



Law Council
OF AUSTRALIA

New family dispute resolution services for Aboriginal and Torres Strait Islander families

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia acknowledges the assistance of its Family Law Section, Indigenous Legal Issues Committee and Federal Litigation and Dispute Resolution Section's Alternative Dispute Resolution Committee in the preparation of this submission.

The Law Council is also grateful for the contributions of the following Constituent Bodies:

- Law Society of New South Wales;
- Law Society of Northern Territory;
- Law Society of South Australia;
- New South Wales Bar Association; and
- Queensland Law Society.

The Law Council acknowledges the Traditional Custodians of the land on which it operates, the Ngunnawal people, and pays respect to Aboriginal and Torres Strait Islander Elders, past, present and emerging. The Law Council also extends this respect to the Aboriginal and Torres Strait Islander members of its Sections and Constituent Bodies.

The term 'First Nations peoples' is used throughout this document in reference to Aboriginal and Torres Strait Islander peoples. This term acknowledges Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia and honours their continued sovereignty and custodianship of the land, in addition to the uniqueness of each nation.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make this submission in relation to the Discussion Paper released by the Attorney-General's Department (**AGD**) in respect of new family dispute resolution (**FDR**) services for Aboriginal and Torres Strait Islander families.
2. The Law Council supports the establishment of new FDR services for Aboriginal and Torres Strait Islander families and supports the approach of building the capacity of Aboriginal Community Controlled Organisations (**ACCOs**) to deliver these services. However, the Law Council has reservations as to whether funding of \$8.3 million is capable of meeting the level of need for FDR for First Nations families.
3. The first part of this submission contains introductory comments regarding the use of FDR in Australia and the accessibility of the family law system for First Nations peoples. The Law Council submits that access to and engagement with a culturally safe and appropriate family law system – including FDR – is fundamental to ensuring the safety, wellbeing and best interests of First Nations' families, especially children.
4. The second part of this submission specifically responds to the questions in the Discussion Paper. Common themes which arise throughout this section include:
 - meaningful consultation, and acceptance of the diversity and complexity of First Nations cultures and peoples, is essential for the effective implementation of any FDR program;
 - the structures in which FDR services are provided must be culturally safe, flexible and robust;
 - concepts of 'family' for First Nations peoples differ significantly to Western culture, as do approaches to communication and dispute-resolution;
 - services delivering FDR in First Nations' communities must endeavour to build trust in that community and will preferably be physically available on Country and embedded within an existing service in the community (e.g., a co-located health justice facility);
 - First Nations clients in remote communities face different challenges and have different needs to those in urbanised areas;
 - practitioners, support staff and external advocates in First Nations FDR settings should be required to undertake consistent cultural competency and safety training;
 - the existing qualification and training requirements for FDR practitioners are unduly restrictive, particularly for First Nations peoples;
 - activities directed towards forging links between ACCOs and appropriate Aboriginal and Torres Strait Islander legal services should be encouraged; and
 - funding must allow for suitably experienced counsel, and accommodate the increasing trend towards pre-litigation mediation, as well as FDR within the litigation process.
5. The third part of this submission briefly canvasses matters which fall outside the scope of the Discussion Paper, but which the Law Council considers important to raise. These matters include instances where one, or some of the parties involved are Aboriginal or Torres Strait Islander, and the need for holistic family capacity building support services.

Introduction

Family dispute resolution in Australia

6. The Law Council acknowledges the importance of FDR in assisting families to resolve matters, both before the commencement of court proceedings, and at any time during proceedings. Parties, Independent Children's Lawyers and judicial officers rely on properly administered and effective FDR throughout proceedings.
7. Family law practice is required to deal with individuals at their most vulnerable, including at the initial stages of separation, where issues of violence and control are heightened and there is often inequality in terms of access to resources. The prevention and de-escalation of conflict through adequate and appropriate dispute resolution process interventions is crucial to provide safe environments for individuals to engage in genuine steps to resolve family disputes, including child custody and property division matters.
8. Australian legal practitioners are required to enable the highest standards of dispute resolution service provision. Many of the Law Council's Constituent Bodies, being state law societies and bar associations, have lists of accredited FDR practitioners who can provide dispute resolution assistance in parenting disputes, as well as mediators and arbitrators who are well qualified to assist in family property disputes.
9. The Law Council understands that many legal practitioners have been made aware through education (including continuing professional development training) and specialist training of the need to consider cultural sensitivities, particularly those involving First Nations peoples.

The accessibility of the family law system for First Nations peoples

10. The Law Council acknowledges the diversity of First Nations peoples, their cultures, family structures, languages and their widely varying lifestyles, values, customs and practices.
11. In 2018, the Law Council released its Final Report for The Justice Project, a comprehensive, national review into the access to justice needs of vulnerable Australians. The Justice Project observed that tailored alternative dispute resolution (ADR) programs, particularly in the realm of family law and child protection, that incorporate First Nations cultural concerns and conceptions of family, are an effective means of enhancing access to justice.²
12. The Productivity Commission also recognised the importance of culturally appropriate ADR services. It stated:

*Culturally sensitive services are particularly important for Aboriginal and Torres Strait Islander Australians who are often reluctant to engage in ADR unless cultural protocols are observed. It is often necessary for ADR processes to be adapted to ensure participation and adherence with agreed outcomes.*³

² The Law Council of Australia, 'The Justice Project Final Report – Part 2: Dispute Resolution Mechanisms' (Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Dispute%20Resolution%20Mechanisms%20%28Part%20%29.pdf>> 20.

