategies through the further development of cultural competence among the system’s service providers. Integral parts of the strategy are measures to increase the number of Aboriginal and Torres Strait Islander people working across the system and to address language and literacy barriers. The question of access to appropriate and accessible legal, family dispute resolution and court services requires further review. Council notes that the Attorney-General, the Hon Nicola Roxon, has recently announced plans to instigate a review of Commonwealth-funded legal services encompassing Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services.³³

Although Council has not made specific recommendations for further research, it is clear that there are a number of areas where more empirical evidence is needed. The question of how sole-parent headed Aboriginal and Torres Strait Islander families function needs further examination so that supportive policies can be developed. The delivery of culturally responsive family dispute resolution and court services would also benefit from an evaluation of the effectiveness of current services from the perspective of Aboriginal and Torres Strait Islander clients. Empirical exploration of the family law needs of Aboriginal and Torres Strait Islander women and children who have experienced family violence could also inform further policy responses.

Recommendations

Recommendation 1: Community Education

The Australian Government works with family law system service providers and Aboriginal and Torres Strait Islander organisations to develop a range of family law legal literacy and education strategies for Aboriginal and Torres Strait Islander peoples.

The strategies should:

- aim to inform Aboriginal and Torres Strait Islander peoples about: the formal justice system, legal responses to family violence and the rights and obligations of separated parents
- allow for education and information to be delivered in Indigenous languages, plain English and in formats that are appropriate to particular communities and age groups, and
- ensure that the information is continuously accessible and delivered in a culturally appropriate manner to Aboriginal and Torres Strait Islander peoples.

Recommendation 2: Promoting Cultural Competency

2.1 The Australian Government develops, in partnership with relevant stakeholders, a cultural competency framework for the family law system. The framework should cover issues of culturally responsive practice in relation to people from Aboriginal and Torres Strait Islander backgrounds. This development should take account of existing frameworks in other service sectors.

2.2 Cultural competency among family law system personnel be improved by:

- 2.2.1 Investing in the development of a flexible learning package (similar to the *AVERT Family Violence Training Package*) that can be adapted across settings and professional disciplines providing both minimum competencies and options for more in-depth development of skills and knowledge and encouraging its use across the sector by making it low cost and flexible in its delivery.
- 2.2.2 Commissioning the development of ‘good practice guides’ across settings to encourage Aboriginal and Torres Strait Islander culturally responsive service delivery for dissemination to individual practitioners through conferences, clearinghouses and national networks. Examples might include the development of resources to support effective

approaches to meeting the needs of Aboriginal and Torres Islander clients in family dispute resolution, children's contact centres and family reports.

- 2.2.3 Building Aboriginal and Torres Strait Islander cultural competency, and understanding of the application of relevant laws and policies (such as the *Family Law Act*) for Aboriginal and Torres Strait Islander clients, into professional development frameworks, Vocational Education and Training and tertiary programs of study across disciplines relevant to the family law system.

Recommendation 3: Building Collaboration and Enhancing Service Integration

3.1 The Australian Government, in consultation with stakeholders, develop strategies to build collaboration between Aboriginal and Torres Strait Islander-specific service providers and organisations and the mainstream family law system (courts, legal assistance and family relationship services). This should include support for Aboriginal and Torres Strait Islander organisations to provide advisory and other support for family law system services.

3.2 The Australian Government provides funding for:

- 3.2.1 The creation of a 'roadmap' of services (including relevant support services) for Aboriginal and Torres Strait Islander families in the family law system
- 3.2.2 Integration of the 'roadmap' into current government resources and initiatives which include the Family Relationship Advice Line and Family Relationships Online, and
- 3.2.3 Promoting a greater awareness of these resources and initiatives for Aboriginal and Torres Strait Islander families and relevant organisations.

Recommendation 4: Early Assistance and Outreach

The Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs work with stakeholders, including mainstream and Aboriginal and Torres Strait Islander-specific service providers, to develop strategies that assist, as early as is possible, Aboriginal and Torres Strait Islander families experiencing relationship difficulties and parenting disputes. Such strategies should include the development of outreach programs by mainstream services within the family law system.

Recommendation 5: Building an Aboriginal and Torres Strait Islander Workforce in the Family Law System

The Australian Government works with stakeholders to ensure a range of workforce development strategies are implemented across the family law system to increase the number of Aboriginal and Torres Strait Islander professionals working within family law system services. These strategies should include:

- scholarships, cadetships and support for education and training opportunities for Aboriginal and Torres Strait Islander professionals to work in the family law system

- consideration of the cultural and social experiences of potential Aboriginal and Torres Strait Islander professionals as professional attributes of significance in developing selection criteria for relevant positions
- funding for family law system services (courts, legal assistance and family relationship services) to proactively recruit, train and retain Aboriginal and Torres Strait Islander peoples, and
- resourcing and supporting service providers to develop mechanisms for continuing professional supervision, support and networking opportunities for Aboriginal and Torres Strait Islander professionals.

Recommendation 6: Family Consultants and Liaison Officers

The Australian Government provides funding for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the family law courts to improve outcomes for Aboriginal and Torres Strait Islander families, including by:

- increasing the information available to the courts about Aboriginal and Torres Strait Islander cultural practices and children's needs to courts through family reports (with reference to specific communities and cultures in specific cases)
- enhancing the ability of courts to meet the needs of Aboriginal and Torres Strait Islander clients in court processes, and
- providing information to courts, and support and liaison to parties, in matters that may require urgent action.

The role of Indigenous Family Consultants and Indigenous Family Liaison Officers may be part of the job description of a person who is ordinarily placed in a Family Relationship Centre or an Aboriginal and Torres Strait Islander-specific service. An inter-agency agreement should require a Family Relationship Centre or Aboriginal and Torres Strait Islander service to provide the family law courts with access to the Indigenous Family Consultant and/ or Indigenous Family Liaison Officer on a clearly defined basis.

Recommendation 7: Access to Court, Legal and Family Dispute Resolution Services

To particularly address the difficulties in providing services to remote locations and gaps in service provision in other locations, the Australian Government instigates a review of the accessibility and appropriateness of court, legal and family dispute resolution services for Aboriginal and Torres Strait Islander peoples, including in regional and remote areas throughout Australia.

Recommendation 8: Interpreter services

8.1 The Australian Government develops a strategy for improving access to interpreter services in Aboriginal and Torres Strait Islander languages. This should be informed by a needs analysis addressing:

- the prevalent language groups
- the pool of available interpreters for particular language groups
- an assessment of which language groups require interpreters
- initiatives to increase the pool in required areas, and

- developing regional lists of pools of interpreters with knowledge and understanding of family law derived either from training provided by local agencies or specialist legal interpreter accreditation developed or approved by National Accreditation Authority for Translators and Interpreters.

8.2 Training in family law should form a specialist component of accreditation for legal interpreters.

8.3 The Australian Government works with stakeholders to develop a national protocol on the use of interpreters in the family law system. This should include:

8.3.1 Protocols to ensure that Aboriginal and Torres Strait Islander clients with language issues are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided with an interpreter if they are identified as in need of one, and

8.3.2 Protocols to guide the sourcing and selecting of interpreters.

Recommendation 9: Torres Strait Islander Customary Adoption (Kupai Omasker)

Action in relation to this issue should be deferred until the outcome of the Queensland Government inquiry into the practice of Kupai Omasker is known. If this inquiry does not lead to a resolution of the difficulties in this area, the Attorney-General may request that Council consider whether amendment to the *Family Law Act* is required to address this issue. If the inquiry recommends recognition of the practice of Kupai Omasker, and if the Queensland Government does not legislate to implement that recommendation, Council would welcome a reference from the Attorney-General on this issue.

1. Introduction

This report responds to the Attorney-General's request that the Family Law Council (Council) consider the extent to which the family law system meets the needs of Aboriginal and Torres Strait Islander peoples and consider strategies for improvement in this area. Council's work in response to this reference has highlighted a range of complex issues embedded in the historical, cultural, socio-demographic and systemic context for the questions raised as part of the reference.

Issues and concerns relating to the family law needs of Aboriginal and Torres Strait Islander peoples have been raised by several inquiries, some of which took place more than two decades ago. Attempts to address these issues and concerns, both at the level of policy and practice, have been incremental and in some instances unsustainable. Recent developments in policy, most notably the *National Indigenous Law and Justice Framework*³⁴ (NILJF), provide a basis for a more comprehensive response in a wider whole of government policy setting which, since 2002, has been attempting to overcome entrenched Indigenous disadvantage.³⁵

At the outset, Council acknowledges the sensitivities and complexities around language and identity in this area. Among Aboriginal and Torres Strait Islander organisations and peoples, preferences vary. In this report, the term 'Aboriginal and Torres Strait Islander peoples' has been preferred. Council's decision in this regard was influenced by three considerations. First, Aboriginal and Torres Strait Islander is the term used in the main relevant legislative framework for this reference, the *Family Law Act 1975 (Cth) (Family Law Act)*. Secondly, this approach is consistent with that used by the Expert Panel on Constitutional Recognition of Indigenous Australians in its recent report, *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution*, which was delivered to the Prime Minister on 19 January 2012.³⁶ Thirdly, the use of this term was supported by the majority of Aboriginal and Torres Strait Islander organisations and people who participated in the consultations for this reference. Council's report also uses the term 'Indigenous' when relevant to describe Aboriginal and Torres Strait Islander specific organisations or professional groups.³⁷

Aboriginal and Torres Strait Islander cultures are diverse and cultural identity is recognised to be complex and dynamic across geography and time.³⁸ Council acknowledges that two constructions of cultural identity are particularly relevant to this reference. The first is the statutory construction in the *Family Law Act*, which defines an 'Aboriginal child' as 'a child who is a descendant of the Aboriginal people of Australia' (section 4). 'Aboriginal and Torres Strait Islander culture' is also defined in the *Family Law Act* (section 4), in relation to children as follows:

- (a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and
- (b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.³⁹

A more restrictive definition than the statutory one of 'Aboriginal child' emanates from government policy positions. This commonly used tripartite definition recognises an Aboriginal person as someone who:

- is of Aboriginal or Torres Strait Islander descent,
- identifies as an Aboriginal or Torres Strait Islander, and
- is accepted in the community in which he or she lives as being Aboriginal or Torres Strait Islander.

According to a resource developed for the family law sector by the Secretariat of National Aboriginal and Islander Child Care Inc (SNAICC), this definition:

'[p]rotects the rights and sensitivities of Aboriginal and Torres Strait Islander people by ensuring that claims of false identity cannot be made by others... The physical appearance or lifestyle of a person is not relevant to their identity'.⁴⁰

It is also appropriate at the outset to recognise the background that has shaped the issues considered in this Report, namely the history of forced removal, forced separation and dispossession that accompanied the colonisation of Australia. The impact of past policies on current conditions and future responses are encapsulated in the following statement from the Human Rights and Equal Opportunity Commission's 1997 Report, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Bringing Them Home Report)*:

[M]ost significantly the actions of the past resonate in the present and will continue to do so in the future. The laws, policies and practices which separated Indigenous children from their families have contributed to the alienation of Indigenous societies today.⁴¹

1.1 Policy context: an overview

Council's work on this reference is taking place in the context of policy initiatives being developed and implemented at a range of levels. Most broadly, since 2002 the Council of Australian Governments (COAG) has adopted a whole of government approach to addressing Indigenous disadvantage (see further 1.3). This involves multilateral initiatives across seven 'building blocks' (early childhood, schooling, health, healthy homes, safe communities, economic participation, governance and leadership) to 'find solutions to the complex problems which underpin Indigenous disadvantage and have been decades in the making'.⁴²

There are three other particularly relevant policy frameworks: the NILJF,⁴³ the *National Plan to Reduce Violence Against Women and their Children (the National Plan)*,⁴⁴ and the *National Framework for Protecting Australia's Children (NFPAC)*.⁴⁵ The NILJF was endorsed by Federal, State and Territory Governments in November 2009.⁴⁶ The NILJF sets out a national approach to addressing the serious and complex issues that mark the interaction between Aboriginal and Torres Strait Islander peoples and the justice systems in Australia. Its aim is to eliminate Indigenous disadvantage in law and justice and it is intended to support the COAG *Closing the Gap*⁴⁷ agenda, particularly in relation to community safety. Initiatives implemented under NILJF will be instrumental in achieving COAG objectives.

The strategies and actions in the NILJF are intended to be flexible rather than prescriptive to enable implementation that is responsive to local needs and consistent with jurisdictional priorities and resource capacity. An important aim of the NILJF is to:

*Improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner.*⁴⁸

NILJF provides an opportunity for governments, non-government and community organisations, and Aboriginal and Torres Strait Islander peoples to build on existing partnerships and agreements to identify and develop the most appropriate response to law and justice issues. The Commonwealth Government is also looking at best practice through evaluation of Indigenous justice initiatives identified under NILJF.

The NFPAC and the *National Plan* each have specific elements relevant to Indigenous peoples, although both are intended to address child protection and family violence issues across the Indigenous and non-Indigenous populations. Initiatives concerned with family support programs and longer term planning are being implemented under the first three year action plan intended to support the overall aim of the NFPAC to ensure that ‘Indigenous children are supported and safe in their families and communities’.⁴⁹ Family support programs include the establishment of 35 Children and Family Centres and the implementation of 50 new Indigenous Parenting Support Services.

The Indigenous-specific outcome in the *National Plan*, endorsed in February 2011 by State, Territory and Federal Governments, is articulated as ‘Indigenous communities are strengthened’.⁵⁰ Specific strategies include strengthening the leadership, economic and employment opportunities for Indigenous women as well as improving access to culturally appropriate support services, fostering cultural healing and developing mechanisms to improve community safety.

A further relevant part of the policy context for this reference is the *Strategic Framework for Access to Justice in the Federal Civil Justice System* (the *Strategic Framework*).⁵¹ The *Strategic Framework* establishes a set of principles for achieving access to justice, supported by a methodology for implementing them that is designed to address the ‘ad hoc’ way in which justice interventions in the federal system have developed.⁵² The five principles identified to inform justice interventions are accessibility, appropriateness, equity, efficiency and effectiveness. The seven elements that make up the methodology are:

- information to enable people to understand their position and what options they have to enable them to make decisions about how to respond to their situation
- action based on early intervention to prevent problems from occurring and escalating
- triage so that matters can be directed to the most appropriate destination for resolution regardless of their entry point into the system
- outcomes that are fair and equitable
- proportionate costs so that the cost of resolving a matter is in proportion to the issues involved

- resilience includes the strategy of equipping people to resolve their own issues, including through access to intervention and support, and
- inclusion recognises that justice needs are often ‘symptomatic of broader problems in peoples’ lives’.

In relation to Aboriginal and Torres Strait Islander peoples, the *Strategic Framework* recognises that the availability of culturally appropriate legal assistance services for civil and family law needs is limited and this ‘compromises the ability of Indigenous Australians to realise their full legal entitlements’.⁵³

A review of policy debates concerning the family law system and Aboriginal and Torres Strait peoples demonstrates a long history of concern about the issues with no fewer than five⁵⁴ significant reports making recommendations for improvements. Some of these recommendations have had an effect on policy, others have not. A consistent theme has been the need to take a holistic approach, with the recognition that responses to family law related concerns cannot be isolated from other cultural, social and economic issues. The policy frameworks referred to in this section create a fertile climate for such action. The demographic overview provided in the next section suggests a pressing need for action.

1.2 Demography, culture, kinship and identity

The Aboriginal and Torres Strait Islander population (estimated to total 517,000)⁵⁵ is culturally, linguistically, geographically and socially diverse. The population is spread across urban rural, regional and remote locations, with New South Wales, Queensland and Western Australia having the largest Aboriginal populations (see Table 1). The Northern Territory has the highest proportion of Aboriginal peoples in its population and the highest proportion of Aboriginal peoples living in remote or very remote areas. Australia’s Torres Strait Islander population predominantly lives in mainland Queensland and the Torres Strait Islands, and numbers about 33,300.⁵⁶ The experience of Torres Strait Islander communities in relation to colonisation has been different to that of many Aboriginal groups (which also differ from each other in many respects). SNAICC’s resource, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (*Working and Walking Together*), notes that ‘Torres Strait Islanders have not experienced the extent of the negative impacts suffered by Aboriginal peoples, as they were not forcibly removed from their traditional lands’.⁵⁷

Table 1: Aboriginal and Torres Strait Islander Population by state⁵⁸

	Number of Indigenous peoples	% of population
New South Wales	138509	2.2
Queensland	127581	3.5
Western Australia	58711	3.2
Northern Territory	53661	30.4
Victoria	30142	0.6
South Australia	25555	1.8
Tasmania	16767	3.7
Australian Capital Territory	3875	1.3

In 2006, just over half of the Aboriginal and Torres Strait Islander population lived in major cities and non-remote regional areas; 31 per cent lived in Major Cities; 22 per cent lived in Inner Regional Australia; 23 per cent in Outer Regional Australia; 8 per cent in Remote Australia and 16 per cent in Very Remote Australia.⁵⁹ The population spread varies significantly between states and territories. In 2006, the majority of the Indigenous populations in New South Wales, Victoria, South Australia and the Australian Capital Territory resided in either major cities or inner regional areas.⁶⁰ In comparison, more than half the Aboriginal and Torres Strait Islander populations living in Queensland and Western Australia lived in outer regional, remote or very remote areas. Most Indigenous peoples living in the Northern Territory lived in remote or very remote areas.⁶¹

Demographic projections⁶² indicate that the size of the Aboriginal population will increase, in both absolute and relative terms, by 2031. Biddle and Taylor predict the population will reach 848,000 by 2031, representing 3.2 per cent of the total Australian population as against 2.5 per cent in 2006.⁶³ The greatest increases are predicted for urban areas, notably Brisbane (from 46,279 in 2006 to 87,981 in 2031), Sydney (46,886 to 59,966) and Perth (25,313 to 32,999).⁶⁴

In terms of age, the composition of the Aboriginal and Torres Strait Islander population is different from that of the non-Indigenous population in ways that, from the perspective of the issues Council is considering in this reference, are very significant. The median age for the Indigenous population is 21 years whilst the median age for the non-Indigenous population is 37 years.⁶⁵ Approximately forty eight per cent of the Aboriginal and Torres Strait Islander population is under 20 years, compared with 25.8 per cent of non-Indigenous Australians.⁶⁶ Indigenous children under four years represent 4.92 per cent of the total population of children in this age group.⁶⁷

The statistical profile of Aboriginal and Torres Strait Islander families differs significantly compared with non-Indigenous families.⁶⁸ Indigenous parents are in a younger age bracket than non-Indigenous parents and, in general, have more children. For example, 58.5 per cent of Indigenous women under 29 years have one or more children, compared with 24.4 per cent of non-Indigenous women of the same age.⁶⁹ Almost 55 per cent of Indigenous children under 15 years live with two parents: in contrast 82.2 per cent of non-Indigenous children in the same age bracket live with two parents. There is a much higher proportion of sole-parent headed families among the Indigenous population, with such families representing 45.3 per cent of

Indigenous families with children under 15 years, compared with 17.8 per cent of non-Indigenous families.⁷⁰ If sole-parenthood is an indicator of a need for family law system support, the data indicates that the need among Indigenous families is proportionately higher than among non-Indigenous families. There is limited empirical evidence about how sole-parent headed Indigenous families function.⁷¹ However, the *Western Australian Aboriginal Child Health Survey* demonstrated that children in its sample in sole-parent headed families were ‘almost twice as likely to be at high risk of clinically significant emotional or behavioural difficulties than children living with both their original parents’.⁷² The *Longitudinal Study of Indigenous Children* has shown that three-quarters of Aboriginal sole-parent headed families are relying entirely on government benefits.⁷³ The link between poorer well-being outcomes and social and economic disadvantage is well-established.⁷⁴

Indigenous peoples in the 15-64 year old age group are more likely to live in multi-family households than non-Indigenous peoples in this age group (12.1% compared with 2.6%). This tendency is particularly marked in the Northern Territory where 38.2 per cent of Aboriginal peoples aged 15-64 years living in such households.⁷⁵

Intermarriage between Aboriginal and non-Aboriginal people is increasing, with the 2006 Census recording, for the first time, majorities of both male (52%) and female (55%) Aboriginal persons indicating they were married to a non-Aboriginal person.⁷⁶ Intermarriage is particularly prevalent among Aboriginal people resident in urban areas, with 82 per cent of Aboriginal men and 83 per cent of Aboriginal women in Sydney reporting being partnered with a non-Aboriginal person, with similar proportions reported in Melbourne, Brisbane and Hobart.⁷⁷ Given the high rate of inter-marriage in urban areas, and the projected population growth of Aboriginal peoples in urban areas, it is likely that an increasing number of children will be born into intermarriage relationships.

The 2005 *National Indigenous Languages Survey* indicated that of the more than 250 known Australian Indigenous languages, only 145 are still spoken.⁷⁸ One hundred and ten of the Australian Indigenous languages still spoken are categorised as severely and critically endangered.⁷⁹ In 2008, one in nine (11%) Indigenous people aged 15 years and over spoke an Aboriginal or Torres Strait Islander language as their main language at home.⁸⁰ Indigenous language speakers are more prevalent in remote areas. Forty two per cent of Indigenous people living in remote areas speak an Indigenous language as their main language at home.⁸¹

In 2008, a quarter of the Aboriginal population were living in their homelands or traditional country, with 44 per cent of Aboriginal people living in remote areas living on their homelands compared with 9 per cent of those who lived in major cities.⁸² Identification with a clan, tribal or language group appears to be growing, with 62 per cent of respondents to the *National Aboriginal and Torres Strait Islander Social Survey 2008* indicating such identification, compared with 54 per cent in 2002. Such identification was indicated for 49 per cent of children aged 4-14 years, 71 per cent of children living in remote areas and 40 per cent in major cities were identified with a particular group.⁸³

Further relevant statistics are available in **Appendix A** of this Report.

Kinship, family and community connection

Aboriginal and Torres Strait Islander notions of family are based on complex and extended ‘kinship’ relationships that determine rights and obligations and are central to how culture is maintained and perpetuated. Customs and approaches vary from group to group,⁸⁴ and can differ significantly between Aboriginal and Torres Strait Islander peoples, but a broad picture is described in *Working and Walking Together*⁸⁵ in this way:

*Kinship systems define where a person fits into the Aboriginal and Torres Strait Islander community, binding them together in relationships of sharing a mutual obligation. Kinship defines roles and responsibilities for raising and educating children, and structural systems of moral and financial support with the community. People living in a traditional setting understand things like the ‘right skin’ and the relationships similar to this, but people living in less ‘traditional settings’ may not know this information. The kinship system is a complex system and often it is the Elders or grandparents within the family who hold this knowledge in its entirety.*⁸⁶

Kinship, culture and a spiritual connection to land are all integral parts of the belief systems of both Aboriginal and Torres Strait Islander peoples. According to *Working and Walking Together*, an Aboriginal person’s country is ‘of fundamental importance...for their ‘home’ or ‘country’ for the duration of their life is at the location where they were dreamed by an Ancestral Spirit’.⁸⁷ Torres Strait Islanders have a similar spiritual connection to the land and sea of the Torres Strait.

The concept of ‘community’ in relation to Aboriginal and Torres Strait Islander people has bearing on this reference. Research by the Australian Domestic & Family Violence Clearinghouse observes that community ‘typically invokes notions of an idealised unity of purpose and action among social groups who are perceived to share a common culture’, and that this concept of community reflects practices among Aboriginal and Torres Strait Islander peoples, organisations and funding bodies.⁸⁸ However, Lumby and Farrelly explain that ‘this notion is complicated by defined groups or factions within the community’,⁸⁹ and that the history, structures, dynamics and needs of each Aboriginal and Torres Strait Islander community are quite distinct from one another and non-Indigenous communities. Community is not a fixed notion, as SNAICC highlights. Individuals ‘may belong to more than one community, and the sense of community is influenced by such factors as where they come from, where their family is and where they live and work’.⁹⁰

Chapter 3 explores the significant implications that these issues have for service delivery and for Aboriginal and Torres Strait Islander professionals in family law and related services.

Child rearing practices

Council’s previous work has referred to the considerable range and variation in Aboriginal and Torres Strait Islander child rearing practices.⁹¹ A review of these practices states ‘there is no one Aboriginal child rearing practice ... within each clan, there is a wide variation of child rearing practices’.⁹² The literature observes that these

practices are constantly in ‘a state of transition’,⁹³ and relates examples that may affect Indigenous engagement with the family law system and related services. For example, Council’s earlier report notes the extensive discussion of differences between Aboriginal and Torres Strait Islander on the one hand and non-Indigenous parenting and child rearing practices on the other, including in the ‘main areas of sleeping, feeding, learning, discipline, playing, care and mobility’.⁹⁴ Reviews of Aboriginal and Torres Strait Islander child rearing practices also discuss family structures that are distinct from those of non-Indigenous families, although familial terms such as ‘mother’, ‘grandmother’ and ‘uncle’ may be used. Responsibility for children may also be broader than biological parents, with multiple caregivers drawn from family or community members.⁹⁵ The review by the Warrki Jarrinjaku Aboriginal Child Rearing Strategy Project Team indicates that:

[A]mongst the Central Australian Aboriginal language groups, the biological mother’s sisters are also referred to as the child’s mothers. The mother’s sisters have an obligation to support her to carry out her daily roles and responsibilities. This may extend to breastfeeding if required and possible. If the biological mother is absent for a period, it is the duty of her sisters or mother to take over the responsibility for the children.

For example ... a child taken from the Pitjantjatjara next to Uluru at about 7 years of age remembers that he had several mothers, and knowing who was his biological mother was never made clear to him or considered important.⁹⁶

This practice remains widespread, with ‘many Aboriginal people ... ‘grown up’ by members of the family other than their biological [parents]’.⁹⁷

The customary adoption practice of Torres Strait Islanders, known as Kupai Omasker, is not practiced by Aboriginal peoples. Within Torres Strait Islander communities, however, customary adoption is a widespread practice, involving ‘all Torres Strait Islander extended families in some way, either as direct participants or as kin to “adopted” children’.⁹⁸ In contrast to Western legal notions of adoption, Torres Strait Islander customary adoptions take place between relatives and close friends where bonds of trust have already been established, and central to this practice is an understanding that:

Children are never lost to the family of origin, as they have usually been placed with relatives somewhere in the family network.⁹⁹

Consideration on the Family Court of Australia’s (the Family Court’s) responses to kinship and customary child rearing practices in relation to Torres Strait Islander families are discussed in Chapter 5.

The importance of culture

In recent years, there has been increasing mainstream recognition of the way that connection with culture, including kinship networks, country, customs and ceremonial practices, are tied to the well-being of Aboriginal and Torres Strait Islander peoples, who:

*[L]earn and experience our culture and spirituality through our families – whether through knowledge, stories and songs from parents, grandparents, elders or uncles and aunts; or through the every day experience of shared values, meaning, language, custom behaviour and ceremonies.*¹⁰⁰

Recognition at a policy level of the damage caused by past policies of forced removal underpin a range of initiatives implemented since the *Bringing Them Home Report* was released,¹⁰¹ including a powerfully symbolic act, the National Apology made in the Australian Parliament by the former Prime Minister, The Hon Kevin Rudd MP in 2008. Empirical evidence of the intergenerational impact of forced removal is provided by the *Western Australian Aboriginal Child Health Survey*. This survey compared children whose carers (mainly parents) had been forcibly separated from their natural family by a mission, the government or welfare with those children whose carers had not experienced forcible separation. The survey found the former group had more than double the chance of being at high risk of clinically significant emotional or behavioural difficulties, were more likely to be at high risk of clinically significant emotional symptoms, conduct problems and hyperactivity and had double the levels of drug and alcohol use.¹⁰²

In relation to Indigenous identity, the connection between culture and well-being is recognised at many levels. For example, the *Overcoming Indigenous Disadvantage Key Indicator Report 2011 (Overcoming Indigenous Disadvantage Report)*,¹⁰³ notes that ‘[c]ulture is an essential component of well-being for Aboriginal and Torres Strait Islander peoples and can also provide individuals and communities with a degree of resilience to entrenched disadvantage’.¹⁰⁴ Recent research has highlighted how relationships with family and extended kin are more important to an Indigenous young persons’ self-concept (i.e. the way they view themselves) than they are for their non-Indigenous counterparts.¹⁰⁵ Cultural affiliation is also recognised to be highly important in a child’s long term development.¹⁰⁶

Increasing attention has been paid to the notion of cultural safety as a principle to inform service responses, organisational policies and resource allocations.¹⁰⁷ The meanings accorded to this concept vary according to the context in which it is applied. For the purpose of this Report, the definition utilised by the Victorian Aboriginal Childcare Agency has been adopted:

[C]ultural safety is the positive recognition and celebration of cultures. It is more than just the absence of racism or discrimination, and more than cultural awareness and cultural sensitivity... Cultural safety upholds the rights of Aboriginal children to:

- *Identify as Aboriginal without fear of retribution or questioning*
- *Have an education that strengthens their culture and identity*
- *Maintain connection to their land and country*
- *Maintain their strong kinship ties and social obligations*
- *Be taught their cultural heritage by their Elders*
- *Receive information in a culturally sensitive, relevant and accessible manner*
- *Be involved in services that are culturally respectful.*¹⁰⁸

1.3 Indigenous disadvantage

Entrenched Indigenous disadvantage is evidenced across a wide range of economic, social, health and educational indicators. The *Overcoming Indigenous Disadvantage Report* summarises progress since 2002 as follows:

*[A]cross virtually all the indicators in this report, there are wide gaps in outcomes between Indigenous and other Australians. The report shows that the challenge is not impossible – in a few areas, the gaps are narrowing. However, many indicators show that outcomes are not improving, or are even deteriorating. There is still a considerable way to go to achieve COAG’s commitment to close the gap in Indigenous disadvantage.*¹⁰⁹

Many Aboriginal and Torres Strait Islander peoples and communities are recognised to be subject to multiple types of disadvantages, with multiple causes and multiple effects.¹¹⁰ This has significant consequences for the ways in which Aboriginal and Torres Strait Islander peoples do or do not interact with the family law system, and the challenges the system faces in meeting their needs. A point constantly reinforced during Council’s consultations is the complex nature of family law service provision to Aboriginal and Torres Strait Islander peoples. In general, economic, educational and health disadvantages are highly relevant in shaping needs and engagement. However, there are three specific areas of disadvantage that have particular implications for Council’s considerations and conclusions. These are:

- child safety and welfare
- family violence, and
- engagement with the criminal justice system.

Key findings from the *Overcoming Indigenous Disadvantage Report* in these areas are:

- Child protection: from 1999-2000 to 2009-2010, the substantiation rate of notifications in relation to Indigenous children increased from 15 to 37 per 1000 children, compared with four to five per 1000 children for non-Indigenous children.¹¹¹ As at 30 June, 2010, 48.3 per 1000 Indigenous children aged 0-17 years were on care and protection orders compared to 5.4 per 1000 non-Indigenous children.¹¹²
- Family and community violence: the proportions of Indigenous people who had been victims of physical or threatened violence in the previous 12 months did not change significantly between 2002-2008 and remained around twice the proportion of non-Indigenous people.¹¹³ In 2008-2009, hospitalisation rates for injuries caused by assault were much higher for Indigenous men (seven times higher) and women (31 times higher) as for other Australian men and women.¹¹⁴ Comparing findings of surveys in 2008 of Indigenous peoples and 2006 of non-Indigenous people, 19.2 per cent of Indigenous women had experienced physical or threatened violence in the previous 12 months, compared with 8.2 per cent of non-Indigenous women.¹¹⁵
- Imprisonment and juvenile detention: between 2000-2010, the imprisonment rate increased by 59 per cent for Indigenous women and 35 per cent for Indigenous men. In 2010, Indigenous adults were imprisoned at 14 times the rate of non-Indigenous adults, compared with 10 times in 2000. In 2010, the Indigenous juvenile detention rate was 23 times the non-Indigenous rate.¹¹⁶

It is difficult to assess Aboriginal and Torres Strait Islander peoples separately, but for measures for which separate data are available (education, labour force status, income, home ownership), outcomes for Torres Strait Islanders are better than outcomes for Aboriginal people, but not as good as outcomes for non-Indigenous people.¹¹⁷

1.4 Approach to addressing the Terms of Reference

The Terms of Reference required Council to consider in relation to Aboriginal and Torres Strait Islander peoples:

- i. ways in which the family law system (Courts, legal assistance and family relationship services) meets client needs.
- ii. whether there are ways the family law system can better meet client needs including ways of engaging clients in the family law system.
- iii. what considerations are taken into account when applying the *Family Law Act* to clients of these communities.

