IS FAMILY DISPUTE RESOLUTION FACILITATING THE CHILD’S RIGHTS TO CULTURE?

BETHAINA DABABNEH

LLB (Hons), Grad Cert Legal Practice, MDR.

A thesis submitted to the University of Western Sydney in fulfillment of the requirements for the degree of Doctor of Philosophy

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Declaration of Originality

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of the my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.

Signed: ........................................ Dated..................................................

Bethaina Dababneh
Statement of Ethical Conduct

The research associated with this thesis abides by all international and Australian codes on human and animal experimentation. Research conducted under this study received approval from the University of Western Sydney Human Research Ethics Committee number H9143.

Signed: ........................................ Dated: ........................................

Bethaina Dababneh
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And to my family... for the times I didn’t cook for you or when you all ran out of socks to wear or when I just wasn’t there for you, I’m sorry, but without your sacrifice I would not be here now stumbling over my words to tell you...my husband Yousef and to my children Deana, Richard, Laith, Robie and Michael, that without you, there would be no point undertaking anything... With all my heart I dedicate this to you.

And finally to my father the late Zaki Hanna Aranki who enthused in me the passion of study and taught me the value of culture, I wish you were here...
ABSTRACT

Is the Process of Family Dispute Resolution facilitating the Child’s Rights To Culture?

The realisation that children are social agents affecting, as well as being affected by those around them, is a relatively new idea. However, it is central to the knowledge that prompted affirmative action by both international and domestic governing bodies to enact legislation recognising children as rights holders. The *Family Law Act 1975 (Cth) (FLA)* now gives effect to the child’s rights to know and enjoy their culture, and to enjoy their culture with others from that culture.

Studies into child development suggest that culture is acquired through intergenerational transmission and the socialisation of children by members of the child’s family and social group. While not all cultural practices will benefit children, generally exposure to familial and community culture gives the child a sense of belonging, self-worth and personal value. Culture is thought to aid the emotional, psychological and social development and adjustment of the child. Research also indicates that children deprived of cultural connections can experience emotional, identity and adjustment difficulties. When parents separate and are conflicted, in grief or cannot agree on the post-separation care of their children, the cultural supports and connections provided by parents, grandparents and even the wider cultural community, may be compromised.

This risk suggests that professionals assisting parents in conflict following separation ought to ensure that children’s cultural connections are maintained. Family Dispute Resolution Practitioners (FDR practitioners) are one such group on whom this duty falls. Practitioners are also duty bound by legal responsibilities and ethical obligations to advise parents that any agreement they make should be in their children’s best interests, which includes the child’s right to enjoy their culture.

Children’s right to know and enjoy culture is a passive right, and its facilitation is dependent primarily on the practitioner’s understanding and preparedness to facilitate...
discussion between parents at FDR about culture, and to include consideration of culture in post-separation parenting plans. Whether practitioners believe they should be giving effect to children’s rights, especially the right to enjoy their culture, is uncertain. This thesis investigates whether and how FDR practitioners are facilitating children’s right to culture in the FDR process.

The research shows that FDR practitioners experience difficulty in understanding culture, but identify culture as an inherent right for children. However they find it difficult to facilitate children’s cultural rights in FDR because of: confusion about their responsibility; lack of confidence in their capacity to do this; the limitations of the FDR process; and the added complexity that cultural dynamics bring to the FDR process. This thesis documents this understanding, and recommends changes that could enhance FDR practitioners’ capacity to facilitate children’s right to know and enjoy their culture in FDR.
LIST OF ABBREVIATIONS

ADR     Alternative Dispute Resolution
ALRC    Australian Law Reform Commission
ATSI    Aboriginal and Torres Strait Islander
CALD    Culturally and Linguistically Diverse
FLA     Family Law Act
FDR     Family Dispute Resolution
FDRP    Family Dispute Resolution Practitioner
FRC     Family Relationship Centre
HREROC  Human Rights and Equal Opportunity Commission
IMI     International Mediation Institute
LSIC    Longitudinal Study on Indigenous Children
NADRAC  National Alternative Dispute Resolution Advisory Council
NMAS    National Mediator Accreditation System
NSW     New South Wales
PDR     Primary Dispute Resolution
SPR     Shared Parenting Responsibility
UDHR    Universal Declaration of Human Rights
UNCRC   United Nations Convention on the Rights of the Child
UWS     University of Western Sydney
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Introduction

A. Overview

Awareness of a child’s rights to culture has increased with the inception of the United Nations Convention on the Rights of the Child (UNCRC) in 1989 that confirmed that children have the right to practice their culture, to profess and practice their religion, and to use their own language.1 In 1990, Australia ratified the UNCRC, recognizing children as individual rights holders. In 2006 there were significant amendments to the Family Law Act 1975 (Cth) (the FLA) to support children’s rights to know and enjoy their culture, with legislators framing culture as a crucial element of children’s best interests and including the right in a number of sections.2 In 2012, further amendments to the FLA affirmed the significance of UNCRC in making decisions about children.3 However, these initiatives did not go far enough in recognizing and implementing the right of minority children to know and enjoy their culture nor the possible impact of the loss of culture on children from minority households following parental separation.

The thesis arose from a concern that children need culture for their physical, cognitive, social, and emotional development.4 The cultural context of the child is influential in the child’s formation of a sound and individual identity. This view is however not reflected in the 2006 amendments to the FLA. The placement of culture as a principle underlying the Objects of the FLA for minority children meant that culture became an additional, not primary factor in the legal consideration of what is in the child’s best interests. This view is highlighted further by the statutory and procedural emphasis on Family Dispute Resolution (FDR) to resolve disputes about children and the role of the practitioner in disputed children’s matters. While attempting to provide responsive services for families post separation, the legislative and other changes to FDR did not prioritise training or development of FDR practitioners to assist them to appropriately meet the needs of parents and children from minority cultural backgrounds.

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1 United Nations Conventions on the Rights of the Child (UNCRC), Article 30
2 FLA: s60B(2)(e), s60(2)(g), s60CC
3 The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011
The thesis explores how and why culture is important for the child, especially following parental separation, and the role and responsibilities of parents and of other decision makers in the cultural socialisation of children. FRD practitioners, given their new facilitative role in FDR, are now considered child advocates enabling them to intervene on behalf of children. However it is unclear to what extent FDR practitioners actively intervene in FDR to advocate the child’s right to enjoy their culture. To understand the practitioner’s role in FDR in relation to this right, research was conducted to gauge the views and investigate the cultural responsiveness of FDR Practitioners on the rights of the child to enjoy their culture. While practitioners proved to be sensitive to the importance of culture for children, most practitioners were not culture competent and took a narrow view of culture in FDR. As such, culture was not seen as a standard issue in which to engage parents in FDR. Indicating that for children of minority cultures, there is a risk of loss of culture following the separation of their parents that is yet to be understood by many FDR Practitioners. The aim of the research then, is to examine the extent to which FDR practitioners are facilitating children’s rights to enjoy their culture, and to consider how this important issue might be given greater focus in FDR.

B. The Difficulties with Defining Culture

Even before the first archaeological markings on cave walls evidencing group rituals were recorded, culture has played a significant role in shaping a group’s dynamics. Now, culture has been recognized in both international and domestic instruments as a human right for children. While scholars have grappled with its meaning for years, they now believe that culture arises from human interaction on social, economic and institutional planes. Culture is the thread that weaves together and distinguishes a group or organization from the greater community. On a social level, culture is the blueprint that gives people their multiple identifying features and observable patterns of behavior, including: their habits and practices, their language and shared systems of beliefs, values and assumptions.\(^5\) Children’s development is both culturally contextualised and socially permeated, containing the integrated patterns of human behaviour that connect the child to their family and community. Through intergenerational socialisation, children learn interactive communications, beliefs, and values and develop social skills to help them form relationships that promote their wellbeing.

On an institutional level, culture is the embodiment of political, social and economic institutions that regulate—through rules and conventions—the social interactions of a population. On a global level, understanding that no society is homogenous, the cultural interactions of the global economy, the development in communications technologies and the ease of migration has led to a permeability of boundaries between cultures. Australia, like many nations in the world, has become a multicultural nation. An important indicator of how successful a nation adapts to its changing demographics, is in how legislators incorporate the needs of a changing population within public policy.

C. Initiatives to the Family Law Act 1975 (Cth)

The amendments in 2006 to the Family Law Act 1975 (Cth) (FLA) were significant because they acknowledged that children’s needs extend not only to protection, but also to the rights of provision and participation. Cultural rights that fulfil the child’s needs to develop a healthy personal identity are considered to be part of the human right to participation. The Family Law Amendment (Shared Parental Responsibility (SPR)) Act 2006 (SPR Act), recognised in s60B, as a principle underlying the main Objects of the FLA, the right of children to know and enjoy their culture, including the right to enjoy their culture with others from that culture. The effect of this right for Aboriginal and Torres Strait Islander children was explicitly spelt out to include the right to maintain a connection with that culture; to have the support, opportunity and encouragement necessary to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and to develop a positive appreciation of that culture. These provisions mirror the rights in the UNCRC and concentrate on the partnerships that culture creates through participation. However this right is not so explicit for children of minority cultures.

Furthermore, it is unclear if and how a child’s right to enjoy his or her culture is to be considered, or in practice whether or not culture is considered in Family Dispute Resolution. By making FDR mandatory in disputed children’s matters, legislators, while attempting to

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8 Family Law Act 1975 (Cth), s60B(2)(e).
9 Family Law Act (FLA) s60B(3)(a) and s60CC(3)(h).
minimise the effects of parental separation on children, did not make FDR accessible to children as a population in general. Children do not attend FDR in most cases, their views are not sought on important decisions that affect their future. The design of FDR concentrates on parents establishing what is in their children’s ‘best interests’ without direct consultation with children.10 Children are recognised as the responsibility of their parents, putting in doubt that children have autonomy to enforce their rights, to culture or to anything else.

D. Children’s Rights Debate

A long standing debate in relation to children’s rights is whether children have rights. Scholars argue that rights require enforcement, and as children lack the requisite understanding of rights and the cognitive abilities to enforce those rights, then by reason, children cannot be rights holders.11 Practitioners believing that children are granted rights only to secure their interests. Subsequently, by focusing attention on parental obligations towards their children, practitioners qualified childrens rights as those rights that parents believe to be in their childrens best interests. This confusion between rights and interests for practitioners has the potential to undermine the child’s individual rights and children’s claims to culture. It will be argued that as part of the practitioner’s responsibilities, practitioners should focus on how to construct children’s right’s in FDR, giving meaning to the notion of children’s rights to enjoy their culture, and on creating a corresponding obligation for parents to implement. The second reason that impedes FDR practitioner’s facilitation of culture for children in FDR is the notion of the child’s evolving capacities. This refers to the age by which children are thought to develop cognitive, emotional and social skills. The thesis will argue that central to both the UNCRC and the FLA, capacity is itself a culture laden notion, with age being relative to the cultural expectations of a particular nation or group. A child’s age, it will be argued, has a great deal of influence on whether the child is considered a rights holder and whether a child is able to participate in decision making. The development of child inclusive practices, as opposed to child focused practices, where practitioner’s work directly with the

child consultant to ascertain the opinion of the child, helps practitioners make child responsive
decisions. Despite the benefits of hearing from the child, there is debate regarding the age a
child is considered capable of forming an opinion and making rational decisions. Not all
children mature with age, and not all majority-aged children can be considered capable. In
short, behind the rhetoric of rights is a debate developing as to whether, children as a class
of persons, have rights and to what extent children can be considered rights holders. With
children often overlooked or given limited recognition in areas of public policy that directly
affect them; where adults make final decisions for children and where adults deem the child
capable of making their own decisions, it will be argued that the combined effect of these
considerations results in negating the notion of children as rights holders. Albeit, the
UNCRC and the FLA both refer to the minimum age of 18 years as a general guide.

E. Family Dispute Resolution

The aims of the 2006 FLA amendments were intended to bring about ideological changes to
the way parents and society in general resolves disputed children’s matters. In recognising
that many disputes over children post-separation are driven by the loss and grief over the
family’s dissolution, the FLA introduced private dispute resolution in the form of
mandatory FDR to assist parents to resolve disputes without resorting to litigation.12 Central to
this objective is the primacy of the child’s best interests; protecting children from protracted
parental conflict caused by family separation; and, not over burdening the child to make
decisions that may prove detrimental to their relationship with their parents.

Described in the legislation as a ‘process other than litigation’, managed by an ‘intermediary
independent of all the parties involved in the process’, a FDR practitioner helps parents to
disassociate their partnering from their parenting, to ‘resolve all or some of their
dispute’.13 The government hoped that using non-litigious dispute resolution would empower
parents to make their own decisions and shift the dynamics of parental disputes from conflict
resolution to cooperative negotiations.14 However this process relies heavily on the abilities of
the practitioner to understand rights, recognize positions and manage FDR.

13 FLA; s10F Definition of FDR.
14 Parkinson Above at 6
Since July 2009, practitioners must meet the accreditation standards in the *Family Law (FDR Practitioners) Regulations 2008*, which requires practitioners to complete a Vocational Graduate Diploma or hold a degree in law, psychology, social work, conflict management, mediation or dispute resolution. As well as complete competency components.\textsuperscript{15} While these components cover violence, relationships and family law, the relevance of culture is only considered in training seminars. Additionally, Practitioners have a number of legal and ethical obligations that arise as part of their intermediary role. These include the philosophies of practitioner neutrality and practitioner independence that enable parents to retain control over the content and resolution of their dispute, encouraging parents to reach a satisfactory agreement. Despite ‘independence’ being within the definition of a practitioner in s10F, there has been much debate as to whether a practitioner can remain independent in any true sense, given their new advisory role: these were discussed above.\textsuperscript{16} It will be argued that a breach of a practitioner’s obligation will undermine the interests of the parent and by association the interests of the child. In the course of providing parents with advice, a practitioner is also obliged to evaluate how parents negotiate and to screen for power imbalances between the parents so as to ensure that the vulnerable parent can negotiate safely. In the context of the practitioners overriding obligation to advocate for children in FDR, maintaining independence and neutrality is likely to breach the practitioner’s duty towards the child. That is, under s63C *FLA* practitioners have a duty to advise and ensure that parents make decisions that are in their children’s best interests. It will be argued that culture is an element that is in the child’s best interests.\textsuperscript{17}

Despite the understanding that non-legal trained practitioners can not give legal advise, there is an onus on practitioners to facilitate discussion between parents and to help parents resolve their disputes by providing parents with the relevant legal and ethical information to help parents make informed decisions.\textsuperscript{18} Culturally competent practitioners are those practitioners who develop professional skills to understand the benefit of culture for children’s wellbeing. Being culturally sensitive may help practitioners defuse any misunderstandings relating to the child’s rights to culture.

\textsuperscript{15} *Family Law (FDR Practitioners) Regulations 2008*, reg 5; Criteria for accreditation relating to qualifications and competencies.
\textsuperscript{16} *FLA* s63
\textsuperscript{17} *FLA* s63(2)(i)
The *FLA* outlines the practitioner’s advisory role. In this role, FDRPs must inform parents that they should regard their child’s best interests as paramount. Encourage parents to negotiate with the view of promoting the child having a meaningful relationship with both parents and always ensuring that children are safe.²⁰ Whilst these are the primary factors outlined in the *FLA* and those that practitioners rely on to assess a best interests outcome in FDR, these can not be achieved without consideration of the secondary factors. It will be argued that the combined effect of a practitioners statutory obligations places FDR practitioners in a position of accountability to ensure children’s best interests.²¹ An important focus therefore is on why practitioners are not prepared to facilitate culture in FDR.

**F. Reasons Explaining Non-Facilitation of Culture**

Despite practitioners appreciating culture for the child, practitioners have struggled to interpret culture as a consideration within the child’s best interests. The thesis will argue that this creates real problems for the facilitation of cultural rights. The suggestion is for practitioners to respond in FDR to the needs of parents from non-dominant cultural background, developing culturally sensitive practices that enable respectful dialogue between practitioner and parents. The thesis will posit that to understand the FDR practitioner’s stance in relation to children’s rights to culture, empirical research must be conducted. While it is understood that all cultures have features that may not be compatible with the mainstream culture, it is only when these cultural practices become harmful to children that their consideration should be balanced against other secondary factors in the child’s best interests considerations. That is, the thesis will argue that practitioners need to gain cultural competence to reconcile the non facilitation of the right to culture when the practice is pitted against a long standing cultural practice that may be considered legitimate and morally acceptable in some cultures. By understanding the ramifications of culture for the child, it will be argued that practitioners will be able to discern between those practices that are important to the child, and therefore worth advocating in FDR, or those practices that may violate and endanger the human rights, dignity and safety of the child in mainstream Australian communities.

²⁰ s60D. Amendments in 2012 give priority to protecting children from physical and psychological harm, abuse, neglect and family violence.
²¹ *FLA* s10K Liabilities.
The focus of the study is to ascertain the views of practitioners on children’s rights to enjoy their culture, and if culture is being facilitated in FDR. The thesis findings suggest that when practitioners were faced with multidimensional conflict relating to culture, religion and conflicted child rearing practices and violence, or where parents were entrenched in their views, practitioners were not confident to work with parents under those circumstances, and were more likely to abandon the FDR, preferring to issue s60I certificates to the parties. Further, it was found that despite accreditation standards now emphasising that practitioners must take a holistic approach to developing culturally aware and respectful practice’s, practitioners lacked awareness to detect culturally based power imbalances in FDR. The implication is that practitioners resorted to using stereotyping of parents to make understanding easier. The thesis will argue that some possible solutions to help practitioners engage with parents from non-mainstream cultures include: on-going educational and practical training; the development of cultural competence and awareness programmes and developing registers of specialist referral services that can help practitioners understand the community they work with and to help build information.

The following section outlines the chapters that will support the research. The thesis comprises nine chapters: the Introduction and three chapters on culture, rights to culture and the practitioner or process of FDR. Each will contain the theoretical underpinnings of the question to be answered; ‘does FDR facilitate the child’s rights to culture’. The fifth chapter will contain the methodology used in the research. The method that supported the research was qualitative research. Qualitative research attempts to understand an event or occurrence from the perspective of the practitioner. It explores the participants lived experiences by using semi-structured interviews and asks the ‘how’ and ‘why’ questions to learn ‘whether’ and ‘if’ FDR was not or could not facilitate the child’s rights to culture. The remaining three chapters will provide the research findings taken directly from the interviews, transcribed and interpreted by the writer. The last chapter will discuss the implications of these findings and the writer’s concluding remarks.

22 Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) reg 5. In addition, the Australian Government Attorney-General’s Department noted the availability of alternative pathways to accreditation that do not involve the vocational graduate diploma: Australian Government Attorney-General’s Department, Submission FV 166, 25 June 2010.
G. Findings, Themes and Hypothesis

As a relatively new field, FDR has yet to be researched for its effects in relation to the non-facilitation of cultural rights for children of non-mainstream cultures; that is, children born within a family that has a parent from a minority culture. In analysing the findings as they relate to the thesis question—Does FDR facilitate the child’s right to culture?—the study has extracted several themes. The first theme is that children need culture to develop a healthy identity and this will be discussed in chapters 2 and research chapter 6. The thesis argues that culture is inter-generationally transmitted to children through cultural socialisation. Culture for the child emphasises the interdependence of a family unit that teaches the child behavioural competencies, values, language, and gives the child their cultural identity. Thus, the family environment and parental attitudes to culture are important in the child’s cultural socialization. Accordingly in family separation, the assumption by family dispute practitioners of the homogeneity of family life and the idea of normality of child rearing, elevates the risk of harm and increases the chance of children being denied culture. This has the potential to affect the child’s development and wellbeing.

The second theme, as provided in chapter 3 of the literature review and chapter 7 of the research findings will provide that international, as well as domestic laws have now acknowledged that culture is important to the development of a child’s identity, through the creation of the *UNCRC* and corresponding amendments to the *FLA*. As FDR is now the main source of dispute resolution in Australian family law, practitioners as child advocates have the responsibility to facilitate culture in FDR, and thus to ensure children have the benefit of culture in their upbringing. It will be argued that practitioners, although sensitive to the importance of culture for children, have been apprehensive about initiating discussions during FDR, have associated culture with conflict and focused mainly on helping parents secure a resolution, with little regard to the long term benefits of culture for children.

In chapters 4 and its corresponding research chapter 8, the third theme posits that the practitioners reluctance to engage parents in discussion about integrating culture in parenting plans, stems from the practitioners interpretation of culture as harmful or practices that are incompatible with mainstream culture. Practitioners reasoned that children should know their heritage, but that facilitating culture for children would hinder the child’s natural integration into mainstream society.
The following section will summarise chapters contained within the thesis and attempt to show the reasons culture has not been an easy issue to understand and thus has generally not been facilitated for children in FDR. Whereas the focus of the thesis is mainly the loss of culture for the child born into a minority culture, the thesis will consider the loss of culture for Indigenous children and Inter-racial adoptees to draw the connection between the harmful effects that loss of culture has caused for these children and the harm that may eventuate for children from minority cultures if a child’s right to enjoy their culture is not implemented in FDR.

**H. Chapter Structure**

*Chapter Two: Culture and Child Development*

This chapter will start by asking ‘what is culture and why is it important for children?’ The chapter will present discussion on the centrality of culture for the child’s physical and psychological development. Arguing that culture is the reflection by which the child views themself and the surrounding world, any distortion of that image, for example as a result of family separation, will distort the child’s sense of self. Studies and case law will be presented on Indigenous children and transnational adoptees to show the harm caused by culturally insensitive policy and culturally incompetent bureaucracy. The chapter will show why parents need their children to remain within their culture. Transmitted inter-generationally and thought to be contained in both genetics and language, beliefs, values and norms, the child’s socialisation occurs primarily from within the family, but also on multiple levels. Socialisation is influenced by the interconnectedness of the nation state, changes in technology, mass media, and educational, social, ideological and legal institutions of the state. Culture is learnt behaviour.

The chapter will show that in family disputes the transfer of culture from parents, grandparents and even the wider cultural community, may be limited or non existant. In these situations, children, if exposed, may only be exposed to their culture sporadically, and this will affect the amount and degree of socialisation within that culture. Using social constructionist and sociocultural theories, the chapter will argue that culture influences the
child’s sense of belonging and formation of identity; thus, its loss is detrimental.

Chapter Three: The Family Law Act and Rights of the Child to Culture

This chapter will start by constructing children’s rights and the difference between the right to culture and culture as a human right. The chapter will provide a brief summary of children’s rights in the UNCRC and the FLA, and trace the incorporation of culture in Australia’s FLA. The chapter will argue that, despite the UNCRC being the most widely ratified international instrument to date, its implementation has occurred with many reservations: some nation states arguing that its universality is incompatible with their national culture.

The chapter argues that the rationale behind the FLA 2006 amendments to make Family Dispute Resolution (FDR) a mandatory process was the need to recognise the failure of the family law system to secure a fairer distribution of time share between parents, to protect children from the fall out of parental conflict, the detrimental effects of litigation on the family and a failure to deter parents from litigation. However the chapter will also argue that while the principle of the child’s best interests is considered the ‘paramount’ consideration in all children’s matters, the child’s interests now take second place to parental prerogatives in FDR. Despite introduction of the culture rights in s60B and s60CC, children’s rights are conditional rights, and are dependent on the child’s evolving capacity, as well as the practitioner’s own cultural competence and ability to understand the importance of culture for the child, and thus their willingness to facilitate discussion of culture in FDR. The chapter will argue that most practitioners believe that children’s rights are a myth. The combined effect of these amendments have left practitioners confused about their obligations to the child and the child’s rights to culture. The chapter concludes by arguing that practitioners need to adopt a culturally responsive practice to fulfil their role as managers of FDR.

Chapter Four: Family Dispute Resolution and the Practitioner

The 2006 amendments to the FLA revolutionised non-litigious dispute resolution by making it mandatory. The introduction of FDR highlighted the detrimental effects of litigation on child
adjustment and family breakdown. The chapter gives the sequence of change from alternative dispute resolution to primary dispute resolution to FDR. The chapter explains the distinction between the three phases of the FDR process: intake, practitioner’s first session and the main session of FDR, and explains that each stage is important to collect information, screen for violence and assess the parents willingness to negotiation in good faith. The chapter will present the new construction of the practitioner’s accreditation, and argue that the practitioner’s statutory and ethical duties are in conflict. The chapter will show that the definition of a practitioners duty in s10F FLA: that practitioner’s are to assist parents to ‘resolve some or all of their disputes’ is in stark contradiction with their duty to remain independent and neutral. Discussion will also address the tenets of FDR—self-determination and neutrality—and why these principles should no longer be stringently held, in light of the practitioner’s new advisor role. Finally, the chapter will show that despite practitioners acknowledging that their primary duty was to act in the child’s best interests, practitioners had trouble translating the principle and interpreting best interest. Preferring the paternalistic view of children’s interests to children’s rights to culture. In practice, practitioners struggling to define culture for the child.

This chapter is pivotal to the study because it answers what practitioners thought about culture and rights for children and why, after recognising the benefits, practitioners were not comfortable facilitating culture for children in FDR.

**Chapter Five: Methodology**

This chapter outlines the method most suited to answering the research question: ‘Does FDR facilitate the child’s rights to Culture?’ The chapter will describe qualitative research methodology, and will argue that this method allows the researcher to generate a deeper understanding of the subject practitioner, revealing how practitioners managed FDR. The chapter will detail the theories that have guided the research: sociocultural theories, constructionist theories and the current literature on qualitative research. The chapter explains why semi-structured qualitative interviews with 30 practitioners practicing in the field of FDR was thought the most appropriate method of investigation The chapter will provide detailed information on the qualitative research methodology, design, the data collection, sampling and the researcher’s reflexive analysis, as well as an in-depth analysis of the data. The chapter will describe the analysis tool used in the research, the NVivo7 data management software
program, to help structure the extensive data into themes and codes. Finally, the challenges encountered during the research will be outlined, as well as the methods used to deal with them.

Chapter Six: Research Findings I: Culture

This chapter will provide the practitioners’ understandings of culture, and present the range of definitions identified. Data will then be presented to show how practitioners interpreted cultural influences on child development. More importantly, it will present the practitioners’ thoughts on who had prime responsibility to facilitate culture for children. The chapter will argue that, despite practitioners acknowledging that culture benefits the child, practitioners found culture difficult to define in the context of child development. Where the dispute between parents contained multiple forms of cultural conflict, such as culture with religion, or conflict, the chapter will argue that practitioners found culture challenging to understand, and despite being sensitive to the child’s need for culture, they were not able to reconcile non-mainstream culture with FDR and Australian family law. It will also be argued that practitioners were more ready to associate culture with negativity, and struggled to find connections between the practices of culture and the child’s best interest. The chapter will conclude that practitioners were not confident to facilitate culture for children; they reasoned that culture was a subjective component of a child’s psychology and unless parents, who knew their children best, presented the subject for negotiation, it was not the practitioner’s position to take the initiative.

Chapter Seven: Research Findings II: Rights

The chapter will argue that practitioners were challenged by the idea of children having rights. The chapter will present the practitioners’ thoughts on why children should not be given rights and why rights for children translated into rights for parents to abuse. The chapter will show that practitioners rationalised that rights were an entitlement that children could not invoke because of their age and capacity to understand those rights. The chapter will argue that practitioners were confused about rights and best interests, often using the term interchangeably. The data demonstrates that practitioners resorted to stereotyping to make arguments as to why culture should not be facilitated for the child.
Chapter Eight: Research Findings III: FDR the Practitioner or the Process

This chapter begins by describing the process of FDR, the practitioners’ understandings of the various stages—intake, pre-session and FDR—finding that most practitioners had only limited awareness of the initial intake process. This is mainly because they did not complete the intake themselves; consequently, most practitioners describe intake as a ‘form filling process’ with boxes or ticks. This chapter will provide comments from the practitioners to show they believed that the initial pre-session and FDR were more comprehensive informational sessions. The chapter outlines that practitioners were restricted by the time of the process. Many practitioners noting that, given the many procedural issues at FDR, issues of time distribution and discussions of childrens best interests, there was no time to address any cultural conflicts between the parents. The chapter shows that practitioners were concerned at the absence of the child’s input at FDR. However the chapter argues it’s the practitioners own lack of cultural knowledge that plagued the practitioner management of FDR with non-mainstream parents. Finally, the chapter presents the practitioners’ personal reflections of their training and abilities to manage culturally contextualised FDR. It found practitioners to have a realistic understanding of their abilities and limitations. The chapter also presents the practitioners’ views on how a good practice should be managed, and concludes that practitioners need to complement their already extensive knowledge of FDR practice with cultural competence training, enabling them to provide the same standard of excellence with parents from non-mainstream cultures.