³ Productivity Commission, 'Access to Justice Arrangements: Volume 1' (Final Report, 5 September 2014), <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>> 308.

13. The Productivity Commission accordingly recommended that the Australian Government should undertake a cost-benefit analysis regarding culturally tailored ADR services for First Nations peoples, fully fund these services if appropriate, and encourage providers of ADR services to adapt their services so that they are culturally tailored.⁴
14. The extensive lack of access and participation in the family law system by First Nations peoples can be best understood by reference to a combination of historic and contemporary factors, including:
 - long-standing issues, such as the effects of colonisation and intergenerational trauma and past policies of forced removal of children and settlement of communities;
 - the prevalence of family violence in First Nations communities, which usually results in families being required to engage with various overlapping jurisdictions which can be complex and overwhelmingly difficult to navigate;
 - family breakdowns for First Nations peoples are often accompanied by related issues such as loss of housing, urgent financial need and child safety concerns, which are compounded by existing socio-economic, health and housing difficulties; and
 - factors such as distrust of police and justice agencies, fear of repercussions and retribution (further violence or ostracism from family and community), can impact a person's decision or ability to access help.
15. The Law Council considers that access to and engagement with a culturally safe and appropriate family law system – including FDR – is fundamental to ensuring the safety, wellbeing and best interests of First Nations families, especially children. However, the Law Council's members have emphasised there is a significant gap in services for First Nations families who wish to access FDR, and particularly FDR carried out by First Nations FDR practitioners.
16. The Law Council supports the dual purposes and intent of improving the suitability of FDR services for First Nations families and empowering ACCOs to assist these families to navigate and resolve post-separation parenting and property disputes in respect of matrimonial property. However, the Law Council emphasises that the challenges of implementing this proposal must recognise the problems with cultural and socio-economic deprivation. This is also aggravated by the extreme regional spread and/or remoteness of some First Nations communities and perennial service delivery challenges in those circumstances.

Responses to Discussion Paper questions

17. The Law Council's responses to the questions in the Discussion Paper are set out below. Questions which the Law Council does not have a view on (relating to Grant Opportunity Guidelines and data and evaluation requirements) have been omitted.

Are there any specific stakeholders who AGD should directly approach to be involved in the consultation process?

The importance of meaningful consultation

18. The Law Council recognises that FDR, like the legal system, is based on a largely Western system. When engaged with First Nations peoples, this system is overlaid

⁴ Ibid 66.

upon a diverse, complex and often misunderstood system of lores, customs and traditions. Frank acceptance of such diversity and complexity is essential to the effective implementation of any program.

19. The Law Council considers that engagement in *Winhangadurinya* (Wiradjuri for 'deep listening') on the part of those consulting with ACCOs and First Nations communities to lead and co-design a program is essential to its success. Consulting with these organisations and communities will provide guidance on which locations are most in need of FDR services as well as the unique cultural characteristics of each community (which must be reflected in the FDR service provided).
20. Without adequate and meaningful consultation – which appears from the Discussion Paper to be AGD's intention and ought to be commended – any program is likely to further entrench the disenfranchisement of First Nations peoples and alienate them from the justice system.

Aboriginal and Torres Strait Islander Legal Services

21. As FDR is a process which is generally a prerequisite to litigation, the Law Council recommends consulting Aboriginal and Torres Strait Islander Legal Services in each State and Territory.
22. These organisations can provide insights into addressing conflict in a culturally competent fashion. For instance, the Aboriginal Legal Rights Movement in South Australia is a community-controlled legal service which provides pro-bono legal services for civil and family law matters. These organisations will also be able to identify and articulate the design of any FDR program in a manner which will increase its utility and prospects of success, while reducing the risk of unintended consequences arising from design deficiencies, which will precipitate – rather than reduce – litigation.

Federal Circuit and Family Court of Australia registries

23. The Law Council suggests consultations should include the Federal Circuit and Family Court of Australia (**FCFCOA**), particularly with Indigenous liaison officers in the Cairns registry, as well as registries in Adelaide, Alice Springs, Darwin, Melbourne and Sydney, which have amassed considerable experience with their specialised Indigenous Lists.
24. The Law Council submits it will be crucial for the new FDR services for First Nations families to dovetail with the Indigenous Lists in participating FCFCOA registries. Consultation should also include those parties providing services to support the Lists.

Care and protection jurisdictions

25. The Law Council observes that there may be significant overlap between the work of the new FDR services and the care and protection jurisdiction for some First Nations families. Accordingly, consideration must be given to how the new FDR services can divert First Nations children and families away from the care jurisdiction.
26. Consultations should include stakeholders in the care and protection jurisdictions in each State and Territory to identify appropriate points for diversion, and what those pathways might look like. It is likely to be useful to consult with those involved with specific Indigenous Lists, such as the Marram-Ngala Ganbu (Koori Family Hearing Day) at Broadmeadows (and expanded to Shepparton) Children's Court in Victoria.