Council sought to understand the overall social and policy contexts that influence the issues raised by the reference. Council faced a number of challenges arising from the complex subject matter and the contracted time frame for its work. A significant feature of the environment in which this work was conducted is explored in Chapter 3: the legacy of fear, suspicion and distrust that past government policies have had on the preparedness of Aboriginal and Torres Strait Islander groups, communities and individuals to engage with government processes. The Aboriginal Social Justice Commissioner, Mr Mick Gooda, recently referred to the need for ‘relationships to be built on a strong foundation of understanding, tolerance, acceptance, dialogue, trust and reciprocated affection’.¹¹⁸ He referred to the need for services and initiatives to be informed ‘by active participation by the people who are directly affected...to ensure that policies are appropriately targeted to meet the needs of the community’. Mr Gooda further noted that: ‘[f]or many Aboriginal and Torres Strait Islander communities, their days and weeks involve answering the revolving door of government bureaucrats from various Federal, State and Local governments who come to talk about a whole range of issues’.¹¹⁹

In recognition of this context, Council is grateful for the willingness of various Aboriginal and Torres Strait Islander agencies and individuals to engage in consultations and make submissions. Council has repeatedly been reminded of the time needed to develop trusting relationships, and of the necessity for initiatives and strategies to be developed in partnership with Aboriginal and Torres Strait Islander individuals, groups and communities. While the Terms of Reference required Council to consult with representatives from Indigenous communities, the scope to do this was fairly limited, given the time required to build trust and rapport. Council made concerted efforts to engage with Indigenous-specific organisations and Aboriginal and Torres Strait Islander peoples working within services, recognising the understanding of community that these organisations and individuals contribute to the discourse.

Many complex issues were raised with Council during its work on this reference. Those deemed most pressing and important by the individuals and organisations that engaged with Council are the focus of this report and the recommendations. There are

many issues that require further exploration, including the ways in which legal recognition can be accorded to traditional approaches to child-rearing among Aboriginal and Torres Strait Islander peoples.¹²⁰ It is clear, for example, that a deep understanding of traditional approaches to what the Western legal system conceptualises as family law issues could only be developed on the basis of a longer term research project conducted by Aboriginal and/or Torres Strait Islander peoples. There are many other gaps in understanding that need to be filled by culturally appropriate and sensitive research. Against this background, the Report outlines developments to date and identifies ways forward.

Council sought to obtain information from as many sources as possible within the limited timeframe. A series of consultations with mainstream and Indigenous-specific organisations and service providers, including the family law courts, focussed on identifying present problems and positive initiatives. Council representatives also had the opportunity to attend four different forums: an Aboriginal and Torres Strait Islander cultural competence workshop, a meeting of the Victorian Aboriginal Justice Forum, a two day forum convened by the Attorney-General's Department, *Improving Access for Indigenous Australians in the Family Law System*, and a meeting of the Northern Territory Family Law Pathways Network with the theme *Indigenous Families in the Family Law System*. Further details and a list of consultations is provided in **Appendix B**. The consultation process also included a request made to Family Relationship Centres (FRCs) to provide information on Indigenous employees, programs and consultation mechanisms.

A general call for submissions was posted on Council's website and specific invitations to make submissions were sent to some Indigenous-specific organisations. A list of submissions received by Council is **Appendix C**.

An extensive literature review has contributed to Council's work. Its scope included policy documents, research, commentary and analytic and evaluative work that contributes to the knowledge base about service provision for Aboriginal and Torres Strait Islander peoples. A list of references is at the conclusion of the report.

In examining the considerations that are taken into account when the *Family Law Act* is applied to Aboriginal and Torres Strait Islander families, Council analysed judgments published on Austlii. A systematic search of this and other databases (e.g. Lexis-Nexis) yielded 55 judgments involving Aboriginal and Torres Strait Islander clients decided since the start of 2007. A list of these cases is at **Appendix D**. The history of the present legislative amendments and an analysis of the cases is discussed at Chapter 5.

2. The family law system and Aboriginal and Torres Strait Islander Peoples

2.1 An overview of the framework

This Chapter provides an overview of the legal framework that pertains to family relationship breakdown in Australia and the system of services and courts that attempt to provide support for families experiencing such breakdowns.

Council recognises that customary law sits alongside the mainstream framework and that a range of culturally-specific organisations provide support to Aboriginal and Torres Strait Islander families and communities.¹²¹ Customary law has been the focus of two main reports, namely, the Australian Law Reform Commission Report - *Recognition of Aboriginal Customary Laws, ALRC Report 31, (1986)*¹²² and a report by the Western Australian Law Reform Commission – *Aboriginal Customary Laws Final Report (September 2006) – The Intersection of WA law with Aboriginal law and culture.*¹²³ Apart from some submissions and consultations recognising the existence of customary law, and noting that Aboriginal and Torres Strait Islander peoples in some communities prefer to use traditional mechanisms to deal with relationship issues, the question of customary law was raised infrequently with Council. Accordingly, this and the following Chapters address the mainstream legal framework and family law system.

The Commonwealth Parliament has power under section 51 of the Commonwealth of Australia Constitution Act (the *Constitution*) to legislate for:

- (xxi) marriage; and
- (xxii) divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants.

The first comprehensive use of these powers by the Commonwealth Parliament was the enactment of the *Matrimonial Causes Act 1959 (Cth) (Matrimonial Causes Act)*, which came into operation in 1961, and the *Marriage Act 1961 (Cth) (Marriage Act)*. The *Matrimonial Causes Act* was replaced by the *Family Law Act*, which came into operation on 5 January 1976. The *Family Law Act* replaced the list of largely fault-based grounds for divorce, such as adultery and desertion of the marriage,¹²⁴ which had been central to the *Matrimonial Causes Act*, with a single no-fault divorce ground based on proof of separation for 12 months.¹²⁵ The no-fault principle continues to underpin divorce applications in Australia to this day. The *Marriage Act* provides the courts with jurisdiction to issue a declaration of nullity where a party's consent to marriage was obtained by duress or fraud, or where a party is not of marriageable age.¹²⁶

The *Family Law Act* also contains frameworks for determining ancillary matters, such as orders relating to children and division of property. Reflecting the terms of section 51 of the *Constitution*, the *Family Law Act* originally dealt with petitions for dissolution of marriage and applications for child custody (as it was then called), child maintenance, spousal maintenance and property division in relation to married couples only. Over the years, its jurisdiction has been extended to include the resolution of disputes about children from unmarried relationships and applications

for property division and financial maintenance by cohabiting unmarried couples. As a result of referrals of power from the Australian States in the 1980s,¹²⁷ the provisions of Part VII of the *Family Law Act*, which deals with parenting orders, were extended in 1988 (and, for Queensland, in 1990) to include all children other than those presently under the care of a State child welfare authority.¹²⁸

On 1 July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amended the *Family Law Act* to implement a raft of significant changes designed to shift the way disputes over children are resolved. Those changes included a requirement for parties to attempt family dispute resolution before applying for a parenting order, with certain exceptions,¹²⁹ a legal presumption of equal shared parental responsibility and, where an order is made for equal shared parental responsibility, consideration of equal parenting time or substantial and significant time with both parents.¹³⁰ The presumption does not apply where there are reasonable grounds to believe there has been family violence or child abuse.¹³¹ The 2006 amendments introduced provisions designed to increase the attention paid to the needs of Aboriginal and Torres Strait Islander children to maintain connections with their culture. These are more fully discussed in Chapter 5, together with an analysis of relevant case law.

A financial settlement regime for separating unmarried couples who have cohabited, broadly mirroring the existing regime for married couples in Part VIII of the *Family Law Act*, was enacted in 2008.¹³²

A number of federal family law matters are not governed by the *Family Law Act*. As a result of the enactment in the late 1980s of the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth), primary responsibility for monitoring arrangements for the financial support of children post-separation is vested in the Child Support Agency rather than the courts.¹³³

A number of issues affecting families are regulated by State legislation, including child protection, youth offending, adoption, assisted reproductive technologies, and domestic and family violence. Child protection legislation in each State provides the relevant child welfare department with authority to seek the removal of children from their families where there is evidence the child has suffered, or is likely to suffer, significant physical, emotional or psychological harm and the child's parents have not protected or are unable to protect the child from that harm.¹³⁴ State-based family violence statutes also empower the police to intervene and remove family members (usually the perpetrator) from the family home where one family member has been violent or has threatened the safety of another family member.¹³⁵

2.2 The family law system and Aboriginal and Torres Strait Islander peoples

The Federal family law system comprises an array of service organisations and professional groups. Key service providers include the family law courts, family relationship service providers, including FRCs, Legal Aid Commissions, two networks of Aboriginal specific legal services being the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services, (FVPLS)¹³⁶ Community Legal Centres, the Child Support Agency and the private legal profession. Some models of Aboriginal and Torres Strait Islander child

and family community controlled organisations also incorporate family support services, including playgroups, relationship counselling, specialist support and parenting services.¹³⁷ While no comprehensive directory for family law services for Aboriginal and Torres Strait Islander people exists, there are some online and printed resources detailing a range of services.¹³⁸

This section provides an overview of the services in the system, with a particular focus on mechanisms for addressing the needs of Aboriginal and Torres Strait Islander peoples, and outlines existing evidence on patterns of service use. Specific programs developed for Aboriginal and Torres Strait Islander peoples are described in Chapter 4.

Council acknowledges that the measurement of legal need is conceptually methodologically complex,¹³⁹ and to date limited attempts have been made to address this issue in relation to Aboriginal and Torres Strait Islander peoples. The administrative data discussed in this section provides a very basic insight into the numbers of clients that various administrative systems recognise as Aboriginal and/or Torres Strait Islander. In relation to Family Support Program services, clients may choose to register on databases or to obtain information, advice or referrals on an unregistered basis. Only those clients that register are ‘counted’, and the number and demographic profile of unregistered clients is uncertain, although Family Relationship Services Australia (FRSA) suggests this figure is up to 30 per cent of total clients.¹⁴⁰ Similarly, data derived from other administrative systems is based on self-identification of clients as Aboriginal and/or Torres Strait Islander and the reliability of such data is uncertain as some clients may choose not to self-identify when accessing services.

Research indicates that family law services are under-utilised by Aboriginal and Torres Strait Islander peoples. In 2009, a New South Wales-based study by Cunneen and Schwartz indicated that ‘very few people sought legal advice in relation to the issues around family law’,¹⁴¹ even though issues relating to post-separation parenting were identified as major concerns for them. This finding is consistent with earlier research by the Law and Justice Foundation of New South Wales.¹⁴² Its 2003 survey on responses to legal incidents among 2431 people resident in New South Wales, including 80 members of the sample who identified as Indigenous, found that Indigenous respondents were 2.1 times more likely than non-Indigenous respondents to report family law events.¹⁴³ Overall, Indigenous respondents were much more likely to report ‘doing nothing’ in response to a range of legal events, including family law, than non-Indigenous respondents (50.9% compared to 32%).¹⁴⁴

Two projects are under way which have significant potential to further inform understanding of the legal, including family law, needs of Aboriginal and Torres Strait Islander peoples. Chris Cunneen and his colleagues from the University of New South Wales Law Faculty are currently conducting an Australian Research Council-funded project that is investigating the civil and family law needs of Indigenous people in Victoria, the Northern Territory and Western Australia. Collaborators in this project include Legal Aid Commissions and Aboriginal-specific legal services in the relevant jurisdictions.¹⁴⁵

A second project is a national survey of legal needs – including a sub-sample of Aboriginal and Torres Strait Islander peoples – commissioned by National Legal Aid. This project is being undertaken by the Law and Justice Foundation of New South Wales and is expected to be completed in early 2012. It will inform National Legal Aid’s service delivery strategies.

2.2.1 The Family Support Program

The Family Support Program (FSP) is a national program that provides funding to non-government organisations to support families and children, especially those who are vulnerable and in areas of disadvantage. It provides early intervention and preventative family support focusing on family relationships, parenting and family law services to help people navigate life events. It also aims to protect children who are at risk of neglect or abuse. There are two streams under the FSP:

Family and Children’s Services stream funded by the Department of Families, Housing, Community Services and Indigenous Affairs include:

- **Communities for Children Services:** including Indigenous Parenting Support Services to provide prevention and early intervention services to families with children up to age 12 and who are at risk of disadvantage;
- **Family and Relationship Services:** dealing with adult relationship issues, counselling for young people and children, and broader parenting support;
- **Specialist Services:** which have particular knowledge and skills for dealing with vulnerable families affected by issues such as drugs, violence and trauma; and
- **Community Playgroups:** to support parents with young children.

Family Law Services stream funded by the Attorney-General’s Department includes FRCs, Family Dispute Resolution, Regional Family Dispute Resolution, Children’s Contact Services, Parenting Orders Program, Post Separation Cooperative Parenting, Supporting Children after Separation Program and Counselling.

The Attorney-General’s Department also funds the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO) which are national services to support the two streams.

2.2.2 Family Relationship Centres

FRCs provide information and advice for families at all stages in their life. The 65 FRCs located around Australia can provide families experiencing separation with information, advice and dispute resolution services to help them to reach agreement on parenting arrangements.¹⁴⁶ They also play a key role in referring individuals, couples and families to a range of other support services. Twelve FRCs are specifically funded to employ Indigenous Advisors. These are: Townsville, Lismore, Dubbo, Mildura, Darwin, Port Augusta, Rockhampton, Cairns, Midland, Geraldton, Nowra and Kimberly.

Survey responses indicated that some of these FRCs have both formal and informal mechanisms for seeking specific advice from Aboriginal and Torres Strait Islander peoples on Indigenous issues, including Aboriginal staffing, reference groups and

community outreach. Not all FRCs have accredited Aboriginal and Torres Strait Islander family dispute resolution practitioners on staff and responses repeatedly highlighted the difficulty in recruitment. Some FRCs offer programs tailored for Aboriginal and Torres Strait Islander clients and cultural competency training for staff, while others have collaborative service delivery arrangements with Aboriginal organisations.

Responses to Council's request for information showed other FRCs also employ Indigenous Advisors, though not through special funding allowances. These include Blacktown, Bundaberg, Bunbury, Adelaide and Perth.

The functions of the Indigenous Advisors include:

- helping FRCs to develop innovative and effective approaches to delivering services to Indigenous families
- conducting community education to Indigenous communities about FRCs and other services
- liaising with Indigenous communities in their areas and with other agencies serving those communities
- coordinating arrangements for service delivery, and
- providing cultural advice and training to FRC staff.

All responses to Council's surveys and requests for information highlighted the difficulty in recruiting appropriately. This issue is dealt with further in Chapter 4.

Operating frameworks specify that all FRCs must provide flexible and culturally sensitive and accessible service delivery models and practices to Indigenous clients in their area, and have in place strategies to achieve this. Strategies to enable effective delivery of FRC services to Indigenous clients might include:

- development of service specific plans for engagement with Aboriginal and Torres Strait Islander clients and community
- providing services at culturally appropriate sites that are welcoming for Indigenous families, and consideration is given to all family members, including women, men and children
- recruiting Indigenous staff in the FRC
- arranging outreach visits and flexible program delivery to communities in their catchment area
- forming linkages with Indigenous communities and agencies servicing those communities
- networking with other providers of family services to Indigenous people, and
- providing Indigenous interpreter services where needed.

When the FRCs initially started operation (there was a staged rollout as part of the 2006 reforms) funding was provided by the Australian Government for an Indigenous communications consultant to provide both strategic advice and appropriate materials for the Indigenous components of the family law reform community education campaign. This included:

- advertisements through Aboriginal and Torres Strait Islander radio and press
- an information brochure explaining the changes to the law and case studies
- posters for communities, and

- training for the first 15 FRCs.

The activities of the Darwin FRC provide a specific example of how this was applied:

*Darwin FRC used a participatory action research model to obtain input from Indigenous Advisors about ways to engage more effectively with Indigenous people living outside the Darwin area. Through this process a number of Aboriginal communities were selected for regular visits from FRC staff and involvement in FRC activities. In addition, a reporting form was designed for these visits which would be useful both in generating statistics and collating information about clients and their community.*¹⁴⁷

2.2.3 The Family Relationship Advice Line and Family Relationships Online

The FRAL is a national telephone service established to assist families affected by relationship or separation issues, and provides free information on family relationship issues and advice on parenting arrangements after separation. It can refer callers to local services, such as FRCs, that can provide further assistance. It includes a separate Legal Advice Service which provides families going through separation and workers in post separation services with simple legal advice and information. In addition, the Telephone Dispute Resolution Service provides clients with non face-to-face dispute resolution to help them to reach agreement on parenting arrangements.

According to data provided by the Department of Families, Housing, Community Services and Indigenous Affairs, approximately 1.3 per cent of callers to FRAL identify as Indigenous. FRAL currently has one Indigenous Information Officer (IIO). Indigenous callers who request the service of an IIO will be transferred to an available IIO. If there is no IIO available, a message states there are no IIOs available and the non-Indigenous Information Officer offers to complete the call. FRAL currently does not have any Indigenous Parenting Advisors.

The FRO provides information about family relationships and separation, and helps people find services across Australia. It also allows families to find out about a range of services that can assist them to manage relationship issues, including agreeing on appropriate arrangements for children after parents separate.

2.2.4 Family Support Program: Indigenous access plans

The eight face-to-face family law service types (FRCs, Family Dispute Resolution services, Regional Family Dispute Resolution, Children's Contact Services, Parenting Orders Program, Post Separation Cooperative Parenting, Supporting Children after Separation Program, and Counselling) are subject to new requirements in relation to access for Aboriginal and Torres Strait Islander clients. By 9 December 2011, these services were required to submit an annual Indigenous Action Plan to the Department of Families, Housing, Community Services and Indigenous Affairs. The plan documents the actions to be taken to improve access for Indigenous families and children and sets an Indigenous Access Improvement Target.¹⁴⁸

2.2.5 Family Dispute Resolution Services

Family dispute resolution is defined by the *Family Law Act* as a process conducted by an accredited independent practitioner or practitioners to assist people affected, or likely to be affected, by separation or divorce, to resolve some or all of their disputes with each other.¹⁴⁹ Examples of family dispute resolution processes include facilitation, mediation, conciliation and negotiation. The aim of family dispute resolution is to assist separating families to resolve disputes in the best interests of their children as an alternative to going to court where this is assessed as a suitable option for the parties. Before proceeding to provide family dispute resolution, the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) (the *FDRP Regulations*) require family dispute resolution practitioners to conduct an intake assessment and be satisfied that family dispute resolution is appropriate.

Since 1 July 2007, it has been a requirement that anyone who wishes to file a court application for parenting orders must first attempt family dispute resolution. There are certain exemptions to this requirement, including where there are reasonable grounds to believe that there has been, or there is a risk of, family violence or abuse of a child, or where the matter is urgent.¹⁵⁰

Under Regulation 25 of the *FDRP Regulations*, a family dispute resolution practitioner must consider whether it is appropriate for the parties to participate in the family dispute resolution process. This includes being satisfied that neither party's ability to negotiate freely is affected by a history of family violence, inequality of bargaining power, or by their own or the other party's emotional, psychological or physical health. Parties engaging in family dispute resolution are required to make a 'genuine effort' to resolve their dispute. Once the family dispute resolution process is concluded, either successfully or unsuccessfully, or if a party has declined to participate or the practitioner has determined that it is inappropriate to conduct or to continue family dispute resolution, the practitioner can issue the parties with a certificate under section 60I of the *Family Law Act*.¹⁵¹ A certificate under section 60I must be filed with any application for a parenting order unless one of the exemptions applies.¹⁵²

Family dispute resolution services are offered in approximately 150 locations across Australia. There are also 42 regional family dispute resolution services nationally, which are specially designed to meet the particular needs of regional communities, providing a range of services to help separating families resolve disputes and reach agreement on parenting arrangements as well as finances and property.

There are approximately 1550 accredited family dispute resolution practitioners providing services in locations throughout Australia. Approximately 1100 of these provide services in government funded organisations, while 450 are private practitioners (some of whom may also provide services to government funded organisations).¹⁵³

2.2.6 Family Support Program administrative data: usage patterns

Administrative data on the number of clients who register with FSP services and identify as Aboriginal and/or Torres Strait Islander suggests very incremental increases in their engagement with these services. Table 2 includes data from the Australian Institute of Family Studies (AIFS) *Evaluation of the 2006 family law reforms* and data from the 2010-2011 financial year obtained from the FSP administrative database.¹⁵⁴ The data demonstrates that the services used by a higher proportion of Indigenous clients are the Specialised Family Violence Services with steady annual increases. Also notable are the very small increases in the use of FRCs by Indigenous clients, particularly in the context of the significant increase in the use of these services by all types of clients (336% increase between 2006-2007 and 2008-2009 - the latter figure reflects a time period where the full complement of 65 FRCs was in operation).¹⁵⁵ Increased use of family dispute resolution services in the Regional Family Dispute Resolution program suggests uptake of these services will occur where they are available.

Table 2: Proportion of FSP registered clients identifying as Aboriginal or Torres Strait Islander 2006-2007 to 2010-2011¹⁵⁶

	SFVS %	MFRS %	Counselling %	FRC %	FDR+ %		CCS %	POP %
2006-07	4.4	5.4	1.5	2.9	1.4		3.6	1.2
2007-08	6.7	5.8	2.2	2.6	1.9		3.6	1.6
2008-09	7.7	8.0	2.6	3.0	1.8		3.9	2.0
2009-10	8.0	7.3	3.5	3.1	FDR 1.2	RFDR 4.4	4.2	1.8
2010-11	8.5	7.3	3.7	3.2	FDR 1.5	RFDR 5.2	4.9	2.1

+The 2006-2007 to 2008-2009 Family Dispute Resolution (FDR) figures include the Regional Family Dispute Resolution (RFDR) services. Figures for these services are given separately for the 2009-2010 and 2010-2011 financial years.

2.3 Legal services

2.3.1 Aboriginal and Torres Strait Islander Legal Services

The ATSILS deliver services from 79 permanent locations, as well as at court circuits, bush courts and outreach locations in metropolitan (11%), regional (61%) and remote areas (28%) throughout all States and Territories. The Attorney-General's Department currently funds eight ATSILS across Australia. Indigenous legal aid services provided by ATSILS include advice, duty lawyer and casework services in criminal, family and civil law. ATSILS deliver services at Indigenous specific courts including Koori Courts, Nunga Courts, Murri Courts and Aboriginal Courts.

In 2010-2011, the eight ATSILS provided 7,516 family law services across Australia. The family law services represent 4.03 per cent of the total services provided by the program. Family law matters comprise a low percentage of the total services provided because ATSILS focus on criminal law. ATSILS are required to give priority to people who are likely to face prison sentences so they allocate resources accordingly to prevent clients from being incarcerated.¹⁵⁷

In addition, some family law matters, including family violence, are referred by the ATSILS to other service providers, such as Legal Aid Commissions, because of conflicts of interest. Conflicts of interest can be categorised into ‘legal’ and ‘community’ conflicts. A legal conflict arises when a lawyer cannot fully uphold their duty of loyalty or of confidentiality to their client because they have a competing duty to another client or a personal interest in the matter. Community conflicts of interest can be seen as a conflict between a lawyer’s duty of loyalty to their client and the need to maintain good relationships with local Indigenous communities. In these circumstances ATSILS may refer these matters to another appropriate service provider.¹⁵⁸

2.3.2 Family Violence Prevention Legal Services

The aim of the Indigenous FVPLS program is to provide holistic assistance to Indigenous peoples who are victims/survivors of family violence and/or sexual assault. The overall objective of the FVPLS program is to provide culturally appropriate legal services and assistance to victims/survivors of family violence and/or sexual assault to prevent, respond to and reduce the incidence of family violence and sexual assault. The funding is used to provide:

- legal assistance, advice and a range of support services
- information, support and referral services, and
- community engagement and family violence prevention activities.

FVPLS are provided at 31 locations, although none of these are in urban areas. All services are located in rural or remote areas to address lack of access to legal services in these areas.

The FVPLS program began in 1998 under the Aboriginal and Torres Strait Islander Commission and was intended to service an unmet need in rural and remote locations for support and assistance for Indigenous victim/survivors of family violence and/or sexual assault. In 2004, the program was transferred to the Attorney-General’s Department at which time the Crime Research Centre of Western Australian was engaged to assist in determining the locations of the FVPLS units in rural and remote locations throughout Australia. At the same time, 250 stakeholders were consulted as well as State and Territory Governments. The outcome of the research and stakeholder feedback resulted in 34 locations being identified, of these 31 locations have been funded with expansion of the program in 2004 and 2006.¹⁵⁹

Administrative data from 2010-2011, provide the following insights into the characteristics of FVPLS service users:

- 86 per cent of clients are Indigenous – the percentage is probably higher but there are instances when a non-Indigenous relative may be counted as a client
- the predominant reason for accessing FVPLS is because of family violence
- almost 90 per cent of clients are female
- clients are generally single and with dependent children
- clients are young with 50 per cent being under 34 years and 33 per cent aged 35 – 49 years, and
- ninety three per cent of clients are low income earners.

The services provided by FVPLS are not limited to family law matters. Services usually involve family violence and/or sexual assault. However, they can also involve post-separation parenting matters.

2.3.3 Community Legal Centres

Community Legal Centres are community-based, independent not-for-profit organisations that provide a range of legal and related assistance services to people who are disadvantaged, those with special needs and those whose interests should be protected as a matter of public policy. Community Legal Centres complement services provided by Legal Aid Commissions, Indigenous legal assistance service providers and the private legal profession. Many Community Legal Centres provide generalist legal services to their respective communities. Specialist legal services work in particular areas of law such as child support, credit and debt, welfare rights, disability discrimination, tenancy, or immigration. Other Community Legal Centres provide targeted specialised services to young people, older people, the homeless, women, or to Aboriginal and Torres Strait Islander women and their children.

The Community Legal Centre program provides specific funding for dedicated:

- women's legal services
- Aboriginal and Torres Strait Islander women's legal services
- Indigenous women's projects (attached to Community Legal Centres), and
- rural women's outreach projects (attached to Community Legal Centres).

The women-specific services provide support to women, often providing State-wide services through telephone advice lines. They also undertake community legal education, law reform activities and outreach work. Of the women's services provided, about 45 per cent of matters relate to federal family law.

An example of a specialist program within the Community Legal Centre umbrella is the Indigenous Women's Legal Program (IWLP) operated by Women's Legal Services NSW.¹⁶⁰ The service provides an Aboriginal legal advice line, undertakes community legal education programs and participates in law reform and policy development activities.¹⁶¹ The IWLP has an Aboriginal Women's Consultation Network that has a two day meeting each quarter to provide advice and guidance on culturally appropriate service provision. Members of this network include regional community representatives, the co-ordinator of Wirringa-Baiya Aboriginal Women's Legal Centre and the IWLP staff.

Community Legal Centres assist approximately 220,000 clients each year (total of Indigenous and non-Indigenous people). Civil law is the primary area of need. In 2010-2011 there was a five per cent increase in the proportion of family law matters (36.28% in 2010-2011 up from 31.95% in 2009-2010).¹⁶² The Women's Legal Centre (ACT and Region) has an Indigenous Women's Law and Justice Support Program. The centre reports that since the program was established in 2006, the number of clients accessing the centre who identify as Aboriginal or Torres Strait Islander has increased from 2% to 9.8% in the 2009-2010 financial year.¹⁶³

Indigenous clients make up 5 per cent of the total clients assisted by Community Legal Centres across Australia every year. Around 33 per cent of their matters relate

to family law. Indigenous women who present to Community Legal Centres make up 70 per cent of the number of Indigenous clients assisted, with 40 per cent of their cases relating to family law matters.

2.3.4 Legal Aid Commissions

Legal Aid Commissions are independent statutory bodies established under state and territory legislation. They receive funding from the Australian Government and their respective State or Territory government to provide legal assistance services, including in relation to family law. Commonwealth funding is provided through the *National Partnership Agreement on Legal Assistance Services (National Partnership Agreement)*.¹⁶⁴ The *National Partnership Agreement* came into effect on 1 July 2010 and is for a period of four years. The primary function of commissions is to provide legal assistance to people who are unable to afford private legal services. Services provided include:

- community legal education, information, advice and minor assistance (both face-to-face and telephone advice services)
- advocacy, representation, casework and other litigation assistance
- duty lawyer services (immediate advocacy assistance in local courts), including in the Federal Magistrates Court of Australia and the Family Court
- the appointment of independent children's lawyers in accordance with requests from the Federal Magistrates Court of Australia and the Family Court, and
- family dispute resolution services.

Legal aid services are provided either by salaried lawyers within the commissions, or by private practitioners to whom the commissions refer legal aid clients. Commissions have established guidelines to determine the eligibility of an applicant for legal aid. They also have established priorities for different legal aid matters. Commonwealth service priorities are set out in Schedule A of the *National Partnership Agreement*.

Under the Agreement, Commonwealth priorities in family law matters are to assist:

- children
- family members resolving complex issues about their children
- parents with special needs' and
- people experiencing, or at risk of experiencing, family violence.

Legal Aid Commissions do not receive Indigenous-specific funding.¹⁶⁵ Legal Aid Commissions work with Aboriginal-specific services to support the provision of legal services to Aboriginal and Torres Strait Islander peoples. More information on such initiatives is outlined in Chapter 4.

Legal Aid Commissions provide broad legal assistance including in relation to family law. In 2009-2010 Legal Aid Commissions across Australia approved over 32,000 applications for legal assistance cases in family law matters, of which 60 per cent were for women and 35 per cent were for men. Of those self-identifying as Indigenous, 3,317 (over 10%) were women and 1,751 (5.3%) were men.¹⁶⁶

Table 3 shows the breakdown of approved applications in family law matters between clients identified as Indigenous and non-Indigenous. A significant increase in family law approvals between 2009-2010 and 2010-2011 is reflected in the Northern

Territory data. Advice from National Legal Aid indicates this fluctuation, particularly noticeable in the context of a small pool of applications, is likely to have been significantly influenced by clients being directed to Northern Territory Legal Aid by the Northern Australian Aboriginal Justice Agency, which for a period in 2010-2011 did not have a family lawyer available on staff.¹⁶⁷

Table 3 Legal aid applications in family law approved, by state & Indigenous status, 2009-2010 and 2010-2011*

State	Period	Indigenous	Non-Indigenous	Unknown / Not recorded	Total
		%	%	%	(N)
NSW	2009-10	13.0	87.0	0	15,430
	2010-11	13.5	86.5	0	13,234
VIC	2009-10	2.5	97.3	0.2	14,861
	2010-11	4.1	93.0	3.0	14,937
QLD	2009-10	7.4	92.6	0	9,804
	2010-11	7.9	92.1	0	7,934
WA	2009-10	9.0	90.4	0.6	2,582
	2010-11	8.6	90.8	0.6	3,194
SA	2009-10	5.6	86.5	7.9	2,639
	2010-11	5.9	89.2	4.9	2,499
TAS	2009-10	4.8	95.2	0	1,924
	2010-11	5.0	95.0	0	1,811
ACT	2009-10	3.1	96.9	0	1,076
	2010-11	5.2	94.8	0	1,077
NT	2009-10	17.2	82.8	0	506
	2010-11	26.1	73.9	0	522
Total	2009-10	7.6	91.9	0.5	49,092
	2010-11	8.2	90.5	1.3	45,208

Note: Total may not add to 100% due to rounding. * Data provided in National Legal Aid Submission

2.3.5 The Private Legal Profession

The majority of people who seek legal advice or representation in relation to family law issues do so from members of the private legal profession. Generally clients pay for this service, but some lawyers in private practice will act for clients who are funded by legal aid or will act on a pro bono basis. Suitably experienced and qualified private practitioners can be appointed as independent children's lawyers in family law proceedings, and this work is funded by legal aid.¹⁶⁸

Family lawyers will, where appropriate, encourage their clients to reach agreement on family law issues outside of the courts, and may refer clients to other services where this will assist them. Many family law disputes are resolved with the assistance of lawyers acting for each of the parties. If an agreement is reached, lawyers will often prepare an Application for Consent Orders so that the agreement reached is binding

and enforceable. Where a dispute cannot be resolved by negotiation, either because of entrenched conflict or because the issues are such that recourse to the courts is to be preferred, lawyers will guide their client through the court process and ensure that their client's case is properly presented. The majority of applications filed in court are resolved during the course of the proceedings with the assistance of the parties' lawyers, but some cases ultimately require judicial determination.

All practising lawyers, whether in private practice or employed elsewhere, are required to undertake continuing legal education. Most States offer specialist accreditation in family law, and accredited specialists have additional ongoing education requirements specific to family law. In order to obtain specialist accreditation, practitioners must satisfy their professional body that they have substantial experience in family law and must pass a formal assessment of their professional skills and their knowledge of family law practice and procedure.

