

ATSILS

Response to Consultation Paper

A review of the Family Law System –
ALRC Issues Paper 48

ATSILS – About Us

1. We thank you for the opportunity to provide comment on the issues surrounding this wide-ranging review of the Family Law System in Australia. We acknowledge the historic importance of this review and the need to reconsider what in the family law system is helping and what is hindering the appropriate, early and cost-effective resolution of all family law disputes and the protection of the best interests of children and their safety.
2. The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (“ATSILS”) provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. We have offices throughout Queensland and provide services to urban, regional and remote clients. Our primary role is to provide legal assistance and representation in criminal law, civil law and family law, including child protection and domestic violence representation. We are also funded by the Commonwealth to perform a state-wide role in the key areas of law and policy reform, Community Legal Education and monitoring Aboriginal and Torres Strait Islander deaths in custody.
3. We have four decades of experience in practice, providing culturally appropriate and accessible legal services to our clients and helping them to navigate their way through the justice system. We work to improve the access of Aboriginal and Torres Strait Islander peoples to justice and to reduce the disproportionate disadvantage experienced by indigenous Australians in the justice system. Our submissions are informed by the experiences of representing our clients from urban, regional, rural and remote areas. We believe the lessons we have learned and the perspective we can bring will be of assistance in this very important area of law reform.

Part 1: Objectives and Principles

(Questions 1-2)

Question 1

What Should be the Role and Objectives of the Modern Family Law System

1. The role and objectives of the modern family law system should be to enable a smooth transition from being an intact family to separated family with the least harm, least stress in an easy to access process.
2. The ideal process would minimise on-going conflict; focus on parental responsibility; and focus on parents achieving their own resolution to family law matters. The role of the Court would then be to facilitate parental resolution, focus the parents on parental responsibility and to impose orders as an absolute last resort.
3. In order to place greater emphasis on the parties achieving their own resolution, the relationship between mediation and steps in the court process should be re-examined, ideally allowing for multiple steps in Family Dispute Resolution.
4. Whether a new system is adopted or it remains the same, it needs to be more accessible to those who live outside the main cities and the process should not be cost prohibitive. At the moment, parenting matters before the court can easily run for 2-3 years or more in some cases, engaging lawyers for the length of the whole process and engaging in parenting programs, therapy and counselling is too expensive a process even for those willing to pay. Representation from state legal services or other funded bodies is not always or continually available for low income groups.

Re-examining the Interrelation of Mediation Processes and Court Processes

5. At the moment, mediation is not available multiple times and is used more as a 'one off' attempt at resolution. This is not helpful: particularly with very young children and high conflict situations. It would be sensible to allow parties to access mediation at many and all stages of a matter.

6. If more FDRC were to become available to the parties, then it would be worth exploring a model where mediations follow the current pattern of court orders, that is having an interim agreement after the first mediation and then further mediations to progress the matters in stages.

Question 2

What Principles should guide any Redevelopment of the Family Law System?

7. With respect to the principles driving redevelopment, the best interests of the child should remain primary, but the following should be subsidiary principles that also guide development:
 - a. Parents have the responsibility for their children and obligations remain on the parents to work out what is best for the children;
 - b. The Family Law Courts are a court of last resort;
 - c. Resolution of issues should be expeditious;
 - d. Minimise harm to any party, including children;
 - e. Early intervention is needed to assist the parties to resolve their issues;
 - f. Parties should be assisted to access the court and its processes;
 - g. Compliance with Court orders is required and the Court will be swift to ensure compliance;
8. With a principle that the parties are primarily responsible for resolving their issues the associated principle is that the court should be a court of last resort.
9. It should be recognised that early intervention to assist the parties is essential to resolve their issues and enable as smooth a transition to separation as is possible. The early intervention is to provide or link with services to assist in the resolution of the dispute such as counselling, mediation, and other affiliated professional services and support groups.
10. Parties should be assisted to access the court and its processes. The Family Law Courts should embrace measures to ensure greater accessibility of the court to the parties through:
 - a. Circuits to remote areas and greater use of video and telephone links for parties' appearances;
 - b. Embracing modern technology to lead parties through the processes and guidance on relevant materials to file;
 - c. Basic assistance supplied to self-represented parties to file materials. Lawyers are unavailable or simply too costly for many people, especially when matters can easily run for 2-3 years, and the lack of help for self-represented people in turn means that self-represented parties floundering their way through the system bring additional delay and congestion to an already overloaded family law system.

11. Harsher penalties should be considered for those that defy or contravene orders and the courts should deal with the contraventions during proceedings rather than leave them until a final hearing and not deal with them at that stage.

Interests of the Child to Remain Paramount but there should be an increased Focus on the Responsibilities of Separating Parents

12. With respect to the principles driving redevelopment, the best interests of the child should remain primary.
13. Practically, this means that the child or children are entitled to a proper consideration of their relationship with each parent.
14. We have seen an increasing disclosure of family violence allegations upon separation and an increased volume of domestic violence orders issued in the state courts. Respondents are often not legally represented or legally assisted to challenge the assumptions concerning their children in those orders. There are unfortunately some parents who play the system to make allegations of family violence to limit or stop a child's relationship with the other parent. An independent examination of the rights of the child to maintain their relationship with each parent should be preserved.
15. The supremacy of the best interests of the child should not supplant the principle that parents remain responsible for the care of their children and the obligation remains upon them to work out what is best for the children. That principle should relieve the pressure on the courts as responsibility for resolution for disputes shifts to the parties.

True Accessibility to the Family Law System

16. Both in principle and in practice, the modern family law system should afford equal access to justice for those living in remote and rural regions. In our experience our clients in remote and rural communities prefer face to face resolution of their disputes, trust only being properly established when facilitators meet them face to face.
17. Access to the Courts must be redesigned to be properly attainable for remote clients who currently face significantly worse barriers of costly travel and overnight stays required to attend court, repetitive appearances that do not create significant progress, and delays of 2-3 years or more in some instances.
18. Consideration should be given to Family Dispute Resolution following the pattern of court orders, having an interim agreement after the first conference and then further Family Dispute Resolution Conferences to progress the matters in stages.

Cultural Competence of the Family Law System and Participation of Aboriginal and Torres Strait Islander Parties

19. As outlined later in this paper, with respect to Aboriginal and Torres Strait Islanders Parties, the cultural competence of the Family Law system should be inherent to the whole process and not just be an added layer. Cultural Competence should inform the rights of the child, the identification of appropriate arrangements between the parties, and recognition of the child's access to culture and culturally significant relations and elders, and not be seen as some secondary contact achieved through a parent's access.¹

Other Considerations, Resourcing the Family Law System

20. The current lack of resourcing of the family law system has led to dissatisfaction from many parties that they feel that they are not being heard, that they get very little time in front of the judge, that their matters take far too long to run and that the other party essentially gets away with contraventions during the proceedings when they ignore orders.
21. Any new system on the same level of funding is likely to suffer from the same major criticisms which are that there are insufficient judges, people out of capital cities and large regional areas do not have the same access to the system, and the ever increasing number of self-represented litigants are not being catered for.
22. Realistic resourcing of the family law court system would assist to restore confidence.

¹ See discussion at Question 14.