27. The Law Council notes that efforts are underway in New South Wales to establish an Indigenous list in the care and protection jurisdiction in the Children’s Court at the Dubbo registry. The Law Council recommends that AGD consult those involved in this effort.

Northern Territory

28. The Law Council submits that in general terms, remote community organisations and leaders should be consulted where the FDR services are to be delivered. This includes Traditional Owners and organisations providing family-related services, such as childcare providers, schools, counselling services and women’s safe house providers (including CatholicCare NT and Territory Families).
29. The Law Council also recommends approaching the following legal assistance and other service providers in the Northern Territory:
- North Australian Aboriginal Family Legal Service (**NAAFLS**), which provides family law representation to remote community residents throughout the Top End;
 - Aboriginal Resource and Development Services (**ARDS**) which delivers a culturally led dispute resolution service in Nhulunbuy;
 - Larrakia Nation Aboriginal Corporation, the peak body for the Traditional Owners of the Darwin region;
 - Tangentyere Council Aboriginal Corporation, which delivers human services and social enterprise activities for the benefit of First Nations peoples from Central Australia in the Northern Territory;
 - Central Australian Aboriginal Family Legal Unit, which provides culturally appropriate legal advice and support services to First Nations peoples who have experienced, or are experiencing, family violence or sexual assault; and
 - North Australian Aboriginal Justice Agency, which provides culturally competent legal services, including family law services and advice in Alice Springs.

Other suggested consultation

30. The Law Council additionally recommends consulting with organisations such as National Legal Aid, Relationships Australia and Anglicare.
31. The Australian Dispute Resolution Research Network – a group of dispute resolution academics across Australia – should also be approached.

What does culturally safe and appropriate FDR look like?

32. It is the Law Council’s view that a significant amount of work is still required in order to determine an appropriate model of FDR for First Nations families, and this work should be done prior to considering the design of the grants administration process. As such, the Law Council suggests that the model-design considerations be carried out as a preliminary piece of work and include an audit of existing FDR services and a determination of how many existing First Nations FDR practitioners there are.
33. Other data which could be gathered during this audit could include how many First Nations peoples access FDR services and in which locations, and what percentage of FDR clients are First Nations peoples.

34. The Law Council considers it crucial that the structures in which FDR services are provided are not only culturally safe, but flexible and robust. The services must reflect the vast diversity of First Nations peoples, through their cultures, values, customs, languages and connections to land and waterways across Australia.
35. The Law Council submits that a one-size-fits-all approach to FDR risks being culturally inappropriate and is less likely to be effective. To ensure cultural safety, the Law Council recommends FDR processes be co-designed with local cultural authorities to ensure local culture informs the process.

Understanding what First Nations families want and need from FDR services

36. The Law Council submits that an essential prerequisite for the effectiveness of new FDR services for First Nations families will be to understand what First Nations peoples want, and what their families need, from FDR services. This must occur when the design of the service is being considered, right through to the point of consideration of users of the service – including consideration of who might participate and how that can occur (i.e., wider definitions of family and kinship groups and how to ensure involvement and access for family members who may not be physically present).
37. Consideration of the necessary skills, training and capacities of FDR practitioners, and of what might be at stake, is also essential. For instance, FDR practitioners should be cognisant of the nature of inter-generational trauma and the colonial drivers of violence in First Nations communities. In this regard, the Law Council notes that Stolen Generations survivors, and their descendants, may have experienced particular and specific forms of trauma that will require specialised expertise on the part of an FDR practitioner to properly negotiate.
38. The Law Council considers that any FDR service would ideally take place within the context of integrated supports to take a holistic approach. This approach recognises that family disputes may be occurring in the context of other difficulties in accessing services or social supports.
39. The Law Council is of the view that the values and principles held by First Nations families regarding cultural integrity and grounding must be a central tenant in the FDR process and that those guiding principles will vary across different First Nations peoples. The safety of children incorporates their cultural safety and their ability to grow up with a strong sense of cultural identity and resilience (and these considerations are enshrined in the ‘best interests’ principles under the *Family Law Act 1975* (Cth)). This cannot be guaranteed if the FDR process does not take culture into account in mediation and parenting agreements.
40. The Law Council understands that First Nations communities and families wish to work together to resolve conflict, and ongoing intervention from mainstream legal services can be harmful to the community. Accordingly, a focus on healing, culture and family as a source of strength, will be important.
41. The Law Council is of the view that FDR service providers should demonstrate that they have consulted with the relevant ACCO and/or with First Nations peoples (such as Elders) who are conversant in customary law. An effective FDR service will understand and respect the social hierarchy of the community in which it operates and implement the relevant customary law in an appropriate and culturally sensitive way within the framework of the FDR process. It is expected that the best services will be those built in the community by members of the community.