2.3.6 Legal Assistance Partnerships

The Attorney-General's Department provides funding for collaboration between FRCs, Community Legal Centres and Legal Aid Commissions for legal assistance services. The funding enables legal assistance services to provide a range of free services to clients of FRCs, including:

- provision of legal information and education to FRC clients on family law
- individual legal advice for FRC clients
- legal assistance before, during and following family dispute resolution as recommended by and in partnership with FRCs
- assistance with drafting parenting agreements and consent orders, and
- training and professional development of staff in FRCs.

2.3.7 Family Law Pathways Networks

The Australian Government funds Family Law Pathways Networks around Australia. Each Family Law Pathways Network comprises professionals operating within the family law system who focus on information-sharing and networking opportunities in a local area; and develop and maintain cross-sector training to help build stronger working relationships across the family law system.

Under current funding agreements, Family Law Pathways Networks are required to establish and maintain relationships with organisations delivering services to culturally and linguistically diverse clients.

The Family Law Pathways Networks aim to contribute to the family law system by:

- assisting with maintaining appropriate referral mechanisms between locally based organisations operating as part of or alongside the family law system, and
- developing and maintaining a shared understanding of the roles of Family Law Pathways Network members and key organisations operating as part of or alongside the family law system and developing and maintaining awareness of products, services and training available to Family Law Pathways Network members.

2.3.8 The Family Law Courts

The family law courts are the Family Court and the Federal Magistrates Court of Australia. Both courts have jurisdiction in family law matters in all States and Territories except Western Australia, which has its own Family Court, the Family Court of Western Australia.¹⁶⁹ The courts are independent, but cooperate to provide streamlined access to the federal family law system. The Family Court hears appeals and deals with the more complex cases at first instance. The Federal Magistrates Court of Australia hears first instance matters under the *Family Law Act*, as well as having jurisdiction in other federal law matters, such as bankruptcy and migration. The AIFS *Evaluation of the 2006 family law reforms* indicated that by 2008-2009, about 14 per cent of applications for final orders in children's matters were made in the Family Court and about 76 per cent in the Federal Magistrates Court of Australia.¹⁷⁰ Australia's first Indigenous appointment to any federal court was made to the Federal Magistrates Court at Newcastle.¹⁷¹ The proportion of filings for final orders made in the Family Court of Western Australia has remained constant at 10 per cent.¹⁷² The Family Court of Western Australia exercises jurisdiction under the *Family Law Act* in relation to nuptial matters and the *Family Court Act 1997 (WA)* in relation to ex-nuptial matters. Appeals from this court are heard by the Full Court of the Family Court.

At the same time as Council was considering this reference, Mr Stephen Ralph forensic psychologist, was finalising a report for the family law courts on the experiences of Aboriginal and Torres Strait Islander clients and the family law courts. Whilst noting the deficiencies in data collection on court usage by Aboriginal and Torres Strait Islander clients, Ralph's research indicates that, according to administrative data provided by the family law courts, the proportion of matters in which one or both parties were identified as Aboriginal and/or Torres Strait Islander varied between 1.5 per cent in 2004-2005 and 2.1 per cent in 2009-10.¹⁷³ For 2010-2011, the proportion recorded stood at 1.6 per cent.

Ralph's analysis of court data indicates the following changes in patterns relating to Indigenous litigant status between 2007-2008 and 2010-2011: a decline in the number of Indigenous applicants, an increase in the number of Indigenous respondents and an increase in the number of matters where both parties are identified as Indigenous.¹⁷⁴

Between the late 1990s and 2006, the Family Court employed Indigenous Family Liaison Officers as part of a program aimed at improving the court's ability to meet the needs of Aboriginal and Torres Strait Islander clients. The program is further discussed in Chapter 4. This program was regularly referred to in very positive terms in Council's consultations and there was much regret expressed by individuals and organisations, and other family law system services, about its cessation in 2006 when the Family Court no longer received funding for these positions. As an alternative, Indigenous Advisors were employed in twelve FRCs from 2006.

Currently, a small amount of resourcing for an Indigenous Family Consultant is being deployed in the Cairns Registry of the family law courts. The Family Court of Western Australia has, at different times, employed Indigenous Family Consultants. One such position currently exists at the Court and is funded until 30 June 2012. The Federal Magistrates Court of Australia, does not employ Indigenous Family Liaison

Officers, but can call upon the Cairns-based Indigenous Family Consultant for support.

3. Aboriginal and Torres Strait Islander clients: Barriers to Access and Engagement

Several core themes relating to barriers and impediments to access and engagement with the family law system were raised in the consultations and submissions and are also supported in the literature. Many of these issues flow from the trends relating to socio-economic, educational and health status, as well as those that underpin the over-representation of people from Aboriginal and Torres Strait Islander backgrounds in the criminal justice and child protection systems. It appears that most of these themes relating to barriers and impediments are relevant, to at least some extent, to many Aboriginal and Torres Strait Islander people, though their impact varies according to geographical location and the nature of the community in which they live.

Many individuals attempting to access the family law system face multiple, simultaneous difficulties which have a combined and cumulative impact on their capacity to engage with and benefit from the system's support services. Service 'engagement' with a client incorporates two elements: initial access and ongoing contact.¹⁷⁵ Council's work on this reference indicates that Aboriginal and Torres Strait Islander families experience difficulties in relation to each of these elements. In the context of other issues that often accompany family breakdown (for example, housing, family violence and child safety), in a population affected by socio-economic, health and housing difficulties to the extent experienced by Aboriginal and Torres Strait Islander families, these issues contribute to non-engagement with, and dis-engagement from, the family law system. Family law matters involving Aboriginal and Torres Strait Islander clients tend to be particularly complex, both because of the nature of the issues involved and because of the need to resolve them in a culturally appropriate way.

3.1 Resistance to engagement

A central point made in many submissions and consultations, and strongly supported in the literature,¹⁷⁶ related to resistance to engagement with government, legal agencies and some non-government organisations (NGOs). There are two inter-related aspects to this theme. The first arises directly from past policies in relation to Aboriginal peoples, most notably in this context, the forced removal of children from families and the forced relocation of communities. As outlined in Chapter 1, the result of past policies is contemporaneously evident in the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and the child protection system. The historical policies and the contemporary patterns of engagement with government-auspiced services, legal services and some NGOs have created a legacy of fear and mistrust that militates against Aboriginal and Torres Strait Islander peoples voluntarily engaging with such systems. For example, the North Australia Aboriginal Justice Agency (NAAJA) stated that:

*[m]any 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.*¹⁷⁷

Similarly, the Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) commented that ‘a history of poor experiences with the justice system in the Aboriginal and Torres Strait Islander communities generally...creates significant barriers to access to justice’.¹⁷⁸

Council’s consultations also suggest that the ongoing overrepresentation of the Aboriginal and Torres Strait Islander population in the child protection system and the criminal law system plays a considerable role in contemporary engagement with government and legal institutions. On several occasions, Council was told that many people in Aboriginal and Torres Strait Islander communities are unaware of the difference between the child protection system and the family law system and that the fear of having children removed inhibits their voluntary engagement with the family law system. Women’s Legal Services NSW, which operates an IWLP, submitted that:

*[M]any women choose not to engage with the family law system as they are concerned that the Department of Human Services then will be involved and take their children away. A partner who is manipulating things for his own benefit or [is] violent may reinforce this concern.*¹⁷⁹

Likewise, the NAAJA said that ‘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’.¹⁸⁰

The second, and related, aspect of these submissions involved a preference for resolving issues arising from relationship breakdown within families and wider communities. In some communities, there are traditional mechanisms for this, although several submissions and consultations indicated that these mechanisms were breaking down in some communities. A desire for privacy is also relevant. FRSA noted on the basis of its experience that some Aboriginal communities ‘may not require or want formal services designed to resolve family disputes or manage post separation parenting arrangements’.¹⁸¹

3.2 Legal literacy

A lack of knowledge about the way the legal system operates also inhibits access by Aboriginal and Torres Strait Islander peoples. A number of submissions and consultations indicated that Aboriginal clients tend to equate the legal system with the criminal justice and child protection systems and are unaware of other aspects of the law, including family law, and the availability of legal assistance and family relationship services, and the possible availability of legal aid. Women’s Legal Services NSW, for example, said:

*[A]boriginal men and women are very unlikely to follow through with a cold referral to a private solicitor. They will immediately think this is extremely costly and not be aware that Legal Aid may be available.*¹⁸²

Whilst a number of organisations are funded to provide legal education services, several indicated that they did not have sufficient resources to provide comprehensive services across vast distances and to diverse communities. NAAJA, for example, said

it 'has two Community Legal Education solicitors to service the entire Top End of the Northern Territory. It is simply not possible with our limited resources to do this'.¹⁸³

Some specific examples of the implications of a lack of legal literacy were provided in consultations and submissions. It was emphasised that, due to the of a lack of knowledge of family law and the availability of services, in addition to other reasons, help was often sought at a point of crisis, such as when a recovery order was required. At this juncture, a lack of understanding of the process could be a source of significant frustration as well as an impediment to securing the child's timely and safe return. The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council submitted that:

*[F]or example, a child may be taken from a mother living in Amata in the APY Lands and the matter is then heard in the Adelaide Court approximately 1200km away. There is a need for education about the process and the reasons for it, so that people understand that even where an urgent recovery order is sought, evidence must be collected and the matter put before a judge before an order can be made. People should also be aware that it is only where there is a court order in place that police can act to assist the return of the child.*¹⁸⁴

Examples were provided in submissions and consultations of the implications of a lack of awareness of family law and how it regulates caring arrangements. Some agencies indicated that there was little awareness of the need to formalise arrangements where children were cared for by extended family members until non-parent carers confronted the practical realities of arranging, for example, medical care, without court orders permitting them to do so.¹⁸⁵ The importance of compliance with court orders was also not well understood, and could contribute to the development of a crisis situation where a child was wrongfully retained and the main carer was unaware that compliance with orders was mandatory and orders could be enforced.¹⁸⁶

3.3 Education, language and communication

The family law system and associated services rely heavily on oral and written English. Aboriginal and Torres Strait Islander populations have, on average, lower levels of educational attainment than the non-Indigenous population. Levels of literacy are lower, and for many, especially those in rural or remote areas, English may be a second or third language, or less commonly, not spoken at all. In 2005, 11 per cent of the Indigenous population over the age of 15 years spoke an Aboriginal or Torres Strait Islander language as their main language at home.¹⁸⁷ There is also a high incidence of hearing impediments in Aboriginal and Torres Strait Islander communities, often resulting from high rates of middle ear infections.¹⁸⁸

These issues operate as barriers to accessing the family law system in several inter-related ways. For example, information about the legal system and associated services may be difficult to locate and access, whether in English or an Aboriginal or Torres Strait Islander language. When services are accessed, information may not be conveyed in a way that is readily understood, absorbed and applied to the individual's situation. Aboriginal and Torres Strait Islander clients with limited English may require a greater time and resource commitment by service providers.

In obtaining legal and relationship advice, and participating in court proceedings,¹⁸⁹ some Aboriginal and Torres Strait Islander people face significant language and communication barriers, and may be uncertain of the advice received or the outcomes of proceedings. For example, NAAJA submitted that ‘complex language is often used in family dispute resolution proceedings. Many of our clients leave mediations with limited understanding of what transpired in the mediation.’¹⁹⁰

A number of consultations and submissions indicated that legal documents, including applications for legal aid, court documents and Child Support Agency forms, are overly complex and inaccessible. The need to fill out such documentation was identified as a factor that contributed to disengagement from the system. The Victorian Aboriginal Legal Service Co-operative Limited submitted that:

*The manner in which information is gathered for our family law clients can be hard for them, especially when distance, requiring fax and post communication, and literacy problems are factored in. We see engagement with the family law system drop off significantly in these cases.*¹⁹¹

The intention and nature of legal documents may not be well understood by clients, resulting in misunderstandings about their effect. For example, the Women’s Legal Service NSW submitted that:

*[F]ace to face communication is best for Aboriginal people as their own languages are based on non verbal communication ... At the moment Aboriginal women are making legal agreements without fully understanding what they have agreed to do. They are not confident to disagree, are worried about being seen as uncooperative and fear their children will be taken away by the Department of Human Services.*¹⁹²

National Legal Aid identified the need for appropriately trained and qualified onsite interpreters as key to mitigating language and communication barriers, noting that in court proceedings ‘telephone interpretation should only be used in urgent circumstances and only if an onsite interpreter is not available’.¹⁹³ While interpreters may be used to ameliorate barriers, the consultations and submissions (see for example North Australian Aboriginal Family Violence Legal Service) indicated that the availability of interpreters, particularly in some language groups,¹⁹⁴ is limited.¹⁹⁵ For cultural reasons, it may be inappropriate to have an interpreter of a particular gender, age or relationship to a party.¹⁹⁶ The interpretation of family law concepts is technically challenging. As the National Accreditation Authority for Translators and Interpreters explained, many Aboriginal and Torres Strait Islander languages do not have equivalent terms or concepts to those of the English language, affecting the accuracy of interpretations and hindering the ability of interpreters to provide explanations.¹⁹⁷

The finite pool of trained and qualified interpreters results in delays in scheduling of events reliant on interpreters,¹⁹⁸ and instances where conflict of interest and confidentiality issues arise, particularly in smaller communities.¹⁹⁹

3.4 Culturally appropriate services and outcomes

There is a range of Aboriginal and Torres Strait Islander specific services available, as well as mainstream services that attempt (or are moving to attempt) to operate in a culturally appropriate way. Specific examples, as well as a synthesis of promising and effective practice principles, are described in Chapter 4. It is apparent from the consultations and submissions that there is significant room for improvement in this area, and that professionals working in the family law service sector are aware of this need. The ability to meet the needs of Indigenous clients received the lowest self-rating of workers for practice issues in the AIFS *Evaluation of the 2006 family law reforms*.²⁰⁰ Issues related to culture impinge on service delivery in a myriad of overlapping ways. Physical environments, modes of communication, observance of cultural protocols concerning gender and the accommodation of substantive cultural norms, including notions of kinship, approaches to child-rearing must all be taken into account in providing culturally appropriate services. A number of key themes were highlighted repeatedly in consultations and submissions which are outlined below.

First, stakeholders stressed the need for mainstream services to provide culturally appropriate services for Aboriginal and Torres Strait Islander peoples so that these can be accessed and engaged with alongside or instead of culturally-specific services. Concerns were raised that a focus on increasing the cultural competency of mainstream service personnel should not involve a resource allocation away from Indigenous specific services, but that both service models should be adequately resourced to provide appropriate options for clients. Aboriginal and Torres Strait Islander peoples may have a preference not to use Aboriginal specific services to maintain privacy. Choice is important as community or family connections with Aboriginal employees at either type of service may mean particular clients are unwilling to use that service. In a legal context, conflicts of interest may eliminate some service choices, meaning that, in practical terms, a culturally specific service may not be available.

A critical component of delivering culturally appropriate services is the ability to recruit, train and retain Aboriginal and Torres Strait Islander staff in a range of specialist (outreach, liaison, support, practitioner) and other roles (for example, administration, reception). Council repeatedly heard that this remains an ongoing challenge. FRSA, for example, submitted that there is a ‘critical under-supply of suitably qualified Indigenous practitioners, with FRCs reporting difficulty in recruiting Indigenous Family Liaison Officers with some positions vacant for extended periods of time’.²⁰¹ Compounding factors for the difficulties in this area are the limited opportunities and access to appropriate training, workplace pressures that face many Aboriginal and Torres Strait Islander staff,²⁰² and the need to recruit Aboriginal and Torres Strait Islander individuals of appropriate standing and reputation in their communities. For example, at the time Council conducted a consultation with Relationships Australia which runs the Darwin and Alice Springs FRCs in the Northern Territory, recruitment for a male Indigenous Family Liaison Officer had been ongoing for some months. The task of recruiting an Aboriginal man with the appropriate characteristics to operate effectively in what the Darwin Indigenous Family Liaison Officer, Mr Kimberly Hunter, referred to as ‘the heartland of initiated men’, was a significantly complex task.²⁰³

Consultations and submissions repeatedly emphasised the fact that culturally appropriate service delivery requires different and complex responses in a number of areas. FRSA contended that ‘traditional service models are often not the most appropriate way to deliver services but contractual requirements, performance measurement frameworks and limited resources can prohibit the development of more innovative and long lasting approaches’. Consultations and submissions stressed the importance of providing preventative as well as early intervention programs. These included the need for education and support initiatives that addressed parenting, family and relationship issues prior to, during and post engagement with the family law system. Suggestions particularly focused on local, intensive support to mitigate against disengagement and problems becoming sustained and serious, such as legal literacy programs and training for Aboriginal elders in family law, programs that work with families to develop parenting skills, relationship programs to improve the self-esteem of Aboriginal men and help them support their families, and dedicated anti-violence programs.²⁰⁴

The time needed to develop trust with Aboriginal and Torres Strait Islander clients was another key theme in many consultations, along with the need for processes that are flexible from the perspective of time, processes and ability to respond to the range of client issues that may present.²⁰⁵ Submissions emphasised the dynamic and unique context of each community, which the Nowra FRC noted requires services to find ‘what works for specific communities – not having a one size fits all’ approach.²⁰⁶ A point made consistently was that several visits to communities or appointments could often be needed before family law issues would be fully discussed. For example, NAAJA noted that:

*[I]t 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.*²⁰⁷

Flexibility is essential to accommodate cultural obligations, such as ceremonial occasions and ‘sorry business’, together with the exigencies created by distance in some instances were referred to in many discussions consultations, submissions and meetings. In relation to process, a key theme was the need to respond appropriately to wider notions of kinship and family, and to be prepared to involve the extended families in service delivery and dispute resolution processes. The Nowra FRC submitted that ‘when working with Indigenous clients, it is not useful to be overly specific about a definition of family’.²⁰⁸ A number of submissions noted that informal arrangements for the care of children would be made, resulting in the placement of children with extended family members, often grandparents, who lacked the legal power to make decisions in relation to issues such as education and medical care, because there were no court orders in their favour.

Another significant point relates to the need for substantive outcomes in parenting matters to be both culturally appropriate and responsive to geographical and other conditions. Agreements, parenting plans and court orders in relation to children spending time with parents and other relatives, and in community, need to be realistic in light of geographical distance and financial, practical and cultural constraints on travel, as well as family and community structures and dynamics. The Nowra FRC

highlighted the importance of the clients' engagement with parenting plans and agreements indicating '[a] client needs to 'own the document' of any parenting plan or agreement developed. It needs to reflect their language and be a record of the conversation that has been had ...'.²⁰⁹

Some submissions indicated that the application of the current principles in Part VII of the *Family Law Act* had produced outcomes that were either unsafe or unsustainable (or both) for Aboriginal and Torres Strait Islander clients. For example the submission from the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands Women's Council, and others emanating from services with a primarily regional or remote clientele, highlighted the difficulty clients from its area had in complying with court orders for spending time with family members where the parties lived some distance from one another. The submission said:

*[w]here an order stipulating a care plan for a child has been put in place it is very hard to ensure compliance due to the remoteness of the location of clients. Clients have limited means of communication or understanding of any assistance that can be provided to them if the other party does not comply and therefore may not report non-compliance for some time. This means that a carer may lose the care of the child for a long time before any action is taken.*²¹⁰

3.5 Geographic and economic barriers to access

It is clear that many Aboriginal and Torres Strait Islander peoples have no or limited access to legal, relationship support, family dispute resolution and court services. Consultations and submissions indicated that this is particularly acute in the more remote parts of Queensland, the Torres Strait, Western Australia, New South Wales, Northern Territory and South Australia, where there is no federal family law courts circuit and the publicly funded legal services that service those areas have limited capacity to provide family law support.

A submission from the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council described the difficulties as follows:

*[M]any of the difficulties that clients of the Service have in engaging with the family law system are due to the fact that they reside in very remote communities and travel extensively between communities for funerals, sporting events and other family commitments. This makes it very difficult for case workers and lawyers to communicate with the client resulting in delays in the matter progressing and being resolved. It is difficult for a client to understand the process and the reasons for such a process when the location of their lawyer and the court are so far away. All clients of the service have English as a second language, which contributes to their difficulty in understanding and engaging with a system that involves oral and written English.*²¹¹

Participants in the *Improving access for Indigenous clients in the family law system* forum held in Adelaide in September 2011²¹² noted that the complexity of Indigenous clients' matters and the structure of service delivery often requires multiple appointments and meetings with various services.

Some submissions and consultations raised concerns about the issues that arise when family law jurisdiction is exercised by local courts in areas where local courts are the only avenue for obtaining orders under the *Family Law Act*. It was commonly asserted that local court magistrates were reluctant to exercise this jurisdiction. When they did, lack of understanding of the *Family Law Act* and in some instances family violence caused concern for agencies representing Aboriginal clients.

The National Legal Aid submission outlined that issues related to residential mobility (sometimes related to the need to access services) created particular types of stresses and family laws need among Aboriginal and Torres Strait Islander families:

*Reasons for relocation may include access to health services, housing, training and the courts. In the Northern Territory issues related to transience also arise from alcohol restrictions and income management arising from the Northern Territory Emergency Response (NTER). Relocation for any of these reasons can cause a fracturing of the family group and a break in contact with a parent and the extended maternal and paternal family, kinship group, community and ultimately country.*²¹³

NAAJA provided the following case example to illustrate these concerns:

*[the agency] is 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...the family is very hesitant about the upcoming proceedings’.*²¹⁴

In regional areas, consultations indicated that physically accessing court and other services was difficult for many Aboriginal and Torres Strait Islander people, who may not have access to cars and live in areas not serviced by public transport. Other factors inhibiting travel include seasonal flooding, travel time and exorbitant travel costs, whether for fuel or taxi fares.²¹⁵ In particular, women in such areas with children experiencing relationship breakdown against a background of family violence may face insurmountable difficulties. In some areas, limited access to telecommunications may mean that people who wish to seek telephone advice and make appointments may have to do so from a public telephone in a public area such as a hotel or post office. In these circumstances their privacy may be compromised and information relevant to their dispute be spread into the wider community including their family, associates and the other party to the dispute. Submissions noted that the ‘travel in, travel out’ basis for some courts and services is not an ideal service model. The submission from FVPLS Victoria, for example, said that ‘regional circuits are too infrequent and FVPLS Victoria solicitors have issues getting clients to court. Often FVPLS Victoria has to cover the cost of travel for our clients to attend metropolitan court hearings in Melbourne (such costs are met out of donated funds)’.²¹⁶

The National Legal Aid submission suggested that the ‘justice hubs’ model being discussed under the Northern Territory’s *Working Futures* policy may be more appropriate for remote communities:

*[T]hese hubs would ideally serve to promote a more positive perception and interaction between the community, the courts and justice agencies, particularly if they assisted in the processing of birth certificates, mediation for community disputes and housed relevant permanent or visiting agencies such as legal and related services.*²¹⁷

In urban areas Aboriginal and Torres Strait Islander people may be a considerable distance from Aboriginal-specific or culturally appropriate legal and relationship support services. Access to such services may not be financially or practically feasible, particularly given the complexity of many disputes involving Aboriginal families.

Some particular gaps in service provisions exist in relation to Aboriginal-specific legal services. One such gap relates to the limited mandate of Aboriginal family violence legal prevention services, which are not funded to provide assistance where there are no family violence issues. Where one party to a family law dispute is represented by the local Aboriginal legal service, the other party may be unable to access Aboriginal-specific legal assistance unless they are the victim of family violence. NAAJA pointed to another gap in service delivery, asserting that in the Northern Territory, men were less well-served than women in the provision of Aboriginal-specific legal services. Its submission noted that if a woman in a dispute contacted NAAJA first, there would be no Aboriginal-specific legal service available for the man.²¹⁸ NAAJA also made the point that as it was the only legal service in the NT servicing remote communities, only one party in a dispute in such an area could be represented by a visiting service. In a similar vein, Aboriginal and Torres Strait Islander Legal Service (Qld) said:

*[W]hile our organisation provides a service to most rural and remote areas, issues often arise for the ex-partners of our clients in these communities in respect to gaining legal advice and representation (such as, where we cannot assist due to a legal conflict of interest).*²¹⁹

The National Legal Aid submission pointed to a gap in its capacity to assist Aboriginal and Torres Strait Islander peoples with family law matters. The submission noted that the *National Partnership Agreement on Legal Assistance Services* allows commissions to use Commonwealth funds to assist people in matters dealt with under State law where a child or applicant's safety was at risk and there are associated family law matters eligible for a grant of legal assistance. The National Legal Aid submission said: 'Aboriginal and Torres Strait Islander matters do not however always involve connected family law priorities, and the ability to use Commonwealth funds to assist...is therefore limited'.²²⁰

3.6 Family violence

Disputes involving family violence present particularly complex issues for the effective delivery of services to Aboriginal and Torres Strait Islander clients. Given the prevalence of family violence in Indigenous communities referred to in Chapter 1, this is an issue that is likely to be fundamental to many family law matters involving Indigenous clients.

In this context, the material before Council indicates that the physical and psychological impacts of family violence compound the other barriers and impediments discussed in this Chapter, requiring particularly sensitive and holistic service approaches. Women's Legal Services NSW noted in this regard that:

Aboriginal women have often had violence inflicted on them by more than one perpetrator, as children and adults. They are particularly vulnerable and generally have moderate to severe post-traumatic stress and associated psychological conditions of varying degrees (e.g. depression, severe anxiety, personality disorders)'.²²¹

Where family violence is relevant, several overlapping legal systems may be involved. Apart from family law issues, these include criminal justice proceedings, applications for personal protection orders, victims of crime assistance applications, and potentially child protection proceedings. Where these apply, particularly complex personal and family dynamics are likely. A range of issues is recognised in the literature to inhibit disclosure of family violence by Aboriginal and Torres Strait Islander peoples. In addition to the distrust of police and justice agencies referred to earlier, relevant factors include a fear of negative repercussions, such as the disclosure leading to further violence between families and ostracism from the wider family and community.²²² Several submissions and consultations also suggested that the decision to leave a violent relationship and to seek legal assistance may expose a woman to pressure and possible retribution from family and community members. Illustrating their clients' experiences in such situations, FVPLS Victoria said:

[A] number of our clients have made it through the dispute resolution process because they have not disclosed family violence. Staff who do not receive cultural awareness training are not trained to ask the right questions that help overcome some of the complex cultural issues that contribute to a general hesitancy to disclose family violence within Aboriginal communities.²²³

3.7 Co-ordination, collaboration and early intervention

Council's work on this reference suggests quite strongly that the services that respond to Aboriginal and Torres Strait Islander peoples' family law needs operate largely in a parallel manner rather than a co-ordinated way. A similar tendency in relation to relationship support and legal services in the family law system more generally was highlighted in the AIFS *Evaluation of the 2006 family law reforms*, which noted that there was evidence demonstrating little understanding, under-developed referral pathways, and in some instances, suspicion between legal services and relationship support services.²²⁴

Council's consultations revealed little familiarity with the services and approaches of FRCs among Aboriginal-specific legal organisations, with the same observation holding true in the opposite direction. This occurs in the context of a broader concern about what has been described as a 'staggering lack of coordination in service delivery, inadequate policy development and program evaluation' in government service delivery to Aboriginal and Torres Strait Islander peoples.²²⁵ A recent publication on service co-ordination for Indigenous communities noted that 'the complexity of existing service systems can also result in a mix of overlapping services

that are multi-layered and fragmented, and services may be provided by Commonwealth, State, Territory or Local government, as well as non-government and community agencies'.²²⁶

Given the complex needs of Aboriginal and Torres Strait Islander clients and their susceptibility to disengagement, co-ordinated service delivery is an integral component of an effective response. The need to counteract a tendency for services and organisations to operate in 'silos' is well-recognised in the literature on effective service provision. As McDonald and Rosier note, a 'siloed service system typically cannot meet the needs of families with multiple and complex problems as effectively as agencies that work in collaboration'.²²⁷

A significant theme that emerged from the *Improving access for Indigenous clients in the family law system* forum was the need for strategies that can assist family law system agencies to understand each other's operating frameworks and practice bases as a way of fostering collaboration and shared understanding.²²⁸ A number of examples of good practice across the sector which were shared at the forum are discussed in Chapter 4.

As noted in 3.4, a related issue highlighted by Council's work is the need for strategies based on early intervention to militate against delays in help-seeking by Aboriginal and Torres Strait Islander families. The perpetuation of violence as a consequence of non-engagement has been observed by Cunneen and Shwartz and was referred to in a number of consultations.²²⁹ Early intervention has been a focus of family law service delivery since the 2006 reforms,²³⁰ and the need for such an emphasis to be strengthened in relation to Aboriginal and Torres Strait Islander clients is clear.²³¹ This is an area where improved collaboration between family law system-specific services and Aboriginal-specific services has the potential to produce significant advantages. The Family Law Pathways Network meeting in Alice Springs in October 2011 highlighted the following conclusion from its discussion about the needs of Aboriginal people:

[B]enefits of prioritising funding to programs that work with families to prevent breakups by developing parenting skills and relationships; programs to improve the self-esteem of Aboriginal men so they are able to support their families... (emphasis in original)

The submission from the Women's Legal Centre (ACT and Region) explained the critical need for better linkages between Indigenous-specific and other services in this way:

[S]trong referral relationships from organisations which support and provide services for Indigenous clients are essential. When navigating the family law system pathways, warm referral relationships and case management are essential to prevent Indigenous clients from abandoning participation in the system. By way of example the Indigenous Liaison Officer (ILO) will accompany women to access other services. The ILO advocated on their behalf and ensures the clients understands the information given by the service and the process.²³²

3.8 Systemic issues

The legal agencies that engaged in submissions and consultations made a number of consistent points about family dispute resolution and court services. Whilst initiatives to make these components of the family law system responsive and accessible to Aboriginal clients were acknowledged, a number of difficulties in the way they operate were identified. Overall, the system's ability to meet the needs of Aboriginal and Torres Strait Islander clients appears to be uneven. There are some very positive initiatives, some of which are discussed in Chapter 4, but there are also many gaps and shortfalls in effective service delivery to Aboriginal and Torres Strait Islander families. The submissions from Indigenous-specific service providers in particular provide insight into client experiences with courts and FRCs.

3.8.1. Courts

Environmental Factors

Many submissions and consultations highlighted environmental factors within the family law system that inhibit Aboriginal and Torres Strait Islander peoples' access. FVPLS Victoria explained that the physical appearance of family law court premises is unappealing to Aboriginal and Torres Strait Islander communities and that the courts themselves 'are perceived as non-Koori friendly environments'.²³³ Similarly, the Aboriginal and Torres Strait Islander Legal Service (Qld) mentioned that 'the overly formal traditional nature of these institutions can be intimidating to many who are entitled to access them'.²³⁴ Their submission also argued that traditional court-based dispute resolution processes can contribute to disengagement, noting:

*[E]ven when our clients do access mediation services and the Court, they sometimes face issues with the approaches of these services, including inflexibility due to rigid rules and processes, often making them irrelevant and unattractive to our clients.*²³⁵

Council's consultations confirmed the existence of this issue affecting Aboriginal and Torres Strait Islander clients, as well as concerns to ensure that family law system services take greater responsibility for making Indigenous clients feel culturally safe.

Cultural Responsiveness

A number of submissions raised concerns about insensitive responses to cultural issues by the family law courts, including culturally inappropriate service models and culturally incompetent personnel. These issues were cited as disincentives to access and use of the courts and family relationship services by Aboriginal and Torres Strait Islander clients. For example, FVPLS Victoria mentioned that 'in the experience of FVPLS Victoria's solicitors, if a client introduces culture as an issue it is often dismissed by the Court as not being genuine or it is overlooked'.²³⁶ Likewise, NAAJA submitted that 'Family Court proceedings are often alienating and do not meet the cultural needs of Aboriginal clients'.²³⁷ The Victorian Aboriginal Legal Service Co-operative Limited noted more generally that 'some courts still struggle to come to terms with contemporary understandings of cultural appropriateness and awareness in their operation'.²³⁸

Particular concerns were raised by some stakeholders about a lack of cultural sensitivity in family reports, and the need for greater cultural awareness training for report writers. The submission from FVPLS Victoria for example, explained that, in their experience, ‘family report writers have demonstrated a superficial understanding of cultural issues’,²³⁹ stating:

*[O]n a number of occasions FVPLS solicitors have seen family reports where cultural issues are dealt with inappropriately or the issue of the child being Aboriginal is not addressed at all. For example, in one case where the other party was non-Aboriginal the recommendation was made that the child’s cultural connections could be met by the non-Aboriginal parent taking the child to NAIDOC week activities once a year.*²⁴⁰

Incorporation of Aboriginal and Torres Strait Islander cultural considerations in court processes

A number of submissions suggested that insufficient attention is paid to Aboriginal and Torres Strait Islander culture in court processes, and that this factor has discouraged some Indigenous families from engaging with the court system. Two related issues were raised in this regard. The first suggested a lack of understanding by judicial officers of the importance of culture in decision making about Aboriginal children, and the second centred on complaints about a failure to either adduce appropriate evidence or to pay sufficient attention to such evidence.

