



FAMILY LAW COUNCIL

*Report*

**Recognition of traditional Aboriginal  
and Torres Strait Islander  
child-rearing practices**

**Response to Recommendation 22: Pathways Report,  
*Out of the Maze***

DECEMBER 2004

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## CONTENTS

	<b>Page</b>
Terms of Reference	4
Full text of Recommendation 22	4
Summary of Advice	5
Recommendations	7
<b>1. Introduction</b>	<b>9</b>
<b>2. What happen now – the current law</b>	<b>10</b>
<b>3. The origins of the proposed changes</b>	<b>12</b>
<b>4. The consequences of the proposed changes</b>	<b>14</b>
Council’s conclusions concerning the proposed changes	14
Recommendation 22(a)	15
Kupai Omasker – A Torres Strait Islander Solution	19
Recommendation 22(b)	19
Recommendation 22(c)	21
Conclusion	22
<b>5. Problems of Evidence</b>	<b>23</b>
How a court receives relevant evidence	24
(a) Child Representative	25
(b) Expert Evidence	25
(c) Court Assessor	25
Adducing Evidence – costs	26
Adducing Evidence – admissibility	27
<b>6. Access to the Family Law System</b>	<b>29</b>
Attachment A      Legislation	31
Attachment B      Consultations	33
Attachment C      Evidence and the <i>Native Title Act 1983</i>	35
Attachment D      Relevant court decisions about the best interests of Aboriginal or Torres Strait Islander children	36
Attachment E <i>H and H</i> [2003] FMCAfam 31 (9 April 2003)	37

## **Response to the Pathways Report: Recommendation 22 – Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices**

### **Terms of Reference**

The Hon Daryl Williams AM QC MP provided Council with the following Terms of Reference:

That Council, as part of the Government response to recommendation 22 of the report of the Family Law Pathways Advisory Group, *Out of the Maze*, review the rationale for and consequences of the proposed amendments to sections 60B, 61C, and 68F of the *Family Law Act 1975 (the Family Law Act)*.<sup>1</sup>

2. That the review take into account the view of indigenous Australians.
3. That the review determines the relevance of the operation of kinship obligations and range of child-rearing practices and shared values of indigenous Australians.
4. That the review considers the proposed amendments in terms of the child's best interests as the paramount consideration.
5. That the review take account of the on-going community discussion about the desirability, or otherwise, of recognising indigenous customary laws.

### **Recommendation 22: Family Law Pathways Advisory Group, *Out of the Maze***

That the *Family Law Act* be amended by:

- a* section 61 should acknowledge unique kinship obligations and child-rearing practices of indigenous culture;
- b* section 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) should include a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language; and
- c* in section 68F(2)(f) the phrase 'any need' should be replaced by 'the need of every indigenous child'.

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<sup>1</sup> The relevant provisions of the *Family Law Act 1975* are provided at **Attachment A**.

## Summary of Advice

Council's responses to the recommended amendments to the *Family Law Act* are as follows:

**(a) [that] section 61C<sup>2</sup> acknowledges unique kinship obligations and child-rearing practices of indigenous culture**

Council does not agree with the proposed amendment to s 61C given:

- (i) the difficulty with deciding just who has parental responsibility under the proposed amendment, and
- (ii) that it is not clear, even if it were possible to determine fairly easily who, other than the biological parent, had parental responsibility, whether that parental responsibility would include the whole bundle of parental responsibilities envisaged under the common law and reflected in the *Family Law Act* and other Acts.

This conclusion was reached notwithstanding that Council was sympathetic to, and agreed in principle with the intention of the proposed amendment. In the end, Council simply could not satisfy itself that there was a practicable way of amending s 61C so as to avoid uncertainty and preclude unintended consequences.

However, Council suggests that a new s 61F along similar lines to that envisaged by the *Out of the Maze* recommendation, might be inserted at the end of Division 2 of Part VII of the *Family Law Act*, without attracting the adverse consequences attaching to the proposal as it stands.

While of undoubted symbolic importance, Council concluded that such an amendment would not of itself provide the functional recognition in the many spheres of government with which Aboriginal and Torres Strait Islander families must deal. Further investigation is required into how this functional recognition of kinship arrangements can be provided by the various arms and tiers of government.

**(b) [that] section 60B(2) includes a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practise their own religion, and use their own language**

Council agrees with this recommendation but with modified wording to avoid the creation of a presumption potentially favouring an Aboriginal or Torres Strait Islander parent over a non-Aboriginal or Torres Strait Islander parent.

Council took the view that a presumption could arise from the references to culture, *religion and language*, because this would seem to imply that the Aboriginal or Torres Strait Islander parent should be preferred in the making of a residence order. Council did not support such a presumption. Further, Council concluded that the presumption problem arising from the proposed amendment to s 60B could not be overcome by a rider to the recommendation to the effect that any amending legislation should make clear that it is not creating a presumption.

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<sup>2</sup> The original recommendation contained a typographical error in that it referred only to s 61. The correct reference is to s 61C.

On the other hand, if the reference was limited to enjoying the child's Aboriginal or Torres Strait Islander culture, that could be achieved in a variety of ways, not necessarily by ordering residence with the Aboriginal or Torres Strait Islander parent. For example, it could be achieved by contact orders to the other parent or grandparents, or specific issues orders requiring that the child remain involved with his or her Aboriginal or Torres Strait Islander family and community. Hence, Council recommends that s 60B be amended along the lines of:

a right, in community with other members of their group, to enjoy their own culture.

Council considers this would not create a presumption.

**(c) [that] in section 68F(2)(f) the phrase ‘any need’ is replaced by ‘the need of every indigenous child’ [so that it would read ‘the need of every indigenous child to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders’]**

Council agrees, and further recommends that a definition of ‘connection’ might be usefully included in the *Family Law Act*.

Council believes that the implementation of the recommendation would not amount to a presumption that an Aboriginal or Torres Strait Islander child needs to maintain a connection with a particular *parent* simply because that parent is Aboriginal or Torres Strait Islander.

In considering the specific recommendations Council's attention was also drawn to two matters that it concluded warranted attention:

**(1) Adducing of evidence**

In Council's view, without relevant evidence, a court cannot properly understand what the ‘lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders’ are. Moreover, it will be difficult to work out what weight to give them in making decisions in the best interests of the child. Equally, the child's ‘need to maintain a connection with the culture, religion and language’ of his/her Aboriginal or Torres Strait Islander parent(s) cannot be assessed otherwise than by having regard to relevant evidence.

Hence, a key issue for Council was how to provide a court with such relevant evidence in order to make a parenting order based on the best interests of the child having regard to all of the circumstances. Council believes that experiences from other jurisdictions may provide a way around these difficulties. Accordingly, Council recommends that a provision be inserted in Part VII of the *Family Law Act* which would allow for greater flexibility in the admissibility of relevant evidence.

**(2) Expansion of the Indigenous Family Consultants program**

Council is also strongly of the view that changing the *Family Law Act* in the ways recommended by Council will not of itself overcome the apparent unwillingness of Aboriginal and Torres Strait Islander people to use the family law system. Other measures such as the expansion of the Aboriginal and Torres Strait Islander family consultants program are necessary for these legislative changes to have any real effect. The expansion of this program was recommended in both the *Out of the Maze* report produced by the Family Law

Pathways Advisory Group and in the *Every Picture Tells a Story* report produced by the Family and Community Services House of Representatives Standing Committee.

## Recommendations

Council's recommendations are:

(1) To amend the *Family Law Act* by inserting a new s 61F at the end of Division 2 of Part VII of the Act along the lines of:

In applying Part VII of the Act to the circumstances of an Aboriginal and Torres Strait Islander child, and in identifying a person or persons who have exercised or may exercise parental responsibility for a child, the court shall have regard to the kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander culture.

(2) That the Attorney-General consider raising the matter of how best to promote the functional recognition by the different arms of government of parental responsibility in Aboriginal and Torres Strait Islander communities with the Minister for Immigration and Multicultural and Indigenous Affairs.

(3) To amend the *Family Law Act* in the manner proposed in recommendation 22(b) such that:

s 60B(2) includes a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture.

(4) To amend s 68F(2) to provide:

(1) a new subparagraph (f) along the lines: “the maturity, sex and background of the child, and of either parent of the child, and any other characteristics of the child that the court thinks are relevant” and;

(2) a new subparagraph (fa) along the lines “the likely effect of any particular parenting order on the need of every Aboriginal or Torres Strait Islander child to maintain a connection with the lifestyle, culture and traditions of his or her peoples”,

with a definition of ‘a connection with the lifestyle, culture and traditions of his or her peoples’ to be inserted in s 68F(4) along the lines of :

the extent to which orders determined on a case-by-case basis may provide:

i) the support and opportunity necessary to explore the full extent of the child's indigenous cultural heritage, consistent with the child's age, developmental level, and wishes, and

ii) the support and encouragement necessary to derive a positive sense of indigenous cultural heritage.