Chapter Nine: Implications and Conclusions

The final chapter draws together all the main findings, the themes and analyses the implications of those themes, making logical conclusions and recommendations for the practice of FDR and its practitioner’s. The chapter draws on discussion from the literature review in chapters 2 to 4 and the research analyses chapters of 6 to 8 and presents the main themes, that: firstly, even though most practitioners were challenged to identify culture, practitioners were culturally sensitive and responsive to culture in FDR; secondly, practitioners recognised that children’s culture was a combination of factors pertaining to the family as well as school, social, media and peer groups, however most practitioners concluded that each
family is a subculture on its own and responsibility for the child’s cultural socialization lies within the family domain not FDR. The third theme concerns the interrelatedness between the practitioners’ legal responsibility to carry out a child responsive practice and their ethical obligations to remain independent of the decision making process and the self-determination of parents. The theme concluded that cultural competence required practitioners to engage in ongoing learning and training. Finally that practitioners should conduct a reflective practice to help practitioners avoid misconduct that amounted to intervention, disrespect for the values of the parent or in disregarding parents’ genuine concerns.

The fourth theme addresses the practitioner’s understanding of several concepts; child’s best interests; child inclusive practice, where children are included in the decision making process of their parenting plans; and, child responsive practice, that extended to practitioners advising parents about the primary factors of equal shared responsibility/time and child safety. The findings concluded that most practitioners understood that in all decision making, the child’s ‘best interests’ are the paramount consideration, however culture as a factor for consideration in s60CC was only mentioned in passing, and only by practitioners with legal training. Culture was interpreted by most practitioners using lay interpretations as something good or at least not bad, and any facilitation of culture for the child lie within the parents’ prerogative. The findings concluded that by failing to advise parents of all the elements that constituted a child’s best interest in the FLA, of which Culture is one, practitioners risk breaching their statutory obligations to children. It was further concluded that, for practitioners to have a good practice, they must be culturally responsive to the needs and complexities of culture in FDR. A recommendation was made that practitioners should gain a level of cultural sensitivity by learning to appreciate cultural similarities and differences.23 This can be achieved when Practitioners develop a culturally competent practice by becoming familiar with cultural characteristics; these include the history and belief systems of members of other ethnic groups.24 Recommendations extended to on-going education, having registers of practitioners that specialized in a particular culture, building friendships through inter-community bi-lateral cooperation, co-mediators, online services, hard copy information and on site practical training. The combined findings suggest that generally practitioners lacked the requisite training to manage multifaceted or highly conflicted, culturally contextualised

23 National Maternal and Child Health Center on Cultural Competency, 1997
24 ibid above at 15.
FDR. This left them challenged, unprepared, sometimes frustrated at not being able to help parents, and this meant that children were not being afforded their rights to a healthy cultural identity.

**I Conclusion**

This thesis makes an original contribution to knowledge by examining the knowledge base of FDR practitioners on the sensitive topic of children’s rights to culture. This is achieved by providing data from interviews with 30 practitioners in the field of FDR from different agencies around Australia. Their input on how FDR is managed and their views on children’s rights to culture have allowed a number of recommendations to be made. These include a recommendation that FDR be made more child responsive and practitioners more culture conscious, culturally competent and professionally accountable. The study suggests that the present accreditation of practitioners be expanded to include a component on culture, both theory and practical. The practice component should be mandatory in field training, not just theory, and to have continuing practitioner education. The findings are important because they show that a very important aspect of a child’s healthy development is being overlooked in post-separation decision making. The recommendation is that children be given opportunities to fully develop their cultural identity following separation, and this means practitioners must be conscious of the child's need to experience their culture and be prepared to help parents realise the same by taking seriously their obligations to facilitate children's cultural rights in FDR.
II CULTURE AND CHILDREN

A Introduction

This chapter will start by asking, what is culture and why is it important for children? By answering these questions the thesis will show that culture strengthens, preserves and promotes the interdependent relationship between parents and children, and is central to a child’s physical and psychological development. Culture is now understood to instil in children the attitudes and values that influence their view of themselves and constructs their sense of identity and belonging.

This chapter will provide a definition of culture that reflects a combination of views and understandings. Culture, on the one hand is the collective summation of a group’s innate subjectivities, values, beliefs, customs, language, history and traditions. Drawing from child development theories, culture for children is the connection between past and present. Exposure to familial and community culture gives the child a sense of belonging, ‘self-worth and personal value’. This aids the emotional, psychological and social development of the child and the development of a healthy individual identity. On the other hand, culture is thought to be, ‘what we create’ beyond our biology. From this definition, the thesis will extract and discuss the relevance of cultural socialization that takes place after birth, the social and physical socialization of the child that continues throughout the child’s life promoted through language and trial and error learning. The patterns of responses that are developed by a group, standardise the group and become the group’s correct way to, ‘perceive, feel, think, and act’. Together these definitions incorporate the scope of human diversity and ways of being, such as gender, ethnicity, class, religion, ability, age and sexuality. Culture, it will be argued, is multi-layered and inherent in the formation of the child’s individuality and identity.

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26 ibid
31 MacNaughton, G Above n 21.
personhood and becomes the reflection by which the child views themselves and the world around them. If children, the subject of broken homes or separation, are denied access to their familial culture then this reflection becomes compromised. It stands to reason that the child’s view of themselves and the family around them will become distorted. The chapter will also show that not all cultural practices benefit the child and, as a natural developmental process, children learn to cull behaviour viewed as inappropriate or harmful.

The chapter will argue that seemingly insignificant actions of parents can affect the socialization of their children.\(^{32}\) Even more so when parents separate, and are conflicted, in grief or cannot agree on the post-separation care of their children, the cultural support provided by parents, grandparents and even the wider cultural community may be compromised. Especially when parents are caught up in the emotional stress of separation, parents may fail to maintain cultural connections or censor cultural practices they believe have become inappropriate for the child. This is more likely to happen when parents are not from the same cultural background. In these situations, children may be infrequently exposed to their minority or Indigenous culture, and this will affect the child’s degree of socialisation within that culture. This, it will be argued, will lead to differential effects from the intra-psychic and interpersonal, to educational and social outcomes for the child and may change the course of a child’s cultural and psychological development.

To establish my argument, using social constructionism and sociocultural theories, the chapter will consider the evolution of culture as a concept, and show how culture influences human behaviour. It will then address the impact of cultural socialisation on the child and conclude by arguing that culture affects children in multiple ways, but more importantly, the chapter will use studies conducted on transnational adoptees and the Stolen Generation and the harmful effects of losing a primary culture, to draw correlations between these children and children of minority cultures.

**B The Concept of Culture**

‘Culture’ as a word is difficult to define and has no common usage.\(^{33}\) As a concept, culture was first used by the Romans to mean cultivation of the soul or mind. It re- appeared in the

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\(^{32}\) Hurrelmann Above n22 at 42.

seventeenth century, referring to the betterment or refinement of individuals through fine arts and humanities, or as the achievement of something good, especially through education. During the eighteenth and nineteenth centuries, the word was mostly used by German thinkers, and it referred more frequently to the common reference points among groups of people. Discussion of the term was often connected to national aspirations or ideals and ‘enlightenment’.\textsuperscript{34} Anthropologists used the term ‘culture’ to refer to a universal human capacity, the reflection of progress of human reason towards intellectual, social, and political self-consciousness.\textsuperscript{35} During the nineteenth century, the word ‘culture’ became synonymous with ‘civilization’, as though they meant the same thing; in fact, they do not.\textsuperscript{36} Civilisation refers to the harmonious habitation of a social group and culture, an inseparable counterpart that differentiates one civilisation from another.\textsuperscript{37} Not until the twentieth century did culture emerge as a central concept in anthropology, encompassing the range of human phenomena, positing that humans inherit common needs. However, we learn different ways to satisfy these needs and that is attributed to our genetic inheritance.\textsuperscript{38}

In the context that no definition or explanation will be a complete measure of the true meaning of culture, this thesis will rely on a concept of culture that combines human phenomena with genetics, to give an individual within a group their patterned ways of thinking, knowing and reacting. To aid in this understanding, a multidimensional, interrelated definition of culture will be provided. Culture is the interaction between the social, economic, political and ideological functions of society. These are interrelated, and regulate the normative patterns of, and ways of doing things, within its institutions, organisations and communities. In this understanding, culture becomes the interrelationship between the physical and mental context of a family’s practices, acquired by the child through the intergenerational transmission of pooled information, knowledge and social skills. Culture for the child is a combination of private and public relationships, the proportion attributable to each relationship type being dependent on the child’s circumstances. Culture defines group dynamics to institutional dynamics, but is more about affiliations to groups. The essential core of culture consists of the

\textsuperscript{35} Katerina Deligiorgis,\textit{ Kant and the Culture of Enlightenment}, (2005), SUNY Press, xi, 248.
\textsuperscript{36} Samuel P Huntington,\textit{ The Clash of Civilizations and Remaking of World Order}, (1996), Simon & Schuster.
\textsuperscript{37} SP Huntington above n. 26
innate ideas, standards, norms and moral beliefs of a group. However, an individual can be affiliated to more than one group. Culture neither originated by pure chance nor by consciously pure design; culture does not exist in isolation. Correspondingly, traditions and cultural practices can influence human evolutionary pathways. As culture evolves more quickly than gene pools, because the replication of ideas and beliefs change more rapidly than genetics, it would seem that few human niches remain stable long enough to influence gene pool evolution in any significant way.

Whereas culture and genetics have traditionally been thought of as two separate processes, recent thought suggests the two are connected. The development of the theory ‘gene-culture co-evolution’ is increasingly realising that culture influences our genetic makeup, at the same that time biological and social trends influence the path of culture. Culture-gene co-evolution is the evolution of genes by psychological adaptation to new ideas, values and adaptation modes. This can alter the individual’s social and physical environment. An example of this is lactose tolerance, which developed from cultures that drank the milk of animals, or the evolution of cooking food that caused physiological changes to the digestive system by shrinking the digestive tract and reforming the jaw and teeth. While it is not the intention of this thesis to document all theories of culture, it is an intention to convey the influence of culture for children as more than the sum of biological or psychological human components. It is through these components that children attain a capacity for learning, adapting more effectively to the world around them.

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44 Kevin N Laland and GR Brown Above n 33.
45 Kevin N Laland and GR Brown above n 33.
(i) The Indoctrination of Culture for the Child

Defining culture is challenging. American anthropologists, Kroeber and Kluckhohn, have identified over 150 different definitions of culture. In summary, they listed culture as composed of four core components: the total way of life of a people; a way of thinking, feeling and believing; an abstraction from behaviour; and a mechanism for the normative regulation of behavior. These components are important because they identify three levels of culture relevant to children. When simultaneously transmitted to the child, they provide the child with behavioural patterns and perceptions that regulate and set limits to the child’s inter-relational and interpersonal interactions with other members of that group, and society in general. This helps to distinguish that group from others in a community.

Most anthropologists agree that culture is learnt behaviour and not biologically inherited. Children are not born with preconceived ideas of normality, but attain culture through social learning. Described as the accumulation of ‘cognitive capital,’ culture is the common information repository of a group of people, common ways of thinking, role expectations and institutional organisations; it includes common ways of communicating to disseminate information. Cultural values generally reflect the basic standards of a society that guide the socially approved goals of its members.

However just as humans increase their cognitive capacities with ideas and communication humans can shape the nature of an institution’s evolution by their ability to engineer innovative social change. What makes social systems complex is the multitude of interacting institutions: the educational institutions that control what we learn; the economic institutions that control and systematically organise cooperation, coordination, and the

48 Albert Kroeber and Kluckhohn, above n 18.
49 Albert Kroeber and Kluckhohn, above n 18
division of labour in societies; and the political institutions that provide social and physical constraints. These inform people, who are members of groups, how members should be rewarded and punished and how other groups should be treated.\textsuperscript{56} Legitimate social institutions have traditionally been viewed in terms of social roles and expected behaviours, where the fulfilment of a role is achieved by creating, elaborating and prescribing behaviours expected of the individual.\textsuperscript{57} These concepts are an amalgamation of meaningful implications that represent a contemporary developmental framework for the child. However, critical to the formation of cultural identity for the child is the degree of participation for the child within a culture. This requires the preservation of meaningful relationships between the child and members of the child’s family and cultural group.

\textbf{C The Effects of Socialization on Childhood Development}

Cultural socialisation is a salient form of child rearing.\textsuperscript{58} Whereas the previous section addressed the different sources of cultural indoctrination for the child, this section will show that specific human behaviours are gained by the child at different stages in the child’s development, something like the interaction between nature and nurture. As Bain notes, ‘we are who we are and we behave the way we do because we happen to live in a particular society at a particular point in space and time’.\textsuperscript{59} While human cultures are the product of acquired behaviour, humans are not the only animal to have culture, although humans are the only animal to amass patterns of nurturance, language and behaviours.\textsuperscript{60} That is, it is not only humans who develop specific child rearing practices that provide their children with the socialisation that helps them adapt to their environment.

In understanding that culture for the child is a conflation of evoked and transmitted culture,\textsuperscript{61} the operation of psychology and the ability of the child to socially ‘learn’ enables adaptations. Glenn described the reciprocity of culture as, ‘learned behaviour that is the substructure of human cultures and the transmission of learned behaviour powers the evolution of human

\textsuperscript{59} Alexander Bain, \textit{The Senses and the Intellect} (3rd ed.) (1868), Longmans, Green.
\textsuperscript{60} Peter Richerson and R Boyd \textit{Not By Genes Alone: How Cultural Transformed Human Evolution}. (2005), University of Chicago Press.
cultures’.  

Children will respond differently to different responses at different developmental stages. These ‘meanings’ are not inherent, but evolve from sociocultural learning. That is, meaning for the child is a mix of contexts, collaboration and cultural learning. The family is primary in acculturating the child’s sense of self. Socialisation is the entrenchment of these sociocultural values and norms, thought to involve internalised bidirectional and interactive learning mechanisms that have an inner (mental) and outer (social) component provided by the child’s family for the child’s survival and future development. Socialisation of children therefore rests in intergenerational cultural learning. Although there are no general characteristics that encompass cultural socialisation, it is thought that the socialisation of children—and its consequences—rely on the individual culture and the traits a society holds valuable. Even so, for families undergoing separation, the threat to the child’s cultural socialisation is very real because minority children have multiple influences to assimilate into mainstream culture.

Given the limited empirical research results on the cultural socialisation of young children a study by Phinney and Chavira investigated the socialisation outcomes of parents of minority group adolescents, found that, although there were significant cultural group differences in parental cultural socialisation (i.e., socialisation of a family’s standards and norms and value systems) family socialisation will have little effect on young adults. These findings are significant: they show that cultural socialisation happens mainly when children are young. While studies of this nature are not common, supplementary knowledge correlated from child developmental theories shows that the younger the child the greater the influence of cultural socialisation. These studies show that parents pass onto their children their sense of pride in their culture, their cultural knowledge and cultural traditions from the time a child is

born.\textsuperscript{69} When children grow and mature, they begin to discern what and how much cultural socialisation they want for themselves.\textsuperscript{70} Other aspects of cultural socialisation includes parents teaching children language, exposing children to positive aspects of their history and heritage,\textsuperscript{71} stories of cultural settings and events, and having cultural artefacts in the home to remind them of their ethnic heritage.

A comparison of findings across studies of younger and older children is consistent with the idea that parents shift their ethnic-racial socialisation strategies, depending on the child’s age and the family circumstances.\textsuperscript{72} Whereas cultural socialisation may be transmitted when children are quite young, discussion of more complex social processes, such as discrimination, are more suited to adolescent children.\textsuperscript{73} That is, the research found that the younger the child, the more receptive to parental teachings and authority: through positive reinforcement, children learn to act according to their family’s expectations and values. Maschinot believes that in family separation, the familial socialisation of young children is disrupted.\textsuperscript{74} She noted this is because children learn the shared meanings of a family’s culture, their moral values and assumptions, through normal daily interaction. In the event that children are removed from a family’s culture because of a family dispute, then children turn to socialisation outside the family, such as social groups, friends and school, to supplement their learning and development.\textsuperscript{75}

However, a number of longitudinal studies on attachment—the emotional bonding between child and parent—provide support for predictions that the socialisation of the child to the family’s culture depends on the quality of a healthy relationship between the child and

\begin{itemize}
\item \textsuperscript{70} Above n.
\item \textsuperscript{71} Curtis W Branch and N Newcombe, ‘Racial Attitude Development Among Young Black Children as a Function of Parental Attitudes: A Longitudinal and Cross-Sectional Study’ (1986) \textit{57 Child Development} 712.
\item \textsuperscript{72} Deborah Hughes and DJ Johnson, ‘Correlates in Children’s Experiences of Parents’ Racial Socialization Behaviours’ (2001) \textit{63 Journal of Marriage and the Family} 981.
\item \textsuperscript{73} Herman A Taylor and MA Fine, ‘Examining Ethnic Identity among Mexican-Origin Adolescents Living in the United States’ (2004) \textit{26 Hispanic Journal of Behavioural Sciences} 36.
\item \textsuperscript{75} Above n.
\end{itemize}
While attachment is a universal, species-wide phenomenon, the current view confirms that cultural socialisation of children in early infancy is critical to establishing the attachment between child and parent: the stronger the bond, the greater the likelihood that children develop an appreciation for culture in adolescence. If this bond between child and parent is damaged or disoriented, for example at separation, studies have shown there is a risk of child maladjustment and dissociation from the family’s cultural upbringing, endangering the cultural integrity of the family.  

**D External Factors Influencing Child Socialisation**

The reflection above is that children attain culture through the influences of both genetic inheritance and social experience. Influences on child behaviour include: the parenting style a parent adopts; the stressors and conflict following family separation; and the amount of support a child receives during this time. These influences have been found to exert a direct influence on the child’s development. When children experience family disputes, especially when the dispute has elements of conflict due to the cultural differences between parents, the socialisation of children may be disrupted. Children’s ability to successfully develop self-determination, normalisation and transition from adolescence to adulthood may also be disrupted. The disparity inherent in the socialisation of children after family separation demonstrates that the importance of family is primary in the development of children’s adjustments to stress, conflict and family dissolution. As identity is contextualised by culture, then the failure by adults to recognise the child’s needs for cultural socialisation is

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77 Above n 63.
80 Rolf. Loeber, Stouthamer-Loebor M. Family factors as correlates and predictors of juvenile conduct problems and delinquency. In: Tonry M, N Morris. (Eds) Crime and Justice- An Annual Review of Research vol 7. Chicago: University of Chicago, 1986; 29-149. Conducted a meta-analysis identifying four main dimensions that lead to child stressors: (i) a neglect paradigm, reflecting poor parent-child relationships and lack of appropriate parental supervision; (ii) a conflict paradigm, reflecting hostile, erratic or threatening discipline and rejecting relationships; (iii) a cluster reflecting deviant parental behaviours and attitudes, including parental criminality; and (iv) a disruption paradigm, including marital discord between parents, and family breakdown.
a failure to value diversity, and this may threaten the child’s wellbeing. However, these descriptions have focused on socialisation of the child within the family. Nevertheless, socialisation is no longer the exclusive domain of families.

A major influence on child socialisation is globalisation, a process of international integration of resources and information. Globalisation is said to strengthen international relations, reduce differences and promote civil evolution. That is, it increases cultural diversity, which allows for change and further advancement for children within nations. More importantly, globalism increases awareness of human rights, through the transnational exchange of information. Mass media is increasingly seen to generate and disseminate knowledge transnationally, and this has become a major influence on family dynamics and child socialisation. The influence of globalisation and mass media has shifted world views on children’s needs and abilities and has increased interest by legislative, educational and health authorities to recognise children’s right holder status.

However, globalisation is also said to have affected nation states in the same way colonisation affected nations in the past—by causing ‘cultural disorientation or culture shock, which subsequently leaves nations, vulnerable to cultural invasion’. That means that national cultures are at risk of becoming diluted by acculturation or assimilation, and these influences have affected children’s outlook on family culture, on how children receive (and the degree they accept) the family’s cultural norms, socialisation processes and values. On another level, globalisation has caused what Akande calls the commercialisation of culture, as children lose confidence in culture and turn to technologies, media, the internet and instant communication devices for socialisation. In turning culture into a commodity, Nwegbu et al. argue that media undermines the cultural values, norms and practices of minority cultures.

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83 Philip Mizen, Oral presentation, XVIII Isa World Congress of Sociology; Facing an Unequal World, Challenges of World Sociology, 2014, Aston University, Birmingham, United Kingdom.
84 Martin Albrow and E King (eds.), Globalization, Knowledge and Society (1990) Sage, 8.
reducing them to ‘reconstructed ethnicity’.89 This causes a crisis for parents when children begin to move away from the family, its culture and its community practices, for active assimilation into mainstream cultures.90 As a result of these changes to economies, environment, technology and migration, it has become increasingly complex for families to maintain their cultural identity and eco-systemic perspectives,91 initiating a need for legislation to protect the intangible cultural heritage of communities. Australia’s initiatives have included: ratifying the UNCRC; and enacting new provisions within the FLA. These will be discussed in detail in the next chapter.

E The Mechanisms that Influence Children’s Social Development

Regardless of culture, the importance of understanding child development is significant for understanding how a child accumulates knowledge, acquires language and communicates skills and information, to build and maintain interpersonal relationships. Finally, it is vital to recognise how these factors help the child develop an individual identity.

As a complex organ, the brain controls mental functions and psychological phenomena, and is inextricably linked to behaviour through the plasticity of the nervous system.92 Psychological and sociocultural phenomena are represented in the brain through the functions of memories and learning.93 McElreath et al. and Efferson et al. found that social learning happens on two levels: from the macro or institutional level, to the micro level of the individual.94 Genetics and genetic coding contains the information on how a brain is pre-wired to control and manage the child’s responses to stimuli: it is trial and error learning, the utility of reinforcement and punishments, a combination of pay-offs and frequency of information that increase or decrease response learning for optimum results,95 shaping how the child’s brain grows and develops.96 Studies by Pryor and Rogers suggest that the most powerful formative effect on child development is the understanding that family and children’s

89 MU Nwregbu, CC Eze and BE Asogwa Above n 79.
90 Above n 79 at 18.
94 Above n at 379
95 Above n at 378
96 Laura E Berk, Child Development (2009), Person Education, 8th edt.
development are interrelated and interconnected. The institution of the family has a direct effect on how children learn to view their position in the family, and generally in the community. Built on five identified building blocks that encourage a healthy development of the parent/child relationship, these are: trust, autonomy, self-confidence, initiative and empathy. These components provide the framework for a strong working relationship between parents and children. Notably then, consequences of family separation send mixed messages to children, such as that ‘everything will be all right’, when in fact parents are challenged to parent their children or make future decisions for their children. How a child responds to these consequences is the subject of sociocultural and social constructionist theories that attempt to disentangle the conditions affecting the child’s responsiveness to family separation, culture and development.

Sociocultural theory reinforces that the child’s behavioural, psychological, and social development is premised on the style of parental child rearing practices. These practices and instructions are essential for the transmission of the family’s standards, norms and values, and guide and limit the child. Through a combination of patterned reinforcements, conditioning or stimulus responses, children learn what acceptable social behaviour is and what behaviour is deemed unsociable or is sanctioned. In 1998, McLoughlin and Oliver described sociocultural learning theory as:

In sociocultural theory the learner is regarded as an apprentice in a culturally defined, socially organised world. Intrinsic to this notion of apprenticeship is the recognition that asymmetric relationships are beneficial to the child’s development. Adult child interaction scaffolds or assists the emerging competencies of the learner. Learning therefore becomes a form of assisted performance.

Sociocultural theory emphasises that child socialisation is dependent upon the social and cultural context in which the child is embedded. Different cultural contexts foreground particular social situations, which in turn position children to actively engage and take

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99 National Association for the Education of Young Children; ‘Developmentally Appropriate Practice in Early Childhood Programs Serving Children from Birth through 8’; A position statement of the National Association for the Education of Young Children, 1997, at 8
100 M Hohmann and D Weikart Above n 91
up particular participation structures for learning. The theory posits that parents who engage children in cooperative dialogue encourage a child’s learning and adjustment to the family separation. Therefore, social and cultural interactions become critical to the genesis of cognitive functions in the child. Vygotsky believed that children need to interact in a sociocultural context to develop cognitive intellect. Alternatively, the theory of social constructivism posits that apart from the child’s direct inheritance of traits from parents, all other aspects of a child’s human identity are created through the interactions within the educational setting, community, and broader society. These various contexts are interrelated, and define the child behavior and development over time. Children’s knowledge of a family’s crisis is individually constructed and socially mediated. If these theories, sociocultural and constructionist represent a true picture on the way external constructions and social relations affect the child’s individual development, then children undergoing family separation and family dysfunction will suffer and the relationship between a child and their parents will become distorted, fractured or less cohesive. The presence or absence of parents, because of family dispute or death, therefore affects the quality of these transmissions. This plays a major role in shaping the child’s personal attributes. Together with social learning theory, it is thought that children’s cognitions, their views, perceptions, and expectations towards others are developed through gaining social competence. How well a child gains competency is a measure of the support a child receives from parents; in turn, this will reflect on how well a child functions at home, at school and with peers. From this information, it appears that child development is a combination of hereditary encoded information plus the child’s abilities to acquire desirable skills through the transmission of

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104 Above n.
107 LS Vygotsky Above n 96
culture. These skills allow the child to function effectively in society.\textsuperscript{112}

One of the major stressors on child development is experiencing parental separation, divorce and or conflict. Whereas children’s development is not necessarily directly affected by family separation, Clarke-Stewart et al. state that the combined impact of family separation, conflict directed towards the child or members of the child’s family, inappropriate parent-child rearing practices, or demanding cultural expectations and absentee parents, may lead to child maladjustments.\textsuperscript{113}

Maladjustment in children is the inability of the child to adjust to life stressors, such as family, schooling, peer pressure or mental health issues. Maladjustment usually causes negative reactions in children, like hostility, vandalism, and alcohol and drug abuse. Family instability is thought to significantly affect a child’s adjustment, because instability affects the child’s sense of safety and security. Children of separated parents are believed to be in a high risk category for developing maladjustments.\textsuperscript{114}

A study conducted in 2006 by Milan et al. on child adjustment and family separation found that a child’s age, and the time of the family separation/conflict, will affect the extent and type of behaviour a child will exhibit.\textsuperscript{115} That is, if the child is young when the family separate, they are likely to exhibit externalising behaviour such as tantrums, violent outbreaks and difficult behaviour. In contrast, it has also been found that family instability in the early years of the child’s development has a strong effect on subsequent child adjustment.\textsuperscript{116} Older children were found to exhibit internalizing behaviour, such as depression or anxiety.\textsuperscript{117} The effects of family separation on children whose parents are from non-

\textsuperscript{112} National Association for the Education of Young Children; ‘Developmentally Appropriate Practice in Early Childhood Programs Served Children from Birth through 8’; A position statement of the National Association for the Education of Young Children, 1997 at 9

\textsuperscript{113} Alison Clarke-Stewart and C Brentano, *Divorce, causes and consequences* (2006), Yale University Press.

\textsuperscript{114} Stephanie Milan and E Pinderhughes, ‘Factors Influencing Maltreated Children’s Adjustment to Foster Care’ (2000) 12 *Development and Psychopathology* 63-81.


\textsuperscript{117} Leve D. Leslie, KK Hyoun, C Katherine and J Pears, ‘Childhood Temperament and Family Environment as
mainstream cultures have been the subject of research by Zhou in 2004. Zhou’s study concentrated on a number of factors: cross-cultural differences/similarities in children’s emotion-related processing; children’s socialisation; and the implications for mental health and competence in children. The findings suggest that although there were cultural differences between children by way of recorded temperament (control and anger/frustration) and in the characteristics of the child’s parenting styles (i.e., whether the parent exhibited an authoritative or a non-authoritative parenting style) the associations between these constructs and child maladjustment across the cohorts of, behavioural problems, social competence, and academic achievement, were found to be the same. These findings suggest that children from all cultures will exhibit the same emotional and psychological effects on their developmental psychopathology as a result of family separation. The issue is that children, irrespective of culture, will react to interfamilial conflict in relatively the same way. However, the authoritarianism that is linked to patriarchal tendencies in some cultures is an indicator of child maladjustment.