NAAJA explained that:

[T]he 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.*²⁴¹

FVPLS Victoria submitted:

*[T]he best interest of the child standard requires that an Aboriginal child has a right to maintain a genuine connection to their culture and that the court weigh this consideration when applying the Family Law Act to Aboriginal and Torres Strait Islander children and families...Although there are often a number of factors that are given consideration by the Court, the Court is required to give consideration to Aboriginal cultural issues. In the experience of FVPLS Victoria’s solicitors, the Court gives less consideration to cultural concerns in the deliberations.*²⁴²

The submission from the Alice Springs Family Law Pathways Network noted the need for training for legal services on the preparation of cultural evidence and reports for the courts and the application of the *Family Law Act*.²⁴³ Council’s consultations

with legal service providers also revealed that many Aboriginal and Torres Strait Islander clients considered that Aboriginality should be the central issue for the courts in deciding the best interests of an Aboriginal or Torres Strait Islander child.²⁴⁴ This issue is discussed more fully in Chapter 5.

Delays and cumbersome processes

In the context of clients with complex support needs, who are highly susceptible to disengagement, complex and lengthy dispute resolution processes can contribute to disillusionment. The submission by Top End Women's Legal Service indicates that delays cause Aboriginal and Torres Strait Islander clients to lose confidence in the system and a dispute resolution forum. Discussing the barriers experienced by Aboriginal women who attempt to use the family law system, Top End Women's Legal Service commented:

*Those that do have the awareness and the know-how to attempt to engage with the formal legal system, and confidence in its ability to deliver justice, soon lose this confidence due to the time it takes to get the help that they seek. It can take 3 months to participate in Family Dispute Resolution. Court processes take even longer. In the end it can be perceived as easier to just walk away from the process and acquiesce to whatever the husband or paternal grandparents want.*²⁴⁵

Similarly, the Victorian Aboriginal Legal Service Co-operative Limited's submission stated that their clients often 'express frustration with the fact that achieving results sought by them can be a slow process, with most *Family Law Act* matters in particular often remaining on foot for periods of up to 12 to 18 months prior to any final determination being reached'.²⁴⁶

3.8.2 Family Relationship Centres

Culturally inappropriate service models

Submissions and consultations indicated that many Aboriginal and Torres Strait Islander clients consider that the family relationship services provided by FRCs, particularly family dispute resolution processes, are not culturally appropriate. Central to this view was a concern that FRCs are unsuitable for Aboriginal families because they are 'focused on the nuclear family model and Anglo Saxon family raising practices'.²⁴⁷ For example, the Victorian Aboriginal Legal Service Co-operative Limited commented 'it has been highly documented that the Western style of dispute resolution is culturally alienating because it does not fit with Aboriginal and Torres Strait Islander values'.²⁴⁸ The Aboriginal and Torres Strait Islander Legal Service (Qld) offered a similar critique, noting that '[m]any existing mediation services are not in tune with Aboriginal and Torres Strait Islander peoples' cultural values [or] ways of resolving matters, and lack the flexibility required to meet the needs of Aboriginal and Torres Strait Islander peoples'.²⁴⁹

NAAJA called for an evaluation of the suitability of family dispute resolution for Aboriginal people, particularly those from remote communities, suggesting that the

NT Community Justice Centre co-mediation model may be an alternative, and more suitable, response for remote communities.²⁵⁰

Many of the concerns expressed in submissions about delays and multi-step processes in the family law courts involved complaints about the mandated pre-hearing processes at FRCs. Intake processes and the number of steps involved prior to getting an appointment for family dispute resolution were seen to be particularly difficult for Aboriginal clients and as a factor contributing to client disengagement.

Fear of government agencies

A further barrier affecting access to FRCs by Aboriginal and Torres Strait Islander families is a fear of government agencies resulting from past negative experiences of government authorities and policies. A number of service providers indicated that Aboriginal and Torres Strait Islander clients do not access FRCs because ‘the FRC is seen as government and feared’,²⁵¹ or suggested that the FRC model was not appropriate for their Aboriginal clients, many of whom are affected by family violence and whose matters might involve a need for ongoing monitoring or evaluation.²⁵² Numerous submissions also suggested that the historical experiences of Aboriginal and Torres Strait Islander peoples in the Australian legal system inhibits their engagement with the family law system.²⁵³

Associated with this fear of government agencies is Aboriginal and Torres Strait Islander clients’ uncertainty over mediators’ authority and a perceived lack of ownership of decision-making. For example, the Victorian Aboriginal Legal Service Co-operative Limited commented that its community contacts have expressed to them that the reluctance to engage is often due to the fact that mediators are seen as authority figures.²⁵⁴ Likewise, the NAAJA stated that ‘some parties leave mediations confused as to the role of the mediator, thinking that they were the “decision maker”’.²⁵⁵

Inaccessible FRC services

A number of submissions indicated that geographical barriers hinder the ability of Aboriginal and Torres Strait Islander families to access FRC services. In particular, the submissions noted that transport, travel and accommodation costs associated with accessing FRC services prohibited the attendance of Aboriginal and Torres Strait Islander clients living in regional and remote areas.²⁵⁶ Women’s Legal Services NSW, for example, said:

*Whilst FRCs are located in large regional centres, they are not in most small towns or anywhere close to where many Aboriginal people live. The lack of private and public transport and costs of travel and accommodation mean attending these services is impossible.*²⁵⁷

NAAJA suggested a reliance on telephone mediation to service non-Darwin based clients in the Top End was inadequate, for a number of reasons:

[I]n 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 the experience of mediators describing how they are writing things on the whiteboard, which the parties cannot obviously see.*²⁵⁸

It would also appear that even where services can be accessed, ongoing engagement with Aboriginal and Torres Strait Islander clients may not occur. For example, the Aboriginal and Torres Strait Islander Legal Service (Qld) submission observed the approach and structure of the service limited its utility:

*[E]ven when our clients do access mediation services and the Court, they sometimes face issues with the approaches of these services, including inflexibility due to rigid rules and processes, often making them irrelevant and unattractive to our clients. We note that these services try to cater for our clients by employing some Aboriginal and Torres Strait Islander employees. This can work to a certain extent in making our clients feel more comfortable about accessing these services and informing our clients, however it does not address the structural issues that make these services so daunting for our clients.*²⁵⁹

4. Effective and Promising Practice

This Chapter discusses effective and promising practices in working with Aboriginal and Torres Strait Islander clients within the family law system. Its discussion draws on earlier significant reports in this area,²⁶⁰ including examinations of best practice in the service delivery and dispute resolution contexts, and provides a description of some recent initiatives that have been designed to address the barriers discussed in Chapter 3. This Chapter also sets out a number of overarching principles identified in previous published work in this field, which provide a useful framework for developing and evaluating culturally responsive service practices.

4.1 Fundamental principles

In the past five years there have been significant efforts to map the principles that contribute to the development of effective practice in dispute resolution for matters involving Aboriginal and Torres Strait Islander peoples. Particularly significant pieces of work that have shaped this body of knowledge include National Alternative Dispute Resolution Advisory Council (NADRAC)'s 2006 report, *Indigenous Dispute Resolution and Conflict Management*²⁶¹ and *Solid work you mob are doing: Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia*, a 2009 report to NADRAC by the Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Project (*Solid Work Report*).²⁶² More broadly, an evaluation of the Department of Families, Housing, Community Services and Indigenous Affairs' *Stronger Families and Communities Strategy* has identified elements of effective service delivery for Aboriginal and Torres Strait Islander peoples that have much in common with the principles that emerge from the work on dispute resolution.²⁶³ Common themes also emerge from a further report published by the *Closing the Gap* Clearinghouse,²⁶⁴ which scrutinises the evidence-base about what does and does not work in program delivery for Aboriginal and Torres Strait Islander peoples. The report examines and synthesises the evidence (including 298 published research reports) on four key areas in the *Closing the Gap* agenda, namely early childhood and schooling, health, economic participation and safe communities.

This section synthesises the key insights and principles from the above-mentioned publications. Council notes that the primary, consistent message from this literature concerns the importance of recognising the diverse needs of individuals and communities and ensuring that local conditions and needs inform service delivery. Further, the existing literature highlights the importance of providing both Indigenous-specific services for Aboriginal and Torres Strait Islander communities as well as culturally responsive mainstream services.

The fundamental principles include:

Meaningful partnerships with Aboriginal and Torres Strait Islander stakeholders

The existing literature indicates that service delivery and dispute resolution initiatives for Aboriginal and Torres Strait Islander clients should be developed and delivered in partnership with the individuals, groups and organisations for whom they are designed. Where appropriate, mainstream and Aboriginal and Torres Strait Islander

specific services should offer complementary programs to increase the range of services available. Previous research suggests that in order to be effective, services for Aboriginal and Torres Strait Islander clients need ‘champions’ in the local community who can promote their use within the community and contribute to their development and improvement. This approach adopts a strengths based model, an approach favoured by some Aboriginal organisations for its focus on community strengths rather than deficits.²⁶⁵

Recognition of traditional mechanisms

A further key principle involves recognition of traditional dispute resolution approaches (such as community based mechanisms presided over by community Elders), and acknowledgement of their importance (subject to constraints arising from civil, criminal, human rights and equal opportunity laws and inconsistent professional obligations). More broadly, the literature indicates that approaches to dispute resolution within mainstream services need to be informed by a respect for language, culture, and an understanding of Aboriginal and Torres Strait Islander community and kinship network relationships.²⁶⁶ A related principle highlights the importance of recognising that ‘healing’ for Aboriginal and Torres Strait Islander communities often comprises a ‘dynamic and unfolding process of individual and collective problem solving’.²⁶⁷

Supporting Aboriginal and Torres Strait Islander initiatives

Promotion of self-determination, including support for the development of new service delivery and dispute resolution initiatives by Aboriginal and Torres Strait Islander peoples for this client group, is a central tenet of effective practice.²⁶⁸ The *Solid Work Report* calls for support for ‘local and regional experimentation and trialling of processes’.²⁶⁹ In relation to the Safe Communities building block in the *Closing the Gap* strategy, Dr Fadwa Al-Yaman and Dr Daryl Higgins note that a characteristic of promising practice initiatives was ‘control of services and responsibility for outcomes resting with Indigenous-managed agencies that provide holistic services and which are appropriately resourced and supported’.²⁷⁰ Similarly, Harry Blagg highlighted that resourced community-led initiatives have empowering and restorative values for the communities, and are an alternative to a sole focus on improving training and skills of service staff.²⁷¹

Addressing barriers

In order to effectively engage with Aboriginal and Torres Strait Islander communities, new service initiatives will need to address the identified barriers to their use of mainstream services. In particular, there may be a need to:

- revise the manner, place and timing of the delivery of services to ensure appropriate flexibility, including the capacity to involve extended family members and support informal entry or ‘warm referrals’ to services;²⁷²
- recognise that extra time will be needed to develop trust and deal with complex needs, and that the continuity of staff-client relationships is crucial;²⁷³

- ensure that the physical environment of the service conveys the message that Aboriginal and Torres Strait Islander peoples are welcome, and that appropriate processes are in place for clients to identify as Indigenous;²⁷⁴
- revise the type and format of communication to and with the client (including the use of local languages, plain English, uncomplicated forms and interpreters where required);
- create mechanisms for involving appropriate community Elders in the oversight and provision of services, such as consulting or committee roles;²⁷⁵
- incorporate child inclusive approaches,²⁷⁶ unless shown to be not in the child's best interests;²⁷⁷
- ensure that staff in the agency are equipped to provide services to Aboriginal and Torres Strait Islander people through cultural awareness and competence training of all staff and management;
- ensure that staff have access to appropriate cultural information specific to their client base through the development of links with appropriate local Aboriginal and Torres Strait Islander community representatives and groups;
- take proactive measures to train, recruit and retain Aboriginal and Torres Strait Islander professionals, including facilitating the development of peer support networks and resources to support self-care initiatives for Aboriginal and Torres Strait Islander staff; and
- initiate outreach measures to build links between the service and the Aboriginal and Torres Strait Islander communities that are its client base. This may include partnering with local Aboriginal and Torres Strait Islander organisations (e.g. health co-operatives) to ensure client's needs are identified and appropriate referrals take place.

Capacity building, recruitment and retention of an Aboriginal and Torres Strait Islander workforce

A further important principle arising from the literature centres on the need for mainstream organisations to take pro-active measures to develop and retain an appropriately skilled and qualified Aboriginal and Torres Strait Islander workforce. Within the context of the family relationships services sector, this may mean that specific professional and accreditation structures will need to be reviewed. For example, National Legal Aid submitted in relation to family dispute resolution practitioners that there is a need to consider possible 'alternative accreditation pathways for ATSI practice experienced workers', suggesting that:

*[T]hese might include recognition of prior learning and relevant practice, an interim accreditation process which could include the requirement for a minimum number of practice hours involving supervision, consultation and co mediation work with an experienced, accredited FDRP, before final accreditation.*²⁷⁸

According to NADRAC, 'accreditation standards should be based on recognition of special skills and assessment of abilities, rather than academic qualifications and some current standards, such as those in the Family Law Regulations, should be reviewed in this regard'.²⁷⁹ The *Solid Work Report* promotes 'the training of regional panels of

Indigenous practitioners, who are perceived by their communities as possessing the [appropriate] personal attributes and who are selected in carefully designed processes in the region'. This report further suggests that 'training programs need to be delivered in communication styles and language that can be understood by, and is directly relevant to, Indigenous participants'.²⁸⁰

It is critical that ongoing professional and education opportunities, initiatives and support aimed at retaining staff take into account the particular pressures that Aboriginal and Torres Strait Islander staff may face. For example, in its submission, the Alice Springs Family Law Pathways Network suggested this may include:

- *loneliness/isolation, particularly if the only Aboriginal & Torres Strait Islander staff member [and the] feeling that no-one understands you, the lack of a shared sense of history and the different values (sharing versus individual wealth e.g.)*
- *expectations by other staff that Aboriginal & Torres Strait Islander staff can or should be able to speak on behalf of all others on any topic even those that only a professor of history or anthropology would be expected to know about in other circumstances. This also includes being expected to answer for the actions or opinions of other Aboriginal & Torres Strait Islander people, even those you have never met or even know of*
- *racist comments by other staff which often conclude with 'but I didn't mean you' or 'it was just a joke'; or policy decisions based on racist stereotypes of welfare/child abuse etc or other underlying assumptions to justify discriminatory practices*
- *being seen as a 'trouble maker' if you speak up or challenge the decisions by management about Aboriginal & Torres Strait Islander issues; or worse, being ignored unless your opinion confirms what is already happening*
- *then having to be the 'Indigenous voice' or 'public face' of the agency or having to answer for the actions of the agency when you have had no say in the decision-making, and*
- *being in an 'add-on' position, rather than being just one of the staff who happens to have a special ability [due to a shared cultural and social perspective] to deal with Aboriginal & Torres Strait Islander clients ... This can mean little change for promotion or other workplace opportunities to expand skills and professional experience; as well as lack of job security when the 'special funds' for the 'Indigenous position' are withdrawn due to a change in management or government policy.*²⁸¹

Supporting awareness, outreach and legal literacy initiatives

Also important is building awareness of the availability of services and promoting legal literacy among Aboriginal and Torres Islander communities on a local basis through the delivery of appropriately formulated and disseminated community education programs. The *Solid Work Report* notes the 'value of educational programs delivered by Aboriginal people who have cultural connections to audience, and the

use of locally produced visual and oral resources to promote processes to others throughout the region and beyond'.²⁸² That report also suggests that local community members who have used particular services make effective ambassadors for those services.

Consistent, sustained funding and realistic performance measures

Funding models and performance measures need to take into account the complex needs of Aboriginal and Torres Strait Islander clients and the time and co-ordination (potentially across many services) it takes to ensure that their needs are adequately met. Further, it will be important to ensure that funding for specific initiatives is sustained over time in order to 'build mutual understandings, to address disadvantage and dysfunction, and to allow genuinely local responses to evolve'.²⁸³ Council notes the observation of Flaxman, Muir and Oprea that many Indigenous policies have been characterised by short-term or incomplete programs, and that 'the cycle of aborted programs and 'unfinished promises' damages the sustainability of successive initiatives...'.²⁸⁴

Co-ordination and collaboration

Collaboration between specialist services and mainstream services needs to be facilitated and encouraged, across a range of areas. Discussions at the *Improving access for Indigenous clients in the family law system* forum raised the complexity of the sector, noting that 'services must work within multiple frameworks – Commonwealth, State and local governments'.

According to the *Solid Work Report* '[i]nteragency coordination and collaboration (including with Aboriginal organisations) is needed to ensure the provision of targeted service delivery and to minimise the likelihood that individuals will fall between the cracks'. The report suggests that existing dispute resolution services and responsibilities be mapped to promote mutual understanding and identify gaps in services. Such a process would reveal where links and collaborations need further development.

What does not work

Al-Yaman and Higgins derived an analysis of what does not work from the evidence base examined in their report. The following characteristics were linked with less effective responses:

- approaches that assume that 'one size fits all'
- lack of collaboration between services
- poor access to services
- external authorities imposing change and reporting requirements
- interventions without local Aboriginal and Torres Strait Islander control and culturally appropriate adaptation
- short-term, one-off funded and piecemeal interventions which do not develop Aboriginal and Torres Strait Islander capacity to provide services.

4.2 Examples of promising strategies and practices

In the course of this reference, Council was made aware through consultations, submissions and the literature, of a number of initiatives and practices that had been implemented or were under development, which were designed to address some of the barriers discussed in the previous Chapter and respond more effectively to the needs of Aboriginal and Torres Strait Islander peoples. Such initiatives cover a range of areas, from organisation-wide policy development to service-level practice approaches tailored to meet the needs of specific communities. A selection of these initiatives is described in the next sections of this Chapter to illustrate the ways in which organisations and services within the family law system are developing strategies to meet the needs of Aboriginal and Torres Strait Islander clients.

4.2.1 Whole of organisation policy responses

In 2006, the National Health and Medical Research Council identified the need for systemic, individual, organisational and professional levels of cultural competency in an organisation.²⁸⁵ This approach was also reflected in the consultations, submissions and the relevant literature on family law services.²⁸⁶ Council notes that this model requires dedicated resources, organisational policies, managerial and individual staff commitment, as well as educational components and initiatives to recruit and support Aboriginal and Torres Strait Islander professionals in the family law sector.²⁸⁷ Some examples of strategies and programs addressing various aspects of this approach are described as follows:

Family Relationship Services Australia: Reconciliation Action Plan 2010-2013

FRSA's *Reconciliation Action Plan* (RAP) was developed with assistance from FRSA's *Reconciliation Advisory Group* which was launched in 2010.²⁸⁸ The plan has six focus areas oriented towards three key themes: relationships, respect and opportunities. FRSA's RAP outlines actions, responsibilities, deadlines and performance measures to meet the six focus areas:

1. promote understanding and respectful relationships by working with and valuing the lived experiences of Aboriginal and Torres Strait Islander peoples
2. support and highlight positive practice in the delivery of family and relationship services to Aboriginal and Torres Strait Islander peoples and communities
3. demonstrate our respect for Aboriginal and Torres Strait Islander culture and leadership by supporting the participation of Aboriginal and Torres Strait Islander peoples in decision making
4. acknowledge the ongoing harm done to families and communities by disrespectful and disempowering social policies and practice
5. increase training, employment and professional development opportunities for Aboriginal and Torres Strait Islander workers in the family services sector, and
6. work collaboratively with our member organisations and related social service sectors to address disadvantage and enhance the wellbeing, safety and resilience of Aboriginal and Torres Strait Islander families.

Family Relationships Services Australia: an agency-wide cultural competence framework

The FRSA submission provided an example which illustrates an agency-wide cultural competence framework, namely the *Cultural Security Policy and Framework of Anglicare Western Australia*, that is applied across all services and functions in the organisation.²⁸⁹ The agency has a Reconciliation Committee and an Aboriginal Reference Group that works with the Board, Chief Executive Officer and Manager of Aboriginal Services. This framework covers the following:

- Aboriginal employment
- cultural training, both internal and external
- monitoring key data on Aboriginal disadvantage and socio-economic progress
- Noongar acknowledgment and language training
- cultural supervision
- participation in NAIDOC Week,²⁹⁰ and
- a Commitment to Aboriginal Clients Policy.

4.2.2 Community education and outreach

Council's consultations suggest that significant innovation is occurring within the system in devising outreach and educational strategies. A number of innovative educational resources using audio-visual and other types of technology were drawn to Council's attention in the consultations and submissions. Such resources offer cost-effective and flexible opportunities to reach substantial audiences across Aboriginal and Torres Strait Islander communities. Several of these resources are described in the following paragraphs.

Education

In 2006 and 2007, the Northern Territory Legal Aid Commission consulted with the Yolŋu people in north eastern Arnhem Land, the Galiwinku people on Echo Island, and the Nguiu and Pirlangimpi peoples on Tiwi Island to provide legal information and ascertain their unmet legal needs. Following these consultations the Northern Territory Legal Aid Commission produced a series of legal education DVDs titled:

- *Family Problems: your rights when things go wrong. A cross cultural legal education video in Warumungu and Warlpiri*
- *Family Problems: your rights when things go wrong. A cross cultural legal education video in Tiwi, and*
- *Romgu Dhukarr Dhiyal Australia - A meeting of two laws: a cross cultural legal education video in Yolŋu Matha.*

The DVD produced for the Galiwinku community explains foundational concepts of the Australian legal system whilst the other two DVDs focus on family issues, including domestic violence, restraining orders and court processes.

The Central Australian Family Legal Unit has developed (with Attorney-General's Department funding) a DVD called 'Super Law' designed to inform people experiencing family violence how the law can protect them.²⁹¹ The animated production, using appropriate language and imagery, covers family violence and

restraining orders, looking after children, sexual assault, family law processes and crimes compensation. As well as discussing tribal law and traditional ways of addressing family violence and family disputes, it explains, through animated scenarios, how the legal services of the Australian family law system can also offer protection for Aboriginal families.

The recently opened Kununurra office of Legal Aid Western Australia has started providing community education to Aboriginal men taking part in a local program for family violence perpetrators. The sessions cover violence restraining orders, the criminal justice response to violence and the child protection issues associated with family violence. The National Legal Aid submission notes that: '[t]he feedback from the program is that the child protection sessions are particularly successful in engaging the possibility of participants to work towards changing their behaviour because of concerns about their children being placed into care as a consequence of the violence'.²⁹²

National Legal Aid also provided an example in its submission, of a workshop being conducted in New South Wales for Aboriginal men who are Elders in the Mount Druitt community. The 'Koori Men's Training Workshop' is conducted by Legal Aid New South Wales and focuses on family and related laws. The submission described the program in the following way:

[I]t was developed with an Aboriginal Service Provider, The Men's Shed. Sessions were delivered by external workers including health, police and Federal Magistrates. Time was allowed for the trainers to listen to the participants stories. An Aboriginal worker involved in organising the training recorded: "The feedback by all participants has been fantastic...The information you presented can now be filtered in a culturally appropriate manner back into our communities, which ultimately may lead to minimising/reducing Aboriginal people's contact with the justice system and in particular Aboriginal male suicide".²⁹³

Outreach

A number of programs designed to respond to specific legal and non-legal service needs of Aboriginal and Torres Strait Islander clients have been developed across Australia. National Legal Aid's submission described a range of initiatives offered by various providers to increase access and engagement by Aboriginal and Torres Strait Islander clients, including:

- outreach visits to communities that are not on the Court circuits or where limited legal services are available;
- establishment of a regional office in Kununurra, Western Australia to better service regional and remote areas;
- appointment of an Aboriginal Advisor/Educator as a contact point for referrals and delivery of legal education to communities;
- legal secondments; and
- a range of programs designed to provide holistic responses to clients needs, including parenting courses, relationship counselling, mental health and drug and alcohol services and community education courses.²⁹⁴

Sisters Day Out

FVPLS Victoria runs the *Sisters Day Out* workshop program in Koori communities throughout Victoria, such as Gippsland, Loddon, Mallee and the Grampians. These wellbeing workshops offer pampering activities, such as hairdressing, massages and manicures, which bring together local Aboriginal women in an informal environment to build self esteem and discuss family violence issues. Confidential consultations with counsellors and lawyers are available during the day.

Brutha's Day Out

The *Brutha's Day Out* initiative was developed by Relationships Australia Victoria in partnership with the Mullum Mullum Indigenous Gathering Place. The inaugural *Brutha's Day Out* event was held in June 2011. The event brought together young Aboriginal men, community leaders and Elders to discuss issues which affect Aboriginal men. The program included men's behavioural change and lateral violence workshops, cultural musical and dance performances, and sacred fire ceremonies. Private counselling consultations were also offered on the day. Each participant in the program developed a cultural design which they drew onto possum skins. The possum skins were then sewn together to form a possum cloak. The program culminated in a celebratory dinner held at the Karralyka Centre on 11 August 2011 where footage of the event was screened and the possum skin cloak was displayed.

4.2.3 Resources to develop and support cultural understanding and competence in service delivery

*Working and Walking Together*²⁹⁵ is a resource to support non-Indigenous Family Relationship Services develop culturally appropriate practices and services. This resource provides information on Aboriginal and Torres Strait Islander cultures and communities, family structures, child rearing practices and details the contextual issues faced by Aboriginal and Torres Strait Islander people. It outlines Aboriginal and Torres Strait Islander cultural protocols, such as 'welcome to country' and bereavement protocols. This resource has guidelines for developing cultural competency in non-Indigenous organisations, which emphasise the importance of respect, capacity building, localising processes and engaging with Aboriginal and Torres Strait Islander organisations and communities.

4.2.4 Service delivery: culturally responsive approaches

Council's consultations highlighted a range of programs where approaches were being newly developed or modified to ensure that initiatives and programs are culturally responsive.²⁹⁶ Many of these programs illustrate the practical application of the principles outlined in the preceding sections of this Chapter. For example, Interrelate Family Centres is currently developing a post-separation program for Aboriginal families. Called *Aboriginal Building Connections*, this program recognises the unique and often complex cultural contexts that affect many Aboriginal people during family separation. The program, which is still in its development phase, builds on Interrelate's Building Connections seminar, incorporating changes to language and layout, including Aboriginal music and artwork, to promote feelings of belonging. Interrelate is currently consulting with a number of Aboriginal communities and

organisations to discuss the content of the program. Consultations have been held in Gippsland, Victoria, and with the Gunai/Kurnai community and the Pambilang Traditional Owners Group in Newcastle, New South Wales. Further consultations are scheduled with the Bundjalung Elders in Lismore, New South Wales and Mingaletta, New South Wales. Other expressions of interest for consultations have been received from Port Augusta and Brisbane.

Another example of culturally responsive service delivery is occurring in Port Augusta, where Aboriginal staff at the Port Augusta FRC have developed a DVD for use with Aboriginal families experiencing separation. The DVD, titled *Child Focussed Dreaming*, was funded by the South Australian Film Corporation, Family Law Pathways Network and Centacare Port Pirie. The Dreamtime story was written by one of the FRC's Aboriginal staff, Aaron Stuart who was born and raised in the region. Staff at the Port Augusta FRC were also involved in the production of the film. The film was shot on a station outside of Hawker, a town to the north of Port Augusta in the Flinders Ranges. The Dreamtime story has three parts: the first part depicts a father handing over the children to the mother and grandmother and the conflict that often occurs at this time. The second part of the film is Dreamtime animation showing the impact parental conflict has on children. The final part of the film is non-animated and includes information about the Port Augusta FRC and also gives an explanation on the family dispute resolution process. Local Aboriginal people played roles in the film.

Case Study: Family Relationship Centre, Alice Springs

Relationships Australia operates an FRC in Alice Springs. In establishing a mediation service for the client base in its catchment – extending 500 km in each direction – the FRC has had to develop specific approaches and strategies to meet the needs of its clients. This section draws on an action research report²⁹⁷ by Cheryl Ross²⁹⁸ (an Arrente/Kaytee) woman from Central Australia and an accredited Family Dispute Resolution Practitioner, Don Mallard²⁹⁹ an Arrente/Yamatji man who is also an accredited Family Dispute Resolution Practitioner and a consultant, Steve Fisher.

Client base profile

The communities that this FRC services are diverse, with clients being resident in towns (Alice Springs and Tennant Creek), town camps and rural and remote areas where a community may have as few as 50 members. For many clients, English may be a second, third or even fourth language. Many clients have complex needs and the context for the dispute may involve issues such as family violence, substance abuse, and housing and/or health concerns. To further complicate the issues, parties may live significant distances from each other and the FRC. Matters often involve members of the extended family. The following description highlights the elements of practice that have been designed or adapted to meet the needs of Aboriginal clients.

Approach to mediation

The mediation model is based on a facilitative and settlement approach in which the role of the mediator is to support the parties to achieve a set of outcomes that prioritise the needs of children with the end result, where possible, being a parenting

plan. In adopting this approach, other frequently used models were considered and found to be largely (though not entirely unsuitable) for the context. For example, while FRC processes tend to be linear, involving a number of set steps, the Alice Springs mediators find their work progresses more organically, and ‘follows cycles of visiting family members, finding out more of the story and explaining and discussing roles and responsibilities’.³⁰⁰

Preparation

Two key elements of the pre-mediation phase in the practice model focus on educating clients about mediation and developing the mediator’s understanding of the story behind the matter to be mediated. In educating clients about mediation, the emphasis is on building understanding that the clients take an active role in the process and assume responsibility for the outcome. The action research report notes that ‘Where a large number of people may need to be consulted along the way, the message has to be reinforced on a regular basis and mediators need to find the right, straightforward and clear language to achieve that’.³⁰¹

The second element, building the story, involves mediators speaking to family members and others who are relevant to the dispute. This may involve members of the extended family on both sides and community members. Building a relationship of trust ‘requires an investment of time to meet, listen to and understand people during the preparatory phase of the process and a willingness to be flexible’.³⁰² This process of compiling the story, ‘with all its facets and details’, has multiple purposes. It not only builds the mediators’ understanding of the issues, reducing the possibility that the process itself may be de-railed through the emergence of new information, but it also:

- builds support for the mediators and the process
- avoids giving offence to people who should be consulted
- reduces rumours and suspicion of the process by ensuring relevant people are fully informed, and
- builds a group of people who have an interest in the mediation achieving a positive result, can vouch for the process and support the outcomes.³⁰³

The report also notes the need for issues relating to privacy and confidentiality to be handled carefully, with clients themselves delineating the boundaries of privacy. Family dispute resolution practitioners working in this program use a two-part approach to privacy, based on the notion that there will be general knowledge of the dispute in the community and detailed knowledge confined to immediate family members. Any further sharing of detailed knowledge needs to occur with the concurrence of the clients.³⁰⁴

Planning for the mediation process also takes account of the particular cultural factors and obligations that may be relevant to the dispute. Cultural obligations need to be taken into account as planning progresses, with the mediators maintaining awareness of these, avoiding assumptions and checking the reasons for particular preferences with the clients at each stage of the mediation process. Approaches to maintaining a child focus are adapted for the context, with the mediator ensuring that ‘he or she refers to the children regularly as part of the ongoing discussion and reinforces proper consideration of their needs at key stages in the process’.

Service providers need to ensure that the physical location for the mediation is acceptable and comfortable for both parties. Timing is also important, particularly where parties need to travel from distant locations and are reliant on ‘payday’ financial cycles, as well as the cost of travel and accommodation and the availability of funds. The complexity of the logistics is compounded when a number of people need to participate. Interpreters may need to be arranged and the planning needs to take into account cultural issues, including avoidance protocols.³⁰⁵

In the preparation phases, mediators may face significant challenges in locating and communicating with clients and conducting relevant consultations. Clients, family members and community members may live in remote areas with limited scope for telecommunication, or they may be highly mobile. The time and effort taken to locate a client who has not initiated the FRC contact may be considerable, and further significant effort may need to be expended to engage them in the process.

Other submissions provided examples of innovative mediation approaches. For example, NAAJA cited the Ponki model it was supporting in the Northern Territory Community Justice Centre (although not in family law matters). The submission notes that this model incorporates traditional Tiwi and contemporary mainstream approaches. The model involves co-mediation with an Aboriginal and a non-Aboriginal mediator, balancing the need for cultural relevance and impartiality.³⁰⁶

4.2.5 Building and sustaining workforce capacity

The difficulty in recruiting and retaining suitably qualified Aboriginal and Torres Strait Islander staff, who are crucial in providing culturally responsive services, was referred to in Chapters 2 and 3. Although targeted positions for Aboriginal and Torres Strait Islander staff within the Courts, the broader legal system and community based organisations have been funded and established, the various recruitment strategies which have been implemented over the last two decades have had limited success. Targeted positions may remain unfilled for some time and the demand for Aboriginal and Torres Strait Islander professionals in the family law sector remains unmet. A number of strategies are being implemented to develop workforce capacity and there are also several examples of measures being used to support Aboriginal and Torres Strait Islander employees in their professional roles.

