

INDIGENOUS ACCESS TO FAMILY LAW IN AUSTRALIA AND CARING FOR INDIGENOUS CHILDREN

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I CARING FOR INDIGENOUS CHILDREN

In Australia, child protection law and family law perform different functions in relation to children. On one hand, child protection law is legislated by the states and territories and is considered to be an area of public law. Child protection law can be viewed as a more reactive model of protection, as child protection authorities become involved with a family after there is an allegation of risk of harm to a child. Ideally, prevention and support services intervene early to ensure the safety and wellbeing of children and family preservation;¹ however, sometimes, (and this is the worst-case scenario) a child may be removed from their family without notice.²

On the other hand, family law is an area of federal law and is considered to be an area of private law. Family law can be viewed as more proactive than child protection law, in that families can create solutions relating to the care and living arrangements of children via processes of mediation or, as a last resort, litigation in a post-separation context.

The federal family law system provides for the rights and needs of Indigenous³ children, particularly the right to cultural identity. Family law also protects particular characteristics unique to Indigenous children such as the right

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1 Department of Families, Housing, Community Services and Indigenous Affairs (Cth), 'Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020' (Annual Report 2009–2010, Council of Australian Governments, June 2010) ch 6.

2 See, eg, *Drake and Drake* [2014] FCCA 2950 [3]–[4] (Sexton J).

3 I use the term Indigenous to mean Aboriginal and Torres Strait Islander peoples, noting with respect the diversity of Aboriginal and Torres Strait Islander identities, language groups, cultures, nations and histories in Australia. I have chosen to use the term 'Indigenous' to reflect its international usage in respect of internationally recognised Indigenous rights and the broader experiences of Indigenous peoples across the world, such as is recognised in the *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

to enjoy their own culture⁴ and the need to have their identity positively fostered and supported.⁵ Family law courts examine a child's situation and circumstances carefully and support placements with culturally appropriate carers in the context of the best interests of the child.⁶

Conversely, state child protection systems are failing Indigenous children and their families. The relationship between Indigenous people and the child protection system in Australia is characterised by the alarmingly large number of Indigenous children who are removed from the care of their parents, and the deep dissatisfaction of Indigenous communities with this process.⁷ There is a lack of compliance with the Aboriginal and Torres Strait Islander Child Placement Principles ('ATSICPP')⁸ and cultural care plans are inadequately prepared for Indigenous children by child protection departments.⁹

Indigenous people in Australia are over-represented in the child protection system,¹⁰ yet under-represented in the family law system.¹¹ In its 2015 *Interim Report*, the Family Law Council noted that:

Overall ... the submissions suggest that Aboriginal and Torres Strait Islander family members who wish to care for children can find it difficult to access and engage with the family law system, which can see children left in the care of the child protection system. The consequence of this is that family reunification for Aboriginal children becomes increasingly challenging, risking destruction of the child's cultural connections and their development of a sense of Aboriginal identity and belonging.¹²

Increased use of family law options by Indigenous communities could result in better outcomes for Indigenous children, but increased use will only be made possible if family law is made more accessible for Indigenous litigants. There are multiple structural, procedural and substantive barriers to accessing the family

4 *Family Law Act 1975* (Cth) s 60B(3).

5 See, eg, *B and F* [1998] FamCA 239, 29–30 (Moore J); *In the Marriage of B and R* (1995) 19 Fam LR 594; *Nineth and Nineth [No 2]* [2010] FamCA 1144.

6 See, eg, *Re CP* (1997) 21 Fam LR 486 ('*Re CP*'); *Davis v Davis* (2007) 38 Fam LR 671.

7 See Australian Human Rights Commission, 'Social Justice and Native Title Report 2015' (Report, 2015) 141 ('*Social Justice and Native Title Report 2015*'), citing Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report, April 1997) ch 21 ('*Bringing Them Home Report*').

8 Senate Community Affairs References Committee, Parliament of Australia, *Out of Home Care* (2015) 243 ('*Out of Home Care Report*'); *Social Justice and Native Title Report 2015*, above n 7, 156–7; Heather Boetto, 'Kinship Care: A Review of the Issues' (2010) 85 *Family Matters* 60, 64.

9 See Melanie Schwartz, Fiona Allison and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Victoria' (Report, Australian Indigenous Legal Needs Project, James Cook University, 2013) 41; *Director-General of the Department of Family and Community Services (NSW) and Gail* [2013] NSWChC 4, [48], [95] (Johnstone J); *Department of Family and Community Services (NSW) and Boyd* [2013] NSWChC 9.

10 Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report (Terms 1 & 2)' (Interim Report, June 2015) 34 ('*Family Law Council Interim Report*').

11 *Ibid*; Stephen Ralph, 'Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice' (Report, Family Court of Australia and Federal Magistrates Court of Australia, 1 October 2011) 10.

12 *Family Law Council Interim Report*, above n 10, 36.

law system for Indigenous people that, if addressed, could see more Indigenous children remain in the care of their family and community members, rather than in the care of the child protection authorities.

In the past two decades, notably since the release of the *Bringing Them Home Report* in 1997, the rate of Indigenous children in out-of-home care¹³ has increased. In 1997, 2785 Indigenous children were in out-of-home care.¹⁴ Yet in 2015, 15 455 Indigenous children were in out-of-home care.¹⁵ This is 9.5 times the rate of non-Indigenous children.¹⁶ Furthermore, across Australia, from 2010 to 2015, the rate of Indigenous children who were the subject of substantiated¹⁷ notifications increased.¹⁸ By June 2015, Indigenous children were nearly 7 times more likely to be the subject of a substantiated notification than non-Indigenous children.¹⁹ The disproportionate number of Indigenous children in out-of-home care requires us to critique the child protection system and ask questions about how child protection authorities are interpreting ‘risk’ to children and families. This article suggests that the child protection system is not providing care that is culturally appropriate and is misunderstanding the impact of removal on the Indigenous child and his or her family and community.²⁰

The reasons why Indigenous people are over-represented in child protection law are complex. Some reasons include past governmental policies of forced removal and cultural assimilation, the intergenerational effects of those forced removals, and cultural differences in family structures and childrearing practices.²¹ Other reasons may include family violence, neglect, drug and alcohol abuse, or emotional abuse.²² A disproportionately high number of Indigenous

13 Out-of-home care is where a child is placed in overnight care and the relevant state or territory makes a payment to the carer: see Australian Institute of Health and Welfare, ‘Child Protection Australia Report: 2014–15’ (Child Welfare Series No 63, 21 April 2016) 48.

14 Steering Committee for the Review of Commonwealth/State Service Provision, ‘Report on Government Services 1999: Volume 2: Emergency Management, Community Services, Housing’ (Report, 11 February 1999) 1028.

15 Australian Institute of Health and Welfare, above n 13, 104.

16 Ibid.

17 A substantiation of a notification occurs when a notification has been investigated and it has been concluded that there is sufficient reason to believe that the child has been, is being or is likely to be, abused, neglected or otherwise harmed: Australian Institute of Health and Welfare, above n 13, 20.

18 Ibid 33.

19 Ibid 28.

20 See Boetto, above n 8, 64, citing Marilyn McHugh, ‘A Further Perspective on Kinship Care: Indigenous Foster Care’ (2003) 8 *Developing Practice: The Child, Youth and Family Work Journal* 14.

21 Child Family Community Australia, *Child Protection and Aboriginal and Torres Strait Islander Children* (October 2016) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>>, citing *Bringing Them Home Report*, above n 7; Australian Institute of Health and Welfare, above n 13, 27, citing *Bringing Them Home Report*, above n 7.

22 Australian Institute of Health and Welfare, above n 13, 27, citing Deborah Scott and Lalitha Nair, *Child Protection Statistics for Aboriginal and Torres Strait Islander Children* (2013) Australian Institute of Family Studies; Kyllie Cripps, ‘Indigenous Children’s “Best Interests” at the Crossroads: Citizenship Rights, Indigenous Mothers and Child Protection Authorities’ (2012) 5(2) *International Journal of Critical Indigenous Studies* 25, 31.

children experience neglect compared to their non-Indigenous counterparts.²³ However, the statistics of neglect must be understood in context. Indigenous people experience high levels of poverty and significant levels of disadvantage,²⁴ and their circumstances are assessed against the Western standards which underlie child protection authorities' assessments of Indigenous families.²⁵ A further compounding difficulty for Indigenous parents is the expectation that they should raise their children within a nuclear family structure that does not value or appreciate the strength of the traditional support structure offered by extended family networks.²⁶

Indigenous engagement with the state child system is characterised by disempowerment,²⁷ fear,²⁸ mistrust,²⁹ and dissatisfaction.³⁰ These experiences are directly linked to the historical continuity of the Stolen Generations³¹ and its transgenerational impacts:³² Aboriginal and Torres Strait Islander people who were previously removed from their communities and their descendants fear in the present day that their children will also be removed.³³ For Indigenous people, there is an overarching association of child protection authorities with the removal of children. This association is deeply entrenched in real experiences that have been shared across communities and through generations; 'child protection triggers immediate fear and distrust'.³⁴

The *Bringing Them Home Report* made clear that the intervention of child protection services was not considered an effective way of dealing with the protection needs of Indigenous children.³⁵ Furthermore, the *Bringing Them Home Report* found that the welfare of Indigenous children is 'inextricably tied to the

23 Between 2014 and 2015, neglect represented 38 per cent of substantiated claims for Indigenous children, compared with 21 per cent for non-Indigenous children: Australian Institute of Health and Welfare, above n 13, 28.

24 Cripps, above n 22, 30.

25 Paul Delfabbro et al, 'The Over-representation of Young Aboriginal or Torres Strait Islander People in the South Australian Child System: A Longitudinal Analysis' (2010) 32 *Children and Youth Services Review* 1418, 1423.

26 Cripps, above n 22, 28.

27 Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) 49 *Australian Journal of Social Issues* 219, 229.

28 Mick Dodson, 'Bully in the Playground: A New Stolen Generation?' in John Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications Association, 2007) 85, 87.

29 *Family Law Council Interim Report*, above n 10, 34.

30 For example, in NSW, there is profound dissatisfaction and inequality experienced by Indigenous families in engaging with the child protection system, and removal of children was an issue of major concern for Indigenous families in NSW: Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *University of New South Wales Law Journal* 725, 742.

31 See Cunneen, Allison and Schwartz, above n 27, 229.

32 See Dodson, above n 28, 87.

33 See, eg, *Bringing Them Home Report*, above n 7, ch 10. Chapter 10 of the report contains a large number of extracts from evidence before the inquiry which recounts the experiences of children removed during the Stolen Generations period.

34 Cripps, above n 22, 29.

35 *Bringing Them Home Report*, above n 7, 393 ff.

well-being of the community and its control of its destiny'.³⁶ The welfare of Indigenous children is connected to the idea of self-determination, in the sense of families and communities having real choices and making empowered decisions about where children will live and how to raise them.

The removal of Indigenous children by state child protection authorities remains a frontline issue for Indigenous communities. In 2015, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, called for efforts to empower and support Indigenous peoples to 'break free from the cycle that brings them into contact with child protection authorities in the first place',³⁷ reflecting a strong desire to keep Indigenous children living within their communities and kinship networks as well as a broader community desire to reduce Indigenous over-representation in child protection services.

Increasing Indigenous access to the federal family law system is one effort that can be made to reduce the over-representation of Indigenous children in out-of-home care. However, action in the family law system should ideally occur prior to the intervention of child protection authorities, otherwise families may find themselves having to navigate two systems. It is important to note that action in family law does not prevent child protection intervention. Family law engagement requires proactive action by families and support services to identify family law needs and quickly engage appropriate legal services. Family law processes may allow care arrangements to be made for a child that reduce the risks of harm to which a child is exposed in the post-separation context. If safe child care arrangements can be made within family and kinship networks then it is possible that the future likelihood of state intervention by child protection authorities will be reduced. Proactively obtaining parenting orders from the family courts may pre-empt any involvement of child protection authorities, which is necessarily reactive.

The above suggestions are limited by deeply rooted structural issues of inequity, discrimination and lack of access to justice for Indigenous peoples. Nevertheless, this article examines the viability of family law options available to Indigenous people in an attempt to elucidate pathways that might address some of the abovementioned concerns. Specifically, this article examines the pathway of accessing the family courts³⁸ to obtain parenting orders for Indigenous children. Australian family law processes offer a viable channel for Indigenous families and communities to address issues relating to the care of Indigenous children.

Family law parenting orders can provide for a child to be placed with a safe family member, or other interested party, for a short, long or indefinite period. Parenting orders can be reviewed for appropriateness and varied with changed circumstances. Such action may abate risks to the child that may otherwise require action by child protection authorities, resulting in intervention and the possible removal of the child. Parenting orders made by family courts may pre-

36 Ibid 400.

37 *Social Justice and Native Title Report 2015*, above n 7, 138.

38 'Family courts' refers to the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia.

empt and mitigate the need for child protection intervention; family law can be engaged as an early intervention strategy.

Analysis of a recent case reveals that the family law and child protection systems can produce vastly different outcomes despite both systems seeking solutions that are in the best interests of the child.³⁹ In some cases the family law system may offer a preferable and more culturally appropriate solution for an Indigenous child than the child protection system.

