

**Submission to the Australian Law Reform
Commission's Review of the
Family Law System, Discussion Paper No 86**

November 2018



NATSILS

**NATIONAL ABORIGINAL & TORRES
STRAIT ISLANDER LEGAL SERVICES**

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1 Introduction

- 1.1 The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) welcomes the Australian Law Reform Commission's (**ALRC**) Review of the Family Law System (**the Inquiry**). NATSILS understands that the Inquiry is an opportunity for the reform of the family law system, particularly in relation to how it can be updated to respond to the needs of diverse Aboriginal and Torres Strait Islander families and family structures.
- 1.2 NATSILS is the peak national body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner throughcare to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS and its members are the experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives NATSILS a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples.
- 1.3 NATSILS represent the following ATSILS:
- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (**ATSILS Qld**);
 - Aboriginal Legal Rights Movement Inc. in South Australia (**ALRM**);
 - Aboriginal Legal Service (NSW/ACT) (**ALS NSW/ACT**);
 - Aboriginal Legal Service of Western Australia Ltd (**ALSWA**);
 - North Australian Aboriginal Justice Agency (**NAAJA**);
 - Tasmanian Aboriginal Community Legal Service (**TACLS**); and
 - Victorian Aboriginal Legal Service Co-operative Limited (**VALS**).
- 1.4 In addition to criminal law work, ATSILS do a range of work across the family law, family violence and child protection systems:
- (a) assistance with care applications, child removal, child protection orders and advice, contact orders and therapeutic orders, out-of-home care placement;
 - (b) family law work including specialist family law services in general family law matters involving children, as well as dispute resolution;
 - (c) advice and casework on family violence and sexual assault;
 - (d) law and policy reform work (see for example NATSILS joint publication with SNAICC and NFVPLS Forum 'Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families'¹);

¹ NATSILS, NFVPLS Forum and SNAICC, *Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families* (2017),

- (e) holistic, preventative and wrap around supports for community members and community legal education on family violence and child protection, discussed further below at 5.7.
- 1.5 We refer to our previous submission to the Inquiry dated 31 May 2018 (**NATSILS Issues Paper Submission**).
- 1.6 NATSILS notes that Western Australia's family law system is unique as it is the only jurisdiction with a state family court. In the Family Court of Western Australia (FCWA), disputes involving married persons are dealt with under the *Family Law Act 1975* (Cth) and disputes involving de facto partners are dealt with under the *Family Court Act 1997* (WA). For this reason, our national recommendations may apply differently in practice in Western Australia.
- 1.7 NATSILS' further submission seeks to provide a response to a number of the proposals and questions raised in the ALRC Discussion Paper 86 (October 2018).

2 Summary of key points

Key Points Proposals 2-1 to 2-8:

- ATSILS and FVPLS already provide culturally safe community legal education on the family law system, as well as culturally appropriate referrals, and should be funded and supported for this work to have more reach;
- The national education and awareness campaign and information package must be co-designed by Aboriginal and Torres Strait Islander communities and organisations, and accessible remotely and in Indigenous languages;
- Aboriginal and Torres Strait Islander Family Liaison Officers must be nationally funded and available. These roles play important community engagement, access, educational and referral roles. These officers should also be on the proposed Working Group.

Key Points Proposals 3-1 to 3-19:

- Changes to simplify legislation and court processes will not alone eliminate barriers to accessing the family law system; more resourcing of ATSILS and FVPLS is needed.
- For parenting orders of any Aboriginal or Torres Strait Islander child, culture and identity must be of paramount consideration.
- Changes to 'parental responsibility' should be inclusive of broader constructs of family and caring responsibilities in Aboriginal and Torres Strait Islander communities.

Key points for Proposals 4-1 to 4-8:

- Increased investment into existing culturally safe community-controlled holistic services such as ATSILS and FVPLS should be prioritised rather than new proposals.
- Mapping of current family law legal need and services is necessary to avoid duplication.

- If Families Hubs are introduced, they must be co-designed with ATSILS, FVPLS and other community-controlled organisations and include these organisations' services.

- Family Advocacy and Support Services can only be effective for Aboriginal and Torres Strait Islander people if it is culturally safe, run by ATSILS or FVPLS rather than mainstream services.

Key points Proposals 5-1 to 5-11:

- Self-determined, culturally safe dispute resolution mechanisms for Aboriginal and Torres Strait Islander people exist, are effective and need more support; for example the Ponki mediators on the Tiwi Islands.

- While recognising that failure to disclose is an issue and can be a tool used against victims of family violence, civil or criminal penalties for non-disclosure would further entrench Aboriginal and Torres Strait Islander people in the justice system and should be avoided.

- Aboriginal and Torres Strait Islander community-controlled organisations including ATSILS and FVPLS must be included in any new dispute resolution consultation, co-design, service delivery, guidelines or frameworks.

Key Points Proposals 6-1 to 6-12:

- NATSILS supports the creation of an Indigenous List (or otherwise named), but has concerns about how a Family Violence list would interact with this list. Judicial officers on the Indigenous List must also have specialist family violence expertise.

- A post-order parenting support service needs to be co-designed and community-controlled to be effective for Aboriginal and Torres Strait Islander people.

Key Points Proposals 7-1 to 7-13:

- When considering proposals for children's strengthened participation in proceedings, a child's wellbeing and best interests are paramount.

- There is confusion about the scope of the proposal for a new child's advocate role and potential duplication with Independent Children's Lawyers.

- There are examples of ATSILS providing holistic, culturally safe supports and advocacy for children including Balit Ngulu, which had to close in September 2018 due to lack of funding.

- NATSILS support the current model of Independent Children's Lawyers, with improved resourcing and cultural competency.

- All people working with Aboriginal and Torres Strait Islander children in the family law system must be culturally competent and have prior relevant experience.

Key Points Proposals 8-1 to 8-7:

- NATSILS support a broader definition of family violence which includes emotional, spiritual, psychological or economic abuse, across kinship networks and communities.

- Coercion, control and fear should be non-mandatory elements, otherwise some behaviours which are family violence may not be classified as such.

- The need to protect confidential information, as well as potential harm and damage of institutional and therapist trust, and the child's best interests, must be balanced with the critical need to gather evidence to assist in the determination of matters.

Key Points Proposals 9-1 to 9-8:

- NATSILS is supportive of the family law system becoming more inclusive, empowering and accessible for people with disability, in particular Aboriginal and Torres Strait Islander people.

- Culturally safe supports for people with disability in the courts have been trialled with success, co-located with ATSILS such as the Unfitness to Plead Project and work in the NSW Koori Youth Court.

- More consultation is needed with First Peoples Disability Network.

- The definition of family should be broadened to be inclusive of Aboriginal and Torres Strait Islander concepts of family and kinship.

Key Points Proposals 10-1 to 10-14:

- Any workforce capability plan for family law must be co-designed with ATSILS and FVPLS, prioritise cultural competency in practitioners and cultural safety in services, and commit to an increased Aboriginal and Torres Strait Islander workforce.

- Core competencies of the family law sector should include expertise in trauma informed practice; family violence; child abuse and sexual abuse; drug and alcohol use; mental health and suicide; disability awareness; children's development; gratuitous concurrence; family violence and child protection system and their intersections; and cultural safety, issues, history and awareness (including Stolen Generations).

- NATSILS support cultural reports and cultural plans for Aboriginal and Torres Strait Islander children, separate to or as part of family reports. NATSILS is of the view that ideally cultural reports will be mandatory, but agree that there should be the ability for the child and family who is the subject of the report to have a view on whether a report is necessary.

- These reports should be written by an Aboriginal and Torres Strait Islander writer who has a relationship with the family and community. NATSILS recommend funding is provided to ATSILS and FVPLS to write these reports and develop cultural plans.

- Single use expert witnesses must have demonstrated cultural competence and experience working with Aboriginal and Torres Strait Islander communities.

Key Points Proposals 11-1 to 11-12:

- While NATSILS sees benefit and supports greater collaboration and information sharing between child protection, family violence and family court systems, there are significant risks for Aboriginal and Torres Strait Islander people (particularly with health records) which must be safeguarded against.

- New information sharing networks and protocols must be co-designed with Aboriginal and Torres Strait Islander organisations and be underpinned by the principles of free, prior and informed consent and data sovereignty.

- Meaningful processes of co-design with Aboriginal and Torres Strait Islander community-controlled organisations and representative bodies is critical for these proposals.

- Western Australia has a best practice model with a policy framework and standards on information sharing, and Memorandums of Understanding between agencies.