Scholarships

Scholarships in Family Dispute Resolution and Counselling for Aboriginal and Torres Strait Islander professionals

One of the barriers to recruiting Aboriginal and Torres Strait Islander staff has been the relatively small number of Aboriginal and Torres Strait Islander professionals with legal and social science qualifications and the required postgraduate qualifications.

Council notes that there have been a small number of successful initiatives that provide Aboriginal and Torres Strait Islander students and professionals with scholarships to gain qualifications in family dispute resolution and counselling. One such initiative in New South Wales, which uses Attorney-General’s Department funding, is offered by UnitingCare Unifam and its Registered Training Organisation,

the Institute of Family Practice. The aim of the scholarship is to equip Aboriginal and Torres Strait Islander professionals and students with the qualifications and competencies required, as well as, through practical placements, some experience towards being ready to work as family dispute resolution practitioners or counsellors in the family law system.

Key components of these successful scholarship programs include:

- ensuring that any selection panel includes Aboriginal and Torres Strait Islander members
- arranging appropriate mentoring and tutoring support, and
- providing travel and accommodation funds for scholarship recipients living away from major urban centres.

More recently, the Attorney-General's Department has provided funding to FRSA to develop a framework for family dispute resolution scholarships for Indigenous and culturally and linguistically diverse students. The objective will be to increase the number of Aboriginal and Torres Strait Islander and culturally and linguistically diverse people undertaking training to obtain family dispute resolution qualifications.

Judge Bob Bellear Legal Careers Pathways Program

Legal Aid New South Wales' Judge Bob Bellear Legal Careers Pathways Program provides scholarships worth up to \$5,000 per year to Aboriginal school students completing their Higher School Certificate, full-time cadetships for Aboriginal and Torres Strait Islander undergraduate law students, positions in Legal Aid New South Wales' *Career Development Program* and professional legal placements for law graduates to complete practical legal training. The program encourages Aboriginal and Torres Strait Islander students to study law at tertiary level and pursue a career in legal practice.

Training, workshops and professional networks

Submissions repeatedly emphasised the need for ongoing training opportunities for Indigenous staff to achieve formal qualifications.³⁰⁷ Through its consultations, Council heard about a number of initiatives that are seeking to address this concern.

Diploma in Counselling and Groupwork – Australian Capital Territory

A Diploma in Counselling and Groupwork, funded by the Australian Capital Territory and Australian Governments, was delivered for the first time in Canberra in 2009. This initiative was developed after community Elders approached Relationships Australia Canberra and Region to address an identified gap in access to therapeutic services for Aboriginal and Torres Strait Islander communities. Fourteen women and four men graduated from this program in the first year with their existing and newly acquired therapeutic skills recognised by a formal qualification. Graduates are eligible for membership of nationally recognised counselling associations and entry into undergraduate degrees in Canberra universities. This qualification has created opportunities in both Aboriginal and Torres Strait Islander communities and mainstream organisations.

A significant outcome of this initiative has been the acknowledgement that Aboriginal and Torres Strait Islander people have unique skills to ‘care for their own’ in a culturally relevant setting. The success of the course has been largely attributed to the mutual learning and respect in the classroom between trainers and students, bridging two cultures and two models of thinking. The program was delivered in 2010-2011 to a second cohort of students in the Australian Capital Territory and, for the first time, in Wagga Wagga, New South Wales.

Family Relationship Services Australia and SNAICC cultural competency training

This project responded to a need to build the capacity of staff to provide culturally appropriate services and to engage effectively with local Aboriginal and Torres Strait Islander families and communities. FRSA’s initiative is based on work developed by SNAICC in 2009 and funded through the Department of Families, Housing, Community Services and Indigenous Affairs. FRSA built on the work begun by SNAICC to develop cultural competency training that is specifically tailored to family and relationship services working with intact and separated families to strengthen relationships, support parenting and facilitate social inclusion. It includes content regarding differences in parenting styles and the duties and expectations of family relationships.

In 2010, FRSA and SNAICC jointly committed to conduct a pilot two day training workshop for a mix of providers, FRSA staff and specialist indigenous practitioner experts from the FSP. The workshop, held in March 2011, covered:

- an introduction to the diversity of Aboriginal and Torres Strait Islander culture and cultural protocols
- principles and strategies for working with Aboriginal and Torres Strait Islander people in culturally appropriate and respectful ways
- tips for developing effective and culturally competent programs, and
- practical skills for mediation and counselling work with Aboriginal and Torres Strait Islander families.

Jaanimili Aboriginal Services and Development Unit, UnitingCare

Jaanimili is the Aboriginal Services and Development Unit for UnitingCare Children, Young People and Families and is a part of UnitingCare New South Wales and Australian Capital Territory. It meets three times a year, and provides cultural knowledge, advice and leadership to guide service delivery and acts as a support network for Aboriginal staff within the organisation. In 2010, the organisation appointed a Manager of Aboriginal Services and Development.

FRSA National Aboriginal and Torres Strait Islander practitioner network

The FRSA National Aboriginal and Torres Strait Islander practitioner network operates as an online forum for Aboriginal and Torres Strait Islander practitioners and non-Indigenous practitioners who work with Aboriginal and Torres Strait Islander families to share ideas, information and resources.

Relationships Australia Indigenous Network

Relationships Australia Indigenous Network (RAIN) was established in 2006 and consists of both Aboriginal and Torres Strait Islander and other representatives from the state and territory branches of Relationships Australia. The network reports to the Committee of Chief Executive Officers through the Chief Executive Officer of Relationships Australia, Western Australia. RAIN's objective is 'to explore and develop Relationships Australia's capacity to work with ATSI Australians, and to connect employees involved in delivering programs to and with community'.³⁰⁸ RAIN holds monthly teleconferences which operate as an information sharing forum for representatives to share ideas and practice models with interstate colleagues.

In 2007, RAIN produced a *Framework for Action* which outlines strategies for Relationships Australia to establish culturally appropriate services for Aboriginal and Torres Strait Islander clients, develop and document innovative practice models and build cultural competency across all service programs.³⁰⁹ RAIN proposed a three-tiered approach to the implementation of the *Framework for Action* through:

1. recruitment
2. cultural competency
3. innovation and accountability.

In 2010, RAIN launched its *Cultural Fitness Package* which aims to incorporate cultural fitness into Relationships Australia's core business, values and programs and assist staff throughout Relationships Australia to develop 'their individual and collective *fitness* in understanding and supporting the needs of Aboriginal and Torres Strait Islander children, families and communities'.³¹⁰

Family Relationship Centres Indigenous Advisors' Network

The FRCs Indigenous Advisors' Network allows Indigenous Advisors in FRCs throughout Australia to share practice information and provide each other with emotional and cultural support. The network meets via teleconference on a monthly basis. The network intends to contribute to national policy developments for Indigenous families and act as a resource for the implementation of the RAP.

4.2.6 Aboriginal and Torres Strait Islander liaison officers and support workers

Courts - Indigenous Family Liaison Officers

Indigenous Family Consultants were first introduced in the Family Court in the late 1990s but the positions ceased to be located in the Court in 2006.³¹¹ The six Indigenous Family Liaison Officer positions established in the Family Court were based in Darwin, Cairns and Alice Springs.³¹² The Indigenous Family Liaison Officer's role was to respond to Aboriginal and Torres Strait Islander clients' first contact with the Family Court and provide support and assistance throughout their interaction with the court system.³¹³ Indigenous Family Liaison Officers were required to gain an understanding of clients' cases and circumstances and connect these clients with appropriate services, such as mediation and legal aid.³¹⁴ Indigenous Family Liaison Officers also provided referrals to community service providers where a need was identified.³¹⁵ One Indigenous Family Liaison Officer, Josephine Akee

described the role as ‘a link between Indigenous Australians and the Family Law Courts’,³¹⁶

Indigenous Family Liaison Officers were based in the mediation section of the Family Court and ran joint mediation sessions with court counsellors in cases involving Aboriginal and Torres Strait Islander clients.³¹⁷ Indigenous Family Liaison Officers assisted other officers of the courts, such as family report writers, independent children’s lawyers and legal representatives.³¹⁸ Indigenous Family Liaison Officers provide information of the family structure, identify key players in the dispute and set up interviews with them where needed and facilitate the procurement of advice from appropriate figures within the relevant Aboriginal or Torres Strait Islander community.³¹⁹

The Indigenous Family Consultant program was referred to very positively in almost all consultations and submissions and significant regret was expressed about the cessation of the program. National Legal Aid, for example, observed that ‘whilst it is understood that an Indigenous Family Liaison Officer role has been placed in some of the FRCs, those positions do not appear to be playing the same role as that of the Indigenous Family Consultant’.³²⁰

As noted in Chapter 2, the Family Court of Western Australia currently has one Indigenous Family Consultant. The officer in this position provides outreach services through visiting communities and being a link to the Court, as well as assisting the Court with Aboriginal clients through being involved in Case Assessment Conferences. As earlier indicated at 2.3.8, there is a small amount of resourcing for an Indigenous Family Consultant being deployed in the Cairns Registry of the family law courts

Aboriginal and Torres Strait Islander Support Workers

Support workers located in legal services play an important role in supporting Aboriginal and Torres Strait Islander clients through their interactions with the legal system and reducing the chance of client disengagement. These positions assist legal services to deal with the complexity of client needs. The Central Australian Aboriginal Family Legal Unit, for example, has an Aboriginal Support Worker who attends court with clients supporting them through the proceedings. The Aboriginal Support Worker explains court processes to the client and assists the interactions between the client and their lawyer.

Similarly, FVPLS Victoria has a paralegal support worker working alongside a lawyer. The role of this worker focuses on client support including scheduling appointments, linking clients to other services, ensuring they have access to transport to attend appointments, and providing them with intensive support in court.

4.2.7 Case Study: prioritising cultural connection in Victorian child protection

The Department of Human Services has worked with the Victorian Aboriginal Child Care Agency (VACCA) over many years to create structures and services that are responsive to the needs of Aboriginal families interacting with the child protection

system. This collaboration has resulted in the application of a multi-layered strategy that:

- attempts to reduce the number of children interacting with the child protection system
- results in fewer children being taken into out of home care when the Department of Human Services involvement does occur
- involves family members, including members of the extended family, in finding solutions in circumstances where child protection becomes involved with a family, and
- results in more children being placed with members of the extended family, or other Aboriginal families, when an out of home care placement occurs.

The approach is premised on the principles that cultural connection and cultural safety are intrinsic aspects of the safety of Aboriginal children, and are critical elements of the best interests principle for Aboriginal children.³²¹ It involves legislative elements, with the *Children, Youth and Families Act 2005* (Vic) (*CYFA*) containing specific provisions about Aboriginal children, a Cultural Competence Framework applicable to agencies who work with Aboriginal children in the child protection context and the Lakidjeka Aboriginal Child Specialist Advice Support Service (ACSASS) to provide advice to the Department of Human Services in relation to assessments of risk, decisions about child placement and other significant case planning decisions.

The *CYFA* requires that a cultural support plan be developed for children who are placed in out of home care.³²² These plans are intended to ensure that children maintain connections with family, community and culture, consistent with the recognition that this is an inherent part of ensuring their best interests are met. ACSASS has a role in consulting on the development of these plans, which ‘should address continuing efforts to locate a suitable placement within the child’s family or Aboriginal community, the involvement of family, maintenance of contact with family and community, links to Aboriginal services and participation in cultural and community events’.³²³ Compliance with this statutory requirement has been limited and measures are shortly to be announced to redress this.³²⁴ A 2011 evaluation of the Child and Family Services Reforms by KPMG found that there are compliance issues with cultural support plans required by section 176 *CYFA* within the child and family service sector.³²⁵ The evaluation findings revealed reported failures of the Department of Human Services to complete cultural support plans by the time children entered care and concerns about the continued relevancy of plans where children’s circumstances and needs change over time.³²⁶ In response to the evaluation findings, the Department of Human Services has provided additional funding to enable Aboriginal Family Decision Making (AFDM) workers to manage cultural support planning and ensure compliance with section 176 requirements.³²⁷

A number of provisions in the *CYFA* specifically address the needs of Aboriginal children and families. For example, a mandatory consideration when determining the best interests of an Aboriginal child under the *CYFA* is the protection and promotion of the child’s Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community.³²⁸ Other legislative provisions include recognition of the principle of Aboriginal self-determination and self-management in decision-making processes regarding Aboriginal children, compliance with the *Aboriginal Child Placement*

Principle and the preparation of cultural plans for Aboriginal children placed in out of home care under guardianship or long term guardianship orders.³²⁹

Aboriginal Family Decision Making under section 12(1)(a) CYFA

Built on the Family Group Conferencing model, AFDM provides culturally appropriate dispute resolution processes for Aboriginal and Torres Strait Islander families. The process brings together a child's immediate family as well as extended family and community members to develop a sustainable plan for a child's future. AFDM sessions are jointly convened by two conveners, a convener from the Department of Human Services and an Aboriginal convener from an Aboriginal Community Controlled Organisation. The AFDM model is markedly different from traditional case planning methods because it involves a significant preparatory phase where the co-conveners engage with all parties involved prior to the decision-making meeting.

Between November 2002 and March 2003, Rumbalara Aboriginal Co-operative piloted the AFDM program in the Hume region. Of the 12 Aboriginal families who accessed the AFDM program during the pilot, five achieved effective outcomes and seven were still developing plans through the AFDM process. There were no re-notifications involving the children of the 12 families and in all cases the children were being cared for within their family group. The evaluation found that the utilisation of Elders in AFDM and the involvement of, and dialogue with, the local Aboriginal community in the project's development were key factors contributing to the success of AFDM. This collaborative approach developed a sense of ownership and shared responsibility for the program within the local Aboriginal community. Community involvement in the development and implementation of the program changed community perceptions of the Department of Human Services and child protection and developed trust.

Aboriginal and Torres Strait Islander Child Placement Principle under section 13 CYFA

The *Aboriginal and Torres Strait Islander Child Placement Principle* establishes a preferred order of placement for Aboriginal and Torres Strait Islander children who are in out of home care which prioritises placement with their extended family and relatives or failing these options, another Aboriginal and Torres Strait Islander family.

The preferred placement order of Aboriginal and Torres Strait Islander children in out of home care is:

1. the child's extended family
2. the child's Aboriginal or Torres Strait Islander community, and
3. other Aboriginal and Torres Strait Islander people.³³⁰

The *Aboriginal and Torres Strait Islander Child Placement Principle* has received legislative or policy backing in all States and Territories.³³¹ VACCA's *Aboriginal Cultural Competence Framework*³³² guides the service provision of Community Service Organisations (CSOs) providing child and family services for Aboriginal children and their families. The *Aboriginal Cultural Competence Framework* outlines strategies, policies and practices for mainstream CSOs to achieve Aboriginal cultural

competence and meet the cultural components of the *CSO Registration Standards*.³³³ It is shaped around six interrelated concepts that assist organisations to build Aboriginal cultural competence:

1. cultural awareness
2. commitment to Aboriginal self-determination and respectful partnerships
3. cultural respect
4. cultural responsiveness
5. cultural safety, and
6. cross-cultural practice and care.

These concepts are encapsulated in the cultural components of the *CSO Registration Standards*.

CSO Registration Standards

1 Leadership and Management: The CSO has the leadership and management capacity to provide clarity of direction, ensure accountability and support quality and responsive services for children, youth and their families.

2 Organisational Culture: The CSO promotes a culture which values and respects children, youth and their families, carers, staff and volunteers.

3 Staff Capacity: Staff, carers and volunteers support positive outcomes for children, youth and their families.

4 Welcoming and Accessible Environment: The CSO creates a welcoming, safe and accessible environment that promotes the inclusion of children, youth and families.

5 Safety, Stability and Development: The CSO promotes the safety, stability and development of children and youth.

6 Strengthening Caring Capacity: The CSO strengthens the capability of parents, families and carers to provide effective care.

7 Responsive Services: The CSO provides responsive services to support the best interests of children and youth.

8 Integrated Service Response: The CSO creates an integrated service response that supports the safety, stability and development of children and youth.

Council's consultations suggest that while this approach is regarded as having resulted in significant improvements, organisations such as VACCA contend that further measures are necessary, both to ensure particular elements of the framework are implemented effectively and to extend its reach. Regarding implementation, VACCA's submission indicates that consultation in ACSASS does not currently occur to the extent that it should, particularly beyond the intake phases of a case. Concerning extension, VACCA argues that ACSASS should have a role in providing advice to the Children's Court of Victoria in relation to care and protection applications. VACCA also considers that compliance with the *Aboriginal Cultural*

Competence Framework should be mandatory for lawyers and Children's Court personnel.³³⁴

5. The Family Law Act and the approach of the Family Law Courts to Aboriginal and Torres Strait Islander parties

The approach of the *Family Law Act* and the family law courts to matters involving Aboriginal and Torres Strait Islander families or children has shifted significantly in the past decade. However, as detailed in Chapter 3, consultations and submissions indicated that barriers to Aboriginal and Torres Strait Islander peoples' access and engagement with the family law system remain a problem. Such barriers relate to geographical remoteness, language and legal literacy, environmental factors, varying levels of cultural competency among family law system personnel and a range of other systemic issues, including concerns about court processes and outcomes.

This Chapter considers the family law courts' application of relevant provisions of the *Family Law Act*, including legislative changes made in 2006 to matters involving Aboriginal and Torres Strait Islander people, particularly with respect to cultural considerations, familial and societal structures, child rearing practices and the consideration of evidence.

Council's research for this reference identified 55 cases with judgments available on Austlii decided between 2007 and 2011. In twelve of these cases, both parties were identified as Aboriginal or Torres Strait Islander. In the remaining cases, one party was identified as Aboriginal or Torres Strait Islander. Council's analysis of the decisions suggests that over time the family law courts' consideration of Aboriginal and Torres Strait Islander culture has become better informed. Reflecting a greater awareness of the diversity of Aboriginal and Torres Strait Islander cultures, the survey of cases revealed an increasing emphasis on evidence specific to the child's particular cultural group, and a growing judicial appreciation of the importance to the child's cultural identity needs of encouraging immersion in their Aboriginal or Torres Strait Islander culture, rather than limited engagement with identified activities.

However, some concerns about the Courts' approach to and understanding of cultural concerns remain. In particular, Council's analysis indicates continuing problems with the way in which matters involving Aboriginal and Torres Strait Islander parties are litigated, and with the approach to cultural issues taken in some family reports, and suggest the need for enhanced cultural awareness training for family law system personnel.

The analysis of reported cases also revealed that some of the sections of the *Family Law Act* introduced by the 2006 amendments have received more attention than others. For example, the direction detailed in section 60CC(6) is referred to minimally in the cases, while sections 60B(3), 60CC(3)(h) and 61F have received relatively extensive attention.

This chapter also considers family law court and possible legislative responses to the customary 'adoption' practice of Torres Strait Islander communities known as Kupai Omasker.

5.1 Background on the Family Law Amendment (Shared Parental Responsibility) Act 2006.

Council's response to Recommendation 22 of the Family Law Pathways Advisory Group's Report, *Out of the Maze*, proposed amendments to the *Family Law Act* to better acknowledge the unique kinship and child rearing obligations of Indigenous cultures and the rights and needs of Indigenous children. Council's response noted:

[T]he difficulty the current law creates is that it may not take sufficient account of the unique kinship and child rearing practices of Aboriginal and Torres Strait Islander peoples ... [it] does not envision parental responsibility to include a wider kinship concept. Rather, parental responsibility is defined in section 61C in terms of the notion that a child has two biological parents.

*The law as it currently stands may indeed result in significant unfairness and the undervaluing of traditional Aboriginal and Torres Strait Islander approaches to child rearing and shared 'parenting'.*³³⁵

In its response, Council made a number of proposals regarding amendments to the *Family Law Act*. All of Council's proposals for legislative change were implemented by the amendments to the *Family Law Act* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

The 2006 amendments introduced sections 60B(2)(e),³³⁶ 60B(3),³³⁷ 60CC(3)(h)³³⁸ 60CC(6)³³⁹ and 61F.³⁴⁰ Prior to these amendments, only section 68F(2), the precursor to section 60CC(3)(h), dealt with Aboriginal and Torres Strait Islander culture. It was included under the consideration of culture and phrased as 'including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders'.

The 2006 amendments encouraged a more thorough consideration of a child's Aboriginal and Torres Strait Islander culture in the assessment of their best interests. As a result, the courts are required to consider the *right* of a child to enjoy and explore their culture and develop a positive appreciation of it. Courts are also specifically directed to consider kinship obligations and child-rearing practices in the child's culture.

As Justice Young commented in *Davis & Davis* (2008) 38 Fam LR 671 at 79:

[T]he 2006 amendments strengthened the language of the provisions in relation to the cultural needs of indigenous children. They introduced a specific right of the child to, inter alia, "explore the full extent" of his or her culture and "to have the support, opportunity and encouragement necessary" to do so. A child of aboriginal heritage also has the right to "develop a positive appreciation of that culture". The previous legislation required the Court to consider "the need" of an indigenous child to maintain a connection with his or her culture. By comparison, the new language creates a far greater imperative for the Court to give consideration to issues of culture. Certainly, the 2006 amendments imbued the notion of "connection" with a stronger and more active meaning.

5.2 History of the case law

5.2.1 Approaches to Aboriginal and Torres Strait Islander cultural heritage

In the first 20 years of the Family Court, no special emphasis in parenting cases was placed upon Aboriginal and Torres Strait Islander cultures.

In *Goudge* (1984) FLC 91-534 the Full Court of the Family Court noted that the child's cultural identity and associated life experience are factors which must be considered, but which are to be weighed against other relevant factors. It was held in that case that no parent is to be advantaged in a proceeding on the ground of racial origin, and that there should be no *prima facie* rule that a child's welfare would be better served in a household of a particular race.

The leading case of *B & R* (1995) FLC 92-636 was the impetus for legislative reform as to how Aboriginal and Torres Strait Islander culture was dealt with under Part VII of the *Family Law Act*. It resulted in the insertion of section 68F(2)(f) *Family Law Act* which was the forerunner of sections 60CC(3)(h) and 60CC(6). In *B & R*, the Full Court of the Family Court said that the unique difficulties faced by Aboriginal and Torres Strait Islander children of racism, and the positive influence of an inclusive culture to counteract racism, were directly relevant to a decision regarding the welfare of the child.

Numerous recent cases have dealt with a child's cultural heritage, and in particular Aboriginal and Torres Strait Islander heritage. A number of themes emerge from judgments in these cases and are discussed below.

There seems to be a slow metamorphosis in the case law. It began with the recognition that the experiences of Aboriginal and Torres Strait Islander children are very different to that of a non-Indigenous child in mainstream society, and that non-Indigenous ideals cannot be applied to a child of Aboriginal and Torres Strait Islander heritage. This led to widespread adoption of anthropological evidence to assist the Court in applying principles in cases involving a child of Aboriginal and Torres Strait Islander descent. Over time, there has been a further acknowledgment of the complexity of Indigenous cultures and the need to specifically identify the precise cultural practices of a family before the court. This has begun to necessitate more particular evidence being given by local Elders, in preference to more generalised anthropological evidence.

5.2.2 Benefits of Identification with Culture

Various judgments have discussed the benefits of a child identifying with their culture. The evidence from Elders in *Dunstan & Jarrod* (2009) FamCA 480 was that a cultural connection for a child is important if the child chooses to 'live black' when they get older. To do this they need to have the confidence to act in accordance with cultural rules and know enough of the language to interact with other Aboriginal and Torres Strait Islander persons. Similarly, evidence was given in *Lawson & Warren* (2011) FamCA 38 that immersion was needed to gain a proper understanding of the complex system of roles and obligations in the Aboriginal community.

Frequently mentioned is the ability of a child to deal with racism or negative attitudes to Indigenous culture if they have the support of their community and a secure cultural identity. The other benefits mentioned in a child knowing their cultural

heritage are a child's sense of belonging which assists in their development of social identity and self esteem. Immersion in a culture has also been proposed to allow the development of pride in a child's cultural heritage and the identification of positive cultural role models.

The cases highlight the potential detriment to a child who is excluded from their cultural community and family, including alienation from their Aboriginal and Torres Strait Islander community and the non-Indigenous community.

Psychological evidence from a cross-cultural perspective, such as that of Ralph (see below), is often referred to in judgments to explain the benefits to a child of being connected to and involved in their culture.

5.2.3 Approaches to Family Structures

Recent case law developments have incorporated both a broader appreciation of the social and family structures that may be applicable to Aboriginal and Torres Strait Islander families and children, and an acknowledgment that the application of non-Indigenous constructs of family organisation to these families may not be appropriate.

Donnell & Dovey (2010) FLC 93-428 focused upon the traditional mainstream constructs of family that are sometimes inappropriately applied to cases involving a child of Aboriginal and Torres Strait Islander heritage. In that case, the trial judge made the comment that if a 'suitable parent' was available to care for the child, they should be preferred over the child's older sister due to the 'significance of the tie between children and their biological parents'. It was held on appeal that this preference for a biological parent was inappropriate, and that the current provisions in the *Family Law Act* were enacted to avoid cases being decided on "modern Anglo-European notions of social and family organisation".

In considering the appeal, the Court noted in *Donnell & Dovey* (2010) at 321

... an Australian court exercising family law jurisdiction in the twenty first century must take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. This is not to say that the practices and beliefs of indigenous people are uniform, since it is well known that they are not. However, it cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous children, even those who may have been raised in an urban setting.

In *Moses & Barton*³⁴¹ the Elder from the Torres Strait that was consulted noted the importance of a biological connection in the carers from the child's extended family.

5.3 Immersion in culture and avoiding tokenism

Prior to the introduction of the amendments to the *Family Law Act* in 2006, the Family Court had for some time stressed the need for an Aboriginal and Torres Strait Islander child to connect with culture through participation. Moore J in *B & F* (1998) at paragraphs 29 to 30 stated:

[A]s I see it, the requirement to maintain a connection to their lifestyle, culture and traditions involves an active view of the child's need to participate in the lifestyle, culture and traditions of the community to which they belong. This need, in my opinion, goes beyond a child being simply provided with information and knowledge about their heritage but encompasses an active experience of their lifestyle, culture and traditions. This can only come from spending time with family members and community. Through participation in the everyday lifestyle of family and community the child comes to know their place within the community, to know who they are and what their obligations are and by that means gain their identity and sense of belonging.

A significant theme in recent cases is that for a child to gain the benefit of their culture, they need to be fully immersed in it, rather than having a non-Indigenous parent expose or teach them about it as a token gesture. A considered and practical application of section 60CC(3)(h) *Family Law Act* is required. A number of judgments have noted that cultural knowledge is obtained through osmotic absorption by being fully immersed in the culture over the long term, and that while participation in NAIDOC week and Sorry Day may be important, it is not sufficient to develop cultural identity, which requires direct exposure on a daily basis.³⁴²

The necessity of immersion in culture is an argument that has been used in cases regarding relocation. *Simons & Barnes* (2010) FMCAfam 1094 is a case where the mother sought relocation so the children could live in their traditional lands to enhance their cultural identity. Similarly, the necessity of cultural immersion has been used as an argument as to why a child should not relocate outside Australia.

As always, each child's circumstances need to be individually assessed. In *Lawson & Warren* (2011) evidence was given by a community authority from the maternal great-grandmother's cultural group, that a child could live with non-Indigenous relatives and achieve a sound appreciation and identity of their Aboriginal heritage through contact with their Aboriginal relatives.

Despite the considerable focus on the necessity of cultural immersion, cases are still being decided where the Courts consider a small amount of time sufficient to establish a cultural connection. *Bachmeier & Foster* (2011) FamCA 86 is a case where the child spent three periods of two hours with the father each year, and the court nonetheless was of the view that that time was sufficient for the father to teach the child about their culture.

In recent case law, there is a wide range of circumstances that the Court has deemed adequate to allow a child's enjoyment of and participation in their culture. There is a broad range of judicial opinion as to what level of exposure to Aboriginal and Torres Strait Islander culture may be sufficient. Council notes that these issues are discussed and dealt with in detail in other contexts, such as out of home care (see Chapter 4).³⁴³

5.4 Role of Expert Evidence

Judicial reference to anthropological material has become not just accepted but expected. In *Donnell & Dovey* (2010) it was commented that it was expected the Judge would familiarise themselves with readily accessible information about

Aboriginal and Torres Strait Islander children. Section 69ZX(3) *Family Law Act* allows anthropological evidence given in one case to be admitted in another.

A significant source of evidence referred to in many judgments reviewed, based on a cross-cultural psychological perspective, is that of Ralph (independent Cultural Consultant and registered psychologist). Ralph was cited for example in *Donnell & Dovey (2010)* and *Sheldon & Weir (2011)* FamCAFC 212. He notes that Aboriginal and Torres Strait Islander children can form serial attachments and have a collectivist view of family and social life. Ralph also notes the importance of active experience in culture rather than a token arrangement.³⁴⁴

In *Sheldon & Weir (2011)*, because of a particular set of circumstances, no expert evidence was called at the trial in relation to Aboriginal culture, including kinship, heritage and child rearing practices. Interestingly, and partly over objection, the trial judge admitted into evidence extrinsic material in the form of academic writings relating to Aboriginal culture, including kinship, heritage and child rearing practices.³⁴⁵ Cited at paragraphs 506 – 509, the trial judge considered evidence of Aboriginal child rearing practices which indicated the child may have multiple care givers with occasional lengthy absences from their parents and develop multiple attachments. In a multiple care giving context, there are opportunities created to form enduring relationships in the community, which allows the support and maintenance of the child's emotional health throughout their life span. The security of an Aboriginal child raised in this fashion would be derived from a network of regular care givers and acceptance in their community.

The use of anthropological evidence has created difficulty in particular cases. For example, in *M & L (2007)* FamCA 396 the Federal Magistrate was found to be in error when such evidence was accepted without consideration of the specific circumstances of the children's culture. The Federal Magistrate had cited an article written by Ralph, however, on appeal, the Court found at [51]:

[T]he criticism of his Honour's approach is that whilst the observations of Mr Ralph may be appropriate for some sections of some aboriginal societies, there was no anthropological evidence before the Court called to indicate what the practices were in the mother's community at X nor the appropriateness of applying generalised attitudes towards the specific situation in hand.

It was noted in *Hort & Verran (2009)* Fam CAFC 214 that anthropological evidence can be of assistance in some cases. However the Court questioned the extent of the assistance, given that the cultural heritages of Aboriginal and Torres Strait Islander groups vary significantly. The Court preferred the use of evidence from an Elder of the particular cultural group, stating at 121:

[W]hilst there may be cases where anthropological evidence is of assistance, we question the extent to which that could realistically be so when, as occurred in this case, there is available expert opinion evidence from an Elder of a particular Indigenous group or society. It is to be remembered that the cultural heritages of the hundreds of Indigenous tribes in this country vary significantly, and that the culture is preserved and passed on by the Indigenous Elders to whom it is entrusted, via the oral tradition. Thankfully, it is now generally accepted in Australia that Aboriginal peoples can speak for

themselves, particularly in relation to their own culture and traditions. The potential for non-Aboriginal Euro-centric impressions or interpretations to usefully inform Courts in relation to Aboriginality must now be limited in ways it was not in earlier times.

5.5 Specificity of Cultural Heritage

The consideration of Aboriginal and Torres Strait Islander cultural heritage requires acknowledgment that there are multiple and distinct Aboriginal and Torres Strait Islander cultures. The cases have increasingly recognised the need for Courts to have regard to the specific nature of a child's culture.

The appeal court in *Donnell & Dovey* (2010) noted that the trial Judge should have had specific regard to the Wakka Wakka culture. The trial Judge made the inappropriate assumption that although the child's culture called for the oldest child to care for their siblings after a parent dies, an exception to this occurs if there is a suitable parent available. No evidence was cited to support the trial Judge's statement, and it was held that such an assumption cannot be made in the absence of evidence about the specific culture to which the trial Judge referred.

Another example was the case of *M & L* (2007) where the Federal Magistrate referred to the research of Ralph in regard to children being raised in a collectivist manner in Aboriginal and Torres Strait Islander communities. The Federal Magistrate was criticised for the determination that the children in the case were brought up in this collective parenting style, without having regard to the specific practices of that community and family. It was similarly noted in *Hort & Verran* (2009) that anthropological evidence may lack specificity.