The limited available data indicates that the family law system is under-utilised by Indigenous clients.⁴⁰ Between July 2014 and June 2015, on average across family law registries, 3.5 per cent of all applications for final orders at both the Federal Circuit Court of Australia and the Family Court were lodged by clients identifying as Aboriginal or Torres Strait Islander (representing 720 applicants).⁴¹ However, the rates varied according to registry from as high as 21.3 per cent in Darwin to 0.6 per cent in Melbourne,⁴² which may reflect the population of Indigenous people in those areas. In a Court User Satisfaction Survey conducted by the Family Court and Federal Circuit Court of Australia in 2015, around four per cent of the interviewees identified as Indigenous.⁴³

There is need for processes that produce reliable statistics about Indigenous usage of family law. The levels of social and economic disadvantage experienced by Indigenous families suggest that there should be more use of family law, if not an over-representation in family law statistics, because:

the presence of high rates of family violence, high rates of involvement with statutory child welfare authorities, including high rates of children living in out of home care, are factors that suggest Indigenous families may have a greater need for assistance in dealing with family law matters, including recourse to litigation in the courts if need be.⁴⁴

Of the limited research available, it has been found that most family law needs for Indigenous people in New South Wales and the Northern Territory concern issues to do with children and, in Victoria, this is a major area of concern.⁴⁵

It appears that if Indigenous access to justice needs were met there would be greater use of family law by Indigenous litigants. There is need for further

39 The case of *Drake and Drake* [2014] FCCA 2950 is discussed in more detail in Part III(C)(1).

40 *Family Law Council Interim Report*, above n 10, 34; Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 10. The available statistics on Indigenous involvement in family law litigation are not particularly reliable: Family Court of Australia, 'Family Court Indigenous Action Plan 2014–2016' (3 November 2014) 5.

41 Family Court of Australia and Federal Circuit Court Statistical Services Unit, National Support Office, 'Percentage of Files where an Applicant or Respondent Identified as ATSI, Financial Year 2014–15' (copy kept on file with author). These statistics were sourced from the Family Court of Australia and Federal Circuit Court of Australia.

42 Due to the low numbers of Aboriginal and Torres Strait Islander-identifying parties, these statistics are highly sensitive to small changes: *ibid.*

43 Family Court of Australia and Federal Circuit Court of Australia, 'Court User Satisfaction Survey – 2015' (Report, 18 February 2016) 7.

44 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 10–11.

45 Cunneen, Allison and Schwartz, above n 27, 229; Cunneen and Schwartz, above n 30, 741; Schwartz, Allison and Cunneen, above n 9, 65.

research and reliable data gathering about Indigenous use of family law so that unmet family law needs⁴⁶ can be addressed.

The lack of Indigenous engagement with family law can also be explained by the historical relationship between Indigenous peoples and Australian legal systems. Perhaps it is ‘not surprising that Indigenous people lack access to legal redress and advocacy as a solution to their problems’, since historical and systemic discrimination has had long-term consequences.⁴⁷ Some consequences include lack of knowledge of legal rights and remedies, as well as lack of trust in Australian legal systems.⁴⁸ Family law has also been avoided by Indigenous families due to the perception of its cultural inappropriateness.⁴⁹

Indigenous people have complex legal needs.⁵⁰ Family law matters for Indigenous people also often entail a level of complexity that is not experienced by non-Indigenous clients.⁵¹ The practical reality for Indigenous families and communities in accessing family law options in circumstances of entrenched disadvantage, discrimination and transgenerational trauma⁵² must be acknowledged. There are many structural, procedural, and substantive barriers to accessing family law for Indigenous people.

The disproportionately high levels of Indigenous children currently in out-of-home care calls into question what options Indigenous families have available to them to avoid their children being ‘taken away’. Many have suggested that the over-representation of Indigenous children in out-of-home care risks creating another ‘Stolen Generation’.⁵³ There is undeniably a necessary and

46 See, eg, Cunneen, Allison and Schwartz, above n 27, 234–5; Schwartz, Allison and Cunneen, above n 9, 58.

47 Cunneen, Allison and Schwartz, above n 27, 237.

48 Ibid.

49 Family Law Pathways Advisory Group, ‘Out of the Maze: Pathways to the Future for Families Experiencing Separation’ (Report, July 2001) 89 (*‘Out of the Maze Report’*).

50 Cunneen and Schwartz, above n 30, 725.

51 Stephen Ralph, ‘Family Court Mediation and Indigenous Families’ (2004) 6(5) *Indigenous Law Bulletin* 10, 11. See also Stephen Ralph, ‘Family Dispute Resolution Services for Aboriginal and Torres Strait Islander Families: Closing the Gap?’ (Family Relationships Quarterly No 17, Australian Institute of Family Studies, September 2010).

52 Intergenerational trauma is experienced by Indigenous communities in response to the impact of colonial policies. Experiences of trauma are compounded by additional current traumatic experiences such as family violence, sexual and physical abuse, and substance abuse ‘both experienced and witnessed by many Indigenous children’: Terri Libesman, ‘Indigenising Indigenous Child Welfare’ (2007) 6(24) *Indigenous Law Bulletin* 4, 4.

53 See *Out of Home Care Report*, above n 8, 225; Cunneen, Allison and Schwartz, above n 27, 229; Heather Douglas and Tamara Walsh, ‘Continuing the Stolen Generations: Child Protection Interventions and Indigenous People’ (2013) 21(1) *International Journal of Children’s Rights* 59; Cripps, above n 22, 25. Terminology such as ‘Stolen Generation’ or ‘lost generation’ has also been used in multiple newspaper articles about the high rates of Indigenous children in out-of-home care: see Dani Conifer and Caitlyn Gribbin, ‘Closing the Gap: Ninth Report Card on Indigenous Disadvantage Set to Be a Mixed Bag’, *ABC News* (online), 14 February 2017 <<http://www.abc.net.au/news/2017-02-14/closing-the-gap-report-to-show-indigenous-policy-progress/8267148>>; Matt Young, ‘Australia in the Grip of a “New Stolen Generation”, Indigenous Children Forcibly Removed from Homes’, *News Limited* (online), 2 August 2014 <<http://www.news.com.au/lifestyle/real-life/australia-in-the-grip-of-a-new-stolen-generation-indigenous-children-forcibly-removed-from-homes/news-story/88e06e6db098dfddf39e8412674734c0>>; Australian Associated Press, ‘Aboriginal Children in Care “a New Stolen Generation”, UTS Indigenous Researcher Says’, *ABC News* (online), 26 May 2014 <<http://www.abc.net.au/news/2014-05-26/stolen->

critical function for child protection services in Australian society in protecting children at risk and in situations of crisis.

The critical difference between family law and child protection law is that family law can be engaged at any time, whereas child protection law is triggered once actual harm occurs or a significant risk of harm to a child is identified. The author stresses that family law care arrangements for children can be put in place *before* child protection authorities intervene, potentially pre-empting the need for any intervention at all. Family law can be used to proactively address care arrangements for Indigenous children as an early intervention strategy.

Kyllie Cripps argues that:

real and sustainable change for those most vulnerable is only achievable if we can move parents and families from being passive recipients of child protection interventions to positions of influence where they are willing and able to actively take on the responsibility for ensuring the safety and wellbeing of their children.⁵⁴

The family law system offers alternative solutions that, in certain situations, may respond better to the interests of Indigenous families than the child protection system. Family law, engaged prior to child protection intervention, may allow an outcome that, for Indigenous families, may be preferable to being the recipient of child protection intervention. The family law system also addresses Indigenous cultural needs that may be overlooked in child protection proceedings.

II COURTS AND LAW

A The Intersection of Family Law and Child Protection Law

Historically, child protection law and family law have been considered to be separate areas of law. Child protection law is regulated at the state and territory level⁵⁵ while family law is regulated at the federal level.⁵⁶ This separation is constitutionally mandated: the federal Parliament may legislate on issues relating to marriage, divorce and matrimonial causes, associated parental rights, and the custody and guardianship of children.⁵⁷ Child protection, not mentioned in the federal heads of power in section 51 of the *Constitution*, is therefore ‘saved’ as part of the legislative power of the parliaments of the states and their laws.⁵⁸

generation-with-aboriginal-children-in-care-nt/5478898>; Debbie Kilroy, ‘Aboriginal Mothers’ Ill-Treatment in Jail Gives Kids a Bad Start’, *Sydney Morning Herald* (online), 21 November 2014 <<http://www.smh.com.au/comment/aboriginal-mothers-illtreatment-in-jail-gives-kids-a-bad-start-20141120-11qe4h.html>>. There are also concerns that the policies that created the Stolen Generations are being replicated under a different policy framework since so many Indigenous children continue to live away from their families because of child protection assessments: Delfabbro et al, above n 25, 1418.

54 Cripps, above n 22, 31.

55 *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Child Protection Act 1999* (Qld); *Children’s Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

56 *Family Law Act 1975* (Cth).

57 *Australian Constitution* ss 51(xxi)–(xxii).

58 *Australian Constitution* s 107.

Child protection law is considered to be an area of public law while family law is considered to be an area of private law. The concept of ‘family’ has traditionally been considered to be an area where the state should not intervene; it is a private sphere.⁵⁹ However, the distinction between these two areas of law has become less clear over time. Justice Benjamin of the Family Court of Australia argues there is a growing ‘grey area’ between public child protection law and private family law, and that the distinction between them is becoming ‘less and less obvious’.⁶⁰ The Family Law Council has also reported that there is increasingly an overlap between child protection law and family law.⁶¹

There appears to be a lack of communication between the two systems that is demonstrated in some family law cases.⁶² It is also questionable whether it is in the best interests of children and the wellbeing of their families and communities to have multiple systems that respond to family needs concerning children. The Australian Law Reform Commission has suggested that the family law system is a fragmented system with respect to legislative issues pertaining to children.⁶³ The Family Law Council has reported dissatisfaction with the separate jurisdictions dealing with parenting orders, child protection and family violence in the Australian legal system.⁶⁴

However, the safety of children is not guaranteed in family law proceedings. In private family law proceedings, children may be exposed to abuse, neglect or family violence, whereas in child protection proceedings, children are, in theory, protected by the child protection authorities. Justice Benjamin writes that there is a ‘[c]onstitutional lacuna’ that is contributing to such safety concerns and that this approach to children and families is ‘fundamentally flawed’.⁶⁵ The Family Law Council has also expressed concerns that the ‘increasingly public law nature of the parenting order work of the family courts’ impedes the protection of children.⁶⁶ In 2014, the federal Attorney-General asked the Family Law Council to investigate the intersection of family law and child protection law and implications for families with complex needs.⁶⁷

Indigenous children are subject to a further tension in the family law domain: how can risk of abuse or family violence to Indigenous children be managed

59 Cripps, above n 22, 25.

60 Justice Robert Benjamin, ‘Public Law Issues in a Private Law System: Child Protection and Family Law’ (2015) 5 *Family Law Review* 102, 102.

61 *Family Law Council Interim Report*, above n 10, 96.

62 See, eg, *Drake and Drake* [2014] FCCA 2950.

63 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 52 (‘*Family Violence: A National Legal Response*’).

64 *Family Law Council Interim Report*, above n 10, 96.

65 Benjamin, above n 60, 104.

66 *Family Law Council Interim Report*, above n 10, 96.

67 See *Family Law Council Interim Report*, above n 10. The *Family Law Council Interim Report* responded to the first and second terms of reference, and Family Law Council, ‘Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report (Terms 3, 4 and 5)’ (Final Report, June 2016) (‘*Family Law Council Final Report*’) responded to the third, fourth and fifth terms of reference.

whilst balancing the rights of Indigenous children to maintain cultural connections and their Indigenous identity?

Stephen Ralph asserts there is ‘an inherent tension between the desire to preserve Aboriginal and Torres Strait Islander children within their own family and cultural group, and the need to intervene when those children have been abused/neglected, or are “at risk”’.⁶⁸ This ideological tension manifests itself in both the child protection area and family law area, creating difficult situations for decision-makers and families about how to manage risk while simultaneously protecting the cultural and identity rights of Indigenous children.

B Child Protection Legislative Framework

Child protection laws differ in each state and territory jurisdiction.⁶⁹ Generally, child protection legislation provides for state intervention into family life in order to protect the safety of children.⁷⁰ Child protection authorities have authority to investigate allegations of neglect, abuse, and other risk factors to children.⁷¹ If the allegation is ‘substantiated’ then removal of a child from their family may be warranted.⁷² The child may be placed in kinship care or foster care (also known as out-of-home-care) for a short, long, or indefinite period of time.

Child protection legislation includes general principles that are applicable to any decision made under the relevant Act concerning an Aboriginal or Torres Strait Islander child or young person.⁷³ The principles in each jurisdiction differ.⁷⁴

68 Stephen Ralph, ‘Indigenous Children and the Courts: An Overview of What’s Happening in Children’s Courts and the Family Courts’ (Paper presented at Australasian Institute of Judicial Administration Indigenous Courts Conference, Rockhampton, Qld, 5–7 August 2009).

69 See above n 55.

70 Indigenous Issues Committee of the Law Society of New South Wales, Submission to Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, 7 August 2015, 5.

71 For example, in NSW, if a report is made that a child is ‘at risk of significant harm’ then the Secretary may investigate and assess the allegation: see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30.

72 For example, in NSW, under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), once an allegation has been investigated the Secretary can either take no further action under s 30(b) or, if the Secretary forms an opinion on reasonable grounds ‘that a child or young person is in need of care and protection’, then the Secretary ‘is to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person’: at s 34(1). Such action can range from arranging support, developing a care plan, developing a parent responsibility contract, seeking orders from the Children’s Court under s 34(2), to taking emergency measures such as the removal of the child or young person without warrant: at s 43.