(i) Why Identity is Important to a Child

Identity is considered a crucial aspect of individual development and psychological wellbeing. Identity is grounded in culture. Cultural identity is a complex construct, ‘a process of exploring the implications of one’s ethnicity and coming to understand and affirm one’s membership in an ethnic group’, where ethnicity includes culture, race, language or kinship. Cultural identity is the shared values, standards and patterned ways unique to a group. It is a significant part of the socialisation and enculturation processes for children. However, developing a particular cultural identity for a child born within a different cultural

Predictors of Internalizing and Externalizing Trajectories from Age 5 to Age 17’ (2005) 33(5) Abnormal Child Psychology 505. Externalising behaviour decreased over time for both sexes, and internalising behaviour increased over time for girls only. Two childhood variables (fear/shyness and maternal depression) predicted boys’ and girls’ age-17 internalising behaviour; harsh discipline uniquely predicted boys’ age-17 internalising behaviour, and maternal depression and lower family income uniquely predicted increases in girls’ internalising behaviour.


context to the mainstream culture may be exceedingly difficult,\textsuperscript{123} even when considering that genetics and temperament play a major role in a child’s development. As such, this section will address why children need a cultural identity— that is, a child’s sense of belonging to a distinct ethnic, cultural or subcultural group. The study will draw conjectures from the limited literature available from transnational or interracial adoptees and Indigenous children, on the psychosomatic conditions that arise from not being able to contextualise a cultural identity. It will draw conclusions on the possible effects for other children.

Cultural identity for the child is important because it allows the child to bond with members of their family and facilitates constructive contact with others of that culture. The allegiances a child forms helps the child to realise ‘who they are’ and ‘where they come from’, heightening the child’s sense of self. A major part of cultural identity is the sense of security the child gets from belonging to a group.\textsuperscript{124} This enables the child to cope with stressors, discrimination and marginalization, especially for children within Indigenous or minority groups.\textsuperscript{125}

The child’s cultural framework is characterised by the attachments that a child forms.\textsuperscript{126} Therefore, the child’s psychological wellbeing is attributable to the influences on the child’s circumstances, and the child’s resilience and personal attributes to cope with those influences. At the same time, culture is not static, but changes as communities adapt to changing environmental and technological influences. As children move through the stages in their identity development, they encounter different community and familial expectations. How children negotiate these expectations will indicate the strength of the child’s cultural identity, which is integral to the child’s individuality.\textsuperscript{127} Children experiencing family separation, transnational adoption or children subject to governmental assimilation policies (removed from their parents in the hope of acculturating them into mainstream culture) are thought to develop problems with the formation of their cultural identity. This is because much of our cultural learning is absorbed unconsciously; that is, we are not always aware that our identity is being culturally shaped.

\textsuperscript{123} James Frideres and R Gadacz, \textit{Aboriginal Peoples in Canada: Contemporary Conflicts}, (2001) Prentice Hall.
\textsuperscript{126} Daniel Stern, The psychological world of the human infant. (1985), New York: Basic pp. 3-34.
**F Loss of Cultural Identity**

We have established above that cultural identity, and pride in the culture, history and traditions of a particular culture are important to a child, and are generated by cultural socialisation. Children experiencing a loss of family culture due to disruption in their lives from death, migration, war or family separation, report a sense of disconnectedness and a sense of alienation from family, community and language. Reactions to these stressors often manifest in aggression, poor social skills and long term dysfunction. However loss of culture can also occur as a result of ‘the pluralisation of social life-worlds’ That is, children have multiple influences and multiple subcultures all pulling them towards mainstream culture. These include: changes to major social trends; urbanisation, changes in the family’s structure and authority (partly owing to women’s entry into the work force); increasing mobility; education and technology and mass communications. All these factors cause the child to acculturate at a faster rate than other members of the family; acculturation being the rate a child adopts the mainstream culture.

However, loss can also be caused by the altruistic removal of children from their birth nations through adoption. Thus, this next section will address the relationship between child psychology-cultural socialisation and loss of culture on transracial adoptees and the experiences of Australia’s ‘Stolen Generation’, and their children. This section will argue that children separated from their culture often face challenges in forming a cultural identity with their original birth culture. However, understanding of this subject has been mixed, with Friedlander suggesting that children will assimilate and learn to become productive members of the culture they live in. The more widely accepted thought is that transracial adoptees will face aggravated challenges to forming a cultural identity (more so

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131 Peter Berger, Above n 123 ibid.
132 The correlation between Australia’s Stolen Generation Indigenous population and that of Canada is strikingly similar; from colonisation, to today’s population facing problems with discrimination and marginalisation.
than other children) and may develop a separation of racial and cultural identities.\textsuperscript{134} That is, a child may identify with their birth race, but consider themselves as part of culture of their adoptive family. Cultural socialisation for these children refers to the new parent’s culture, not to the child’s birth culture. The following discussion will explain the symptomology and consequences of loss of culture on transnational adoptees and children affected by colonisation. While these forms of loss are due to social practices, their significance can be used to draw correlations with the children of minority cultures removed from their culture as a result of family separation.

\textit{(i) Transnational Adoptions}

There have been many studies about the psychological and behavioural effects of transnational adoption on children, but the implications of these adoptions in developing identity are not clear, partly because it is difficult to isolate single factors that influence a child’s social health and ethnic identity.\textsuperscript{135} Even so, there has been research into the development of racial awareness, showing that children as young as two and a half years old are aware of racial differences.\textsuperscript{136} Consequently, it is important to identify why culture and the development of a healthy cultural identity is determinative in a child’s wellbeing. In transracial adoptions, a child from one ethnic group being adopted by parents from another ethnic group, studies suggest that a loss of culture can result in affecting a child’s concept of self because children feel like they are caught between cultural groups. These children often struggle to find and identify with one cultural group.\textsuperscript{137} The effect of looking different to parents or having a different colour to parents, as well as experiencing mainstream discrimination, adjustments to new environments and cultural differences, all these factors affect the child’s psychological wellbeing.

Research in clinical psychology and social work on the psychological adjustment and identity formation of adopted children consistently show that many adopted children at some stage in their lives experience low self-esteem, depression, alienation, withdrawal, and a desire to


\textsuperscript{136} Ruth McRoy and L Zurcher, Transracial and Inracial Adoptees, (1983), Charles Thomas.

\textsuperscript{137} Grace S Kim, KL Suyemoto and CB Turner Above n 128
meet and reunite with birth parents. Interracial adoptees, as stated above, face additional and more complex challenges: recognising that they do not ‘match’ their adoptive parents, at the same time needing to feel accepted by the community that sees them as being ‘different’, and struggling to fit in with their original as well as their adoptive cultural communities. As one adoptee writes, ‘adoption is like having all of your birth family die and getting a replacement family and being told by society how lucky you are that all of your family is dead but we gave you a new one’.

Despite the scant literature that exists on transracial adoption, there have been a number of recent studies showing that a child’s sociocultural adjustments to their adoptive situation relies on the parent’s attitude to the importance of cultural socialisation, actions parents take, their behaviour and belief about the importance of transmitting to the child a cultural identity that incorporates both the child’s original birth and the adoptive parents’ culture. In a study conducted in 2001 on 241 Korean adolescent adoptees in North America, Yoon found that parenting practices, cultural socialisation and the child’s wellbeing were directly linked to the child’s cultural identity. Yoon found that a positive cultural identity, where children develop positive attitudes towards their parents’ Korean cultural history, practices and traditions, contributed to the child’s psychological adjustment and ethnic pride. Study results also identify that transracial adoptees report increased incidents of racial discrimination that lead to adjustment difficulties, and this had an effect on the child’s formulation of an identity. The basic argument is that placing children within a culturally similar family enhances the development of positive cultural identity and gives the child better coping skills to deal with racism. The Donaldson report (a key report that identified several challenges

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144 Ibid Above at 136
for children in transnational adoptions, and analysed the Yoon report) cautions parents using the ‘race-blind approach’ to adoption. This is where parents disregard their child’s birth culture and appearance, advising that ‘whether adopted by Black or White parents, children’s best interests are served by on-going connections to their racial heritage’. For these children, the importance of vigilant adults being aware of and addressing their individual cultural issues and needs maximises their opportunities for development and happiness.

Studies compiled by DeBerry et al. on African American and African-born black children adopted by North American white parents, show that children prefer their parent’s ‘American-centric identity over their Afrocentric values’. These results affirm studies carried out by Kim in 1975 and 1976 on Korean adolescents and their adoptive parents. Kim found no significant difference between the scores of interracially adopted Korean children to self-esteem, personality integration and adjustment measures compared to other American teenagers. However, Kim did find that the time of placement had an effect on the degree of self-esteem, personality integration and adjustment an adolescent exhibited, confirming studies by Phinney and Chavira discussed above. The findings show that the younger the child (children of non-school age) was when placed in an adoptive home, the higher the levels of adjustment compared to children who were older when placed with their adoptive parents. These children had lower self-esteem, personality integration and adjustment measures. Kim suggests this could be attributed to language barriers, cultural differences and new environments that the children were adjusting to in the initial period of adoption. Again, these studies confirm research by McRoy and Zurcher showing that when white adoptive parents of African American children do not perceive cultural differences as being important (i.e., they were colour blind), then it was less likely these parents would understand the

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148 Donaldson Report Above n 139 at 13


152 Jean S Phinney and V Chavira Above n 114
importance of cultural socialisation for their children. In these situations where parents de-emphasised the significance of culture and did not respect or engage in affirmative reinforcement of primary socialisation processes to address the child’s dual cultural identity, this failure by parents was seen to cause the child to either become entrenched in the adoptive parent’s culture or left to deal with identity issues on their own. This was seen to give rise to long term identity problems with children. Studies by Constantine and Blackmon in 2002 showed that parents who encourage minority children to blend with mainstream culture contributed to the child’s low self-esteem of their original culture. However they also found that racially aware parents’ (or a low colour blind racial attitude) was a sufficient solution to ensure the facilitation of an adoptee’s cultural socialisation. The long term outcomes for adoptees are succinctly expressed as: ‘children of colour who are placed with white adoptive parents also face the real, and potentially devastating, impact of losing their cultural and racial identity’. The real question seems to be whether adoptive parents are willing and prepared to facilitate the child’s birth culture, prepared to seek out post-adoption support groups, provide children with culture specific activities learn the ethnic language and speak openly about the difficulties their child may experience. Kim suggests that the key to identity development for the child is dependent on the quality of the relationship with both their birth culture group and their new adoptive family’s group, more than the time the child has been exposed to race and ethnicity. Kim also suggests that asking parents to engage in cultural socialisation of their transracial adopted child contradicts the idea of adoption. That is, the implication of a successful adoptive relationship between parent and adoptive child means that the child must exclusively adopt the family’s culture to become a part of the family, in lieu of their own cultural identity. However, this argument is problematic for two reasons: firstly, it obscures awareness of and distorts normative developmental processes by denying normal child development in which children can appreciate dual cultures, even if they may not adopt dual cultural identities per se. Studies by

153 Ruth McRoy and L Zurcher, Above n 129.
156 ibid
157 Above n 136 at p62
159 Grace S Kim, KL Suyemoto and CB Turner, ‘Sense of belonging, sense of exclusion, and racial and ethnic identities in Korean transracial adoptees’ (2010) 16 Cultural Diversity and Ethnic Minority Psychology 179
Friedlander noted that children will develop pride in their birth culture but, ‘there is no evidence that bicultural identification per se promotes feelings of divided loyalty, alienation, or isolation, at least during childhood and adolescence’.\textsuperscript{161} Secondly, while it could be argued that identification with the birth family’s culture is positive for the adopted child, helping the child ‘fit in’ and identify with the adoptive parents culture helps the child to establish the attachment bond between child and adoptive parent. In the context of a minority child whose parents have separated and their cultural identity is being threatened by distance (one parent relocating away from family) the issue is not a loss of birth culture but a loss of a shared cultural family identity. Manning’s research on how members of the same multiracial family form a cultural identity is relevant to children of Australia’s minority children undergoing family separation.\textsuperscript{162} Manning describes how “the constructs of a shared family identity is both a process and a product”.\textsuperscript{163} She notes that this construction requires roles and themes within the family, but cultural identity is a product developed through communication.\textsuperscript{164} She adds, ‘a shared family identity is a group identity that encompasses individual identity characteristics shared by each family member’.\textsuperscript{165} In an interracial adoption situation, the parents reconcile the uniqueness of the child’s birth culture while enabling the child to conform to the family culture.\textsuperscript{166} Conversely, in family separation where the child is born into a dual cultured family where both cultures are intact, after family separation, culture becomes a factor in dispute between the parents and one of the parents not agreeing on the child’s once dual-culture.

(ii) Indigenous Loss of Culture

Correspondingly, studies on Australia’s Indigenous children will be addressed separately to interracial adoptees. This is because indigenous children often experience additional challenges to their loss of culture in the form of their socio-political circumstances.\textsuperscript{167} Therefore a brief introduction to Australia’s history may give context to the Indigenous child’s symptomology. Whereas Australia’s history of colonization is marred

\textsuperscript{163} ibid p63
\textsuperscript{164} ibid p63
\textsuperscript{165} ibid p63
\textsuperscript{166} LD Manning Above n 158 ibid p63
by abuse and degradation of Aboriginal laws, society, culture and religion, it was Australia’s policy of assimilation from the 1920s and into the 1970s that involved the removal of children from their parents under the guise of protection and cultural socialization that resulted in the Stolen Generation. Implicit to results documented by the New South Wales’ (NSW) Department of Health\(^{168}\) and the Attorney Generals Department in 1975,\(^ {169}\) the disconnection of Indigenous peoples from their cultural lands and heritage has resulted in higher than average death rates, poor health\(^ {170}\) and observably lower standards in educational, occupational, economic and social status of Indigenous individuals compared to the general Australian population. In addition, Indigenous Australians are grossly over-represented in Australian care and protection systems,\(^ {171}\) and in criminal statistics, both in terms of conviction rate and the rate of imprisonment.\(^ {172}\) The effects of removal have been determined as a causal mechanism through which subsequent generations of Indigenous children still have difficulty in positively attaching to their Indigenous culture. These findings are significant, because they show that the ill effects of removal from one’s family culture are not a situational effect, but also affect generations of the one family. As noted by the Aboriginal Healing Foundation, ‘Intergenerational or multi-generational trauma happens when the effects of trauma are not resolved in one generation’.\(^ {173}\) With children of non-mainstream culture whose family’s are affected by separation and dysfunction, the loss of culture and language that are important in the transfer of cultural knowledge, become relevant to the child.

Significant disruption to the cultural continuity in one generation has been known to pass to the next, and children begin to view this altered way of life as the ‘norm’, and the cycle of dysfunction continues.\(^ {174}\) Notwithstanding, findings from the 2008 National Aboriginal and Torres Strait Islander Social Survey (NATSIS), found that strong attachment to culture was associated with better outcomes for Indigenous Australians in a range of ‘mainstream’ indicators: ‘self- assessed health, educational attainment, employment status, less chance of

\(^{168}\) New South Wales (NSW) Department of Health, *Aboriginal Mortality in NSW Country Regions 1980/81*, Sydney, October 1983, 4. See also *Aboriginal Social Indicators 1984*, 10. in New South Wales was approximately 49 years for males and 56 years for females.


\(^{170}\) *National Trachoma and Eye Health Program*, Report, Royal Australian College of Ophthalmologists, Sydney, 1980, Table 1.7. Eye disease and Trachenoma report at 15% greater than the Australian population.

\(^{171}\) Australian Institute of Health and Welfare (AIHW, 2013). Indigenous children and young people are over-represented in the system, with nearly 13,268 Indigenous children and young people on care and protection orders.

\(^{172}\) House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (AGPS, 1980), para 111; 25% more likely than the average Australian population


\(^{174}\) Aboriginal Healing Foundation, ibid 166.
having been arrested and alcohol abuse', 175 with these children developing ‘a stronger sense of self-identity, were more resilient and had a positive sense of community’. 176 In Australia, studies confirmed that when carers of Australian Indigenous youth were fluent in their Aboriginal language, the youth were less likely to show signs of emotional or behavioural difficulties. 177 Zubrick et al., citing an American report by Chandler and Lalonde in 2005 on Australian Indigenous youth, identified the factors that improved social and emotional wellbeing included the capacity to formulate a cultural identity, autonomy and effective functioning within a community. 178 They also found that where the community’s social structures were primarily founded on kinship structures, education and knowledge of the land, then the Indigenous child developed a sense of clan, tribal or language group identity. 179 Studies by Fleming and Ledogar suggest that ‘evidence is accumulating in favour of resilience from elements of a broad concept that includes cultural identity, participation in traditional activities, and “spirituality”’. 180 In 2011, Dockery 181 found that although participation and identity were still strong indicators of wellbeing in Indigenous children, speaking the Indigenous language and exhibiting a strong cultural identity in urban areas attracted discrimination in both education and employment sectors, and this caused psychological stress. 182

Commonwealth Government of Australia initiative, *Footprints in Time: A Longitudinal Study on Indigenous Children* (LSIC) aimed to provide an insight into the diverse circumstances facing Indigenous children, their families and communities. 183 The study was based on the

176 Aboriginal and Torres Strait Islander Health Performance Framework 2012 Report p5
177 Stephen R Zubrick, SR Silburn, DM Lawrence, FG Mitrou, RB Dalby, EM Blair, J Griffin, H Milroy, JA De Maio, A Cox and J Li, *The Western Australian Aboriginal Child Health Survey: The Social and Emotional Wellbeing of Aboriginal Children and Young People* (Curtin University of Technology and Telethon Institute for Child Health Research, 2005).
179 Brian Bishop, S Colquhoun, and G Johnson, ‘Psychological Sense of Community: An Australian Aboriginal Experience’ (2006) 34(1) *Journal of Community Psychology* 1
181 Alfred M Dockery, ‘Traditional Culture and the Wellbeing of Indigenous Australians: An Analysis of the 2008 NATSISS’, CLMR Discussion Paper 2011/01, Centre for Labour Market Research, Curtin University. In the follow-up study based on the 2008 NATSISS, separate factors relating to participation in cultural activities, cultural-identity, language use and engagement in traditional activities were constructed.
belief that the provision of culture, language, knowledge, understanding and connection to family and community were strong identifiers of child wellbeing. Central to this belief was that educating children about their culture and its connections to ‘past, present and future’ was imperative. These findings recognise that culture is a vital ingredient in the child’s development of an identity; they highlight the need to ensure that all children’s cultural needs should be carefully considered and supported in any process, such as FDR, that may have an impact on the child’s future wellbeing. In conclusion, studies such as these indicate that understanding by governing bodies and persons working with children, minority or Indigenous, particularly in areas such as family law, need to be culturally competent to provide all children with culturally responsive parenting plans for future development to reduce the risk that loss of culture can have on children.

(iii) Canada’s Indigenous Youth and Cultural Identity Problems

In comparison, studies conducted on Canadian indigenous youth and suicide trends in 2003 found that results were analogous of indigenous youth everywhere. They found that communities with evidence of commitment to cultural continuity that preserved a shared past and a commitment to creating a collective future, had significantly lower rates of youth suicide. They argued that suicide among indigenous youth was greater when the youth feared losing ‘the thread that tethers together their past, present and future’. The maintenance of ‘cultural continuity’ has been shown to help children and youth connect to their community and formulate healthy cultural and self-identities. Further, there is evidence that children who retained their parent’s native language were more likely to develop healthy adjustment in general. The reasoning behind this indicates that culture and language are so intrinsically bound that culture cannot survive without language to disseminate its message. Language as a tool for transmitting culture is widely regarded as ‘a link which

2012/01. The sample was drawn from 11 different sites around Australia, designed to ‘cover the range of socio-economic and community environments where Aboriginal and Torres Strait Islander children live’, and provide roughly equal representation of urban, regional and remote areas, among other criteria. The first wave interviews were conducted from April 2008 to February 2009 for around 150 children from each site. FaHCSIA estimate that this represents around 6 per cent of the total Indigenous population in each cohort (2009, 12). In total, 1,687 study children and their families participated in the Wave 1 interviews.

184 Above n p 6.
186 Michael J Chandler, CE Lalonde, B Sokol and D Hallett, Above n 178 p 3
connects people with their past, and grounds their social, emotional and spiritual vitality’. This affirms studies by Whitbeck, Chen, Hoyt and Adams in 2004 on Native American Indians, which found that enculturation, ‘the process by which individuals learn about and identify with their traditional ethnic culture’, guards against alcoholism and provides individuals with resilience to prevent the internalisation of stress associated with historical loss and trauma.

The above discussions reveal the complexities of children’s culture and children’s psychological adjustment. In addressing the thesis question—‘does FDR in Australian family law facilitate the child’s right to culture?’—these studies become imperative to show the connections between children’s culture and the effects that loss of culture can present. However, these studies are also significant for acknowledging the importance of cultural identity and socialisation for children. Some inferences that may be drawn to answer the thesis question arise from the Donaldson report. This report linked the complexities of interracial adoptions with parental socialisation practices, and considered that government policy and instructional practice play a large part in the enablement of child’s cultural identity. The report reaffirmed the above discussion that parents who minimise the racial differences of the child, and deny children a cultural identity by withholding culture, devalue family culture for mainstream culture. The implications of these findings suggest it is critical for adults, specifically parents, to nurture and facilitate culture for their children, to enable and encourage cultural adjustments to be made by the child, along with the development of a positive cultural identity. The report also confirmed that a strong cultural identity acts as a protection mechanism against trauma associated with loss, discrimination, suicide ideation, and alcohol and drug abuse. The Report concluded that the dynamics between parent, child and cultural socialisation explains the connection between relationships

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190 Michael J Chandler, CE Lalonde, B Sokol and D Hallett, ibid 129.


192 ibid at 74

193 Donaldson Above n184 at 89

and identity.\textsuperscript{195}

(iv) When Children Reject Familial Culture and Religion

When children begin to self-identify with mainstream culture on subjects like religion, values and standards, then the possibility for conflict between the child and the family, especially grandparents, is heightened.\textsuperscript{196} The divergence in ideologies between parents and children often creates a ‘gap’ between values and views on social institutions, interpersonal relations and communication skills. This disorients the family, giving rise to a strained parent/child relationship. Different views can sometimes be seen as rejecting the familial culture and its position on authority, morality, the meaning of acceptable behaviour, views on rights and freedoms, social expectations and academic performance.\textsuperscript{197} The resulting effects become magnified when children reach adolescence.\textsuperscript{198} Bengston suggests that children in these strained families will adopt the values and standards of the mainstream culture at a much faster rate than children of intact families.\textsuperscript{199} Yet, Hughes found that in cases where children were confident to socialise within a minority culture, the parent/child relationship was strong;\textsuperscript{200} correspondingly, the stronger the bond between child and family so too the strength of the bond with the family’s culture. Renzaho and Guiso et al. proposed that families who attempt to ‘preserve their cultural values’ related to ideals of family closeness, respect for the elderly, and the maintenance of core values,\textsuperscript{201} can also preserve a family’s inter-relational culture.

While differences between parents and adolescents can occur in any society and under any circumstances, because of the complex interplay of factors associated with cultural expectations, respect and acculturation, observable cultural variations between parent and

\textsuperscript{195} John Fleming and RJ Ledogar (2008), above n 173, 47
\textsuperscript{198} AIHW, Above n164 at53
child may affect family unity and constitute an erosion of the family’s cultural integrity. Correspondingly the quality of parenting and of the parent-child relationship, in conjunction with the socio-economic factors, and repeated changes in family structure (e.g., re-partnering of parents, changing living arrangements), all heighten the risk for intergenerational dissonance. In these situations the transmission of culture to a child can be complex. In the understanding that intimacy and power are the two main predictors of family relationships, in times of family separation, where there is significant physiological and psychological stress between the parents or between parents and child, the risk of the child losing their connection with the family’s basic identifiable traits and their cultural identity is high, leading to psychosocial adjustment. In situations whether the parent’s conflict is affecting the child’s cultural socialization, parents must be willing to leave their conflict aside for the sake of their parenting, to ensure their child’s wellbeing.

G Conclusion

The chapter discussed the meaning of culture and found it was situational, in that it means different things to different people. Culture is understood to be inherent in the formation of the child’s identity. This is important because an individual’s identity is the assertion of their personhood and recognition of their individuality. Primarily, culture gives a group of people their way of life and their distinctive identity. Transmitted inter-generationally by the family and contained in genetics and language, beliefs, values and norms of the family, culture is both innate and learnt behaviour. While children’s socialisation is age and culture specific and provides children with the means to grow function and develop in society, each culture defines and divides childhood into age-related developmental stages and cultural influences. Culturally embedded beliefs and expectations also shape childrearing practices and parenting practices that give context to the developing child. The combined effect is the production of a distinct cultural identity for the child. However, cultural socialisation of the child is no longer the family’s exclusive domain. Globalisation has created interconnectedness between nation states; this has allowed technological, education, mass media, social and ideological ideas to flow to children. Socialisation is now seen to occur on multiple levels with multiple influences.

The chapter has argued that culture preserves, promotes and strengthens an interdependent
relationship between parents and children. It is central to a child’s physical and physiological development. In family separation, where children are denied access to their familial culture, then children’s development and wellbeing is compromised and children’s reflection of themselves, their family and their community will become distorted.

This chapter provided evidence from studies conducted on children involved in transnational adoption and Indigenous children to show the need for a child to develop an identity. Further evidence was presented on Canada’s indigenous youth that were removal from their homes by governing bodies much like the Stolen Generation in Australia and the ramifications of the loss suffered as a result. From these studies, we drew parallels to children in separated or separating families who are denied their culture. The argument put forward is that children of minority cultures need to formulate a cultural identity to their familial culture to benefit their emotional, psychological and social development.

To establish this argument, the chapter considered evolution of the concept ‘culture’, using social constructionism and sociocultural theories to show how culture influences the child’s behaviour. It concluded that children develop an individual identity of complex familial and mainstream affiliations that give them a multifaceted identity. The chapter then addressed the impact of family separation on the cultural socialisation of children, and again concluded that in family separation, culture is a major predictor of family conflict and the loss of culture for the child, especially if the minority parent is no longer the primary carer. In these situations, where parents are emotionally drained and physiologically perplexed the greater the conflict over the child’s cultural upbringing, the less likely the child will acculturate to the family culture. The chapter concluded that the child’s cultural socialization by parents enables the development of the child’s, physical, social, emotional, and cognitive facilities. Providing a safe loving environment for the child encourages core familial relationships and the formation of a healthy cultural identity, minimising the negative effects on a child’s symptomology.

The next chapter will discuss culture not merely as a tool for identity formation, but as a tool of agency. The realisation of culture as a factor that affects the wellbeing of the child is recognised in international and domestic law, and has become a human right for children. Despite this acknowledgement, children and childhood are seen as in need of protection. This, it will be argued, is the challenge posed to both parents and legislators alike. It takes more than creating passive legislation to facilitate the child’s rights to culture. It takes concrete
recognition of children as rights holders, and changes to the collective psyche of professional managing FDRs to hold practitioners accountable for the work they do in relation to facilitating culture for children. The practitioner and the process will be addressed in Chapter Four of this study.
III THE FAMILY LAW ACT AND THE RIGHTS OF THE CHILD TO CULTURE

A Introduction

The previous chapter outlined the connections between culture, family and child development. The chapter concluded that culture provided by family is crucial to a child’s psychological wellbeing and formation of cultural identity. The chapter outlined the implications for children denied their culture because of transracial adoptions, bureaucratic naivety, family dissonance or institutional ignorance, and concluded that culture is important for the maintenance of the bonds between family and child and is vital to the child’s development of a healthy identity.

Chapter Three is important because it will show that culture has been acknowledged by both the international community and domestic legislators as a factor fundamental to the interests and values of all human beings and the basis of all societies. Identified in this manner, culture becomes society’s identifiable framework, from which all political, legal, economic and human rights arise. This recognition has been translated by the UNCRC and the 2006 FLA amendments, as a human and legal right, respectively. However, the view of children as a rights holder is challengeing the traditional view of a child as a possession of the family and an ‘object’ of concern.202 As discussed in Chapter Two, are a dichotomy, children’s perceived vulnerability places them in a position of needing protection on the one hand, with the need to acknowledge children’s agency, promoting and protecting the child’s human dignity on the other. This is an important insight because, in the context of this thesis, the chapter will argue that despite governing bodies recognising culture as a factor that directly affects the child’s best interests and promotes the harmonious development and wellbeing of the child, children’s culture has been given secondary status in both the UNCRC and the FLA, behind the primary factors of safety and time with parents. Therefore, this chapter will first discuss the instruments guiding the provision of the right to culture—the UNCRC and the FLA—and will then discuss how these instruments construct the child as a ‘subject of rights’.