In *Dunstan & Jarrod* (2009), there was disagreement among two Aboriginal parties, the father and foster carers with long term guardianship of the child, over the extent to which the child's right to enjoy their Aboriginal culture, including the right to enjoy that culture with other people who share it, should impact on parenting arrangements. The father contended that it was important for his daughter to live with him, as it was necessary for the child to experience her Aboriginal culture, and that it was also in the best interests of Aboriginal children to be raised within their community, particularly as cultural knowledge was passed from father to daughter. An Aboriginal Elder provided evidence that a child could adapt to differing Aboriginal groups' cultures, just as they can adapt between Aboriginal and non-Indigenous cultures.³⁴⁶ The Court decided to award the father sole-parental responsibility in regard to the child's tribal identity and culture, and defined time. The child's foster carers were granted primary care for the child, with the Court noting the strong support shown by the foster carers for the child's engagement with her father's Aboriginal culture and community. However, the Court did not hold that it was in the best interests of the child to stay with the father.³⁴⁷

5.6 The Role of Family Consultants, Experts and Aboriginal Elders

Donnell & Dovey (2010) is an example of a case where the family report writer was criticised for not considering the child's heritage when making recommendations, and where the Full Court of the Family Court was of the opinion that the report should not

have been relied upon, due to the methodology adopted not being culturally appropriate and ‘inappropriately focussing on the primacy of the parent’.³⁴⁸ While the father’s environment and family were visited and his trial affidavits considered, the report writer did not undertake a similar assessment of the sister’s situation.³⁴⁹ In contrast, the family report writer in *Dunstan & Jarrod* (2009) interviewed an Elder of the father’s tribe, and in *Davis & Davis* (2007) FamCA 1149 they interviewed a ‘cultural consultant’ before making their recommendations.

Hort & Verran (2009) determined that evidence regarding Aboriginal and Torres Strait Islander practices can be given by an Elder of the community or such other person accepted by the community as being authoritative. This was also the approach taken in *Donnell & Dovey* (2010).

The father in *Sheldon & Weir* (2011), relying on the Full Court of the Family Court’s decision in *Hort & Verran* (2009), argued that he could speak for himself in relation to his own culture and traditions. The Full Court of the Family Court in *Sheldon & Weir* (2011) commented that the previous Full Court when saying ‘...it is now generally accepted in Australia that Aboriginal peoples can speak for themselves, particularly in relation to their own culture and traditions’, was not referring to the parties themselves giving evidence about their own culture and traditions but rather that the court was referring to a suitably qualified, and preferably independent person, such as an Elder. The father in this case had not suggested he was an Elder nor did he assert that he had the necessary qualifications as an expert (although he had lectured at a tertiary level on Aboriginal cultural issues).

In a few cases, a difficulty has arisen where an Elder is so closely associated with the child or their family that they cannot be regarded as an impartial witness.

5.7 Significance of Aboriginal and Torres Strait Islander culture

Approximately 13 per cent of the 55 cases considered noted that Aboriginality was not a significant part of the lives of one or both parents, or was not an issue raised by the parties. In some cases a parent was tested on their beliefs and practices to ascertain whether their cultural recognition was opportunistic.³⁵⁰ For example, the Court held in *Sheldon & Weir* (2011) at [111] that the trial judge was correct in finding ‘the parties had not cared for the child using traditional Aboriginal child care practices and the approach they adopted was a clearly defined primary carer to whom the child became primarily attached’.

5.8 Relevance of non-Indigenous culture

Justice Cohen in *Luckwell & Herridge* (2011) FamCA 52 noted that although the child’s Aboriginal and Torres Strait Islander heritage must be encouraged, the child also had an Anglo-Celtic background that should not be stifled or ignored. His Honor concluded that the child should be permitted to explore and retain connections with both backgrounds and cultures. Other cases, for example *Simons & Barnes* (2010), have noted that a child will not be sheltered from their non-Indigenous cultural background if living within an Aboriginal community, as they ‘will grow up immersed in the dominant anglo-centric culture of mainstream Australia’.³⁵¹

5.9 Judicial weight given to Indigenous cultural heritage and other statutory considerations

It is frequently noted in the case law that there is a dilemma between a child maintaining their cultural heritage and identity, and other factors referred to in sections 60CC(2) and (3), including stable attachment and protection from harm. For example, family violence in a particular case may militate against an outcome that allows a child to be fully exposed to his or her Indigenous culture.

A good illustration of this tension is in *Sheldon & Weir* (2011). In that case, the Full Court of the Family Court considered how a trial Judge had balanced the statutory considerations in circumstances where the mother wished to return to the Republic of Ireland with a two and a half year old child. The father was an Aboriginal person who had developed, in his late teens, a strong sense of his Aboriginal identity and an intimate knowledge of his cultural 'protocols, respect, and history'. It was accepted that the child's ability to participate in and have a connection with her Aboriginal culture was an important consideration in the case.

The trial Judge allowed the mother to take the child to Ireland, ordering that the child spend regular holiday time with her father in Australia from the time she was about six years of age. The trial Judge acknowledged that if the child lived in Ireland it would be more difficult for her to participate in Aboriginal lifestyle, culture and customs and enjoy this aspect of her heritage. The trial Judge found that the mother had limited understanding of Australia's Aboriginal history and that she had said to the family consultant that she believed it was opportunistic of the father to claim that he was Aboriginal in circumstances where, other than in his workplace, he did not involve himself in kinship or community life. Notwithstanding that stated view, the trial Judge found that the mother had a genuine willingness to accept the Court's decision and found that the mother, as the child matured, would give her warm support to her daughter's appreciation about Aboriginal culture and her sense of identity as an Aboriginal person.

The trial judge found that, provided the child was able to spend time with her father in Australia at a frequency and for a period sufficient to focus on her Aboriginal kinship bonds and community, her participation in and identification with Aboriginal heritage would be strong.

It would seem in this case, had all other considerations been finely balanced, the father's superior proposal relating to the child's Aboriginal heritage may have led to a result where the child stayed in Australia. However, other considerations weighed against the child remaining with her father in Australia, including issues relating to family violence, an unacceptable risk of sexual abuse presented by the paternal grandfather, the father's lack of appreciation of that risk, the child's emotional and psychological needs arising from the fact that she had her primary attachment with her mother, evidence about the emotional wellbeing of the mother if she remained in Australia and findings about the father's level of understanding of the child's emotional needs.

5.10 Responses to Torres Strait Islander customary adoption practices ('Kupai Omasker')

A further issue affecting Torres Strait Islander families concerns responses to a customary 'adoption' practice known as Kupai Omasker. A description of this custom is provided in Chapter 1. According to Ban, customary adoption 'is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin to 'adopted' children'.³⁵² While primarily kinship-based, adoptions may also take place between close friends where bonds of trust have already been established. Some of the reasons for the widespread nature of this custom within Islander communities include the maintenance of bloodlines and inheritance of traditional land, ensuring that family members who cannot have children due to infertility are able to raise a child, and the strengthening of alliances between families.³⁵³ A key characteristic of this practice is the principle that children 'are never lost to the family of origin', as they have usually been placed with relatives somewhere in the family network.³⁵⁴

Council last addressed the issue of customary child-rearing practices in its response to Recommendation 22 of the Family Law Pathways Advisory Group's Report, *Out of the Maze*, in 2004. At that time, Council saw a need to develop special processes for the recognition of traditional practices affecting Aboriginal and Torres Strait Islander children. Recommendation 2 of Council's 2004 report has not yet led to any significant change in this regard. The problem has been discussed in various reports dating back to 1986,³⁵⁵ including *Every Picture Tells a Story*.³⁵⁶ A number of cases have also described and dealt with customary adoption practices (discussed at 5.10.1).

The Family Court for many years responded to this need by making consent parenting orders in favour of 'receiving parents' (ie the parents with whom the child is placed). This practice has been scaled back in recent years. Council consulted with a number of people associated with the making of parenting orders in the context of Kupai Omasker arrangements and who otherwise dealt with Torres Strait Islander people in the context of legal proceedings.³⁵⁷ Part of Council's consultations revealed a growing concern among Islander communities for security of parental responsibility for children who are 'adopted' under Island custom, and a desire for greater availability of court services and orders for families living in the Torres Strait. By way of anecdotal example, Council was told of one situation where a child had been living for a considerable time with 'receiving' parents under a Kupai Omasker arrangement. The child's receiving parents had made an arrangement for the child to spend time with the child's natural parents. Issues arose whilst the child was with them and the Queensland Department of Communities (Child Safety Services) intervened and took the child into care. Because of the lack of any parenting orders or official birth certificate, the Department did not recognise the receiving parents as having any standing to have the child returned to live with them.

Council notes that the Queensland Government is currently conducting consultations with Torres Strait Islander communities in the Torres Strait and mainland Queensland and with a view to possible legislative recognition of the practice of Kupai Omasker. This may provide security for children and families affected by this practice without the need to seek orders from the family law courts. Council also notes that the Queensland Magistrates Court conducts a regular circuit to Thursday Island and other

islands in the Torres Strait. State Magistrates have power under the *Family Law Act* to make parenting orders.³⁵⁸ Currently the Family Court, when making such parenting orders, do so with the aid of a full family report and after receiving a report or information from an Indigenous Liaison Officer. In the absence of legislative action, the capacity of Queensland Magistrates to make parenting orders in favour of receiving parents may offer an effective solution to the present problems facing children adopted under Islander custom, provided that appropriate reports were available to the Queensland Magistrate to enable that Magistrate to make a determination under the existing provisions of the *Family Law Act*.

As will be seen in the recommendations, in the event that the current Queensland inquiry does not lead to a change in the law, Council would welcome a further reference to consider this issue and whether an amendment to the *Family Law Act* is necessary and appropriate to meet the best interests of children affected by Kupai Omasker arrangements. This may include examination of whether or not the *Family Law Act* should be amended to create a power to make a declaration recognising the traditional adoption practices of Torres Strait Islanders.

5.10.1 Case law recognition of Torres Strait Islander customary adoption

The issue of customary adoption was raised in a number of the cases surveyed by Council involving Torres Strait Islander families. This issue was also the focus of discussion and findings in a recent native title decision of the Federal Court. In *Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No. 2)* [2010] FCA 643, Justice Paul Finn discussed Kupai Omasker at 196 to 201:

[B]oth the State and the Commonwealth concede that adoption is and has been the commonplace in Torres Strait. Neither concedes, and the State contests, that it was, or is, a matter of traditional laws and customs.

The subject of adoption was discussed by Rivers (of the Cambridge expedition) as it affected his preparation of the genealogies for Mer and Mabuiag in 1898: see Haddon 1908, at 64-65; Haddon 1904, at 126. As he said of Mer:

The chief difficulty and source of error in Murray Island was the very great prevalence of the practice of adoption. In that island it is a common practice to adopt the child of another, sometimes even before the child is born, and it is customary in these cases to keep the child ignorant of his real parentage. Even after such an adopted child reaches adult life he will always give the name of his adoptive father when questioned as to his parentage, and I was told, and have no reason to doubt, that in many of these cases the men were still ignorant of their real parentage. The fact of the true descent is always, however, remembered by the elders of the families concerned, even if it has been forgotten by the community at large, and, as we shall see later, the real line of descent involves certain restrictions on marriage which render it necessary that the record of it shall be preserved.

The practice clearly pre-dates sovereignty. It was referred to and accepted by all of the Islander witnesses. Some were either adopted (e.g. Nelson Gibuma of Boigu) or had an adopted parent (e.g. George Mye of Erub and George Lui of

Poruma). I would note in passing that Mr Lui's father's adoption was as unusual as it was expedient: he was a teacher and was adopted by the elders of Poruma who wished to retain him on the island.

The evidence, which is consistent across the claim area, is that adoption generally occurs among close blood relations and for a variety of reasons (e.g. a couple's inability to have children, their inability to look after a child, or to replace a person being married out of a family). The information that a person is adopted should be kept from the child, although it is now common for biological parentage to be found out because of modern requirements for registration of births, etc. Adoption still carries with it traditional marriage restrictions for the reasons given by Rivers.

The evidence equally discloses instances of inter-island/PNG adoptions: see e.g. the evidence of Alick Tipoti, Patrick Whap, Tom Ned Stephen, Ethel Bob, Nelson Billy. Professor Scott's opinion, based on his own interviews at Erub, Masig and Iama and on the studies of others, was that "social cohesion [of the regional society of Torres Strait] within a shared normative order was reinforced by regionally-extensive relations of inter-marriage and adoption": Scott, 2008, at [348]. He also noted that, prior to sovereignty, and apart from adoption by close blood relations, it was also a traditionally-sanctioned means of incorporating strangers and of population recruitment: ibid [296]-[297].

There were not laws and customs requiring children to be adopted out – and to this extent, as the State points out, to engage in the practice was "entirely discretionary". I am nonetheless satisfied the manner and effects of adoption were the subjects of traditional laws and customs to the extent I have described. Adoption has had, and retains, the significance in social relationships that is captured by the Principle of reciprocity and exchange. In this I agree with Professor Scott, as also with the Applicant's written submission (at [554]). Nelson Billy's "first reason" for adoptions, I would note, was that:

... if you and I are cousins or brothers and I've got child and you haven't, I can give you one. We have to share.

Finally, I am satisfied that the laws and customs on adoption were, and are, essentially the same across Torres Strait.

A contested 'adoption' arrangement was also the subject of discussion in the 2003 Family Court case of **Lara and Lara & Marley and Sharpe**.

In **Lara and Lara & Marley and Sharpe** (2003) FamCA 1393, former Chief Justice Nicholson dealt with a parenting case between the biological parents of a child, referred to in the decision as 'Alice', and the biological father's older sister and her husband. Alice had lived in the family of the paternal aunty since she was three months old and was three years old at the time of the hearing.

The Laras submitted that Alice came to live with them when she was three months old on the basis that she was to be with them permanently and was to be brought up as their child. Their evidence was that this arrangement was a traditional Islander adoption, described as Kupai Omasker.

His Honor made the following comments under part of the judgment headed 'Kupai Omasker (traditional adoption)' at 37 to 46:

The concept of giving children runs deep in Torres Strait Islander culture and the practice is extremely widespread, as can be seen in this case where most of the participants have been traditionally adopted.

The western concept of adoption does not fully cover this practice, which has a spiritual or cultural relevance that is not relevant in western adoptions.

The practice has been given no legal recognition under Australian law, which is of great concern to Torres Strait Islanders and carries with it practical difficulties in relation to inheritance, proof of identity and the need for children to obtain parental consent to certain activities and decisions. In recent years, following discussions between Torres Strait Islanders and Elders and representatives of the Court, the Family Court of Australia has facilitated the making of residence orders and orders conferring sole parental responsibility upon the couple or person receiving the child pursuant to these traditional arrangements, and I have issued Practice Directions to assist this process.

A residence order does not amount to an adoption order, and can of course be subsequently revoked or varied in appropriate cases. It does, however, have the advantage of recording such arrangements and obviating some of the practical difficulties involved in non recognition of the practice by conferring parental responsibility upon the receiving parents.

The court has now made some hundreds of such orders. Features are that they are made with the consent of all relevant parties that can be ascertained; before such orders are made a report is prepared by a Court Counsellor with the assistance of an indigenous Court family consultant; and the Judge hearing the matter normally sits with one or more Elders as assessors to ensure that what is being recognised is a traditional adoption.

Importantly it is not the Court, but the parties and the community that determine that a traditional adoption has taken place. As I see it, the Court's role is simply to recognise that fact and make orders accordingly in the best interests of the child or the children concerned.

In the present case it is sought to be argued that the Court should itself determine whether the arrangement to hand over Alice was a traditional adoption to which effect should be given.

I consider that it is not the Court's role to make that decision. I note that Buckley J took a similar view in the case of Kitchell Zitha Bon (unreported TV 2198 of 1997 Delivered 4 September 2001) where he said:

As I indicated on a number of occasions during the course of the trial, in my view it would be entirely inappropriate for a Judge in the particular circumstances of this case to make a finding as to whether or not a traditional adoption has taken place. The issue is an extremely complex one and the varying practices and nuances that apply are such that it would more appropriately be a matter for the relevant elders to determine.

I respectfully agree with his Honour's view.

An understanding of Torres Strait Islander custom, and particularly the practice of Kupai Omasker, is nevertheless relevant to the determination of this case and in assessing the actions of the people involved. In particular, it explains why the giving of a child by his/her biological parents to another couple is much more acceptable in a Torres Strait Islander context than it would be in the wider community.

Notwithstanding His Honour being of the view that (under the context of current legislation) the Court did not have a role to play to determine whether or not there had been an effective traditional Islander adoption, he did in fact go on to make a finding, at 132 of the judgment, that that was in fact the intention of all the parties when Alice was three months old: ‘While I do not consider it necessary for me to determine whether or not this was a traditional adoption for the reasons already stated, I think it more probable than not that all of the parties considered that this was what was intended.’

His Honor drew a distinction between making a finding that it was the intention of the parties for Kupai Omasker to have taken place as opposed to a determination that that is what had happened. His Honor proceeded to decide the matter by making a determination as to what was in Alice’s best interests with reference to matters under what was then section 68F *Family Law Act*. Those matters included section 68F(f) (as it was then) being Alice’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. His Honour did not place great weight on criticism of the lifestyle that Alice would have in the place where the Laras lived when compared with where her biological parents lived. His Honour concluded that the paternal aunty was a Torres Strait Islander and ‘there are substantial Torres Strait Islander communities throughout most parts of North Queensland. I therefore do not consider there is any real risk of her being cut off from her culture by reason of living with Simon and Irma Lara’.

The Practice Direction to which His Honor referred in paragraph 39 of his reasons for judgment, was issued on 29 March 2004 and set out the procedure in the Family Court at that time to make ‘Applications arising from traditional customary adoption practise – Kupai Omasker’.

***Matthews and Anor & Matthews* [2011] FamCA 982**

This case is a very recent example of how the Family Court currently deals with Kupai Omasker cultural practices. In the course of his judgment, Benjamin J quotes the following description by Moore J in *Moses and Barton* [2008] FamCA 590 at paragraph 3 of the traditional practices of Kupai Omasker:

[T]he permanent giving of a child from one family to the other by mutual consent, usually within the extended family. The child takes the surname of the receiving family and is brought up as their child. It is a widespread practice in Torres Strait Islander families and is integral to Islander society and the development of social and economic bonds between families. It is regarded as strengthening the social structure through kinship and reciprocity and is

strongly connected to wider aspects of customary laws which define the identity of Torres Strait Islanders.

Benjamin J applied the relevant principles under section 60CC and with the aid of a family report and information provided by an Indigenous consultant, concluded that in the facts of this case, orders should be made for sole parental responsibility and for two children to live with the ‘receiving parents’ and that there be no contact between the child and the ‘giving parent’ except as permitted by the applicants or either of them and excluding any extended family and social gatherings where the families might be together in line with the Torres Strait Islander customary practices of giving and receiving children.

5.10.2 Comments made by Council in 2004 about a functional recognition of child rearing practices

In 2004, Council commented that the legislative provisions which Council had then recommended, and which were adopted, would not address the question of adequate functional recognition of particular child rearing and kinship-based parenting practices within Aboriginal and Torres Strait Islander communities. In particular, Council said at paragraphs 38 to 48 (footnotes excluded):

[W]hile a general provision along the lines recommended above could be included in Division 2, that will not overcome the problem of how to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities. This is a significant issue in the day-to-day lives of Aboriginal and Torres Strait Islander people. For example, it is important to recognise in law that a relative who is not a parent may actually be exercising the primary parental responsibility for the child, in order to determine specific legal and administrative questions. For example, this is required to ascertain whether a person is entitled to:

- *Receive Family Tax Benefit A*
- *Receive child support*
- *Consent to medical treatment on behalf of a child, and*
- *Enrol a child in school.*

It is for this reason that Council sees the need to develop special processes for that recognition in relation to Aboriginal and Torres Strait Islander children. In short, Council sees merit in considering easier ways of recognising the parental responsibilities of non-biological parents in Aboriginal and Torres Strait Islander communities. The aim would be to devise processes which do not in most cases require a full scale court application with its attendant costs and difficulties.

What follows are three options to illustrate how such a recognition process might work:

Option 1

Create a special procedure by legislation departing from the normal procedures under the Family Law Act for recognition of non-biological

parents as having parental responsibility. This legislation would allow an appropriate person under Aboriginal and Torres Strait Islander customary law to be recognised as having parental responsibility for the purposes of Federal law where both biological parents indicate their consent without having to go through a complex and court-based process. Simple registration with a Government agency familiar to Aboriginal and Torres Strait Islander people such as Centrelink would be all that is required.

That parental responsibility could last for as long as neither biological parent withdraws his or her consent. An application to a court or to the Administrative Appeals Tribunal might be required in a situation where the primary caregiver consents (e.g. the mother) but the father either does not consent, or cannot be located for the purposes of seeking consent.

Option 2

Same as option 1, but the recognition of parental responsibility would be for all purposes, state and federal. This would then cover medical treatment and schooling for example. This could only be done after appropriate consultation with the States and Territories.

Option 3

Amend specific legislation on child support, family tax benefit or whatever, to create a process whereby non-parent persons can be recognised as exercising primary parental responsibility for the purposes of that Act e.g. receiving child support payments or family tax benefits.

Council believes that this is not an issue that can be resolved by the Commonwealth alone given the range of benefits and services provided by State and Territory governments. We also believe that requiring that this matter be determined on a legislation by legislation basis is a complex solution and one that is unlikely to be welcomed by Aboriginal and Torres Strait Islander people. On this basis Council believes that Option 2 above offers the best practical approach to dealing with this issue.

In light of what appears to be something of an impasse in terms of the functional recognition of parental responsibility in this area, Council recommends that the Attorney-General may wish to raise this matter with the Minister for Immigration and Multicultural and Indigenous Affairs. If the Attorney-General agrees to this, Council can provide further advice on the options set out above. Alternatively, the Attorney-General may wish to give approval to the Chairperson to pursue this matter in an exploratory way with the Minister for Immigration and Multicultural and report back to the Attorney-General.

Recommendation 2 (of the Family Law Council's December 2004 report)

Council recommends that the Attorney-General consider raising the matter of how best to promote the functional recognition by the different arms of Government of parental responsibility in Aboriginal and Torres Strait Islander communities with the Minister for Immigration and Multicultural and Indigenous Affairs.

In addition to these options Council has included the following summary of a Family Court initiative that is dealing with these very issues in the Torres Strait.

Kupai Omasker – A Torres Strait Islander Solution

In close consultation with the Torres Strait Islander community the Family Court has developed a special procedure for dealing with matters involving the traditional child rearing practices of the Torres Strait island peoples. The term Kupai Omasker describes the practice of permanently transferring children from one family to another, with the children usually remaining within the extended family. The practice is by consent of the parties concerned and the child takes the name of the new family. The transfer occurs as the result of a verbal agreement and usually takes place within the extended family.

The primary purpose of the special procedure was to attempt to respond to a large number of applications for parenting orders from Torres Strait Islanders who had previously had children transferred to their care under the Kupai Omasker practice. There was considerable uncertainty about the legal responsibility for these children.

The Court developed special affidavits and application forms to allow parenting applications to be made that recognised the special nature of Kupai Omasker. Under s102B of the Family Law Act the Court appointed two elders as assessors wherever the Court sat. In addition the Court was assisted by a Court Counsellor and a Torres Strait Islander Family Consultant. The Court was able to make parenting orders with reduced formality and abbreviated procedures. Those orders were made quickly and with minimal cost in terms of the applicants and the Court.

While this procedure operates within the unique traditions of the Torres Strait it may well be possible for similar procedures to be developed to deal with similar issues in the Aboriginal community. The Council believes that in the absence of a process as recommended above that the Family Court and the Federal Magistrates Court should give consideration to the possibility of developing similar procedures for Aboriginal communities.

Council believes that while such innovative solutions are an option, that these are matters that do not need to be dealt with by courts unless there is a dispute. Council believes that an administrative solution as suggested in option 2 above would offer a cheaper and less formal process and be therefore more likely to be used by more Aboriginal and Torres Strait Islander people.

5.10.3 Constitutional power

In 1967, by constitutional referendum, the words ‘other than the Aboriginal race in any State’ were removed from section 51(xxvi) of the Constitution and since that time section 51(xxvi) of the Constitution enables the Australian Government to make laws relating to: ‘[t]he people of any race for whom it is deemed necessary to make special laws’.

Council notes that the report by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples (‘Expert Panel’), *Recognising*

Aboriginal and Torres Strait Islander peoples in the Constitution ('the Report'),³⁵⁹ was recently delivered to the Prime Minister on 19 January 2012.³⁶⁰ The Report makes several recommendations,³⁶¹ including the repeal of the race power under section 51 (xxvi), provided it is accompanied by the insertion of a new head of power to legislate with respect to Aboriginal and Torres Strait Islander peoples.³⁶² The Report goes on to recommend that:

a new 'section 51A' be inserted after section 51 consisting of preambular or introductory language (italicised below—see Chapter 4) and operative language along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples
Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.³⁶³

The Report provides this recommendation after the detailed discussion of the impact it may have on existing or future laws,³⁶⁴ observing that:

[t]he Panel's view, based on advice, is that repeal and replacement would not invalidate or require re-enactment of legislation originally passed in reliance on section 51(xxvi). Rather, as a seamless exercise, such laws would continue to be supported by the new power ('section 51A') from the time of repeal of the old power (section 51(xxvi)), which would occur at the same time.³⁶⁵

Council considers that if a referendum changed the Constitution in the way suggested by the Report, the Commonwealth would still have power to make a change to the *Family Law Act* to enable declarations concerning Kupai Omaker.

5.10.4 Endorsement of the United Nations Declaration of the Rights of Indigenous Peoples

On 3 April 2009 the Honorable Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin MP, stated that the Australian Government officially endorsed the United Nations Declaration on the rights of Indigenous Peoples.³⁶⁶ That declaration includes:

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 34

Indigenous peoples have the right to their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs in accordance with international human rights standards.

5.10.5 The current inquiry by the Queensland Government

As noted at 5.10, Council was informed that the Queensland Government is currently conducting a consultation with Torres Strait Islander communities with a view to possible legislative recognition of the practice of Kupai Omaker, which may provide security for children and families affected by this practice without the need to seek orders from the family law courts.

Key questions of the consultation included:

- What issues must be taken into account when deciding what is in the child's best interests?
- What issues must be taken into account when deciding whether a receiving parent is suitable?
- How do we know if the giving parent/s have given their informed consent?
- What problems are experienced by people who have been traditionally adopted when they are a child?
- What problems are experienced by people who have been traditionally adopted when they become an adult?
- What is the nature and extent of traditional adoption in the Torres Strait, NOA and mainland?
- What is taken into account when a decision is made to traditionally adopt a child?
- Who makes the decision?
- What does it mean to traditionally adopt?
- What is the best way for the State Government to decide whether to legally recognise a traditional adoption?

At the time of writing, consultations had been conducted in the Torres Strait and with Islander communities in several regional mainland locations, including Townsville, Rockhampton, Bamaga and Cairns.

6. Conclusions and Recommendations

There is a range of Australian Government policy frameworks that articulate broad level policy approaches to addressing the issues raised in Council's work on this reference, including the NILJF, the *National Plan*, the NFPAC and the *Strategic Framework*. Each of these frameworks is relevant to considering actions in relation to the family law needs of Aboriginal and Torres Strait Islander peoples. Council considers that the recommendations made in this Chapter can make a significant contribution to the *Closing the Gap* agenda by better supporting Aboriginal and Torres Strait Islander parents and children facing relationship breakdown.

The demographic profile of the Aboriginal and Torres Strait Islander population, outlined in Chapter 1, suggests there are significant imperatives for action in this area with almost half of the population currently under 20 years of age.

Council has formed the view that a range of actions need to be implemented in line with the four levels already identified by Maria Dimopoulos as 'strategic domains in legal empowerment'.³⁶⁷ These domains are:

1. Cultural (providing legal literacy and education to marginalised communities)
2. Structural (providing culturally competent services for marginalised groups)
3. Law reform (changing the law to recognise and support marginalised groups)
4. Application (monitoring and documenting discrimination).

Many of the issues raised in Council's submissions and consultations are inter-related, requiring multiple, mutually-supporting actions across these domains. For example, addressing the issue of resistance to engagement, discussed in Chapter 3, requires initiatives based on education and information, coupled with the provision of culturally safe services in a context where the legislative framework supports culturally sensitive outcomes. Weakness in, or absence of, an appropriate response in one of these domains will undermine progress in the others. This assessment informs the approach Council has taken in formulating its recommendations.

In putting forward these recommendations, Council acknowledges that there are several areas where research is required to allow for better policy responses. These areas are highlighted in the following discussion. It also notes that proposals contained in this Report are consistent with key recommendations put forward by other significant reviews in this area. Notably, the *Strategic Framework* recommended that: '[t]he Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians'.

Council recognises that approaches to implementing these recommendations should be informed by the effective practice principles discussed in Chapter 4. Responses to the implementation of these recommendations require the engagement, support and ownership of Aboriginal and Torres Strait Islander peoples and should be tailored to meet the needs of the particular communities and groups they are intended to serve.

Material before Council demonstrates that positive efforts to respond effectively to the needs of Aboriginal and Torres Strait Islander families are already underway in the

family law system and the recommendations in this report are intended to recognise and build on this work. The need to address resistance to engagement through community education, and to support this through a systematic approach to enhancing the cultural competence of service personnel are at the core of Council's recommendations. Other integral parts of Council's proposals are strategies to increase the number of Aboriginal and Torres Strait Islander professionals working across the family law system and measures to address language and literacy barriers and develop improved outreach and preventative programs with Indigenous communities.

Although Council has not made specific recommendations for further research, it is clear that there are a number of areas where more empirical evidence is needed. The question of how sole-parent headed Aboriginal and Torres Strait Islander families function needs further examination, so that supportive policies can be developed. Comprehensive evaluations of the accessibility and effectiveness of family dispute resolution and court services from the perspective of Aboriginal and Torres Strait Islander clients are also needed. Empirical exploration of the specific family law needs and views of Aboriginal and Torres Strait Islander women and children, particularly those who have experienced family violence, could also inform further policy responses.

6.1 Legal Literacy Strategies

Council's work on the reference indicates there is a critical need to develop understanding among Aboriginal and Torres Strait Islander peoples of the Australian family law system, including dissemination of information about relevant laws and available legal support and family dispute resolution services. A statement from the *Strategic Framework for Access to Justice in the Federal Civil Justice System* is particularly pertinent in this context: '[i]nformation failure is a significant barrier to justice – people do not understand legal events, what to do or where to seek assistance'. The relevance of this statement to Aboriginal and Torres Strait Islander peoples is significantly amplified.

As discussed in Chapter 4, there are some excellent legal literacy initiatives already underway. However, it is clear that more needs to be done and that existing funding for educational activities among Indigenous communities is inadequate. Any action in this area could potentially support prevention of harm and early assistance to families in crisis, and should specifically address family violence and the rights and obligations of separated parents in relation to their children. Options for linking community education initiatives with parenting support programs being implemented as part of the *Closing the Gap* strategy should also be considered.

Recommendation 1: Community Education

The Australian Government works with family law system service providers and Aboriginal and Torres Strait Islander organisations to develop a range of family law legal literacy and education strategies for Aboriginal and Torres Strait Islander peoples.

The strategies should:

- aim to inform Aboriginal and Torres Strait Islander peoples about: the formal justice system, legal responses to family violence and the rights and obligations of separated parents
- allow for education and information to be delivered in Indigenous languages, plain English and in formats that are appropriate to particular communities and age groups, and
- ensure that the information is continuously accessible and delivered in a culturally appropriate manner to Aboriginal and Torres Strait Islander peoples.

6.2 Promoting Cultural Competency

The rationale for the recommendation concerning the development and implementation of a cultural competence framework needs to be examined from several aspects. Such a framework would be a symbolic embodiment of the principles and values that should inform engagement by agencies across the family law system with Aboriginal and Torres Strait Islander peoples. More concretely, the framework should set out the actions, approaches and procedures that agencies should apply in meeting the needs of Aboriginal and Torres Strait Islander clients. From a client perspective, the framework should endeavour to communicate the message that family law agencies system-wide have an obligation to meet their needs in an effective and culturally appropriate manner, breaking down the perception referred to in consultations and submissions that ‘mainstream services aren’t for us’. Over time, the implementation of such a framework could contribute to the amelioration of the inconsistent approaches to culture referred to in the material before Council and support the development of a common understanding of the core elements of culturally responsive practice.

Council’s recommendations are informed by work conducted in the child protection context, particularly work undertaken in partnership by the Victorian Aboriginal Child Care Agency and the Department of Human Services in Victoria. The *Aboriginal Cultural Competence*³⁶⁸ framework represents something of a precedent for Council’s recommendation, which also reflects the ideas behind other initiatives such as the Australian Government’s *Engaging Today, Building Tomorrow* framework.³⁶⁹ This latter framework was developed as part of the *Closing the Gap* agenda. It guides engagement by Australian Public Service agencies with Aboriginal and Torres Strait Islander peoples on policies, programs and services that affect their lives.