Part 2: Access and Engagement

(Questions 3-13)

23. The Family Law system needs to be less complex for self-represented parties to navigate their way through the system. Self-represented parties don't necessarily know how to prepare, complete and file documents and assistance may not be available when required. Access to information is still an issue, it is hard for parties to get forms, the web-site could be more helpful for lay person self-represented parties who are now required to access the portal. There is still a significant number of people with no access to a computer or printer and if there is access to such in a local service, insufficient assistance to navigate the portal.
24. The Family Law System as it now stands creates hurdles for those with low literacy, language issues, little access to computers or printouts and poor reception. This applies especially for those who live in remote and regional areas. This may be different for the younger generation with higher education levels, the more socially disadvantaged will most probably access the internet on their mobile phones which may not allow full engagement with the portal. There is also the question of limited credit on mobile phones.
25. Extra funding for support services may help overcome these barriers. Due to limited resources outreach to regional and remote areas is difficult for services and need to be supplemented by other means such as information at the local library done in funded partnership with local services.

Questions 3

What In what ways could access to information about family law and family law related services, including family violence services, be improved?

and

Questions 4

How might people with family law related needs be assisted to navigate the family law system?

26. The question of what information is needed cannot be separated from the question of how it is delivered to assist people navigate the family law system.

27. Upon separation, the parent moving out may have limited facilities available at the initial stage.
28. The Respondent in Domestic Violence Orders leaves the home and may not even have housing or may be in prison but still wishin to maintain a relationship with the children.
29. Access to information could be improved several ways:
 - a. Improved website design to cater for people who have not had any experience in dealing with Courts and legal matters; and greater use of apps and podcasts and video via the internet;
 - b. Improved funding for not-for-profit and community legal centres and ATSILS and QIFVLS to provide assistance and information;
 - c. Special court staff to assist with the filing of documents.
30. The Family Law Courts website, although generally good, is still daunting to those who have not had experience in dealing with Courts and legal matters. It is important to note that people will often access these facilities: even if they can afford a private solicitor as they may not have any idea where to start or have any basic information or idea as to how the family law system works.
31. Access to the website is contingent on access to computers and access to bandwidth. That could be improved by consultation with other government bodies and greater whole of government provision of computers. In the communities, gaps in coverage means that social media is the primary means of communication, so more appropriately these days, information on the processes and the relevant forms should be made available through apps and social media sites.
32. Given the variety of personal circumstances which affects how best to conduct proceedings on behalf of the individual, it remains important that people be able to access information and services from not-for-profit and community legal centres, so it remains important to ensure that the services continue to receive appropriate funding.
33. Liaison officers (for example Aboriginal and Torres Strait Islander Liaison Officers) could be present at court to provide basic assistance to self-represented parties, who can be directed to such persons for assistance in filing documents similar to directions to see the duty lawyer.
34. Increased education via social media (or other media) would assist. Self-help videos similar to the ones provided other courts² for their processes could be created to explain the filing process, what to put in court documents and how to use the Commonwealth Courts Portal.
35. Current wait times on calls made to the National Enquiry Centre can take 45-60 minutes to be answered. Extra staff could assist to reduce waiting times. Waiting on those times is only financially feasible on landlines which limits who can use the call services, especially given the numbers giving up landlines.

² See below at Question 11.

36. There is a need for a regional court system. The small number of cities which have family court registries is insufficient to cater for a state which is as decentralised as Queensland. The Registries as they are set up now have a ticket system, they have limited time to spend on individuals and do not give advice.
37. Additionally, people will often have matters in different Courts to deal with, particularly where domestic violence orders or criminal law charges are in the mix. For people who have limited exposure to how the court system works which is the case for most family law litigants, it gets especially confusing. More information on the website and in the apps to describe those interactions would assist.

Question 5

How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

38. To make the family law system properly accessible to Aboriginal and Torres Strait Islanders, improved cultural competency is required in the family law system as well as addressing the logistics and expense of accessing the court from rural, remote and regional communities.
39. Consideration must be given to the appointment of specialist judges, specialist family report writers, cultural report writers and Indigenous liaison officers. In a similar fashion to the Murri Court system in the Queensland Magistrates Courts, it would be preferable to have a dedicated Judge and Court list for Indigenous family law matters.³
40. While in the past there have been Indigenous Liaison Officers ('ILO') appointed to the Court to assist Aboriginal and Torres Strait Islander litigants, to our knowledge there is only one at present. For cultural reasons it is appropriate to have both a male and a female ILO available.
41. Other measures to improve the cultural competence of the court would be:
- a. There should be greater training and more cultural awareness by all court staff, especially report writers.
 - b. There should be funding for cultural reports from either the court or LAQ.
 - c. The appointment of specialist cultural support officers.
42. For complex matters which can involve trauma and inter-generational trauma, significant health issues, greater coordination with affiliated health services, counselling services and the Elders would assist.
43. A greater understanding of the barriers of travel and expense that exist for Aboriginal and Torres Strait Islander clients needs to be factored into the family law system. Repeated trips for

³ This is expanded upon at the end of Part 7.

mentions and family reports place an enormous burden on parties, distance, difficulty and expense of travel and other responsibilities (such as the care of other children) make participation in the court process very difficult. This is expanded upon under question 9.

44. Better access to interpreters and translators is essential. It is difficult to obtain an interpreter in Court. They are very expensive to engage and so that the Court is loath to arrange the appointment of one unless it is essential. It is important to note that a lot of the processes and procedures in the Family Law Courts are difficult enough for people from an English-speaking background to understand: let alone someone to whom English is a second or third language.
45. Language assistance is needed not only in the courtroom but also at the earlier stage of preparing documents. The Family Law system's reliance on documentation, particularly affidavits, makes it very difficult to properly conduct proceedings if an interpreter is only available at Court. It is very difficult to access an affordable translator to translate documents.
46. A possible approach would be to engage language assistance that is not necessarily accredited for Court interpretation and translation and to have that assistance appointed to the matter and available prior to Court appearances. Local community groups or translator services may be able to provide people with the necessary language skills. A party or potential party would be able to access local community groups or affiliated services more readily and face-to-face, which is preferable to attempting to achieve the same result over the Internet or by telephone.

Question 7

How can the accessibility of the family law system be improved for people with disability?

47. Physical access to the Courtrooms could be improved. At the moment access to the Courtrooms is difficult for disabled persons, especially in crowded courtrooms.
48. With respect to assistance to participate in the process, the party may be relying on the support of third-party services and groups. Provision of resource materials to those groups and services would provide assistance through them to the litigant.

Question 8

How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

49. Specific references to LGBTIQ people would confirm that they are also covered by the legislation.

Question 9

How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

50. At the moment access is very difficult in remote areas because Court appearances and other Court events (for example Child Inclusive Conference interviews) have to occur around the Court. This can be very difficult for Aboriginal and Torres Strait Islander clients in remote areas due to the distance, difficulty and expense of travel and other responsibilities (such as the care of other children) that make travel very difficult. For example, some of our clients must drive or travel for 5 hours or more to get to court. Those on state benefits cannot sustain such expense. More use of skype and Magistrates Court video-link facilities would assist in this regard although it should be noted it is culturally important, especially among remote communities, to have face to face interactions.
51. The introduction of additional circuits to remote areas is necessary to improve access. The result is that some parties may settle for consent orders or parenting plans that they should not have had to. For example, holding a circuit to Mt Isa by a judge from either Cairns or Townsville every 6-8 weeks by video link could solve this problem. This will require cooperation with state courts to share infrastructure.
52. Greater flexibility with report interviews would dramatically improve access. For example, for Hervey Bay clients the cost of travelling to Brisbane for s 11F and Family Reports can be prohibitive, as they often have to include overnight accommodation. Set times for these report interviews such as only 9am or 2pm, can create problems for the people attending, were the times to be more flexible then a trip could be done in a day and not cause additional accommodation expenses to be incurred.
53. Alternatively, were funding supplied by Legal Aid Queensland or the Court for report writers to travel to the parties' local areas or out of the major cities then the report interviews would be easier to attend for remote and regional clients. For example, in the same way that Legal Aid Queensland appoints one barrister for all of the criminal matters when the district court sits in either Hervey Bay or Maryborough, consideration could be given to funding a report writer to travel to regions where the Federal Circuit Court circuits and complete a number of reports over the space of a week.