The chapter will argue that the development of culture as a right for children evolved from the need to establish and protect the child’s right to develop a healthy identity. However, in both instruments the child is conspicuously under-defined, and simply delineated, as in *UNCRC* Article 2, ‘every human being up to the age of 18 years’. This description does not reflect the heterogeneity of the child’s experiences, their differences of age, culture or economic circumstance, making all children seemingly homogeneous and this defeats the purpose of giving children individual rights to ‘their’ culture. The discussion will briefly trace the challenges that children’s right to culture has presented in practice, in both the *UNCRC* and for Australian decision makers. The chapter will further discuss the implications of the rights of the child to culture, and children’s agency and how these notions are reconciled by decision makers when considering the principle of the child’s best interests.

This chapter will begin by setting out how children and children’s rights are constructed.

**B. How the Concept of ‘Child’ was constructed in Children’s Rights**

The introduction of rights for children in the *UNCRC* and by *FLA* in Australia has been insightful, yet at the same time, naïve. It is insightful in that the introduction of rights for children will protect the child’s human rights to protection, provision and participation. However, these instruments are also seen as being naive in their objectives because children’s rights are both conditional on age and maturity, depending on responsible adults to recognize the right and being prepared to facilitate it. The child’s right to enjoy their culture is one such right. The following section will examine how scholars and policy makers construct children, and whether this construction can accommodate the child as a rights holder.

When Woodhead argued that children’s rights are a phenomenon, a product of the social, political, economic and religious circumstances within a particular historical period, he meant that children’s rights depart from the conventional instrumental paradigm, that young children are entitled to quality of life, to respect and to wellbeing. He claims that in this assumption, child related professions can impose standards and values on children and

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204 ibid at p22
make decisions believed to be best for them. Farson further elaborate that it is precisely the child’s vulnerability and inabilities that children need rights. However they distinguish these rights as children ‘having a right to an identity, to a home, to an education and to protection from abuse.’ Farson argues that these types of rights protect the child’s wellbeing and are not those espoused by Child liberationists as the right to self determination but protection rights dependant on adults to provide. Farson believes that rights should not be based on the age of the child but on the level of competence, thus committing the definition of children’s rights to a right based approach. If children are acknowledged as having a right to self determination then this changes the focus from children as being vulnerable and incapable towards - child’s agency and this is fundamental to the notion that children are rights holders. Rights are entitlements, valuable commodities. According to Freeman, an individual should not have to ‘beg’ to get rights.

Rights are the normative rules that set the limits of legal systems, social entitlements or moral conventions. Legal rights are a legally enforceable entity, providing the holder with recourse to sanctions and compensation for breaches. Human rights are those that are inalienable and inherent to all persons, adult or child, simply because of their humanity. While rights can be used as an umbrella term to describe a body of thought, a distinction must be drawn between ‘rights’ and ‘rules’ of behaviour. Rights have the potential to be enforced, whereas a rule of behaviour speaks of the individual’s interests. Rights may empower the child; however, the notion of the child’s best interest provides protection against adult arbitrariness.

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205 M. Woodhead Above n 196 at p69
208 ibid at p 65
209 ibid at p 66
Children’s rights tend to be in two forms: those advocating children as autonomous persons under the law, and those placing a claim on society for protection because of children’s dependency. This is important because in differentiating these rights, the *UNCRC* distinguishes between the rules of behaviour that necessarily become legal norms within a society and those cultural practices of a particular group that may cause harm to children but receive more legitimacy within their cultural community than the *UNCRC* standards.\(^{215}\)

However, the relationship between rights and the ability to claim a right is not clear, especially where children are concerned. Freeman argues that the parental role is limited to parents acting as the child’s representative obligated to their children to make choices that would maximises the child’s chances at becoming successful productive adults.\(^{216}\) Freeman argues that rights are a ‘valuable commodity’ however not all claims constitute action.\(^{217}\) A person may not even know they have a right, but this does not detract from an entitlement, whether effective or not, existing and that no one can take it away.\(^{218}\) It is this interpretation of rights that provides children with the security of both international and domestic protections. In contrast, a right may not give rise to a legal entitlement at all, nor be associated with any claim unless it is practicable, universal and paramount. In this sense, rights must be socially accepted, encompass all members of the group and be able to trump all other considerations.\(^{219}\)

The traditional liberal theory of rights states that independent, rational individuals who are capable of making choices can expect freedom from government interference.\(^{220}\) However, children do not fit into this framework.\(^{221}\) In fact, children’s rights present particular theoretical and practical difficulties for decision makers;\(^{222}\) it has been argued that children cannot be rights holders, as they are incapable of making choices and exercising, or


\(^{218}\) ibid at p 76


\(^{222}\) ibid at p1579
waiving their rights. As a result, children have been largely denied the freedom to become social agents within the community. The absence of recognition for their rights ‘weakens the position of children seeking redress against violations of rights and diminishes the likelihood of formal channels for so doing’. 

Theorist Michael Freeman notes that the ultimate rationale for children’s right’s lay in the delegation of those rights to the moral agency of adults. Rather than empowering children, he notes, the effect of children’s rights is to empower officials to act on their behalf. This is because children having rights is considered more ‘evolutionary than revolutionary’; that is, rights come with age and maturity. Therefore, in recognising children’s rights it is likely to be that those rights will reflect an adult focus. Children’s rights have been described as a ‘slogan in need of a definition’ and an excuse to frame children as incompetent to justify adult authority over children. However, the notion of children’s rights has also been critiqued as being counterproductive to children. That is, as young children are too young to enforce their rights against any wrong doers (unless by proxy through a responsible adult), then children’s rights often become an adult prerogative. Placing greater responsibility on the child before they are able to understand their obligations is therefore tantamount to abandoning children. Despite the terminology, scholars are polarised in their views.

These conflicting views suggest that children hold an anomalous position in society, principally as rights holders capable of making age-specific decisions, and being able to challenge the notion that the ‘powerful elites decide which, if any, of the claims made by

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226 ibid. This thought will be discussed fully in Chapter Four, in relation to the delegation of rights to the FDR practitioner to act as the child’s advocate.
231 Martim Guggenheim, What’s Wrong with Children’s Rights (Harvard University Press, 2005).
children they will recognise, while simultaneously needing special protection. Even so, Woodhead suggests that children’s rights should be accorded to the distinctive phases and stages of development in a child’s life. These stages are themselves influenced by multiple social and cultural contexts and are marked by the acquisition of learning and physical skills and capabilities. Children’s dependency on adults is not disputed, and during the early stages of childhood children need secure responsive relationships with adults, peers and siblings to develop secure emotional attachments to enable development. By recognising children as distinct rights holders, there is opportunity to transform attitudes towards children’s incapacity and children’s views of themselves. Even so, children’s rights have traditionally been translated in both the private and public domains as adult responsibilities. This is because the degree to which a child participates in social, political and legal decision making is influenced by whether adults allow the child to do so.

C International Recognition of Children’s Rights

In 1924, the League of Nations adopted the first international treaty concerning children’s rights, the Declaration of the Rights of the Child. This Declaration gave specific rights to the children and responsibilities to adults. The Universal Declaration of Human Rights (UDHR), adopted in 1948, represented the first global expression of rights to which all human beings were inherently entitled, recognising that ‘motherhood and childhood are entitled to special care and assistance’ but not directly giving rights to children. The UDHR is based on the belief that human rights are attributes of human beings and not on any ideology or philosophy. Its founding statement in Part 1 Article 5; ‘that all human rights are universal, indivisible and interdependent and interrelated’, seeks to end the division between civil and political rights, economic, social and cultural rights for all children, irrespective of their ‘race,
nationality or creed’. It further places due responsibility on families to care for and protect their children. Since that founding comment, scholars have been in debate over whether children should be granted rights or protection. By 1959 children’s rights were being recognised as specific entities pertaining to the child. The Declaration of the Rights of the Child, describes children’s rights in ten principles. However, these rights were focused on the protection of the child against economic exploitation, giving children the right to be educated and the right to healthcare. Yet these instruments were not enforceable, and so they projected an ideal for children. After ten years of consultation, in 1989 most of the world’s nations adopted the UNCRC, the first legally binding instrument that set out in 54 Articles the economic, social and cultural rights of the children.


The universality of the UNCRC means that the 54 Articles underscoring the human rights of children under the age of 18 years, regardless of race, religion or dis/abilities, in the form of civil, political, economic, social and cultural rights, have become the authority on children’s rights. Of these 54 Articles, Articles 1–42 are first generation rights that integrate civil and political rights, such as the right to association. These substantive Articles contain the minimum standards and entitlements for children and are divided into three categories, more commonly known as the ‘3 P’s’: provision, protection and participation. Made up of a comprehensive list of interconnected, interdependent and indivisible rights that rely on five overarching rights: the best interests of the child (Art 3.1), non-discrimination (Art 2), participation (Art 12) and implementation rights (including economic, social and cultural) that underpin the ultimate goals of the UNCRC, which are the right to life (Art 4), survival and development (Art 6). These guiding principles are reinforced by the specific rights to survival and development; protection from harmful influences, abuse and exploitation and full participation in family, cultural and social life. Most importantly, the underlying premises of the UNCRC is the notion that children are entitled to special care and the claim to life, liberty and happiness; with the family (with the help of legislative

242 UDHR Article 25(2)
243 Article 6.
244 Article 19
245 Article 9, 16, 17, 27, 28.

The \textit{UNCRC} promotes a rights based approach to children’s rights in order to promote and protect children’s rights through legislative changes and the training of civil servants and professionals to advocate on behalf of children.\footnote{Gerison Lansdown, Every Child’s Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12 (Save the Children UK (on behalf of Save the Children and UNICEF) 2011, 43.} Culture was recognised by the drafters of the \textit{UNCRC} to promote the child’s identity and wellbeing, and is included in the Preamble of the \textit{UNCRC} and within a number of Article(s), 17: access to information; 29: education; and 31: to play and leisure, but specifically Article 30: to culture.

(ii) \textit{United Nations Convention on the Rights of the Child and the Specific Right to Culture}

In \textit{UNCRC}, culture is recognised as:

\begin{quote}
In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language. Article 30 [emphasis]
\end{quote}

Whereas the \textit{UNCRC} defines children with a minority identity as those from an ethnic, religious, or linguistic minority or persons of indigenous origin,\footnote{J Schiratzki, ‘Children’s Rights in EU—A Tool for Autonomous Citizenship or Patriarchy Reborn?’ (2011) 1 Europarâttstlig Tidskrift 70.} the \textit{UNCRC} provides no definitive interpretation of the word ‘culture’, nor does the \textit{UNCRC} limit the scope of interpretation. Therefore, culture can encompass a multidimensional construct comprised of many different constituent elements such as language, religion, play recreational activities.\footnote{UNCRC Articles 30, 31}
Yet culture can simply be defined as a ‘set of beliefs, attitudes, values, and standards of behaviour that are passed from one generation to the next’.252 The passing down of culture or the transmission of culture, as discussed in Chapter Two, suggests the interconnectedness of culture. That is, culture connects people in common ways like language, practices and ideologies.253 However, culture is not deterministic because individuals can act outside the cultural expectations of their family and peers.254 Thus, the UNCRC refers not to culture, but to ‘children’s cultural rights’. However, as culture affects all aspects of a child’s life, it becomes difficult to examine cultural rights in isolation of the child’s other rights. That is, cultural rights are derived from those rights associated with development, and includes rights in four main areas: the right to know and enjoy culture (i.e., practice); the right to formulate a cultural identity, that is when an individual legitimises a culture by identifying with its context; the right to use a language and religion associated with a culture; the right to learn or access information and artefacts of a culture.255 In Article 17, these rights are given weight by ensuring that children have access to socially and culturally appropriate information and material. To aid this grant, the UNCRC places a positive duty on states to, ‘to encourage the dissemination and production of children’s books’.256 Together with this, Article 29 affirms that education should advance the child’s knowledge of culture, inter alia, ‘the development of respect for the child’s … own cultural identity, language and values’.257 Also existing is the right to active participation in culture through rest and leisure, play and recreation in Article 31, and the specific right in Article 30 for children to participate in culture, practice religion and use their own language in a community and to enjoy these rights with others of that community.258 These Articles are seen to promote the child’s welfare and protect the child’s rights to a cultural identity. Although the UNCRC gives children individual rights, it is founded on family and relationships.259 Article 5 UNCRC

257 UNCRC Article 29.
258 UNCRC, Article 30
259 Madeline Saffigna, D Franklin, A Church and C Tayler, Victorian Early Years Learning and Development Framework Evidence Paper Practice Principle 4: Equity and Diversity (2011), Department of Education and
states that the family is the foundation of society and the natural environment for the nurturance and wellbeing of all its members, especially its children. Consequently, the child’s socialisation and training in the family’s culture is primarily dependent upon their families. When families suffer from separation and conflict, it is possible for the child’s socialisation by their family to be interrupted or lost. In the event that parents do not respect their child’s rights to culture, then the **UNCRC** places a responsibility on governments to provide support. Article 5 imposes a duty on governments to assist parents in fulfilling their responsibility to protect their child’s rights. This duty has been translated in the 2006 amendments to the **FLA**, and its implementation is being conducted by the process of FDR.

**D How the Family Law Act Incorporated its Cultural Responsibilities to the Child**

Whereas the **UNCRC** does not draw a distinction between interest and rights, the **FLA** has gone to great lengths to do just that. Since the inception of the **FLA** in 1975, there have been over 69 amendments to the Act. The most significant reform since the introduction of the no-fault divorce in 1975 has been the reforms to Part VII of the **Family Law Act 1975**, by way of the **Family Law Reform Act 1995** (Cth) (hereafter ‘the Reform Act’), that culminated in the **Family Law (Shared Parental Responsibility) Act 2006** (Cth) (hereafter, the ‘**SPR Act**’) and more recently in the **Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011**.

While these Acts show how the focus of decision makers has shifted the view of children from vulnerable dependants to children as rights bearers, they also show the progression of the right to culture and the heightened awareness of culture for children. Lanteri suggests that in decision making a middle ground must be met to ensure that cultural

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262 Explanation: Interests; reflecting the needs, desires, concerns and underlying positions of individuals and, Rights being the independent standards socially recognized or formally established in law.


264 Children’s Division.

differences are considered. In situations where culture plays a significant role in the proceedings Dewar argues that ‘minority values should be accepted in the decision making process as proper and legitimate, to be weighed as such in the process of balancing the other factors relevant to the child’s best interests’. In this section, the chapter will explain how the FLA incorporated the rights of the child to culture in legislation, but made its facilitation conditional on changes to the FDR process.

In a diverse society such as Australia, culture influences a child in multiple ways and on a daily basis, as children go from home to school, with friends and within the general community, as well as by the influence of technology and communications. Children are born into a cultural context; as noted in Chapter Two, when children are exposed to their familial culture, they begin to develop an appreciation for cultural plurality. This recognition is integral to the child’s understanding of others and the self and in the development of a cultural identity. The importance of culture has now been recognised within the FLA as the right to know and enjoy culture in s60B and to continue to enjoy culture with others of that culture in s60CC.

However, children’s right to culture are incompletely integrated into the FLA and poorly understood in family law, especially because its philosophical emphasis is premised on the child’s best interest principle. This principle is based on Article 3 of the UNCRC that instructs decision makers to make the child’s best interests a paramount consideration in all matters affecting the child. The standard is now incorporated into s60CA of the FLA that places the best interest consideration in a two tiered layer of rights: the primary considerations that determine whether children would benefit from having a meaningful relationship with both parents and protection from family violence; as well as the additional considerations, such as being able to participate in decision making or expressing a

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266 Annamariee Lanteri, ‘Cultural Conflicts in Family Matters’ (1999) 14(1) Australian Family Lawyer 1 at 7
271 FLA s60CC(2)(a).
272 ibid ss60CC(3)(b), (d) and (f).
view.\textsuperscript{273} The child’s right to culture was considered secondary and is now found in s60CC(3)(g), (h) under the child’s background.\textsuperscript{274} The principle provision for minority children appears in s60B(2)(e) principles underlying the Objects of the FLA, and gives children the right to know and enjoy culture, and with others of that culture. However while s60B(2)(e) is intended to provide the right to all children, as per the Explanatory Memorandum that clarifies ‘[i]t is not intended to be limited only to ATSI children’,\textsuperscript{275} s60B(3) as an exclusive provision expands on s60B(2)(e) that provides a wide interpretation of cultural rights for all children but more specifically provides Indigenous children with the right to maintain a connection with the land,\textsuperscript{276} to have the support, opportunity or encouragement necessary to explore the full extent of that culture, as consistent with the child’s views, age and developmental level.\textsuperscript{277} It also provides scope to develop a positive appreciation of that culture.\textsuperscript{278} In s61F, the legislation reiterates the rights of Indigenous children, and further expands on these by adding that the court should consider, ‘any kinship obligations, and child rearing practices’. These expanded rights do not appear for minority children or for the increasingly different family structures that are present in society today.\textsuperscript{279} By this inclusion, it appears that legislature did not understand the importance of culture for minority and community cultures.\textsuperscript{280} Not only does the legislation fail to provide an explanation or meaning to the term, the child’s ‘background’, its focus on Indigenous culture implies that children of other cultures do not have the same right to enjoy their cultural heritage.

While the focus of the provisions in Part VII of the FLA are to guide judicial decision making in contested children’s matters, in matters that are filed at the court as a result of terms of settlement between the parents requiring the court to issue consent orders, ss 60CC(2) or (3) states that the court is not ‘required to have regard to any or all of the factors set out in the Act’, and this includes the child’s cultural background. The issue that is the subject of this study, whether culture is facilitated for children in FDR, is premised on the same principles.

\textsuperscript{273} ibid s60CC(3)(a).
\textsuperscript{274} ibid s 60CC(3)(g).
\textsuperscript{275} Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility Bill 2006) (Cth), at [41].
\textsuperscript{276} FLA s 60B(3)(a).
\textsuperscript{277} FLA s 60B(3)(b)(i).
\textsuperscript{278} FLA s 60B(3)(b)(ii). These rights are reproduced in s 60CC(6) of the Act.
\textsuperscript{279} Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility Bill 2006) (Cth) Article [139].
As FDR is a private dispute resolution process, it requires parents to self-determine their plans based on agreement and consent and in these agreements parents are free to consider or not consider culture in their resultant plans for their children. This presents a concern because it means that neither judicial officers nor practitioners of FDR are required to address cultural heritage as a matter of course. This raises several questions; firstly, whether practitioners at FDR are focusing parents on the child’s rights to culture; secondly, whether practitioners believe culture to be within the child’s best interests and thirdly, whether practitioners are culturally competent to understand the importance of culture for children thus providing the child with every opportunity to develop into a healthy adult. While these points will be discussed in detail in the Chapter 4, here it must be stated that with no directives to mandate the inclusion of culture as a right in FDR, the FLA failed to keep culture at the forefront of considerations in children’s matters and this can translate as a culturally incompetent practice of dispute resolution. To understand how cultural rights have evolved in the FLA, it is necessary to give a brief outline of the changes to the FLA culture provisions up to the 2006 FLA amendments.

E The History of Family Law Act Amendments

As noted in the Second Reading Speech of the Family Law Bill 1974, the objective of the FLA is the maintenance and protection of the family unit as the natural and fundamental group unit of society.281 A significant recognition in the Bill was the importance of protecting the child against violence and abuse and the right of children to know and be cared for by both parents. Further, it states that children are to have contact with both parents, ‘except when it is or would be contrary to a child’s best interests’ and this was a specific safeguard against violence and abuse. The terminology of guardianship, custody and access denoting the child as property were replaced by parental responsibility, residence, and contact with the view of reducing the conflict that was suggestive of children contested matters. An important acknowledgement in the Bill was that a child’s cultural heritage was important, however this related to Indigenous children. Children born of parents from minority cultures received little mention.282

281 Commonwealth, Parliamentary Debates, Senate, 3 April 1974, 640.
The impetus for the reforms came in 1991, after several discussion papers were released by the Australian Law Reform Commission (ALRC) (No.57) that sought to assess whether the law in Australia recognised culture and respected and accommodated families from non-mainstream cultures. The ALRC Report (no. 57) noted that ‘families play a central role in the development of a person’s cultural identity and the transmission of culture, language and social values’ and recommended that the FLA should be amended to ensure that in assessing the best interests of the child the court takes adequate notice of the cultural links a child may have’. The ALRC Report recommended the need for reform to the FLA to make the legal system more accessible to everyone. That is, the ALRC Report noted the importance of culture and recommended that the FLA should reflect more multicultural sensitivity by ensuring that a child’s culture is taken into account when assessing parenting plans.

Two further investigations influenced reform of family law, but were given greater weight than the ALRC Report and these were; the Joint Parliamentary Select Committee Inquiry into Family Law 1992 and the Family Law Council’s Patterns of Parenting after Separation 1992. These investigations found that, unlike the Children’s Act 1989 in England, the language in the FLA was one of custody and contact and connoted the idea that children were no more than possessions. Influenced by these investigations, the Family Law Reform Act 1995 (Cth) (Reform Act) made several legislative changes to family law, targeting parent’s actions and motives while concentrating on the child’s interest and welfare. The stated objectives of the Reform Act were to: promote shared parenting irrespective of paternity; reduce litigation to reduce conflict; encourage dispute resolution and concentrate on the rights and needs of children as opposed to their parents, post-separation. To encourage the use of alternate dispute resolution (ADR) processes to settle disputes, rather than litigation and to ensure that family violence is taken into account in making parenting orders.

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283 Multiculturalism and the Law (ALRC IP 9) in 1990; and three discussion papers in 1991—Multiculturalism: Family Law (ALRC DP 46); Multiculturalism: Criminal Law (ALRC DP 48); Multiculturalism: Consumer Contracts (ALRC DP 49).
285 ALRC Report 57.
288 ibid 14.
While the Reform Act implemented many of the ALRC recommendations specifying that in considering the welfare of the child the court must have regard to the importance of the child maintaining links with their culture, no separate provision in relation to culture was included in the body of the Reform Act. The reason for this was stated as: ‘No express provision is made about cultural continuity or religious upbringing in the 1995 Reform Act because they are subsumed under the general welfare principle’. This meant that if the relevant decision maker assessed that culture was relevant to the child’s best interests, then by implication it would be found in s68F(2)(f) of the welfare provision under the subheading of ‘any relevant fact of circumstances’. The right to ‘culture and traditions’ appeared as a clarification to the main consideration—the child’s ‘background’—and not as a specific legal right. The suggested reason for the non-inclusion of culture in the legislation at the time was stated in the case of Re CP, concerning a four year-old Indigenous boy who had lived most of his life with an unrelated woman. After consideration of the factors that promoted the child’s welfare under the Reform Act, the court awarded the child to the carer against the wishes of the biological mother, who wanted her son returned to her in the Tiwi Islands, where he would be cared for by members of her family. On appeal the issue turned to the difficulty in applying the provisions of the Reform Act to minority and Indigenous cultures. The reason the court cited was because the Reform Act provisions were based on ‘an Anglo-European notion of parental responsibility’, as opposed to an Indigenous community style ‘system of family care’. In his critique of the case, Dewar argues that the Government as it was then was unwilling to recognise any kinship arrangement other than the nuclear family type. This raised two problems for parents of minority or Indigenous background that wanted parenting plans to reflect their children’s cultural needs: firstly, that the Reform Act had difficulty dealing with cultural systems of family arrangement that did not involve a family structure other than the Anglo-European or nuclear structure; and secondly, that the Reform Act failed to acknowledge the child rearing practices of Indigenous parents. This is important to the facilitation of culture for children, because it restricts judicial discretion from considering other child rearing practices as being appropriate under the FLA.

In the same year as the decision in Re CP, the Human Rights and Equal Opportunity

289 J Dewar Above n 260.
290 s68F(2)(f) The child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.
292 Above n 8,1991.
293 Dewar J, above n 61, 217.
Commission (HREROC) published *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (the Bringing them Home Report).  

The Report conducted an analysis of the ‘separation of Indigenous children from their families by state mechanisms’, including family law. The Bringing them Home Report, found that the family law system conflicted with Aboriginal child rearing values and this was in violation of the *UNCRC* Article 30, the rights of the child to practice their own culture, language and religion. As Ralph noted, HREROC commented that it was not enough that decision makers considered, ‘the significance of the child’s Indigenous heritage’, but that the court should appoint Aboriginal Family Consultants to provide parents with a cultural awareness programme that addressed the ‘child’s cultural identity’.

In 2001 the Family Law Pathways Advisory Report, *Out of the Maze Report*, (the Pathways Report) was released and intended to provide the Government with advice on how to achieve a family law system that provided families in crisis with support, provided parents with an information service and appropriate pathways to resolving their disputes.

In its recommendations, the Pathways Report noted the incompatibility of the adversarial trial with the child’s best interests and addressed the need to make family law more culture conscious for Indigenous children. The Pathways Report recommended that the Reform Act be amended to recognise in a new section 61 the ‘unique kinship obligations and child-rearing

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295 Article 30 (Children of minorities/indigenous groups): Minority or indigenous children have the right to learn about and practice their own culture, language and religion. The right to practice one’s own culture, language and religion applies to everyone; the Convention here highlights this right in instances where the practices are not shared by the majority of people in the country.

296 Stephen Ralph is in private practice and is a consultant in family law and child protection; preparation of court reports; psychological assessments; counselling and therapy with individuals, families and children.

297 S Ralph, ‘Best Interests of the Aboriginal Child’ (1998) 12 *Australian Journal of Family Law* 140: Family assessment as employed generally by counsellors is steeped in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and family organisation. The prominence of psychological theory and clinical practice based upon the study of small family groups and individual needs runs counter, however, to an effective understanding of the collectivist nature of Aboriginal family life. Of particular concern is the possibility that counsellors who have limited knowledge or experience in working with Aboriginal families may produce reports that do not adequately address the issue of the child's cultural identity and consequently the report may fail to attend to vital cultural issues affecting the child’s best interests. This possible deficit in cross-cultural understanding is one of the issues that the court's cultural awareness programme seeks to address both through the appointment of Aboriginal Family Consultants and through training of counsellors in this area.

practices of Indigenous culture’. The Pathways Report also suggested adding the words, ‘the child needs’ to s68F, to alleviate concerns and doubts as to whether Indigenous children ‘need to’ maintain ‘a connection with the lifestyle, culture and traditions of Aboriginal people’. In making recommendations to the Australian Law Reform Commission and the Family Law Council, the Pathways Report noted that in circumstances where there was family conflict, children need separate representation to their parents. Despite the Pathways Report asserting that concepts such as ‘kinship obligation’, ‘child-rearing practice’, ‘family’ and ‘adequate and proper parenting’, as they applied to Indigenous parentage were difficult to understand, the Pathways Report recommendations were applied to the FLA in the 2006 Amendments.

In late 2003, the Australian Government House of Representatives Standing Committee on Family and Community Affairs released a response to the Out of the Maze Pathways Report, called the, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, (the Standing Committee Report). The Standing Committee report arose from an inquiry into child ‘custody’ arrangements in the event of family separation, but primarily in response to criticisms by fathers’ groups that the system had not changed after the *Reform Act 1995*, to enable ‘joint custody of children’ and the fact that family law had become too litigious. The inquiry looked into what factors should be considered when deciding the issue of time allocation between parents and when the presumption of equal time between parents can be rebutted.