Key Points Proposals 12-1 to 12-11:

- NATSILS does not support the establishment of a Family Law Commission when the extensive resources required for this proposal could go into under-resourced Aboriginal and Torres Strait Islander community-controlled organisations providing family support, family violence, child protection and legal services.

- There is extensive unmet legal need for Aboriginal and Torres Strait Islander people across family law, family violence and child protection which ATSILS and FVPLS should be resourced to meet.

- NATSILS supports the creation of a cultural safety framework, however this must be co-designed and self-determined from community members who use the family law system as well as representative community-controlled peak bodies.

- A cultural safety framework must include a commitment to embedding Aboriginal and Torres Strait Islander people at every level of the family law system, including providing opportunities to train and develop local people where possible.

3 Education Awareness and Information [Proposals 2-1 to 2-8]

Key Points Proposals 2-1 to 2-8:

- ATSILS and FVPLS already provide culturally safe community legal education on the family law system, as well as culturally appropriate referrals, and should be funded and supported for this work to have more reach;

- The national education and awareness campaign and information package must be co-designed by Aboriginal and Torres Strait Islander communities and organisations, and accessible remotely and in Indigenous languages;

- Aboriginal and Torres Strait Islander Family Liaison Officers must be nationally funded and available. These roles play important community engagement, access, educational and referral roles. These officers should also be on the proposed Working Group.

- 3.1 NATSILS recognises the need to further spread awareness about family law, particularly in remote and regional areas, and broadly supports Proposals 2-1 to 2-3, 2-5 to 2-8 for a national education and awareness campaign.
- 3.2 However, we note the Discussion Paper's failure to recognise the significant and important work performed by existing ATSILS and Family Violence Prevention Legal Services (**FVPLS**) in delivering culturally safe and specialised community legal education, awareness and information to Aboriginal and Torres Strait Islander people.
- 3.3 NATSILS recommends that with sufficient, sustainable funding, ATSILS and FVPLS would have a greater reach in communities to assist with improving awareness of the family law system and rights for Aboriginal and Torres Strait Islander people.
- 3.4 In relation to Proposals 2-1, 2-2, 2-7 and 2-8, in NATSILS' view, the proposed information package must be:

- (a) co-designed with Aboriginal and Torres Strait Islander communities and organisations, and particularly include active collaboration, engagement and co-design with regional, sub-regional and remote communities;
- (b) facilitated by Aboriginal and Torres Strait Islander people from community-controlled organisations who understand the family law system;
- (c) available in Aboriginal and Torres Strait Islander languages;
- (d) written in plain English; and
- (e) accessible in a range of formats, including visual and digital.

3.5 In contrast to the proposed referrals to ‘universal services’ in Proposal 2-4, NATSILS recommends re-establishing Aboriginal and Torres Strait Islander Family Liaison Officers. These court-based officers provided clients with the option of speaking with someone from their community in person about the family law system and court processes they are facing. They provided culturally appropriate support, referral pathways and act as a conduit for communication in a culturally appropriate manner. Aboriginal and Torres Strait Islander Liaison Officers played a critical role in assisting parties to overcome language and cultural barriers, and in navigating the complexities of the family law system.

3.6 These roles were initiated in 1993 in the Northern Territory and Queensland, but have since been defunded (with the exception of one Indigenous Family Liaison Officer in Cairns), but continue in Western Australia, where they are referred to as ‘Aboriginal Family Liaison Officers’.² NATSILS recommends that any information and awareness campaign operates in conjunction with a national roll out of Aboriginal and Torres Strait Islander Family Liaison Officer positions.

3.7 NATSILS shares the views in the National FVPLS Forum submission with regard to the proper resourcing for the role of community-controlled organisations in undertaking legal health checks and developing relationships for culturally appropriate referral pathways.

3.8 NATSILS are broadly supportive of the Government convening a Standard Working Group in Proposal 2-5 as a means of co-designing the education campaign and information package. There must be representatives of Aboriginal and Torres Strait Islander communities and organisations such as ATSILS and FVPLS on this Working Group. Participation costs for involvement in the Working Group should be resourced. Due to the variety of jurisdictional differences in the family law system, it will be important to involve representatives from jurisdictional sub-groups to capture relevant local expertise and knowledge. NATSILS is also of the view that Aboriginal and Torres Strait Islander Family Liaison Officers should be part of the Working Group, given their experience working with Aboriginal and Torres Strait Islander people engaging with the family law system.

3.9 In respect of Proposal 2-7, NATSILS have some reservations about the parameters of a web-chat service, for example, the appropriateness of delivering legal services through this medium.

² Family Court of Australia, ‘Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice’, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>>.

4 Simpler and Clearer Legislation [Proposals 3-1 to 3-19]

Key Points Proposals 3-1 to 3-19:

- Changes to simplify legislation and court processes will not alone eliminate barriers to accessing the family law system; more resourcing of ATSILS and FVPLS is needed.
- For parenting orders of any Aboriginal or Torres Strait Islander child, culture and identity must be of paramount consideration.
- Changes to 'parental responsibility' should be inclusive of broader constructs of family and caring responsibilities in Aboriginal and Torres Strait Islander communities.

- 4.1 NATSILS are broadly in agreement with the proposals set out in 3-1 and 3-2 but note that:
- (a) the need to consider the consequences of the separation of the definition of parentage into new legislation, including jurisdictional questions for the determination of these matters;
 - (b) there may be difficulties in adapting a pro-forma document to suit the peculiarities of each matter, for example in complex family violence or child protection matters;
 - (c) these changes themselves are not a panacea for improving accessibility to the family law system, and we refer to our comments on this point in our Issues Paper Submission, including the need for more resourcing of culturally safe services including ATSILS and FVPLS.
- 4.2 NATSILS supports Proposal 3-3 for the elevated prioritisation of safety of children in parenting matters. NATSILS agrees with the National FVPLS Forum position on the definition of 'safety' to include freedom from family violence in all its forms, including safety from psychological, emotional and other non-physical harms, and cultural safety for Aboriginal and Torres Strait Islander children.
- 4.3 NATSILS supports Proposal 3-4 in principle, provided that the re-wording does not in practice lose any of the comprehensive protections for children currently in s 60CC.
- 4.4 Regarding Proposals 3-4 and 3-6, NATSILS emphasises that for parenting orders of any Aboriginal or Torres Strait Islander child, culture and identity must be of paramount consideration. NATSILS is of the view that the current legislation limits the consideration to 'the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture.'
- 4.5 We refer to our comments on page 7 of our Issues Paper submission, regarding the most appropriate mechanisms for introducing cultural evidence, and options for including connection to culture as a paramount consideration.
- 4.6 NATSILS is broadly supportive of the proposed wording on maintaining and developing a child's cultural identity for s 60B. We note that developing a connection to culture could involve an immersive element, as genuine learning of culture occurs through direct lived experience. The proposed wording requires co-design with communities, Elders and Aboriginal and Torres Strait Islander community-controlled organisations.

- 4.7 NATSILS supports Proposal 3-6 that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.
- 4.8 The family law system can further alienate Aboriginal and Torres Strait Islander people through the use of formal and legal jargon. One example is the use of the term 'parental responsibility' in parenting orders; for many parents this phrase might not have any meaning and there is some difficulty with the application of this term currently. For this reason, NATSILS supports Proposal 3-7 for the replacement of the term parental responsibility. In terms of the new wording, NATSILS recommends in relation to Aboriginal and Torres Strait Islander children, such wording reflects the broader sense of family and care arrangements in Aboriginal and Torres Strait Islander communities, so that the definition is inclusive of family members who are not parents or grandparents but may be more remote relatives or kinship carers who are exercising decision making responsibilities. For example, "other persons recognised by the child's family and community as having decision making responsibility".
- 4.9 On Question 3-8, on resolving consultation with parents, NATSILS submits that properly funded culturally appropriate legal services are fundamental. In addition, Aboriginal and Torres Strait Islander Family Liaison Officer positions are imperative to assist Aboriginal and Torres Strait Islander partners to resolve matters concerning children.
- 4.10 NATSILS supports Proposal 3-11 and highlights the need for meaningful consultation and co-design to determine appropriate protocols and protect vulnerable parties especially those who are victims of family violence.
- 4.11 On Question 3-2, NATSILS does not support the early release of superannuation, noting government's responsibility in providing appropriate supports for people experiencing hardship as a result of separation (for example due to family violence). Victims should not suffer further financial hardship as a result of leaving a relationship.
- 4.12 On Question 3-4, NATSILS supports the greater use of registrars to consider urgent applications for interim spousal maintenance to improve accessibility to this support.