73 See *Children and Young People Act 2008* (ACT) s 10; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 11–14; *Care and Protection of Children Act 2007* (NT) s 12; *Child Protection Act 1999* (Qld) s 5C; *Children’s Protection Act 1993* (SA) s 5; *Children, Young Persons and Their Families Act 1997* (Tas) s 10G; *Children, Youth and Families Act 2005* (Vic) s 14; *Children and Community Services Act 2004* (WA) ss 12–14.

74 The following is a summary of the principles found in the state and territory legislations, each drawn from the relevant state or territory legislation, as pinpointed in above n 73:

- to consult with a relevant Aboriginal or Torres Strait Islander organisation and to have regard to the submissions of that organisation (ACT, SA, Tas);
- to have regard to the relevant Indigenous traditions and cultural values (including kinship rules) (ACT, SA, Tas);

1 *Aboriginal and Torres Strait Islander Child Placement Principles*

The ATSICPP have been enacted in all states and territories,⁷⁵ following the recommendation of the *Bringing Them Home Report* to implement minimum standards of treatment for all Indigenous children within child protection systems.⁷⁶ The ATSICPP aims to facilitate culturally appropriate placements for Indigenous children so that the children can preserve their Indigenous identity and culture.⁷⁷ The ATSICPP asserts that Indigenous children should be placed with family members and community, and failing that, with other Aboriginal and Torres Strait Islander people.⁷⁸ The preferential order of placements for Indigenous children is:

1. with the child's extended family;
2. with the child's Indigenous community;
3. with Aboriginal or Torres Strait Islander carers; or
4. with non-Indigenous carers.⁷⁹

The ATSICPP are not determinative principles when deciding where to place an Indigenous child. If it would not be in the child's best interests to be placed in accordance with the ATSICPP then an alternative care arrangement can be made.⁸⁰

Some reports assert that the level of conformity with the ATSICPP is high. For example, the Australian Institute of Health and Welfare reported that across

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- to have regard to the general principle that an Aboriginal child should be kept within the Aboriginal community and a Torres Strait Islander child within the Torres Strait Islander community (ACT, SA, Tas);
 - the principle of community participation – participation of families, kinship groups, representative organisations and communities in decision-making (NSW, NT, WA);
 - to allow participation of Indigenous people in decisions 'with as much self-determination as possible' (NSW, WA);
 - the keeping of permanent records concerning Indigenous children (NSW);
 - to allow Indigenous children to develop and maintain connections with their Indigenous family, culture, traditions, language and community (Qld);
 - to take into account the long term effect of a decision on a child's identity and connection with family and community (Qld);
 - to take account of a child's self-identification as Aboriginal and the expressed wishes of the child (Vic);
 - when a child has parents from different Aboriginal communities, to give consideration to the child's sense of belonging (Vic); and
 - to make arrangements to ensure continuing contact with family, community and culture (Vic).

75 See *Children and Young People Act 2008* (ACT) s 513; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13; *Care and Protection of Children Act 2007* (NT) s 12; *Child Protection Act 1999* (Qld) s 83; *Children's Protection Act 1993* (SA) s 5; *Children, Young Persons and Their Families Act 1997* (Tas) s 10G; *Children, Youth and Families Act 2005* (Vic) s 13; *Children and Community Services Act 2004* (WA) s 12.

76 *Bringing Them Home Report*, above n 7, 516 (recommendation 51a).

77 Boetto, above n 8, 64.

78 Australian Institute of Health and Welfare, above n 13, 55, citing Jennifer Lock, 'The Aboriginal Child Placement Principle' (Research Project No 7, New South Wales Law Reform Commission, March 1997) 50.

79 Australian Institute of Health and Welfare, above n 13, 55.

80 *Ibid.*

Australia between 2014 and 2015, 66 per cent of Indigenous children were placed in accordance with the ATSI CPP, and that this proportion is similar to previous years.⁸¹ This report suggested that the ‘high proportions’ of Indigenous children being placed in accordance with the ATSI CPP demonstrated the positive impact of the ATSI CPP.⁸² However, we should question whether a 34 per cent non-compliance rate is acceptable. *Why aren’t 100 per cent of Indigenous children being placed with culturally appropriate carers?*

Furthermore, the placement of an Indigenous child with an extended family member does not guarantee that the child will maintain ongoing connections to his or her Indigenous culture and heritage, and this may be particularly so if the extended family member is non-Indigenous. If an Indigenous child is placed with a non-Indigenous extended family member then there is no requirement for a cultural care plan to ensure the child’s ongoing connections with their Indigenous culture and heritage as placement with any member of the extended family is considered in keeping with the ATSI CPP.⁸³ More recent evidence suggests that the proportion of Indigenous children who have been placed with relatives, kin, Indigenous carers or in other Indigenous residential care has decreased over the past ten years.⁸⁴ There have been varying levels of conformity with the ATSI CPP⁸⁵ due to many factors such as the lack of available Indigenous carers.⁸⁶ There have been calls for strengthened compliance measures regarding the ATSI CPP and support to areas related to compliance, such as benefits to carers.⁸⁷

2 Cultural Needs and Identity Addressed in Care Plans/Care Agreements

Generally, a ‘care plan’ or ‘care agreement’ refers to an individual plan that meets the needs of a child or young person that is either developed by agreement with the child’s parents or is a set of proposals for the relevant court’s consideration, and includes decisions about the placement of the child and arrangements for contact between the parent(s) and child.⁸⁸ Care plans that are

81 Ibid 54.

82 Ibid.

83 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13(1)(a).

84 Productivity Commission (Cth), ‘Report on Government Services 2016: Volume F: Community Services’ (Report, Steering Committee for the Review of Government Service Provision, 27 January 2016) ch 15, table 15A.24.

85 See *Out of Home Care Report*, above n 8, 243; *Social Justice and Native Title Report 2015*, above n 8, 156–7; Boetto, above n 8, 64; Kyllie Cripps and Julian Laurens, ‘Protecting Indigenous Children’s Familial and Cultural Connections: Reflections on Recent Amendments to the *Care and Protection Act 2007* (NT)’ (2015) 8(17) *Indigenous Law Bulletin* 11, 13.

86 Child Family Community Australia, above n 21; Daryl Higgins, Leah Bromfield and Nick Richardson, ‘Enhancing Out-of-Home Care for Aboriginal and Torres Strait Islander Young People’ (Report, Australian Institute of Family Studies, October 2005) 68; Terri Libesman, ‘Cultural Care for Aboriginal and Torres Strait Islander Children in Out of Home Care’ (Report, Secretariat of National Aboriginal and Islander Child Care and Barnardos Australia, 10 August 2011) 31.

87 Cripps and Laurens, above n 85, 13; Boetto, above n 8, 63.

88 See, eg, *Children and Young People Act 2008* (ACT) s 455; *Children and Young Persons (Case and Protection) Act 1998* (NSW) ss 3 (definition of ‘care plan’), 78; *Care and Protection of Children Act 2007* (NT) s 70; *Child Protection Act 1999* (Qld) s 51ZF; *Children, Young Persons and Their Families Act 1997* (Tas) s 11; *Children, Youth and Families Act 2005* (Vic) pt 3.5; *Children and Community Services Act 2004* (WA) s 89. In SA, arrangements for a child are made via a voluntary custody

prepared for Indigenous children should address how their cultural needs and identity will be fostered and supported in the new care arrangement. Culturally appropriate care plans are critical in safeguarding Indigenous children's connections with their culture, community and country⁸⁹ and protecting their long-term wellbeing.⁹⁰

Wide concern has been expressed by judicial officers and researchers that the care plans prepared by the child protection authorities are not adequately addressing the cultural needs and cultural identity of Indigenous children.⁹¹ Recent judicial decisions in the Children's Court of New South Wales have noted that the ATSICPP are not being adequately addressed by child protection case workers, and that the care plans that are being prepared for Indigenous children are not adequate, not appropriate, and are insufficiently specific to the child's cultural needs.⁹² The President of the Children's Court of New South Wales, Judge Johnstone, has expressly noted the inadequate attention being paid to the cultural needs of Indigenous children in the preparation of care plans:

I wish to place on record that this Court is increasingly frustrated by the lack of cultural knowledge and awareness displayed by some caseworkers and practitioners in their presentation of matters before it. The time has come for a more enlightened approach and heightened attention to the necessary detail required, which may require specific training and education by the agencies and organisations involved.⁹³

Recent family law decisions have also criticised child protection management of cases involving Indigenous children for failing to accommodate Indigenous children's cultural and identity needs in their proposals.⁹⁴

Across Australia, it appears there is a lack of a clear legislative mandate for care plans to incorporate measures that protect the cultural identity and cultural connections of Indigenous children.⁹⁵ It appears that the cultural and identity needs of Indigenous children are not being adequately provided for under current legislative frameworks, nor is there adequate compliance with the ATSICPP. As the numbers of Indigenous child removals increase, and community dissatisfaction increases, it is crucial to look to further ways to protect the cultural and identity rights of Indigenous children.

agreement or via decisions made at a family care meeting: see *Children's Protection Act 1993* (SA) ss 9, 28.

89 See, eg, Cripps and Laurens, above n 85, 13–14, where the authors discuss the recent amendments to the *Care and Protection of Children Act 2007* (NT) and the importance of cultural identity to Indigenous children.

90 Cripps and Laurens, above n 85, 12.

91 See, eg, Schwartz, Allison and Cunneen, above n 9, 10, 78.

92 See *Director-General of Department of Family and Community Services (NSW) and Gail* [2013] NSWChC 4; *Department of Family and Community Services (NSW) and Boyd* [2013] NSWChC 9.

93 *Director-General of Department of Family and Community Services (NSW) and Gail* [2013] NSWChC 4, [48], [95]. See also *Department of Family and Community Services (NSW) and Boyd* [2013] NSWChC 9.

94 See, eg, *Drake and Drake* [2014] FCCA 2950. This case is discussed in more detail in Part III(C)(1).

95 See, eg, Cripps and Laurens, above n 85, 14. Victoria is the only state that has imposed a legislative obligation that case plans for Indigenous children must ensure the maintenance and development of the child's Indigenous identity and encourage the child's connection to their Indigenous community and culture: see *Children, Youth and Families Act 2005* (Vic) s 176.

C Family Law Legislative Framework

The *Family Law Act 1975* (Cth) (*Family Law Act*) established the Family Court of Australia in 1976.⁹⁶ The Federal Magistrates Court was established in 1999, and renamed in 2013 as the Federal Circuit Court of Australia ('FCCA').⁹⁷ The overarching principle in the *Family Law Act* that regulates judicial determinations involving children is known as the 'best interests of the child' principle.⁹⁸ Part VII of the *Family Law Act* sets out the legislative framework that judicial officers must follow when making decisions about children and includes a number of objects,⁹⁹ underlying principles,¹⁰⁰ primary and additional considerations¹⁰¹ that must be taken into account. It is notable that the *Family Law Act* now provides that the need to protect the child from harm is to be given greater weight than the right of the child to have a meaningful relationship with both parents.¹⁰²

96 The Family Court is the superior family court and deals with complex legal family disputes.

97 The FCCA has family law jurisdiction as well as jurisdiction over other areas of federal law and conducts regular circuits to regional locations. The FCCA has registries in all states and territories except Western Australia. In 1976, Western Australia chose to create a state court, the Family Court of Western Australia, to be invested with federal family law jurisdiction under *Family Law Act* s 41.

98 See *Family Law Act* ss 60B, 60CA.

99 See *Family Law Act* ss 60B(1), 60B(4):

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring that children have the benefit of both their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

...

- (4) An additional object is to give effect to certain requirements of the [*Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)].

100 See *Family Law Act* s 60B(2):

- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

101 *Family Law Act* s 60CC.

102 *Family Law Act* s 60CC(2A).

The *Family Law Act* only encourages litigation as a last resort.¹⁰³ If parents are unable to reach an agreement themselves, they, or another person interested in the care and welfare of the child, can apply to the family courts for parenting orders.¹⁰⁴ Any party that is concerned with the care, welfare or development of the child can apply for a parenting order.¹⁰⁵ Parenting orders can be varied over time as circumstances change¹⁰⁶ and can accommodate a variety of people who might be involved in the care and welfare of the child.¹⁰⁷ Parenting orders can deal with the issues of where and with whom a child is going to live, and with whom that child will communicate and spend time, among other matters.¹⁰⁸ Usually, when parents engage with the family courts, any children are still living with them or other family members and have not yet been removed by child protection authorities.¹⁰⁹ If a child is under the care of a person pursuant to a child protection order then a family law court cannot make a parenting order involving that child unless the child has ceased to be under the care of that order or the consent of the relevant child protection officer has been obtained.¹¹⁰

As stated, any person that is concerned with the care, welfare or development of a child has standing to apply to the family courts for a parenting order.¹¹¹ This is different to child protection law which usually only allows the child, the child's parents, and the secretary of the relevant child protection department to be involved in child protection proceedings.¹¹² In the children's courts, if a relative or other person concerned with the welfare of the child wishes to care for a child, they can usually only do so by seeking the leave of the children's court by making a 'joinder application'.¹¹³

The difference between family law and child protection law in allowing for a person *other than the child's parents* to apply to become a party to proceedings is particularly relevant for Indigenous families. Indigenous families may have many extended family members that are interested in or responsible for the care, welfare and development of a particular child.¹¹⁴ The role of extended family members in childrearing is of fundamental importance in raising Indigenous

103 *Family Law Act* s 63B. Parents can enter into an informal agreement called a 'parenting plan'; however, if parties want an enforceable arrangement they will need court orders.

104 *Family Law Act* s 65C.

105 *Family Law Act* s 65C.