Nonetheless, it was not until the 2006 amendments to the *FLA* that Australian legislature accorded Australia’s obligations regarding the child’s rights to culture with those of

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300 s68(2)(f) The child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.


the *UNCRC*. The Explanatory Memorandum\textsuperscript{304} suggested that debate on the interpretation of children’s cultural rights, expressions of cultural identity, the definition of ‘cultural community’ and the right to participation in cultural activities by Indigenous children, were the reason for including the provisions to culture in the *FLA*. The intent behind this inclusion was to change community views from culture as opposing the human rights of children, to culture being a part of human rights for children.\textsuperscript{305}

The changes to the *FLA* came by way of Division 12A of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the SPR), reflecting a second generation of shared parenting reforms, the first generation reforms were implemented in 1996, through the *Reform Act 1995*. However, the *SPR* affected children’s rights in a number of substantive ways; to the resolution of parenting disputes; with the introduction of a presumption in favour of equal shared parental responsibility in s61DAA, and focused on changing the legislative provisions governing parental time arrangements. The *SPR* introduced in s60CC factors by way of primary and additional considerations that made up the factors that were considered in the child’s best interests (s60CA). The two primary considerations found in s60CC(2); (a) meaningful involvement; and in (b) protecting the child from harm through exposure to abuse, violence or neglect.\textsuperscript{306} In s60CC(3), which includes a list of additional ‘matters’ a court should consider when determining what is in the child’s best interests, culture is contained in s60CC(5) & (6), the right to enjoy Aboriginal or Torres Strait Islander culture. To further entrench the idea of factors that make up the child’s best interest, similar factors were included in s60B by way of objects that further emphasise the need to protect children from harm, and principles in the form of secondary considerations intended to guide the court’s application of the objects provisions. Accordingly, s60B(2)(e) provides the right to know and enjoy culture for all children; an extension of rights in s60B(3)(a) & (b) that allow Indigenous children to maintain connections with the land and to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views.

The *SPR* also established significant social changes in the form of introducing

\textsuperscript{304} *Family Law Amendments Bill (Shared Parental Responsibility) Bill 2005* Explanatory Memorandum Attorney-General’s Office


\textsuperscript{306} s60CC(2)(b) which makes ‘the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’.
mandatory FDR (a topic addressed in Chapter 4) in all contested children’s matters, influencing the pathway that parents took to obtain parenting plans. Parkinson noted that the legislative framework and the principles established in the SPR had a direct influence on judicially determined outcomes, although there was still room for judicial interpretation of the law. However, the real question he posits is, what influence will the legislation have on matters that are settled by FDR, with practitioners’ understandings of the law varying, and the extent of their obligations amounting to advising parents they can consider entering into a parenting plan, making arrangements for children to spend equal or substantial and significant time with each parent (s63DA). Otherwise, how the SPR legislation and principles influence non-litigated parenting agreements is uncertain. Even more uncertain is whether the cultural rights of children will be facilitated in FDR.

**F Why Culture is Difficult to Implement**

Despite positive obligations by the Australian legislature to facilitate children’s cultural rights in domestic law, children’s rights in the FLA still depend on a responsible adult for their implementation. While neither the UNCRC nor the FLA provide a framework of how much culture, and in what form, is in the child’s best interests (other than providing consideration of factors that may be valued as ‘good’), both now recognise the value of a child’s familial or birth culture to the child’s wellbeing: discussion of this took place in Chapter Two. In the knowledge that children’s rights are a product of historical and cultural factors, as well as being dependant on the actors—both government and non-government bodies—that translate that knowledge into policy, the next two sections will briefly discuss the reservations to culture in the FLA, and briefly examine the Reservations provided to the UNCRC’s ‘Child Committee’ by individual nations, regarding the challenges of implementing cultural rights for children in those respective nations.

(i) *Australia’s Reservations*

In response to Australia’s changing demographics and the growing number of parents of non-mainstream cultures needing a resolution for the contested children’s cases, the Family Court of Australia and Federal Circuit Court of Australia, *Statement of Strategic*
Court of Australia and Federal Circuit Court of Australia released a policy statement outlining changes to the service and the Court’s objectives to meet the needs of parents from minority and Indigenous cultures. The stated objectives are to: ‘strive for high quality, accessible and client-centric services for culturally and linguistically diverse (CALD) clients that support the resolution of their legal family disputes’. McClelland noted, ‘an effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves’. However in the context of family law, the following two cases will show the difficulty that culture presents to the orthodoxy of the reconstituted family and the inherent pro-contact ideology of the Australian family law. These two cases show the challenges faced by the judiciary to move away from traditionally dominant patriarchal notions of the family and the narrow view of gendered family roles, to an understanding of what constitutes contemporary normative family life. Despite initiatives to amend and include culture as a right for children within the FLA, the outcome of these cases shows a prevalence by the judiciary to the universalised ‘truths’ about what constitutes the child’s best interests post separation. The effect of this understanding suggests that despite the expanded legislative considerations to the rights to culture and the extensive research conducted on the children of the Stolen Generation and interracial adoptees, there is limited judicial understanding of culture and its effects on child development.

Although the FLA now provides a number of provisions that the judiciary must weigh before making a decision specific to culture and Indigenous placements, s 60B(2)(e), 60B(3), 60CC(3)(h), 60CC(6), 61F, in the matters of M & L and Donnell v Dovey, in which the courts dealt with the meaning of ‘parent’ and child placement, the court found that the word ‘parent’ should take its ordinary meaning and in so doing, reaffirmed the concept of a nuclear family based on western ideals of child rearing practices. In M & L the issue concerned an appeal to the Full Court of the Family Court by the mother of two children, who were aged nine and five years at the date of the appeal. The mother had been the children’s primary carer prior to the father’s application for substantial time with his children. At the hearing, the mother alleged the father drank alcohol excessively, abused marijuana, engaged in extra marital relationships, and had been violent towards her. The father did not

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310 (Aboriginal Culture) (2007) FLC 93–320, both indigenous parents and the family had a history of violence.

311 [2010] FamCAFC 15at 324.
deny these claims. In their reasoning, the Full Court rejected the trial judge’s reasoning that the child would be able to assimilate more easily and develop a better sense of Indigenous identity with his father. The Full Court ordered the child live with the mother. As Payne notes, by rejecting the child rearing norms of Indigenous communities, the court in *M & L* interpreted s60B to mean that children have a right to know and be cared for only by their ‘parents’ and no other significant figure. This endorsed white mainstream practices and rejected the fluidity of the Aboriginal way of life. The relevance of this decision is twofold: firstly that judges were balancing their interpretation of Indigenous child rearing practices against a western ideological perspective of parenting; and secondly, it shows that as recently as 2007, the judiciary were challenged in their understanding of Indigenous community child rearing practices. In *Donnell v Dovey*, the issue concerned an eight-year-old boy, the descendent of two indigenous groups: his father is a Torres Strait Islander and his mother is from the Wakka Wakka tribe. The parents separated and the mother re-partnered. In 2007, the child’s mother died in a car accident and the boy was being looked after by his half-sister. The application by the father to get full responsibility failed. Justice Brereton noted that in relation to Aboriginal cultural attitudes to family placement, that despite the court’s understanding that the child’s development of their cultural and ethnic identity is essential for the child to develop their individual identity in the child’s best interests, in the short to medium term a child’s attachment is more important than a child’s culture. This was noted despite the court being unsure about the long term effects of their decision on the child. In their reasoning, the Full Court determined that the sister’s claim would come under s 61F of the FLA, that the court must have regard to ‘identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child’, and this was overlooked by the trial judge. The court also noted that the trial judge overlooked that under Wakka Wakka tradition, the elder children looked after the younger children if the parents died. The court emphasised that the sister was also from an Aboriginal cultural background, and that the child had lived with her since his mother’s death and had formed an attachment to


316 s61F (b).
the sister. The case highlighted difficulties in the applicability of the court to apply the law to cultural systems of family care within a kin-network.

For transnational adoptions, the Adoption Act 2000 (NSW) provides that specific child placement principles are to be applied if the child is Aboriginal or Torres Strait Islander. In a matter analogous to Donnell and Dovey (above), and decided in the same year, the court dealt with the issue of the cultural identity of a three month old Sudanese child who had been placed with a white couple. In Director-General Department of Community Services v D, the court in this particular matter found the child’s best interest rested with the return of the child to the mother. The matter concerned the adoption of a child conceived through a sexual attack on the mother while she was in Sudan. Shortly after the mother arrived in Australia, she found out she was pregnant. At the time, the mother agreed to the adoption she was in a women’s shelter hiding from her brother and suffering severe depression and post-traumatic stress.

The court found that under s.58(2)(d) Adoption Act, the mother’s consent was ineffective. Justice Brereton, who also presided over the matter of Donnell and Dovey, said in his judgement that the child had formed a loving relationship with her adoptive parents and had already formed an attachment with her white carers. He noted that the father of the child was unknown and the mother lived in a different geographical location to the adoptive parents. In his reference to transracial placements and cultural identity, his honour made reference to Goldstein’s assessment that: ‘As to the balance of risk between raising a child apart from her mother and culture against that of disrupting an established secure attachment, the dilemma is not a novel one’. That is, it would be harmful to remove a child when a child has formed attachments and is settled with adoptive parents. However, this was not the reasoning in this matter. Brereton j noted that, [84] ‘In my view, the expert evidence supports the following propositions. First, all else being equal, it is preferable that a child be raised in the context of her natural family, ethnicity and culture’. What is significant in this matter is that the court recognised that ‘Cultural traditions cannot be handed down by those outside them’; them’ being those of the same culture, and that the risk of a child developing low

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317 Sections 35 and 39 respectively Adoption Act 2000 (NSW) set out the principles to be applied
321 Per: Justice Brereton, Director-General Department of Community Services v D (2008) 37 FamLR 595.
self-esteem and identity confusion is exacerbated in cases of transracial adoption when children are deprived of their cultural heritage.\textsuperscript{322} While the court ordered that the child be returned to her mother, the court also recognised that the best interests principle must take into account not only culture but the child’s development and degree of stability within a family and the strength of attachments the child has made. However, these cases show the challenges that are facing Australian judiciary in their assessment of the child’s best interests in cases of children from a non-mainstream culture.

While symptoms of low self-esteem and loss of a cultural identity, as well as other maladjustments, have been found common in relation to most children displaced from their culture, the Reservations cited in the UNCRC in relation to the non-implementation of the UNCRC Articles are not those of confirming the child’s familial culture, but instead cite the refusal of national governing bodies to implement the UNCRC rights as a means of preserving their national and familial cultural identity.

\textbf{G. Australia’s changing Demographics}

In response to Australia’s changing demographics and the growing number of parents of non-mainstream cultures needing are solution for the contested children’s cases,\textsuperscript{323} the Family Court of Australia and Federal Circuit Court of Australia released a policy statement outlining changes to the service and the Court’s objectives to meet the needs of parents from minority and Indigenous cultures. The stated objectives are to: ‘strive for high quality, accessible and client-centric services for culturally and linguistically diverse (CALD) clients that support the resolution of their legal family disputes’. McClelland noted, ‘an effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves’.\textsuperscript{324} However in the context of family law, the following two cases will show the difficulty that culture presents to the orthodoxy of there constituted family and the inherent pro-contact ideology of the Australian family law. These two cases show the challenges faced by the judiciary to move away from traditionally dominant

\textsuperscript{322} ibid
\textsuperscript{323} 27\% of Australians today were born overseas. Australia’s people are multilingual, multicultural and religiously diverse. Family Court of Australia and Federal Circuit Court of Australia, \textit{Statement of Strategic Intent} (Commonwealth Government of Australia, 2012).
patriarchal notions of the family and then arrow view of gendered family roles, to an understanding of what constitutes contemporary normative family life. Despite initiatives to amend and include culture as a right for children within the FLA, the outcome of these cases shows a preference by the judiciary to the universalized ‘truths’ about what constitutes the child’s best interests post separation. The effect of this understanding suggests that despite the expanded legislative considerations to the rights to culture and the extensive research conducted on the children of the Stolen Generation and interracial adoptees, there is limited judicial understanding of culture and its effects on child development.

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\textsuperscript{325} (Aboriginal Culture) (2007)FLC93–320, both indigenous parents and the family had a history of violence.
\textsuperscript{326} [2010] FamCAFC 15at324.
\textsuperscript{328} ibid 396 [61] (Kay J).
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338 Justice Brereton, Director-General Department of Community Services v D (2008)37FamLR595.
339 ibid
reservations cite the refusal of national governing bodies to implement the *UNCRC* rights as a means of preserving their national and familial cultural identity.

**H Issues with Implementing Children’s Cultural Rights**

As a legally enforceable international convention, the *UNCRC* must, not only establish the framework for children’s rights, but must be seen to be culturally sensitive and radically different to previous conventions. However, despite the *UNCRC* ethos that children have a right to know and enjoy their culture, this principle lies in the presumption that all children have human rights to culture and that a child’s cultural identity is their passport to a family, group or community. Despite this description and despite the *UNCRC* being the most widely ratified international document, the *UNCRC* has been criticized for its universality.\(^{340}\)

As with other instruments that attempt to address the multidisciplinary subject of Children’s rights,\(^ {341}\) the *UNCRC* addresses problems that involve and affect children within different social, political and historical realities. Lejeune argues the *UNCRC* can only apply to a geo-political area in which the same attitudes to law, the same political system and compatible cultural traditions are firmly rooted.\(^ {342}\) This reflection is based on the criticism that the *UNCRC* ignores cultural differences and attempts to standardise a western/white philosophy of children’s rights, where dominant views emanating from Western traditions and beliefs as opposed to culturally specific practices and traditions based on local culture.\(^ {343}\) Stephens noted, ‘some critics of the Convention argue…that its declaration of universal children’s rights gives children the right to be remade in the image of adults and non-western childhoods the right to be remade in western forms.’\(^ {345}\) By this comment, Stephens draws attention to two elements: the fact that children under the *UNCRC* have rights individual to adults; and secondly, that the *UNCRC* does not


\(^{344}\) Joanne Westwood, *An Introduction to Early Childhood Studies*, (2013), Maynard & Powell.at 12

differentiate between cultural differences and only recognizes the western notion of childhood. However, these criticisms are seen by Archer as a narrow reading of the UNCRC Articles. He notes that the UNCRC language is wide and accounts for variation in childhood. However, even Archer debates the viability of giving children rights that are not in proportion to their physical, cognitive and emotional characteristics. Similarly, King argues that instruments such as the UNCRC cannot be said to be law, but an ideal of what humanity wants for children, with the view that children’s well being today ensures a well-adjusted adult of the future. In King’s evaluation, the UNCRC is more aspirational than legal; that is, the UNCRC has no legal standing. However, these criticisms stem from the fact that the UNCRC has no powers to sanction countries that violate the rights regime. Even so, King’s comments show the challenges caused when trying to implement a treaty within the international community when it comes to children’s human rights. On the one hand there is an understanding that childhood is culturally contextualized and children hold an interdependent role within the family. Another view is that children are constructed as opposites to adults; in practice, children are seen as ‘citizens in waiting’, or as ‘potential bearers of rights, which they may exercise only when they have reached the age of reason’. The concept of citizenship is associated with notions of having standing in a community, a right to vote and being an individual as part of society with duties and obligations. For children in Australia, childhood varies in context, but generally it is tied to notions of children’s rights and adult responsibilities. Children’s citizenship is still contested and contextual. With Millei and Imre, noting that in Australia the socialization of children to become autonomous citizens is a factor taken for granted, this is commonsense. This is important because it assumes that all children will be socialized by the same standards and norms. This challenges governments and decision makers to construct children as the same. This leads to justifications that childhood is constructed on notions of dependency, education and play, which is unsuitable in many community or collectivist cultures. This can lead to assumptions that all children lack competence, knowledge

346 ibid 6.
348 ibid
349 ibid 58–69.
351 ibid
and judgement, and that parents know what is best for their children.\textsuperscript{355}

While the debates on children being rights holders will continue, there is no argument that as a social group, children often rely on adults to articulate, advance and implement their rights. The challenge for parents and governing bodies is to protect the child’s human rights to culture by accommodating children’s rights within their social, political and legal structures and make the laws governing children’s rights to culture more relevant at a local level. King agrees that the way a society responds to children’s rights will be seen in that society’s willingness to challenge long held notions of childhood development and children’s rights.\textsuperscript{356} However, it is also agreed that the family has the most influence on child development.


It is widely recognized that the family is the primary provider of cultural instruction, guidance and protection for the child. Article 18 \textit{UNCRC} places parents at the centre of the child’s development.\textsuperscript{357} While family is not defined in the \textit{UNCRC}, its Preamble reads, ‘the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children’.\textsuperscript{358} Still, the parents’ influence over their children is not unfettered, with Article 5 placing limits on parental discretion and noting that parents are only to provide their children, ‘appropriate direction and guidance’.\textsuperscript{359} It does however promote that children, ‘should grow up in a family environment, in an atmosphere of happiness, love and understanding’, and accepts parents as the most suitable to understand their children’s needs.\textsuperscript{360} The \textit{UNCRC} further renders government as co-assistants to parents, to provide all necessary support, allowing parents to raise children in a manner conducive to promote well being, and at their discretion.\textsuperscript{361} This is despite Article 18, Article 3-best interests

\begin{footnotesize}
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\item \textsuperscript{355} ibid
\item \textsuperscript{357} Martin Guffenheim, \textit{What is wrong with children’s Rights}, (2005) Theo Liebmann New York Law Journal, 16; and Article18: Parents are the most important people in children’s lives and must always do what is best for them. Governments must do all they can to help parents look after children well.
\item \textsuperscript{358} \textit{Preamble}.
\item \textsuperscript{359} Article5: State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
\item \textsuperscript{360} \textit{UNCRC Preamble}.
\item \textsuperscript{361} \textit{UNCRC Article 5}.
\end{itemize}
\end{footnotesize}
and Article 5 entrenching the idea of children as individuals and challenging the idea of children as being possessions of their parents. Yet, for children, being an individual does not necessarily equate to independence. It depends on the interpretation of those charged with the responsibility of incorporating the principles of the UN CRC. A misinterpretation or a non-systematic application of the Articles could mean fragmentation and inconsistencies in the implementation of children’s rights at a domestic level. If children’s rights are to gain credibility, King suggests, the UN CRC must adopt serious policing regimes to ensure children’s rights are being enforced at the national level. Even so, Hafner-Burton and Tsutsui suggest that ratification by nations is more window dressing than real commitment. They note that nations ratify the UN CRC to avoid international scorn for not respecting human rights and in the knowledge that, ‘global human rights treaties supply weak institutional mechanisms to monitor and enforce regime norms’. Hafner-Burton argues that part of the difficulty in affirming cultural rights is that they are a collective right, because culture is the connection between many individuals within a group. This collective nature of the right puts it at odds with individual rights.


Despite gaining the general consensus of the world community on children’s rights with 193 signatories, the UNCRC’s implementation into the domestic law in many countries has been lax. While some governments ratified the UNCRC to gain political recognition and raise their country’s international profile, other countries required the monetary benefit that comes from ratification. The main suggestion as to why governments failed to implement the Articles pertaining to the child’s rights to culture is the ‘cultural distinctiveness or relativist’

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362 King above n 334.
364 ibid 3.
365 Article4: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the frame work of international co-operation.
366 Joint Standing Committee on Treaties, Parliament of Australia, UNCRC (1998) ix. In Australia in 1999, during a Federal government inquiry into the status of the UNCRC, a 51% vote was entered in favour of with drawing its support from the instrument.
argument. This term was first coined by Boaz in 1887 and refers to the view that ‘civilisation is something not absolute…but relative’ to the life of society. Cultural distinctiveness or relativism argues that the cultural ideologies of some nations are so incompatible with those of western liberalism on human rights that it justifies their reputation. In contrast, there was also suggestion that despite a genuine acceptance by governments of the UN Convention on the Rights of the Child human rights ideologies, governments could not overcome the ‘cultural clash’ between the western mentality espoused by the UN Convention and the individual nation’s grassroots social and cultural value systems, nor its local communities. Therefore, Bissell’s question is whether governments, in the framework of hegemonic globalisation, really have the power or authority to act according to the responsibility given to them by the UN Convention and whether the social, economic and political climate of the nation state can sustain the obligations it sets for children.

The Arab scholar Qamar, in dismissing Article 2, non-discrimination, as not being feasible in Islamic countries, argued the issue is that childhood varies with the time, place, cultural and religious ideologies of a particular nation state; therefore, a universal rights regime is not in the child’s best interest as it does not consider the individual child’s circumstances.

In a number of documented Reservations made by countries of the Middle East, the reason given was that the UN Convention rights could not be interpreted and were incompatible with Sharia law, which governs all issue relating to divorce, family disputes and children. In addressing the Compliance Committee in 2001, the Egyptian delegate noted that the notion of ‘best interests’ is a relative term depending on the child’s environment and customs at any given time. The delegation’s Reservation was based on the ideology that children were part of a

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375 Egypt, UN Committee on the Rights of the Child, UN Doc. CRC/C/SR.680 at 49 (2001).
family unit and should be seen and not heard.\textsuperscript{376} Conversely, the Egyptian delegate, despite acknowledging their government’s acceptance of the human rights agenda of the \textit{UNCRC}, stated that ten years (since the \textit{UNCRC} had been ratified), was not enough time to change the views of a nation that had been set by thousands of years of cultural indoctrination.\textsuperscript{377}

As An-Na’im noted on the culture Articles in the \textit{UNCRC}, culture can be defined in many ways, and the right to culture not only means a right to practice one’s culture, but to practice one’s culture without the imposition of other cultural practices that may not be compatible.\textsuperscript{378} In their Reservations presented in 1993, 1996 and 2003 respectively, the Islamic countries of Jordan, Yemen, Sudan and Egypt noted that as Sharia forms the basis of their country’s civil, legal and moral systems, any action taken on behalf of children not recognized under Sharia doctrines and practices is rejected.\textsuperscript{379} Cerna suggested the underlying premise of these Reservations is that the \textit{UNCRC} is the first international instrument giving the child human rights beyond that of the family. This is seen in some cultures as a violation of the traditional sanctity of the family. She noted, ‘the private sphere, which deals with issues such as religion, culture, the status of women, the right to marry and to divorce, to protection of children…is a domainin which the most serious challenges of the universality of human rights arise’. \textsuperscript{380}

However, fundamental to the notion of children’s human rights is the assumption that the state is to ‘protect’ the individual ‘natural’ rights of its citizens.\textsuperscript{381} In terms of the child’s rights debate, children’s rights, in the context of an international instrument like the \textit{UNCRC}, becomes a contradictory term. This is because children’s rights instruments are interpreted by adults according to their own cultural context; any right deemed appropriate for the child is provided by adults that then enable the child to access the right. Children are passive participants in the dynamics of this process. In the debates over the universality of children’s rights in the \textit{UNCRC}, decision makers focus on the appropriateness of the terms of the grant, instead of the child’s needs. Fernando notes that the debates ‘appear to include everything but children’. \textsuperscript{382} The danger in excessive emphasis on relativism is that it can encourage cultural

\textsuperscript{376} Alston, ibid at 321
\textsuperscript{377} Egypt, UN committee on the rights of the Child, UN Doc. CRC/C/SR. 680, at 49 (2001).
\textsuperscript{380} Christine M Cerna Above n 372 ibid p749.
\textsuperscript{382} Jude I Fernando, \textit{‘Children’s Rights: Beyond the Impasse’} (2001) 575 Annals of the American Academy of
ideologies and practices that are fundamentally detrimental to the child.\textsuperscript{383} Fernando suggests that:

What is [still] required today is a constructive dialogue on the issue of childhood and children’s rights that does not fall into the twin traps of relativism and universalism, that does not ignore the heterogeneity of children’s lives or obscure the commonality of ways in which economic and political forces in an increasingly unstable and polarized world have affected the lives and experiences of these children.\textsuperscript{384}

Fernando further suggests a need for decision makers to avoid placing children’s rights within the discourse of national relativism that confines interpretation of rights to one universal application. That is, that all human rights within a society are to be accorded the same system of norms as western cultures. In the case of a conflict between the cultural norms of the individual and the state, then interpretation of those acts are accorded with local culture, and with cultural relativism that holds that traditional culture is unchangeable. While Howard, in her discussion of human rights critiques cultural relativism as an ‘essentialist stance that views culture as static’, she recognises that some assumptions of human rights discourses, such as autonomy, are not ‘universal’.\textsuperscript{385} Within a national context, the issue becomes whether traditional cultures of indigenous groups and minorities are being respected in relation to the best interests of children from those groups. Alston notes that rather than argue between universalism and cultural relativism, there is a need to develop approaches that will specifically address the child’s unique cultural and socioeconomic circumstances.\textsuperscript{386}

\textbf{K The Best Interests of the Child in a Human Rights Context}

In this section, while best interests have been discussed throughout the commentary above, we focus on the child’s unique circumstances by explaining the principle of the child’s best interests as this relates to the child’s rights to culture, and the difficulty decision makers and other responsible adults have had with its interpretation.

The term ‘best interests of the child’ was first defined by the Declaration of Human Rights in 1959 as promoting protection and opportunities, and facilitating for the child, ‘by law and other means to enable (the child) to develop physically, mentally, morally, spiritually and

\textsuperscript{383} ibid at p8.
\textsuperscript{384} Jude L Fernando Above n 360 at p11.
\textsuperscript{386} Philip Alston (1994),above n 321
The general principle contained in Article 3 of the UNCRC provides that the best interests of the child ‘shall be a primary consideration’, that is, one of many considerations that provides context for the planning and policy making that may affect the child such as: the civil and political rights of freedoms of expression and association, as well those rights that give the child access to economic, social, and cultural rights, education and to health care. According to Freeman, Article 3 ‘must be seen both as informed by and constrained by the rights, and the other principles, provided for by the Convention’ Culture is mentioned in the Preamble and in a number of Articles and is considered to be a second generation right with economic and social rights. Civil and political rights are considered first generation rights and these are also the primary rights of the UNCRC.

While the UNCRC has become the most important human rights instrument for children, it has also been criticized for its vagueness in not providing a framework or interpreting important principles and concepts, such as: what constitutes best interests practices; welfare, dignity, needs, or cultural identity for children; and what type of protection is required to support the child’s best interests. Liebel notes that the principle is framed in open terms and relies on the indivisibility and interdependence of the Articles to provide the child’s best interests. Eekelaar suggests that when considering best interests one must include all objective and subjective aspects of the child’s circumstances. Nevertheless, Ottosen notes that the phrase in general lacks precision and this has caused much disparity between the UNCRC’s universal nature of rights and how the rights are interpreted both at a national and

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388 Articles 14,15.
389 Articles 30,31,32.
390 Article 29.
391 Liebel above n 345, p43.
393 UNCRC Article 5: Family, fundamental group of society, Article 12: right to participation, Article 31 right to play and leisure.
394 Manfred Liebel above n 345, p43.
395 John Eekelaar, ‘The Importance of Thinking that Children have Rights’ in P Alston, S Parker, J Seymour (eds.), Children, Rights and the Law (Clarendon Paperbacks, 1992). It has been suggested that this comprises the core aspects of evidence-based social work. See also, in International Family Law, Policy and Practice (2013) ‘Child Law in an International context: A Commemorative Collection of Articles Based on Themes from the University of Tromso’s International Conference 21–25(2012)’.
local level. In understanding that children’s rights are constructed by the individual governing body, this has created obstacles to conceptualizing and recognizing cultural practices that may be harmful to children, especially where the activity is not recognized by existing legal paradigms within a nation state.

The vagueness and lack of guidance provided to decision makers regarding the principle of best interests has raised several concerns. In his treatment of the drafting of Article 3 of the \textit{UNCRC}, Philip Alston pointed out that the final text did not stipulate that the best interests of the child included his or her physical, mental, spiritual, moral, and social development (as the first Polish draft had done) nor that it is the child’s own views that are accepted as being in the child’s best interests. Further, he asserted that the best interest principle in the \textit{UNCRC} does not mean that the child has the freedom to decide what is best in their interest. Instead, ‘best interest’ is something that adults decide for their children, and these decisions are affected by social norms, community culture and traditions.

Despite the \textit{UNCRC} not offering a definitive statement of what constitutes ‘best interest’, it does provide a rights based framework that defines the application of the principle. That is, by stating that legislators must ‘ensure’ the child’s best interests, the \textit{UNCRC} places positive obligations on nation states and caregivers to respect the child’s opinions, age and circumstances, and to ensure that the rules of practice are adhered to for the benefit of the child. Despite placing a positive obligation on governments, the language of the \textit{UNCRC} tends to be normative, thus allowing variations in the interpretations as to what normative standards will apply to the standard of best interest.

As an interpretative legal principle, best interest has proved challenging to non-legal disciplines working with children, such as FDR practitioners, psychologists and sociologists.

\begin{footnotes}
\footnote{ibid 171.}
\footnote{ibid}
\end{footnotes}
Within the legal field, the principle has become the guide for decision makers in relation to parental responsibility and children maintaining a relationship with each parent, as well as matters concerning the facilitation of the child’s cultural heritage.