5 Getting Advice and Support [Proposals 4-1 to 4-8]

Key points for Proposals 4-1 to 4-8:

- Increased investment into existing culturally safe community-controlled holistic services such as ATSILS and FVPLS should be prioritised rather than new proposals.
- Mapping of current family law legal need and services is necessary to avoid duplication.
- If Families Hubs are introduced, they must be co-designed with ATSILS, FVPLS and other community-controlled organisations and include these organisations' services.
- Family Advocacy and Support Services can only be effective for Aboriginal and Torres Strait Islander people if it is culturally safe, run by ATSILS or FVPLS rather than mainstream services.

- 5.1 Trust of institutions in the family law space is a barrier to justice for Aboriginal and Torres Strait Islander people. The historic association between the family courts and 'welfare' systems, including intergenerational trauma from the Stolen Generations, raises fears that children will be removed as a result of engaging with court processes.
- 5.2 Aboriginal and Torres Strait Islander women facing violence face further barriers to accessing justice. These were outlined in our joint policy position statement with SNAICC and NFVPLS Forum, "Strong families, safe kids: family violence response and prevention for Aboriginal and Torres Strait Islander children and families":
- (a) Lack of understanding of legal rights and options and how to access supports when experiencing family violence;
 - (b) Poor police responses and discriminatory practices within police and child protection services;
 - (c) Fear of child removal if disclosing family violence;
 - (d) Mistrust of mainstream legal and support services to understand and respect the needs, autonomy and wishes of Aboriginal victims/survivors;
 - (e) Community pressure not to go to the police in order to avoid increased criminalisation of Aboriginal men;
 - (f) Pressure not to leave a violent relationship, stemming from a priority within some parts of the community of maintaining the family unit due to a misconceived fear that parental separation will threaten cultural connection (especially for children) and community cohesion;
 - (g) Poverty and social isolation; and
 - (h) Lack of cultural competency and indirect discrimination across the support sector, including for example discriminatory practices within police and child protection agencies, lack of culturally appropriate housing options, alienating and deterrent communication and client/patient approaches by medical, legal, community services and other professionals.
- 5.3 For these reasons, NATSILS has concerns about the development of Families Hubs as a new, mainstream institution, in Proposal 4-1. It is unlikely that Aboriginal and Torres Strait Islander people will engage with Family Hubs without significant co-design, control and presence of Aboriginal and Torres Strait Islander people, agencies and providers.
- 5.4 ATSILS and FVPLS and other culturally safe Aboriginal community-controlled organisations currently provide many of these services for our community members. Investment should be directed into these community-controlled services, which are accountable to community, deeply aware and connected to community needs, and which have cultural safety embedded from the strategic level through to delivery.
- 5.5 As recommended in our Issues Paper submission, there is an urgent need for governments to work with Aboriginal and Torres Strait Islander organisations to identify unmet legal need, particularly in civil areas including family law. Similarly, there is a need to map services proposed by the Families Hubs to avoid unnecessary duplication and further stretching of limited government resources, when those resources could be put into existing, community-controlled services.

5.6 NATSILS is supportive generally of the idea behind Families Hubs: a holistic and preventative approach to family law matters, and the recognition of other social factors as intertwined with family law issues (eg. housing, health, financial). However, this holistic approach is one that ATSILS and FVPLS as well as other community-controlled services have been championing and practising for many years.

5.7 For example, ATSILS deliver holistic services including, amongst others:

- (a) ALSWA's Youth Engagement Program;
- (b) NAAJA and ATSILS Queensland's Throughcare programs;
- (c) ALRM's financial counselling service;
- (d) VALS' Balit Ngulu youth legal service (now closed);
- (e) health justice partnership projects such as NAAJA and Miwatj Health;
- (f) ALS NSW/ACT's drivers licence program and Koori Youth Court work;
- (g) NAAJA's Kunga Stopping Violence program for women in Alice Springs;
- (h) VALS' Family Violence Support Workers;
- (i) ALS NSW/ACT's Indigenous Child Protection Project (ICPP) with PIAC;
- (j) Community legal education programs on child protection and family violence in remote and regional areas (for example offered in Risdon Prison by TACLS and to women in APY Lands by ALRM).³

5.8 If Families Hubs are pursued, and with respect to Proposal 4-4, NATSILS recommends:

- (a) co-designing the Hubs with Aboriginal and Torres Strait Islander communities and existing community-controlled organisations, especially ATSILS and FVPLS;
- (b) that any Families Hub be properly funded and structured so as to enable culturally safe and holistic support including properly funded culturally appropriate legal assistance pathways operated by ATSILS or FVPLS;
- (c) that Hubs be staffed by Aboriginal and Torres Strait Islander people and be community-controlled;
- (d) Hubs provide support to all parents, guardians, carers, however we note the need for victim-survivors to have safe spaces separate from perpetrators; and
- (e) Hubs are supported by well-funded Aboriginal and Torres Strait Islander Family Liaison Officers to assist clients.

³ For more information on these programs, see NATSILS Submission to the Review into the Indigenous Legal Assistance Program (2018), <http://www.natsils.org.au/portals/natsils/submission/NATSILS%20ILAP%20Submission%20For%20Website.pdf?ver=2018-10-29-161426-540>.

- 5.9 NATSILS refers to pages 9-10 of our Issues Paper Submission that sets out how parties who have experienced family violence or have complex needs can be better supported. Cultural healing – driven by Aboriginal and Torres Strait Islander community controlled organisations, built on trauma-informed practice and responsive to the diverse needs in different community contexts, must be embedded in all elements of family violence response and prevention for Aboriginal and Torres Strait Islander peoples.
- 5.10 On Proposal 4-5, NATSILS is of the view that Family Advocacy and Support Services (**FASS**) can only be effective for Aboriginal and Torres Strait Islander people if they are culturally safe and run by community-controlled organisations such as ATSILS or FVLPS, rather than mainstream services as with the current model.

6 Dispute Resolution [Proposals 5-1 to 5-11]

Key points Proposals 5-1 to 5-11:

- Self-determined, culturally safe dispute resolution mechanisms for Aboriginal and Torres Strait Islander people exist, are effective and need more support; for example the Ponki mediators on the Tiwi Islands.
- While recognising that failure to disclose is an issue and can be a tool used against victims of family violence, civil or criminal penalties for non-disclosure would further entrench Aboriginal and Torres Strait Islander people in the justice system and should be avoided.
- Aboriginal and Torres Strait Islander community-controlled organisations including ATSILS and FVPLS must be included in any new dispute resolution consultation, co-design, service delivery, guidelines or frameworks.

- 6.1 NATSILS refers to page 8 of our Issues Paper Submission in relation to dispute resolution and reiterate that culturally appropriate, self-determined, non-litigious methods of dispute resolution are important to resolving family law issues for Aboriginal and Torres Strait Islander people.
- 6.2 Specially targeted resolution processes between Aboriginal and Torres Strait Islander families or parties should be developed flexibly so as to provide a place-based and culturally safe framework for parties. NATSILS are of the view that a single model will not work for every Aboriginal and Torres Strait Islander person due to the diversity of our peoples across Australia. There are current dispute resolution models that have been developed in co-design with community and these are largely successful. Such a flexible approach to resolution outside of Courts and parallel specialist List developed within the Court process (see more in Part 7) is likely to lead to cost effective and timely resolution of family disputes.
- 6.3 One example is the Ponki mediators on the Tiwi Islands. Tiwi Island communities address conflict constructively, using a combination of cultural mainstream skills and practices, and the Ponki mediators work to support Tiwi Island families. Their work is complex, and their aim is to actively address community safety and family wellbeing promptly and expertly. Ponki mediators are nationally trained and accredited, and work collaboratively with existing and established services. Ponki mediators provide the much needed cultural foundation framework and strength that local people recognise and respond to. Examples of the work undertaken by Ponki mediators include:

- (a) reference letters for court;
 - (b) court support for community members;
 - (c) meeting magistrates;
 - (d) conflict mediation –community violence; and
 - (e) conflict mediation – family mediation.
- 6.4 These culturally safe, self-determined dispute resolution mechanisms need to be resourced and accessible.
- 6.5 NATSILS also notes the importance of properly skilled Family Dispute Resolution providers having adequate knowledge of financial issues, amongst other matters described in Proposal 5-2, in order to properly make determinations concerning the parties.
- 6.6 As to Question 5-1, NATSILS do not consider there to be a need to revise the timeframes, however there is benefit in more education so separating parties are aware of the timeframes. In cases where family violence is present property and financial matters in some cases continue to be tools for perpetrators to maintain control over family members and this can have detrimental impact on parties and family members.
- 6.7 In respect of Question 5-2, while it is appropriate to consider non-disclosure when determining how the financial pool is to be divided, NATSILS does not support civil or criminal penalties for non-disclosure, as this may further entrench Aboriginal and Torres Strait Islander people in the justice system. NATSILS are concern this may have a disproportionate impact on Aboriginal and Torres Strait Islander people. There are other appropriate means of having accountability for those people failing to disclose. Quasi-criminal sanctions for contravention of family court orders are already available and the existing framework should simply be reviewed for effectiveness concerning the area of disclosure.
- 6.8 On Proposals 5-9 and 5-10 the NATSILS emphasise the importance of inclusion of Aboriginal and Torres Strait Islander community-controlled organisations such as ATSILS or FVPLS in any consultation, co-design, service delivery, guidelines or frameworks. NATSILS again note that it is critical for any achievement of better outcomes for Aboriginal and Torres Strait Islander people that our organisations be properly funded.