106 Final parenting orders can be reviewed if the applicant can establish that there has been significant change in circumstances: see *In the Marriage of Rice and Asplund* (1979) FLC 90-725; see, eg, *Carriel and Lendrum* (2015) 53 Fam LR 157.

107 *Family Law Act* s 64B.

108 *Family Law Act* s 64B(2).

109 However, this is not always the case, such as in the case of *Drake and Drake* [2014] FCCA 2950.

110 *Family Law Act* s 69ZK.

111 *Family Law Act* s 65C.

112 See, eg, *Children and Young Persons (Case and Protection) Act 1998* (NSW) s 98.

113 See, eg, *Children and Young Persons (Case and Protection) Act 1998* (NSW) s 98(3).

114 See, eg, Boni Robertson, Hellene Demosthenous and Catherine Demosthenous, 'Stories from the Aboriginal Women of the Yarning Circle: When Cultures Collide' (2005) 31(2) *Hectate* 34, 37, where the authors state:

The mother is not necessarily the biological mother, but grandmothers, aunties, sisters, cousins, nieces, all women assume the role and responsibilities of mothering a child of their community. All mothers are the carers of children, regardless of whether or not they have been the bearers of children.

children.¹¹⁵ Grandparents, aunts and uncles play a ‘far more significant role in caring for children ... than is likely to be the case with non-Indigenous families’.¹¹⁶ The collectivist nature of Indigenous families means that extended family members have obligations and responsibilities for the care of children; caring for and responsibility for the growing up of children is invested in many people.¹¹⁷ This may explain why extended family members are frequently involved in Indigenous family law disputes.¹¹⁸

1 Indigenous Children under the Family Law Act

Importantly, the *Family Law Act* gives effect to the *Convention on the Rights of the Child* (‘CRC’),¹¹⁹ which acknowledges the particular rights of Indigenous children. Article 30 of the *CRC* stipulates that Indigenous children must not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.¹²⁰

Significant amendments were made to the *Family Law Act* in 2006 regarding Indigenous children.¹²¹ The amendments introduced provisions *requiring* the court to consider the right of the child to enjoy their Indigenous culture, the likely impact of any proposing parenting order on that right, and also to have regard to kinship and childrearing practices of Indigenous cultures.¹²²

Now, in every case involving an Aboriginal or Torres Strait Islander child, the court *must* consider the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture. Section 60B(3) of the *Family Law Act* now states that the Indigenous right to culture includes the right to:

- (a) Maintain a connection with that culture; and
- (b) To have the support, opportunity and encouragement necessary:
 - (i) To explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and
 - (ii) To develop a positive appreciation of that culture.¹²³

115 Keryn Ruska and Zoe Rathus, ‘The Place of Culture in Family Law Proceedings: Moving Beyond the Dominant Paradigm of the Nuclear Family’ (2010) 7(20) *Indigenous Law Bulletin* 8, 8, citing Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No 31 (1986) 188–9 [344].

116 Stephen Ralph, ‘Family Court Mediation and Indigenous Families’, above n 51, 10.

117 Stephen Ralph, ‘Addressing the Needs of Indigenous Women in the Family Court’ (2004) 6(1) *Indigenous Law Bulletin* 21; Stephen Ralph and Stephen Meredith, ‘Working Together: A Model of Mediation with Aboriginal and Torres Strait Islander Families in the Family Court of Australia’ (2002) 40 *Family Court Review* 329, 331.

118 Stephen Ralph, ‘Family Court Mediation and Indigenous Families’, above n 51, 10.

119 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

120 *CRC* art 30.

121 See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

122 Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) 11 [41], 14–15 [63], 17 [74], 26–7 [130]–[131]. These amendments implemented recommendations 1, 3 and 4 of Family Law Council, ‘Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, *Out of the Maze*’ (Report, December 2004) 8 (‘*Response to Out of the Maze Report*’).

123 *Family Law Act* s 60B(3).

Section 60B(3) expanded the underlying principles of part VII and in doing so, made clear that for Aboriginal and Torres Strait Islander children, their right to culture must be considered in the family law process of determining what is in that child's best interests. The meaning of 'connection' with culture has since been interpreted to mean requiring an active and participatory connection to culture:

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 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.¹²⁴

This interpretation of the scope and meaning of the term 'connection' as an active, lived experience has been cited with approval by the Full Court of the Family Court of Australia in cases such as *Hort and Verran*¹²⁵ and *Sheldon and Weir*.¹²⁶

The 2006 amendments also inserted section 60CC which specified primary and additional considerations to be taken into account when determining what is in a child's best interests under section 60CA. In particular, when determining an Indigenous child's best interests, the court must consider:

- (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 of any proposed parenting order under this Part will have on that right.¹²⁷

The 2006 amendments also introduced a new requirement for the court to regard any kinship obligations and childrearing practices of a child's Indigenous culture in making parenting orders or in identifying persons who may exercise parental responsibility for an Aboriginal or Torres Strait Islander child.¹²⁸ One of the purposes of implementing this provision was to facilitate greater involvement of extended family members in the lives of children.¹²⁹

The 2006 amendments to the *Family Law Act* have been both praised and criticised. The Indigenous Issues Committee of the Law Society of New South Wales praised the amendments for at least partly addressing the recommendation made by the *Bringing Them Home Report* that there should be national standards legislation that presumes that it is in the best interests of the child

124 *B and F* [1998] FamCA 239, 29–30 (Moore J), affirmed and cited in, for example, *Davis v Davis* (2007) 38 Fam LR 671, 690–1 [77]; [2007] FamCA 1149, 77 (Young J); *Drake and Drake* [2014] FCCA 2950, [193] (Sexton J); *Offer and Wayne* [2012] FMCAfam 912, [90] (Brown FM); *Jerome and Tanzer* [2012] FamCA 548, [94] (Johnston J).

125 [2009] FLC ¶93-418, 83 771 [106] (Coleman, O'Ryan and Strickland JJ).

126 [2011] FamCAFC 212, [108]–[110] (Coleman, May and Loughnan JJ).

127 *Family Law Act* s 60CC(3)(h).

128 *Family Law Act* s 61F.

129 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 26–7 [131].

to remain with his or her Indigenous family, community and culture.¹³⁰ The Australian Law Reform Commission commended the amendments for recognising the importance of cultural heritage for Indigenous children.¹³¹ The amendments demonstrated some commitment from the federal Parliament in emphasising the importance for family courts to consider Indigenous cultural issues, particularly Indigenous childrearing practices.¹³² This was a ‘blind spot’ in the *Family Law Act* prior to 2006¹³³ that was raised in cases such as *Re CP*¹³⁴ and subsequent commentary.¹³⁵ However, the 2006 amendments have also been criticised for further entrenching Western nuclear family structures¹³⁶ and for not incorporating ATSICPP.¹³⁷ These issues are examined in more depth in Part III of this article.

2 *Family Law Policies and Engagement Strategies regarding Indigenous Issues*

The FCCA established an Indigenous Access to Justice Committee in 2012 comprised of FCCA judges and key community members. Led by the Committee, the FCCA developed a Reconciliation Action Plan 2014–2016 (‘FCCA RAP’) that has been endorsed by Reconciliation Australia.¹³⁸ The FCCA RAP is the first Reconciliation Action Plan to be created within a Chapter III court in Australia, and aims to increase access to justice for Indigenous Australians.¹³⁹ The FCCA RAP aims to improve relationships between the Court and Indigenous communities, to increase respect towards Aboriginal and Torres Strait Islander peoples by developing appropriate cultural competency training for staff and the judiciary,¹⁴⁰ and to develop opportunities for Indigenous people to enhance their educational and career prospects via placements and work experience opportunities.¹⁴¹

130 Indigenous Issues Committee of the Law Society of New South Wales, above n 70, 7. See *Bringing Them Home Report*, above n 7, 514 (recommendation 46a).

131 *Family Violence: A National Legal Response*, above n 63, 169.

132 Ruska and Ratus, above n 115, 11; Simon Moodie, ‘Parenting Orders and the Aboriginal Child’ (2010) 1 *Family Law Review* 61, 61; Stephen Ralph, ‘Recent Initiatives in Family Law and Implications for Aboriginal and Torres Strait Islander Families’ (2006) 75 *Family Matters* 82, 83.

133 Ralph, ‘Recent Initiatives in Family Law’, above n 132, 83.

134 (1997) 21 Fam LR 486. In *Re CP*, the Full Court of the Family Court of Australia recommended introducing a provision into the *Family Law Act* that would require judges to take account of Indigenous kinship care systems and childrearing practices: at 506 (Nicholson CJ, Ellis and Moore JJ). The Court also held that fluid child care arrangements may reflect culturally appropriate childrearing practices, rather than unreliability or neglect within a family: at 503, 506 (Nicholson CJ, Ellis and Moore JJ).

135 See, eg, Robyn Davis and Judith Dikstein, ‘It Just Doesn’t Fit’ (1997) 22 *Alternative Law Journal* 64, 67.

136 See Ruska and Ratus, above n 115, 10.

137 *Family Law Council Interim Report*, above n 10, 35. For criticism of the pre-2006 position, see, eg, John Dewar, ‘Indigenous Children and Family Law’ (1997) 19 *Adelaide Law Review* 217, 218; Davis and Dikstein, above n 135, 67.

138 See Federal Circuit Court of Australia, ‘Reconciliation Action Plan 2014–2016’ (2014).

139 *Ibid* 7–8.

140 *Ibid* 13.

141 *Ibid* 16.

The Family Court of Australia has developed an Indigenous Access Plan 2014–2016 ('FCA IAP').¹⁴² The FCA IAP acknowledges multiple barriers for Aboriginal and Torres Strait Islander families including:

- a lack of understanding about the family law system among Aboriginal and Torres Strait Islander clients;
- resistance to engagement with, and even fear of, family law system services;
- literacy and language barriers;
- a need for Indigenous specific and culturally competent mainstream services;
- the challenges arising from lengthy and multi-step Court processes for Aboriginal and Torres Strait Islander clients;
- the setting being based on Western notions of child-rearing, kinship and family, and concerns as to whether they operated in a culturally safe way; and
- lack of access to services for communities in regional and remote areas.¹⁴³

The FCA IAP was established by the Aboriginal and Torres Strait Islander Outreach Committee, previously called the Indigenous Working Group. The FCA IAP also aims to improve relationships, respect, and opportunities, and specifically details measures that responded to recommendations made by Stephen Ralph in his 2012 report – entitled *Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice*,¹⁴⁴ and the findings of the Family Law Council's 2012 report – entitled *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.¹⁴⁵ Some of the advised measures include providing cultural competency training for Family Consultants, for all registry staff to be aware of Indigenous support services and be able to link clients to them, cultural learning for judicial officers, building Indigenous cultural competency into the professional development system, providing access to interpreter services, an obligation for staff to enter Indigenous status into recording systems to improve data gathering, increasing Indigenous employment opportunities, and increasing commercial relationships with Indigenous businesses.¹⁴⁶

Notably, the FCCA has recently launched a pilot program which is trialling an 'Aboriginal Family Law List' where Indigenous staff members from Indigenous community support services and Indigenous legal services will be available to provide court support for Indigenous litigants.¹⁴⁷

There appears to be greater awareness across the family law system of the issues affecting Indigenous clients and a genuine willingness to take steps towards improving Indigenous access to justice through both law reform and family law policy. The Family Law Council has noted the increased awareness of

142 See Family Court of Australia, above n 40. This Plan has not been endorsed by Reconciliation Australia.

143 Ibid 5–6.

144 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11.

145 Family Law Council, 'Improving the Family Law System for Aboriginal and Torres Strait Islander Clients' (Report, February 2012).

146 See Family Court of Australia, above n 40, 9 (item 5), 10 (items 8–9), 11 (item 11), 13 (item 16), 13 (item 18), 9 (item 4), 16, (item 31), 16 (item 32).

147 The Shed and Wirringa Baiya Aboriginal Women's Legal Centre, 'Worried About Kids? Aboriginal Family Law List' (Pamphlet distributed at 3rd Annual Community Legal Centres NSW Aboriginal Family Law Day, 28 November 2016).

the importance of extended family to Indigenous people in the FCCA RAP.¹⁴⁸ However, it is also important to be critical and to demand a commitment that is specific and adequately funded. Particular measures that could be taken and recommendations for improvement have been thoroughly documented by Stephen Ralph, the Family Law Council and others.¹⁴⁹

III DISCUSSION

Analysis of family law cases involving Indigenous litigants reveals that judicial officers have developed a sophisticated understanding of the cultural and identity rights of Indigenous children and their families in family law proceedings. The lack of a legislated ATSI CPP in family law legislation is not necessarily a detriment for Indigenous children, as:

- the *Family Law Act* imposes an obligation on judicial officers to consider the right of a child to enjoy his or her Indigenous culture;¹⁵⁰
- the case law demonstrates that judicial officers have sophisticated understandings of Indigenous identity, the diversity of Indigenous peoples and the potential impact of removal on an Indigenous child's identity and maintenance of culture;¹⁵¹ and
- it is rare for child protection authorities to intervene in family law proceedings.¹⁵²

The case law demonstrates that family law courts are increasingly recognising Indigenous cultural practices, in particular, kinship obligations, childrearing practices and Torres Strait Islander traditional adoption practices. Family law courts are also allowing the evidence of Indigenous elders to be admitted in family law proceedings.