Question 10

What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

54. Two major changes we see that would reduce the costs (which includes reducing the number of mentions and the time taken to resolve matters) could be to:

- a. have a family consultant assigned to a matter at the commencement of proceedings, similar to the case assessment carried out in the Western Australian system.
 - b. The appointment of an Independent Childrens Lawyer at the first mention of a complex matter.
55. Independent Childrens Lawyers often have an important and useful role in resolving matters, particularly in circumstances where there is a self-represented litigant.
56. Better funding and greater use of Family Dispute Resolution and arbitration services could assist. Self-funded parties for example could agree to source private reports and then conduct mediation or arbitration on issues that cannot be resolved.
57. Another approach would be to enable use of family reports and/or counselling reports for the purposes of Family Dispute Resolution or arbitration but also retaining the ability of the parties to seek reviews as agreed or recommended after a new agreement or decision is made for example six months, a year or two years later. This could also be facilitated by a registrar managed system.

Question 11

What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

58. Many self-represented litigants struggle to fill out forms and to write their affidavits and cannot realistically draft orders, especially consent orders in a manner acceptable to the court.
59. Self-represented parties are at a disadvantage if the other party is represented. Suggestions for review include to:
- a. Simplify Forms;
 - b. Create order templates;
 - c. Utilise support services and document assembly software to help parties prepare their own material;
 - d. Provided dedicated staff available on court days in a one stop shop in court to assist with forms and filing documents and to provide referrals;
 - e. Supply self-help videos and kits to explain the filing process, completing court documents and how to use the Commonwealth Courts Portal.
60. The Court forms are very formal. They could be simplified. Better explanations of how the forms relate to each stage in the process of resolving family law court matters would also assist parties to understand what the forms are there to achieve.
61. The court website is fairly wordy and the wording can be confusing to litigants. News magazines and television segments these days rely heavily on well-designed graphics and animations to explain complex ideas to the general public to the point that it has become an art form in itself.

62. Greater use of pictures and videos would assist parties to understand the information that needs to be conveyed to them. For example, various courts have created some self-help videos on Youtube that explain the process and how to prepare for hearings.⁴
63. To take services one step further, document assembly software is becoming more commonplace in large solicitors firms to generate straightforward legal documents. There are a number of systems that could usefully be adapted and employed for the run of the mill family law matters which would assist self-represented litigants. It also has the potential to make not-for-profit and community legal centre advice more efficient if draft documents were already prepared and in turn would enable them to assist greater numbers of people.
64. The availability of liaison staff or services who could assist with filing documents and explaining the process for self-represented litigant either in person or over the phone. An Aboriginal and Torres Strait Islander liaison officer would fulfil an important role, numbers of available Aboriginal and Torres Strait Islander liaison officers can be increased.
65. Finally, the creation of a special self-represented parties court day would assist the ability of the court to deal with unrepresented parties rather than juggle them in a mixed list on a busy court day. If there was a dedicated day for self-represented parties, this would assist the other services who cater for self-represented parties to render assistance more efficiently.

Question 12

What other changes are needed to support people who do not have legal representation to resolve their family law problems?

66. Ensure that there is a regular and properly funded duty lawyer service for men and women at all Courts on all days that the Court is sitting and on the days that financial conferences are being held. The duty lawyer service is an excellent way for litigants to get assistance on the day of the mention and usually helps avoid otherwise unnecessary adjournments or interim hearings.

Question 13

What improvements could be made to the physical design of the family law courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

⁴ For example <https://www.youtube.com/watch?v=-QmOIA9PHLA>, for the Magistrates Court of Victoria <https://www.youtube.com/watch?v=nFapNRoy1yc>, by Caxton Legal Centre on appearing in the Magistrates Court on a criminal charge <https://www.youtube.com/watch?v=4r1QKj0zxxl>

67. There is a need for more safe rooms. The current approach where a large number of matters are all listed at the same time and most litigants have to all wait in a communal waiting area is not ideal. There are only limited room available for litigants to wait in private and these are usually allocated by security attached the courthouse services.
68. Rethinking the physical layout of Courts and waiting rooms is the most obvious approach but also the most time-consuming and expensive approach. Another way to resolve this is to limit the number of matters listed at any one time and/or to create more court spaces. Obviously, this can only be done if more Judges are appointed.
69. Apart from having more safety rooms, other solutions would include:
- a. engaging private security staff during court circuits in regional areas,
 - b. having segregated waiting rooms for parties that have known domestic violence or security issues.
 - c. Installing video-link conference facilities from remote access safe rooms or suites.

Part 3: Legal Principles in Relation to Parenting and Property

(Questions 14-19)

Question 14

What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

70. the ideal outcome for children is that any dispute regarding the child is resolved properly and efficiently and that any impact that the breakdown of the family relationship or the court proceedings may have on the child is minimised.
71. The best interests of the child should remain paramount. While the number of factors currently included in the legislation has attracted criticism for being diverse, sometimes contradictory and productive of uncertainty, the counter argument to that is that modern families are diverse and the number of factors reflect that.
72. While the Part could be rewritten, it is important to include some parameters beyond just 'the best interests of the child'. We consider that at least two factors in subsection 60CC(3) are crucial for the consideration of the best interests of an Aboriginal or Torres Strait Islander child

(3) Additional considerations are:

(b) the nature of the relationship of the child with: (i) each of the child's parents; and (ii) **other persons (including any grandparent or other relative of the child)**;

(h) 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;

(6) 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.

(Note: emphasis added by bolding)

73. The impact on a child of a separation is often that the child loses connection to important family members. For Aboriginal and Torres Strait Islander children, in an intact family there are a number of relationships which are important to them, through their patrilineal side of the family, through the matrilineal side of the family and through various relationships through aunties and uncles and cousins. The English language reduces the descriptions of these relationships down to sister or brother or auntie and uncle which often causes untold confusion in courts generally to properly describe and understand the relationships being referred to and their ongoing significance to the child.

74. In the context of the Torres Strait, an example of a culturally important relationship was noted by Justice Paul Finn in *Akiba*⁵:

The Applicant goes on to notice that the kinship system across the Strait is more than just a system of terms of address. It involves the identification of reciprocal duties and privileges so marking out the confluences of laws and customs acknowledged by the native title claim group and their ancestors. I would add that there was considerable body of evidence from the Islander witnesses which did illustrate responsibilities in particular kin relationships, that most commonly referred to being the responsibility of a mother's brother for teaching a boy how to hunt, to assist him to kill his first dugong or turtle and for instructing him at his first shave.

75. The indivisible link between connection to culture and relationships with other Aboriginal people has been described by Mr Jackomos and quoted most recently in the final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory:

"For us culture is about our family networks, our Elders, our ancestors. It's about our relationships, our languages, our dance, our ceremonies, our heritage. Culture is about our spiritual connection to our lands, our waters. It is in the way we pass on stories and knowledge to our babies, our children; it is how our children embrace our knowledge to create their future. Culture is how we greet each other and look for connection. It is about all the parts that bind us together. It is the similarities in our songlines."

76. Even for those living away from their culture and immersed in mainstream Australia social life, kinship is the one aspect of culture which remains strong. One of the most important obligations and expectations of kin is that they maintain contact, interactional failings cause concern, and this is generally applied within a wide range of kin.⁶

⁵ *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*, [2010] FCA 643, at para 212.

⁶ D. Eades, *They Don't Speak an Aboriginal Language or do they?* In *Aboriginal ways of using English*. Aboriginal Studies Press, (2013) pp 56-75, from a study carried out in South East Queensland.