7 Reshaping the Adjudication Landscape [Proposals 6-1 to 6-12]

Key Points Proposals 6-1 to 6-12:

- NATSILS supports the creation of an Indigenous List (or otherwise named), but has concerns about how a Family Violence list would interact with this list. Judicial officers on the Indigenous List must also have specialist family violence expertise.
- A post-order parenting support service needs to be co-designed and community-controlled to be effective for Aboriginal and Torres Strait Islander people.

- 7.1 As to Proposals 6-1 to 6-3, NATSILS are supportive of properly triaged matters and the development, expansion into other registries and regional communities of appropriate lists including an Indigenous List.
- 7.2 NATSILS supports the proposal for a specialised family law matters list for Aboriginal and Torres Strait Islander people. A specialised list allows for a more culturally appropriate experience with fairer outcomes for Aboriginal and Torres Strait Islander people, because judicial officers understand their barriers to justice, systemic and otherwise. The exact name of the list should be agreed with local Aboriginal and Torres Strait Islander people.
- 7.3 In our Issues Paper Submission, NATSILS described several examples where this has been done with successful outcomes:
- (a) the Koori Family Hearing Day for the Family Division of the Broadmeadows Children’s Court;
 - (b) the Federal Circuit Court of Australia’s specialist list, introduced in 2016 by Judge Sexton in the Sydney Registry;
 - (c) the Aboriginal & Torres Strait Islander List of the Federal Circuit Court in Adelaide with Judge Kelly.
- 7.4 The most recent and arguably the most distinctive model is Jiji Nyirti currently being piloted by the Family Court of Western Australia at Newman. This model is highly simplified, involves minimal formality and is not process-driven. It is based around family led discussions assisted by interpreters with a low level of intervention from the judicial officer. The rolling out of this model has been informative in respect of what works and does not work in encouraging Aboriginal people to use the family courts.
- 7.5 The creation of specialist lists and the development of co-location in regional courts and centres should be adequately supported by funded positions including new positions to ensure their effectiveness. For example: Aboriginal and Torres Strait Islander Family Liaison Officers, Aboriginal and Torres Strait Islander Mediators, Aboriginal and Torres Strait Islander Independent Children’s Lawyers.
- 7.6 NATSILS recommends that all professionals working in the family law system have training on:
- (a) trauma informed practice;
 - (b) family violence;
 - (c) drug and alcohol use;
 - (d) children’s development;
 - (e) gratuitous concurrence; and
 - (f) cultural safety, issues and awareness.
- 7.7 Cultural competency needs to be prioritised not only for practitioners that regularly work with clients from different backgrounds, but for all practitioners, as well as judges, magistrates and other family law staff.

- 7.8 Consideration should also be given to accessibility issues for remote Aboriginal and Torres Strait Islander people in developing co-location models. For example, video linking services assist with access for regional and remote parties.
- 7.9 As with all specialised lists, Aboriginal and Torres Strait Islander people should be given the ability to opt out of any services should they choose.
- 7.10 ATSILS have years of specialist experience working in Koori courts, Nunga Courts, Murri Courts, and various sentencing circles and lists around Australia. These new family law lists will create additional demand for ATSILS and FVPLS and our organisations must be adequately resourced to take on this work.
- 7.11 As to the development of a Family Violence List in Proposal 6-3, NATSILS raises concerns over the overwhelming caseload of such a list, as well as complications with its interaction with the Indigenous List. While there is a clear benefit in family violence having the specialist knowledge and expertise in a Family Violence List, judicial officers who sit on the Indigenous List must also be experts in this area (and visa versa), given the alarming and disproportionate rates of Aboriginal and Torres Strait Islander women and children experiencing family violence.
- 7.12 Any post-order parenting support service as referred to in Proposals 6-9 and 6-10 will only be effective for Aboriginal and Torres Strait Islander people if co-designed with the community and where services are provided by appropriately skilled and funded Aboriginal and Torres Strait Islander community-controlled organisations.
- 7.13 NATSILS notes that previously family consultants of the FCWA (previously known as family court counsellors) provided this service through what was known as 'supervision'. A family court counsellor would be allocated to the case to 'supervise' the operation of orders that had been made for example, 6 or 12 months. If a dispute arose about the workings of the orders, a parent or party could call the counsellor and the counsellor would talk with the other parties and assist them to overcome the issue. The service was very effective but had to cease because the workload of family consultants has increased so significantly, and they were not sufficiently resourced to undertake this new function.
- 7.14 On Proposal 6-12, when ensuring family court premises are appropriate and safe, governments should consult with Aboriginal and Torres Strait Islander communities and community-controlled organisations on the location of the premise to ensure that needs are met.

8 Children in the Family Law System [Proposals 7-1 to 7-13]

Key Points Proposals 7-1 to 7-13:

- When considering proposals for children's strengthened participation in proceedings, a child's wellbeing and best interests are paramount.
- There is confusion about the scope of the proposal for a new child's advocate role and potential duplication with Independent Children's Lawyers.
- There are examples of ATSILS providing holistic, culturally safe supports and advocacy for children including Balit Ngulu, which had to close in September 2018 due to lack of funding.

- NATSILS support the current model of Independent Children’s Lawyers, with improved resourcing and cultural competency.

- All people working with Aboriginal and Torres Strait Islander children in the family law system must be culturally competent and have prior relevant experience.

- 8.1 NATSILS highlights the importance of the protection of a child’s wellbeing and their best interests in relation to the proposals to strengthen children’s participation in proceedings.
- 8.2 In relation to Proposal 7-1, we refer to our earlier comments regarding Proposal 1-1, in addition to the need to resource and support Aboriginal and Torres Strait Islander community-controlled legal services who provide holistic support for children including ATSILS and FVPLS.
- 8.3 Further, NATSILS is of the view that the system can be improved by:
- (a) increased cultural competency across the system including prioritising the recruitment of Aboriginal family consultants, Aboriginal and Torres Strait Islander Family Liaison Officers and support workers;
 - (b) further training for court staff, judiciary, lawyers and support persons as to what is appropriate for a child of a given age; and
 - (c) cultural experts assisting in preparing the space for a child with a culturally diverse background.
- 8.4 If Families Hubs are established, then NATSILS agrees with Proposal 7-2, on the basis that culturally safe, holistic and community-controlled organisations are resourced to offer programs to Aboriginal and Torres Strait Islander children through the Hubs.
- 8.5 In relation to Proposals 7-3, 7-4 and 7-7, NATSILS support the facilitation of a child’s view in proceedings, to the extent that the child consents to participate, that they have a culturally safe space forum to do so, they are supported in this process, and that they are not unnecessarily exposed to harm or parental conflict by their involvement (for example strategies such as Proposal 7-6).
- 8.6 NATSILS agrees that it should remain the position that children are not required to participate if they do not wish to do so.
- 8.7 There is some confusion over the proposed scope of the new children’s advocate in Proposal 7-8, and how this would interact or possibly duplicate the existing Independent Children’s Lawyer. This proposal appears to have arisen out of a perceived failure of the Independent Children’s Lawyer to present a child’s views in proceedings or adequately facilitating the child’s participation. For example with Proposal 7-11, it is unclear whether this would generate a new report for the child, and if so, who would be required to pay for the report.
- 8.8 It is possible that, if Aboriginal and Torres Strait Islander Family Liaison Officers were reintroduced, they could fulfil this ‘advocate’ role for Aboriginal and Torres Strait Islander children. In the case of Aboriginal and Torres Strait Islander children, there should be explicit reference to the need to have participation of culturally competent family consultants, Aboriginal and Torres Strait Islander Family Liaison Officers and support workers with appropriate expertise and experience.