The relevance of cultural issues for Indigenous children and their families in family law matters is not a new phenomenon confronting family law courts.¹⁵³ Family law principles in relation to Indigenous culture have developed significantly since the establishment of the Family Court. Indigenous cultural issues are now legally relevant to judicial determinations of an Indigenous child's welfare and best interests. Under the current legislative framework, if the subject child in family law proceedings is an Indigenous child, judicial officers must consider, among other matters:

148 *Family Law Council Interim Report*, above n 10, 35.

149 See, eg, Stephen Ralph, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12 *Australian Journal of Family Law* 1; Ralph and Meredith, above n 117; Ralph, 'Family Court Mediation and Indigenous Families', above n 51; Ralph, 'Addressing the Needs of Indigenous Women', above n 117; Ralph, 'Recent Initiatives in Family Law', above n 132; Ralph, 'Indigenous Children and the Courts', above n 68; Ralph, 'Indigenous Australians and Family Law Litigation', above n 11; *Out of the Maze Report*, above n 49, 92 (recommendation 23).

150 *Family Law Act* s 60CC(3)(h)(i).

151 This proposition is developed further in Part III(C) of this article.

152 See Benjamin, above n 60, 103.

153 See, eg, *In the Marriage of Sanders* (1976) 10 ALR 604.

- the right of that child to enjoy his or her Aboriginal or Torres Strait Islander culture, which means the right of that child to maintain a connection with that culture and to have the support, opportunity and encouragement necessary to explore the full extent of that culture and develop a positive appreciation of that culture;¹⁵⁴ and
- any kinship obligations and childrearing practices of the child's Aboriginal or Torres Strait Islander culture.¹⁵⁵

Despite a legislative framework that appears to protect the cultural and identity rights of Indigenous children and recognises kinship obligations and childrearing practices, there are many barriers to accessing the family law system that are particular to Indigenous people.¹⁵⁶ Stephen Ralph argues that 'for many Indigenous families, recourse to the legal system for assistance in sorting out a family dispute is an undertaking that is fraught with difficulties that often extend beyond those encountered by other Australians'.¹⁵⁷

The barriers are multidimensional, however, for clarity, I will characterise the barriers as 'structural' issues, 'procedural' issues, and 'substantive legal' issues. However, all barriers must be examined in a holistic manner in order to understand the complexity of the issues confronting Indigenous people in accessing the family law system. Moreover, some of the issues listed here as 'procedural' or 'substantive legal' may also be structural issues and vice versa.

The Australian legal system is dominated by mainstream perspectives, that is, non-Indigenous Anglo-Australian perspectives, 'at all levels'.¹⁵⁸ However, 'many Aboriginal people do not want to be referred to mainstream services and be seen by non-Indigenous practitioners'.¹⁵⁹ Indigenous people have reported negative experiences with the broader Australian legal system.¹⁶⁰

Some barriers that have been identified across many areas of law, including family law, include: lack of cultural sensitivity¹⁶¹ and cross-cultural awareness,¹⁶² language issues,¹⁶³ lack of awareness of legal rights,¹⁶⁴ lack of being able to identify legal needs¹⁶⁵ and cost.¹⁶⁶ Furthermore, there is ongoing historical distrust

154 *Family Law Act* ss 60CC(3)(h), 60CC(6).

155 *Family Law Act* s 61F.

156 See, eg, *Out of the Maze Report*, above n 49, 9; *Response to Out of the Maze Report*, above n 122; Family Law Council, 'Improving the Family Law System', above n 145; *Family Law Council Interim Report*, above n 10; Josephine Akee, 'The Role of Indigenous Family Liaison Officers in the Family Court of Australia' (2006) 75 *Family Matters* 80.

157 Ralph, 'Addressing the Needs of Indigenous Women', above n 117, 20. See also Akee, above n 156, 80.

158 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 57.

159 Ralph, 'Family Court Mediation and Indigenous Families', above n 51, 11.

160 Ralph, 'Addressing the Needs of Indigenous Women', above n 117, 20; Ralph and Meredith, above n 117, 329.

161 Rebecca Smith, 'Care and Protection and Family Law Issues: An ALS Perspective' (2007) 82 *Precedent* 23, 24.

162 Cunneen and Schwartz, above n 30, 727.

163 *Ibid*; Akee, above n 156, 81.

164 Smith, above n 161, 23.

165 Cunneen and Schwartz, above n 30, 729, citing Dora Dimos, 'Civil Law ALS Outreach Review' (Report, Legal Aid New South Wales, March 2008) 5, quoting Dora Dimos, 'Civil Law Review' (Report, Legal Aid New South Wales, November 2003) 31.

of government departments and ongoing concerns about the potential for children to be removed forcibly.¹⁶⁷ These issues affect engagement with the federal family law system as well as the state child protection system. Furthermore, the acceptance and use of Western legal structures is widely seen by Indigenous people as a form of compliance,¹⁶⁸ and therefore as a source of disempowerment.

A Structural Issues

The structural barriers to accessing family law confronting Indigenous peoples are deeply linked to historical and cultural experiences of dispossession, the Stolen Generations, and disempowered engagement with Australian authorities and Australian law. There is ongoing mistrust and fear of family law courts and children's courts among Indigenous peoples because of the association of any legal system related to their children that may lead to the removal of them from their family unit.¹⁶⁹ This mistrust is deeply entrenched and has significantly contributed to Indigenous communities' reluctance to engage with family law systems.

Academics describe biases present in the family law system such as the predominance of a nuclear family structure¹⁷⁰ and heteronormativity.¹⁷¹ The literature identifies a bias whereby family law principles privilege mainstream Western/Anglo/European values, and do not adequately accommodate Indigenous values, cultural traditions or rights, and in doing so create ethnocentrism, bias, and potential discrimination. For example, a court may show a cultural bias against Indigenous childrearing practices that do not emphasise the non-Indigenous values of permanence and stability for children, as demonstrated in *Re CP*.¹⁷² The fluidity of Indigenous child care arrangements amongst the greater family network and community are opposed to Anglo-European notions of social and family organisation (manifested in the nuclear family paradigm) which are predominant in psychology and assessment criteria within family law systems and decision makers.¹⁷³

The perception of bias has also been experienced by Indigenous litigants engaging in family law processes. Research conducted by Stephen Ralph in 2011

166 Akee, above n 156, 81; *Family Law Council Interim Report*, above n 10, 97.

167 Ralph, 'Addressing the Needs of Indigenous Women', above n 117, 20, citing *Bringing Them Home Report*, above n 7; Ralph and Meredith, above n 117, 329.

168 See Cripps, above n 22, 26.

169 *Family Law Council Interim Report*, above n 10, 34.

170 See, eg, Dewar, above n 137, 219. The author argues that Australian family law reflects a nuclear model of family and relationships that are demonstrative of its Anglo-European heritage. See also Ruska and Ratus, above n 115, 10. The authors argue that the 2006 amendments to the *Family Law Act* embedded the concept of centrality of parents and privilege parents over other kinship carers.

171 See, eg, Alearo Zanghellini, 'Is There Such a Thing as a Right to Be a Parent?' (2008) 33 *Australian Journal of Legal Philosophy* 26, 59. The author asserts that there are ethnocentric and heteronormative biases in family law systems.

172 Dewar, above n 137, 222; see *Re CP* (1997) 21 Fam LR 486, 503, 506, where Nicholson CJ, Ellis and Moore JJ warned against conflating fluid child care arrangements (that may reflect culturally appropriate childrearing practices) with unreliability or neglect within a family.

173 Ralph, 'The Best Interests of the Aboriginal Child', above n 149, 4; Ralph and Meredith, above n 117, 333.

found that Indigenous clients perceived bias and unfairness against them in family court processes.¹⁷⁴ In the Court User Satisfaction Survey conducted by the Family Court and FCCA in 2015, Indigenous interviewees reported the lowest levels of satisfaction.¹⁷⁵ The main areas of dissatisfaction arose from: feeling that their case had been handled unfairly, feeling less safe than other interviewees and lack of clarity about what would happen during attendance at the Court.¹⁷⁶ As such, bias is also a procedural barrier. These issues are addressed in more detail in Part III(C)(3), which discusses the privileging of the nuclear family structure and failure to accommodate Indigenous cultural practices, including kinship obligations and childrearing practices. The possibility of judicial ethnocentrism in decision-making has been clearly recognised through a number of cross-cultural awareness training initiatives within the family law system.¹⁷⁷

Geographical remoteness is also a barrier for Indigenous clients in accessing the family law system.¹⁷⁸ Twenty-five per cent of Indigenous people and communities live in remote and very remote areas compared to two per cent of non-Indigenous people.¹⁷⁹ Generally, knowledge of legal rights and remedies is poor among Indigenous communities.¹⁸⁰ General lack of knowledge of the role and function of family law, processes and courts has also previously been identified as a major issue for Indigenous people.¹⁸¹ Litigants also experience confusion about where to deal with family matters involving children given the separation of federal and state jurisdictions regarding parenting orders, child protection, and family violence.¹⁸² Accessing family law is also made more difficult as family law service providers are often underfunded and under-resourced.¹⁸³

Disadvantage, in the sense of marginalisation, is entrenched for Indigenous people.¹⁸⁴ This is a structural issue rather than an endemic issue. Structural disadvantage has occurred via historical and cultural processes of non-Indigenous engagement with Indigenous cultures and peoples, through policy, law, as well as dominant social thought and ideologies.

Stephen Ralph argues that ‘there is ... a long-standing, widespread acknowledgement across all sectors of the legal system that cultural factors and socio-economic disadvantage are barriers to accessing justice within the Australian legal system and that these are barriers that confront Indigenous

174 Ralph, ‘Indigenous Australians and Family Law Litigation’, above n 11, 37.

175 Family Court of Australia and Federal Circuit Court of Australia, above n 43, 28.

176 Ibid 20, 26, 28.

177 Ralph, ‘The Best Interests of the Aboriginal Child’, above n 149, 1–2.

178 *Family Law Council Interim Report*, above n 10, 34; Cunneen and Schwartz, above n 30, 727; Ralph, ‘Addressing the Needs of Indigenous Women’, above n 117, 20.

179 See Cunneen, Allison and Schwartz, above n 27, 221.

180 Smith, above n 161, 23; see also Cunneen, Allison and Schwartz, above n 27; Cunneen and Schwartz, above n 30, 727.

181 Ralph and Meredith, above n 117, 329; Schwartz, Allison and Cunneen, above n 9, 65.

182 The Family Law Council has noted that the separation of legal systems concerning parenting orders, child protection and family violence is an area that requires reform: see *Family Law Council Interim Report*, above n 10, 96.

183 See Cunneen, Allison and Schwartz, above n 27, 235; Cunneen and Schwartz, above n 30, 741.

184 *Out of Home Care Report*, above n 8, 69; Cunneen and Schwartz, above n 30, 727.

people across all jurisdictions'.¹⁸⁵ Addressing the entrenched level of Indigenous disadvantage is a considerable yet crucial barrier to overcome in increasing access to legal justice for Indigenous people in Australia.¹⁸⁶

B Procedural Issues

Procedural issues are issues relating to procedures and processes within the family law system that impede Indigenous access to family law. The procedural issues mentioned below are not ordered in terms of importance or prevalence and are not an exhaustive list.

1 Formality

The formality of the family law system is a barrier for Indigenous clients.¹⁸⁷ Procedural issues such as having to complete forms may present as barriers for Indigenous people,¹⁸⁸ particularly for those whose level of literacy is low,¹⁸⁹ and yet this is a significant feature of the legal system. Levels of literacy for Indigenous people in Australia are generally lower compared to non-Indigenous Australians.¹⁹⁰ The formality of the family law system may be experienced more acutely by Indigenous litigants.

2 Cost

The cost of family law proceedings is a barrier for Indigenous families.¹⁹¹ Legal advice can be expensive¹⁹² and Indigenous Australians generally experience higher levels of poverty than non-Indigenous Australians.¹⁹³ Furthermore, community legal services and Aboriginal and Torres Strait Islander legal services may not receive adequate funding to allocate sufficient resources to family law matters, resulting in a lack of service provision in the area of family law.¹⁹⁴

3 Communication Issues

Communication breakdown between lawyers and Indigenous clients creates barriers for Indigenous clients in accessing family law.¹⁹⁵ Communicating with Indigenous clients may require specialised or trained staff, lawyers and judicial officers to be aware of Aboriginal English, to understand that English may be the

185 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 54.

186 Cunneen and Schwartz, above n 30, 727.

187 *Family Law Council Interim Report*, above n 10, 97. Cunneen, Allison and Schwartz found that in the Northern Territory the formality of family law necessitates assistance for Indigenous clients: Cunneen, Allison and Schwartz, above n 30, 236.

188 Akee, above n 156, 81.

189 *Family Law Council Interim Report*, above n 10, 35.

190 Douglas and Walsh, above n 53, 68.

191 *Family Law Council Interim Report*, above n 10, 97.