77. As noted in the Family Law Council Report to the Attorney-General in 2012⁷,

“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.”

78. From our experience of our clients matters, these comments remain apposite. As noted in the Family Law Council Report, despite the increased focus on the importance of cultural immersion, cases are still being decided before the family law courts where only small amounts of time are still considered sufficient to establish a cultural connection.⁸ It is important that orders allow for more than tokenistic engagement in culture, to participate beyond NAIDOC week and Sorry Day, but to allow the child to properly engage in culture and develop cultural identity.

79. The ideal would be that the child does not lose these important relationships after the separation because they form part of the identity that the child forges as he or she grows up. The loss of culture and kinship is far greater as is often seen when only one parent is Aboriginal or Torres Strait Islander and orders are made for children to live with the non-indigenous party.

Question 15

What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

80. Ideally the definition of family violence should be uniform across all States and in the Family Law Act. It would also be of benefit to provide examples in the legislation. There should be a uniform approach regarding family violence allegations.

81. Early resolution of family matters would assist.

82. Care should be taken to ensure that an alleged perpetrator of family violence is not disenfranchised by the ‘system’. It is important to note that, due to the wide definition of family violence, it is entirely conceivable that a person can be described as a perpetrator of family

⁷ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012), available at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>

⁸ *Ibid*, at pp 79-80.

violence in the context of a highly stressful breakdown of a relationship and the resultant frustrations being denied contact with the child and be otherwise not a perpetrator of family violence.

Question 16

What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

83. It should be clearer in the Part that extended and non-biological family members are able to be considered as part of the regime. At the moment, the only real reference is to the person who can actually apply for an Order which is technical and confusing for people.
84. Referring back to the submission under Question 14, in Aboriginal and Torres Strait Islander Communities there is much more of the concept of it taking a village to raise a child. Presently definitions do not sufficiently include important persons to the child in parenting arrangements.
85. Numerous complications arise post separation with traditional adoptions within the Torres Strait Islander community. Broader definitions to encompass the circumstances of a child adopted under Kupai Omasker would be helpful. This area has not been fully considered at this stage.
86. The recommendation to consider whether the Family Law Act meets the best interests of children affected by the Kupai Omasker arrangements was made earlier in the Family Law Council paper *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* in February 2012.⁹
87. Kupai Omasker was described by Justice Paul Finn in *Akiba* in the context of native title findings:¹⁰

The practice clearly pre-dates sovereignty. It was referred to and accepted by all of the Islander witnesses... The evidence, which is consistent across the claim area, is that adoption generally occurs among close blood relations and for a variety of reasons (eg 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 ... 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-

⁹ Discussed in 6.9 Torres Strait Islander customary adoption practices ('Kupai Omasker'), Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012).

¹⁰ *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*, [2010] FCA 643, at paras 198-201

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

88. Traditional adoption practices, or Kupai Omasker, are widespread throughout the Torres Strait and amongst Torres Strait Islander families on the mainland. Parenting orders made by the Family Law Courts under the *Family Law Act 1975* confirm such arrangements but do not constitute a formal adoption at law. Under Torres Strait Islander traditions, an adopted child becomes a full member of his or her new family and takes on the family surname, however this status is not reflected in the law. Parenting orders expire when the child turns 18 years of age, the child is not eligible under the Queensland laws of intestacy if the receiving parent dies intestate, birth certificates do not reflect the names of the adoptive parents. Children are being left in limbo by this unsatisfactory state of affairs. As previously noted by the Family Law Council in their 2012 report *Improving the Family Law System for Aboriginal and Torres Strait Islander Client*, there are three options for a functional recognition of child rearing practices that could usefully be explored to resolve this problem.¹¹

Question 17

What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

89. It would be beneficial to have a ‘small claims’ type simplified jurisdiction for low value property pools (for example where the property just consists of furniture) or debt property pools (where the debts come from credit cards, mortgages or personal loans).

Question 18

What changes could be made to the provisions in the *Family Law Act* governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

¹¹ Discussed in 5.10.2 *Comments made by Council in 2004 about a Functional Recognition of Child Rearing Practices* in Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012).

90. While the current system seems to be appropriate with a party being able to obtain spousal maintenance prior to a property settlement or to receive a lump sum prior to the property proceedings being resolved there is still a flaw with the failure to take Centrelink payments into account.

Question 19

What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

91. While ATSILS does not assist with Binding Financial Agreements (BFAs) our view is that BFAs are currently of little utility and provide no certainty to anyone who enters into one. Some lawyers will simply not prepare them because the legislation is too technical and BFAs can easily fail.

Part 4: Resolution and Adjudication Processes

(Questions 20-30)

Question 20

What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

92. The introduction of processes to facilitate ongoing attempts by families to resolve matters themselves.
93. Consolidation of existing family law court processes to achieve one court system not two. Having achieved one court system, creating more judges and creating more court dates would help address the bottleneck.
94. Better availability of more FDRC during proceedings would take the pressure off the available judge hours. Creating in Court FDR specialists within the Registry would integrate the FDR process with Court case management processes.
95. Creation of further pre-filing procedures in some types of matters, for example, for child related procedures, a compulsory case assessment report or family report could be introduced. The exception to this would be matters involving urgency, domestic violence, child abuse or other matters that require expedition.

Question 21

Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

96. If parties wish to be diverted to other dispute resolution processes then those opportunities should be afforded to them, with assistance from their legal practitioners and the courts to do so. If parents can reach a resolution on their own then it is likely to produce a robust resolution.
97. If parties need to have their dispute resolved by a court then that desire should be respected. There are some disputes that cannot be resolved by Family Dispute Resolution, especially those involving trauma, family violence and complex issues. Disputes amenable to other dispute resolution processes should be diverted to those processes, but equally it should be recognised that it is important to have specialist Family Law Courts with Judges empowered to impose the necessary orders and bring a dispute to an end.

Question 22

How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

98. The costs of a sustaining a system where property matters drag through it invites reconsideration of how better to spend those same resources to better effect.
99. One option is to require mediation before proceedings in the same way that it is done in children's matters or else to require it after the first return date. FDRC via state legal aid services or family relationship centres should be available as of right for these kinds of matters.
100. Mediation itself may not be appropriate for some matters where there is significant conflict between parties in which case some decision-making process is required. Mandatory arbitration in small property matters could supply that, provided the parties agree to abide by their agreement or the decision at arbitration.
101. Another option would be to have case assessments carried out by specialist property dispute resolution practitioners.

Question 23

How can parties who have experienced family violence or abuse be better supported at court?

102. Greater support would come from having an Indigenous Liaison Officer or Social Worker available for consultation and support for complex matters which can involve trauma and inter-generational trauma, or significant health issues. Also, greater coordination with affiliated health services, counselling services and the Elders might assist.
103. Providing dedicated rooms for waiting and shorter court lists so there are less people around, less waiting time and the Court has more time to deal with these complex matters. As outlined earlier physical improvements to the layout of the court, a greater number of safe rooms, segregated waiting rooms for parties that have known domestic violence/Security issues, and installing video link conference facilities from remote access safe rooms or suites.
104. Finally, access to a duty lawyer service on the day of Court would assist parties in matters involving family violence and the associated issues.

The Western Australian Family Court Case Assessment Conference

105. The Case Assessment Conferences carried out by the Western Australian Family Court is worthy of further investigation with a view to applying it elsewhere.

106. The purpose of the Case Assessment Conference is to assess the risk for a child arising from a number of risk factors including family and domestic violence, child abuse, alcohol or substance abuse and mental health issues. This assessment provides a critical early intervention focus.¹²

107. The counsellor-led Case Assessment Conference model grew out of the Columbus Pilot¹³ in the Family Court of Western Australia and allows recommendations to be made to the Court on relationship issues and risk issues, and provides case management of the matter, provided independence is maintained.