- 8.9 There are examples such as in Queensland the Office of the Public Guardian's child advocate system that provide children with protection and support in a manner that is empowering. This can facilitate further connection with a children's legal representative and assist with the provision of evidence to the Court.
- 8.10 With regard to the example of the United Kingdom 's Children and Family Court Advisory and Support Service, NATSILS notes that while this model may be considered in relation to mainstream services, Aboriginal and Torres Strait Islander children have different needs and come from families with different value systems, norms and structures.
- 8.11 ATSIILS can provide these holistic supports. In 2017 VALS launched a separate legal service titled Balit Ngulu, which means "strong voice" in Wurundjeri, to provide legal assistance in the areas of youth justice, child protection, family law, and civil law issues to Aboriginal young people across Victoria. Balit Ngulu was Australia's only dedicated legal service for Aboriginal young people. Balit Ngulu provided holistic, integrated and culturally appropriate services to 100 Aboriginal young people to address issues such as recidivism, cultural needs, connection to family, educational and employment needs, and leadership so that they can be assured that they are not a lost cause and they can have a strong voice in their own affairs. Advocacy provided by Balit Ngulu has made the difference between having children placed in out-of-home care or within their kinship networks.⁴
- 8.12 Luke Edwards was one of Balit Ngulu's CSOs. Growing up in Shepparton he also used to get into trouble but had an Uncle who taught him Indigenous culture and encouraged him to get an education. As a Balit Ngulu CSO, Luke made a folder for each young client that details their country, family history, and other information for magistrates. He sat with the lawyers and ensures that young people understand what is happening to them. He helped guide them through the court environment, connects them with social services and connects them with culture. With great sadness, Balit Ngulu had to close its doors on 29 September 2018 due to a lack of government support and funding.
- 8.13 Any person in the family law system interviewing or writing a report for an Aboriginal or Torres Strait Islander child will ideally be an Aboriginal or Torres Strait Islander person, and where they are not, they must have experience and training in working with Aboriginal and Torres Strait Islander children. Any person or practitioner performing these functions must be appropriately skilled and experienced including being able to empower children to provide their views. This person should also be adept at ascertaining children's view, understanding cultural context, and communicate accurately to the court. Again, it is imperative for such positions to be filled by Aboriginal and Torres Strait Islander people, preferably from culturally safe, community-controlled organisations.
- 8.14 NATSILS refers to VALS' Issues Paper Submission, which notes that cultural reports should be written by an Aboriginal community-controlled organisation that is connected to the child, parent or extended family. The report writer should consult with the family and extended family when appropriate, and with relevant community members. This information should be included alongside academic information that assists in explaining the experiences of the family, such as, the impacts of

⁴ M Perkins, 'I'm a lost cause, aren't I?' Aboriginal legal service faces closure', *The Age* (online), 5 June 2018, <<https://www.theage.com.au/national/victoria/i-m-a-lost-cause-aren-t-i-aboriginal-legal-service-faces-closure-20180603-p4zj81.html>>.

intergenerational trauma and child removal on the family and their community. NATSILS is of the view the same principles apply to reports about children.

- 8.15 In relation to Proposal 7-10, NATSILS supports the existing model of Independent Children’s Lawyers. However, NATSILS recommends that there needs to be better resourcing of report writers so that a child can have a relationship with the writer, as well as better resourcing of child representatives who act on the child’s best interests. NATSILS considers that ICLs should be trained and educated in cultural issues. There are very few ICLs that are currently equipped to properly understand cultural issues for Aboriginal families. For example, there is currently no Aboriginal ICL in Western Australia or in the Northern Territory.
- 8.16 Regarding Question 7-1, NATSILS’ view is that the ideal approach would be to appoint an ICL for every child where the care arrangements for that child are substantially in dispute, the parents objectively can be seen to have little capacity to co-parent and conflict is high, or there are other complex needs or risk issues. Such practitioners should be required to undertake specific training and education around meeting and communicating with child clients, with an important objective being to improve the independent communication of information to the child about the court process, what it means and how it is likely to affect them. In NATSILS’ view, there is not a sufficient emphasis upon keeping children (particularly older children) informed and up to date. Children tend to be interviewed infrequently by ICLs (perhaps once or twice in the life a case) and quite often the purpose of this is to ask them for any views they want to express, rather than focussing on empowering them with information.
- 8.17 NATSILS supports Proposal 7-13 in principle. If a Children and Young People’s Advisory Board is established, this must include representatives of Aboriginal and Torres Strait Islander communities with relevant cultural and professional knowledge and experience to enable better systems, policies and practice development.

9 Proposal 8 - Reducing Harm [Proposals 8-1 to 8-7]

Key Points Proposals 8-1 to 8-7:

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| <ul style="list-style-type: none"> - NATSILS support a broader definition of family violence which includes emotional, spiritual, psychological or economic abuse, across kinship networks and communities. - Coercion, control and fear should be non-mandatory elements, otherwise some behaviours which are family violence may not be classified as such. - The need to protect confidential information, as well as potential harm and damage of institutional and therapist trust, and the child’s best interests, must be balanced with the critical need to gather evidence to assist in the determination of matters. |
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- 9.1 NATSILS support Proposal 8-1. Currently, not all forms of family violence will be captured by the definition. NATSILS agrees with NFVPLS that the definition of family violence should be amended to be similar to the definition in the *Family Violence Protection Act 2008* (Vic):
- a) behaviour by a person towards a family member of that person if that behaviour—
 - i) is physically or sexually abusive; or

- ii) is emotionally or psychologically abusive; or
- iii) is economically abusive; or
- iv) is threatening; or
- v) is coercive; or
- vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

9.2 Aboriginal and Torres Strait Islander definitions of the nature and forms of family violence are broader than mainstream definitions. This can cover a range of acts that are criminal, such as physical and sexual assault, and non-criminal, such as emotional and spiritual abuse. Family violence includes intergenerational violence and abuse, affects extended families and kinship networks. An individual can be both a perpetrator and a victim of family violence.

9.3 For example, the Victorian Indigenous Family Violence Task Force defined family violence as:

‘An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self-harm, injury and suicide.’⁵

9.4 NATSILS is of the view that coercion, control and fear should be non-mandatory elements, otherwise some behaviours which are family violence may not be classified as family violence.

9.5 NATSILS agrees that the development of information-sharing protocols are critical. For Proposals 8-5 and 8-6, that deal with the sharing of information given in confidence, must take into consideration:

- (a) specific consultation and co-design with specialist Aboriginal and Torres Strait Islander organisations be undertaken to determine appropriate frameworks for sharing of information;
- (b) the necessity of accessing the information balanced against potential harm;
- (c) the impact of sharing confidential information with institutional trust and relationships with therapists;
- (d) the best interests of the child;
- (e) consent and the right to object to production;
- (f) access to information by perpetrators; and
- (g) the need to protect confidential information and the critical need to gather evidence to assist in the determination of matters.

⁵ Victorian Government, *Victorian Indigenous Family Violence Taskforce Final Report* (2003), 123.

- 9.6 In relation to Proposal 8–7, NATSILS recommends that a working group to develop guidelines in relation to the use of sensitive records in family law includes representatives from ATSILS and FVPLS.

10 Proposal 9 - Additional Legislative Issues [Proposals 9-1 to 9-8]

Key Points Proposals 9-1 to 9-8:

- NATSILS is supportive of the family law system becoming more inclusive, empowering and accessible for people with disability, in particular Aboriginal and Torres Strait Islander people.
- Culturally safe supports for people with disability in the courts have been trialled with success, co-located with ATSILS such as the Unfitness to Plead Project and work in the NSW Koori Youth Court.
- More consultation is needed with First Peoples Disability Network.
- The definition of family should be broadened to be inclusive of Aboriginal and Torres Strait Islander concepts of family and kinship.