**L Australia and the Principle of Best Interest**

The standard of best interest has become the guiding principle in the *FLA*. This section will provide an explanation of how Australian decision makers and practitioners of FDR have interpreted the principle and why this principle is so important to children’s matters and the development of children’s rights to culture.

In Australia the bestinterest’ principle serves to promote the subjective interests of a child, morally, physically, culturally and socially. This is contained in s65AA of the 2006 *FLA*, which states that, ‘a court must regard the best interests of the child as the paramount consideration’. Generally, this has included factors in s60CA, both procedural and substantive, relating to the long and short term ‘care, welfare and development of the child’. These include considerations of whether the parents have the capacity to provide the child with physical and emotional safety and stability, with financial, moral and cultural support and wellbeing. As such, the principle of the child’s best interests is based on a needs-approach that entitles children to expect that their best interests will be respected by the relevant decision maker, whether that be, ‘public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’, or parent.

The scope of the best interest principle is found within the framework of factors contained in s60CA, known as the primary and secondary factors, and in s60B, Objects and Principles; notwithstanding this guidance remains ‘normative rather than objective’. In the leading case on the factors that constitute the child’s best interests, *Goode and Goode (2006)*, the court interpreted the defining word concerns’ to carry an obligation to consider positively all actions.

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404 *FLA*s65AA.
405 *FLA*s65AA.
406 UNCRC: The Principle of Best Interests.
408 FLC93–286.
that not only directly affect the child, but also actions that referenced or were in relation to the child, or actions that touched the child. They stated that in giving the word ‘concerning’ a wide-ranging application, decision makers are more likely to achieve the objects of the UN CRC and the child’s best interests. In this manner, the phrase goes to define the limits of judicial discretion and parental decision making.\footnote{CJ Mason, T Dawson and JJ Gaudron, \textit{Secretary, Department of Health and Community Servicesv JWB and SMB} (1992)\textit{175CLR 218} at 27.}

Section 60CC provides the primary and additional considerations in determining the child’s best interests. Section 60CC(3) provides that the court must have regard to, among other things, the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and either of the child’s parents. On a purely literal construction of this provision in relation to cultural rights, it appears to recognize the child’s cultural heritage and the importance of the socialization of the child within a community of people of the same culture. However, it restricts the grant to Indigenous children. Kordouli states that s60CC factors range from a narrow inclusion of rights concerning the child’s wellbeing to a wide interpretation of the grant to include how parents may influence the child.\footnote{Vicky Kordouli, ‘Relocation, Balancing the Judicial Tight rope’(2006)\textit{20 Australian Journal of Family Law}89-110 at p90.} While Kordouli argues that judicial determinations have generally adopted a wide interpretation of best interests,\footnote{ibid at p 90.} in practical terms the paramount principle discourages an excessively adversarial approach to parenting agreements, in the hope of alleviating the detrimental effects of conflict on children.

In \textit{W v R}, Carmody J\footnote{(2006)\textit{35FamLR}608,613–76} summed the point of best interests and familial conflict:

\begin{quote}
The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important. Nonetheless, the child’s best interests have statutory priority and prevail over the legitimate rights, interests and expectations of all others, including the parents, in the event of conflict.\footnote{ibid at 672.}
\end{quote}

In this interpretation, the child’s rights override the parent’s interests; however, the child’s interests are decisive in any determination. With the amendments to the \textit{FLA} in 2006, most children’s matters in Australia are now decided by FDR and practitioners who are required to manage child focused FDR resulting in plans that reflect the child’s best interests. Chew notes that the requirement to consider culture in determining the child’s best interests is limited by
the *FLA*, and the ‘inescapably ethnocentric aspect of decision making’.⁴¹⁴ Ralph agrees and critiques whether the standard is appropriate for judicial decisionmaking in child related proceedings.⁴¹⁵ These views move beyond the rhetoric of the principle of ‘best interests of the child’ to deconstruct and expose what informs judicial discretion and how judges decide what is best for any child in any particular circumstance. Even in considering the list of factors in s60CC, that the court must have regard to, judicial discretion underpin what factors are relevant to a particular case and then how much weight each must be given. In the cases relating to the child’s rights to culture, cultural competence is necessary to avoid imposing restrictive measures on the socialization of the child and the freedom of expression for the family in general.⁴¹⁶

**M Conclusion**

The chapter emphasized that the right to culture for the child is now an international right in the *UNCRC*, ratified by Australia and only recently implemented in domestic law in the *FLA*. While it is understood there will always be a dichotomy between the child’s rights and the child’s capacity to invoke those rights,⁴¹⁷ and between rights and interests of the child, there cognition that culture is important to the development of a child’s identity is a positive sign towards protection of the right. However, despite a fundamental shift in the way children are conceptualized and the evolving role they are playing in decision making processes, the concept of children as social agents is not widely accepted.

The chapter discussed the challenges in implementing the right to culture on an international and domestic level. One of the key issues that emerged for nation states after ratifying the *UNCRC* was the concept of universality of the *UNCRC* rights. While it is understood that childhood is a culturally constructed notion, the *UNCRC* has been criticized for being based on western ideology. However, the main reservation lodged with the *UNCRC* committee as to

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why nations cannot implement the *UNCRC* in domestic law, is the fact that children’s rights and children’s best interests are culturally constructed and relative to the nation State and circumstances of each child. In most circumstances, children are considered passive right holders, part of a family unit and not as independent individuals.\(^{418}\) This view raises concerns in light of the 2006 amendments to the FLA to grant children rights to culture because it means that decision makers are confusing the children’s rights to culture with the child’s best interests and prioritising parental rights over the child’s autonomy.\(^{419}\)

In Australia, in an effort to recognise children as individuals with rights and not possessions of the family, amendments in 2006 to the *FLA* introduced a different perspective to the child by granting children rights under Part VII, and specifically rights to culture in s60B\(^{420}\) and s60CC.\(^{421}\) Culture is found as a principle underlying the objects. As a secondary factor in the analysis of the principle of the child’s best interests found in Article 3 of the *UNCRC*,\(^{422}\) and within s65AA *FLA*,\(^{423}\) culture is only considered after the primary factors and only in circumstances that can be considered convenient for the parents. Despite this innovation to make children’s interests the paramount consideration in Australia, the removal of children’s matters to FDR makes children’s rights to culture a matter of parental discretion and practitioner competency and this puts in doubt that culture will be considered and facilitated for children.

The chapter also discussed a number of cases judicially decided and suggested that although Australia’s judiciary is sensitive to the cultural rights of the child, the concepts of culture, family, childrearing and best interests are proving a challenge. However, the most identifiable change to Australia’s legal system in relation to obtaining a culturally inclusive parenting plan is the amendments to the *FLA* that introduced FDR as a mandatory process.\(^{424}\) While guided by the principle of best interests of the child, FDR relies on the tenets of self-determination of the parents and the child’s evolving capacities to help parents resolve their disputes, discharging


\(^{420}\) s60B: Objects and principles underlying the child’s Best interests.

\(^{421}\) s60CC: How a court determines what is in a child’s best interests.

\(^{422}\) UNCRC: Best interest of the child

\(^{423}\) Child’s best interests paramount consideration in making a parenting order.

\(^{424}\) 60I Attending family dispute resolution before applying for Part VII order
their duties by managing child focused FDR, giving parents the final decision on all child-related matters. FDR is a major factor in the assessment of whether culture will be facilitated for children. The framework of FDR and the practitioner’s new role as child advocate and gatekeeper to the litigation system will be discussed in the next chapter.
In Chapter Two, culture was identified as a major component in the development of identity and in the healthy adjustment of the child. In Chapter Three, discussion turned to how the UNCRC and Family Law Act 1975 (Cth) (FLA) in Australia, set about recognizing culture as a right for children. As shown from that discussion, culture is incorporated in several Articles in the UNCRC, with its Preamble expressly stating, ‘the importance of the traditions and cultural values of such people for the protection and harmonious development of the child’. As a signatory of the UNCRC, Australia amended its FLA 1975 (Cth) in 2006, to include culture specific sections in Part VII. At the same time, it made FDR the predominant process to resolve disputes about the post-separation care of children; consequently, its practitioners became the gate keepers to the family litigation system. This chapter will consider those changes and investigate the extent to which the process of FDR can and should facilitate the child’s right to culture. Secondly, the chapter will review the factors that may assist or limit FDR practitioners to facilitate children’s right to enjoy their culture.

One of the key amendments to FLA in 2006 was the introduction of mandatory FDR as a necessary step for all parents unable to otherwise agree on post-separation parenting arrangements for their children. Hence, the study will inquire whether FDR as a private non-litigious process is flexible enough to accommodate the needs of parents from minority and Indigenous cultures that attend FDR. The chapter will draw attention to the contextualized nature of FDR, and highlight how this obscures the rights of children to culture, because of its western ideological orientations. The question of whether FDR practitioners are culturally competent to understand the needs of parents of minority and Indigenous cultures, enabling productive discourse and option generation between practitioners and parents is a major focus of this chapter. The chapter will also discuss how practitioners supplemented their knowledge of minority and Indigenous culture at FDR, concluding that insufficient knowledge of specific cultural issues risks stereotyping by practitioners of parents, leading to incorrect assumptions of parents and their motives at FDR. Lastly, the chapter wills show how

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425 UNCRC Preamble.
practitioners interpret the principles of self-determination and neutrality, and how this affects the practice competence of practitioners.

The chapter will argue that, despite the number of legislative provisions, policies and practice standards that govern FDR, there is little cultural training, other than training in cultural awareness. This, it will be argued, challenges the practitioners’ understanding and acceptance of the importance of culture for children, especially when practitioners are child advocates in a child focused process where children are at times heard, but not seen. The chapter will show that the disjuncture in training for practitioners has had two influences. Firstly, with Australia’s changing demographics, practitioners are now expected to help parents of all cultures make decisions in the child’s best interest. This requisite requirement of their role, as practitioners and managers of FDR, means practitioners need to be (or become) culturally conscious and competent to help parents make decisions determining such important matters as: where children will live; who will be the resident parent; whether equal, substantial or significant time is given to the non-resident parent; and how much of that time is for cultural purposes. The chapter will show that this requirement has created a challenge for practitioners, as many FDR practitioners lack the knowledge and confidence to assist parents from culturally diverse backgrounds or many practitioners grow to rely on their own cultural background to interpret the dispute. The chapter will show that being culturally competent was interpreted by practitioners to mean they should fulfill their regulatory requirements to help parents resolve disputes. However, being culturally competent is not so much having the knowledge to bring the parents to a resolution of their dispute, as of being self-aware of their own cultural contexts and having a willingness to learn, understand and appreciate other cultures.

However, practitioners it will be argued, have broader responsibilities than just to parents. Practitioners in FDR shift between their role of child advocate and facilitator/evaluator between parents. In the broader discussions and debates about the role of practitioner, it will be suggested that practitioners move between these roles by focusing on parents, moving them beyond their dispute so that parents engage in productive dialogue focusing on the

child. With FDR now the norm, not the exception indisputes over children, this means that practitioners must attend to needs of all parents, irrespective of cultural origins.428

Dewar and Parker points out that there is evidence to show that non-legal family dispute resolution practitioners practice in ignorance of the FLA.429 From 2008, accreditation for new practitioners stipulates that practitioners must do a component of study on the FLA and the amendments in 2006.430 These require practitioners to instruct parents that the child’s best interests are satisfied when children have a meaningful relationship with both parents within a safe environment.431 This means that FDR practitioners, while not all legal practitioners, must conduct FDR ‘in the shadow of the law’, the FLA.432 Culturally sensitive practitioners, it will be argued, should advise parents about the new principles introduced in 2006 in s60B,433 giving children the right to enjoy their culture and to do so with other people who share that culture.434 Whether and how this is occurring is the focus of the empirical investigation of this thesis.

Therefore, the aim of this chapter is to provide an overview of FDR, its origins and its processes. The chapter will also assess the role of practitioners who manage FDR, their understanding of culture, children’s rights and what their responsibilities are towards facilitating children’s cultural rights in FDR. Lastly the chapter will explore the limitations of the process and the effects of those limitations on the capacity of the practitioner to adequately provide for children’s rights to culture in their management of FDR.

B Overview of Alternative Dispute Resolution

ADR is thought to have potential to deal with conflicts in a non-confrontational manner. It has been identified by the National Alternative Dispute Resolution Advisory Council

430 Family Law (Family Dispute Resolution Practitioners) Regulations, 2008.
431 s60D.
433 s60B: Objects of Part and principles underlying it.
434 s60B(2)(e)
(NADRAC), as ‘an umbrella term for processes other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them’. 435 In Australia, ADR was introduced by the Commonwealth Court of Conciliation and Arbitration in 1904. Since then, there has been a steady increase in the number of Australian laws that provide or refer to ADR. 436

Primarily developed and used in areas of industrial relations and labour law in Australia, 437 ADR has been extended to disputes concerning civil litigation, equal opportunity, anti-discrimination and the environment. 438 Founded on a philosophy of ‘self-determination, non-compulsion, conciliatory and community responsiveness’, 439 Williams noted that ADR is an array of processes and practices that span opposite ends of the same ‘procedural continuum’, to include negotiation, conciliation and mediations and arbitration. 440 Each process varies in its properties, from semi-judicial arbitration (with its use of an authoritative third party) to mediation (employing a neutral third party to facilitate negotiations and helping parties resolve their own disputes). Unlike litigation, ADR is used to manage and settle disputes in a non-confrontational manner both in out-of-court and in-court proceedings.

Astor and Chinkin suggest that the measurement of ADR’s potential depends on its intended goal. 441 While there are no set standards for ADR and ordinary court rules are not applicable between the parties, parties must make a ‘genuine effort’ to resolve their dispute. 442 Williams argues that any government intervention or attempt to regulate ADR would counter its flexibility and accessibility and make it less appealing to disputing parties. 443 However in 1997, a NADRAC 444 discussion paper on ADR and access to justice agreed with Scutt’s views on confidentiality, and suggested that ADR may lack fairness and justice. In its report Issues of Fairness and Justice in ADR, it noted that in, ‘giving control to the parties rather

435 ADR: defined in 1995 Act. The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding or (ii) the agreement of the parties.
437 National Alternative Dispute Resolution Advisory Council (NADRAC).
440 ibid at p 203
442 Family Law Act 1975 (Cth) s 60I(8).
443 Williams, above n 411 at p 7.
than a third party decision maker…may do grave injustice to one of the participants’.\textsuperscript{445}

While NADRAC acknowledged the importance of providing an alternative to litigation, there was also concern that ADR reduced the potential for legislativere forms, as it prevented the establishment of caselaw precedent that could benefit other similar matters.\textsuperscript{446} To that effect, Fiss called ADR ‘secondary justice’; that is, secondary to judicial determinations.\textsuperscript{447} Fiss believed litigation was only for rich disputants who could afford primary justice, and the poor had to settle for ADR. However, this view is disturbing, mainly because it shows a lack of understanding in the process and in its potential. While it is not disputed that accessing justice through court proceedings has never been easy due to the cost, stress and time implications,\textsuperscript{448} the knowledge that ADR is now providing a cost effective resolution through the courts, the Ombudsman’s department and in neighbourhood community justice centres, has made ADR the preferred method of dispute resolution in most instances.\textsuperscript{449} However, it was not until 1991 that the \textit{FLA} was amended to allow post-separated married couples to have property and spousal maintenance disputes arbitrated.\textsuperscript{450}

In a Report of the Joint Select Committee on the Operation and Interpretation of the \textit{FLA},\textsuperscript{451} it was recognized that the civil justice system in Australia, as in the UK and the US,\textsuperscript{452} was crippled by excessive delays and complexities, and needed a more sensitive pathway to resolving parental conflict and disputes.\textsuperscript{453} The Joint Select Committee’s Report\textsuperscript{454} recommended that initiatives be implemented to shift parent’s focus from a dysfunctional culture of aggression and ‘positional’ negotiation to child centred negotiations and the child’s best interests.\textsuperscript{455} These perceptions, Bamford notes, whether real or not, became a catalyst for procedural change.\textsuperscript{456} Recommendations made by the Joint Select

\textsuperscript{445} NADRAC at para [10.02].
\textsuperscript{446} NADRAC at para [10.02] ibid 15.
\textsuperscript{448} Mauro Cappelletti and B Garth, \textit{Access to Justice–A World Survey} (1978), Sijthoff and Noordhoff, 6.
\textsuperscript{453} ibid at p13,17.
\textsuperscript{454} Joint Select Committee on the Operation and Interpretation of the \textit{Family Law Act 1975,1992}.
Committee and reform agencies led to changes in the form of procedural, institutional and regulatory frame works of the legal profession.\textsuperscript{457} This also led to changes to the rules that govern the profession, as well as recommendations for legal education.\textsuperscript{458} These recommendations introduced a national model of professional practice rules in ADR, in the form of family conciliation counseling in the court system.\textsuperscript{459} True interest-based mediation was not introduced to family law proceedings until the early 1990s, and even then it remained voluntary.

By 2000, there were over 104 different statutes that referred to ADR;\textsuperscript{460} Sourdin noted this recognition proved that ADR, in the form of mediation was gaining approval.\textsuperscript{461} With judges relying more and more on case management to confine litigants to the relevant issues within a case, there was a distinct shift from litigation to pre-trial settlement.\textsuperscript{462} However, the use of judges in court-annexed mediations was creating issues, with Sir Laurence Street arguing that in using judges and court officials as mediators, there was a risk of compromising the court’s integrity to make impartial decisions, threatening public confidence in the court’s ability. His reasoning was that the role of the judge was not to facilitate settlement; instead, it was to adjudicate.\textsuperscript{463}

The enactment of the\textit{ Family Law Reform Act 1995 (Cth)} (\textit{Reform Act}), was premised on a number of objectives that sought to reduce the adversarial nature of family law matters and to encourage separating or separated parents to resolve their disputes using primary dispute

\begin{itemize}
\item \textsuperscript{457} Victorian Law Reform Commission, \textit{Civil Justice Review}, Report 14(2008) and Australian Government Attorney-General’s Department, \textit{A Strategic Framework for Access to Justice in the Federal Civil Justice System}. Also, Mediators who wish to issue section 60I certificates under the Family Law Act 1975 need to be accredited under the Family Law (Family Dispute Resolution Practitioners) Regulations 2008. Only accredited practitioners are afforded the confidentiality and admissibility protections under that Act.
\item \textsuperscript{458} Ibid
\item \textsuperscript{459} NADRAC, Above n 421 at p101. See also G Smiley and J Morrison, ‘It would have helped if we’d come earlier’, (1982), \textit{Family Court Research Report}, Principal Registry Library.
\item \textsuperscript{460} Tom Altobelli, Above n 6. Available at: <http://epublications.bond.edu.au/adr/vol3/iss1/3>; In Queensland, a Charter of Rights for ChildinCare’ is included as a schedule to the \textit{Child Protection Act 1999 (Qld)}, NSW has non-binding principles for children to participate in decision making regarding their care and protection in the Children and Young Persons (Care and Protection) Act 1998 (NSW) s9. Community Justice Centres Act 1983 (NSW).
\item \textsuperscript{462} Campbell Bridge, ‘Development in Mediation in Australia: The 5Cs of ADR’, (2012), \textit{Alternative Dispute Resolution Conference}, Singapore.
\item \textsuperscript{463} Lawrence Street ‘Note on the Detachment of Judges to Mediation’ (2006) 17 \textit{Australasian Dispute Resolution Journal}, 188. See discussion in Chapter One regarding impartiality.
\end{itemize}
resolution before litigation.\textsuperscript{464} The government hoped that by encouraging parents to use a process based on self-determination, that parents would reach more satisfying outcomes in their children’s matters. Other contributing factors to the amendments were the need to highlight that children were not property of the family, but that children had rights and parents had responsibilities to those rights. Part of those responsibilities was to provide the child with a meaningful relationship with both parents, where parents continued to share their parenting responsibilities post-separation. Most importantly, the changes were in response to the harm that family conflict was having on children and the need to protect all vulnerable family members from violence.\textsuperscript{465} While there may have been an assumption that the introduction of the reforms introducing primary dispute resolution (PDR) in Part III Reform Act 1995,\textsuperscript{466} could change people’s expectations and behaviours, the transition to PDR in the area of family law in Australia was marked by ‘fragmentation, duplication and confusion’.\textsuperscript{467}

\textit{C Introducing Primary Dispute Resolution}

The introduction of PDR in s14E\textsuperscript{468} of the Reform Act was necessary for all the reasons cited above, but mainly to bring about an attitudinal change to how parents approached dispute resolution.\textsuperscript{469} PDR, and ADR method, comprised mechanisms such as counselling, mediation, arbitration or other means of conciliation or reconciliation to resolve contested children’s matters.\textsuperscript{470} These processes were ‘formal or informal, assisted by a third party or unassisted, consensual or mandated’.\textsuperscript{471} However, despite the comprehensiveness of the legislation setting out the PDR scheme, Altobelli claimed that the legislation had no systematic framework.\textsuperscript{472} Its definitions and descriptions were left to individual interpretation and there was confusion as to which processes were consensual or which were

\textsuperscript{465} Rachel Field, Above n 457 ibid at p98
\textsuperscript{466} Michael Lamb, Stremberg & Thompson, Above n
\textsuperscript{467} Tom Sourdin, T Fisher and L Moloney, above n 37 16.
\textsuperscript{468} Similar to s60B Objects and Principles, FLA 2006: Primary Dispute Resolution Methods means procedures and services for the resolution of disputes out of court, including : (a) Counselling services provided by family and child counsellors. (b) Mediation services provided by family and child mediators. (c) Arbitration services provided by approved arbitrators
\textsuperscript{469} Tom Sourdin, T Fisher and L Moloney, above n 37 17.
\textsuperscript{471} ibid at p1
\textsuperscript{472} ibid at p19
compulsory. Altobelli notes that while all PDR’s are intended to be voluntary, court ordered counseling and conciliation became compulsory. The lack of systemic definitions of PDR in the legislation and regulations, and the wide range of processes meant that each process was regulated by a different set of regulations, practices and policies. This also meant that different service provider agencies needed to develop a ‘mindset’ on how to practice PDR, formulating distinct ideologies, prescribed language and individual procedural framework. With this lack of co-ordinated procedures, and with no national governing body to regulate the process, nor a uniform system of practitioner accreditation, enforcing standards or developing quality improvement strategies was piece meal. This led the Attorney General’s department in 1998 to conclude that in order to protect consumers from political and administrative injustices, regulations were necessary to standardize the use of PDR.

Inspired by the report, Every Picture Tells a Story, (discussed in chapter 3) and recommendations made by the House of Representatives Standing Committee, which suggested that parents were not using PDR to its full benefit, the government introduced reforms to the FLA Part VII in 2006, in the form of shared parenting and mandatory FDR. The rationale to convert PDR to a mandatory process and introduce a pre-trial assessment regime at the beginning of the family separation process was an initiative to promote a less adversarial culture that maintained a child’s right to have a meaningful relationship with both parents after separation. This, the government hoped, would provide families with an opportunity to re-structure their dispute and subsequently reduce the risk of parents and children entering a cycle of dysfunction.

473 Counselling and conciliation is compulsory, mediation is voluntary, per Altobelli, above n 423.
474 For counselling, see s62F, for conciliation see s79(9) Act and Order 24 rules(1)–(3); Also see T Altobelli ‘Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?’ (1997) 11 Australian Journal of Family Law 55 at p42.
475 ibid p3
477 ibid p40
478 ibid.
479 Daryl Williams Above n 417 at p22
From Primary to Mandatory Family Dispute Resolution

The need to reduce inter-parental conflict post-separation prompted institutional changes in the FLA from litigious-based approaches to dispute resolution to private based but mandatory dispute resolution in FDR.

In 2006, the FLA made several extensions to the 1995 Reform Act that was intended to consolidate the requirements of the family law amendments.\(^{484}\) With the establishment of a network of 65 Family Relationship Centres offering families in crisis arrange of services that included FDR,\(^ {485}\) the government hoped to bring about a cultural shift to how family separation was managed.\(^ {486}\) With the notable inclusion of s60I FLA, the government made FDR compulsory in all contested children’s matters, with the notable exceptions of those matters assessed unsuitable because of issues of violence and abuse.\(^ {487}\) FDR referred to varied and fragmented approaches to dispute resolution, an alternative process to litigation.\(^ {488}\) FDR was defined broadly in the FLA as any non-judicial process where an independent FDR practitioner helped people affected, or likely to be affected, by separation or divorce, to resolve some or all of their disputes with each other.\(^ {489}\) These dispute resolution processes included mediation, conciliation and arbitration. In practice, mediation was the key process used in FDR.\(^ {490}\) However, the biggest change was the creation and support of the practitioner’s new evaluative role in FDR.

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\(^{485}\) FRC’s provide: family mediation, family relationships services such as counselling, parenting education, relationships skills courses, financial advice and help-line.


\(^{487}\) 60I(9) of the Act, if your matter is urgent, if the Court is satisfied that there are reasonable grounds to believe that: there has been child abuse and/or family violence by a party. (b) the court is satisfied that there are reasonable grounds to believe that: (i) there has been abuse of the child by one of the parties to the proceedings; or (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or (iii) there has been family violence by one of the parties to the proceedings; or (iv) there is a risk of family violence by one of the parties to the proceedings.


\(^{489}\) FLA 1975 (Cth) s10F.

Practitioners are now expected to manage FDR using an evaluative/facilitative form of mediation; that is, practitioners must evaluate whether or not parents are making a genuine effort or each an agreement that is suitable to the child’s specific circumstances, is child focused and in the resultant plans reflect the child’s best interests. In 2004, the NADRAC produced a discussion paper, *Who Says You’re a Mediator? Towards a National System for Accrediting Mediators*. The paper outlined the challenges for practitioners and made recommendations for the development of mediation standards and qualifications. There recommendations made in the paper amounted to creating an accreditation body to authorize FDR organisations to accredit their practitioners and to set standards to monitor and review the practice of FDR and provide complaint and disciplinary processes for the sanctioning of practitioners. However, FDR services and agencies varied in their approaches and underlying philosophies. Despite the fragmentation in accreditation and the plethora of accreditation systems, FDR as a private dispute resolution method maintains the core tenets of self-determination and empowerment, and promotes the elements of autonomous decisionmaking for parents; for practitioners, it promotes neutrality and confidentiality of process. Definitions and discussion of these principles were provided in Chapter Two of this thesis. It will be argued in the next section that despite the introduction of the FLA Regulations in 2008 regulating practitioner accreditation requirements, the level of education and training of practitioner’s is outweighed by their responsibilities to minority and Indigenous families. That is, the level of education and training to meet the accreditation requirements for FDR do not meet the level of responsibility that a practitioner’s role carries to manage culturally competent FDR.

**E The Practitioners’ Accreditation**

This section will argue that the changes to the *FLA* in 2006—which included the introduction of a two-tiered system of rights, the introduction of mandatory of FDR in suitable contested children’s matters, new measures for the protection of vulnerable members of the family and the introduction of culture as a right for children—also changed the role and

491 The National Mediation Conference is a biennial conference of Australian mediators in Brisbane.
492 The Australian Government Attorney-General subsequently made a grant to the National Mediation Conference in Darwin in 2004.
493 Part VII *FLA* s60CC.
requirements of the practitioner. This section will briefly look at the accreditation requirements and the inclusion of culture as a factor for consideration by practitioners.

While the responsibility for practitioners in regards to changes in family law (between the Reform Act 1995 recommendations to use PDR, and the introduction of mandatory FDR in 2006 FLA exponentially increased the practitioners’ responsibilities as far as their new interventionist role, educational requirements and responsibilities concerning the child best interests), their training to meet the needs of minority and Indigenous parents have not changed accordingly. As at as 2004, debate about whether practitioners needed standardized training was still raging; the only mechanisms for enforcing standards were federal and state government funding criteria and code of practice, ethics and conduct standards. However, there was no national enforcement agency. As a result, Australian standards for PDR practitioner competence remained very much ad hoc.