Question 24

Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

108. On the spectrum of family violence matters, there are some matters that can only be resolved by the courts because of family violence.

109. There has been a high success rate with the FDRs conducted by the Legal Aid Office of Queensland, however it is unclear if some time after resolution the parties still proceed to a hearing or commence proceedings.

Question 25

How should the family law system address misuse of process as a form of abuse in family law matters?

110. There should be an education campaign about the misuse of process on the courts' websites so that parents, especially the self-represented, can be made aware of the courts attitude and the legislated position.

Question 26

In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

111. The availability of a mandatory Family and Dispute Resolution or Conciliation conference before proceeding to hearing would assist.

¹² Family Court of Western Australia, Annual Review 2016 available at http://www.familycourt.wa.gov.au/_files/Publications_Reports/FCWA_Annual_Review_2016.pdf

¹³ PT Murphy, LT Pike & P.Kerin, *Practice Notes*, 11 Journal of Family Studies (2005); LT Pike & PT Murphy, The Columbus Pilot in the Family Court of Western Australia (2006), in *Protecting Australia's Children: Research and Evaluation Register, 1995-2010* available at <https://apps.aifs.gov.au/cfcaregister/projects/977>

112. Non-adjudicative processes such as FDRC should be available at multiple opportunities during the Court process and not be limited by merit testing as is the current practice. It should particularly be available at the early and interim orders points. It is useful to have these processes available after an independent expert report has been prepared: often this is a useful way of parents being able to have their positions reality tested.
113. There is currently a pilot program in Upper Mount Gravatt where the Family Relationship Centre is providing Legally Assisted culturally appropriate family dispute resolution services for families from indigenous and CALD backgrounds that are experiencing family violence. We are waiting to see the evaluation of the pilot, it seems to be a very promising development.

Question 27

Is there scope to increase the use of arbitration in family disputes? How could this be done?

114. The process currently available via the state Legal Aid Commission can be expanded.
115. Private arbitration is generally very expensive hence the extent to which it would reduce waiting times would be limited because most litigants would not be able to access this form of resolution.
116. The appointment of more Judges may resolve this issue.

Question 28

Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

117. Online systems are well suited to informing and helping parties to prepare for mediation however more studies would need to be done to determine if online dispute resolution processes would have any success in the family law sphere. Greater use of online counselling could also be explored.
118. Concerns about the use of an online dispute resolution system include confidentiality, and whether the actual party has engaged in the process.
119. Use of technologies such as skype could create another option between face to face mediation and shuttle mediation. The greater sense of distance might assist the parties to engage in mediation.
120. As far as the ATSILS client base is concerned, parties in rural and remote areas have a preference for face to face interaction. Further the absence of reliable internet access or technology would place this option out of reach of many people, especially those in rural or remote communities.

Question 29

Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

121. There is a need for Aboriginal and Torres Strait Islander report writers for cultural input.
122. There is scope to adjust existing Child Inclusive Conference and Child Dispute Conference procedures with the family consultants to allow for problem solving decision making processes and to adopt it in a way that ensures that the Court is still involved in the process by way of receiving reports and making court orders.
123. The timing of appropriate intervention would appear to be at a stage prior to court proceedings such as at the time of Family Dispute Resolution or other dispute resolution conducted prior to filing.
124. There is also opportunity for greater linking between the federal and state agencies providing support to families such as the disability support scheme and family support services. Referral lists can be made available to family consultants and judicial officers. Some judicial officers currently provide names of experts to parties in property matters.

Question 30

Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

125. Currently in the State's Child Protection System, the Family Group Meeting is a child focussed process that involves input from all persons who affect the child's life. As outlined under question 26, there is a pilot project in Upper Mount Gravatt providing culturally appropriate family dispute resolution services for families experiencing family violence. Their conferences include extended family and/or support persons as relevant. In our view the involvement of significant family members is important, especially for Aboriginal and Torres Strait Islander parties.
126. Similar to the Child Protection System's Family Group Meeting (FGM), a slightly modified family report or family consultant report process would be a very good opportunity to facilitate more family inclusive decision-making. This would be particularly useful culturally where ATSI parties might have extended family involvement in child raising arrangements. The strength of such an approach would be that it would incorporate the wishes of the children as well as other family members however this should be confined to cases where it is appropriate to do so.

Part 5: Integration and Collaboration

(Questions 31-33)

Question 31

How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

127. Aboriginal and Torres Strait Islander family law clients are more likely than non-Aboriginal clients to have complex needs, including family violence and child safety related needs exacerbated by the experience of inter-generational trauma.
128. Many client families will have support needs associated with issues of disability, mental health, drug and alcohol abuse, family violence and engagement with child protection systems, and there needs to be greater collaboration between the family law system and Aboriginal and Torres Strait Islander-specific services to improve access to and the experience of family law services for Aboriginal and Torres Strait Islander clients.
129. Orders could be made regarding parties being involved in services to assist in addressing issues raised in proceedings. The extent to which that is feasible depends upon the area that the client family lives in. In regional areas, services (let alone culturally competent services) are very limited for families with complex needs. Support in those circumstances comes mainly from the local indigenous health service, women's services, and the local Elders. In urban areas there are more services and more scope to require engagement in services to address important issues. Once again lack of funding may not ensure regularity or continuity of services. There should be an assessment of available funded services to ascertain service provision levels and difficulties they face. In areas where more services are available, it would assist if service providers could also be at duty court to provide 'on the spot' service and referrals.
130. There have been recent initiatives in Aboriginal and Torres Strait Islander health and justice partnering and combined legal services and social support which are showing promising results for addressing the underlying causes of family violence and child safety concerns.

Question 32

What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

131. The specialist nature of the Family Law Courts needs to be preserved. In our view, handing over the determination of often complex family law matters across so busy state courts who don't have the specialist expertise of the family court or federal circuit judiciary. In our view there is

need for greater specialisation and expertise of family law court judges to improve family law court processes and orders. In our view it would be a retrograde step to move further away from that level of specialisation.

132. It may assist to amend the law and the State/Commonwealth legislative framework to enable the state police service to enforce protective family law court orders in the same manner as they do domestic violence orders.
133. The matters determined in state courts which have the greatest overlap with family law court matters are Domestic Violence Orders and Child Protection matters. Options to ensure greater coherence between these related matters include:
 - a. Require Child Safety Authorities be involved in proceedings if the Court considers it appropriate.
 - b. Expand the jurisdiction of the Family Law Courts for concurrent jurisdiction over State Domestic and Family Violence Acts. State courts can still proceed on the Domestic and Family Violence matters but where the matters are intrinsically tied up in the Family Law Court proceedings, the state court can also remove matters to be dealt with by the Family Law Courts instead.

Question 33

How can collaboration and information sharing between the family law courts and state and territory child protection and family violence systems be improved?

134. The information often requested is:
 - a. Allegations of neglect or abuse;
 - b. Opinions and summaries prepared by child protection case workers;
 - c. Records of Departmental Intervention;
 - d. Matters that have proceeded to court and have resulted in an outcome such as a court order.
135. In the absence of current department involvement, subpoenas are required to obtain child protection history. The court can also order the department to provide information.
136. Practitioners are hampered in getting the proper information they require, which when provided, is significantly redacted.
137. Information about the existence of child safety orders or departmental intervention should be made available to the court.

138. There are serious concerns about and hence care should be exercised in allowing the untested opinions and summaries of child protection case to be admitted into evidence in family law court proceedings.