- 10.1 NATSILS is supportive of the family law system becoming more inclusive, empowering and accessible for people with disability, in particular Aboriginal and Torres Strait Islander people. Almost half (45%) of Aboriginal and Torres Strait Islander people aged 15 years and over were living with disability or a restrictive long-term health condition in 2014-15.⁶ Research shows Aboriginal and Torres Strait Islander people with disability experience double disadvantage: “Aboriginal and Torres Strait Islander people with disability experience unique form of ‘intersectional discrimination’ and social inequality that is an interaction of discrimination that is both Aboriginal and Torres Straits Islander and disability related.”⁷
- 10.2 The interaction of people with cognitive and mental health disability and the justice system has been identified by the Australian Government as an issue of national concern.
- 10.3 NATSILS is of the view that First Peoples Disability Network should be consulted about these proposals relating to disability, particularly with regard to developing a decision-making framework in Proposal 9-1 and the regarding the improvements needed to the model of litigation representatives in Proposal 9-3.
- 10.4 NATSILS also notes the need for mapping and recognition of support services already provided by First Peoples Disability Network and affiliated organisations.
- 10.5 For Proposals 9-2 to 9-5, it is important that any supporters and litigation representatives for Aboriginal and Torres Strait Islander people are culturally competent, preferably from Aboriginal and Torres Strait Islander community-controlled

⁶ Australian Bureau of Statistics, *Social And Economic Wellbeing Of Aboriginal And Torres Strait Islander People with Disability* (2017), <[http://abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20\(Feature%20Article\)-10000](http://abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20(Feature%20Article)-10000)>.

⁷ Scott Avery, *Culture is Inclusion: Summary of Research Findings* (2018), https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf.

organisations, with training and experience working with Aboriginal and Torres Strait Islander People.

- 10.6 In relation to Proposal 9-6, NATSILS suggests that any proposal arising from this ensures that Aboriginal and Torres Strait Islander access to the NDIS via these referrals is equal. Currently there are many barriers to equal access to the NDIS.⁸
- 10.7 For Proposal 9-7, NATSILS refers to our work with Melbourne University researchers to develop The Unfitness to Plead Project, which sought to develop practical and legal options to address the problem of people with cognitive disabilities being found unfit to plead and subject to indefinite detention. The program did this by developing and introducing cost-effective, culturally appropriate supports for those at risk of being found unfit to plead into community legal centres in Victoria (VALS), New South Wales (Intellectual Disability Rights Service (IDRS)) and the Northern Territory (NAAJA).
- 10.8 According to the research team's summary report, people with cognitive disabilities face barriers across the entire criminal justice system. Disadvantages identified include:
- (a) Inaccessible court proceedings that rely on complex language;
 - (b) Inconsistent availability of support throughout court proceedings;
 - (c) Under-resourced legal services;
 - (d) Long delays in proceedings involving accused people with cognitive disabilities;
 - (e) The 'criminalisation of disabilities' whereby the environmental causes of difficult behaviour are ignored or played down, or behaviour associated with a disability is misinterpreted as defiance.
- 10.9 A summary of the above project and what can be done to support Aboriginal and Torres Strait Islander people (and the broader community) in the justice system was developed by researchers at Melbourne university in collaboration with ATSILS and FPDN is available online.⁹
- 10.10A case study from the project demonstrates that "a relatively modest program intervention at a crucial point in criminal justice proceedings can improve outcomes for accused persons with cognitive disability" and provide potentially hundreds of thousands of dollars in cost savings to government per client. The report also found that the program: "[A]ppears to reduce the need for unfitness to plead determinations by assisting accused persons to participate in proceedings and exercise their legal capacity. Such formal support is increasingly shown to be effective for many persons with disabilities and appears to provide a cost-effective and rights-affirming practice for securing access to justice."¹⁰

⁸ Scott Avery, Indigenous people with disability have a double disadvantage and the NDIS can't handle that (2018), <https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>.

⁹ Unfitness to Plead Project, <https://socialequity.unimelb.edu.au/data/assets/pdf_file/0003/2477037/Unfitness-to-Plead-Project-ATSI-Legal-Services-Brochure.pdf>.

¹⁰ R McCausland, R Reeve, P Gooding, E Baldry, *Cost Benefit Analysis of Support Workers in Legal Services For People with Cognitive Disability* (2017), 3,

10.11 NATSILS has been working with Melbourne University, the ATSILS and First Peoples Disability Network to demonstrate the importance for disability support workers to be co-located in each of the ATSILS and in FPDN. The support workers would assist clients with cognitive and mental health disabilities who have a disability particularly when they are young people or are at risk of being found unfit to stand trial, or who are at risk of being unable to participate in proceedings against them. The proposal builds on existing, evidence-based programs for providing support to accused persons with cognitive and psychiatric disabilities but fills a major gap in the provision of legal services to Aboriginal and Torres Strait Islander people. This proposal brings together and builds upon two initiatives that have developed separately from within the legal sector and the disability sector to build a nationally consistent model of support for people with cognitive and psychosocial disability who come in contact with the justice system.

10.12 In a similar project, FPDN has been providing support to young Aboriginal people with disability who appear before the New South Wales Youth Koori Court. This support provides counselling, psychosocial and mentoring to young Aboriginal people with disability, many of who have multiple disabilities, have experienced significant trauma and most likely subject to violence and abuse prior to their coming in contact with the justice system. This support is provided by other young Aboriginal people with disability employed by FPDN, and is encouraged by the Childrens Magistrates, legal representatives and support workers attached to the NSW Department of Juvenile Justice. FPDN has initiated this program by drawing upon its reserves and receives no direct funding for the support program. This proposal seeks to provide a sustainable funding base for this program to continue.

10.13 NATSILS is of the view that these culturally safe supports could equally translate to the family law setting as a support available under Proposal 9-7.

10.14 NATSILS agrees that the definition of family member should be inclusive of Aboriginal and Torres Strait Islander concepts of family in Proposal 9-8. While there should be further consultation and co-design of this definition, NATSILS points to the definition of “relative” in the *Children and Community Services Act 2004* (WA) as an example of a more inclusive definition:

relative, in relation to a child, means each of the following people —

(a) the child’s —

(i) parent, grandparent or other ancestor;

(ii) step-parent;

(iii) sibling;

(iv) uncle or aunt;

(v) cousin;

(vi) spouse or de facto partner, whether the relationship is established by, or traced through, consanguinity, marriage, a de facto relationship, a written law or a natural relationship;

- (b) in the case of an Aboriginal child, a person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned in paragraph (a);
- (c) in the case of a Torres Strait Islander child, a person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned in paragraph (a).

11 Proposal 10 - A skilled and Supported Workforce [Proposals 10-1 to 10-15]

Key Points Proposals 10-1 to 10-14:

- Any workforce capability plan for family law must be co-designed with ATSILS and FVPLS, prioritise cultural competency in practitioners and cultural safety in services, and commit to an increased Aboriginal and Torres Strait Islander workforce.
- Core competencies of the family law sector should include expertise in trauma informed practice; family violence; child abuse and sexual abuse; drug and alcohol use; mental health and suicide; disability awareness; children's development; gratuitous concurrence; family violence and child protection system and their intersections; and cultural safety, issues, history and awareness (including Stolen Generations).
- NATSILS support cultural reports and cultural plans for Aboriginal and Torres Strait Islander children, separate to or as part of family reports. NATSILS is of the view that ideally cultural reports will be mandatory, but agree that there should be the ability for the child and family who is the subject of the report to have a view on whether a report is necessary.
- These reports should be written by an Aboriginal and Torres Strait Islander writer who has a relationship with the family and community. NATSILS recommend funding is provided to ATSILS and FVPLS to write these reports and develop cultural plans.
- Single use expert witnesses must have demonstrated cultural competence and experience working with Aboriginal and Torres Strait Islander communities.

- 11.1 As a matter of priority, cultural competency is expected of practitioners, judicial roles, and other family law staff. There should also be minimum and meaningful requirements for professionals in these roles.
- 11.2 Cultural competency and cultural safety needs to be prioritised not only for practitioners that regularly work with clients from different backgrounds, but for all practitioners, as well as judges, magistrates and other family law staff.
- 11.3 There are many facets to what makes an Aboriginal or Torres Strait Islander person feel culturally safe, but there is not a definitive list, because cultural safety varies for different people and places. In the context of the justice system, cultural safety for Aboriginal and Torres Strait Islander people includes:
 - (a) feeling heard, believed and understood, including in your own language;
 - (b) feeling confident to share your story;