Concerns there were ‘no professional structure form mediators’ led to the tri-agency collaboration to formulate a national accreditation system for professionals working in Family Relationship Centres. The system was aimed at ensuring practitioners met a suitable level of competence to apply acceptable legal and ethical standards, and to ensure that issues of impartiality, conflict of interest and confidentiality prominent in traditional mediation practices, became general requirements of the practice. In an attempt to resolve these concerns about accreditation standards for mediators, in 1991 the Law Reform Commission (‘Commission’) stated in their recommendations on mediator skills and training that, ‘the role requires knowledge and skills of a distinct process’. While the Commission recommended training for practitioners to reduce the risk of harm to clients by incompetent and unethical practitioners, the Commission did not recommend legislation. Government reforms with the Family Law Regulations 1984, under the FLA amending family mediation standards and accreditation of practitioners, came in to force in June 1996 as part of the

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496 Legal Aid Commissions, the Family Services Council and NADRAC.
498 Susan F Law, above n 63162–171, 162.
500 ibid
greater *FLA* reforms. They standardized the practice of mediation processes and accreditation for practitioners. Evenso, as Benjamin notes, while standards of ‘consistency, quality and public protection’ are necessary, the process’s confidentiality makes quality control of serviced delivery problematic. Benjamin suggested that organisations should standardise the qualification of professionals and the practice of mediation to improve the ‘clarity, workability and flexibility’ of the process. Albeit by the government requiring practitioners to develop specialty knowledge, skills and competence in the field, the government in advertently set a standard for professionalism and legitimacy. By adhering to a code of professional ethics and the tenets of self-determination, autonomy, confidentiality and neutrality, practitioners achieve a high standard of practice.

While training is a necessary part of any professional instruction, there is also an argument that it is not necessary or practical to insist that all practitioners train to meet a particular standard. The argument against standardising practitioner competencies, concerns the possible effect that making rigid regulations could have on the flexibility of FDR and the diversity of practitioner innovation of practice. Despite this knowledge, consultations with NADRAC and the Family Law Council affirmed that insufficient training restricts the practitioner’s abilities to evaluate relationships or shift conflict towards constructive interaction. They require that all practitioners obtain accreditation to meet the changing demands of the position.

However, the debate about standardising accreditation for practitioners also had negative repercussions. In practice, the move to standardize professional qualifications meant that only
those with legal or sociology degrees could practice mediation. According to Wade, the culling of personnel working in PDR gave those with the relevant qualifications a monopoly in the field. The main reason given for this prohibition was that practitioners from non-English speaking backgrounds, and those practitioners who were Aboriginal and Torres Strait Islander, lacked English language proficiency and thus would fail to meet the tertiary qualification requirements. The exclusion of mediators from Aboriginal or minority groups working with families meant that the standards and norms of the profession became standardised to white western notions of dispute resolution and parenting practices. Astor suggests that the regulations reinforced the middle class bias in favour of well-educated mediators from the majority culture, and reaffirmed studies by Wade that PDR was a service more suited to white middle class families. While the government partially waived the restriction on Indigenous mediators to allow them to work with Indigenous parents, there was some suggestion that having a culturally suitable mediation model for Indigenous and minority parents might be more effective to meet the needs of parent so from non-mainstream cultures. This insight was important because it revealed that the inappropriateness of the mediation model was recognized over 30 years ago; and yet little has been done to rectify the practice.

Practitioners who now want accreditation, must meet the educational requirements in the Family Law (Family Dispute Resolution Practitioners (FDRP)) Regulations 2008 (the FDRP Regulations) and satisfy the prerequisite entry requirements of having an undergraduate degree or higher qualification in psychology, social work, law, conflict management, dispute resolution, family law mediation or equivalent, a diploma in conflict management or a certificate in mediation, to enrol in the Vocational Graduate Diploma of FDR. Alternative requirements consist of a person having appropriate qualifications or accreditation under the National Mediation Accreditation Scheme and completing the six core units from the CHC80308 Vocational Graduate Diploma of Family Dispute Resolution.

512 ibid at p296.
513 ibid at p306.
514 Attorney-General’s Department, 1997, Delivery of Primary Dispute Resolution Services in Family Law August: 30 transcripts 262.
516 Wade, above n 504.
517 NADRAC, in its report Primary Dispute Resolution in Family Law, to the Attorney-General’s office.
518 CHC83108 Vocational Graduate Diploma of Family Dispute Resolution.
equivalent). These regulations involve participation in at least five days of family mediation practice training and at least 10 hours of supervised FDR. Yet, there are no requirements for practitioners to develop cultural competence. While the 2012 Vocational Diploma requires practitioners to ‘Develop approaches to include cultural and human diversity’, and develop an understanding of the importance of culture, the training only includes being culturally aware and respectful towards parents and co-workers from a minority or Indigenous cultural background. The competence categories do not include specific cultural training on how culture affects the child’s development. The focus of the competence categories is on providing domestic and family violence support to minority and Indigenous clients. Astor argues that family disputes assessed with having a history of violence or abuse should not attend FDR, because they exacerbate the imbalance of power, endanger the safety of vulnerable parties (usually women and children) and make consensual decision making impossible. For practitioners assessing whether the case is suitable for FDR, the practitioner must have regard to whether the parties can ‘negotiate freely’ without fear of violence and with relatively equal bargaining power. However, culturally contextualized conflict is much more difficult to detect and manage, and requires specialized training. Therefore, while the inclusion of cultural awareness is a positive move towards culturally efficient FDR, the new regime of practice does not address the growing concerns that FDR is not suited to minority and Indigenous clients.

(i) Practitioners’ Legal Obligations

In recent years there has been a shift away from litigation to self-determining processes like negotiation and mediation and this has raised the profile and liability of practitioners managing these conflicts. Since 2008, practitioners have to meet practice standards that emphasise the need practitioners to meet a level of competence in technical and tertiary knowledge, and ethical understanding. These competencies are defined in Division 3 FLA

520 Family Law Regulations 1984 (Cth), Reg. 58.
521 CHC80308—Vocational Graduate Diploma of Family Dispute Resolution 2012.
522 Helen Astor, Above n 493. Also see Legislation now requires Practitioners to be confident that the parties can attend FDR to discuss their issues: Family Law Regulations 1984 (Cth), Reg. 62.
sections 10F-10K\textsuperscript{525} and set out the legal obligations of practitioners. 10F of the \textit{FDRP Regulations},\textsuperscript{526} provide that practitioners are to ‘help people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other’,\textsuperscript{527} and to remain independent of all parties at FDR.\textsuperscript{528} However, Rhoades et al. observed that many practitioners believed their overriding legal obligation was to ensure that in any discussions relating to the child, that the child’s best interests become the paramount consideration in contained in s60D, and s60CC relating to the child’s best interests and encouraging parents to consider equal time share with the child and to engage in equal shared parental responsibility for their children.\textsuperscript{529} Further provisions are contained in \textit{FLA} sections 63DA(1)-(3) outline the practitioners role as advisors and sets out the details a practitioner must provide to parents when considering the best interests of a child, among these instructions in s63DA(3)(c), that parent must allow the child to be involved in occasions and events that are of special significance to the other parent and this includes cultural practices and special traditional and religious events. Practitioner’s legal duty to the child will be discussed in more detail below. In facilitating discussion between the parents in FDR, practitioners now have a duty to evaluate whether parents are negotiating in good faith and assess the genuineness of those negotiations.\textsuperscript{530} Once practitioners assess that a parent has failed to meet the standard of ‘genuine’ negotiation; that is, negotiating to achieve a child focused result, practitioners are authorized to issue s60I certificates \textit{FLA}, indicating that parents can seek litigation. Marshall notes that practitioner competence is necessary to manage power relationships in FDR to ensure that parties are able to negotiate freely, at the same time maintain their own distance so that they do not breach their duty of independence.\textsuperscript{531} However, what constitutes genuine effort is not defined in the \textit{FLA}.\textsuperscript{532}

\textsuperscript{525} 10F. Definition of family dispute resolution; 10G Definition of family dispute resolution practitioner; 10H. Confidentiality of communications in family dispute resolution; 10J. Admissibility of communications in family dispute resolution and in referrals from family dispute resolution; 10K. Family dispute resolution practitioners must comply with regulations

\textsuperscript{526} Family Law (Family Dispute Resolution Practitioners (FDRP)) Regulations 2008, s10F

\textsuperscript{527} FLA s10F.

\textsuperscript{528} FLA s60F.


\textsuperscript{530} Rhoades et al Above 507 at p 56


Practitioners therefore rely on their own subjective judgement about the effort made by parents, at times leaving the practitioner vulnerable to criticisms of bias and unprofessionalism.\textsuperscript{533} In a highly emotive area of family law, it is expected that there will be aggrieved parents who are not satisfied with the plan, the process or the manner in which the practitioner managed the session.

Additionally practitioners have a number of practice procedures that require the practitioner to assess the suitability of FDR for the parents.\textsuperscript{534} These include the giving of instructions to parents about confidentiality, ensuring the safety of parents by screening for violence or abuse and detecting issues relating to culture, language and religion that are vital to the maintenance of consistency and protection. Nevertheless it is these very concepts that make it hard to monitor the process of FDR. Bush noted that, ‘The absence of any structure of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners…’\textsuperscript{535}

While the practitioner cannot provide parents with legal advice unless they are a legal practitioner, practitioners conduct their practice in the shadow of the law,\textsuperscript{536} because practitioners must explain the principle of the child’s best interests, reconstructing the provisions in lay terms for parents. This requires practitioner’s to have varied competencies and to be efficient in managing FDR. Armstrong notes that practitioners should develop specific knowledge of ‘cultural, religious, language and structural factors’ to facilitate the child’s right to culture in FDR.\textsuperscript{537} While the practitioner’s legal obligations are limited to an advisory role, there are no mandatory standards governing practitioners.\textsuperscript{538} However, they do have numerous ethical obligations. Ethical considerations are those carried by the practitioner and related to the practitioner’s personal, professional and cultural background.

\textsuperscript{534} Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 29
\textsuperscript{536} Family Law (Family Dispute Resolution Practitioners) Regulations 2008-REG 28 Information to be given to parties before Family Dispute Resolution 1 (a).
\textsuperscript{537} Susan Armstrong, ‘Culturally Responsive Family Dispute Resolution in Family Relationship Centres’ (2009) 13 Family Relationships Quarterly 3, 5.
(ii) Practitioner Ethical Obligations

Where as the legal obligations of practitioners area some what new addition with the amendments of the 2006 FLA and the introduction of Regulations in 2008, the ethical principles affecting the practitioner’s role have been well established over many years. Today, a practitioner holds several roles simultaneously: child advocate, evaluator and facilitator, and their obligations have correspondingly increased. The obligation practitioners believe is the most important in FDR, concerns the practitioner’s ethical obligation to act as an advocate for the child, by focusing parents on the child’s needs and interests. Simultaneously, practitioners have a cluster of obligations relating to FDR that they must observe when facilitating dispute resolution discussions between parents, the principles of neutrality or impartiality and independence that relate to the practitioner, and their associated principles of self-determination and empowerment that enable parents. How a practitioner balances between these concepts provides legitimacy to the practice of FDR.

In FDR, practitioners bring to the role transferable skills gained from socio-economic status, occupation, gender, culture and religion and professional experience and training. Practitioners as cultural beings import their own views about parents and their dispute, and how the dispute should be resolved. Together, these constitute the practitioner’s cognitive frame work, affecting their perception of the world. Cohen argues that practitioners believe they can enter mediation as ‘blank slates’, being totally objective with no prejudice or need to re-evaluate their position. He notes that one must be mindful of ‘our core values and world view’ and have an understanding of one’s own internalized biases to effectively deal with others. However, while the notion of neutrality and consent are cornerstone of western liberal notions of justice, Bogdanoski argues that in light of a ‘weakening theory of consensualy’, for example with the introduction of mandatory FDR, practitioner neutrality

541 Donna Cooper and R Field, Above n 533 ibid at p221
544 ibid
will provide legitimacy to the practice.546

While most practitioners have adopted neutrality as a principle guiding their practice,547 there is still much debate about the concept of neutrality, both in a definitional sense548 and whether it exists in any absolute sense in FDR.549 Astor noted that neutrality demands we examine the practitioner’s context and culture, identity and values and their impact on disputes and dispute settlement in order to distinguish appropriate from problematic mediator behaviour.550 While neutrality and impartiality are thought to be synonymous, they do not mean the same thing: neutrality is unbiased behaviour, while impartiality refers to an unbiased attitude.551

Empirical studies552 suggest there is also a divergence of thought between the rhetoric and the actuality of neutrality. A study conducted by Rhodes et al. in 2007 on the different expectations of family lawyers and FDR practitioners around FDR, suggested that each group of professionals was working towards achieving different goals. The lawyer’s primary responsibility was to their client’s best interests, as opposed to the FDR practitioner who spoke of taking an ‘impartial’ or ‘neutral’ position when working with both parents. Where as the practitioner’s primary duty lay in facilitating discussion with both parents, the practitioner’s responsibilities were aimed at achieving the child’s best interests. The practitioner’s ethical duty to the child was paramount over that of parents. Therefore, the neutral space claimed by practitioners was that space occupied by the child.553

There are benefits for the practitioner in remaining neutral in FDR, primarily to allow parents

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546 Tony Bogdanoski, ‘The ‘Neutral’ Mediator’s Perennial Dilemma: To Intervene or Not to Intervene?’ (2009) 9(1) Queensland University of Technology Law and Justice Journal (QUTLJJ) 2636.
548 Two generally accepted synonyms are discernible: neutrality as impartiality and neutrality as even-handedness.
550 ibid at p156
self-determination of their own children’s plans. As an interest-based process, parties in FDR are encouraged to negotiate with one another on the basis of their underlying ‘needs, desires, concerns, and fears’. By adopting this approach, parents (with the aid of the practitioner) are able to identify dispute issues. This allows for the generation of options, enabling the parents to see a better option for their children’s future interests. In this process, the practitioner is intended to remain neutral as to the outcome of the parent’s decisions. However, the question then becomes can a practitioner retain neutrality in light of a plan that does not reflect the child’s best interests? A study by Rhodes et al. suggests that practitioners had varying commitment to the principle of neutrality. The study found that a number of practitioners were prepared to intervene to ‘reconstruct ideas and behaviours’, citing that their role as advocate for the child meant they must intervene to ensure that plans made for the child reflected the child’s best interests. In contrast, other practitioners were committed to the principles of neutrality, preferring to respect the parent’s arrangements for their children. These practitioners tended to emphasise the idea of ‘empowerment’ or ‘self-determination’ for parents, repeatedly defining neutrality as one of the main characteristics of their role. The concern of those practitioners was in facilitating FDR without aligning with one side or the other, and not imposing their own judgements on parents. Even so, Boulle states that in recent years, there has been a trend for practitioners to take a more proactive role in FDR, and this too has influenced the process/content distinction.

In matters concerning violence, neutrality raises particular significance for the victims. Field argues that facilitator neutrality inferring respect for the self-determination of parents in reaching an agreement contextually satisfying to the family circumstances is increasingly being questioned in its application to FDR. She called the concept ‘a myth’. Field suggests this is because practitioners in their claim to redress power imbalances between parents, do not place enough weight on the fact that relationships of violence and intimidation are built

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555 ibid pp 117, 40.
556 Uniting Care Unifam’s ‘Keeping Contact’ Program, which operates in Sydney and Parramatta (‘Keeping Contact’in Rhodes et al., above n 507 at p9.)
557 S. Armstrong, above n 531.
558 Astor, above n 530 at p21.
up over many years.\footnote{Rachel Field, 2005, ‘Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution’, Queensland University of Technology Law and Justice Journal (QUTLJJ) 2.} Despite Hart suggesting that mediation can produce long lasting and sufficiently fair parenting plans even in dysfunctional and violent relationships,\footnote{Barbara Hart, ‘Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation’ (1990) 7 Mediation Quarterly 317, 319.} it is suggested that practitioners are unlikely to reverse in a number of hours what many years of dominance and control have caused.\footnote{ibid p319. Also see the CFDR Report in Rae Kaspiew, John De Maio, Julie Deblaquiere and Briony Horsfall Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases Final report, (2012), Australian Institute of Family Studies at p2}

In line with the omission of neutrality from documents detailing the National Mediation Accreditation System,\footnote{Australian Mediation Association, Australian National Mediation Standards: Practice Standards (2007) cl 2 <http://www.ama.asn.au/Final_%20Practice_Standards_200907.pdf> at 4 June 2008.} research conducted by Douglas in 2008 concluded that neutrality cannot be considered a principle tenet of mediation because it has been found to be absent in both content and practice.\footnote{Susan Douglas, 2008, ‘Neutrality in Mediation: A Study of Mediator Perceptions’, (2008) Queensland University of Technology Law and Justice Journal (QUTLJJ) 7.} Douglas claims that despite results showing that practitioners believed FDR was a parent centred process and neutrality was a significant part of their practice, as a principle in mediation the claim of neutrality hid the reality of the practitioner’s impact on the practice.\footnote{Douglas Above 558, p139.} This is because a practitioner’s orientation of worldviews, paradigms, behaviours, and mannerisms will reflect in the way they conduct the process of FDR and this will impact on the process dynamics.\footnote{Morgan Brigg, ‘Mediation, Power and Cultural Difference’ (2003) Conflict Resolution Quarterly 20(3) 2, 87-306.}

Conceptually, practitioner neutrality is an ideology; in practice, evidence shows that it would be difficult for practitioners to assert they did not influence the outcome, as well as the ‘product of the content’.\footnote{Australian Mediation Association, Australian National Mediation Standards, ibid at76.} Taylor states that concepts of ‘power’ and ‘neutrality’ cannot be universally defined because they must be viewed and understood as highly contextual phenomena.\footnote{Alison Taylor, ‘Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process’ (1997) 14(3) Mediation Quarterly 215, 221. See also: S Cobb and J Rifkin, ‘Practice and Paradox: Deconstructing Neutrality in Mediation’ (1991) 16(1) Law and Social Inquiry 35, 45.} Neutrality therefore must be seen as a situated concept because it depends on the individual interpreting the situation. In reality, there is a blurring of the line between controlling process and content. This is because practitioners are in a position of influence,
and parents often look to the practitioner for guidance. In these situations, strategic interventions\textsuperscript{570} can help facilitate children’s rights to culture. As culture frames people’s experiences of conflict, not addressing culture in FDR becomes a source of tension, and the ‘culture question’\textsuperscript{571} becomes a major challenge facing practitioners.\textsuperscript{572} Brigg argues that culture is a, “notoriously vague and imprecise term”.\textsuperscript{573} In Addressing Aboriginal culture, Brigg notes that familiarity with culture is necessary to understand the behaviour of parties in conflict situations. He explains that culture is often reflected through the individuals understanding of the conflicted situation and this is further compounded by the individuals, ‘wider set of social, political, and material relations’ that include the individuals social, ethnic and traditional practices.\textsuperscript{574} However in accepting the, ‘culture as behaviour’,\textsuperscript{575} definition Brigg believes that mediators may stereotype individuals and over simplify the conflict.\textsuperscript{576} Understanding the uniqueness of culture within conflict resolution enables mediators to draw on their—‘technical ability and susceptibility of the self’,\textsuperscript{577} enabling the mediator to shift the power differentials within a conflict resolution.\textsuperscript{578} Armstrong argues that while a self-aware practitioner will instinctively be culturally responsive, practitioners are challenged to respond to ‘the richness and imitations of families’.\textsuperscript{579} For practitioners to be reflexive about their own cultural characteristics means they can guide their clients in a culturally responsive manner to find options that enable the client to develop culturally appropriate plans for their children. Accordingly, Hung asserts that a culturally competent practitioner will attain the four concepts of: non-partisan fairness; the degree of mediator intervention; role limitation; and objectivity.\textsuperscript{580} This enables culturally responsive practitioners to interpret and reframe mainstream cultural norms and values to parents, to help them help themselves.\textsuperscript{581} Then again, Marshall states that when practitioners use reframing techniques in mediations, they are

\textsuperscript{571} Hugh Miall, O Ramsbotham and T Woodhouse, Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts, (1999), PolityPress,63.
\textsuperscript{572} Morgan Brigg, Control Governance and Susceptibility in Conflict Resolution: Possibilities Beyond control, (2007), Social & Legal Studies 16:27-47, p28
\textsuperscript{573} Morgan Brigg, The New Politics of Conflict resolution: Responding to Differences, (2009), Palgrave Macmillan,43
\textsuperscript{574} ibid p 28
\textsuperscript{575} ibid p30
\textsuperscript{576} ibid p29-3
\textsuperscript{577} Morgan Brigg Above n 551 at p28
\textsuperscript{578} ibid p30
\textsuperscript{579} Susan Armstrong above n 531 at p32.
referring to a political activity. That is, by reframing a parent’s needs, wants and concerns, a practitioner diplomatically alters the language used by one parent to soften its effect on the other parent; thus redirecting the confrontational remark to make it neutral and palatable. Yet, this is not an unusual event in community dispute resolution practices. It is common practice to take an emotionally laden communication, reframe the content in a more non-confrontational manner, enabling the message to be directed to the other party, and not in anger or frustration. That is, it changes the way something is said, without altering its content. Benjamin argues that the mediator ‘takes the communication of a party, and without abrogating his or her meaning entirely, alters and redirects that meaning to allow more constructive use in the settlement process’. The benefit of practitioners remaining neutral or ‘true to themselves’, and not ‘aligned’ with the parents at FDR helps the practitioner to project an unbiased, professional stance, while not being cold or unsympathetic. This is important as it observes the tenets of parental empowerment and self-determination and encourages trust between the practitioner and parents.

F Practitioners Understanding of Culture and Violence

Augsburger noted that culture is a complex yet powerful construct in our society, affecting communities and individuals in distinct ways. Each culture understands conflict, violence, gender roles and power imbalances from its own perspective, based on its own system of values established through historical precedents. The interrelationship of culture, violence and conflict and the effects on individuals (usually women and children) within an intimate relationship presents complex challenges for practitioners at FDR. With an increased emphasis on informal processes and the principles of empowerment and self-determination, the possibility for negative consequences resulting for women and their children, and the likelihood that inappropriate plans are entered into as a result of fear, intimidation and

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583 Benjamin, above n 481 at 99.
585 ibid at p 239
violence, is great.\textsuperscript{587} In these situations, the practitioner’s skills, both observational and practice are important to protect vulnerable individuals subjected to long term, systemic harm.\textsuperscript{588} This section will address the screening safety protocols in the \textit{FLA} and the amendments to the \textit{FLA}’s definition of violence and abuse. It will then address the practitioner’s accountability to the child in these situations, to be culturally sensitive and appreciate the significance of culture for the family, but also culturally competent to understand the limits of facilitating culture for children.\textsuperscript{589} Then this section will address the skills a practitioner needs to be culturally competent.

While the current legislative framework of the \textit{FLA} requires parents to attend FDR before court, unless an exemption is available—that is, violence, abuse or any other factor that would put a parent or child in danger—the safeguards accompanying the changes to the 2006 \textit{FLA}, in the form of violence screening and assessment processes, may not be adequate to detect violence associated with culture.\textsuperscript{590} It is well understood in the literature that violence, whether within an intimate relationship or not undermines a relationship.\textsuperscript{591} It destabilises the principles of self-determination and party empowerment in FDR, causing power imbalances that would subject one party to the manipulation and demands of the other.\textsuperscript{592} Whereas violence and its effects can be recognised, violence in the form of cultural practices carry different standards: research conducted by Bartels suggests that the complexities of cultural practices often disguise family violence and abuse with notions of traditional cultural practices.\textsuperscript{593} The \textit{FLA Regulations 2008} Regulation 25 now requires practitioners to be satisfied that the matter is suitable for FDR before starting the process. While the processes of intake and screening procedures are intended to remove these cases from FDR, there will certainly be cases that are not detected and will enter the FDR system.\textsuperscript{594}

Despite violence screening being a priority for both FDR and the family court, many argue that violence screening does not always detect power imbalances between the

\footnotesize{\textsuperscript{587} Field, Above n 539. \\
\textsuperscript{588} Augsburger above n 557 at 181 \textsuperscript{589} Susan Armstrong, ‘Good Practices with Culturally Diverse Families in Family Dispute Resolution’, (2009) \textit{Australian Institute of Family Studies}, 48at51. \\
\textsuperscript{590} Dale Bagshaw, ‘Family violence and mediation. Does culture make a difference?’, (2008), Hawke Research Institute’s Centre for Peace, Conflict and Mediation University of South Australia, 1-14, p8 \\
\textsuperscript{591} ibid p17 \textsuperscript{592} Rachaelcha Field, above n 539 at p 6; see also Astor Above n530 at p45. \\
\textsuperscript{593} Lorana Bartels, ‘Emerging Issues in Domestic/Family Violence Research’, \textit{Research in Practice Report no.10} (2010), Australian Institute of Criminology,5. \\
\textsuperscript{594} Dale Bagshaw Above n 569 at p1, 8.}
parties,\textsuperscript{595} making true consensus to mediate impossible.\textsuperscript{596} Research suggests this is due to the efficiency of screening assessments relying on a number of factors, including: resource allocations; institutional policy; and the level of training of practitioners to detect, interpret and assess\textsuperscript{597} whether the matter involves a history of physical or psychological violence, and whether there are immediate safety concerns for family members. The comprehensive screening and assessment is intended to determine the suitability of the matter for a joint session of FDR. However, screening does not only happen as a pre-FDR process, but continues throughout the FDR, requiring the practitioner to make professional judgements on whether there is equal bargaining power among the parties, and whether the parties are able to freely negotiate. In the event that the matter is found unsuitable for FDR, the practitioner is able to provide the family with referrals to more suitable services, in the form of counselling, along with issuing certificates, enabling the parties to move to litigation.

While recent changes to the definition of violence and abuse in s4AB \textit{FLA}, have been broadened to reflect the multiple forms of violence and abuse, studies have shown that there are no clear markers that distinguish violence from cultural practices.\textsuperscript{598} Power differentials, self-determination and autonomy are not always detectable by conventional surveys, and this can have detrimental effects on the interests of ‘vulnerable third parties’.\textsuperscript{599} The new definition includes ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful’.\textsuperscript{600} The screening protocols in place within the family courts and FDR are still in their infancy, with training programmes for court staff and other service providers concentrating on the impact of violence and abuse on victims and the barriers to disclosure.\textsuperscript{601} There are no structured programmes for practitioners on how to detect culture, or harmful cultural practices; this critique highlights the importance of FDR screening for these matters. By not implementing culture specific screening regimes for practitioners,

\begin{footnotesize}
\begin{itemize}
\item Renata Alexander, ‘Family Mediation: Friend or Foe for Women?’ (1997) 8 \textit{Australian Dispute Resolution Journal} 255.
\item ibid p 16
\item Hilary Astor and C Chinkin, \textit{Dispute Resolution in Australia}, (2002) LexisNexis,2nded
\item FLA s4B
\end{itemize}
\end{footnotesize}
government risks practitioners using inappropriate identification methods to fit parents within a cultural stereotype.

While the legislation gives practitioners a wide discretion to include cultural practices under ‘other behavior by a person’, this requires practitioners to possess a level of understanding of the different cultural practices to differentiate violence from cultural practices and how culture can manifest as violence in family relationships. For practitioners, being culturally competent means understanding that the interpretation of violence is culturally contextualized and understood according to the community or sociocultural group to which it belongs. Developing rapport and cultural sensitivity by practitioners ensures practitioners address the needs of parents resulting from language barriers or disability. Cultural insensitivity represents one barrier for the provision of a culturally competent practice, research conducted by the Partnerships against Domestic Violence (2000) study found particular groups—like Indigenous peoples and women from non-mainstream cultures—have many barriers when coming forward about family violence. Aside from the fear of reprisal and the escalation of violence towards themselves and their children, the study found that victims were ashamed to discuss family violence. Many spoke of wanting to maintain family and community ties. Victims also had concerns about reporting violence and talking to police; one reason for this is the language barrier prevalent among these groups. Others feared being ostracized by their family, which would leave them without any support, financial or familial.

Anthropologists like Nader believe the introduction of private dispute resolution insituations where victims of violence have to mediate with their transgressor pacifies, even further, the weaker member of the relationship. That is, ADR encourages unequal power imbalances by benefitting the powerful party in reaffirming their dominance and control. This notion was

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602 FLA s4AB (1).
605 Partnerships against Domestic Violence–Annual Report 2000-01... Meta Evaluation Bulletin No 4-A Guide to Evaluation (June 2000); On Attitudes to Domestic and Family Violence in the Diverse Australian Community.
606 DVIRC Discussion Paper No.6 Above n 583 at p26
608 ibid
confirmed by Scutt when she said that as a confidential process, ADR lacked transparency, meaning that agreements cannot be reviewed, creating many opportunities for abuse. Scutt suggests that without public scrutiny of the process, there can be no protection or reform, further disadvantaging vulnerable groups in society, whether women or parents from minority or Indigenous cultures. However, Robert and Palmer argue that inequality and power imbalances need not render FDR processes inapplicable. They define that a practitioner’s role is to move the parties from dysfunctional and aggressive disputes to productive negotiation, which centres on their children’s best interests.