- (5) That a modified version of s 86 of the *Native Title Act 1993* (Cth) be inserted into Part VII of the *Family Law Act*.
- (6) That the Attorney-General bring the issue of admissibility of evidence relating to cultural practices to the attention of the Australian Law Reform Commission in the context of its current reference concerning the *Evidence Act 1995* (Cth).
- (7) To expand the Aboriginal and Torres Strait Islander family consultant program as recommended by the *Out of the maze* report, and in the recent report *Every picture tells a story*.<sup>3</sup>

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<sup>3</sup> Family Pathways Advisory Group *Out of the Maze: Pathways to the Future for families experiencing separation* (Commonwealth, 2001), 75; House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story*, Parliament of Australia, December 2003, 56.

## 1 Introduction

1 In its 2001 report *Out of the Maze* the Family Law Pathways Advisory Group considered how an integrated family law system could better accommodate Aboriginal and Torres Strait Islander families' perspectives.<sup>4</sup>

2 In Recommendation 22 the Pathways Advisory Group attempted to enshrine in three proposed amendments to the *Family Law Act* cultural principles relating to the child-rearing responsibilities of the wider Aboriginal and Torres Strait Islander family in the following manner:

That the Act be amended so that:

(a) section 61C<sup>5</sup> acknowledges unique kinship obligations and child-rearing practices of indigenous culture;

(b) section 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) includes a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practise their own religion, and use their own language; and

(c) in section 68F(2)(f) the phrase 'any need' is replaced by 'the need of every indigenous child'.

3 The Hon Daryl Williams AM QC MP asked the Family Law Council to review this recommendation and approved the Terms of Reference set out above.

### Structure

4 The material addressing the terms of reference is arranged as follows:

- Introduction
- What happens now - the current law
- The origins of the proposed changes
- The consequences the proposed changes
- Council's conclusions concerning the proposed changes to:
  - (a) s 61C
  - (b) s 60B(2)
  - (c) s 68F(2)(f)
- Council's conclusions concerning evidentiary issues
- Access to the Family Law system - the key role of Aboriginal and Torres Strait Islander Family Consultants

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<sup>4</sup> As a result of consultations Council avoids usage of the more generic label 'indigenous' in this report.

<sup>5</sup> Above n 2.

## 2 What happens now – the current law

5 In order to appreciate the impact of the proposed changes to the law it is important to understand how parenting orders are made now, and the factors a court must consider before making such orders.

6 The *Family Law Act* provides that when making parenting orders, the best interests of the child are the paramount consideration.<sup>6</sup> So when a court is deciding what parenting order to make in the best interests of the child it needs to have a capacity to consider the implications of making such an order in terms of the importance to a child of continuing a connection with the culture, lifestyle and traditions of each parent.<sup>7</sup>

7 Sections 60B and 61C of the *Family Law Act* state the principles that a court must have regard to in relation to determining both the rights that a child has in family law proceedings and the duties and responsibilities that parents have with respect to their child.

8 There is no presumption in the *Family Law Act* that a parenting order need be made in favour of either parent. The object of a decision in parenting order cases is always to determine with whom the child will live and with whom the child will have contact, having regard to the best interests of the child. This invariably means the relative importance of each cultural influence on the child needs to be weighed, and a decision made about parenting arrangements, in the best interests of the particular child.

9 The difficulty that the current law creates is that it may not take sufficient account of the unique kinship and child rearing practices of Aboriginal and Torres Strait Islander peoples<sup>8</sup> because:

- i. Parenting orders are generally made on the basis of a division of parental responsibility between the legally recognised parents (usually the biological parents). The family law system does not envision parental responsibility to include a wider kinship concept. Rather, parental responsibility is defined in s 61C in terms of the notion that a child has two biological parents. The rights of the child are set out accordingly in s 60B. And whilst parental responsibility can be conferred on a range of other people (s 65C(c)), only the legally recognised parents are accorded full parental responsibility from the outset, until a court orders otherwise (s 61D).

The law as it currently stands may indeed result in significant unfairness and the undervaluing of traditional Aboriginal and Torres Strait Islander approaches to child rearing and shared 'parenting'.<sup>9</sup>

- ii. Given the importance that Aboriginal and Torres Strait Islander peoples place on the continuation of their culture and traditions, difficulties arise from the lack of clear guidance contained in s 68F(2)(f) about whether the child's 'need' to maintain a

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<sup>6</sup> See s 65E of the *Family Law Act 1975*.

<sup>7</sup> This was a point made by Chief Justice Evatt in *Goudge* (1984) 54 ALR 513 at 526.

<sup>8</sup> The *Out of the Maze* report relevantly notes that, as a result, very few Aboriginal and Torres Strait Islander people utilise the family law system. See above n 3, 89. See also Recommendation 54 of the Australian 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* (Commonwealth, 1997). Recommendation 54 has not yet been implemented – see (1999) 4 (3) AILR 67.

<sup>9</sup> See for example J Dewar 'Indigenous Children and Family Law' (1997) 19 Adel LR 217-230.

connection with his/her cultural traditions needs to be proved in each case, or whether the child's need is the presumed consequence of the child's best interests. There is also uncertainty about just what 'connection' means in family law cases.<sup>10</sup>

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<sup>10</sup> S Ralph 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12 *Australian Journal of Family Law* 140.

### 3 The origins of the proposed changes

10 The recommendation of the Pathways Report has its origins in several previous Australian reports. The Australian Law Reform Commission (the ALRC) report *The Recognition of Aboriginal Customary Laws* highlighted the fact that the kinship relationships and child-rearing practises of Aboriginal and Torres Strait Islander peoples are “of fundamental importance in bringing up children” in their societies.<sup>11</sup>

11 In commentary which reflects the ALRC’s observation, the *Royal Commission into Aboriginal Deaths in Custody* found that the impact on Aboriginal and Torres Strait Islander children of growing up outside their families or communities often created “social and cultural dislocation” and consequently, poorer life chances.<sup>12</sup> *Bringing Them Home* and *Out of the Maze* both recommend the enactment of more extensive provisions providing guidance to courts regarding the best interests of Aboriginal and Torres Strait Islander children in family law matters.

12 Hence, recommendation 22 has been long in the making. It began, in a sense, with recommendations by the ALRC that more attention should be paid to Aboriginal customary law, and where appropriate given effect to by the legislature through incorporation into mainstream laws.<sup>13</sup>

13 The Human Rights and Equal Opportunity Commission in its report *Bringing Them Home*,<sup>14</sup> which preceded the Pathways report by four years, made a recommendation in very similar terms:

That the *Family Law Act* be amended by:

1. Including in s 60B(2) a new paragraph (ba) "children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practise their own religion, and use their own language" and;

2. replacing in s 68F(2)(f) the phrase "any need to maintain a connection with... (Aboriginal culture" with the phrase "the need of every Aboriginal and Torres Strait Islander child to maintain a connection with...(Aboriginal culture)".

14 This recommendation was adopted, almost without change, by recommendation 22 of the Family Law Pathways Advisory Group’s *Out of the Maze* report. The Pathways Group went further however by adding a third limb with respect to s 61C, recommending that:

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<sup>11</sup> Australian Law Reform Commission Report 31 *The Recognition of Aboriginal Customary Laws* (AGPS, 1986) Volume 1, 233. See also the work undertaken in relation to the child-rearing practices of particular Aboriginal and Torres Strait Islander groups, such as those of the Torres Strait Islander people – J A Stubbs & J Akee 1999 'Kupai Omasker: Torres Strait Islander traditional adoption child rearing practice' Family Court Cairns, Family Court of Australia (1999).

<sup>12</sup> See Commissioner Elliot Johnston QC *Royal Commission in Aboriginal Deaths In Custody National Report* Vol 2 (AGPS 1991), 284-87.

<sup>13</sup> Australian Law Reform Commission, above n 11, 233.

<sup>14</sup> *Bringing Them Home*, above n 8: note particularly recommendation 54 from that report.

- (a) section 61C<sup>15</sup> acknowledges unique kinship obligations and child-rearing practices of indigenous culture

15 Despite recognising the rationale for this proposal, it proved to be the most problematic for Council in terms of determining an appropriate means of implementation.