Understanding the concept of 'family' for First Nations peoples

42. The Law Council notes that while the concept of 'family' for First Nations peoples varies from place to place, it is broader and much more expansive than the linear notion of 'family' in Western cultures.
43. The Law Council understands that the roles and obligations of various family members to one another in First Nations cultures is complex and deep-seated. Any system designed to resolve family disputes between First Nations peoples ought to take account of those cultural sensitivities, which include:
 - who may speak when others are present;
 - obligations of deference to Elders;
 - avoidance relationships – where one person cannot speak or be present whilst another relative is in the room; and
 - impacts of separation of relatives from children of separated parents to whom they owe cultural obligations.
44. The Law Council recognises that the role and place of the wider extended family can play a significant role in the lives of First Nations peoples, particularly where children are involved. Accordingly, appropriate FDR in some First Nations communities may involve extended family members.

Communication and dispute-resolution approaches

45. The Law Council submits that the approach to communication and how conflict is resolved ought to be at the fore of any design of an FDR process.
46. The Law Council considers it crucial for FDR providers and practitioners to understand that a stark contrast exists between the communication preferences of First Nations peoples and the conventional client interviewing practices used in the Australian legal and dispute resolution system. Extended periods of silence during conversations and less direct means of communicating disagreement are common in First Nations cultures,⁵ which may result in dispute resolution taking greater amounts of time than might otherwise be the case.
47. The Law Council is accordingly of the view that the most effective approach is to educate service providers and structure the FDR process from a First Nations perspective. Specifically, to increase receptivity and a willingness to engage in the FDR process within First Nations communities, the new FDR services must respectfully integrate traditional First Nations dispute resolution processes. For instance, asking open-ended questions would be more likely to elicit a response, as opposed to direct, close-ended questioning which is typical in Western cultures.⁶
48. These considerations underscore the need for the FDR process to be flexible and not dictated by a rigid process that is to be determined within a certain timeframe. The Law Council considers that allowing the parties in dispute to have the time and agility to consider their options and digest new perspectives, with the choice as to how the process occurs, guided by the facilitator, will lead to better outcomes.

⁵ Commissioner for Children and Young People Western Australia, *'Engaging with Aboriginal Children and Young People toolkit: Aboriginal communication styles'* (Factsheet, 2017), <<https://www.cyp.wa.gov.au/media/2858/aboriginal-communication-styles.pdf>>.

⁶ See Queensland Health, *'Aboriginal and Torres Strait Islander cultural capability'* (Factsheet, September 2015) <https://www.health.qld.gov.au/__data/assets/pdf_file/0021/151923/communicating.pdf> 2.

However, there will be resource implications in building a culturally safe process which does not impose a rigid framework for engagement.

Selecting mediators

49. The Law Council submits that although it would be beneficial to have First Nations peoples act as mediators in FDR, this approach needs to be carefully considered and a one-size fits all approach may not always be appropriate. By reason of the complex social networks and obligations within First Nations communities as well as meeting standard obligations to avoid conflict and ensure impartiality, it may often be difficult for a person, who is from another community or is not an Elder, to act as a mediator in an FDR process. On the other hand, First Nations peoples also bring strong knowledge and an understanding of how these complex social relationships and obligations might be best managed in a given community.
50. As with other dispute resolution processes, models of co-chairing can be employed to enhance skillsets and support families holistically, for instance, through the use of a legally trained FDR practitioner and an FDR practitioner with cultural expertise. This approach has been employed in some native title disputes. As part of this model, the Law Council recommends that at least one co-chair should be a First Nations person. While both co-chairs may, in some circumstances, not be First Nations persons, this should only be the case if there is no suitable or available First Nations person to assume the role of co-chair.
51. The Law Council is of the view that requirements regarding First nations persons' formal qualifications as potential FDR mediators should be carefully considered, including whether current arrangements effectively bar First Nations persons – who have informal but significant knowledge and skills – from practising, and how these issues might be overcome.

Physical location

52. It is the Law Council's view that FDR services which are physically available on Country to First Nations communities and families are far preferable to a centralised service operating from a major city. In this regard, the Law Council notes the success of the Family Court of Australia (as it then was) in hearing matters in relation to traditional Torres Strait Islander adoption practices on Country.⁷
53. The Law Council strongly supports the provision of FDR services from within, not outside, specific First Nations communities wherever possible. In some limited circumstances, however, it may be more practicable for FDR services to be delivered by an ACCO outside of a particular First Nations community (e.g., a Darwin-based service providing FDR services to remote communities in the Northern Territory). Where this is the case, the Law Council suggests employing local staff, such as Indigenous liaison officers entrenched in ACCOs, to assist in the FDR processes provided within the service or through other services to ensure cultural sensitivity and that all parties feel comfortable engaging and participating. However, the Law Council hopes that centralised FDR services with remote outreach will be the exception, rather than the rule, and strongly encourages the utilisation of services which are embedded within First Nations communities, not external to them.

⁷ See Kupai Omasker, '*Incorporating Traditional Adoption Practices into Australia's Family Law System*' (Paper, March 2013) <http://cairns-family-commercial-lawyers.com.au/wp-content/uploads/article-Incorporating-Traditional-Adoption-Practices-into-Australia_s-Family-Law-System-Deanne-Drummond.pdf>.