- (c) being able to seek service without fear of mistreatment, repercussions or misunderstanding of cultural needs;
 - (d) not having to defend your experience of systemic or cultural barriers or discrimination, knowing that your legal representative will do their best to overcome those barriers to get you a fair hearing and outcome.
- 11.4 'Cultural competence', on the other hand, is not about the experience of an Aboriginal person *receiving* the service but is about the values and abilities of the person, organisation or system *delivering* the service. 'Cultural competence' is usually used in the context of discussing non-Indigenous people. Importantly, cultural competency is a journey, not a tick-box training exercise, it involves an understanding of the local community from members of that community.
- 11.5 In the context of family law, cultural competence includes, for example, understanding Aboriginal concepts of family and caring arrangements, concepts of family violence and disability, knowledge of that particular community's customs, traditions, views, and child rearing practices, the effects of intergenerational trauma from Stolen Generations in child protection and family violence matters, the impacts of colonisation and systemic racism on Aboriginal and Torres Strait Islander families.
- 11.6 NATSILS supports Proposal 10-1, on the basis that the process to develop a workforce capability plan involve consultation and co-design with ATSILS and FVPLS and other community-controlled family support organisations.
- 11.7 In addition to core-competencies, a workforce capability plan must include commitments to increase the Aboriginal and Torres Strait Islander workforce in the family law system, at all levels of the system. This should include Aboriginal and Torres Strait Islander interpreters.
- 11.8 For Proposal 10-3, NATSILS agrees with the list of the proposed core competencies for the family law workforce, with the following additions at a minimum:
- (a) drug and alcohol use;
 - (b) children's development;
 - (c) gratuitous concurrence; and
 - (d) cultural safety, issues, history and awareness for Aboriginal and Torres Strait Islander people.
- 11.9 With regard to Proposal 10-12, NATSILS refer specifically to the Use of Single Expert Witnesses to conduct Family Assessments in the Family Courts. NATSILS recognise that the Family Courts are reliant in many cases on reports provided by expert witnesses appointed to assess families and make recommendations regarding future arrangements for children, therapies or interventions which would be useful for parties and children, reporting views expressed by children and a wide range of other relevant matters. Such reports provide a vital independent source of expert evidence to assist families to negotiate solutions to end litigation, or where negotiations are unsuccessful or not appropriate, the judicial officer is often greatly assisted by the independent expert evidence in reaching a decision.
- 11.10 Usually, witnesses acting in the role of single expert are psychologists or social workers. The qualifications, experience, and skills of such experts vary widely, and it is the position of NATSILS that the vast majority of expert witnesses do not have

significant, and sometimes have no, special experience or skill in working with, assessing and reporting upon Aboriginal and Torres Strait Islander people and their children and families. Indeed, NATSILS are concerned that it appears that there are no mental health diagnostic tools which have been based on Aboriginal populations.

- 11.11 Accordingly, there is concern that the results of assessments provided to the Family Court in respect of Aboriginal and Torres Strait Islander people may be inaccurate and misleading. In our view safeguards and standards should be introduced to ensure that where it is proposed that Aboriginal and Torres Strait Islander people participate in an assessment process by an expert witness, that expert witness must demonstrate special knowledge and skill in working with and understanding Aboriginal and Torres Strait Islanders people.
- 11.12 NATSILS is supportive of Proposal 10-14 for cultural reports and plans for Aboriginal and Torres Strait Islander children. Cultural reports can play a significant role in overcoming the cultural barriers presented by the family court system and greatly assist judges in gaining a more comprehensive understanding of the circumstances and needs of particular families.
- 11.13 NATSILS members have differing views about whether the report should be mandatory, with the risk that in some cases cultural reports may not be appropriate. Ideally cultural reports will be mandatory, however there should be the ability for the child and family who is the subject of the report to have a view on whether a report is necessary, if they have capacity.
- 11.14 The reports should be written by an Aboriginal community-controlled organisation that is connected to the child, parent or extended family. The report writer should consult with the family, extended family and Elders when appropriate, and with relevant community members. This information should be included alongside academic information that assists in explaining the experiences of the family, including the impacts of inter-generational trauma and child removal on the family and their community.
- 11.15 While NATSILS supports the addition of cultural reports, culture should also be included in the standard family reports where that report is about an Aboriginal or Torres Strait Islander family.
- 11.16 Report writers often lack cultural awareness (for example, gender sensitivities) and are not trained to report on kin arrangements and other avenues of resolving violence and conflict. There is often a disparity between the actual circumstances and what is written in private reports when there are language and literacy barriers and no interpreter available.
- 11.17 The preparation of comprehensive family reports makes a significant difference in reducing financial barriers and in ensuring culture is valued and respected in the process of resolving family disputes.
- 11.18 NATSILS recommends extra funding be allocated to NATSILS for them to prepare cultural reports (as part of family reports or separate as in Proposal 10-14) and cultural plans for all cases that involve Aboriginal and Torres Strait Islander children, where an report and plan is appropriate.
- 11.19 Report writers must be instructed to report on cultural issues with community and Elders consulted as appropriate. Where the matter concerns an Aboriginal or Torres Strait Islander child, the report should be prepared by an Aboriginal or Torres Strait Islander report writer, and with an interpreter available. More Aboriginal and Torres

Strait Islander psychologists should be trained on how to prepare family reports. Family reports need to recognise the different nature of Indigenous families, including important information such as kinship mapping, and interviews with extended family, such as aunts or other culturally relevant people in the community. Community law and justice groups can assist with this work.

12 Proposal 11 - Information Sharing [Proposals 11-1 to 11-12]

Key Points Proposals 11-1 to 11-12:

- While NATSILS sees benefit and supports greater collaboration and information sharing between child protection, family violence and family court systems, there are significant risks for Aboriginal and Torres Strait Islander people (particularly with health records) which must be safeguarded against.
- New information sharing networks and protocols must be co-designed with Aboriginal and Torres Strait Islander organisations and be underpinned by the principles of free, prior and informed consent and data sovereignty.
- Meaningful processes of co-design with Aboriginal and Torres Strait Islander community-controlled organisations and representative bodies is critical for these proposals.
- Western Australia has a best practice model with a policy framework and standards on information sharing, and Memorandums of Understanding between agencies.

- 12.1 NATSILS supports greater collaboration and information sharing between the family courts and the state and territory child protection and family violence systems, provided that adequate safeguards are in place and data collection and use is done in a culturally sensitive way.
- 12.2 NATSILS is supportive of Proposals 11-2 and 11-11 but wary of the risks of developing and implementing a national information sharing network and information sharing scheme. There has been a long history of governments controlling, misusing and destroying the data of Aboriginal and Torres Strait Islander people, including through policies such as the Stolen Generations. This is why the concept of data sovereignty is so important for Aboriginal and Torres Strait Islander organisations today.
- 12.3 The legacy of Stolen Generations has lived on with mandatory reporting in child protection systems, meaning that Aboriginal people are hesitant to access services if they perceive a threat of their child being removed. This chilling effect on engagement with services could be spread more broadly across the child protection, family violence, police and family law sector if these information sharing proposals are not designed and implemented in a culturally safe and human rights compliant way (for example Questions 11-2 and 11-3).
- 12.4 The principles of free, prior and informed consent and data sovereignty must underpin a national information sharing network. Free, prior and informed consent is part of Aboriginal and Torres Strait Islander people's right to self-determination.¹¹

¹¹ United Nations Permanent Forum on Indigenous Issues, "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, New York, United States of America, 17-19 January 2005" (E/C.19/2005/3), paras. 46-49.

12.5 The UN Permanent Forum on Indigenous Issues has recommended governments:

“Follow the principle of free, prior and informed consent at all levels and take into account both the Fundamental Principles of Official Statistics as established by the Statistical Commission and provisions on human rights and fundamental freedoms and data protection regulations and privacy guarantees including respect for confidentiality.”¹²

12.6 Data sovereignty has been described as “Indigenous authority over the management of information that are about Indigenous peoples, their territories and ways of life, in a way that is consistent with the laws, practices and customs of those peoples”.¹³

12.7 The need to protect confidential information, as well as the need to prevent potential harm and damage of institutional trust and trust of services, and the child’s best interests, must be balanced with the critical need to gather evidence to assist in the determination of matters.

12.8 Western Australia has been a leader in the development of a collaborative approach to dealing with children’s matters involving child protection concerns. In 2008, the FCWA entered into a Memorandum of Understanding (MOU) with CPFS and Legal Aid WA to ensure the best possible outcomes for children.¹⁴ The MOU provides for procedures for the provision of information from CPFS to the court and in 2009 a senior CPFS officer was collocated with the Family Court Counselling and Consultancy Service (FCCCS).

12.9 NATSILS is of the view that these MOUs between the Federal Family Court and state and territory-based courts dealing with child protection matters, as well as the relevant departments, would be greatly beneficial.

12.10 Further, WA’s Policy Framework and Standards on Information Sharing between government agencies is in NATSILS view, a commendable model.¹⁵

12.11 Meaningful processes of co-design with Aboriginal and Torres Strait Islander community-controlled organisations and representative bodies is critical for these proposals. The frameworks must be culturally safe, aligned with trauma-informed practices, and not undermine trust by Aboriginal and Torres Strait Islander people in the family law system and support services.