16 The premise of the original two limbs of the Pathways recommendation seems to be to introduce a requirement that courts exercising family law jurisdiction clearly and unequivocally consider the scope and content of a child's Aboriginal or Torres Strait Islander ancestry, and to presume at first instance that continued connection with its associated language, culture and traditions is in the best interests of the child.

17 In its 2001 report *Out of the Maze* the Family Law Pathways Advisory Group considered how an integrated family system could better accommodate the perspectives of Aboriginal and Torres Strait Islander families.<sup>16</sup> It concluded that:

At present the Family Law Act does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents. Meaningful consideration needs to be given to amending the Family Law Act to incorporate indigenous child-rearing practices. The Family Law Act needs to offer guidance as to the importance placed on a child's cultural identity. This is imperative when determining the best interests of indigenous children.<sup>17</sup>

18 The case for specifically recognising Aboriginal and Torres Strait Islander customary laws has also been put forward many times in various jurisdictions.<sup>18</sup>

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<sup>15</sup> Above n 3.

<sup>16</sup> Family Law Pathways Advisory Group, above n 3.

<sup>17</sup> Family Law Pathways Advisory Group, above n 3, 74.

<sup>18</sup> For example, various Canadian states provide for decision-making in 'custody' matters to have regard to the best interests of the child in terms of providing ongoing connection between the child and the child's 'indian' or 'native' ethnic community – see P Lynch (2001) *Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia* in Sydney Law Review [Vol 23:501]; *Child and Family Services Act RSO 1990 c. C-11. S 37(4)* (Ontario); *Child Welfare Amendment Act 1985. SA. C. C-8.1. s 73* (Alberta); *Youth Protection Act RSQ cP-34.1 s 2.4(5o)(c)* (Quebec); *Child, Family and Community Service Act RSBC 1996 c46 s 2(e) and (f)* (British Columbia). The United States of America deals with this issue in the context of its adoption law – see *Indian Child Welfare Act 1978 USC 25 ¶ 1915*.

## 4 The consequences of the proposed changes

19 While the changes proposed in the Pathways Report mirror those in the *Bringing them Home Report*, neither of those reports gives any detailed discussion of the likely effect of such changes on the way that parenting orders are made under the *Family Law Act*. The following paragraphs set out what Council believes may be the effect of such changes.

20 It has been observed by the courts that ss 60B and 60C guide the interpretation of the operative provisions in Part VII of the *Family Law Act*.<sup>19</sup> Amendment to these provisions as proposed may have the effect of changing the way in which the provisions in Part VII are interpreted by courts and, therefore operate.<sup>20</sup>

21 One way the interpretation may change is because the recommended amendments introduce a new purpose into Part VII. The new purpose is to promote the right of “children of indigenous origins . . . , in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language.”

22 It is clear that s 60B and s 68F(2) operate together to provide clear guidelines for courts making parenting orders in the best interests of the child.<sup>21</sup> Together with the language of the proposed amendment to s 68F(2)(f), the guidelines would change. Given this, Council took the view that before it agreed to any change, it had to be very clear about just what consequences might ensue, not just in the family law system, but in other areas of the community that link up with decisions made in the family law system.

### Council’s conclusions concerning the proposed changes

23 Council’s consideration of the issues raised by Recommendation 22 was assisted by a consultation process designed to elicit the views of Aboriginal and Torres Strait Islander peoples.<sup>22</sup> Council’s approach to this review was to make as clear as possible an intention to amend the *Family Law Act* in ways which ensure greater attention is paid by courts to issues affecting Aboriginal and Torres Strait Islander families and children.

24 Council starts from the position that the family law system should be applicable and relevant to everyone. This view is consistent with that taken by the Council of Australian Governments which committed all Australian governments to policy directions based on providing inclusive mainstream services.<sup>23</sup> The ALRC<sup>24</sup> and Council agree that policies which value cultural and ethnic diversity are best promoted through the making of general

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<sup>19</sup> *B and B* (2003) FamCA 451 at ¶ 283; see also *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 at 10.57.

<sup>20</sup> Section 15AA(1) *Acts Interpretation Act 1901* (Cth).

<sup>21</sup> *AIF v AMS* (1999) FLC 92-852; (1999) 199 CLR 160.

<sup>22</sup> Council wrote to a large number of organisations that deal with Aboriginal and Torres Strait Islander clients and who are familiar with the issues they face in the family law system. A summary of the submissions received is at **Attachment B**.

<sup>23</sup> *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* - endorsed by the Council of Australian Governments, Perth, Western Australia, 7 December 1992. See also *Communiqué of Council of Australian Governments' Meeting*, Canberra, 5 April 2002.

<sup>24</sup> Australian Law Reform Commission Report 57 *Multiculturalism and the Law* (AGPS, 1992).

amendments to existing laws to accommodate individual differences, rather than develop special laws.

25 However, given the unique Aboriginal and Torres Strait Islander cultures, and their special place in Australia's social and political landscape, focused legislative amendment in this area seems appropriate.

26 In Council's view, it is very important to highlight cultural influence as a significant and relevant factor in the lives of Aboriginal and Torres Strait Islander children. There are traditional family and kinship structures which influence the lives of many Aboriginal and Torres Strait Islander children.

27 There is a strong case for recognising the uniqueness and complexity of Aboriginal and Torres Strait Islander cultures, languages and religions. There is enormous diversity between Aboriginal and Torres Strait Islander people,<sup>25</sup> and with the passage of time their cultures continue to evolve and change.

28 Governments have committed to pursue a policy agenda which recognises and acknowledges the special place of Aboriginal and Torres Strait Islander peoples in the Australian community under the auspices of reconciliation.<sup>26</sup> Council supports this agenda.

29 Council believes that there is a case to address directly the issue of recognising Aboriginal and Torres Strait Islander kinship obligations and child-rearing practices as integral elements of their concept of 'family'. In particular, it is appropriate to provide this recognition in the context of parenting order decisions in the best interests of the child.

30 With that background in mind Council's analysis of the three limbs of Recommendation 22, and its conclusions, is as follows:

**Recommendation 22(a): [that] section 61C<sup>27</sup> acknowledges unique kinship obligations and child-rearing practices of indigenous culture**

31 As noted previously, this limb of recommendation 22 was not sourced from the *Bringing them Home* report. While Council agreed with the ostensible purpose of acknowledging kinship obligations and child-rearing practices it could not see a way in which s 61C could be a suitable vehicle for this purpose. Section 61C provides:

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<sup>25</sup> A clear reminder of the degree of dynamism and difference that exist can be found from results of the Australian Bureau of Statistics *Census of Population and Housing: Aboriginal and Torres Strait Islander People* (Commonwealth, 1996), which noted that there are over 50 common Aboriginal languages, and about 100 other known Aboriginal languages. If language groupings are any measure of cultural differentiation, considerable diversity still exists in and between those loosely categorised as Aboriginal and Torres Strait Islander peoples.

<sup>26</sup> See "Aboriginal Reconciliation" in Communiqué of Council of Australian Governments' Meeting, Canberra, 3 November 2000.

<sup>27</sup> Above n 3.

**Each parent has parental responsibility (subject to court orders)**

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

32 It follows that amending s 61C could have potentially significant consequences given the effect which designating 'parental responsibility' has in diverse spheres of government. Hence, reluctantly, Council could not agree with the proposed amendment to s 61C given the difficulty of deciding just who has parental responsibility under the proposed amendment. Moreover, it is not clear that even if it were possible to determine fairly easily who had such responsibility, other than the biological parent, whether that responsibility would include the whole bundle of responsibilities envisaged under the common law and reflected in the *Family Law Act* and other Acts.

33 This conclusion was reached notwithstanding that Council was sympathetic to, and agreed in principle with the proposed amendment. In the end, Council simply could not satisfy itself that there was a practicable way of amending s 61C so as to avoid uncertainty and potentially unintended consequences.

34 It may be that recognition of the extended family and kinship networks of Aboriginal and Torres Strait Islander peoples can go in to another division of Part VII of the Act as a general principle, for example as a self-standing section along the line of:

In applying Part VII of the Act to the circumstances of an Aboriginal and Torres Strait Islander child, and in identifying a person or persons who have exercised or may exercise parental responsibility for a child, the Court shall have regard to the kinship obligations and child-rearing practices of indigenous culture.

35 That would be another way of expressing the same intent without trying to amend the wrong section. A possible option would be to insert a new section into Division 2 of Part VII along the lines suggested.