54. The Law Council also considers there may be considerable benefits in co-locating FDR services through health partnerships so that access to each service is enhanced. For instance, an FDR practitioner could be present at a medical or community health clinic so that a person could attend the clinic for a health matter and talk to an FDR practitioner during the same visit. The success of co-located models, such as health justice partnerships (which integrate legal services with health settings), provides an example of an innovative existing method of addressing the often complex and intersecting issues that affect First Nations peoples.⁸ Health justice partnerships are premised on the notion that many of the factors that lead to poor health cannot be fixed by healthcare alone, and that people who are vulnerable to intersecting legal and health problems may not turn to legal services for solutions.⁹

Building trust and continuity

55. All services delivering FDR in First Nations communities must endeavour to build trust in the community if they are to succeed. Where services based in capital cities must provide FDR to remote communities, more time will need to be spent in the community than merely flying in to facilitate a mediation. The Law Council considers that a more effective model would involve individuals from these services living in the community and training suitable First Nations peoples and Elders in certain aspects of the FDR process (including adopting the co-chair model, identified above).
56. The Law Council particularly considers that parents and extended family members are likely to better engage in the FDR process if practitioners spend time meeting the family members, explaining the process in person and asking the parents specific preparatory questions, such as who is appropriate to invite to the mediation and where it should take place.
57. The Law Council is of the view that each mediation may require two or more visits – at least one for preparation and another to conduct the mediation. Ongoing management of the dispute may also be needed, through providing follow-up services or linking to other services and processes.

Use of technology

58. The Law Council cautions against over-reliance upon technology as a means of conducting FDR. In regional and remote areas, reliable internet for audio-visual links may be limited. More importantly, not all users will be familiar or comfortable with such a medium of communication, which may adversely impact the effectiveness of any FDR.

Other aspects of culturally safe and appropriate FDR

59. Additional aspects of culturally safe and appropriate FDR suggested by the Law Council's members include:
- specialist panels;
 - guidelines and processes to ensure cultural safety for participants in FDR;

⁸ The Law Council of Australia, *The Justice Project Final Report – Part 1: People Experiencing Economic Disadvantage* (Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20Experiencing%20Economic%20Disadvantage%20%28Part%201%29.pdf>> 9.

⁹ Health Justice Australia, *What is a health justice partnership?* (2022) <<https://www.healthjustice.org.au/hjp/what-is-a-health-justice-partnership/>>.

- opportunities for additional supports for First Nations clients, including regarding who can attend mediation and suitable processes for mediation, such as allowing it to take place over more than one session;
- a culturally safe and appropriate mediation approach with culturally capable practitioners who represent their First Nations clients;
- funding of cultural reports;
- information about the role of support persons in the FDR process;
- promotional material (i.e., Frequently Asked Questions and factsheets) developed by and written for First Nations peoples in their own language(s) (as applicable);
- parenting agreements to incorporate cultural considerations and ways for these to be upheld;
- intake processes to incorporate the sharing of information around culture; and
- post-conference support for parties who have reached an agreement.

What formal or informal culturally safe and appropriate dispute resolution or family law service models currently exist? What is working well? What could we learn from them?

60. The Law Council is aware of and acknowledges some promising practices around the country designed to overcome the identified barriers to First Nations peoples accessing appropriate dispute resolution or family law services.

The Federal Circuit and Family Court of Australia

61. As noted above, the FCFCOA's Indigenous List is a noteworthy example of the Court's commitment to the goals in its Reconciliation Action Plan.¹⁰ It provides a relatively informal and culturally appropriate court setting whereby parties appear before the court with support persons, service providers and extended family, or the relevant child welfare agency, to work through issues in dispute to ensure the safety, wellbeing and best interests of First Nations children.
62. The Law Council understands that this model encourages engagement and promotes problem solving by the family, often diverting children from the welfare jurisdiction and providing flexibility in parenting arrangements, which enable First Nations children to remain connected with their families.

North Australian Aboriginal Family Legal Service

63. NAAFLS provides family law advice and representation to Top End Aboriginal communities in the Northern Territory. Aboriginal Client Support Officers work hand in hand with solicitors – who undergo cultural sensitivity training – to ensure the service provided is culturally safe for clients. The Law Council is aware that the presence of a Client Support Officer typically helps clients feel more comfortable in engaging with NAAFLS.
64. The Law Council understands that NAAFLS staff travel to remote communities with the Northern Circuit Court, with each community visited between once a month and once every three months. However, the Law Council is aware that the 'fly in' nature of this model presents difficulties for family law matters. As family law proceedings

¹⁰ Federal Circuit and Family Court of Australia, 'Reconciliation Action Plan 2019 – 2021' (May 2019) <<https://www.fccoa.gov.au/node/252>>.

are particularly onerous for parties in terms of filing requirements, parties in remote communities can find it difficult to meaningfully engage in such processes.