12.12 NATSILS is of the view that there are advantages of having information sharing protocols in place and we refer to the existing framework in WA as a workable model.

¹²United Nations - Indigenous Peoples, Recommendations on Data and Indicators, <<https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/data-and-indicators/recs-data.html>>.

¹³ The Australian Indigenous Governance Institute, Submission to the Productivity Commission Inquiry into Data Availability and Use, <https://www.pc.gov.au/_data/assets/pdf_file/0014/203234/sub060-data-access.pdf>, para 2.3.

¹⁴ Government of Western Australia Department of Communities, *Statutory review of Children and Community Services Act 2004* (November 2017), 87 <<https://www.dcp.wa.gov.au/ccsactreview/Documents/Statutory%20Review%20of%20the%20Children%20and%20Community%20Services%20Act%202004.pdf>>.

¹⁵ Western Australian Government, *Policy Framework and Standards: Information Sharing Between Government Agencies* (2017), <https://department.justice.wa.gov.au/files/Info_sharing_policy.pdf>.

12.13 However, NATSILS highlight the risks associated with data sharing for Aboriginal people. In particular, on Question 11-2, the sharing of health records is fraught with high levels of community concern. Very clear protections and protocol surrounding privacy and data protection made in consultation with Aboriginal and Torres Strait Islander organisations and communities would need to occur to allay these concerns. Protocols would likely require significant reform of various laws and regulations. A framework of controls including possibly penalties for misuse of information should be considered.

13 Proposal 12 - System Oversight and Reform Evaluation [Proposals 12-1 to 12-11]

Key Points Proposals 12-1 to 12-11:

- NATSILS does not support the establishment of a Family Law Commission when the extensive resources required for this proposal could go into under-resourced Aboriginal and Torres Strait Islander community-controlled organisations providing family support, family violence, child protection and legal services.
- There is extensive unmet legal need for Aboriginal and Torres Strait Islander people across family law, family violence and child protection which ATSILS and FVPLS should be resourced to meet.
- NATSILS supports the creation of a cultural safety framework, however this must be co-designed and self-determined from community members who use the family law system as well as representative community-controlled peak bodies.
- A cultural safety framework must include a commitment to embedding Aboriginal and Torres Strait Islander people at every level of the family law system, including providing opportunities to train and develop local people where possible.

13.1 NATSILS does not support Proposals 12-1 to 12-6 for a Family Law Commission. The family law system and services supporting families compete for limited resources and struggle to deal with demand. This proposal would require a significant amount of time and financial resources which need to be directed into frontline services and family courts.

13.2 For example, culturally safe legal services are desperately under-resourced. The demand for ATSILS services continues to grow, with particularly high demand for:

- (a) criminal services, including casework and advice matters;
- (b) civil services, especially in the areas of tenancy and police complaints;
- (c) child protection and family law services; and
- (d) representation for defendants of Domestic Violence Orders (which the ATSILS are not currently funded to provide except in very limited circumstances).

13.3 With respect to civil and family law services, a number of reports have highlighted the levels of unmet need for civil and family law in Aboriginal and Torres Strait Islander

communities.¹⁶ It has been noted that an increasing proportion of services delivered by ATSILS relate to civil and family matters.¹⁷ Yet ATSILS are facing \$10m in cuts from 2020-2022.

- 13.4 NATSILS' view is that resourcing for a Family Law Commission would be better invested into frontline Aboriginal and Torres Strait Islander community-controlled and culturally safe services. These preventative, holistic services will assist Aboriginal and Torres Strait Islander families to stay strong, safe and together, reducing the demand on the family law system.
- 13.5 If the proposal moves forward, Government must genuine and meaningful collaboratively co-design this Commission with community, ATSILS and FVPLS, and include Aboriginal and Torres Strait Islander representatives on the Commission.
- 13.6 NATSILS supports the development of a cultural safety framework in Proposals 12-8 to 12-10. See above at 11.2 to 11.5 on definitions and commentary on the concepts of cultural safety and cultural appropriateness.
- 13.7 A cultural safety framework cannot be created without input and co-design from Aboriginal and Torres Strait Islander people using the system, ATSILS and FVPLS and peak bodies.
- 13.8 NATSILS points to NAAJA's cultural competency framework as an example of principles relevant to developing a cultural safety framework.

NAAJA CULTURAL COMPETENCY FRAMEWORK¹⁸

A key differentiator of NAAJA in our service delivery model is the emphasis, value and priority we place on developing cultural competency. We take this work seriously because Aboriginal people across the NT tell us how important this work is to them.

NAAJA understands that, as an organisation, if we are to say we are culturally appropriate then we must make a meaningful commitment to developing cultural competency. We must integrate this across our practice, and be accountable. We set ourselves a high standard in our commitment to developing cultural competency and put ourselves forward as a unique and distinct service working with Aboriginal people in this context. We aspire to be a leader in this field and serve as an example to other government and non-government services where Aboriginal peoples feature prominently.

NAAJA is a culturally appropriate organisation because we make a meaningful commitment to developing cultural competency, and because:

1. We are managed and led by an Aboriginal board

¹⁶ F Allison, M Schwartz and C Cunneen, 'The Civil and Family Law Needs of Indigenous People in WA (A report of the Australian Indigenous Legal Needs Project)' (Report, Australian Indigenous Legal Needs Project, 2014); C Cunneen, F Allison and M Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) 49(2) *Australian Journal of Social Issues* 219.

¹⁷ See NATSILS Submission to the Review into the Indigenous Legal Assistance Program (2018), <<http://www.natsils.org.au/portals/natsils/submission/NATSILS%20ILAP%20Submission%20For%20Website.pdf?ver=2018-10-29-161426-540>>, 14. For 2016-2017, approximately 82% were criminal matters, 11% civil matters, 5% family law matters and 2% violence protection.

¹⁸ NAAJA, 'Cultural Competency Framework 2017 – 2020', <http://www.naaja.org.au/wp-content/uploads/2018/01/Summary_NAAJA-Cultural-Competency-2017-to-2020.pdf>.

2. Aboriginal people serve senior roles across our practice and key roles across our workforce
3. We provide a quality education and professional development program for staff
4. We integrate learnings in cultural competency across our practice
5. We are culturally responsive and adapt to local and regional contexts
6. We are accountable in this work.

The 'Cultural Competency Framework 2017 – 2020' outlines NAAJA's approach to developing and integrating best practice cultural competency across our services for Aboriginal people in the Northern Territory. See [NAAJA's website](#) for a summary of the framework.

13.9 In addition, NATSILS suggests the following factors should be considered in a cultural safety framework:

- (a) community-controlled, representation and accountability;
- (b) Aboriginal and Torres Strait Islander people embedded at every level of the system, including providing opportunities to train and develop local people where possible;
- (c) staff across the system are culturally competent;
- (d) the family law system has a holistic approach to services aimed at addressing underlying issues;
- (e) accessibility (including in Indigenous languages and remote and regional areas);
- (f) facilitating access to Indigenous specialist courts and lists;
- (g) staff at every level understand and work to overcome systemic barriers to just outcomes;
- (h) having an active role in Aboriginal and Torres Strait Islander communities;
- (i) working to make the family law system culturally appropriate;
- (j) empowering community with knowledge of their legal rights.

14 Conclusion

14.1 The soaring rates of family violence and child removal experienced by Aboriginal and Torres Strait Islander women and families are two of the most serious human rights emergencies in Australia. This Inquiry has the opportunity to reform the family law system to better address these critical issues.

14.2 Yet the Inquiry has put forward a number of new resource-intensive proposals which, while they may have utility, would take away from the much needed additional

resources urgently required in the family law system. This is particularly so for holistic, preventative and wrap-around services for families, women and children, including legal services, run by Aboriginal and Torres Strait Islander community-controlled organisations.

- 14.3 Further, the Discussion Paper has generally failed to recognise the important holistic, culturally safe supports and services already provided by ATSILS and FVPLS, as well as other Aboriginal and Torres Strait Islander community-controlled organisations. In this respect, many proposals purport to duplicate services that our organisations currently provide. Despite this, the Inquiry proposes that they should be run mainstream organisations.
- 14.4 On the other hand, the Inquiry puts forward a number of important reforms which NATSILS supports and looks forward to working with governments on these changes.
- 14.5 For all of these proposals going forward, NATSILS emphasises the importance of co-design and meaningful consultation with Aboriginal and Torres Strait Islander community-controlled organisations, particularly ATSILS and FVPLS.
- 14.6 For further information please contact our NATSILS Executive Officer, Karly Warner
[REDACTED]