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**Recommendation 1**

Council recommends amending the *Family Law Act* by inserting a new s 61F at the end of Division 2 of Part VII of the Act along the line of:

In applying Part VII of the Act to the circumstances of an Aboriginal and Torres Strait Islander child, and in identifying a person or persons who have exercised or may exercise parental responsibility for a child, the Court shall have regard to the kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander cultures.

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36 One aspect of ‘child rearing practices’ that may be raised in court is the view taken of disciplining children within some Aboriginal and Torres Strait Islander families. Indeed the views expressed during recent consultations by the Law Reform Commission of Western Australia emphasise the different way ‘non-Aboriginal law views children’s rights and, in that context, disciplinary practices within Aboriginal families.’<sup>28</sup> The Background Paper released by the Law Reform Commission suggests there are two scenarios a court might be called upon to consider:

Where a parenting dispute is between two Aboriginal parents then it is hard to imagine that either party could effectively use a claim of excessive child discipline against the other party, so long as the disciplinary practices in question were acceptable in Aboriginal society. The issue might be more contentious where the dispute is between an Aboriginal parent and a non-Aboriginal parent.<sup>29</sup>

37 The Background Paper concludes by noting that presumably the proposed amendment ‘would make it more difficult for the decision-maker to draw an adverse influence from a culturally appropriate form of disciplining a child.’<sup>30</sup>

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

- receive Family Tax Benefit A
- receive child support
- consent to medical treatment on behalf of a child, and
- enrol a child in school.

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

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

### **Option 1**

Create a special procedure by legislation departing from the normal procedures under the *Family Law Act* for recognition of non-biological parents as having parental responsibility. This legislation would allow an appropriate person under

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<sup>28</sup> Toni Buti and Lisa Young, *Background Paper – Family Law and Customary Law*, Law Reform Commission of Western Australia (August 2004), 34-35.

<sup>29</sup> *Ibid*, 35.

<sup>30</sup> *Ibid*.

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

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

### **Option 2**

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

### **Option 3**

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

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

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

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### **Recommendation 2**

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

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

## **Kupai Omasker – A Torres Strait Islander Solution**

44 In close consultation with the Torres Strait Islander community the Family Court has developed a special procedure for dealing with matters involving the traditional child rearing practices of the Torres Strait Islander peoples.<sup>31</sup> The term Kupai Omasker describes the practice of permanently transferring children from one family to another, with the children usually remaining within the extended family. The practice is by consent of the parties concerned and the child takes the name of the new family. The transfer occurs as the result of a verbal agreement and usually takes place within the extended family.<sup>32</sup>

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

46 The Court developed special affidavits and application forms to allow parenting applications to be made that recognised the special nature of Kupai Omasker. Under s 102B of the *Family Law Act* the Court appointed two elders as assessors wherever the Court sat. In addition the Court was assisted by a Court Counsellor and a Torres Strait Islander Family Consultant. The Court was able to make parenting orders with reduced formality and abbreviated procedures. Those orders were made quickly and with minimal cost in terms of the applicants and the Court.

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

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

### **Recommendation 22(b): [that] section 60B(2) includes a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language**

49 Council considered that in its original form the amendment to s 60B could amount to a presumption that would favour an Aboriginal or Torres Strait Islander parent. This is because, given the enumeration of a parcel of rights relating to culture, religion, and language, the parent who could most readily satisfy these needs would be an Aboriginal or Torres Strait Islander, as the case may be. The Pathways Report does not make the recommendation in

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<sup>31</sup> The description of the process adopted in recognising Kupai Omasker is taken from the Overview by the Chief Justice in the Family Court of Australia's *Annual Report 1999-2000* (AGPS), 9.

<sup>32</sup> Stubbs & Akee, above n 11.

those terms. However, there is a potential that enactment of the proposed amendments would have this effect.

50 Council believes the objective best interests of the child are paramount and, in Council's view, it would be quite wrong for a parent to be able to rely on a statutory preference to assert that one cultural, ethnic or religious background is to be preferred over another in terms of its importance to the child. It is the view of Council that it is not appropriate to create a statutory presumption that a child of Aboriginal or Torres Strait Islander descent will or should reside with the Aboriginal or Torres Strait Islander parent. There are compelling reasons in Council's opinion for taking this view.

51 The difficulties with creating a presumption in relation to residence and contact for children post separation were clearly outlined in the report *Every Picture Tells a Story*. The Report states that:

In the end, how much time a child should spend with each parent after separation, should be a decision made either by parents or by others on their behalf, in the best interests of the child concerned and on the basis of what arrangements work for that family.<sup>33</sup>

52 This view of Council was challenged in a strongly presented commentary on an earlier draft of this advice made by the Aboriginal Legal Service of Western Australia (the ALSWA). The ALSWA said:

Other cultures do not share this history, nor do they have such a large and consistent body of evidence available describing their children's need for cultural connection and the harm that can result to the child if this need is not met. That evidence indicates that Aboriginal and Torres Strait Islander children have a special need for connection with their culture.<sup>34</sup>

53 After weighing these competing arguments Council favoured restricting the parcel of rights so that culture alone is specified. This, it reasoned, would allow a court to read the provision as requiring greater consideration than currently occurs to a child's Aboriginal and Torres Strait Islander ethnic and cultural heritage when determining with whom a child should reside, consistent with the best interests of the child. This stops short of a creating a presumption. In Council's view this is an appropriate balance commensurate with the best interests of the child remaining the paramount consideration.

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### Recommendation 3

Council recommends amending the *Family Law Act* in the manner proposed in recommendation 22 (b) such that:

s 60B(2) includes a new paragraph stating that children of Aboriginal or Torres Strait Islander origins have a right, in community with other members of their group, to enjoy their own culture.

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<sup>33</sup> House of Representatives, above n 3, paragraph 2.44.

<sup>34</sup> Submission of the Aboriginal Legal Service of Western Australia, dated June 2004, 10.

**Recommendation 22(c): [that] in section 68F(2)(f) the phrase ‘any need’ is replaced by ‘the need of every indigenous child’**

54 Council is of the view that s 68F(2) should continue to reflect the diversity of cultural backgrounds that exist in Australia, and that it is appropriate to have a dedicated subsection that deals solely with Aboriginal and Torres Strait Islander children.

55 The need for recognition of other cultural backgrounds was raised by Federal Magistrate Ryan in the case of *H v H* [2003] FMCAfam 31 (9 April 2003). In that case, which involved a child of Lebanese-Australian descent, Federal Magistrate Ryan observed that s 68F(2)(f) is not inclusive of all cultures and operates so as to wrongly characterise the Australian community as being comprised of “Anglo-Saxon children” and “Aboriginal or Torres Strait Islander children”.<sup>35</sup>

56 Council intends by the new paragraph (f) to provide a form of words which highlights the importance of considering the background of a child and either parent. It is intended that the culture and ethnicity of a child and either parent would be relevant to a determination of their ‘background’.

57 In Council’s view it is also appropriate to provide a separate new paragraph (fa) which fixes specifically on Aboriginal and Torres Strait Islander children and their connection with the lifestyle, culture and tradition of their peoples. By being set out as a separate subsection, recognition is given to the uniqueness of the place of Aboriginal and Torres Strait Islander peoples in the Australian community and its history. Section 68F(2)(a) would still allow a child to express a contrary wish but the new paragraph (fa) would require a court to have regard to an Aboriginal or Torres Strait Islander child’s need to continue to have a connection with his/her heritage.

58 The particular words fix on the issue of their connection with lifestyle, culture and traditions as issues that are relevant in making parenting orders. There is a nexus between these issues and the content of kinship obligation and child-rearing practice in the context of the particular matter. Hence, it makes sense to ensure that relevant evidence in relation to all of these issues are ventilated in such a way as to inform a court’s decision making about the impact of kinship obligations and child-rearing practices on the child.

59 Council’s consultations revealed some uncertainty about what was encompassed by the phrase relating to a ‘connection to culture’ Council considered while this is inevitably somewhat of an amorphous concept, a definition may assist decision-makers in ascertaining its meaning. For this reason a definition has been included to complement the original recommendation.

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**Recommendation 4**

Council recommends that s 68F(2) be amended to provide:

(1) a new subparagraph (f) along the lines: “the maturity, sex and background of the child, and of either parent of the child, and any other characteristics of the child that the court thinks are relevant” and;

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<sup>35</sup> *H v H* [2003] FMCAfam 31 (9 April 2003). See **Attachment E**.