In terms of the existence and development of culturally competent services across the family law system, Council’s work suggests such competence exists in some areas and services but is inconsistent or lacking in others. There is evidence of some excellent work being done in this area (see Chapter 4), but there are also indications of a need for improvement. In particular, material emanating from consultations and submissions indicates a lack of confidence in the ability of mainstream family law services to consistently deliver culturally appropriate services at a range of different levels. Areas referred to with particular concern included family dispute resolution models, family reports, and Court processes.

Recommendation 2: Promoting Cultural Competency

- 2.1 The Australian Government develops, in partnership with relevant stakeholders, a cultural competency framework for the family law system. The framework should cover issues of culturally responsive practice in relation to people from Aboriginal and Torres Strait Islander backgrounds. This development should take account of existing frameworks in other service sectors.
- 2.2 Cultural competency among family law system personnel be improved by:
 - 2.2.1 Investing in the development of a flexible learning package (similar to the *AVERT Family Violence Training Package*) that can be adapted across settings and professional disciplines providing both minimum competencies and options for more in-depth development of skills and knowledge and encouraging its use across the sector by making it low cost and flexible in its delivery.
 - 2.2.2 Commissioning the development of ‘good practice guides’ across settings to encourage Aboriginal and Torres Strait Islander culturally responsive service delivery for dissemination to individual practitioners through conferences, clearinghouses and national networks. Examples might include the development of resources to support effective approaches to meeting the needs of Aboriginal and Torres Strait Islander clients in family dispute resolution, children’s contact centres and family reports.
 - 2.2.3 Building Aboriginal and Torres Strait Islander cultural competency, and understanding of the application of relevant laws and policies (such as the *Family Law Act*) for Aboriginal and Torres Strait Islander clients, into professional development frameworks, Vocational Education and Training and tertiary programs of study across disciplines relevant to the family law system.

6.3 Building Collaboration and Enhancing Service Integration

In recent years, the challenges associated with the co-ordination of service delivery across the family law system and in the delivery of government services to Aboriginal and Torres Strait Islander peoples have received significant critical attention.³⁷⁰ The delivery of family law services to Aboriginal and Torres Strait Islander families reflects the intersection of the difficulties noted in each of these sectors. Advancement in this area included a forum held in Adelaide in September 2011, convened by the federal Attorney-General’s Department, which was designed to improve access to the family law system’s services for Indigenous peoples. This forum highlighted the need for better understanding between service providers across both sectors and represented a first step in generating such understanding. There was strong support among service providers for this forum and for a subsequent conference facilitated by the Alice Springs Family Law Pathways Network in October 2011, which provided further opportunities to share practice insights and build collaboration. Such collaboration is recognised to be essential to meeting the complex needs of Indigenous clients.

Recommendation 3: Building Collaboration and Enhancing Service Integration

- 3.1 The Australian Government, in consultation with stakeholders, develop strategies to build collaboration between Aboriginal and Torres Strait Islander-specific service providers and organisations and the mainstream family law system (courts, legal assistance and family relationship services). This should include support for Aboriginal and Torres Strait Islander organisations to provide advisory and other support for family law system services.
- 3.2 The Australian Government provides funding for:
 - 3.2.1 The creation of a ‘roadmap’ of services (including relevant support services) for Aboriginal and Torres Strait Islander families in the family law system
 - 3.2.2 Integration of the ‘roadmap’ into current government resources and initiatives which include the Family Relationship Advice Line and Family Relationships Online, and
 - 3.2.3 Promoting a greater awareness of these resources and initiatives for Aboriginal and Torres Strait Islander families and relevant organisations.

6.4 Early assistance, outreach and prevention

The age profile of the Aboriginal and Torres Strait Islander population, the evidence of the need to overcome resistance to engagement with services and recognition of the importance of strategies oriented toward preventing problems from developing, underpin this recommendation for early assistance and preventative programs. It builds on the methodology identified in the *Strategic Framework for Access to Justice in the Federal Civil Justice System* (see Chapter 1) and on the focus of the *National Partnership Agreement on Legal Assistance Services* on preventative and early interventions services, as well as existing work by family law system services, including parenting skills and outreach programs.

Recommendation 4: Early Intervention and Prevention

The Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs work with stakeholders, including mainstream and Aboriginal and Torres Strait Islander-specific service providers, to develop strategies that assist, as early as is possible, Aboriginal and Torres Strait Islander families experiencing relationship difficulties and parenting disputes. Such strategies should include the development of outreach programs by mainstream services within the family law system.

6.5 Building an Aboriginal and Torres Strait Islander workforce in the family law system

The submissions and consultations received by Council emphasised the need for sustained, pro-active measures to develop, recruit and retain an appropriately skilled and qualified Aboriginal and Torres Strait Islander workforce in the family law system. Specific professional and accreditation structures may need to be reviewed to ensure that appropriate qualifications, skills and attributes are reflected in recruitment

initiatives and measures. Ongoing professional and peer support, training and networking opportunities for Aboriginal and Torres Strait Islander staff should also be included in workforce development strategies.

Recommendation 5: Building an Aboriginal and Torres Strait Islander Workforce in the Family Law System

The Australian Government works with stakeholders to ensure a range of workforce development strategies are implemented across the family law system to increase the number of Aboriginal and Torres Strait Islander professionals working within family law system services. These strategies should include:

- scholarships, cadetships and support for education and training opportunities for Aboriginal and Torres Strait Islander professionals to work in the family law system
- consideration of the cultural and social experiences of potential Aboriginal and Torres Strait Islander professionals as professional attributes of significance in developing selection criteria for relevant positions
- funding for family law system services (courts, legal assistance and family relationship services) to proactively recruit, train and retain Aboriginal and Torres Strait Islander peoples, and
- resourcing and supporting service providers to develop mechanisms for continuing professional supervision, support and networking opportunities for Aboriginal and Torres Strait Islander professionals.

6.6 Family consultants and liaison officers

The material before Council demonstrated a gap in the support available for family law courts in meeting the needs of Aboriginal and Torres Strait Islander clients. As described in Chapter 4, the Family Court's program involving Indigenous Family Liaison Officers was greatly valued by the various relevant stakeholders affected by this program. Although many Family Relationship Centres employ Indigenous Family Liaison Officers, the transition of the functions of the Family Court's Indigenous Family Liaison Officers into the Family Relationship Centres did not occur as originally intended.

Council considers that action is required to ensure support for Aboriginal and Torres Strait Islander clients using the family law courts and family relationship services and to enable these services to meet the needs of Aboriginal and Torres Strait Islander clients. In line with Council's consultations and recent work conducted by Ralph, Council recommends that Indigenous Family Consultants and Indigenous Family Liaison Officers be employed in Aboriginal and Torres Strait Islander-specific legal organisations and Family Relationship Centres. Situating liaison officers within Indigenous-specific legal services recognises the experience that these organisations already have in fulfilling court support functions and enhances the opportunities for retaining Aboriginal and Torres Strait Islander staff. This client-focused arrangement, which also recognises that persons appointed to these positions are likely to have connections with relevant local communities, supports service choice for Aboriginal and Torres Strait Islander clients who may wish not to use a mainstream or an Indigenous-specific service. This arrangement, coupled with the presence of

Aboriginal liaison officers in Family Relationship Centres, is also designed to support Council's recommendations for strengthening collaboration across the family law system.

Recommendation 6: Family Consultants and Liaison Officers

The Australian Government provides funding for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the family law courts to improve outcomes for Aboriginal and Torres Strait Islander families, including by:

- increasing the information available to the courts about Aboriginal and Torres Strait Islander cultural practices and children's needs to courts through family reports (with reference to specific communities and cultures in specific cases)
- enhancing the ability of courts to meet the needs of Aboriginal and Torres Strait Islander clients in court processes, and
- providing information to courts, and support and liaison to parties, in matters that may require urgent action.

The role of Indigenous Family Consultants and Indigenous Family Liaison Officers may be part of the job description of a person who is ordinarily placed in a Family Relationship Centre or an Aboriginal and Torres Strait Islander-specific service. An inter-agency agreement should require the Family Relationship Centre or Aboriginal and Torres Strait Islander service to provide the family law courts with access to the Indigenous Family Consultant and/ or Indigenous Family Liaison Officer on a clearly defined basis.

6.7 Access to court, legal and family dispute resolution services

Council has concluded that there is a need for a holistic and thorough examination of the gaps in legal, court and family dispute resolution services to Aboriginal and Torres Strait Islander peoples. As discussed in Chapter 3, Council's consultations revealed a concern that the provision of family law services are an 'add-on' and of lesser priority than the provision of legal services in areas such as crime, child protection and family violence. It is also apparent that while there are very positive developments in some Family Relationship Centres, the coverage and availability of culturally appropriate family dispute resolution services across the sector are limited. In keeping with the effective practice principles outlined in Chapter 4, Council considers that it is necessary to conduct a more detailed examination of the existing barriers to culturally responsive service delivery and examine how such services can be made more widely available to Aboriginal and Torres Strait Islander families.

In a similar vein, it is clear that present the coverage of court services is not meeting the needs of Aboriginal and Torres Strait Islander communities. In particular, there are very limited circuits run by the Federal Magistrates Court of Australia and there is a lack of access to federal family law court services in regional and remote areas. Council notes the importance of further exploration of alternative, more accessible and engaging models of delivery, such as the 'justice hubs' model being examined under the Northern Territory's *Working Futures* policy (see Chapter 4). Encapsulating the concerns expressed in many submissions and consultations, the North Australian Aboriginal Justice Agency noted that '[t]he 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',³⁷¹

The need for a review of court services to vulnerable client groups has previously been canvassed by the *Strategic Framework for Access to Justice in the Federal Civil Justice System*, the Legal and Constitutional Affairs Committee inquiry into Access to Justice³⁷² and the Office of Evaluation and Audit (Indigenous Programs).³⁷³ Council notes that the Attorney-General, the Hon Nicola Roxon, has recently announced plans to instigate a review of Commonwealth-funded legal services encompassing Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services.³⁷⁴

Recommendation 7: Access to Court, Legal and Family Dispute Resolution Services

To particularly address the difficulties in providing services to remote locations and gaps in service provision in other locations, the Australian Government instigates a review of the accessibility and appropriateness of court, legal and family dispute resolution services for Aboriginal and Torres Strait Islander peoples, including in regional and remote areas throughout Australia.

6.8 Interpreter services

Council has reviewed the factors that contribute to the low levels of engagement with family law services by Aboriginal and Torres Strait Islander clients. Addressing the demand for appropriately trained and qualified onsite interpreters was identified as key to mitigating language and communication barriers, and highly preferable to the use of telephone interpreters.

While interpreters may be used to ameliorate barriers, the consultations and submissions indicated that the availability of interpreters, particularly in some language groups,³⁷⁵ is limited.³⁷⁶ The need for appropriate training of interpreters in legal concepts and processes was also noted. The finite pool of trained and qualified interpreters results in delays in scheduling of events reliant on interpreters³⁷⁷ and leads to instances where conflict of interest and confidentiality issues arise, particularly in smaller communities.³⁷⁸ In light of these issues, Council has made a number of recommendations for improving access to interpreter services for Aboriginal and Torres Strait Islander clients of the family law system.

Recommendation 8: Interpreter Services

8.1 The Australian Government develops a strategy for improving access to interpreter services in Aboriginal and Torres Strait Islander languages. This should be informed by a needs analysis addressing:

- the prevalent language groups
- the pool of available interpreters for particular language groups
- an assessment of which language groups require interpreters
- initiatives to increase the pool in required areas, and
- developing regional lists of pools of interpreters with knowledge and understanding of family law derived either from training provided by

local agencies or specialist legal interpreter accreditation developed or approved by National Accreditation Authority for Translators and Interpreters.

8.2 Training in family law should form a specialist component of accreditation for legal interpreters.

8.3 The Australian Government works with stakeholders to develop a national protocol on the use of interpreters in the family law system. This should include:

8.3.1 Protocols to ensure that Aboriginal and Torres Strait Islander clients with language issues are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided with an interpreter if they are identified as in need of one, and

8.3.2 Protocols to guide the sourcing and selecting of interpreters.

6.9 Torres Strait Islander customary adoption practices ('Kupai Omasker')

Council notes that the Queensland Government is currently consulting with Torres Strait Islander communities with a view to possible legislative recognition of the practice of Kupai Omasker, which may provide security for children and families affected by this practice without the need to seek parenting orders from the family law courts. In the event that the review by the Queensland Government does not result in legislative reform to address this issue, Council would welcome a reference from the Attorney-General to consider whether reform to the *Family Law Act* is needed to meet the best interests of children affected by Kupai Omasker arrangements. This may include, for example, examination of whether amendment to the *Family Law Act* is required to enable courts exercising jurisdiction under the *Family Law Act* to make a declaration recognizing the traditional child rearing practices of Torres Strait Islanders in relation to an arrangement:

- which has voluntarily been entered into by the biological parents (the giving parents) of the child and the person with whom the child has been placed (the receiving parents)
- which is in the best interests of the child (particularly having regard to any unacceptable risk to the child of child abuse or family violence in the receiving household)
- which is recognized by relevant Elders or community leaders as a Kupai Omasker arrangement, and
- which has been in place for a specified period of time, unless special circumstances exist so that the court finds a shorter period of time is appropriate.

The effect of any such declaration might be that, the persons in whose favour a declaration recognising traditional child-rearing practices is made, becomes the parent of the relevant child and as a consequence, the biological parents are no longer the parents of the relevant child. As a result, the effect of such a section would be to enliven the provisions of Division 2 Part VII of the *Family Law Act* and the receiving parents would have exclusive and permanent parental responsibility for the child.

Recommendation 9: Torres Strait Islander Customary Adoption (Kupai Omasker)

Action in relation to this issue should be deferred until the outcome of the Queensland Government inquiry into the practice of Kupai Omasker is known. If this inquiry does not lead to a resolution of the difficulties in this area, the Attorney-General may request that Council consider whether amendment to the *Family Law Act* is required to address this issue. If the inquiry recommends recognition of the practice of Kupai Omasker, and if the Queensland Government does not legislate to implement that recommendation, Council would welcome a reference from the Attorney-General on this issue.

ENDNOTES

¹ The terminology Aboriginal and Torres Strait Islander peoples is used in this report for two reasons: (a) that it the terminology used in the *Family Law Act 1975* (Cth) section 4 and (b) it is preferred by many Aboriginal and Torres Strait Islander peoples according to: Secretariat of National Aboriginal and Islander Child Care Inc, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (Secretariat of National Aboriginal and Islander Child Care Inc, March 2010). However, Indigenous may be used when referring to particular policy frameworks, position titles or data sources where this term is used in the original. Council also acknowledges that the experience of Torres Strait Islander groups has been different to that of many mainland Aboriginal groups (which also differ from each other in many respects). *Working Together and Walking Together* notes that ‘Torres Strait Islanders have not experienced the extent of the negative impacts suffered by Aboriginal people, as they were not forcibly removed from their traditional lands’ (17).

² Australian Bureau of Statistics, ‘Population Distribution’, *Aboriginal and Torres Strait Islander Australians*, (Cat. no. 4705.0) (2006).

³ Australian Institute of Aboriginal and Torres Strait Islander Studies and Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages Survey Report 2005* (Australian Government Department of Communications, Information Technology and the Arts, 20 November 2005).

⁴ Biddle N, and Taylor, J, *Indigenous Population Projections, 2006-31: Planning For Growth*, Centre of Aboriginal Economic Policy Research, ANU, 2009, Table 6.

⁵ *Ibid.*

⁶ Heard, G, B Birrell and S Khoo, *Intermarriage Between Indigenous and Non-Indigenous Australians*, (2009) 17(1) *People and Place*, 1, 6.

⁷ Data from a customised table produced from the Australian Bureau of Statistics using ABS Table Builder. This Table was produced for this report by Dr Lixia Qu, a senior research fellow at the Australian Institute of Family Studies. Council is grateful for her assistance.

⁸ Biddle and Taylor, above n 4.

⁹ *Ibid.*

¹⁰ Prime Ministers Report (2011) *Closing the Gap*, Canberra: Australian Government.

¹¹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage - Key Indicators 2011 Report* (Productivity Commission, August 2011).

¹² *Ibid.*

¹³ Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009–2015* (4930, Australian Government Attorney-General’s Department, 2010).

¹⁴ Council of Australian Governments, *National Plan to Reduce Violence Against Women and the Children*, Commonwealth of Australia, 2011.

¹⁵ Council of Australian Governments, *Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020* (April 2009).

¹⁶ Australian Government Attorney-General’s Department, Report by the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009).

¹⁷ Council of Australian Governments, above n 14, Objective 1.2, p 13.

¹⁸ Australian Government Attorney-General’s Department, above n 16, Rec 11.4 and 11.7.

¹⁹ Gooda, Mick, *Social Justice Report 2011* (Australian Human Rights Commission, January 2011), 14.

²⁰ R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, and L. Qu, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies: 2009).

²¹ See *Family Law Act 1975* (Cth) ss 60I(7) and (9).

²² Akee, Josephine, *The role of Indigenous Family Liaison Officers in the Family Court of Australia*, (2006) (75) (Spring/Summer2006) *Family Matters* 80.

²³ This concept is defined in various ways. The concept applied in this report is based on: Victorian Aboriginal Childcare Agency, *Building Respectful Partnerships: The Commitment to Aboriginal Cultural Competence in Child and Family Services*, Melbourne, 2010, 17.

²⁴ This body of work consists of: National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (National Alternative Dispute Resolution Advisory Council, January 2006); Bauman, Toni and Australian Institute of Aboriginal and Torres

Strait Islander Studies, *Final Report of the Indigenous Facilitation and Mediation Project July 2003 - June 2006: research findings, recommendations and implementation* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006); Flaxman, Saul, Kristy Muir and Ioana Oprea, *Indigenous Families and Children: Coordination and Provision of Services - Stronger Families and Communities Strategy 2004–2009* (2009) *Occasional Paper No. 23*; Al-Yaman, Dr Fadwa and Dr Daryl Higgins, *What works to overcome Indigenous disadvantage: Key learnings and gaps in the evidence* (Closing the Gap Clearinghouse, 2011).

²⁵ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the future for families experiencing separation* (Family Law Pathways Advisory Group, 2001).

²⁶ See *Family Law Amendment (Shared Parental Responsibility) Act 2006*

²⁷ Section 60B(2)(e) provides that the principles underlying these objects are that (except when it is or would be contrary to a child's best interests), children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

²⁸ Section 60B(3) provides that 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: (a) to 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.

²⁹ Section 60CC(3)(h) provides that additional considerations by a court in determining what is in the child's best interests are: if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right.

³⁰ Section 60CC(6) provides that for the purposes of paragraph (3)(h), an Aboriginal child's or a 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; 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.

³¹ Section 61F provides that 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.

³² Family Law Pathways Advisory Group, above n 24.

³³ Attorney-General of Australia, 'Review of legal assistance services' (Media Release, 30 January 2010: <<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/30-January-2012---Review-of-legal-assistance-services.aspx>> (accessed 22 February 2012).

³⁴ Council of Australian Governments, above n 13.

³⁵ *Ibid.*

³⁶ Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples, *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution* (2012).

³⁷ Secretariat of National Aboriginal and Islander Child Care Inc, above n 1.

³⁸ Dudgeon, Patricia and Darlene Oxenham, *The Complexity of Aboriginal Diversity: Identity and Kindredness* (1989) 5(1) *Black Voices* 22.

³⁹ *Family Law Act 1975* (Cth) s 4.

⁴⁰ Secretariat of National Aboriginal and Islander Child Care Inc, above n 1, 8.

⁴¹ Human Rights and Equal Opportunity Commission, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997), at 3.

⁴² Prime Ministers Report, above n 10, 1.

⁴³ Standing Committee of Attorneys-General Working Group on Indigenous Justice, above n 13.

⁴⁴ Council of Australian Governments, above n 14.

⁴⁵ *Ibid.*

⁴⁶ Standing Committee of Attorneys-General Working Group on Indigenous Justice, above n 13. The Framework and the Good Practice appendix can be accessed at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_DraftNationalIndigenousLawandJusticeFramework>

⁴⁷ Prime Ministers Report, above n 10.

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- ⁴⁸ Standing Committee of Attorneys-General Working Group on Indigenous Justice, above n 13, 10.
- ⁴⁹ Council of Australian Governments, above n 15, 29.
- ⁵⁰ Ibid 28.
- ⁵¹ Australian Government Attorney-General's Department, above n 16.
- ⁵² Ibid 61.
- ⁵³ Ibid 143.
- ⁵⁴ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws (ALRC Report 31)* (Australian Law Reform Commission, June 1986); Human Rights and Equal Opportunity Commission, above n 41; Family Law Council, *Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices: Response to Recommendation 22: Pathways Report, Out of the Maze* (Family Law Council, December 2004); Family Law Pathways Advisory Group, above n 25; and House of Representatives Standing Committee on Family and Community Affairs, *Ever picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation* (Commonwealth of Australia, 2003).
- ⁵⁵ Australian Bureau of Statistics, above n 2. 'Counting' Aboriginal and Torres Strait Islander peoples is recognised to be particularly challenging in a range of data collection contexts. A key issue is whether people choose to identify themselves as Aboriginal and/or Torres Strait Islander.
- ⁵⁶ Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander people: an overview*. (Cat. no. IHW 42) (Australian Institute of Health and Welfare, 2011), at 10.
- ⁵⁷ Secretariat of National Aboriginal and Islander Child Care Inc, above n 1, 17.
- ⁵⁸ Above n 7.
- ⁵⁹ Ibid.
- ⁶⁰ Australian Institute of Health and Welfare, above n 56, 10.
- ⁶¹ Ibid.
- ⁶² Biddle, N, J Taylor and M Yap, *Are the gaps closing? - regional trends and forecasts of Indigenous employment* (2009) 12(3) *Australian Journal of Labour Economics* 263. Such projections are recognised to be methodologically complex. In their report, Biddle and Taylor put forward three series of projections based on differing assumptions. For simplicity, and recognising that these projections are indicative only, we refer to the Series A projections in this report.
- ⁶³ Ibid.
- ⁶⁴ Biddle et al, above n 62, Table 6.
- ⁶⁵ Australian Institute of Health and Welfare, above n 56, 8.
- ⁶⁶ Biddle et al, above n 62, 7.
- ⁶⁷ Ibid 8.
- ⁶⁸ For a discussion of the challenges involved in collecting data on Aboriginal and Torres Strait Islander families, see Morphy, Frances, *Lost in Translation: Remote Indigenous households and definitions of the family*, Family Matters, No 73, 2006.
- ⁶⁹ Above n 7.
- ⁷⁰ Ibid 7.
- ⁷¹ Data from *Footprints in Time, the Longitudinal Study of Indigenous Children (LSIC)*, has potential to shed light on these issues. At the time this report was being prepared, analyses based on these data were just beginning to emerge: e.g. Walter, M and Hewitt, B (2011) Indigenous family relationships and post-separation parenting, paper delivered at the LSAC and LSIC Research Conference, Melbourne 15-16 November 2011.
- ⁷² Zubrick SR, Silburn SR, Lawrence DM, Mitrou FG, Dalby RB, Blair EM, Griffin J, Milroy H, De Maio JA, Cox A, Li J. The Western Australian Aboriginal Child Health Survey: The Social and Emotional Wellbeing of Aboriginal Children and Young People. Perth: Curtin University of Technology and Telethon Institute for Child Health Research, 2005.102.
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- ⁷⁴ E.g. Australian Institute of Health and Welfare, *A Picture of Australia's Children* Cat no PHE 112, Canberra: AIHW 2009, Ch 27.
- ⁷⁵ Above n 7.
- ⁷⁶ Heard et al, above n 6,6.
- ⁷⁷ Ibid 6.
- ⁷⁸ Australian Institute of Aboriginal and Torres Strait Islander Studies and Federation of Aboriginal and Torres Strait Islander Languages, above n 3; Australian Institute of Health and Welfare, above n 56, 43.
- ⁷⁹ Ibid 3.

- ⁸⁰ Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey, 2008, cat. no. 4714.0' (Australian Bureau of Statistics, 2009) <<http://abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4714.0Main+Features122008?OpenDocument>>; Australian Institute of Health and Welfare, above n 56, 43.
- ⁸¹ Ibid.
- ⁸² Ibid.
- ⁸³ Ibid.
- ⁸⁴ Secretariat of National Aboriginal and Islander Child Care Inc, above n 1.
- ⁸⁵ Ibid.
- ⁸⁶ Ibid 21.
- ⁸⁷ Ibid 12.
- ⁸⁸ Bronwyn Lumby and Terri Farelly, *Family Violence, Help-Seeking & the Close Knit Aboriginal Community: Lessons for Mainstream Service Provision. Issues Paper 19*, Australian Domestic and Family Violence Clearing House, 2009, 5.
- ⁸⁹ Ibid.
- ⁹⁰ Secretariat of National Aboriginal and Islander Child Care Inc, above n 1, 9.
- ⁹¹ Family Law Council, above n 54.
- ⁹² Yeo, S, 2003, *Bonding and attachment of Australian Aboriginal Children*, Child Abuse Review, vol 12, p. 297, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing up our way Aboriginal and Torres Strait Islander child rearing practices matrix*, 2011 p.120.
- ⁹³ Howard, S, 2001, *Fathering and Indigenous Families – a North Queensland Community Partnership*, paper presented at the Helping Families Change Conference, Melbourne, 23 -24 February, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing up our way Aboriginal and Torres Strait Islander child rearing practices matrix*, 2011, p. 123.
- ⁹⁴ Secretariat of National Aboriginal and Islander Child Care, 2004, *Indigenous Parenting Project: Executive Summary*, p.13.
- ⁹⁵ Yeo, above n 92, 32.
- ⁹⁶ Warrki Jarrinjaku ACRS Project Team, 2002, Warrki Jarrinjaku Jintangkamanu Purananjaku *Working Together Everyone and Listening*, Aboriginal Child Rearing & Associated Research: A Review of the Literature, Department of Family and Community Services, Canberra, p. 58 as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing up our way Aboriginal and Torres Strait Islander child rearing practices matrix*, 2011, p. 24.
- ⁹⁷ Phyllis Daylight and Mary Johnstone, *Women's Business: Report of the Aboriginal Women's Task Force*, Canberra, Australian Government Printing Service, 1986, p. 27 as cited in Secretariat of National Aboriginal and Islander Child Care, 2010, *Working and Walking Together*, p.26.
- ⁹⁸ Ban P. *The rights of Torres Islander children to be raised within the customs and traditions of their Society*, Submission to Queensland Government Joint Select Committee on Surrogacy 2008.
- ⁹⁹ Ibid.
- ¹⁰⁰ Larkins, Steve, *Strengthening culture, strengthening identity: Keys to healing for Aboriginal and Torres Strait Islander children and young people and securing their social and emotional wellbeing* (2010) (17) *Family Relationships Quarterly*.
- ¹⁰¹ Some of these initiatives are described and evaluated in: Ministerial Council of Aboriginal and Torres Strait Islander Affairs, *Evaluation of Responses to Bringing Them Home Report, Final Report* (Office of Aboriginal Affairs, Department of Premier and Cabinet, December 2003).
- ¹⁰² Zubrick SR, et al, above n 72, 467.
- ¹⁰³ Steering Committee for the Review of Government Service Provision, above n 11.
- ¹⁰⁴ Ibid 2.13.
- ¹⁰⁵ Purdie, N, Self-Concepts of Indigenous and Non-Indigenous Australian Students.
- ¹⁰⁶ Ralph, Stephen, *The Best Interests of the Aboriginal Child in Family Law Proceedings* (1998) 12(2) *Australian Journal of Family Law* 1, at 4; see also Colquhoun, S and Dockery, M, (2011) *The link between Indigenous culture and well-being: qualitative evidence for Australian Aboriginals*, paper delivered at the LSAC and LSIC Research Conference, Melbourne, 15-16 November 2011.
- ¹⁰⁷ Lumby and Farelly, above n 88, 10-20.
- ¹⁰⁸ Victorian Aboriginal Childcare Agency, above n 23, 17.
- ¹⁰⁹ Steering Committee for the Review of Government Service Provision, above n 11, 3.
- ¹¹⁰ Ibid.
- ¹¹¹ Ibid 5.
- ¹¹² Ibid 4, 115.
- ¹¹³ Ibid 5.

¹¹⁴ Ibid 4,119.

¹¹⁵ Ibid 4,122.

¹¹⁶ Ibid 6.

¹¹⁷ Ibid 12.1-12.9.

¹¹⁸ Gooda, above n 19, 14.

¹¹⁹ Ibid 23.

¹²⁰ Above n 54.

¹²¹ These include community controlled organisations (ACCOs) and Aboriginal specific-services that, for example, provide counselling, outreach and parenting support services, specialist services, child care and education services. Many of these services also provide or would like to provide a holistic suite of services to families, with a focus on prevention and early intervention.

The Victorian Cultural Competence Framework states, ‘Aboriginal Services have broad objectives, other than to just provide services. ACCOs operate differently to mainstream CSOs. ACCOs carry and express the political aspirations of Aboriginal people in seeking to alleviate disadvantage and provide the best possible level of services.

ACCOs are also different and unique because of their culturally based value systems, kinship systems and the way they embed culture in their service delivery. ACCO board members and staff are often part of the community they serve and have experienced the same issues of racism and marginalisation. Board members are selected on the basis of Aboriginal community membership, which is seen as a key determinant of expertise/skills and knowledge required to govern.

The community expects the organisation to be actively involved in community life, for example, hosting children’s days, sponsoring cultural or sporting events. ... ACCOs exist as a sector within a sector that is often in demand of further resources despite often going beyond the specifics of their funding agreements. Most ACCOs are funded on the basis of particular programs, projects and services and often do not have the overall infrastructure in place that is required when running multi program agencies. Also, ACCOs may be expected to partner with a large number of CSOs, which will also place demands on a limited resource base.

VACCA, 2008, Aboriginal Cultural Competence Framework, available online:

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.cyf.vic.gov.au%2F_data%2Fassets%2Fpdf_file%2F0008%2F312668%2Fframe_work_cultural_support_2008.pdf&ei=u88UT7i7OrCiiAfto6ww&usg=AFQjCNHLCgUCrcSVW3bkIQVTFIKXIT7-6g> as at 16 January 2012 p. 33.

See also eg Larkins, above n 100; and Lawrence M, Yorgum Family Counselling Service in Family relationships Quarterly No 17 at <<http://www.aifs.gov.au/afrc/pubs/newsletter/frq017/frq017-6.html>> and Secretariat of National Aboriginal and Islander Child Care, Multifunctional Aboriginal Children’s Services National Report, December 2000.

¹²² Australian Law Reform Commission, above n 54.

¹²³ Western Australian Law Reform Commission – *Aboriginal Customary Laws Final Report (September 2006) – The Intersection of WA law with Aboriginal law and culture*

¹²⁴ The grounds for divorce were set out in *Matrimonial Causes Act 1959 (Cth)*, s 28.

¹²⁵ Which could be satisfied even if both parties had continued to live under the one roof during that time: *Family Law Act 1975 (Cth)*, ss 48, 49(2).

¹²⁶ *Marriage Act 1961 (Cth)*, s 23.

¹²⁷ Other than Western Australia.

¹²⁸ *Family Law Act 1975 (Cth)*, s 69ZK. The section provides certain exceptions to this limitation.

¹²⁹ *Family Law Act 1975 (Cth)*, s 60I(1).

¹³⁰ *Family Law Act 1975 (Cth)*, s 61DA and 65DAA.

¹³¹ *Family Law Act 1975 (Cth)*, s 61DA(2).

¹³² The regime implemented references of power given by NSW, Victoria, Queensland and Tasmania over the period 2003 to 2006. Following a later South Australian reference in December 2009, the regime commenced, for South Australian unmarried couples, on 1 July 2010.

¹³³ The Family Court retains power to make orders for the maintenance of children over 18 years if the provision of maintenance is necessary to enable the child to complete his or her education or because of a mental or physical disability of the child: *Family Law Act 1975 (Cth)*, s 66L.