Part 6: Children's Experiences and Perspectives (Questions 34-40)

139. It seems anomalous that children have a voice in Child Protection matters via a direct representative but not in Family Law disputes. The experience of children having a voice in family law court proceedings seems to be that the child can often say what the resident parent expects to hear. If a child is given a voice in proceedings, in our view there should also be independent cultural support for the child who may feel constrained when faced by a person who appears to be an 'official' asking questions of them. The danger is that children could respond with answers they think the report writer wishes to hear.
140. Involvement of a family consultant may also be beneficial for the re-introduction of a child to the non-resident parent. Family consultants have a greater role in such matters, especially in instances where one parent has had a break in time with the child. Parents on low wages or state benefits are unable to afford private therapeutic practices that provide such services.

Question 34

How can children's experiences of participation in court processes be improved?

141. Ideally the family law system should produce arrangements that are child focussed and which meet the child's needs. The preferable position would be that children should not even know they are going through the court process however this is unlikely to happen in most situations.
142. Decisions about parenting after separation have a direct and deep impact on children but the child's ability to influence those decisions is muted. The quandary is whether to give children a voice and an ability to directly participate in proceedings or to whether to continue to shield children from court proceedings and to simply provide indirect methods of hearing their views and incorporating their views into the shaping of interim and final orders.
143. Of primary concern is the obtaining of orders which actually preserve the Aboriginal or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture, including the right to participate in that culture with others.
144. The Family Law Act as it now stands is drafted to ensure a consideration of the best interests of children caught up in family proceedings and so reflects the language of the *Convention on the*

Rights of the Child, ratified by Australia on 17 December 1990¹⁴. Further, consistent with other international instruments and principles of Human Rights, it is also drafted to ensure a 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. As s60CC currently stands, that is a factor that must be taken into account by the Court and it only becomes a discretionary factor if the court is considering a consent order.

145. The best interests of the child include in the case of an Aboriginal or Torres Strait Islander child includes the need to maintain a connection to the lifestyle, culture and traditions of their people. As highlighted recently in the *Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory*, connecting an Aboriginal child or young person to the relationships with their land and kin is not just a 'factor' to be considered but intrinsic to their best interests.

146. The importance of connection to kin and culture for a child has been explained as:

*"... even more so than the Australian community generally, many Aboriginal people have cultural responsibility to raise, or assist in raising, children who are not their own."*¹⁵

*"It is a traditional practice and role of Grandparents or Aunties and Uncles to also care for and raise children..."*¹⁶

*"For us culture is about our family networks, our Elders, our ancestors. It's about our relationships, our languages, our dance, our ceremonies, our heritage. Culture is about our spiritual connection to our lands, our waters. It is in the way we pass on stories and knowledge to our babies, our children; it is how our children embrace our knowledge to create their future. Culture is how we greet each other and look for connection. It is about all the parts that bind us together. It is the similarities in our songlines."*¹⁷

147. The important relationships for ATSI children are to grandparents through the matrilineal line and through the patrilineal line, to aunts and to uncles with specific cultural roles to carry out, and there are other important relationships such as cousin-brothers and cousin-sisters.

148. The current method of taking cultural issues relevant to the child into account via family reports is not working sufficiently well. A survey conducted by the Family Court concluded that there was a level of frustration that cultural concerns were not being taken into account for ATSI children. Our experience confirms this. Looking at the specifics, the survey of family law

¹⁴ *Convention on the Rights of the Child* [1991] ATS 4.

¹⁵ Aboriginal Legal Service of Western Australia (ALSWA), submission made to the House of Representatives Standing Committee on Family and Community Affairs, cited in *Every Picture Tells a Story* (2003).

¹⁶ National Network of Indigenous Women's Legal Service Inc, submission made to the House of Representatives Standing Committee on Family and Community Affairs, cited in *Every Picture Tells a Story* (2003).

¹⁷ A. Jackomos, cited in the *Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017).

practitioners revealed a negative view of family reports in these cases and many were critical of report writers when it came to the assessment of cultural issues.

149. Cultural Report writers should address the matters for consideration at sections 60CC (3)(h) and (6) but additionally they could also cover the sorts of matters currently traversed in cultural support plans in Child Protection matters such as¹⁸:

- a. information on matters relating to the child's identity including a genogram of at least three generations of the child's family, information about the child's clan or nation, language group, totem, land or water country;
- b. Information on matters relating to the child's connection, including the story of the child's mother's country, the story of the child's father's country and the history of the community where the child lives;
- c. Information on the child's cultural journey to date, whether the child has returned to Country, whether the child's traditional ownership has been supported, whether there is a confirmation of Aboriginality; and information from the child on the child's reflections on their cultural journey;
- d. Information about and contact with key family members, including parents, siblings, aunts, uncles, grandparents, sister cousins and brother cousins, and other extended family members. Information about other people significant to the child.
- e. Information from the child on family members they would like to spend more time with or would like to meet, what cultural activities the child wants to take part in, what would help the child to strengthen their belonging to the community.
- f. Information on an ATSI role model or cultural mentor for the child and who can be the child's primary source of cultural authority.
- g. What cultural sports or recreational activities, learning materials, documentaries, music or movies about Aboriginal culture would help connect the child to the wider local Aboriginal or Torres Strait Islander community.
- h. Identification of Health and developmental support services for the child that are culturally informed.

150. One possible way to improve taking cultural issues relevant to the child into account would be to require the parties to file a cultural support plan with their affidavits.

151. Currently section 60CC factors are only required to be taken into consideration with respect to the principal protagonists, that is the parents or the parties to the matter. Other avenues are usually closed off. This is especially concerning when parties do not live in close proximity or

18

where one party is not an Aboriginal or Torres Strait Islander. If children are placed with a non-ATSI party, it is questionable as to whether that connection is maintained.

152. The assessment of cultural issues in family reports¹⁹ and the assessments of the cultural issues relevant to what would be best for the children needs to be improved. If a child is given a voice in proceedings, it may assist for the child to have access to independent cultural support.

Importance of Culture in the Family Law Courts

153. The report of the Family Law Council in 2016 in *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* traversed a number of cases where the importance of culture was discussed.

- a. In *Dunstan & Jarrod* (2009) FamCA 480, evidence was given that in the particular circumstances of that case, if the child wished to live a traditional life style then 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.
- b. Similar 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.
- c. *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".
- d. 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

¹⁹ S.Ralph, *Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice* (2011) available at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>

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."

- e. 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."

- f. 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.
- g. 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. An example cited in Complex families is the decision in *Bachmeier & Foster* (2011) FamCA 86 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.
- h. Apart from the adequacy of the time, we would question why other family members were not considered for regular contact.
- i. A significant source of evidence referred to in many judgments reviewed, based on a cross-cultural psychological perspective, is that of Stephen Ralph an 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.²⁰

- j. 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.
- k. Specific practices of communities and families vary. As recognised in *Hort v Verran* (2009) Fam CAFC 214, at para [121]:

“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.”

Question 35

What changes are needed to ensure children are informed about the outcome of court processes that affect them?

154. Counselling services should be made available to children following court outcomes. Perhaps this needs to be mandated.

Question 36

What mechanisms are best adapted to ensure children’s views are heard in court proceedings?

²⁰ S. Ralph, *The Best Interests of the Aboriginal Child in Family Law Proceedings* (1998) Australian Journal of Family Law, Volume 12, No 2.

155. The current Child Inclusive Conference and Family Report processes work quite well to put forward the views of children in Court proceedings. However, where Aboriginal and Torres Strait Islander children are concerned they may feel the pressure and limit their comment to what they feel the report writer wishes to hear. There are also family pressure and loyalties which make it hard for children to express their real thoughts. Perhaps a way to increase this would be to allow for more than one Child Inclusive Conference to be held (usually there is only one) at different stages of the proceedings to ensure that the views of children are captured at different stages.
156. For Aboriginal and Torres Strait Islander children the provision of an independent cultural support person would assist. The extent to which the Independent Children's Lawyer communicates with children is unknown.