(2) a new subparagraph (fa) along the lines “the likely effect of any particular parenting order on the need of every Aboriginal or Torres Strait Islander child to maintain a connection with the lifestyle, culture and traditions of his or her peoples,

with a definition of ‘a connection with the lifestyle, culture and traditions of his or her peoples’ to be inserted in s68F(4) along the lines of

the extent to which orders determined on a case-by-case basis may provide:

i) the support and opportunity necessary to explore the full extent of the child's indigenous cultural heritage, consistent with the child's age, developmental level, and wishes, AND

ii) the support and encouragement necessary to derive a positive sense of indigenous cultural heritage.

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## **Conclusion**

60 Whilst Council accepts that these proposed amendments move some way from the terms of recommendation 22, Council believes they are appropriate in the circumstances and deliver a similar outcome to that contended for by the Pathways Advisory Group.

61 Council believes that this position will help to overcome the strongly held view amongst most of those who responded to the Council’s invitation to make a submission on this matter that courts were not currently giving sufficient consideration to these issues. In particular ALSWA said:

Specific cultural influences appear to remain either the subject of the court’s assumptions, or “go under the radar” without actually being judicially considered. This suggests that the effect to date of s 68F(2)(f) of the Family Law Act 1975 and its Western Australian equivalent s 166(2)(f) of the Family Court Act 1997 has indeed been cosmetic rather than substantive.<sup>36</sup>

62 In Council’s view, amendments to the *Family Law Act* which involve merely inserting provisions which state that a court is to have regard to specific cultural norms will not be sufficient to achieve the objectives of the Family Law Pathways Advisory Group. The family law system should be as culturally appropriate and sensitive as reasonably possible, and courts exercising family law jurisdiction should have the capacity to properly investigate the content of the best interests of all children.

63 A court must have the capacity to give *content and context* to the unique kinship arrangements and child rearing obligations *on a case by case basis* to ensure that its decisions are able to adequately take account of differences within and between different Aboriginal and Torres Strait Islander communities. Without such a capacity, changes to the law would have no more effect than the current provision in s 68F(2)(f) appears to have.

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<sup>36</sup> Aboriginal Legal Service of WA, above n 35, 5.

## 5 Problems of Evidence

64 At present, concepts such as ‘kinship obligation’, ‘child-rearing practice’, ‘family’ and ‘adequate and proper parenting’, as they relate to Aboriginal and Torres Strait Islander peoples, are not contained in the *Family Law Act*. These are concepts that are difficult to grapple with. The definition of those concepts depends on achieving a high level of cultural specificity.

65 The provision of precise definitions which work will be problematic. That is not to say the unique kinship obligations and child-rearing practices of Aboriginal and Torres Strait Islander peoples should not be acknowledged. They should. Council agrees with the intention of Recommendation 22(a).

66 However, problems arise wherever legislation states concepts without working definitions. Having said that, the case law suggests that properly resourced courts can give content to elastic concepts by construing them having regard to the particular facts of the case and relevant evidence.<sup>37</sup> The High Court has demonstrated one approach to giving content to concepts whose practical meaning depends on the particular facts of the matter, and the capacity of courts to receive relevant evidence.<sup>38</sup>

67 Aboriginal and Torres Strait Islanders peoples are separate and distinct peoples with their own kinship relationships and practices of child-rearing and adoption.<sup>39</sup> Thus, a significant difficulty with the proposition that the *Family Law Act* should be amended to specifically include “kinship relationship” and “child-rearing practice” is that Aboriginal and Torres Strait Islander cultures and communities are dynamic.<sup>40</sup> Without providing a way of ensuring that appropriate evidence is available to a court to base its decisions on, any statutory formulation of their cultural practices and traditions would almost certainly become sclerotic in its operation.

68 Council is aware of only a handful of reported Australian cases in which an Aboriginal or Torres Strait Islander child is the subject of proceedings for a parenting order and the issues for decision have turned on the interpretation of ss 61C, 60B and s 68F(2)(f). As a result, there is little information about how decisions are made about the best interests of Aboriginal or Torres Strait Islander children in terms of their need to maintain a connection with the lifestyle, culture, and traditions of their peoples.<sup>41</sup>

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<sup>37</sup> A review of the *Land Rights Act (NT)* shows that it is possible to insert concepts into legislation without definition provided sufficient resources are provided to a court to investigate their content and context – see House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs "Unlocking the Future" The Report of the Inquiry into the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth, August 1999).

<sup>38</sup> *Western Australia v Ward* (2002) 191 ALR 1. See **Attachment C**.

<sup>39</sup> *Review of the Adoption of Children Act 1965*, Report No. 81 (NSW Law Reform Commission, 1997), paragraph 2.58.

<sup>40</sup> See for example C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al (eds) *Aboriginal Australia* 2<sup>nd</sup> Edition, (University of Queensland Press), 1998, 114.

<sup>41</sup> See s 68F(2)(f) of the *Family Law Act 1975*. The difficulties historically associated with researching these matters have arisen in part because the Family Court, before the roll-out of Casetrack in 2003-04, neither collected statistics about Aboriginal and Torres Strait Islander clients, nor made provision in the court forms for self-identification. Some work has been done on unreported cases – see K Burns ‘Indigenous Women and the Law’ in *Indigenous Law Bulletin* 1999 Vol 4 (25).

69 In those few cases where the issue has been considered, it seems clear that the courts are of the view that evidence bearing on the child's cultural heritage should be adduced in the proceedings, including evidence from an appropriately qualified expert.<sup>42</sup> The general thrust of these cases make clear that the legislative recognition of Aboriginal and Torres Strait Islander culture and heritage in s 68F needs to be complemented by provisions which take account of the kinship care systems of Aboriginal and Torres Strait Islander peoples.

70 Council agrees with these observations. Because of the diverse and dynamic nature of Aboriginal and Torres Strait Islander cultures and customs, a court will undoubtedly require assistance in making relevant determinations about what is in an Aboriginal or Torres Strait Islander child's best interests. Particularly as the meaning of 'kinship' and 'child rearing practices' may have very specific meanings depending on where it is used, and will differ on a case by case basis depending on who the child is. These issues may go to the very heart of the question of what "aboriginality" is, and the recognition of interests that are tied to this concept.<sup>43</sup> Resolution of these issues may need to be the subject of expert opinion evidence.

### How a court receives relevant evidence

71 In order to do justice in individual cases, a court must be able to ensure that it is properly apprised of the facts as they relate to the particular circumstances, cultural identity and ancestry of Aboriginal and Torres Strait Islander children. Issues of cultural identity, and ancestry may necessarily be the subject of expert evidence because it reflects on the "unique experience" of Aboriginal and Torres Strait Islander peoples.<sup>44</sup>

72 It will often be expensive to adduce relevant expert evidence in a proceeding.<sup>45</sup> Given that the costs in any event could well be significant, there is a real value in determining whether a process exists which would enable relevant evidence to reach a court. Council has examined three mechanisms to assist courts to receive evidence in parenting order cases. Processes relating to child representatives, expert witnesses, and court assessors are discussed below.

#### (a) Child Representative

73 The court may be assisted by the appointment of a child representative.<sup>46</sup> The appointment of a child representative in cases involving Aboriginal and Torres Strait Islander children has been described as not just helpful, but essential.<sup>47</sup> The Full Court of the Family Court in *Re K*<sup>48</sup> stated the involvement of an Aboriginal or Torres Strait Islander child as one

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<sup>42</sup> See **Attachment D**.

<sup>43</sup> See for example the exhaustive definition of native title in s 223 of the *Native Title Act 1993* (Cth).

<sup>44</sup> The use of genetic analysis as a means of confirming ethnic and cultural identity, and the cost of scientific research, highlight this. In the context of criminal prosecutions, for example, the costs associated with adducing expert evidence about the culture and/or traditions of an Aboriginal or Torres Strait Islander defendant will not necessarily be met by the Crown. See discussion in *B v R & Separate Representative* (1995) 127 FLR 438. For a recent example of the usefulness of such evidence see the judgment of the Chief Justice in *Simon Lara and Irma Lara & Tom Marley and Elizabeth Sharp* [2003] FamCA 1393.

<sup>45</sup> See eg. *Munugurr* (1994) 4 NTLR 63. In this case the defendant adduced evidence by affidavit and statutory declaration that was served on the Crown. Witnesses were called to give oral evidence only if required for cross-examination.

<sup>46</sup> See Family Law Council *Pathways for Children: A Review of children's representation in family law*, August 2004.

<sup>47</sup> Australian Law Reform Commission *Seen and Heard: priority for children in the legal process* Report No 84 (1997), paragraphs 16.62-16.63.