192 Akee, above n 156, 81.

193 Cunneen and Schwartz, above n 30, 738; Cripps, above n 22, 30.

194 Cunneen and Schwartz, above n 30, 726.

195 Cunneen, Allison and Schwartz found that communication breakdown between lawyers and Indigenous clients is an issue in the Northern Territory: Cunneen, Allison and Schwartz, above n 27, 236.

client's second or third language, an ability to use plain English, and competency to engage the services of a translator as needed. Lack of cross-cultural understanding or cultural competency may also contribute to communication breakdown. Differing sociocultural practices regarding issues such as 'who has the right to speak, Indigenous kinship relations, gratuitous concurrence, eye contact and temporal and spatial definitions'¹⁹⁶ may lead to miscommunication between the Indigenous client and staff member, lawyer or judicial officer. Cultural awareness is a crucial aspect of providing effective legal services to Indigenous clients.¹⁹⁷

4 *Lack of Indigenous Liaison Officers, Indigenous Family Consultants and Indigenous Family Dispute Resolution Practitioners*

The current lack of Indigenous Liaison Officers and Indigenous Family Consultants working at the Family Court and FCCA has been identified as an impediment to Indigenous access to family law.¹⁹⁸ Between 1996 and 2008, the Family Court had a program that employed six Indigenous Liaison Officers,¹⁹⁹ however the program was discontinued due to the Commonwealth government decision to place responsibility for these types of roles with community based agencies.²⁰⁰ While it functioned, the program had a 'highly significant impact on the relationship existing between Indigenous people and the broader Australian system of law'.²⁰¹ In 2004, the program won the Australian Institute of Judicial Administration Award for Excellence in Judicial Administration.²⁰² Recently, the Family Law Council called again for increased funding to provide for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers to specifically assist the family courts in improving engagement and outcomes for Indigenous families.²⁰³ There is also a lack of accredited Indigenous family dispute resolution practitioners.²⁰⁴

5 *Safety: Indigenous Children and Women*

The family law system does not provide the same type of risk management as in the child protection system. Concerns about safety and the level of risk management in the family law system have been raised by academics and researchers, particularly in regards to children,²⁰⁵ in the context of the

196 Cunneen and Schwartz, above n 30, 727.

197 Ibid.

198 *Family Law Council Interim Report*, above n 10, 107. See also Akee, above n 156, 81.

199 Ralph, 'Indigenous Children and the Courts', above n 68, 14.

200 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 59.

201 Ralph, 'Addressing the Needs of Indigenous Women', above n 117, 21.

202 Ralph, 'Indigenous Children and the Courts', above n 68, 14.

203 See *Family Law Council Interim Report*, above n 10, 107. The Council was repeating its recommendation from Family Law Council, 'Improving the Family Law System', above n 145, 101.

204 Stephen Ralph, 'Family Dispute Resolution Services for Aboriginal and Torres Strait Islander Families', above n 51.

205 See, eg, *Family Law Council Interim Report*, above n 10, 96; Benjamin, above n 60, 104.

increasingly complex risk issues in family law matters that come before the family courts.²⁰⁶

The Family Law Council has cast doubt on the capacity of family courts to adequately manage risk to children in families with complex needs and to ensure the safety of the children in family law disputes.²⁰⁷ Family law courts were originally designed to hear private law disputes, but the orders made are increasingly becoming public in nature; the courts determine issues such as parenting capacity, risk, the definition of ‘family violence’ and the definition of ‘safety’.²⁰⁸ Matters involving children and concerns for their safety are increasingly addressed by the family courts.²⁰⁹ Indigenous women confront unique risks as they often manage multiple and conflicting priorities such as ‘kinship, familial, community and cultural responsibilities together with safety’.²¹⁰ Indigenous women may also experience social and cultural pressures that do not exist for non-Indigenous women such as tolerating family violence to avoid shaming their family or community.²¹¹ Interaction with law authorities or the court may be perceived as community betrayal. Family law spaces may not be, or may not be perceived to be, safe places for Indigenous women.

C Substantive Legal Issues

1 Risk of Alerting Child Protection/Welfare Authorities

For those concerned about child protection intervention, a risk of engaging in family law is that the court may alert child protection services.²¹² Urgent circumstances and significant risk of harm to a child or children necessitate or justify temporary or final child protection authority intervention.

A recent example of temporary child protection authority intervention in family law proceedings is the case of *Department of Family and Community Services (NSW) and Annissa*.²¹³ Both the parents and children were Indigenous and there was a history of domestic violence, drug and alcohol abuse and neglect in the family. The Department found that the children were at a high risk of neglect and abuse living with their mother and that there were significant concerns around the father’s history of domestic violence.²¹⁴ The Court ordered

206 Helen Rhoades, John Dewar and Nareeda Lewers, ‘Can Part VII of the Family Law Act Do What Is Asked of It?’ (2014) 4 *Family Law Review* 150, 156.

207 *Family Law Council Interim Report*, above n 10, 96.

208 *Ibid* 95–6.

209 *Ibid* 96.

210 Cripps, above n 22, 30, citing Kyllie Cripps, Leanne Miller and Daphne Yarram, ‘Resistance and Renewal: Building and Supporting Community-Led Partnerships Initiatives: Responding to Family Violence in Indigenous Communities in Victoria’ (Community Report, Indigenous Law Centre, University of New South Wales, February 2012).

211 Douglas and Walsh, above n 53, 69, citing Suellen Murray, ‘“Why Doesn’t She Leave?”: Belonging, Disruption and Domestic Violence’ (2008) 31(1) *Women’s Studies International Forum* 65, 67.

212 Family courts have discretion to seek the intervention of the relevant child protection/welfare department in family law proceedings in any case that affects or may affect the welfare of the child: see *Family Law Act* s 91B.

213 [2015] FamCA 1131.

214 *Ibid* [55]–[75] (Foster J).

the Department to exercise sole responsibility and direct where the children would live until further orders were made.²¹⁵

The risk of child protection intervention contributes to the real fear maintained by Indigenous families that their children may be taken away or removed by child protection authorities.²¹⁶ However, intervention by a child protection authority does not necessarily foresee an outcome where the judicial officer will agree with the authority's proposal or that the matter will ultimately be transferred to the relevant child protection jurisdiction. The court can make a decision that is different to the authority's proposal if it is in the best interests of the child or children to do so.

For example, in the recent case of *Drake and Drake*, an Aboriginal grandmother had made an application to the FCCA seeking parental responsibility for her six Aboriginal grandchildren, who had been living with her since 2011.²¹⁷ The family law proceedings were pending when the New South Wales Department of Family and Community Services removed the six children from the grandmother's care without notice to her, her solicitor, the Independent Children's Lawyer or the Court.²¹⁸ It is also notable that in this case, the relevant guidelines for placement of Indigenous children were not followed by the Department.²¹⁹

At the final hearing, despite the Department forming the view that the grandmother did not have adequate parenting capacity,²²⁰ the Court held that the grandmother did have sufficient parenting capacity to care for her six grandchildren and made orders for all of the children to be returned to her and for her to have sole parental responsibility for the children.²²¹ Notably, the family law solution in this case was to make orders for the grandmother to engage with appropriate support services²²² in order to foster a safe environment for the children, whereas the solution sought by the Department was removal of the children.

In *Drake and Drake*, Judge Sexton criticised the child protection Department's management of the case and the weaknesses of the Department's proposal at the final hearing,²²³ including, inter alia:

- Lack of detail as to the children's future living arrangements if sole parental responsibility were granted to the Department, including whether or not the siblings would stay together and whether or not suitable Indigenous carers could be found.²²⁴

215 Ibid [10], [110] (Foster J).

216 See *Family Law Council Interim Report*, above n 10, 36.

217 [2014] FCCA 2950, [3] (Sexton J).

218 Ibid [4] (Sexton J).

219 Ibid [73] (Sexton J).

220 Ibid [3], [115] (Sexton J).

221 Ibid [3] (Sexton J).

222 Ibid [241] (Sexton J).

223 The Department's proposal included, inter alia, for sole parental responsibility to be granted to the Minister, rather than to the children's grandmother, and for the children to live in out-of-home care: see ibid [34] (Sexton J).

224 Ibid [230].

- Disregard of the children's emotional needs, including maintaining relationships with each other and with both parents.²²⁵
- Disregard of the children's need to maintain a meaningful connection with their culture.²²⁶
- Unhelpful approach to communicating with the grandmother, who was the primary carer. Judge Sexton stated:

The Department has never established a cooperative working relationship with the Grandmother ... [who] has felt intimidated rather than assisted when questioned about child protection concerns ... This Grandmother needs family support services, rather than constant monitoring.²²⁷
- The Department's decision to remove the children from the grandmother's care when the family law proceedings were already on foot, and without notice to the Court.²²⁸

Judge Sexton found 'that the Department caseworkers involved in this case have shown poor knowledge of and insight into how to build a cooperative working relationship with this Aboriginal Grandmother'.²²⁹

Community belief that child protection authorities will intervene in family law proceedings and remove children from their family and extended family is not an unfounded fear; rather, that fear is rooted in historical and contemporary experiences of marginalisation and oppression and a long history of government removals of Indigenous children from their families. However, overall, child protection authorities rarely become involved in family law proceedings.²³⁰ Cases such as *Drake and Drake* demonstrate the capacity of the family law courts to make decisions in the best interests of Indigenous children that also meet the broader community concerns about culturally appropriate placements for Indigenous children. In *Drake and Drake*, the application of family law principles, focusing on the best interests of the children and also considering their cultural and identity needs, provided a solution that was more holistic than, and preferable to, the solution sought by the child protection authority.

2 *Lack of ATSI CPP in the Family Law Act*

The lack of ATSI CPP in the *Family Law Act* acts as a barrier for Indigenous families.²³¹ There is a perceived risk involved for Indigenous families when choosing to engage with family law courts. Unanswered questions abound. What guarantees are in place to ensure the child will stay with family members or kin? What guarantees are in place to ensure that the Indigenous child's cultural identity is protected, preserved, and fostered in a positive way?

Family law courts have acknowledged the importance of Indigenous identity to an Indigenous child's wellbeing and the potential detriment caused by removal

225 Ibid [232].

226 Ibid.

227 Ibid [233].

228 Ibid [249].

229 Ibid [240].

230 Benjamin, above n 60, 103.

231 *Family Law Council Interim Report*, above n 10, 35.

out of their Indigenous culture, in particular to a non-Indigenous environment. In *In the Marriage of B and R*,²³² the Family Court acknowledged the unique experiences of Aboriginal people, including the experience of forced removals of children and subsequent identity crises arising out of growing up in a foreign environment and being isolated from their Aboriginal identity.²³³ The Court held that these factors are relevant to the Court's consideration of an Aboriginal child's welfare and what is in that child's best interests: 'Aboriginal culture and history and the interaction of Aborigines [sic] in a predominantly white culture are unique and judicial consideration of the significance must go much further than the fact that one has a right to know one's culture'.²³⁴

The Court accepted evidence that the effects on Aboriginal children of being raised in a Western environment where their Aboriginal identity was not reinforced could contribute to 'severe confusions of that identity and profound experiences of alienation'.²³⁵ The Court also held that life as an Aboriginal person means confronting discrimination on a daily basis, that the removal of an Aboriginal child to a foreign environment is likely to have a devastating impact on that child, that Aboriginal identity and self-esteem is more likely to be reinforced from within the child's Aboriginal community, and that children brought up in ignorance of their Aboriginality or in circumstances which belittle or deny their Aboriginality are likely to experience significant impacts on their self-esteem and self-identity into adult life.²³⁶

Poignantly, the Court held that these factors are unique to Aboriginal experiences and are relevant to determining the welfare and best interests of an Aboriginal child,²³⁷ and that:

By failing to recognise these uniquely Aboriginal experiences, its effect is to administer something less than equal justice to Aboriginal people. By pretending that these experiences are not what they are – tragic, relevant, and unique – this approach treats Aboriginal people as if they were not who they are. It recognises less than their complete identity and humanity. That is an effect which this court finds objectionable, and the approach taken is one which we reject.²³⁸

In the more recent case of *Nineth and Nineth [No 2]*,²³⁹ Murphy J held that it would be 'profoundly detrimental' for the child to be deprived of being able to 'live his Aboriginality',²⁴⁰ and that the child 'deserves the opportunity to live his Aboriginality'.²⁴¹ In this case, the child had been living with his great-aunt. The great-aunt was, in fact, an Aboriginal woman, who placed limited importance on her Aboriginality and placed more importance on her Christian faith.²⁴² It was held that, in respect of nurturing the child's Aboriginal identity, it would be in the

232 (1995) 19 Fam LR 594.

233 Ibid 601–2 (Fogarty, Kay and O'Ryan JJ).

234 Ibid 594 (Fogarty, Kay and O'Ryan JJ).

235 Ibid 601 (Fogarty, Kay and O'Ryan JJ).

236 Ibid 605 (Fogarty, Kay and O'Ryan JJ).

237 Ibid 623 (Fogarty, Kay and O'Ryan JJ).

238 Ibid.

239 [2010] FamCA 1144.

240 Ibid [126].

241 Ibid [130].

242 Ibid [67], [93] (Murphy J).

best interests of the child to be placed with his grandmother, as she was an Aboriginal woman who placed great emphasis on her Aboriginality and had a deep belief in her culture and family.²⁴³

Furthermore, the family courts have acknowledged the diversity of Indigenous peoples of Australia and that Indigenous peoples and cultures cannot be viewed as homogenous. In *Re CP*,²⁴⁴ the Full Court of the Family Court ordered a retrial regarding parenting orders that had granted parental responsibility of a Tiwi child to a mainland Aboriginal person.²⁴⁵ The Full Court held that the trial judge had not acknowledged the specificity of Aboriginal and Torres Strait Islander cultures, and how this might impact on the identity and development of the Tiwi child in the case.²⁴⁶ The Full Court held that the trial judge had ascribed too little weight to the distinctiveness of Tiwi culture from the culture of other Aboriginal groups,²⁴⁷ and had placed insufficient recognition on the specificity of the child's own distinctive cultural heritage as a Tiwi child and that the child's identity was 'inextricably bound' up in this.²⁴⁸

The Full Court held that it was incorrect to view Aboriginal cultures as homogenous, but instead recognised that there are significant differences between Aboriginal groups.²⁴⁹ It is important for a judge to understand the specificity of a child's cultural heritage and the impact on the child's future welfare should the cultural heritage be denied or limited.²⁵⁰ In reaching this decision, the Full Court relied upon the evidence of a Tiwi man who was, according to Tiwi law and culture, the child's grandfather,²⁵¹ and who stated the importance of the child returning to the Tiwi islands and the specificity of Tiwi culture compared to Aboriginal cultures on mainland Australia:

I need to see C to come to Tiwi in about, say the next couple of weeks time because we need him at Nguui in the Tiwi island because it's very important that he learns a lot of our culture because the culture is different between mainland in the Northern Territory. We got traditional culture design – culture doesn't compare – the traditional cultural doesn't compare with Aborigine in the northern part of the mainland. We different altogether. We different language, different dialogue, different dances, different dreaming we got.²⁵²

The diversity and specificity of Indigenous cultures has also been acknowledged in *Davis v Davis*.²⁵³ In that case the child was living with her white father and paternal grandmother in La Trobe Valley, Victoria.²⁵⁴ The child's

243 Ibid [130] (Murphy J).

244 (1997) 21 Fam LR 486.