Other dispute resolution services in the Northern Territory

65. The Law Council is aware of – and commends – the Aboriginal Building Connections program, facilitated by Relationships Australia Northern Territory (**RANT**). This free, three-hour group program is designed to educate First Nations parents about the impact of conflict on children post-separation. This program is implemented by a team of First Nations Cultural Advisors and is delivered both on-site to individuals who present to RANT for FDR, and off-site to groups in rehabilitation centres, prisons, women’s shelters, and in remote First Nations communities.
66. The Law Council is aware that the ARDS Mediation Team in Nhulunbuy delivers a ‘two-ways’ Dispute Resolution service. ARDS employs local First Nations conciliators who are supported by formally accredited mediators and their dispute resolution process is informed by lore and the role of family in Yolngu culture.
67. On the Tiwi Islands, the Ponki Mediators group provides culturally led mediation services and works collaboratively with existing and established services. The Law Council suggests it may be worthwhile for AGD to make contact directly with this group for further information.

What locations are most in need of ACCOs to deliver FDR?

68. As a starting point, the Law Council considers that all locations with a large population of First Nations peoples should have a culturally safe and appropriate FDR service. However, resources should be allocated not solely based on population, but on other measures such as income, given First Nations clients in remote communities face different challenges and have different needs to those in urbanised areas.
69. The Law Council recommends that AGD refer to data held by Aboriginal and Torres Strait Islander Legal Services or the Law and Justice Foundation of New South Wales¹¹ to assist in determining the areas with the greatest demand for FDR services.
70. The Law Council is aware that for many residents of remote Top End communities in the Northern Territory, engaging in family law proceedings is extremely challenging, and dispute resolution services are very limited in these areas. Accordingly, the Law Council submits that culturally sensitive and accessible FDR services in remote Northern Territory communities may have a particularly positive impact due to the lack of available services in these locations.

¹¹ See Delphine Bellerose and Geoff Mulherin, ‘*Aboriginal and Torres Strait Islander Legal Services National Picture, 2018 – 2019*’, Law and Justice Foundation of New South Wales (Report, November 2020) <[http://www.lawfoundation.net.au/ljf/site/articleIDs/A42A1194795D1C0A85258632000EDAE0/\\$file/ATSILS_National_Picture_2020.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/A42A1194795D1C0A85258632000EDAE0/$file/ATSILS_National_Picture_2020.pdf)>.

How can ACCOs be supported to ensure they can hire and train the right staff for these roles, and grow capacity in providing FDR?

Funding

71. The Law Council has previously expressed a view that the current level of funding – \$8.3 million over three years – does not address the level of need within First Nations communities, particularly compared to other ACCO sectors, such as health.¹² The Law Council reiterates such view.
72. The Law Council submits that sufficient and secure ongoing funding for ACCOs is needed, in order to:
 - attract, recruit and hire appropriate staff (particularly First Nations peoples);
 - enable staff to obtain suitable training; and
 - in the Northern Territory, engage in meaningful consultation and relationship-building with remote communities and travel (or relocate) to remote communities as needed.
73. Noting that many ACCOs already experience considerable difficulty attracting staff, particularly in rural and remote areas, the Law Council considers that salary incentives should be considered in the funding model.
74. The Law Council suggests that consideration should also be given to funding a practice or program development role, so that there can be overarching support for ACCOs offering FDR, rather than the success of the program relying solely on individuals within each organisation.

Training

75. The Law Council recommends that practitioners, support staff and external advocates who work in First Nations FDR settings should be required to undertake cultural competency training. This is especially the case for individuals who are not Aboriginal or Torres Strait Islander.
76. The Law Council considers it important that the cultural competency and safety training provided by ACCOs is generally consistent across the States and Territories and is a prerequisite to receiving funding.
77. The Law Council expects ACCOs will play a significant role in ensuring service providers receive ongoing training that is compatible with the dynamics, customs, traditions and values of the community in which it will operate.

Are there any potential barriers to ACCO staff obtaining formal FDR qualifications and what support could be offered to address these barriers?

78. The Law Council's members have expressed some concerns in respect of the existing qualification and training requirements for FDR practitioners, specifically that it will restrict the availability of practitioners outside major centres and the ability

¹² Law Council of Australia, '*Closing the Gap: additional funding a step in the right direction*' (Media Release, 6 August 2021) <<https://lawcouncil.asn.au/publicassets/aba6fb50-66f6-eb11-943f-005056be13b5/2021%2008%2006%20-%20MR%20-%20Closing%20the%20Gap.pdf>>.

of First Nations peoples to undertake this role. As mentioned above, there are concerns that formal qualification requirements for First Nations people, who have significant knowledge, skills and understandings of the social networks in their communities, will function as gatekeeping.