Question 37

How can children be supported to participate in family dispute resolution processes?

157. Careful counselling is important if children are to be involved in FDR. Their ages and levels of maturity also have to be taken into consideration.
158. This is a delicate question – whether children should actually be involved in dispute resolution procedures or not. Perhaps, the early intervention would simply be having a report provided as to their views.

Question 38

Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

159. One of the main risks is to involve children in adult decision making too soon or inappropriately. It is important to note that most children usually love both parents. It is also important to note that parents can expose the children to unacceptable behaviour and require loyalty from them.
160. Influence by one parent (or both parents) will be the biggest issue if the children are present during any discussions. Alternatively, the children's views could be sought independently to be put to the parents.
161. If the parties could hear what their children actually want this may help with moving proceedings along. Conversely though, it needs to be ensured that children are not being coached, so it's a catch 22.
162. For ICLs to be more involved with children, they will need specialised training.

Question 39

What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

163. The Child Inclusive Conference process with family consultants could be used to do this, which may require employing more family consultants and more regular Child Inclusive Conferences. To interact with children in a culturally safe manner, either the family consultants would be required to undergo cultural competence training or cultural consultants should be available to support the children.
164. Family consultants, although employees of the court, when put on the stand have to be independent of judicial views. The Family consultants' integrity is important in recording and reporting, this too can be assisted by the involvement of independent cultural consultants.
165. As far as ATSI clients are concerned, the ICLs currently being appointed are senior practitioners and most practitioners in private practice have very limited time and may tend to communicate in legalese which may well put up an immediate barrier. This is in contrast to Queensland's State Legal Aid inhouse lawyers. Private practitioners also tend to work for fee-paying clients and are less familiar with the issues faced by socially disadvantaged families and the cultural concerns of Aboriginal and Torres Strait Islander parties.

Question 40

How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

166. Children could be interviewed by family consultants: during and after the Court process to obtain information regarding their experiences. A recent study in Queensland, the Youth Voices survey, has developed a useful methodology for capturing youth views from their own perspective on their experiences with various services.
167. One possible means is to ask a child or children that had been involved in the process to talk to other children currently in the process. Certainly, letting other children know (particularly if they feel they are the cause of their parents break up or ill feeling) they are not responsible (and hearing that from another child) may be of significant benefit.

The Rights of the Child and Culture

168. Access to culture is formative for identity and maintenance of cultural identity is in the best interests of the child.²¹ The child's relationship with their family, extended kin, and community

²¹ See for example the arguments of the Queensland Aboriginal and Torres Strait Islander Child Protection Peak Ltd (QATSICPP), *Long Term Guardianship Position Paper* (2011).

creates the required linkages to their belonging, and their access to the holistic life concepts of Aboriginal and Torres Strait Islander traditions supports their cultural identity.²²

169. The Family Law Act as it now stands is drafted to ensure a consideration of the best interests of children caught up in family proceedings and so reflects the language of the *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990. Further, consistent with other international instruments and principles of Human Rights, it is also drafted to ensure a 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. As s60CC currently stands, that is a factor that must be taken into account by the Court and it only becomes a discretionary factor if the court is considering a consent order.

170. As highlighted recently in the *Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory*, connecting an Aboriginal child or young person to the relationships with their land and kin is not just a 'factor' to be considered but intrinsic to their best interests.

²² Dodson M, *The Wentworth Lecture – The End in the Beginning; Re(de)finding Aboriginality* in Journal of the Australian Institute of Aboriginal and Torres Strait Islander Studies (1994)

Part 7: Professional Skills and Well-being

(Questions 41-44)

Question 41

What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

171. The following competencies were identified by our Family Law practitioners as key:
- a) Understanding of the law,
 - b) empathy with clients,
 - c) child focus,
 - d) cultural competence,
 - e) ability to realistically reality test clients,
 - f) ability to maintain professionalism,
 - g) ability to manage high levels of stress,
 - h) ability to manage constant exposure to high-level conflict,
 - i) ability to manage exposure to distressing abuse content,
 - j) ability to conduct risk assessments,
 - k) Ability to mediate.
172. A significant feature of our practice is that many of our clients have experienced trauma and intergenerational trauma which has and continues to have a significant impact in their lives. Underlying many of the skills listed above is the ability to provide trauma-informed legal services.
173. An associated skill, because the family law legal problem sits in context with other problems, is to be able to collaborate and work with other professional services and to refer clients to other services.
174. The unrealistic expectations of parties is a constant feature. The burden of providing clients with more realistic expectations currently rests on the lawyer so the skill to provide their clients with more realistic expectations about going to court is actually about and what the court can and cannot do is critical.

175. These skills are specialist skills, and Specialist Continuing Professional Development programs are an important way to build and maintain these skills.

Question 42

What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

176. The following competencies were identified by our Family Law Practitioners as key:
- a) Compassion,
 - b) Decisiveness,
 - c) Cultural competence,
 - d) The ability to recognise issues,
 - e) The ability to resolve the dispute between the parties properly and efficiently,
 - f) Ability to manage professional collaboration between judicial officers and family law practitioners,
 - g) The skills listed for family law practitioners in question 41 above, including child focus,
 - h) The ability to conduct risk assessments.
177. We would support training for Judges in risk assessments, to gauge risk factors identified as significant in the circumstances of the parties and to consider risk assessment tools when making orders. The National Domestic and Family Violence Bench Book (at <http://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk/>) has outlined risk factors drawn from local and overseas sources including judicial bench books, academic literature, and a range of risk assessment tools as key signifiers of risk for the escalation of domestic and family violence. The only note of caution we would make is that for the overseas studies some factors are more deep-rooted in the specific cultures of the countries undertaking the studies, and this needs to be taken into account when according it weight in the Australian context.

Question 43

How should concerns about professional practices that exacerbate conflict be addressed?

178. The adversarial stance adopted by some practitioners is highly unsuited to parenting matters and often results in exacerbating the issues of concern.

179. Such conduct may often fall short of conduct requiring intervention of the LSC or professional bodies, so there should be a mechanism for a formal complaints process because these practices misuse the processes of the court and affect the justice and outcomes for the parties.
180. The difficulty for the clients, is that a complaint about any perceived unprofessional conduct involves investigation, and that investigation then prolongs the proceedings. Generally, the circumstances of the ongoing matter are such that further delay is not in the best interests of the client which means that the complaint is not brought.
181. Specifically, it has often been raised that some lawyers maintain a conflict and the frequent suggestion is that it is maintained for financial reasons. The reality or otherwise of this perception only comes to light once the litigation has been resolved or an account has been sent to the client of that lawyer.
182. One step that could be considered for introduction is prior to commencement of proceeding for solicitors to be required to sign a form similar to that in civil proceedings under the UCPR that matters actually have merit and cannot first be addressed by FDRC.

Question 44

What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

183. It is recognised that current funding levels for judges lead to the current judges being overworked and lacking sufficient time to give informed consideration to matters before them with lengthy daily lists sometimes even extending to 40 or more matters. This situation flows onto every other facet of legal proceedings. Greater funding of judges would have a flow on effect into all aspects of family law proceedings with parties spending longer times in Court and placed under pressure to attempt resolution.
184. Because family law professionals work in a highly stressful role where they frequently dealing with high conflict, emotional situations, the need for specialist counselling and other support services for family law system professionals and judicial officers is critical.
185. Excellent short courses and seminars have been made available for barristers and solicitors, for example the Northern Territory Law Society put on a seminar with the head of a medical emergency department to talk about techniques for professionals dealing with stress in high pressure situations. Recently the Bar Association of Queensland had a psychologist who was well familiar with the stresses of practitioners at the bar speak to dealing with stress for litigators.²³

²³ H.Paust, Neuroplasticity and Implications for Mental Health, available at: http://www.hearsay.org.au/index.php?option=com_content&task=view&id=2277&Itemid=203

Funding for the Court and not-for-profit legal services would assist in providing training relevant to the special demands of lawyers, court professionals and judges.