245 Ibid 492–4, 505 (Nicholson CJ, Ellis and Moore JJ).

246 Ibid 500 (Nicholson CJ, Ellis and Moore JJ).

247 Ibid.

248 Ibid.

249 Ibid 501, 504 (Nicholson CJ, Ellis and Moore JJ).

250 Ibid.

251 According to Western concepts of family relationships, this man was the child's first cousin once removed.

252 *Re CP* (1997) 21 Fam LR 486, 505 (Nicholson CJ, Ellis and Moore JJ).

253 (2007) 38 Fam LR 671.

254 Ibid 671.

mother was a West Arrente woman who lived in Central Australia.²⁵⁵ Young J made orders for the child to relocate with her mother to Central Australia so that the child would be able to enjoy her right to her specific and unique Western Arrente culture. Young J found that the child had a right to ‘enjoy her correct Aboriginal culture with other people(s) who share that same culture’.²⁵⁶ His Honour found that it would not be sufficient for the child to continue to live in La Trobe Valley with exposure to the Aboriginal Koori culture of that area. Young J held that for the child to maintain her cultural connections it was required for her to spend time with family members and her Indigenous community.²⁵⁷

Despite ATSI CPP not having been incorporated into family law legislation, it appears that judicial officers exercising family law jurisdiction have a sophisticated understanding of the implications of placements and child care arrangements for Indigenous children and the impact on their identity, self-esteem, and continuing connection to culture. Judicial officers also appear to understand the diversity of Indigenous peoples and how this affects a determination of a culturally appropriate living arrangement for an Indigenous child. *In the Marriage of B and R*,²⁵⁸ *Nineth and Nineth [No 2]*²⁵⁹ and *Davis v Davis*²⁶⁰ demonstrate that judicial officers exercising family law jurisdiction have sophisticated understandings of Indigenous cultural diversity and the importance of culturally appropriate living arrangements for Indigenous children and the potential adverse effects of *culturally inappropriate* arrangements.

While this is reassuring, there is nothing to be lost, and only more culturally appropriate decisions to be gained, by incorporating the ATSI CPP or equivalent principles into the *Family Law Act*, particularly if the principles are to operate under the broad umbrella principle of the best interests of the child.

3 Nuclear Family Structures and Accommodating Indigenous Cultural Practices and Values

It has been argued that the construction of ‘family’ in the *Family Law Act* privileges the concept of the nuclear family; that the concept of ‘family’ centres around the existence of two parents and the relationship of the child with those two parents.²⁶¹ An emphasis on nuclear family structures and the relationship between parents and child can conflict with Indigenous childrearing values,²⁶² by limiting what is considered to be ‘normal’. For example, in Indigenous cultures, it may be ‘normal’ for a child to be raised by multiple female extended family and community members rather than just the child’s biological parents. Often,

255 Ibid.

256 Ibid 701 [130].

257 Ibid 689–90 [70]–[72].

258 (1995) 19 Fam LR 594.

259 [2010] FamCA 1144.

260 (2007) 38 Fam LR 671.

261 Ruska and Ratus, above n 115, 8.

262 Ibid 11.

Indigenous familial responsibilities for childrearing are shared among Indigenous women.²⁶³

Stephen Ralph argues that:

The Aboriginal perspective is based upon a collectivist view of family and social life that sees responsibility for the growing up of children invested in many people. According to this view children come to trust in the capacity and commitment of a multitude of people to care for them and nurture them through childhood and into adulthood. By this means children come to take their place in Aboriginal society where responsibilities and obligation to family and kin are deeply rooted and pervasive.²⁶⁴

Rebecca Smith argues that the best interests of the child principle does not accommodate Indigenous family structures and may fail to recognise fundamental cultural differences.²⁶⁵ The United Nations Committee on the Rights of the Child has noted that applying the best interests of the child principle to Indigenous children requires particular attention:

the best interests of the child is conceived both as a collective and individual right ... [it] requires consideration of how the right relates to collective cultural rights ... In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.²⁶⁶

The Committee recommended that for any legislation, policy or program affecting Indigenous peoples there should be consultation with Indigenous communities and the opportunity for those communities to meaningfully contribute to how the best interests of Indigenous children can be decided 'in a culturally sensitive way'.²⁶⁷

Furthermore, Indigenous litigants have expressed dissatisfaction for the ways in which courts have considered cultural issues under the best interests of the child principle:

Comments provided by Indigenous litigants in interview revealed that many believed the concern they expressed about the importance of cultural issues was ignored, or at worst viewed as a disingenuous attempt to gain a strategic advantage over the non-Indigenous other party. Several litigants expressed anger and distress at having their Aboriginal identity questioned and challenged during court proceedings.²⁶⁸

The same study that reported this dissatisfaction also found that Indigenous clients were not satisfied with the assessment of cultural issues in family reports.²⁶⁹ The limited research available on family reports indicates that family report writers may misunderstand the complexities of family violence,

263 Cripps, above n 22, 28, citing Heather Goodall, "'Assimilation Begins in the Home": The State and Aboriginal Women's Work as Mothers in New South Wales, 1900s to 1960s' (1995) 69 *Labour History* 75, 92. See also Robertson, Demosthenous and Demosthenous, above n 114, 37.

264 Ralph, 'The Best Interests of the Aboriginal Child', above n 149, 5.

265 See Smith, above n 161, 25.

266 Committee on the Rights of the Child, *General Comment No 11: Indigenous Children and Their Rights under the Convention*, 50th sess, UN Doc CRC/C/GC/11 (12 February 2009) 6–7 [30]–[32].

267 *Ibid* 7 [31].

268 Ralph, 'Indigenous Australians and Family Law Litigation', above n 11, 47.

269 *Ibid*.

particularly the gendered nature of family violence and the link to child abuse.²⁷⁰ The inconsistent quality of family reports²⁷¹ may particularly affect Indigenous women, who experience unique forms of family violence.²⁷² As judicial officers may privilege family reports as a form of evidence in family law proceedings,²⁷³ it is critical that family report writers are given adequate cultural competency training as well as family violence training, including on how family violence affects Indigenous women. There is limited research available on family reports and family violence.²⁷⁴ There is need for future research on how family reports address family violence and cultural issues related to Indigenous women, men and children.

The concern that family law privileges a Western nuclear family structure to the detriment of Indigenous family structures and childrearing practices has been acknowledged in legislative reform by the insertion of section 61F into the *Family Law Act* in 2006.²⁷⁵ The case law demonstrates that Indigenous cultural practices in regards to childrearing are relevant in determining who may be a culturally appropriate carer for an Aboriginal or Torres Strait Islander child in certain circumstances. For example, in *Davis v Davis*, Young J considered section 61F and found that the mother's Western Arrente kinship and cultural practices would inevitably play an increasingly relevant role in the development of the child's identity,²⁷⁶ and that many members of the mother's extended family would be involved in the care, education and teaching of culture and custom to the child²⁷⁷ at particular times in various locations.²⁷⁸

There is no presumption or preferential position that applies to parents over non-parents in family law.²⁷⁹ The Full Court of the Family Court has held that each application for a parenting order will be determined on 'its own facts and having regard to the best interests of the child as the paramount consideration'.²⁸⁰ In interpreting section 60CC of the *Family Law Act* as to what are the best interests of the child, 'it is not parenthood which is crucial to the best interests of the child, but parenting – and the quality of that parenting and the circumstances in which it is given or offered by those who contend for parenting orders'.²⁸¹ However, Keryn Ruska and Zoe Rathus maintain there is a tendency for judicial

270 See Rachael Field et al, 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25 *Journal of Judicial Administration* 212, 226.

271 Ibid 235.

272 See Cripps, above n 22, 30; Douglas and Walsh, above n 53, 69.

273 Field et al, above n 270, 226.

274 Ibid 236; Samantha Jeffries et al, 'Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence? Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System' (2016) 39 *UNSW Law Journal* 1355, 1356, 1365.

275 See Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill (Cth) 27 [130]–[131].

276 *Davis v Davis* (2007) 38 Fam LR 671, 695 [98].

277 Ibid 694 [95].

278 Ibid 695 [99].

279 *Department of Family and Community Services (NSW) and Annissa* [2015] FamCA 1131, [22] (Foster J).

280 *Valentine and Lacerra* (2013) 49 Fam LR 255, 267 [43] (Faulks DCJ, Coleman and Strickland JJ).

281 *Yamada and Cain* [2013] FamCAFC 64, [27] (Thackray, Murphy and Macmillan JJ) (emphasis in original).

officers to privilege the ‘familiar norms’ of the nuclear family structure, and that this contributes to a ‘privileging of parents over other kinship carers’.²⁸²

In *Donnell v Dovey*,²⁸³ the subject child’s sister sought a parenting order and asserted that according to Wakka Wakka²⁸⁴ traditions ‘it is the responsibility of an eldest child to raise a younger sibling in circumstances where the parents have passed away’.²⁸⁵ The child had been living with his adult sister and her family since their mother had died.²⁸⁶ The father was a Torres Strait Islander man who wanted sole parental responsibility for the child and for the child to live with him.²⁸⁷ The primary judge had assumed that it would not be culturally inappropriate (that is, it would not be inconsistent with Wakka Wakka culture) for the child to live with his father.²⁸⁸

The Full Court of the Family Court found that the primary judge had overlooked section 61F by not having regard to the kinship obligations and childrearing practices of the child’s Aboriginal and Torres Strait Islander cultures.²⁸⁹ The Full Court stated that it was crucial to consider section 61F in any case involving an Aboriginal or Torres Strait Islander child.²⁹⁰ The Full Court referred to the Explanatory Memorandum that explained the purpose of introducing section 61F into the *Family Law Act*: to ‘facilitate greater involvement of extended family members in the lives of children’.²⁹¹ The Full Court also noted the importance for family law courts to:

take judicial notice of the fact that there are marked differences between indigenous and non-indigenous [sic] people relating to the concept of family ... it cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous [sic] children ...²⁹²

The family courts have demonstrated a greater recognition of the importance of Indigenous extended family to Indigenous children.²⁹³ The decision in *Drake and Drake*²⁹⁴ was commended by the Family Law Council for ‘demonstrat[ing] a greater recognition of the importance of extended family for Aboriginal and Torres Strait Islander children’.²⁹⁵

282 Ruska and Rathus, above n 115, 11, arguing this was the case in *Donnell v Dovey* (2010) 42 Fam LR 559.

283 (2010) 42 Fam LR 559.

284 The Wakka Wakka are an Indigenous group of the Burnett Region in Queensland: see State Library of Queensland, *Indigenous Languages Map of Queensland* (2016) <http://www.slq.qld.gov.au/resources/atasi/languages/indigenous-languages-map?result_24045_result_page=6>.

285 *Donnell v Dovey* (2010) 42 Fam LR 559, 569–70 [49] (Warnick, Thackray and O’Ryan JJ).

286 *Ibid* [4] (Warnick, Thackray and O’Ryan JJ).

287 *Ibid* [16] (Warnick, Thackray and O’Ryan JJ).

288 *Ibid* 593–6 [173]–[192] (Warnick, Thackray and O’Ryan JJ).

289 *Ibid* 631 [344] (Warnick, Thackray and O’Ryan JJ).

290 *Ibid* 594 [178] (Warnick, Thackray and O’Ryan JJ).

291 *Ibid* 594 [179] (Warnick, Thackray and O’Ryan JJ), citing Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 27 [131]. This section implements recommendation 22 of the *Out of the Maze Report*, above n 49, 91. This recommendation was reiterated in *Response to Out of the Maze Report*, above n 122, 5.

292 *Donnell v Dovey* (2010) 42 Fam LR 559, 625 [321] (Warnick, Thackray and O’Ryan JJ).

293 *Family Law Council Interim Report*, above n 10, 35.

294 [2014] FCCA 2950.

295 *Family Law Council Interim Report*, above n 10, 35–6.