Tertiary qualifications

79. The Law Council submits that the over-specification of narrow qualification requirements, as opposed to professional accreditation or certification by professional organisations, may lead to problems with the provisions of suitable services at the regional level, not to mention constraining the possibility of First Nations persons being appointed as FDR practitioners.
80. The Discussion Paper appears to place undue emphasis on the Vocational Graduate Diploma of Family Dispute Resolution (**Graduate Diploma**).¹³ While reference is made to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth), the Discussion Paper has not adequately dealt with the ability to be accredited by a recognised mediation body, as provided for in regulation 5(3). The Law Council submits that any discussion or proposal regarding the Graduate Diploma must include reference to an appropriate professional body.
81. The Law Council submits that there may be limited ACCO staff based in remote communities who have the prerequisite degree to enrol in the Graduate Diploma (or equivalent course). As such, ACCOs based in remote communities may need support in providing staff with the opportunity to engage in relevant tertiary education with a long-term goal of being a local FDR practitioner.
82. Further, the number of First Nations persons who are attaining tertiary qualifications remain disproportionately low per capita. Emphasising tertiary qualifications as a condition to appointment as an FDR practitioner is likely to reduce the number of First Nations peoples providing those services. The Law Council notes that whatever benefits cultural competence training may bring, the most culturally competent regime is one of self-determination, where First Nations peoples are involved at every level of the system, including FDR.
83. The Law Council considers that if this program is to succeed, a new paradigm will be needed, in which the qualities, attributes and experiences of ACCO staff are supported by training to ensure adequate access to FDR services by people of the community, in the community.

National Mediator Accreditation System standard

84. The Law Council submits that the requirement for a person (without a prerequisite tertiary qualification or relevant FDR experience) to enrol in the Graduate Diploma if they have accreditation under the National Mediator Accreditation System (**NMAS**) should not be pursued. This is because NMAS is currently a voluntary industry standard and making it a base requirement for prospective FDR practitioners creates a monopoly, which is undesirable and would likely create further barriers to access.
85. The Law Council instead suggests there may be scope to utilise legal professional bodies, which already have accreditation requirements for lawyers acting in an ADR capacity. Legal professional bodies have developed quality standards within a highly regulated dispute resolution environment and strong disciplinary requirements

¹³ Attorney-General's Department, 'New family dispute resolution services for Aboriginal and Torres Strait Islander families' (Discussion Paper, January 2022) 5-6.

embedded in legal professional legislation. However, further consideration should be given as to the practicalities of legal professional bodies taking on an oversight role for non-lawyer FDR practitioners.

Alternatives to obtaining formal qualifications

86. The Law Council proposes that the FDR practitioner standard should be that a practitioner has met the training or competency requirements established by their professional body to act as a mediator.
87. Similar to the conceptual consideration that should be carried out in relation to an appropriate FDR model for First Nations families, the Law Council submits that higher-level consideration should be given to what kind of qualifications and qualities First Nations FDR practitioners ought to possess.
88. The Law Council recommends there be an alternative pathway for accreditation for First Nations FDR practitioners. It might also be useful to consider an accreditation process which provides 'credit' for relevant work or educational experience.
89. In the Law Council's view, FDR practitioners providing services for First Nations families should, most importantly, have the expertise of someone who is embedded in First Nations cultural knowledge and practice. Knowledge of the law (in the family and care jurisdictions) should buttress this expertise.
90. As outlined above, the Law Council would encourage the use of First Nations persons to co-chair the FDR wherever possible, which would assist those persons – in conjunction with training from appropriate bodies – to obtain the 50 hours of supervised practice necessary for attaining accreditation.¹⁴ This approach would consequently increase the probability of more First Nations peoples becoming FDR practitioners.

Working with Children Checks

91. The Law Council notes that mandatory Working with Children Checks (**WWCC**) can present a potential administrative barrier to otherwise fit and appropriate First Nations carers in the child protection system.
92. The Law Council submits that such checks, albeit well-intentioned, may function as a bureaucratic barrier to First Nations peoples who could be appropriate FDR practitioners, but are deterred due to the WWCC application requirements and process. First Nations peoples may also assume that having a criminal record will automatically preclude them from receiving a WWCC, which is not necessarily the case.
93. The Law Council acknowledges and supports the policy intent behind requiring mandatory WWCCs for people who engage in child-related work, in order to protect vulnerable children. Nonetheless, consideration could perhaps be given as to whether compulsory WWCCs are justified for FDR practitioners, and whether a less onerous requirement would assist in encouraging First Nations peoples to pursue a career as an FDR practitioner.

¹⁴ Ibid 6.

Are there other activities that could be part of this grant opportunity?

94. The Law Council submits that where it is most appropriate for a FDR practitioner to be based in a remote community, relocation and living costs may be required. Language training may also be appropriate to enable FDR practitioners to more effectively communicate with clients.
95. The Law Council considers that activities directed towards forging links between ACCOs and appropriate Aboriginal and Torres Strait Islander legal services should be encouraged. First Nations families can be empowered by having access to appropriate legal advice and knowledge of their options.
96. Funded activities must also encompass regular reviews of how the FDR service is functioning and how it is perceived by the community. The Law Council considers it is essential that First Nations peoples with strong community connections can receive honest feedback about the service from community members.

Do you have any other comments about the proposed grant activities?