186. A forum for cross professional dialogue may also promote joint problem solving in this area.

Comment: The Need for an Indigenous List in the Family Law Courts

187. Reviews²⁴ examining the under-utilisation of the family law system by Aboriginal and Torres Strait Islander people have identified a range of issues including legal literacy, language and communication difficulties²⁵, a lack of culturally appropriate services and cultural safety, and geographic and economic barriers. Apart from difficulties with mainstream legal processes, which can be culturally intimidating and unresponsive to an Aboriginal world view, the reports noted a continuing mistrust of the family law system.

188. Focussing on the courts themselves, there is a need to build the cultural competency of family law system professionals and to provide ongoing cultural competence training for family law professionals, including judicial officers. This includes a deeper understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices, traditional methods of resolving family disputes, and the effects of trauma and inter-generational trauma on families.

189. This is not to say that there haven't been well structured and well thought out judgments but there isn't consistency in the family law system. Even at the most basic level, it has been pointed out that while sections 60B (3), 60CC (3)(h) and 61F have received relatively extensive attention, the direction detailed in section 60CC(6) is referred to minimally.²⁶

190. The creation of a special list could not only produce specialist judges and specialist family law professionals who will deepen their expertise in culturally safe resolution of family law disputes, it will also encourage specialist service providers delivering culturally competent services such as post-separation parenting programs and family dispute resolution services. A special list could also lead to practice directions which help solve many of the problems for access to the courts which have been described elsewhere in this paper.

191. The creation of Murri Courts in the Queensland State Magistrates Court system has produced many positives including strengthening the relationship between the court and indigenous

²⁴ House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story* (2003); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2016)

²⁵ D. Eades, *Telling and Retelling your Story in Court: Questions, Assumptions, and Intercultural Implications* (2008) available at <http://www.austlii.edu.au/au/journals/CICrimJust/2008/26.html> contains a very helpful analysis of the structural differences and fundamental contradictions between giving evidence in court and the giving of intelligible accounts by Aboriginal and Torres Strait Islanders within their own culture.

²⁶ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, (2012) p76. While s 60CC(6) has received more attention since then, the contrast remains.

community in dealing with indigenous justice issues.²⁷ This process could be examined further for a Family Law fit.

²⁷ A.Morgan and E.Louis, Evaluation of the Queensland Murri Court: Final Report, AIC (2010); Queensland Courts, Murri Court Reinstatement Feedback Report(2015) available at http://www.courts.qld.gov.au/_data/assets/pdf_file/0005/487139/mc-rpt-reinstatement-feedback-report-2015.pdf , the 2018 evaluation report is close to release. On Murri Court generally see <http://www.courts.qld.gov.au/courts/murri-court/resources>

Part 8: Governance and Accountability

(Questions 45-47)

Question 45

Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

192. As outlined earlier in this paper, the general public is broadly unaware of how the Family Law Courts work. This means that those who come to the courts often come with unrealistic expectations and may be quite disillusioned when they depart the courts.
193. The sorts of feedback we get from some parties is that parties lack confidence in the family law system, they feel that they are not being heard, they are concerned that they get so little time in front of the judge, and that matters take far too long to run. A common complaint is that the other party essentially gets away with it all during the proceedings.
194. Most dissatisfaction with the system can be attributed to the current state of funding of the Family Law system. There are not enough judges, and people out of capital cities and large regional areas do not have the same access to the system as those in the more populous areas, and the ever-increasing number of self-represented litigants are not being catered for. More funding is needed for the overburdened system. Many complaints are also attributable to the parties' lack of understanding of how the Family Law system works, ignorance as to the sorts of orders commonly made, and unrealistic expectations.
195. Information and comment from parties as to their experiences could potentially inform future funding and prioritisation of funding, provide feedback on the efficacy of services, and provide practical information to those about to embark upon proceedings. However, given the very heightened nature of contentious family law proceedings, many view the proposal of allowing parties to ventilate their views regarding family law proceeding with considerable misgivings. As one practitioner described it, it would be like opening Pandora's box.
196. We support the continued need to restrict the publication of information but whether the current laws are too restrictive is a question worth pursuing. Safeguards should remain in place to restrict information but remaining restrictions could include the publication to certain people only and the continued use of pseudonyms.

197. With respect to the restriction of publication of information, it's important to note that the real names of litigants are freely available every day on the website to anyone who cares to look in the Court lists. When looking at how effectively identities of parties and children can be protected it is important to remember that in small communities, circumstances particular to the parties can have them easily identified. In urban communities, parties may still be identified with relatively unsophisticated methods of cross checking of information.
198. It is recommended to loosen restrictions on the publication of information in the specific areas that could benefit, that is on the topic of resourcing of the courts and costs to the parties and on the topic of efficacy of orders.
199. The resourcing issues, which is obvious to participants in the family law system, could usefully be commented upon. Comment on the time, cost and delay involved in family law court proceedings could generate ideas for better ways of having a process to arrive at final orders. De-identifying information should be relatively straightforward in those circumstances.
200. Central to the success of publication of commentary is the question of what media should be allowed to publish. The primary choices are mainstream media, social media via an outreach program, and interviews for academic articles and think tank reports. The timing of the feedback would also be an important factor. Conducting formal exit-interviews some time after the matters have finalised would be the preferable approach for gaining feedback in high conflict matters. For commentary to be published in either mainstream media or outreach programs, given the ability of some parties to weaponise almost any process in the heat of their family law dispute, it may be advisable to seek their feedback after passions have cooled and the parties have adjusted to the changes brought about by the order.
201. Drawing on lessons learned from the reporting of criminal law proceedings, the criticism of mainstream media is the tendency for sensationalist aspects of the case to dominate an account, relegating balancing facts to the last paragraph. Media coverage is patchy at best, a complete picture of the court's operations and an explanation of the mundane never find their way into newspaper columns. What the journalists do bring is a fresh eye, an outsider's view, and a readable style.
202. Many courts have outreach programs and social media is an effective way to reach a public audience in search of information and news. That process is also amenable to stopping an article which may unintentionally reveal identities of the parties or of children. What it often lacks is the finger on the pulse that mainstream media maintain.

203. In our view, a Social Media outreach program, possibly outsourced to experienced journalists with access to experienced family law practitioners, would provide the ideal balance between protecting information and informing the public.

Question 46

What other changes should be made to enhance the transparency of the family law system?

204. The general opinion amongst our practitioners is that the current transparency of the family law system is adequate. One suggestion was that regular meetings between the judiciary and legal practitioners and other service providers would help, however they note that this would be contingent on proper funding of the courts otherwise the time cannot be made for this additional activity.

Question 47

What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

205. The article in the Australian newspaper on Friday 4 May 2018 highlighted the problems when a report writer goes rogue. There are actions which are not sufficient to establish an abuse of process or to seek a stay and that psychologists report was a good example, but it still clearly needed some form of intervention. A father's relationship with his child, which previously was sound, was damaged by the collective effect of the report and the reliance on professional bodies to take action. The Courts need greater powers to intervene when its processes are being misused. Maintaining the independence and integrity of experts at all times is essential.