<sup>48</sup> (1994) FLC 92-461 at 80,774 per Full Court.

of 13 grounds for justifying the appointment of a child representative where there are real issues of cultural or religious difference affecting the child. Council understands that child representatives are often used in cases involving Aboriginal or Torres Strait Islander children.<sup>49</sup>

### (b) Expert Evidence

74 *H and H* (referred to above) is a recent case that underscores the difficulties with the current law in relation to assessing evidence about a child's best interests in terms of the relative importance of and degree of connection with family traditions, culture, and lifestyle.<sup>50</sup> The case illustrates the difficulties of getting relevant evidence before a court in parenting order cases. This is exacerbated by the additional hurdle of the court lacking the power to admit relevant evidence from extrinsic sources and credible published research.

75 Some might say the bar is high for a reason, and there is no doubt that evidence adduced from whatever source should be open to scrutiny. However, a provision which operates to hinder a court from making relevant inquiries and receiving evidence pertinent to factors on which it must make a decision, and about which it otherwise has no information, makes it harder to make a decision in the best interests of the child.

76 *H and H* suggests that the *Family Law Act* be amended to provide greater scope for a court to take notice of evidence emanating from a range of sources in proceedings involving the making of parenting orders.<sup>51</sup>

77 Council agrees with this suggestion. Interestingly the court already has the power to conduct investigations in child maintenance cases, but not in parenting order cases. Subsection 66J(2) provides that the court:

In taking into account the proper needs of the child the court ... (b) may have regard, to the extent to which the court considers appropriate in the circumstances of the case, **to any relevant findings of published research in relation to the maintenance of children.**

78 Much has been learnt about particular Aboriginal and Torres Strait Islander peoples in a variety of contexts through the provision, and acceptance of expert evidence. For example, a large body of anthropological, archaeological and sociological information has been led in the context of native title claims. Given the expense of collecting and presenting that information in the first place, it would be a pity if the rich body of information about the culture and traditions of various Aboriginal and Torres Strait Islander peoples that could be garnered from relevant sources, and summarised in the case law, should be overlooked.

### (c) Court assessor

79 In addition to the general provisions relating to child representation, the *Family Law Act* currently contains reference in s 102B to the appointment of a court assessor.<sup>52</sup> The role of the court assessor is to assist the court in reaching an informed decision about the evidence before it.

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<sup>49</sup> Data extracted manually by the NT LAC indicates of the 40 appointments made in 2003/04, 50% related to Aboriginal and Torres Strait Islander children.

<sup>50</sup> [2003] FMCAfam 31 (9 April 2003). See **Attachment E**.

<sup>51</sup> S 66J(2)(b) *Family Law Act 1975*.

<sup>52</sup> See Rule 15.38 Family Law Rules 2004. Compare former Order 30B Family Law Rules 1984.

80 With the exception of the Family Court's Kupai Omaskar program concerning the recognition of traditional parenting arrangements in the local Torres Strait Islander community, assessors are rarely used.<sup>53</sup> In the Kupai Omaskar program the assessors are elders from the community and assist the judge in his or her decision making. Assessors do this by giving information on whether the proposed consent arrangement is appropriate and fits the community's ethos.

81 In Council's view assessors could be used more often. It is not clear what the barriers may be to increasing their use, and Council suggests this could be looked at further. It is likely that increased utilisation will result in the costs of proceedings increasing. Further, the impact on the legal aid budget is likely to be considerable if amendments encourage more Aboriginal and Torres Strait Islander people to bring family law proceedings in the Family Court or the Federal Magistrates Court. This is because of the relatively low median income of Aboriginal and Torres Strait Islander families would mean that most would be eligible for legal aid under the means test.<sup>54</sup>

### Adducing evidence - Costs

82 The Aboriginal Legal Service of Western Australia made clear in its response to Council that the difficulty and potential cost of adducing this sort of evidence on a case by case basis was another strong reason for supporting a rebuttable presumption in favour of maintaining the child's link to their Aboriginal or Torres Strait Islander heritage.<sup>55</sup>

83 Whilst there would undoubtedly be hearsay problems from time to time,<sup>56</sup> a provision along the lines of s 86 of the *Native Title Act 1993* could be inserted in the *Family Law Act* to provide a court with the flexibility to draw on relevant evidence adduced in other proceedings in other courts to inform decision making in the best interests of the child pursuant to s 68F(2). Such a provision may, however, need to be limited to the kinship relationships and child rearing practices of Aboriginal and Torres Strait Islander people.<sup>57</sup>

84 While Council believes that the case for not supporting a rebuttable presumption is compelling, however, Council does agree that the *Family Law Act* should give greater recognition of Aboriginal and Torres Strait Islander kinship and child rearing practices. Council suggests the following approach would assist a court in informing itself of the content of those traditions wherever such reliable information exists.

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<sup>53</sup> Family Court of Australia *The Changing Face of the Expert Witness* Discussion Paper (Commonwealth, 2002).

<sup>54</sup> 1996 Census data shows that the median weekly income was less than two-thirds of that received by all Australian families: \$492 compared with \$762.

<sup>55</sup> Aboriginal Legal Service of WA, above n 35, 7.

<sup>56</sup> Australian Law Reform Commission, above n 11, 472-74.

<sup>57</sup> This issue was raised in the context of a claim to communal native title to, or ownership of, the Murray Islands in the Torres Strait. The trial of the factual issues commenced before Moynihan J in the Queensland Supreme Court. The Commonwealth took no active role in these proceedings at which difficulties in the reception of evidence arose as objection was taken by Queensland on the ground that much of the evidence was hearsay. *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

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## Recommendation 5

Council recommends that a modified version of s 86 of the *Native Title Act* be inserted into Part VII of the *Family Law Act*:

Evidence and findings in other proceedings

Subject to subsection 68F(2), a court exercising jurisdiction under the Act may:

- (a) receive into evidence the transcript of evidence in any other proceedings before:
  - (i) the Court; or
  - (ii) another court; or
  - (iii) a recognised State/Territory body; or
  - (iv) any other person or body; and draw any conclusions of fact from that transcript that it thinks proper; and

(b) receive into evidence the transcript of evidence in any proceedings before the assessor and draw any conclusions of fact from that transcript that it thinks proper; and

(c) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iv).

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## Adducing Evidence - admissibility

85 While this would go a long way to reducing the cost of getting evidence into court it does not address broader issues of admissibility. Council notes with interest the Law Reform Commission of Western Australia's work in establishing the Aboriginal Research Reference Council (the ARRC) as part of the conduct of its reference into Aboriginal Customary Law.<sup>58</sup>

86 It is a body comprised of volunteers – drawn from business consultants as well as key Aboriginal organisations such as the Aboriginal and Torres Strait Islander Commission, the Aboriginal Legal Service, the WA Department of Indigenous Affairs, Aboriginal Elders and other prominent members of the Aboriginal community. Their role is to assist the Commission by ensuring that cultural protocols are adhered to during the project and that culturally sensitive issues are dealt with respectfully by the project team in the conduct of the reference.

87 The ARRC model represents one possible means of bringing together people with diverse qualifications and expertise to provide, collate and facilitate access to information pertinent to understanding various aspects of Aboriginal and Torres Strait Islander communities and cultures.

88 Council endorses the ARRC model as a potentially very useful source and mechanism for the collection of information about how Aboriginal and Torres Strait Islander communities work, and courts should be able to avail themselves of this information as it becomes available.

89 There remains an issue of admissibility in relation to material not adduced subject to the ordinary rules of evidence and which has not gone through a fact finding body. Council considered a similar issue in its submission<sup>59</sup> responding to recommendation 109 of the

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<sup>58</sup> Personal communication with Heather Kay, Executive Officer, Law Reform Commission of Western Australia on 26 and 28 March 2003. See also <http://www.lrc.justice.wa.gov.au/>

<sup>59</sup> Family Law Council, 16 March 2001

Australian Law Reform Commission Report *Managing Justice – A review of the federal civil justice system*.<sup>60</sup> It recommended that s 66J(2)(b) of the *Family Law Act* not be amended to expressly empower the Court to have regard to *any* relevant, accredited and published research findings. Council’s reasoning was that it would be difficult in many cases for a court to determine what information is or is not relevant, and thus admissible (or not).

90 It would be desirable to consider whether courts should be provided with an express power to receive information relevant to the exercise of their family law jurisdiction in parenting cases involving Aboriginal or Torres Strait Islander peoples in light of the outcomes of the Family Court of Australia’s Children’s Cases Program (CCP). The CCP allows a relaxation of rules of evidence in children’s cases to promote a more hands-on approach by judicial officers to case-management. It may be that after the CCP is concluded the Government may decide to introduce reforms to the *Family Law Act* to mandate a more flexible approach to the adducing of evidence in children’s cases. These reforms may assist in resolving the admissibility issues in the sorts of cases discussed above.