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- ¹³⁴ See for example, *Children, Youth and Families Act 2005* (Vic), s 162.
- ¹³⁵ See for example, *Family Violence Protection Act 2008* (Vic).
- ¹³⁶ Lumby and Farrelly suggest that ‘Aboriginal specific’ services ‘generally consist of Aboriginal community-controlled organisations and Aboriginal department identified positions within mainstream organisations’: see above n 88, 19.
- ¹³⁷ See for example, Secretariat of National Aboriginal and Islander Child Care, *Multifunctional Aboriginal Children’s Services National Report* (2000) and Department of Family and Community Services, *Review of the Aboriginal and Islander Child Care Agency (AICCA) Program* (2004).
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- ¹³⁹ Coumarelos, C, Wei, Z and Zhou, A, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (2006) Sydney: NSW Law and Justice Foundation.
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- ¹⁴¹ Cunneen, Chris and Melanie Schwartz, *Civil and Family Law Needs of Indigenous People in New South Wales: The priority areas* (2009) 32(2) *University of New South Wales Law Journal* 742.
- ¹⁴² Coumarelos et al, above n 139.
- ¹⁴³ *Ibid* 88.
- ¹⁴⁴ *Ibid* 100.
- ¹⁴⁵ A National research study of the civil and family law needs of indigenous people. See http://www.jcu.edu.au/law/staff/JCUPRD1_073482.html.
- ¹⁴⁶ For a description of the background to the Family Relationship Centres see, P. Parkinson, *Keeping in Contact: Family Relationship Centres in Australia* (2006) 18 *Child and Family Law Quarterly* 157.
- ¹⁴⁷ Caruana, C and Parker, R. *Embedding research in practice: Research within Family Relationship centres in Australia*, Australian Family Relationships Clearinghouse Briefing Number 14, 2009.
- ¹⁴⁸ <http://www.fahcsia.gov.au/sa/families/progserv/familysupport/Documents/RelatedInformation_ClosingtheGap.pdf>
- ¹⁴⁹ *Family Law Act 1975* (Cth) s 10F.
- ¹⁵⁰ *Family Law Act 1975* (Cth) s 60I(9).
- ¹⁵¹ *Family Law Act 1975* (Cth) s 60I(8).
- ¹⁵² *Family Law Act 1975* (Cth) s 60I(7).
- ¹⁵³ Data provided by Attorney-General’s Department: October 2011.
- ¹⁵⁴ Information provided by the Attorney-General’s Department.
- ¹⁵⁵ Kaspiew et al, above n 20, 38.
- ¹⁵⁶ Data from 2006-07 to 2008-09 taken from Kaspiew, R et al, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, 2009), Table 3.23.
- ¹⁵⁷ Information provided by the Social Inclusion Division – Attorney-General’s Department.
- ¹⁵⁸ *Ibid*.
- ¹⁵⁹ *Ibid*.
- ¹⁶⁰ This service also auspices two of the Family Violence Prevention Legal Services (in Bourke and Walgett respectively).
- ¹⁶¹ Women’s Legal Services NSW submission, *Family Law Council Inquiry: Indigenous Clients and the Family Law System* (2011).
- ¹⁶² Information provided by the Attorney-General’s Department.
- ¹⁶³ Women’s Legal Centre (ACT & Region), *Submission to the Family Law Council: Indigenous and Culturally and Linguistically Diverse Clients in the family law system* (2011), 2.
- ¹⁶⁴ Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services* (July 2010), <http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_NP.pdf>
- ¹⁶⁵ National Legal Aid, *Submission to Family Law Council: Indigenous and Culturally and Linguistically Diverse clients in the family law system* (2011).
- ¹⁶⁶ Data provided in National Legal Aid Submission, *Ibid*.
- ¹⁶⁷ Personal communication with Louise Smith, National Legal Aid, 22 November 2011.
- ¹⁶⁸ Legal Aid NSW *Annual Report for 2009-2010* reported that 44.3% of legal aid services in NSW were provided by private lawyers.
- ¹⁶⁹ Some aspects of jurisdiction under the Family Law Act may be exercised by local courts: s 69J.
- ¹⁷⁰ Kaspiew et al, above n 20, 304-305.

- ¹⁷¹ Matthew Myers, Attorney-General for Australia, 'Australia's first Indigenous Federal Magistrate welcomed' (Media Release, 10 February 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/10-February-2012---Australia's-first-Indigenous-Federal-Magistrate-welcomed.aspx>> (accessed 23 February 2012)
- ¹⁷² Ibid 305.
- ¹⁷³ Ralph, S, *Indigenous perspectives on access to justice in the Family Law Courts* (Presentation to the Family Law Forum, September 6-7 2011, Adelaide, South Australia)
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- ¹⁷⁵ Cortis, Natasha, Ilan Katz and Roger Patulny, *Engaging hard-to-reach families and children* (Occasional Paper No 26, National Evaluation Consortium, 2009) 3.
- ¹⁷⁶ Cunneen, Chris and Melanie Schwartz, above n 141, 725; Human Rights and Equal Opportunity Commission, above n 41; Ralph, Stephen, *Addressing the need of Indigenous Women in the Family Court* (2004) 6(1) *Indigenous Law Bulletin Special Focus Edition: Indigenous Women 20*; Altobelli, T, N Atwool and J Akee, 'Panel: Accessing the family law system' (Paper presented at the International Forum on Family Relationships in Transition, Melbourne, 1-2 December 2005).
- ¹⁷⁷ North Australian Aboriginal Justice Agency submission, *Aboriginal Clients in the Family Law System* (2011) at 5.
- ¹⁷⁸ Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission to the Family Law Council: Improving the Family Law System for All* (2011) at 3.
- ¹⁷⁹ Women's Legal Services NSW submission, above n 161, 2.
- ¹⁸⁰ North Australian Aboriginal Justice Agency submission, above n 177, 5.
- ¹⁸¹ Family Relationship Services Australia submission, above n 140, 7.
- ¹⁸² Women's Legal Services NSW submission, above n 161, 4.
- ¹⁸³ North Australian Aboriginal Justice Agency submission, above n 177, 6.
- ¹⁸⁴ Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, *Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council submission to Family Law Council reference* (2011).
- ¹⁸⁵ North Australian Aboriginal Justice Agency submission, above n 177, 7; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council submission, above n 184.
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- ¹⁸⁷ Australian Bureau of Statistics, above n 80.
<<http://abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4714.0Main+Features122008?OpenDocument>>; Australian Institute of Health and Welfare, above n 56, 43.
- ¹⁸⁸ Steering Committee for the Review of Government Service Provision, above n 11, 40.
- ¹⁸⁹ Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd, *Submission to the Family Law Council: Aboriginal and Torres Strait Islander Clients & the Family Law System* (2011) at 5.
- ¹⁹⁰ North Australian Aboriginal Justice Agency submission, above n 177, 11.
- ¹⁹¹ Victorian Aboriginal Legal Service Co-operative Limited, *Submission to the Family Law Council of Australia: Aboriginal and Torres Strait Islander Clients & the Family Law System* (2011) at 6.
- ¹⁹² Women's Legal Service NSW submission, above n 161, 7.
- ¹⁹³ National Legal Aid submission, above n 165, 11, 22.
- ¹⁹⁴ Participants at the *Improving access for Indigenous clients in the family law system* forum in Adelaide in September 2011 observed that there were limited interpreter services outside the Northern Territory. See also North Australian Aboriginal Family Violence Legal Service, *NAAFVLS Family Law Response to Attorney general request* (2011).
- ¹⁹⁵ National Legal Aid submission, above n 165, 10, also participants at the *Improving access for Indigenous clients in the family law system* forum in Adelaide in September 2011.
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- ²¹⁶ Aboriginal Family Violence Prevention and Legal Service Victoria submission, above n 178, 7.
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- ²²³ Aboriginal Family Violence Prevention and Legal Service Victoria submission, above n 178, 10.
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- ²³¹ For a discussion about the adaption of the Triple P parenting program for Aboriginal parents, see Robinson, E and Parker, R *Prevention and early intervention is strengthening families and relationships: challenges and implications*, Australian Family Relationships Issues Paper Number 2, 2008 6.
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- ²⁷⁹ NADRAC, above n 24, Statement of Principle 7, p 15
- ²⁸⁰ Ibid, 123.
- ²⁸¹ Alice Springs Family Law Pathways Network submission, above n 202, 16.
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- ²⁸⁵ Above n 88, 11.
- ²⁸⁶ See generally Paper by Matthew Myers, above n 274.
- ²⁸⁷ Above n 88, 11.
- ²⁸⁸ The Reconciliation Advisory Group consists of: Debra Bennet, Glenda Devlin, Elizabeth O’Connor, Terri Reilly, Bobette Robinson, John Swann, Steven Torres-Carne and Rae Walter.
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- ²⁹⁹ Mr Mallard currently works as a Ranger Mentor for Aboriginal men and women who are training to become Rangers in their own communities.
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³³³ *Children, Youth and Families Act 2005* (Vic)

³³⁴ Above n 321.

³³⁵ Family Law Council, above n 54, 12.

³³⁶ Section 60B(2)(e) provides that the principles underlying these objects are that (except when it is or would be contrary to a child's best interests), children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

³³⁷ Section 60B(3) provides that 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: (a) to 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.

³³⁸ Section 60CC(3)(h) provides that additional considerations by a court in determining what is in the child's best interests are: if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right.

³³⁹ Section 60CC(6) provides that for the purposes of paragraph (3)(h), an Aboriginal child's or a 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; 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.

³⁴⁰ Section 61F provides that 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.

³⁴¹ *Moses & Barton* (2009) FamCA 590

³⁴² See for example, *Van Rodenberg and Carne* [2008] FamCA 478

³⁴³ See for example, VACCA, above n 328.

³⁴⁴ Ralph, above n 106.

³⁴⁵ *Sheldon and Weir (No.3)* [2010] FMCAfam 1138 at [206].

³⁴⁶ *Dunstan and Jarrod and Another* [2009] FamCA 480 at 150.

³⁴⁷ *Dunstan and Jarrod and Another* [2009] FamCA 480 at 186.

³⁴⁸ *Donnell and Dovey (2010)* FLC 93-428 at 268.

³⁴⁹ *Donnell and Dovey (2010)* FLC 93-428 at 265 – 270.

³⁵⁰ For example, *Simons v Barnes (No 2)* [2010] FMCAfam 1094 at 177 noted that 'the Independent Children's Lawyer noted that the mother had very belatedly sought to make such a connection and queried whether her focus on her Aboriginality and culture was somewhat opportunistic.' This suggestion was rejected by the Court.

³⁵¹ *Simons and Barnes (No 2)* [2010] FMCAfam 1094 at 163.

³⁵² Ban, above n 98.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Above n 54.

³⁵⁶ *Ibid.*

³⁵⁷ Justice Watts met with Josephine Akee (current part time Indigenous Consultant with the Federal Magistrates Court in Cairns); Stacey McGuinness (Family Consultant in Cairns who has travelled to the Torres Strait Islands on many occasions to prepare family reports); Federal Magistrate Willis (Cairns Federal Magistrates Court); Magistrate Robert Spencer (Cairns Regional Coordinating State Magistrate); Sandy Giarrusso (Registry Manager, Cairns); Juergen Kaehne (Aboriginal & Torres Strait Islander Legal Service Cairns); Martin Doyle (Aboriginal & Torres Strait Islander Legal Service Mackay); Beverley Hall (Legal Aid Cairns); Sandra Sinclair (private practitioner who regularly appears for indigenous persons in the Family Court and the Federal Magistrates Court) and the Honourable Alastair Nicholson, former Chief Justice of the Family Court of Australia.

³⁵⁸ *Family Law Act 1975* (Cth), s 39.

³⁵⁹ Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples, above n 35 - this Report and further information is available online at <<http://www.youmeunity.org.au/>> accessed 27 January 2012

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- ³⁶⁰ Ibid
- ³⁶¹ Ibid, for a full list of recommendations see xviii - xix.
- ³⁶² Ibid 144.
- ³⁶³ Ibid 153.
- ³⁶⁴ Ibid 144-153.
- ³⁶⁵ Ibid 151.
- ³⁶⁶ United Nations Declaration on the Rights of Indigenous Peoples Published by the United Nations 07-58681, March 2008
- ³⁶⁷ M. Dimopoulos, *Issues Paper 20: Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities*, (Australian Domestic and Family Clearinghouse, 2010).
- ³⁶⁸ Above n 23.
- ³⁶⁹ Department of Families, Housing, Community Services & Indigenous Affairs, *Engaging today, building tomorrow [kit]: a framework for engaging with Aboriginal and Torres Strait Islander Australians* (2011).
- ³⁷⁰ See e.g. Kaspiew et al, above n 20; Australian Government Attorney-General's Department, Report by the Access to Justice Taskforce, above n16, Rec 6.7; Steering Committee for the Review of Government Service Provision, above n 11.
- ³⁷¹ North Australian Aboriginal Justice Agency submission, above n 177, 2.
- ³⁷² See information at:
<http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/info.htm>
- ³⁷³ See information at: <<http://www.anao.gov.au/Publications/Indigenous-Program-Reports>>
- ³⁷⁴ Above n 33.
- ³⁷⁵ Participants at the *Improving access for Indigenous clients in the family law system* forum in Adelaide in September 2011 observed that there were limited interpreter services outside the Northern Territory. See also North Australian Aboriginal Family Violence Legal Service submission, above n 194.
- ³⁷⁶ National Legal Aid submission, above n 165, 10.
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Constitution

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Marriage Act 1961 (Cth)

Matrimonial Causes Act 1959 (Cth)

Appendix A: Statistics

Selected characteristics of Indigenous population and Non-Indigenous population by state (Place of usual residence)

(This Table was produced by Dr Lixia Qu, Senior Research Fellow at the Australian Institute of Family Studies, using customised data from the ABS 2006 Census)

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total ^a
Indigenous population	138509	30142	127581	25555	58711	16767	53661	3875	455027
<i>as a % of population</i>	2.2	0.6	3.5	1.8	3.2	3.7	30.4	1.3	2.4
Gender									
Indigenous: % male	49.4	48.9	49.1	48.7	49.4	49.5	49.1	49.8	49.2
Indigenous: % female	50.6	51.1	50.9	51.3	50.6	50.5	50.9	50.2	50.8
Non-Indigenous: % male	49.1	48.9	49.3	49.1	49.5	48.9	52.0	49.1	49.2
Non-Indigenous: % female	50.9	51.1	50.7	50.9	50.5	51.1	48.0	50.9	50.8
Age									
Indigenous: 0-14 (%)	38.4	36.9	38.9	36.4	37.0	36.2	34.8	36.2	37.6
Indigenous: 15-64 (%)	58.1	59.1	58.1	60.1	59.8	60.4	62.1	62.2	59.1
Indigenous: 65+ (%)	3.5	4.0	3.0	3.5	3.3	3.4	3.2	1.6	3.3
Non-Indigenous: 0-14 (%)	19.4	19.2	20.0	18.2	19.6	19.1	20.4	18.9	19.4
Non-Indigenous: 15-64 (%)	66.6	67.3	67.4	66.5	68.1	66.0	74.1	71.3	67.2
Non-Indigenous: 65+ (%)	14.0	13.5	12.5	15.3	12.2	15.0	5.5	9.7	13.4
Education (15-64)									
Indigenous: Degree or higher (%)	5.2	6.9	4.3	4.1	3.8	4.6	1.8	16.7	4.5
Indigenous: Other post-school qualification (%)	21.9	24.3	20.8	20.1	16.6	24.2	11.7	23.0	19.9
Indigenous: No post-school qualification (%)	72.9	68.7	74.9	75.8	79.6	71.1	86.5	60.3	75.6
Non-Indigenous: Degree or higher (%)	21.2	21.8	16.3	16.4	18.1	14.8	15.3	34.7	19.7
Non-Indigenous: Other post-school qualification (%)	29.3	26.9	29.1	28.2	29.9	28.1	28.2	23.9	28.5
Non-Indigenous: No post-school qualification (%)	49.6	51.2	54.6	55.5	52.0	57.1	56.5	41.5	51.8
Employment (15-64) ^b									
Indigenous: Full-time (%)	25.6	30.2	29.3	22.3	22.3	30.8	15.7	43.2	25.5
Indigenous: Part-time (%)	15.7	15.2	19.0	17.2	19.0	19.1	18.6	15.6	17.6
Indigenous: Unemployed (%)	10.9	9.5	8.1	8.6	7.9	8.6	6.5	7.9	8.9
Indigenous: Not in labour force (%)	43.5	40.4	38.3	46.9	45.0	37.1	54.5	28.4	43.2
Non-Indigenous: Full-time (%)	45.8	45.6	47.9	44.3	48.0	41.0	60.5	53.2	46.4
Non-Indigenous: Part-time (%)	19.9	21.0	20.9	22.1	21.5	21.9	15.6	20.7	20.7
Non-Indigenous: Unemployed (%)	4.3	4.1	3.5	3.9	2.8	4.7	2.2	2.7	3.9
Non-Indigenous: Not in labour force (%)	25.6	24.8	23.2	25.2	22.6	27.7	15.8	18.4	24.5

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total ^a
Indigenous population	138509	30142	127581	25555	58711	16767	53661	3875	455027
<i>as a % of population</i>	2.2	0.6	3.5	1.8	3.2	3.7	30.4	1.3	2.4
Marital status (15-64)									
Indigenous: Never married (%)	63.8	62.6	66.3	65.0	66.4	54.6	49.3	61.3	62.7
Indigenous: Widowed (%)	1.7	2.0	1.8	2.3	2.0	1.6	3.8	0.7	2.1%
Indigenous: Divorced/separated (%)	12.5	13.6	10.2	11.3	9.0	13.3	6.8	13.0	10.7
Indigenous: Married (%)	22.0	21.8	21.7	21.4	22.5	30.5	40.1	25.0	24.5
Non-Indigenous: Never married (%)	37.5	38.8	37.2	37.7	37.8	36.6	41.4	41.2	37.9
Non-Indigenous: Widowed (%)	1.4	1.3	1.3	1.4	1.2	1.6	1.2	1.1	1.3
Non-Indigenous: Divorced/separated (%)	11.2	10.8	12.5	12.3	11.7	13.1	13.3	10.8	11.5
Non-Indigenous: Married (%)	50.0	49.2	48.9	48.5	49.3	48.6	44.1	46.9	49.3
Social marital status (15-64)									
Indigenous: Married (%)	22.4	22.7	21.6	20.3	19.8	31.2	32.2	25.8	23.4
Indigenous: Cohabiting (%)	15.2	14.6	19.9	15.5	20.9	15.6	9.6	14.8	16.5
Indigenous: Not living with a partner (%)	62.4	62.8	58.5	64.2	59.3	53.1	58.2	59.4	60.1
Non-Indigenous: Married (%)	50.4	49.5	49.3	48.9	49.6	49.1	44.5	47.8	49.6
Non-Indigenous: Cohabiting (%)	9.0	9.2	11.7	10.5	11.4	12.3	17.1	10.9	10.1
Non-Indigenous: Not living with a partner (%)	40.7	41.3	39.1	40.7	39.0	38.6	38.4	41.3	40.3
Number of children ever had (women 20-29)									
Indigenous: none (%)	44.3	51.1	41.7	43.6	35.8	49.0	31.0	63.9	41.5
Indigenous: one (%)	21.1	21.1	21.8	21.3	23.1	22.8	25.5	15.3	22.1
Indigenous: two (%)	17.9	14.7	18.0	18.9	20.2	17.5	22.5	11.5	18.6
Indigenous: three or more (%)	16.7	13.0	18.5	16.2	20.9	10.7	21.0	9.3	17.7
Non-Indigenous: none (%)	75.3	80.1	71.5	74.4	74.7	66.7	71.7	82.7	75.6
Non-Indigenous: one (%)	13.0	11.0	14.7	13.7	13.4	16.4	14.6	9.9	12.9
Non-Indigenous: two (%)	8.2	6.3	9.5	8.5	8.4	11.4	9.8	5.4	8.0
Non-Indigenous: three or more (%)	3.6	2.6	4.3	3.4	3.5	5.5	4.0	1.9	3.5
Number of children ever had (women 40-49)									
Indigenous: none (%)	10.2	14.1	12.7	14.3	12.0	7.5	15.4	12.2	12.0
Indigenous: one (%)	10.6	10.4	10.6	11.5	9.5	9.4	11.3	12.7	10.6
Indigenous: two (%)	24.9	24.8	21.0	20.9	18.9	33.4	18.0	28.5	22.5
Indigenous: three or more (%)	54.3	50.7	55.7	53.4	59.6	49.7	55.4	46.6	54.9
Non-Indigenous: none (%)	15.4	15.8	14.4	15.3	13.9	13.9	19.1	17.8	15.2
Non-Indigenous: one (%)	13.3	12.3	12.3	12.9	11.6	12.2	13.5	13.4	12.6
Non-Indigenous: two (%)	37.7	38.6	37.4	40.8	39.9	38.5	35.2	38.8	38.4
Non-Indigenous: three or more (%)	33.6	33.3	35.8	31.0	34.5	35.4	32.2	30.1	33.8

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total ^a
Indigenous population	138509	30142	127581	25555	58711	16767	53661	3875	455027
<i>as a % of population</i>	2.2	0.6	3.5	1.8	3.2	3.7	30.4	1.3	2.4
Living arrangements, persons aged 15-64 years ^{cd}									
Indigenous: living in one-family household (%)	79.9	78.5	77.0	74.5	75.4	82.9	54.6	78.3	75.1
Indigenous: living in multi-family household (%)	5.7	3.1	11.0	9.5	13.4	3.2	38.2	1.9	12.1
Indigenous: living alone (%)	10.2	12.2	7.8	11.6	8.4	10.0	5.3	12.1	8.9
Indigenous: living in group household (%)	4.3	6.3	4.2	4.5	2.8	3.9	1.9	7.7	3.9
Indigenous: living in one-family household (%)	83.2	83.2	82.7	82.9	83.4	83.3	78.8	81.7	83.0
Indigenous: living in multi-family household (%)	3.2	2.4	2.7	1.5	1.9	1.7	2.6	1.7	2.6
Indigenous: living alone (%)	9.1	9.4	9.1	11.3	10.3	10.9	12.1	9.9	9.5
Indigenous: living in group household (%)	4.5	5.0	5.5	4.2	4.3	4.1	6.5	6.7	4.8
Living arrangements, persons aged 65+ years ^{cd}									
Indigenous: living in one-family household (%)	63.0	59.7	64.5	54.6	63.1	64.7	50.8		61.3
Indigenous: living in multi-family household (%)	4.0	2.7	10.2	9.9	15.1	2.7	35.6		10.6
Indigenous: living alone (%)	30.3	33.1	22.2	31.4	18.9	29.5	11.6		25.1
Indigenous: living in group household (%)	2.8	4.5	3.1	4.1	2.9	3.1	2.1		3.0
Indigenous: living in one-family household (%)	67.3	67.9	68.3	66.8	67.8	65.5	65.0	69.3	67.6
Indigenous: living in multi-family household (%)	2.9	2.1	2.0	1.0	1.6	0.9	3.3	1.7	2.2
Indigenous: living alone (%)	28.0	28.4	27.6	30.9	29.1	31.9	28.1	27.6	28.5
Indigenous: living in group household (%)	1.8	1.6	2.1	1.3	1.5	1.7	3.7	1.5	1.8
Living arrangement, children aged under 15 years ^c									
Indigenous: couple families (%)	49.7	49.3	57.5	48.9	56.0	62.8	63.6	56.1	54.7
Indigenous: sole families (%)	50.3	50.7	42.5	51.1	44.0	37.2	36.4	43.9	45.3
Non-Indigenous: couple families (%)	82.3	83.0	81.0	80.5	83.4	79.0	84.3	84.0	82.2
Non-Indigenous: sole families (%)	17.7	17.0	19.0	19.5	16.6	21.0	15.7	16.0	17.8

^a Include people in other territories.

^b Persons who were employed and away from work were included and thus the column percentage may not sum to 100%.

^c Based on persons in place of enumeration.

^d Exclude persons living in non-classifiable households.

Note: The category "not stated" was excluded from total in computing percentages.

Source: The table is based on the information derived from the 2006 Census TableBuilder.

Appendix B: Consultations

Aboriginal and Torres Strait Islander Legal Service Cairns

- Juergen Kaehne (Aboriginal & Torres Strait Islander Legal Service Cairns)

Aboriginal and Torres Strait Islander Legal Service Mackay

- Martin Doyle (Aboriginal & Torres Strait Islander Legal Service Mackay)

Aboriginal Family Violence Prevention and Legal Service Victoria

- Antoinette Braybrook (Chief Executive Officer, Aboriginal Family Violence Prevention and Legal Service Victoria)
- Jacqui Katona (Manager of Policy and Development, Aboriginal Family Violence Prevention and Legal Service Victoria)
- Jenni Smith (Principal Lawyer, Aboriginal Family Violence Prevention and Legal Service Victoria)

Central Australian Aboriginal Family Legal Unit

- Vanessa Lethlean (Principle Legal Officer, Central Australian Aboriginal Family Legal Unit)
- Lillian Davis (Counsellor, Central Australian Aboriginal Family Legal Unit)

Central Australian Aboriginal Legal Aid Service

- Patricia Miller (CEO, Central Australian Aboriginal Legal Aid Service)

Darwin Family Relationships Centre

- Kimberly Hunter (Indigenous Advisor, Darwin Family Relationship Centre)
- Rokiah Kingi (Indigenous Advisor, Darwin Family Relationship Centre)

Family Courts

- The Honourable Justice Robert James Charles Benjamin (Chair of the Aboriginal and Torres Strait Islander Committee, Family Court of Australia)
- The Honourable. Alastair Nicholson (Former Chief Justice, Family Court of Australia)
- The Honourable Chief Federal Magistrate John Pascoe AO (Chief Federal Magistrate, Federal Magistrates Court of Australia)

Family Court of WA

- Paul Kerin (Manager Family Court Consultancy and Counselling Service)
- Sharon Pedly (Indigenous Family Consultant)
- Ashley Feehan (Indigenous Family Consultant)

Federal Magistrates Court Cairns

- Josephine Akee (Indigenous Consultant with the Federal Magistrates Court in Cairns)
- Federal Magistrate Willis (Cairns Federal Magistrates Court)
- Sandy Giarrusso (Registry Manager, Cairns)
- Magistrate Robert Spencer (Cairns Regional Coordinating State Magistrate)

Interrelate Family Centres

- Dr Jonathon Toussaint (Executive Manager, Interrelate Family Centres)

Jannimili

- Servena McIntyre (Janimili representative and Manager of Aboriginal Services and Development, Uniting Care Burnside)
- Nicole Manning (Janimili representative)
- Audrey Gibbs (Janimili representative)
- Leanne Wright (Janimili representative)
- Melissa Brown (Janimili representative)

Legal Aid Cairns

- Beverley Hall (Legal Aid Cairns)

New South Wales Legal Aid

- Kylie Beckhouse (Director of Family Law, NSW Legal Aid)

North Australian Aboriginal Family Violence Legal Service

- Wayne Connop (Principal Solicitor, North Australian Aboriginal Family Violence Legal Service)

North Australian Aboriginal Justice Agency

- Jared Sharp (Managing Solicitor – Advocacy Section, North Australian Aboriginal Justice Agency)
- Clara Mills (Civil Law Solicitor, North Australian Aboriginal Justice Agency)
- Siobhan Mackay (Civil Law Solicitor, North Australian Aboriginal Justice Agency)
- Priscilla Collins (Chief Executive Officer, North Australian Aboriginal Justice Agency)

Northern Territory Legal Aid Commission

- Melinda Schroeder (CLE & Pathways Network Project Officer, Northern Territory Legal Aid Commission)
- Jaquie Palavra (Manager – Family Law Section, Northern Territory Legal Aid Commission)
- Fiona Hussin (Policy Solicitor – Policy, Community Legal Education and Aboriginal Outreach, Northern Territory Legal Aid Commission)
- Michael Powell (Senior Solicitor – Family Law Practice, Northern Territory Legal Aid Commission)

Relationships Australia Northern Territory

- Christine Dewhirst (Director of Post-Separation Services, Relationships Australia Northern Territory)
- Marie Morrison (Chief Executive Officer, Relationships Australia Northern Territory)

Relationships Australia Victoria

- Jo Fox (Liaison Officer – Aboriginal and Torres Strait Islander Services, Relationships Australia Victoria)
- Violet Harrison (Liaison Officer – Aboriginal and Torres Strait Islander Services, Relationships Australia Victoria)

Top End Women's Legal Service

- Ann Cox (Top End Women's Legal Service)

Torres Strait & Northern Peninsula Area Health Service Primary Health Centre

- Ivy Trevallion (Child & Youth Mental Health Clinician, Torres Strait & Northern Peninsula Area Health Service Primary Health Centre)

Victorian Aboriginal Child Care Agency

- Muriel Bamblett (Chief Executive Officer, Victorian Aboriginal Child Care Agency)

Victorian Aboriginal Legal Service Co-operative Limited

- Samantha Dwyer (principal of the family law section, Victorian Aboriginal Legal Service Co-operative Limited)
- Louise Hicks (Research Officer, Research, Planning and Development Unit, Victorian Aboriginal Legal Service Co-operative Limited)

Victorian Family Law Pathways Network

- Francesca Gerner (Project Sponsor, Victorian Family Law Pathways Network)

INDIVIDUALS

- Stacey McGuinness (Family Consultant in Cairns who has travelled to the Torres Strait Islands on many occasions to prepare family reports)
- Sandra Sinclair (Family Law Consultant, Bottoms English Lawyers Cairns has regularly appeared for indigenous persons in the Family Court and the Federal Magistrates Court)

COMMUNITY FORUMS

1. Aboriginal and Torres Strait Islander Cultural Competence Workshop (FRSA and Secretariat National Aboriginal and Torres Strait Islander Child Care Inc), 9-10 March 2011.
2. Victorian Aboriginal Justice (Creswick, Victoria) Forum 8 April 2011.
3. Attorney-General's Department Improving access for Indigenous clients in the family law system Forum 6-7 September 2011 (Adelaide).
4. Family Law Pathways Network Indigenous Families in the Family Law System Forum 25-26 October 2011 (Alice Springs).

Appendix C: Submissions

Submissions were received from the following persons and organisations in response to the Family Law Council's Reference (in alphabetical order).

- Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd, 31 May 2011.
- Aboriginal Family Violence Prevention and Legal Service Victoria, 2 June 2011.
- Alice Springs Family Law Pathways Network, 15 November 2011.
- Family Relationship Services Australia, 17 August 2011.
- National Accreditation Authority for Translators and Interpreters Ltd, 7 October 2011.
- National Legal Aid, 7 November 2011.
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, 31 May 2011.
- North Australian Aboriginal Family Violence Legal Service, 22 September 2011.
- North Australian Aboriginal Justice Agency, 31 May 2011.
- Nowra Family Relationship Centre, 31 May 2011.
- Top End Women's Legal Service Inc, 30 May 2011.
- Victorian Aboriginal Legal Service Co-operative Limited, 9 June 2011.
- Women's Legal Centre (ACT & Region), 30 June 2011.
- Women's Legal Services NSW, 7 June 2011.

Appendix D: Cases

Donnell and Dovey (2010) FLC 93
Dunstan and Jarrod and Another [2009] FamCA 480
Moses and Barton [2008] FamCA 590
M & L (Aboriginal Culture) [2007] FamCA 396
Van Rodenberg and Carne [2008] FamCA 478
Bartlett and Anor and Farley and Anor [2009] FMCAfam 1237
U and N [2010] WASCA 106
Verran and Hort and Verran [2009] FMCAFAM 1
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Appendix E: Functions and membership of the Family Law Council

The Family Law Council is a statutory authority that was established by section 115 of the *Family Law Act 1975*. The functions of Council are set out in sub-section 115(3) of the *Family Law Act 1975* which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

Members of the Family Law Council (as at December 2011):

Associate Professor Helen Rhoades (Chairperson)

Ms Nicola Davies	Mr Clive Price
Federal Magistrate Kevin Laphorn	Justice Garry Watts
Dr Rae Kaspiew	Mr Jeremy Culshaw
Ms Elizabeth Kelly	

The following agencies and organisations have observer status on the Council (with names of attendees):

Australian Institute of Family Studies – Professor Lawrie Moloney
Australian Law Reform Commission – Ms Sara Peel
Child Support Agency – Ms Debbie Hayer
Family Court of Australia – Registrar Angela Filippello
Family Law Courts (Family Court of Australia and Federal Magistrates Court of Australia) – Ms Pam Hemphill
Family Court of Western Australia – Magistrate Annette Andrews
Family Law Section of the Law Council of Australia – Ms Amanda Parkin
Federal Magistrates Court – Ms Adele Byrne
Family Relationships Services Australia – Ms Samantha Page

The Aboriginal and Torres Strait Islander Clients Committee:

Dr Rae Kaspiew (Convenor)

Mr Clive Price	Ms Elizabeth Kelly
Justice Garry Watts	Magistrate Annette Andrews
Ms Nicola Davies	Mr Jeremy Culshaw
Ms Sara Peel	Ms Angela Filippello
Ms Debbie Hayer	

Secretariat:

Ms Sarah Teasey and Mrs Kim Howatson (Attorney-General's Department)

Research Assistants:

Ms Naomi Pfitzner, Ms Rebecca Apostolopoulos, Ms Laura Morfuni and Ms Emily Cheesman