97. The Law Council reiterates that the proposed funding appears to be inadequate and must make allowance for suitably experienced counsel and accommodate the increasing trend towards pre-litigation mediation, as well as FDR within the litigation process.
98. The Law Council recommends that the terms of the grants ought to be extended to counsel qualified to act in mediation. The system must include the capability for the ACCOs selected for this program to be able to brief work to suitably experienced counsel.
99. The Law Council recognises there is now an increasing practice in the FCFCOA to have a form of pre-action mediation. It is important that the scope of funding and expected work accommodate the increasing emphasis on pre-litigation mediation, in addition to mandated mediation during the formal court process.
100. Measures should be put in place to ensure that legal assistance is available to the parties involved in FDR mediation. It cannot be assumed that all parties will automatically qualify for legal assistance. The Law Council submits that having both parties adequately represented will assist in facilitating more effective outcomes.
101. The Law Council recommends that as an initial step, a pilot of the program be conducted in a geographical area of identified need in order to test the level of funding required. A pilot program would allow issues to be identified quickly and to ensure that funding is sufficient before the program is rolled out more broadly.

What measures could be put in place to help address and mitigate some of the identified barriers to service access, to support participation in FDR?

102. The Law Council suggests the following measures be put in place to help address and mitigate the barriers to service access identified in the Discussion Paper:
 - Language barriers

- language training for practitioners;
- use of interpreters; and
- employment of local First Nations liaison officers.
- Physical barriers
 - some communities may benefit from the installation of audio-visual link facilities for FDR if on-site mediation is not possible;¹⁵ and
 - FDR practitioners based in communities would avoid the need for expensive travel.
- Perception of bias against men
 - education programs alongside FDR services to promote understanding of FDR services in the community; and
 - co-chair mediations by male and female practitioners.
- Cultural barriers in respect of the shame of separation
 - culturally informed education programs.
- Fear of gossip
 - ensuring sufficient local staff to avoid family conflicts; and
 - clear confidentiality requirements.

103. The Law Council notes that remoteness is not identified in the Discussion Paper as a barrier to service access. The Law Council considers that geographic remoteness is a relevant barrier to service which must be considered in the design of this program. The Law Council is aware that typically, the more remote the community, the greater the need.

What should AGD consider when selecting which organisations should receive funding for this program?

104. The Law Council submits that the normal tendering process for the provision of services is not appropriate in this instance. Instead, more attention should be placed on encouraging the use of existing organisations with day-to-day contact with First Nations communities, such as Aboriginal and Torres Strait Islander Legal Services. The service should be delivered regionally, in the community, to the greatest extent possible.

105. The Law Council notes that these organisations may already have regional coverage and an administrative hub to participate, and this will avoid undue duplication of costs. It would also maximise existing lines of communication into local First Nations communities which would encourage trust in service provision.

106. Whether an ACCO is connected to a legal service and how this interacts with a client's ability to access their own lawyer is another consideration. For example, anyone accessing legal aid with respect to a family law matter is required to participate in Legal Aid Queensland mediation, but Legal Aid Queensland does not fund representation for assistance in the non-lawyer assisted programmes.

¹⁵ See, however, discussion on the use of technology at paragraph 58.

What are the current ways that service performance is measured in ACCOs who deliver dispute resolution or legal / family relationship type services?

107. The Law Council submits that aside from court-provided statistics in respect of more favourable outcomes – and whether these outcomes ‘stick’ – there should be close liaison with First Nations organisations and land councils to measure the response at the community level. This would provide an additional method of validating the effectiveness of the scheme.
108. Otherwise, consideration ought to be given to engaging an organisation, such as the Law and Justice Foundation of New South Wales, which is equipped with the necessary skills in qualitative evaluative research to report on the performance indicators to be adopted and measured.

Other matters warranting consideration

Instances where one, or some, of the families involved are Aboriginal or Torres Strait Islander

109. A matter not addressed in the Discussion Paper is the impact and consequences of the separation of persons, or family law issues, in families where only one, or some, of the family members involved are Aboriginal or Torres Strait Islander. This raises difficult questions, including whether a First Nations FDR process can be undertaken in conjunction with a standard FDR process, and whether the adoption of a culturally tailored FDR process should require the consent of all parties.
110. The Law Council recommends that further careful consideration should be given to this issue. Any such consideration should take into account the consequences of preferring one social order and cultural system over another.

Family capacity building support services

111. The Law Council suggests that the provision of FDR services to First Nations families should be situated within a suite of other culturally effective family capacity building services. While such issues are outside the strict scope of the Discussion Paper, the Law Council emphasises that a holistic, earlier-intervention approach is required to build capacity in First Nations families, within a therapeutic model, linked to legal avenues for assistance.
112. The Law Council recommends that the broader services offered by Family Relationship Centres be available in a culturally appropriate and effective way for First Nations families, including the provision of safe and dedicated physical spaces for such services. Referrals to these services should be available at identified points in a family lifecycle, such as during pregnancy, relationship breakdowns, restoration of children from out-of-home care and exiting custody.
113. The process itself should provide a therapeutic scaffold for families, and it would be appropriate for the services and referrals to be coordinated by an ACCO worker. In the Law Council’s view, the resourcing required for the success of new FDR services for First Nations families will need to include sufficiently resourcing ACCOs in order to carry out and coordinate this family capacity building work.