91 Council also notes that similar issues of admissibility of evidence may impact in other areas of the law. The Attorney-General may wish to bring this matter to the attention of the Australian Law Reform Commission in the context of its current reference concerning the *Evidence Act 1995* (Cth).

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#### **Recommendation 6**

Council recommends that the Attorney-General bring the issue of admissibility of evidence relating to cultural practices to the attention of the Australian Law Reform Commission in the context of its current reference concerning the *Evidence Act 1995* (Cth).

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<sup>60</sup> A general recommendation to reform the *Family Law Act* was made in the Australian Law Reform Commission *Managing Justice – A review of the federal civil justice system*, Report No. 89 (January 2000). Recommendation 109 stated “The Attorney General should request the Family Law Council to report on whether the Family Law Act should be amended to provide specifically that whenever the best interests of children are being determined, the Court may have regard to any relevant, accredited and published research findings. Any such material relied upon should be expressly acknowledged by the Court.” Report No 89 (Commonwealth, 2000).

## 6 Access to the Family Law System

92 The cultural norms and traditions of Aboriginal and Torres Strait Islander families may mean they are strangers to and therefore distant from the operations of mainstream family law. The data from the Family Court on the number of counselling files opened each indicates that in 2000 51% (36) of files in the Alice Springs Sub-Registry and 16% (39) of files in the Darwin Registry involved Aboriginal or Torres Strait Islander families.

93 The Northern Territory has comparably higher concentrations of Aboriginal and Torres Strait Islander peoples than elsewhere in the Australian community. To put this in context, 36% of the population in Central Australia/Alice Springs Sub-Registry and 22% in the Top End /Darwin are people of Aboriginal or Torres Strait Islander descent.<sup>61</sup>

94 There is also anecdotal evidence to suggest that in northern Queensland and the Northern Territory where the Family Court's Aboriginal and Torres Strait Islander Family Consultant program is widely used, the number of Aboriginal and Torres Strait Islander people using court services is roughly equivalent to the rate of usage by mainstream Australian clients per head of population.

95 The apparent low rate of usage elsewhere in Australia of the mainstream family law system by Aboriginal and Torres Strait Islander peoples demonstrates the relative inaccessibility of that system.<sup>62</sup> The *Family Law Act* is modelled on a euro-centric notion of the nuclear family. It does not sit well with Aboriginal and Torres Strait Islander understandings of 'family' in which the structure of social obligations are more 'fluid'.<sup>63</sup> There is an understanding that in a nuclear family, the child is cared for by his/her biological family. That may not be so in Aboriginal or Torres Strait Islander communities in which family relationships may be significantly wider than this, including people who are members of the child's community but have no biological relationship with the child.

96 By changing the law to acknowledge a diversity of family structures among Aboriginal and Torres Strait Islander communities, more Aboriginal and Torres Strait Islander peoples may feel comfortable about participating in the mainstream legal system, rather than outside it. However, Council recognises that the mere act of changing the law, in and of itself, is unlikely to have more than a passing influence on the use of the family law system by Aboriginal and Torres Strait Islander peoples.

97 The fact that increased participation in the family law system cannot be guaranteed was also observed by the Office of Aboriginal and Torres Strait Islander Affairs (OATSIA) in its submission to Council. OATSIA expressed particular concern that neither the *Bringing*

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<sup>61</sup> Figures provided by the Family Court in personal communication: 10 November 2004. The Court will be better able to collect this type of information using its new IT system Casetrack.

<sup>62</sup> This issue is borne out in Council discussions with Aboriginal and Torres Strait Islander peoples. See Council minutes from: Rockhampton, 2002 (22-23 August); Townsville, 2000 (31 August – 1 September); and Darwin, 2000 (25-26 May). Council notes that the Court does not currently gather statistics regarding the number of Aboriginal and Torres Strait Islander clients attending court registries for assistance/advice (or even counselling), or at the resolution or determination phases. We understand that with the introduction of *Casetrack*, the Court will be able to collect such data on the basis of self-identification by clients.

<sup>63</sup> Dewar J, above n 9, 217-230. See also See also eg S B Boyd, H Rhoades, K Burns 'The politics of the primary caregiver presumption: a conversation' in *Australian Journal of Family Law* 13: 3 (November 1999), 233-63.

*Them Home* report nor *Out of the Maze* provides much detail to support the specific recommendations for legislative change.

98 A change to the law as suggested by the terms of reference and as recommended by Council in this report will, in Council's view, have little impact on the overall accessibility of the system for Aboriginal and Torres Strait Islander people. In Council's view such legislative changes without other changes will have minimal impact on access and usage.

99 One initiative which has been suggested to improve access and increase usage is to enhance the provision of appropriate specialised primary dispute resolution services. In establishing such services it would be necessary to consider staffing, education, and also the need to develop the most suitable protocols. An important benefit is that such processes may better accommodate customary law in a less adversarial setting.<sup>64</sup>

100 The Council is aware that there are a number of other initiatives being proposed by the Family Court and others to assist in overcoming this problem. One promising initiative brought to Council's attention at its Gold Coast meeting in September 2004 was Legal Aid Queensland's Indigenous Mediation program.<sup>65</sup> Further consideration needs to be given to such initiatives. In particular the Council strongly supports the work being done by the Family Court's Indigenous Family Consultants as a practical and effective means of making the system more accessible to Aboriginal and Torres Strait Islander people. Council strongly supports the expansion of this initiative. Without such an initiative the changes recommended above will have minimal impact on Aboriginal and Torres Strait Islanders' access to the family law system.

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#### **Recommendation 7**

Council supports the recommendations for the expansion of the Aboriginal and Torres Strait Islander family consultant program as recommended by Pathways Report *Out of the Maze* report, and in the recent report *Every picture tells a story*.<sup>66</sup> Without such an initiative the changes recommended above will have minimal impact on Aboriginal and Torres Strait Islanders' access to the family law system.

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<sup>64</sup> Buti and Young, above n 29, 37. Note that the WA Department of Justice's Aboriginal Alternative Dispute Resolution Services are only available for criminal justice matters.

<sup>65</sup> See *Indigenous Mediation Feasibility Report*, Legal Aid Queensland, PDR Unit, June 2004.

<sup>66</sup> House of Representatives, above n 3, 56.

## **Legislation**

Section 61C of the *Family Law Act 1975* provides:

### **Each parent has parental responsibility (subject to court orders)**

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Section 60B provides:

### **Object of Part and principles underlying it**

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (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 of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
  - (c) parents 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.

Section 68F(2) provides (emphasis added):

### **How a court determines what is in a child's best interests**

- (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
- (2) The court must consider:
  - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
  - (b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

- (i) either of his or her parents; or
- (ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

*(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;*

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

- (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
- (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

*Aboriginal peoples* means the peoples of the Aboriginal race of Australia.

*Torres Strait Islanders* means the descendants of the indigenous inhabitants of the Torres Strait Islands.

## ATTACHMENT B

### Consultations

Council received six submissions from: the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Aboriginal and Torres Strait Islanders Legal Services Secretariat (NAILSS), the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service (ATSIWLAS), the Women's Legal Resources Centre, and the Office of Aboriginal and Torres Strait Islander Affairs (in the Department of Immigration, Multicultural and Indigenous Affairs). Council provided an early draft of this document to the Aboriginal Legal Service of Western Australia which provided a detailed response.

Council wrote separately to the Secretariat of National Aboriginal and Islander Child Care (SNAICC) inviting it to provide Council with a submission but at time of printing no submission has yet been received.

### Comments

#### Recommendation 22(a)

All respondents supported this recommendation except OATSIA which expressed reservations about the capacity to deal legislatively with the complexity of child rearing and kinship obligations in indigenous societies.

Like Council the respondents observed that it was important to be able to get relevant evidence about the place of children in traditional Aboriginal and Torres Strait Islander family and community structures.

ATSIC commented that:

Indigenous culture is diverse and kinship structures and child rearing practices vary from place to place. It is vital the Family Court is aware of the different cultural practices within their region. In parts of the Northern Territory for example maintaining bloodlines is cultural law and the concept of *poison cousins* exists to maintain pure blood lines. A family may move to Darwin where their cultural law is not observed and mix with *poison cousins* but on return to the community the law would again be observed. A family Court decision in Darwin to give primary residency to kin from another blood line and residency to the father during school holidays could create a situation where on return to the fathers community the child would be rejected by the community in the future because of his residency with a *poison cousin*. Such complexities would need to be given careful consideration by the Family Court.