The family courts have also acknowledged the particular importance of the role of siblings for an Indigenous child. In *Nineth and Nineth [No 2]*,²⁹⁶ the Family Court held that one reason for placing the Aboriginal child with his Aboriginal grandmother was due to the child's right to be reunited with his Aboriginal siblings and develop a relationship with them.²⁹⁷ The Court held that the need for the child's relationship with his siblings was important for any child regardless of cultural heritage, *however*, the relationships between Aboriginal siblings are particularly important *because* of their Aboriginality, and the understood importance of family and kin in Indigenous families.²⁹⁸

Another example of how family law courts are increasingly recognising Indigenous childrearing practices is in the circumstances where the Family Court has encountered the issue of Torres Strait Islander traditional adoptions and facilitated parenting and residence arrangements for the benefit of the Torres Strait Islander child. The family courts have been involved in dealing with parenting cases involving Torres Strait Islander traditional adoption practices called 'Kupai Omasker'.²⁹⁹ The practice is widespread in Torres Strait Islander culture and has a spiritual and cultural relevance that does not exist in Western adoptions.³⁰⁰

The case of *Lara v Marley*³⁰¹ involved a child in such a scenario. Two elders and a court-appointed expert gave evidence about Kupai Omasker and its practice within the Torres Strait Islands.³⁰² One elder explained that in the Islander community, the handing over of a child by a biological parent is a permanent arrangement, where the child is usually given to extended family members and the child adopted is not meant to find out the identity of their natural parents until he or she is around 21.³⁰³ An elder of the Kaurareg people gave evidence that Kerrnge law binds the Kaurareg people, and when a couple is unable to look after their own child, they may give that child to an extended family member.³⁰⁴ At that point, parental responsibilities and obligations transfer to the new parents.³⁰⁵ The court-appointed expert gave evidence that traditional adoption practices occur throughout the Torres Strait and that there are significant differences between Meriam culture in the east and the culture in the Wester Islands.³⁰⁶

Torres Strait Islander traditional adoptions are not recognised by Australian law.³⁰⁷ However, there are practical difficulties that arise for the child in question

296 [2010] FamCA 1144.

297 *Nineth and Nineth [No 2]* [2010] FamCA 1144, [112] (Murphy J).

298 *Ibid.*

299 Kupai Omasker is the concept of biological parents giving a child to another family as a permanent arrangement for that family to raise the child: see *Lara v Marley* (2003) 32 Fam LR 270, 275–6 [37]–[46] (Nicholson CJ).

300 *Ibid* 275 [37]–[38] (Nicholson CJ).

301 (2003) 32 Fam LR 270.

302 *Ibid* 276 [47]–[48] (Nicholson CJ).

303 *Ibid* 276 [49]–[50] (Nicholson CJ).

304 *Ibid* 277 [57] (Nicholson CJ).

305 *Ibid.*

306 *Ibid* 277 [63] (Nicholson CJ).

307 *Ibid* 275 [39] (Nicholson CJ).

who has been the subject of such a traditional adoption. For example, there are issues regarding inheritance, proof of identity, or obtaining parental consent to participate in certain activities.³⁰⁸ Regarding inheritance, after a child is given to another family under Kerrnge law, the child's inheritance rights are suspended and the obligation is transferred to the new parents.³⁰⁹ However, under succession law, this will not be acknowledged and the child will remain entitled to the inheritance of his or her birth parents.³¹⁰ The birth parents will also remain liable for child support under the *Child Support (Assessment) Act 1989* (Cth).³¹¹ The Family Court has facilitated the making of residence and parenting orders to assist with some of the practical difficulties.³¹²

Nicholson CJ held that:

A residence order does not amount to an adoption order, and can of course be subsequently revoked or varied in appropriate cases. It does, however, have the advantage of recording such arrangements and obviating some of the practical difficulties involved in non-recognition of the practice by conferring parental responsibility upon the receiving parents.³¹³

Nicholson CJ held that it is not the role of the Court to determine whether or not a traditional adoption has taken place³¹⁴ – this role is for the community in which the practice occurs.³¹⁵ Rather, Nicholson CJ held that ‘the court’s role is simply to recognise that fact and make orders accordingly in the best interests of the child’.³¹⁶

It is notable that despite the lack of formal legal recognition of Torres Strait Islander traditional adoptions that the Family Court has made concerted efforts to assist families with practical difficulties and disputes arising out of a traditional Torres Strait Islander adoption arrangement. The Family Court appears to follow a process that involves Indigenous Family Consultants and elders, and seeks expert evidence via elders or from other suitable culturally appropriate sources.³¹⁷ The Family Court is effectively providing legitimacy to the informal adoption arrangement by granting parental responsibility to the ‘adoptive parents’. Furthermore the Family Court is recognising Indigenous traditional adoption without imposing the ideas and structure of Western adoption. The Family Court is actively involved in a process of facilitating the practical difficulties

308 Ibid.

309 Ibid 277 [57] (Nicholson CJ).

310 See, eg, *Succession Act 2006* (NSW) s 127.

311 *Child Support (Assessment) Act 1989* (Cth) ss 3, 25A.

312 *Lara v Marley* (2003) 32 Fam LR 270, 275 [39] (Nicholson CJ).

313 Ibid 275 [40].

314 Ibid 275 [44], quoting *Kitchell Zitha Bon* (Unreported, Family Court of Australia, Buckley J, No TV 2198 of 1997, 4 September 2001):

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

315 *Lara v Marley* (2003) 32 Fam LR 270, 275 [42] (Nicholson CJ).

316 Ibid.

317 Ibid 275 [41] (Nicholson CJ).

concerning children who have been the subject of traditional Torres Strait Islander adoption. This is very encouraging.

4 *Admissibility and Reliability of Evidence of Indigenous Elders*

The family courts are accepting the evidence of Indigenous elders in family law proceedings. In the case of *Hort and Verran*, the Full Court of the Family Court held that the evidence of an Indigenous elder is considered to be evidence of an ‘appropriately qualified expert’ for the purposes of giving evidence about Aboriginal cultural issues and the relationship between Aboriginality and the best interests of the child.³¹⁸ Although the substantive appeal was largely unsuccessful, the Full Court commented on the role of evidence provided by Indigenous elders.³¹⁹

One ground of appeal was that the trial judge had erred in making the primary decision without anthropological evidence.³²⁰ The Full Court held that although it is important to obtain the evidence of an appropriately qualified expert in relation to the child’s Aboriginality, the relevant expert need not necessarily be an anthropologist.³²¹ The Full Court held that in this case, the grandmother, as a Tiwi elder, was an appropriately qualified expert with respect to the children’s Tiwi identity and culture:³²²

It is to be remembered that the cultural heritages of the hundreds of Indigenous tribes in this country vary significantly, and that the culture is preserved and passed on by the Indigenous Elders to whom it is entrusted, via the oral tradition. Thankfully, it is now generally accepted in Australia that Aboriginal peoples can speak for themselves, particularly in relation to their own culture and traditions. The potential for non-Aboriginal Euro-centric impressions or interpretations to usefully inform Courts in relation to Aboriginality must now be limited in ways it was not in earlier times.³²³

In *Donnell v Dovey*, the Full Court also affirmed that evidence related to Indigenous cultural practices does not necessarily need to be given by an anthropologist or be the subject of peer-reviewed research, but may be given by an elder of the Indigenous community:³²⁴

We accept that the best evidence may be that given, if it is available, by an elder or such other person within the indigenous [sic] community who is accepted by the community as being able to speak with authority on its customs.³²⁵

318 [2009] FLC ¶93-418, 83 770 [104] (Coleman, O’Ryan and Strickland JJ). The Aboriginality of a child is a matter which is relevant to the welfare of the child and accordingly evidence from an appropriately qualified expert should be adduced and taken in to account: *In the Marriage of B and R* (1995) 19 Fam LR 594, 624 (Fogarty, Kay and O’Ryan JJ).

319 In this case, the Tiwi elder who gave evidence about the children’s Tiwi culture and traditions was also the grandmother of the children. For this reason, the Court held that the grandmother could not be regarded as an impartial witness, however this did not affect the reliability of her evidence: see *Hort and Verran* [2009] FLC ¶93-418, 83 774 [120] (Coleman, O’Ryan and Strickland JJ).

320 *Ibid* 83 769 [98].

321 *Ibid* 83 770 [102].

322 *Ibid* 83 770 [104].

323 *Ibid* 83 774 [121].

324 *Donnell v Dovey* (2010) 42 Fam LR 559, 605 [228] (Warnick, Thackray and O’Ryan JJ).

325 *Ibid*.

*Hort and Verran*³²⁶ demonstrates the growing acceptance of the family courts of the reliability of Indigenous knowledge, a greater willingness to allow oral evidence of Indigenous elders in court proceedings, and a better understanding of the relevance of Indigenous cultures and traditions, as told by elders, to the best interests of Indigenous children, particularly in relation to their identity and development needs.

IV CONCLUSION

A Benefits of Family Law for Indigenous People

There are benefits to be gained from proactive engagement with the family law system.³²⁷ Family law is a forum that can enable Indigenous families and communities to provide their own solutions to keeping children safe within family and cultural structures, prior to the reactive intervention of child protection services.³²⁸ Family law processes offer a level of control and agency to Indigenous clients.³²⁹ Family law courts can make orders that keep children safe, as well as take into account specific needs and interests of the Indigenous child. Furthermore, family law can be engaged as an early intervention process.³³⁰ There will be better outcomes for Indigenous families and children if they are referred to the family courts at an early stage.³³¹

B Limitations and Future Research

This article intends to provide an overview of the legislative framework, and review of recent case law, research and academic articles available regarding Indigenous access to family law in Australia, despite the limitations of the available research. The author has framed family law as an area of law that provides for Indigenous rights to culture and identity, and, in comparison, criticises current practices under child protection laws. However, the author acknowledges the argument privileges family law over child protection law. As previously stated, child protection services perform a crucial societal function in protecting children from harm that cannot be displaced by family law. Furthermore, families that have already engaged or been approached by child protection services may find themselves 'boxed in' by the child protection jurisdiction.

The article's proposal for increasing Indigenous access to family law is limited by the structural, procedural, and substantive legal inequities and disadvantages experienced by Indigenous Australians in accessing legal justice.

326 [2009] FLC ¶93-418.

327 See Vicky Kuek, 'Aboriginal Family Law Roadshow: Law Society Visits Broken Hill' (2016) 21 *Law Society of New South Wales Journal* 71, 71.

328 Ibid.

329 Indigenous Issues Committee of the Law Society of New South Wales, above n 70, 9.

330 Ibid 2, 10.

331 Ibid 10.

Disadvantage must not be equated with deficit,³³² rather, the author intends to place the burden of increasing knowledge about and improving access to family law options on leaders, community services, legal services and providers and governments at both state and federal levels. The author presses for *increased* and *more culturally safe* family law engagement with Indigenous people and communities in Australia.

Research is needed in many areas including, in particular, the intersection between the family law and child protection jurisdictions and critique of both areas of law from international human rights and Indigenous perspectives. Future directions for research include:

- numbers of Indigenous persons who are filing applications in family law courts;
- the progress of matters with Indigenous parties through the mediation/dispute resolution phase and into interim and final hearing stages;
- the cultural competency of court staff including judicial officers and family consultants; and
- whether providing legal education for community and support services will increase Indigenous access to family law.

It would also be useful for a database to be created which documented family law decisions involving Indigenous children and Indigenous parties, including, for example:

- what issues related to culture/identity were taken into account;
- what, if any, interactions occurred between the family law court and child protection authorities, including whether the relevant child protection authority was requested to intervene in the proceedings, whether or not the authority declined or accepted to do so;
- if the relevant child protection authority did intervene in proceedings then what impact did the authority's proposals have on the ultimate outcome; and
- whether the matter was ultimately transferred/referred to the child protection jurisdiction or remained within the family law jurisdiction.

Qualitative research is also needed to record Indigenous litigants' current experiences of the family law court system and suggestions for increasing accessibility and law reform.

C Moving Forward

There are systemic, procedural and substantive legal issues that confront Indigenous people in accessing legal justice in Australia. However, family law

332 The discourse of deficit, and the related discourse of victimhood, pathologises representations of Indigenous identity to essentialised narratives of deficiency and victimhood in the face of colonisation. Such essentialised representations must be avoided so that the plurality of Indigenous experiences, identities and cultures may be more freely expressed and accepted by the mainstream polity.

has the potential to meet some of the cultural and legal needs and interests of Indigenous families and communities, particularly the cultural and identity rights of Indigenous children. Family law is a channel that can be used by Indigenous people to develop culturally safe care arrangements for their children. Despite Indigenous communities' difficulties in engaging with Australian legal institutions, the *Family Law Act* offers a level of control and agency that is not available through child protection processes. Family law can be engaged as an early intervention process, whereas child protection authorities react to an allegation of neglect, abuse or family violence. Family law early intervention may pre-empt the need for child protection crisis management. Family law court orders reflect care arrangements for an Indigenous child in the context of both Western standards of safety and in the context of their Indigenous culture. Family law legislation and jurisprudence obliges judicial officers to consider the cultural rights of Indigenous children, including kinship and childrearing practices that may differ from Anglo-Australian practices.

Overall, the Australian family law system appears to be encouraging increased use by Indigenous communities. However, there is significant scope for the family law system to become more accessible and more culturally safe for Indigenous litigants. Family law systems must increase accessibility to family law options for Indigenous people as part of a broader commitment to increasing equitable access to justice for Indigenous peoples and in pursuit of reconciliation. Future action could include increasing the knowledge of Indigenous communities of family law options (leading to the possibility of choice and empowerment), gaining more funding and resources for Indigenous service providers (increasing support services), continuing law reform that aligns family law legislation and practice with international human rights norms regarding the rights of Indigenous peoples, and ensuring all court staff, lawyers working with Indigenous clients, and other service providers receive cultural competency training. Such action is, of course, subject to limited resourcing and government funding. However, it is critically important to increase the capacity of legal services and providers, including courts, community support services and Indigenous communities to be able to identify and address Indigenous family law needs and keep Indigenous children safe within family and kinship networks.