ATSIWLAS and NAILLS expressed concern that judges of the Family Court and Federal Magistrates need to have access to sufficient information and evidence in coming to terms with the existence and nature of traditional kinship obligations and child rearing practices.

WLRC recommended that court staff should receive cultural awareness training to assist them in dealing with the complex mixture of issues affecting Aboriginal and Torres Strait Islander

children and families. ALSWA expressed significant concern about what it saw as a general lack of understanding and appreciation of the significance of ‘connection to culture’ for Aboriginal children throughout the Western Australian family law system.

NAILLS indicated that culturally appropriate child representation should be more widely available to assist the child and the court. ATSIWLAS generally endorsed the use of culturally appropriate legal representation as a means of getting relevant evidence before the court.

#### Recommendation 22(b)

All respondents supported the recommendation.

NAILSS expressed concern about the influence of Eurocentric thinking about what is family on the application of s 60B(2). It was suggested that an amended s 60B(2) could still be used to support an argument against the return of a child to his or her family or kinship group on the grounds that it would result in a lack of “adequate or proper parenting” for the child.

#### Recommendation 22(c)

All respondents supported this recommendation.

In summary the ALSWA said the following:

There is a large body of evidence available indicating that Aboriginal and Torres Strait Islander children in particular need to connect with their culture, and are at risk of psychological harm if this is not facilitated.

To date the family law system has been deficient in various ways in addressing this need of those children. Legislative amendment is necessary to address those deficiencies.

## ATTACHMENT C

### Evidence and the *Native Title Act 1983*

In *Western Australia v Ward*,<sup>67</sup> when construing s.223(1) of the *Native Title Act 1983*, which sets out the definition of native title rights and interests, the majority said:

... Section 223 (1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a "connection" with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about *the kind of connection that exists* under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection. *Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom* and, in the second, upon what is meant by "connection" by those laws and customs. This latter question was not the subject of submissions in the present matters, the relevant contention being advanced in the absolute terms we have identified and without examination of the particular aspects of the relationship found below to have been sufficient. We, therefore, need express no view, in these matters, on what is the nature of the "connection" that must be shown to exist. In particular, we need express no view on when a "spiritual connection" with the land... (emphasis added).

The High Court clearly recognises the value of having available relevant evidence concerning traditional law and custom where they give context and content to the interpretation of central concepts. In the context of this discussion, the central concepts are 'family', 'kinship obligations' and 'child-rearing practices'.

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<sup>68</sup> (2002) 191 ALR 1 at paras 63-64 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

## ATTACHMENT D

### **Decisions about the best interests of Aboriginal or Torres Strait Islander children in terms of their need to maintain a connection with the lifestyle, culture, and traditions of their peoples**

The Full Court of the Family Court of Australia in *B v R* was clear that it has an obligation to receive evidence relevant to the unique experience of Aboriginal and Torres Strait Islander peoples, and commented that the history of forced removal of such children from their families and their consequences "are now so notorious that it would be expected that a trial judge would take judicial notice of them."<sup>68</sup>

In *Re CP*<sup>69</sup>, the Court considered the best interests of a Tiwi child who had been in the care of an Aboriginal woman from Thursday Island. A dispute arose about custody and guardianship as between the child's biological Tiwi mother and the child's Aboriginal carer. The Court decided an appeal from a single judge who ordered that the child reside with his Aboriginal carer. In ordering that the matter be reheard, the Court made the following comments:

it was incumbent on the trial judge, under s.68F(2)(f), to balance up the specific Aboriginal environment on the one hand, and the specific Aboriginal Tiwi environment on the other. That he considered these as generic Aboriginal environments constituted a misapprehension "of the difference between the specificity of this child's cultural heritage, and its impact on his developing identity..."<sup>70</sup>;

sections 61B and 61C proceed from an Anglo-European notion of parental responsibility which vest responsibility in specific people, whereas indigenous care arrangements are relatively fluid<sup>71</sup>;

"...It appears to us that the legislative recognition of indigenous culture and heritage in s.68F may need to be complemented by provisions which take account of the kinship care systems of Aboriginal and Torres Strait Islander peoples."<sup>72</sup>

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<sup>69</sup> *B v R & Separate Representative* (1995) 127 FLR 438 at 470-71.

<sup>69</sup> (1997) 21 Fam LR 486.

<sup>70</sup> (1997) 21 Fam LR 486, 500.

<sup>71</sup> (1997) 21 Fam LR 486, 505.

<sup>72</sup> (1997) 21 Fam LR 486, 506. The Court did not go on to explain how such provisions would work.

## ATTACHMENT E

### *H and H* [2003] FMCAfam 31 (9 April 2003)

The judgment notes that in family law proceedings “anthropological findings or sociological findings as a general rule are inadmissible in other proceedings, whether between the same or different parties.”<sup>73</sup> An analogy was made in relation to native title proceedings, in *H and H* where reference was made to s 146 of the *Native Title Act* in which a court is able to receive relevant expert evidence given in other proceedings, in effect through published works.

#### **S146: Evidence and findings in other proceedings**

In the course of an inquiry, the Tribunal may, in its discretion:

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the Tribunal; or

(ii) a court; or

(iii) a recognised State/Territory body; or

(iv) any other person or body; and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any report, findings, decision, determination or judgment of any court, person or body mentioned in any of subparagraphs (a)(i) to (iv) that may be relevant to the inquiry.<sup>74</sup>

The judgment notes that s 68F(2)(f) is the only section in the *Family Law Act* which requires a court to take into account the culture and traditions of a child. The subsection provides that a court must take into account:

the child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders) and any characteristics of the children that the court thinks are relevant

when determining what parenting order is in the child’s best interests.

It goes on to observe that s 68F(2)(f) is not inclusive of all cultures and operates so as to wrongly characterise the Australian community as being comprised of “Anglo-Saxon children” and “Aboriginal or Torres Strait Islander children”<sup>75</sup>. The matter involved a child of Lebanese-Australian descent.

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<sup>73</sup> [2003] FMCAfam 31 (9 April 2003).

<sup>74</sup> S 146 *Native Title Act 1993* as extracted in *H and H* [2003] FMCAfam 31 (9 April 2003).

<sup>75</sup> Ralph, above n 10, paragraph 27.

The father's counsel sought to lead a witness to give expert evidence about the social and cultural impact of the Lebanese/Australian community on the child and the child's parents. The mother's counsel sought to challenge the evidence on the basis that the witness did not have sufficient expertise to give the evidence. The issue of the witness' sufficiency of expertise raised squarely the issue for decision by Heydon J in *Makita (Australia) P/L v Sprowles*<sup>76</sup> which reviewed the law in relation to the receipt of expert opinion evidence and the operation of s 79 of the *Evidence Act 1995* (NSW). Heydon J's judgment would have caused considerable difficulty for the father's counsel.

The father's counsel had to show that:

- (a) there is a field of specialised knowledge in relation to Lebanese community norms and sociology
- (b) the witness had specified training, study or experience to become an expert on that field and
- (c) the opinion of the witness was "wholly or substantially based on the witness' expert knowledge".

The bar on the admissibility of expert opinion evidence is a high one, and may preclude acknowledgement of the lore men and elders within Aboriginal and Torres Strait Islander communities as the "experts" in relation to content and meaning of their cultures and customs.

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<sup>76</sup> 52 NSWLR 705.

## **ATTACHMENT F**

### **THE FAMILY LAW COUNCIL**

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

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

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

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

#### **Membership of the Family Law Council (as at 1 November 2004)**

Professor Patrick Parkinson, *Chairperson*

Ms Josephine Akee

Ms Nicola Davies

Mr Kym Duggan

Federal Magistrate Christine Mead

Justice Susan Morgan

Mr Clive Price

Ms Susan Purdon

Mr Garry Watts

The following six agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

**Australian Institute of Family Studies** - Mr Bruce Smyth

**Australian Law Reform Commission** - Ms Lani Blackman

**Child Support Agency** - Ms Yvonne Marsh

**Family Court of Australia** - Ms Jennifer Cooke, and Ms Dianne Gibson

**Family Court of Western Australia** - Judge Stephen Thackray

**Federal Magistrates Court** - Mr Peter May

**Family Law Section of the Law Council of Australia** - Ms Maurine Pyke

**The Aboriginal and Torres Strait Islander Committee**

Mr Kym Duggan                      *Convenor*  
Ms Josephine Akee  
Ms Jennie Cooke  
Professor John Dewar              (Member until 17 August 2004)  
Ms Tara Gupta                      (Member until 11 October 2004)

Mr Matthew Osborne and Mr Christopher Paul    *Secretariat*