By refocusing parents, the practitioner balances the power between the parties to a point where each is given due justice. However, while bringing culture related violence to the forefront of society’s attention will help government to shift social acceptance of interfamilial violence, more is needed in terms of FDR policy and practice around culture and violence within the context of unequal gendered distribution of power and resources.

Further, the introduction of Section 4AB ss(2)(i) FLA extends its reach, to read, that, ‘preventing the family member from making or keeping connections with his or her family, friends or culture is an example of family violence’. In the context of culture, being an inherent element in a child’s development of an identity, in family separation and conflict, the child (the subject of contested FDR) is often denied the right to practice the culture of the non resident parent. This denial of culture (because parents are too conflicted about appropriate child rearing practices post-separation) can now be interpreted as abuse; that being, serious psychological harm as a result of violence.

As a natural consequence of parental conflict, children are often prevented from making a connection with others from that culture, including extended family and friends; this fits

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610 ibid


612 Simon Roberts and M Palmer Above n 590 p307

613 ibid


615 FLA s4AB(2)(i).

616 Abuse defined FLA(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence.
within the meaning of violence to a child. Practitioners managing FDR with families of diverse cultural backgrounds experiencing conflict as a result of cultural differences should be aware of how culture influences the dynamics in FDR, and how culture laden conflict serves to disenfranchise vulnerable parents in negotiations. This awareness will give perspective to the significant influence culture has on the parent’s ability to represent and advocate confidently, not only for their children, but also for their own interests. Developing cultural competencies for the practitioner will enable them to understand the legal implications of s4AB (2)(i), and the ethical obligations to support the child’s right to enjoy their culture. Correspondingly, an understanding of cultural difference—that is, the incompatibility of norms and values—will help practitioners self reflect on their own cultural preferences and develop an appreciation of how culture shapes the process of conflict resolution. This arguably meant that culturally competent and sensitive practitioners were also aware of their own limitations to understanding culture.

G The Practitioners’ Responsibility to the Child’s Best Interests

While Family Dispute Resolution Practitioners identified their legal duty was to the child’s best interests, studies show that practitioners believed that their professional obligation was to advocate for the child of disputing parents in FDR. The child’s best interest is a principle defined by legal institutions and combines cultural philosophies, religions and moral standards. That is, the principle mandates that children’s best interests are distinguished between a ‘positive’ right for adults to provide protection for the child in law, and, a child’s ‘moral’ right to have rights in the first place. Therefore, the philosophical consideration then becomes what types of rights ‘fit’ the child, to ensure the child is protected and respected.

The principle of best interests is culture specific and is embedded in the lifestyle of the child. As discussed in Chapter Three, the paramountcy element of the best interest principle

617 S Armstrong, above n 582 at p 9
618 ibid at p5
619 S Armstrong Above n 582 p15
620 ibid at p15
is derived from international law, and is the basis of all decisions made on behalf of children in family law in Australia. In circumstances where parents are entrenched indispute, the question becomes can practitioners shift the focus to child centred FDR and ‘the best interests of the child’? This is difficult to answer. The principle of the child’s best interests is central to the objectives of the FLA. However, the best interests are interpreted using a hierarchy of primary and additional factors found in s60CC, and in the Objects and Principles of section 60B, with culture being a factor within the s60Bprinciples. Research conducted by Bagshaw et al. in 2010, suggests that the legislative provisions considered in determining children’s best interests in s60CC FLA are confusing and difficult to apply in a specific child’s circumstances. By placing the best interests of the child in a multi-tiered formation of rights, the legislation has caused inconsistencies and confusion. That is, the best interest tenet is premised on the two primary factors found in s60CC: in ss60(2)(a), the legislation promotes the child having a ‘meaningful relationship’ with both parents; s60(2)(b) contains the right to safety. Decision makers and legal professionals placing more weight on ensuring that children spend time with parents than on safety, despite ss60(2A) specifically placing safety before meaningful relationship. 

However, for non-legal FDR practitioners, the duty is found under FLA sections Section60D, 63DA(1)–(3) ‘advisor’s obligations in relation to the best interests of the child’. These are limited to providing parents with information about the primary considerations found in s60CC ‘meaningful relationship with both of the child’s parents’; and protecting the child from physical or psychological harm. However in s63DA(3)(c) a practitioner in an advisory capacity is able to consider ‘occasions and events that are of special significance to the parent’, as being within the ‘meaningful’ time that a child spends with the parent. The implication of this subsection is that practitioners now have a duty to encourage discussion

623 United Nations Convention on the Rights of the Child, Article3.1: ‘In all actions concerning children, whether undertaken by...courts of law...the best interests of the child shall be a primary consideration.’
628 s63DA(3)(c): (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
in FDR on any topic that a parent considers culturally important and wants their children to share in, post separation. However, culture, as described in Chapter Two of the thesis, relies heavily on the practitioner’s definition and understanding of culture. Facilitation of discussion on culture for children at FDR subsequently becomes a matter of construction for the practitioner and depends on the practitioner’s interpretation of what age-specific practices are appropriate and in the child’s best interest for that particular child.

Nevertheless, the *FLA* has placed culture as a secondary consideration behind the list of interests which prioritise children’s rights to contact and protection above their participation rights. Participation rights are those rights that enable the direct participation of the child in any civil, or political event, such as the right to be heard under Article 12 and s60CC(3)(a) of the *FLA*, or any social or cultural event such as religion, play or cultural practices. By placing the child’s rights to participation secondary to those of protection, that is, the child’s need to maintain a relationship with the parents and the safety of the child, as opposed to participating in culture, the legislation has restricted any innovative interpretation of cultural rights to an obscure framework of ‘needs’ and ‘best interests’. Any consideration of culture in FDR becoming a parental prerogative and on whether the right in s63DA(3)(c), understood contextually within a framework of family and age appropriate development, is considered to be in the child’s best interests by the practitioner.

### H Conclusion

The evolution of ADR to PDR to FDR was necessary, not so much to change procedure, but to change the mind set of parents and professionals that litigation should not be the first
thought in dispute resolution. However, the amendments in 2006 were said to be revolutionary in that they made a once voluntary process of ADR now mandatory in FDR for parents in conflicted children’s matters. In becoming the key dispute resolution process in family law, the real question became, whether FDR can accommodate the cultural diversity of families in Australia. With more and more parents from indigenous and minority background using FDR, the practitioners understanding of culture has been put into question. While studies conducted by Rhodes et al\(^\text{637}\) and Armstrong,\(^\text{638}\) above, show that culturally sensitive practitioners using FDR can accommodate innovative dispute resolution methods to bring about culturally responsive plans, practitioner with little or no training in conducting FDR with parents of non-mainstream cultures has the potential of placing the child’s rights to culture in jeopardy.

The chapter found that a key advantage to the introduction of mandatory FDR in the 2006 FLA reforms was that it took most contested children’s matters away from an over burdened court system and placed the decision making within an environment that encourages parents to develop cooperative parenting solutions. However the chapter named a number of key concerns to the introduction of mandatory FDR and changes to the role of the practitioner. Firstly, the practitioners new evaluative role; a critical element of this concern is that practitioners that once considered neutrality and parent self determination to be the cornerstones of their profession are now being asked to assess the genuineness of parents negotiations in FDR. Asking practitioners to ‘judge’ whether parents are negotiating in good faith and in a child focused manner, puts in doubt whether the concept of neutrality and self determination actually existed in FDR.

This chapter discussed the legal and ethical obligations of practitioners. Practitioners—despite their legal duty to help parents resolve ‘some or all of their dispute’ and provide advice on the framework of the child’s best interest, were found to be governed by their sense of obligation to the child’s right to maintain a meaningful relationship with each parent and the overriding right to safety.

The chapter discussed the need for practitioners to become culture competent and culture

\(^{637}\) Hilary Rhodes et al Above n 600
\(^{638}\) Susan Armstrong Above n 582.
sensitive in order to understand and appreciate the child’s rights to culture and the need for parents to formulate a culturally responsive plan for their children. The chapter addressed the need for practitioners to understand and interpret the amended definition of violence and harm in the 2012 FLA in order to understand that the ‘obstruction’ of culture for a child is now considered an act of violence towards the child. Further still, with the understanding that culture shapes meanings, from one’s perception of child rearing to the way one understands justice and conflict; understanding culture for a practitioner meant; they could understand the subtle cultural underpinnings that form the power differentials between parties, ensuring the appropriateness of FDR in the circumstances of the dispute and the safety of all parties. However the chapter concluded that the placement of culture as a secondary right in s60B (2) (e) and s60CC, behind the primary rights of time spent with parents and safety meant that practitioners focused their understanding of best interests on these rights, leaving the bulk of the discussions in FDR, including the child’s rights to culture, to parents.

This chapter has outlined that legislation has now recognized that a culturally competent practitioner require specific skills, ‘an amalgam of abilities, aptitudes and awareness’.639 Now practitioners must meet a minimum level of educational and practice competence. While culture awareness is a prerequisite to attaining qualifications and accreditation for practitioners, culture competence training that enables a practitioner to understand the complexities of managing FDR within a cultural context, is not a requirement to working with families of non mainstream cultures. This deficit in the training of practitioners means that the provision of culture for the child in FDR and the ultimate success of the legislation to develop a culturally competent family law system now depends on the practitioners awareness of culture and their sensitivity to the child’s cultural needs.

This chapter and the previous three chapters have provided the basis for the hypothesis that children’s rights to culture are not being facilitated in FDR. However it is necessary to conduct empirical research to confirm this hypothesis. The next chapter will outline the mode of conducting qualitative research in the form of semi-structured interviews and then set out the logic behind such research.

639 Susan Armstrong Above n 582
V THE RESEARCH METHOD

A Introduction

The previous three chapters provided a context to assist answering a complex question: does FDR facilitate the child’s rights to enjoy their culture? The prime focus of this chapter aims to outline the qualitative research methodology used to answer this question. The chapter will explain the rationale behind the research and the type of data collected. It will further outline the theory and the challenges encountered during the research.

B The Rationale for the Research

In general, this thesis attempts to further our understanding and knowledge about the complexities of children’s rights to culture within FDR, by highlighting the conventions of practitioner’s who manage FDR. FDR is a field of practice that is both legislatively regulated and observes practice policy standards in the management of dispute resolution practice. In response to the 2006 amendments, FDR has become the main dispute resolution system in Australia, managing responsive services, and engaging parents from many cultural groups. The primary goal of qualitative research here is to understand specific communities and people.

The research focus is therefore on the discourses of practitioners that reveal their conventions. Given that FDR is a confidential and private process, any insight obtained from these discourses will aid our understanding of the process, its practitioners and the challenges and constraints imposed on the management of FDR. FDR has been critiqued in Chapter Four as a process based on western white ideologies of dispute resolution not suited to the needs of minority and Indigenous parents. Therefore, a systematic and detailed analysis of its practices towards the cultural rights of children is particularly important.

While there is a broad range of literature on the benefits and challenges of FDR, and the cultural responsiveness of the person-practitioner, there is very little relating to how FDR facilitates children’s rights to culture. As a relatively new field, FDR is now the main source of dispute resolution in Australian family law. Practitioners are the main source of identifiable information on the workings or management of FDR in relation to minority and Indigenous parents. Therefore, empirical research is necessary to reveal practitioners’ reflexivity and appreciation of
the relationship between their own cultural competence and children’s needs for culture, and to assess whether and how FDR facilitates this right. For these reasons, the methodology will focus on the knowledge base and perceptions of practitioners of FDR, in relation to why children need culture—if they do at all—and how (and whether) FDR can facilitate such rights.

C Methodology

Methodology can be interpreted as ‘an integrated system of ideas, values and principles, which together determine the object of research, the method of inquiry and the analysis of data’. This study will take the form of a qualitative research study using interviews. The interviews are intended to evoke meaningful responses that relate the practitioner’s understandings of the subject under research. Interviews look for meaningful and culturally salient responses by the practitioner that attempt to enrich our knowledge base. Qualitative research methods, in contrast to quantitative methodologies, attempt to discover what is assumed to be a dynamic reality, while focusing primarily on understanding the specific as opposed to generalized behaviour. Qualitative research asks ‘why’ and ‘how’ questions: in this research the ‘how’ will relate to the practitioners’ management of FDR and the ‘why’ will be answered when practitioners reveal why they do not facilitate culture for children. The purpose of this study is to determine: does FDR facilitate the child’s rights to enjoy their culture? Qualitative research aims to understand a research problem from the perspective of the people it involves. By understanding these views, it is possible to develop new knowledge of the practice of FDR and the role of practitioners. There search findings will be used to encourage policy changes, enabling the facilitation of culture for children, as granted in the UNCRC and the FLA Part VII.

D Rationale for using Qualitative Methodology

641 Richard Tewksbury, Qualitative versus Quantitative Methods: Understanding Why Qualitative Methods are Superior for Criminology and Criminal Justice, (2009), Journal of Theoretical and Philosophical Criminology, Vol 1(1) p39
642 Paul Gill, K Stewart, E Treasure and B Chadwick, ‘Methods of data collection in qualitative research: interviews and focus groups’, (2008) 204 British Dental Journal 291.
With any investigation, the overall design is essentially dependent upon the nature of the research question. A search project is unique, ultimately it is up to the individual researcher to determine what that ultimate question is. Russell and Kelly point out that good research questions spring from ‘researchers’ values, passions, and preoccupations. The questions developed for this study examine the practitioner’s perceptions about children’s rights and culture in FDR. That is, by using a qualitative methodology, the study attempts to gather data relevant to the interpretation of actions and experiences of practitioners working in FDR. This is important because practitioners are independent of the legal system that guides judicial decision making, making their decisions and mode of FDR management discretionary. In FDR, practitioners using skills to mediate between disputing parents to resolve ‘all or some of their disputes’ rely on their personal, professional and cultural interpretation of the situation before them: it is this interpretation that decides whether culture for children is notable to the child’s wellbeing and should be facilitated in FDR.

As an interpretive practice, qualitative methodology does not favour any one theory or any particular method of analysis, but attempts to understand the phenomenon holistically. On a technical level, Creswell defines qualitative research as an inquiry process. He argues that qualitative research uses multiple theoretical paradigms to explore social or human problems. These include a range of overlapping methods of information gathering or analysis: ethnography, interviews and oral history, phenomenology, grounded theory and/or discourse analysis. Qualitative research in the form of interviews is important because interviews assess the representational view in the field of FDR, and seek to understand the meanings of central themes particular to a particular field or participant. Interviews allow people to convey a situation from their own perspective and in their own words; they can be tailored to the specific knowledge base of the participant.

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FDR is not an open process, and only those involved in the session (practitioners and parents and on rare occasions, children) are privileged to the discussions. The topic subject concerned the accommodation of the child’s cultural rights in FDR, this question required the researcher to explore the practitioner’s level of culture awareness and sensitivity and whether practitioners were culture competent to manage culture responsive FDR. Therefore, the practitioner was the best source of information. By interviewing practitioners, it was hoped that information about how they managed FDR with parents from non-mainstream cultures would be revealed. By using semi-structured interviews, the study looked to develop social and cultural understanding and knowledge of the phenomenon being researched. Its objective was to understand the practitioner, as manager of FDR, their appreciation of children’s rights and their willingness to facilitate culture in FDR. The interview process is mainly concerned with discovering and then interpreting the practitioners’ understanding and assumptions, their views and concerns about children’s rights, culture and the structure of FDR, and whether FDR can facilitate the same.  

Qualitative research is a complex design and method of analysis based on the assumption that if one wants to understand a complex phenomenon, one has to consider the multiple ‘realities’ of those who experience it: the ‘insider’, in our case the practitioner. The study relied on examining how practitioners make meaning of children’s rights and culture, and how they varied in their answers and their interpretations of their experiences in FDR. Interviews also assessed the knowledge base, ideas and biases of practitioners working in FDR, how they ‘order, classify, structure, and interpret’ their realities, and then how practitioners act on these interpretations. A founding aim of qualitative research is to expose the ‘lived reality’, or constructed meaning of practitioners. By asking questions that require specific detail about the practitioner’s experience, about their knowledge of culture and what influences their FDR management, we are able to gain a deeper understanding of the sociocultural phenomena of FDR management. The understanding is deeper than with any quantitative method, such as a survey or a questionnaire.  

children’s rights and culture, the developmental tool for children’s identity. This feature of qualitative research is important because it furthers our understanding of FDR functioning, and the practitioner’s role within the process.

E Theories that Guide this Research

The theories that guide this research are social constructionism and sociocultural theory. These two theories attempt to explain the interconnectedness between the child’s need for cultural socialization to develop into a healthy adult, and the practitioners’ understandings of the same.

The use of social constructionist theory in this study is important because it acknowledges that children are a product of their ‘cultural, political and historical’ environment within a specific time and place. Social constructionism posits that, apart from the traits we inherit from our ancestors and the differences in how we develop, everything else that makes us human is created, advanced or destroyed by the interactions we have with others. As Steedman notes, most of what is known and most of the knowing that is done, is concerned with trying to make sense of what it is to be human, as opposed to scientific knowledge. Individuals or groups of individuals define this reality. Reality is socially defined and refers to the subjective experiences of everyday life, and how the world is understood, rather than to the objective reality of the natural world.

Children’s competencies and identities are dependent on the manner in which adults, parents, practitioners and society in general, view children and childhood. Mayall addresses the relationship between childhood and children’s rights, and proposes that to understand the social condition of childhood, we need to study ‘children as a social group and childhood as a social phenomenon’. She posits this will shift adult understandings of the child and redress the

660 Martyn Hammersley, What’s Wrong with Ethnography? (1992), Routledge.
662 B Mayall ibid at 247
child’s needs, by promoting their rights. In the context of FDR this is important, because the child remains invisible as an autonomous being and parents are charged with making parenting plans that affect the child’s long term wellbeing. The construction of children as less than ‘rational’, as dependent and lacking competence, justifies adult actions on their behalf. Understanding children understood from this narrow perspective influences institutions to make policies and formulate practice, as well as theories and beliefs that regulate children’s lives.

Most traditional views of knowledge have taken for granted that people know ‘a’world and that knowledge live’s ‘in the mind’ or in the consciousness of an individual, and that reality exists ‘in the world’. In their landmark study, *The Social Construction of Reality*, Berger and Luckmann argued that all knowledge, including the most basic, taken for granted common sense knowledge of every day reality, is derived from and is maintained by social interactions. That is, knowledge is in part generated by interaction between individuals, but also between individuals and existing knowledge and individual’s interactions in the world. When individuals interact, they do so with the understanding that their respective perceptions of reality are related. As people act upon this understanding, their common knowledge of reality becomes reinforced. As this common sense knowledge is negotiated by individuals, human types, meanings and institutions come to be represented as part of a subjective and an objective reality. That is, the reality of a group, community or organisation. Social constructionism advances that children’s reality and knowledge is constructed through their interactions with family, school and those of their community. If children are removed from that environment, their reality is changed.

Berger and Luckmann argue that some aspects of reality are generated and institutionalized through the interaction and socialization of individuals. On an institutional level, family relationship centres (FRCs) were created by the 2006 amendments to the *FLA*, and place authority in the hands of a ‘community of knowledgeable peers’. These ‘peers’ are the practitioners of FDR, who use the knowledge derived from a ‘community’ or body of individuals

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663 B Mayall Above n 655 ibid
667 ibid
668 ibid
670 Peter Berger and T Luckmann, Above n 645 at 20.
who agree about the truth. It can be said that FDR, as a body of knowledge, is one such community, with this knowledge base being disseminated throughout the practice, and its norms and assumptions adopted by all practitioners. Thus, practitioners can claim they are experts in the field of FDR because they possess the knowledge. For Berger and Luckmann, socially shared understandings not only describe reality, but also shape reality. That is, a common practice or understanding between individuals becomes their reality and anything outside that reality is foreign.

Social constructionism explores the development of shareable social constructs between members of a social setting. Sociocultural methods explore relationships. Central to this study are the practitioner’s understandings of the relationships between the effects of culture on the dynamics of disputing and peacemaking, and on culture as it relates to the child’s development and wellbeing. Cole looks at cultural traditions and norms as constructs that help individual’s ‘functional cognitive systems’. These constructs are shaped through a group’s activities on a needs-by basis, and determine the characteristics of a particular social group, as well as being shaped by that group. Understanding child development from a sociocultural perspective requires an examination of culture in everyday life. This includes: looking at the way people use tools and how technologies affect people; their involvement in cultural traditions and practices; the structures that house people; the institutions of family life and community practices. All of these elements affect the child. Sociocultural theory, in relation to children’s cultural learning, describes that children attain ‘higher order functions’ (social, cognitive and cultural development) through the interdependent interaction and intergenerational teachings or transmission of culture to children from parents, caregivers and peers. Recognising development as a sociocultural process has important implications for policy, curriculum and pedagogy. In FDR, the practitioner’s cultural responsiveness and abilities to respond to the child’s rights to culture reflects the practitioner’s understandings of culture’s importance to child formation.

673 ibid
676 ibid
677 ibid
Recruitment and Sample Size

The recruitment strategies used in this research were purposeful or criterion-based sampling: the participants invited to take part in this research were those persons most suited to answering the research question.679 The practitioner was found to be the most suited for the purpose, for two reasons: firstly, practitioners are the managers of FDR, working with parents in contested children’s disputes and evaluating whether parents are negotiating in good faith, as discussed in Chapter Four. Secondly, the subject matter concerned children’s rights to culture and whether and how these were discussed by the parents. As the process does not allow for direct child participation to assess their views on a culturally responsive parenting plan, the practitioners became the best source of information on the causes and effects of culture in FDR.

The process of recruitment started with a list of FRCs, the Legal Aid Commission and private practitioners from around Australia who worked with minority or Indigenous parents (the focus group). The list was compiled with the help of my supervisor, who had previously completed research in this area. This list included the names of centre coordinators and information about who might also be interested in taking part. Other areas of possible recruitment came from the Attorney General’s (A-G) database and the online FDR register: both comprise registered FDR listed practitioners working with non-mainstream families. Other sources included my work experience. As a legal practitioner working primarily in Family law and Conferencing with the Legal Aid Commission, I had a good idea of the firms suitable in this area of the law. The search for potential research participants also included telephoning centres and private firms in areas like Lakemba, Punchbowl and Bankstown in the Sydney metropolitan area with a high concentration of minority groups. Names and addresses were compiled, and then over 100 letters with details of the research went out, inviting participation. This was followed by telephone calls to introduce myself as the researcher and to give those individuals who appeared as potential participants a brief insight into the research.

Letters are a formal method of introducing the research and the researcher, as they clearly outline the name of the project, the necessary confidentiality statements, the time and possible location of where the research may take place. The letter also included relevant information about ethics approvals, confidentiality and consent forms. Telephone calls followed the letter of

introduction. During the telephone conversations, practitioners responded promisingly; however, actual agreement to participate was low. When it appeared that responses were not strong, a second telephone call was made approximately four weeks after the first to FRC managers, the larger law firms and some of the private practitioners who had already declined the invitation, asking them whether they could give me names of practitioners to invite. This also produced a few names who were also invited to participate. From actual feedback and from what I could surmise from conversations with invitees, practitioners rejected the invitation to take part in the research because time was a major problem and that their workloads were already heavy. Others indicated that they had already participated in a number of research projects and this made them feel ‘over researched’, justifying their rejection of our invitation. However, the majority of responses indicated that although they did work in areas with minority and/or Indigenous groups, these groups did not use their service. A number of practitioners offered possible suggestion for why minority and Indigenous parents may not use the service, the main reason was that FDR was not a common practice of how these groups would resolve their personal family disputes. These comments were also documented but not used without the permission of the practitioner and went to validate later comments made by practitioners within the study. Consequently, these practitioners did not have the relevant experience to participate in the study.

The sample size was not large, but reflected the many different institutions that provided FDR for families. There was a good cross section of the practitioner population as far as specifications were concerned. They ranged in gender, age, professional and cultural background, and were from a mix of provider services, Legal Aid, private firms, Angli-care and Catholic-care in the Sydney area. FRCs were from around the state with one participant from Queensland. The final number was 30 practitioners.

According to Morse, sample size depends on a number of factors, ‘the quality of data the scope of the study, the nature of the topic, the amount of useful information obtained from each participant, the number of interviews per participant, the use of shadowed data, and the qualitative method and study design used’.

According to Morse, sample size is relative to the question being investigated, the time allocated for collection and data gathering; this cannot be estimated in advance of the study. The time factor is important because the thesis itself had time restrictions; the university was funding the study and so each stage of the study had to

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be scheduled, organised and timed. At the end of the six months allocated for the research, the results generated from the sampling size of 30 practitioners had generated the in-depth data required to gain insight into the practitioners’ understanding about culture, allowing the researcher to draw valid inferences about the research phenomenon. Whereas the final number of responses reflected the FDR community’s ability to share their views, in qualitative research the quantity of participants is not important, but quality is. Guest et al. suggest that ‘although the idea of saturation is helpful at the conceptual level, it provides little practical guidance for estimating sample sizes for robust research prior to data collection’. 681 As a general guide, Bertaux states that in qualitative research 15 is the smallest acceptable sample. 682

(i) Saturation

Saturation is a term used to announce the ‘adequacy’ of the data generated, when the data no longer provides new information, or when the data is sufficient to enable ‘development of meaningful themes and useful interpretations’. 683 When the researcher can find no more new information and the theory appears to be strong with no apparent gaps or unexplained phenomena, then saturation is reached. In this study, data from 30 practitioners provided enough information for the researcher to produce these themes and interpretations. After intense reading, reporting, listing, entering facts within codes and theme, and then forming sub-themes, the generation of anything new diminished to the point where the researcher was re-reading and rehearing the recordings to ‘fish’ for new information. It was at this time that all the raw data appeared to be carefully placed with meaningful categories in readiness for inclusion into the thesis body. At this stage, the researcher was convinced that the data was saturated.

Nevertheless, the idea of saturation has been criticised for possible bias. That is, who decides when saturation has occurred in any particular research? The answer seems to be the researcher. However, when writing up the findings chapters, and during discussions with supervisors, some data within the code themes was found to contain more information than initially interpreted, and so this generated more and different themes. This is because different

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683 Greg Guest, A Bunce, and L Johnson, ibid at 35.
researchers can have different views on the subject, and therefore saturation can be discretionary. According to Adelman et al., the knowledge that qualitative research produces is significant in its own right. The research results produced in this study confirm this statement. The material gained from this single study allowed for several hypotheses to be formulated and legitimate conclusions to be reached. These will be discussed in the research findings chapters that follow.

G Data Collection: Qualitative Interview

The data collected to answer the hypothesis was gathered from semi-structured interviews with practitioners. A variety of questions were asked that included the practitioner’s understanding of culture, the practitioner’s style of management, the interrelationship between the different parts of the FDR process (intake and main session, as discussed in Chapters Four & Eight), and questions to determine the cultural sensitivity of the practice. The interviews took approximately one hour and were recorded by a hand held micro recorder. Before the main interview questions were started, initial conversation with the practitioner included questions of an introductory nature about the facilities provided at the FRCs, what type of clientele came to them and about their experience with parents of minority or Indigenous cultures. These ‘breaking the ice’ questions gave the researcher an idea about the practitioner as a person, an insight into the practitioner’s professional experience with minority and Indigenous parents, and their attitude on culture.

There were 10 main questions. These were carefully formulated to lead to an understanding of why, how and what practitioners believed about children’s rights to culture, and whether this belief would lead practitioners to facilitate discussion on culture in FDR. During the interviews, some elaboration was necessary, requiring the researcher ask follow up questions to clarify an answer, or to seek ‘what happened then’, ‘how did you handle that situation’, ‘was the FDR successful’, type questions. These clarified and helped the researcher understand the culturally specific information about the values, opinions, behaviours, and the social understanding of practitioners in FDR. A technique was applied, used in FDR by practitioners,

where the answer is reframed by the researcher to make sure the intended meaning was clear, such as ‘do you mean…?’

The informal open ended style of question was found by the researcher to encourage discussion. The majority of interviews were face-to-face-style interviews; for those practitioners who were interstate or out-of-state, or for those practitioners who were short of time, telephone interviews were set up. However, the face-to-face interview was preferred as the researcher could see the manner in which a practitioner answered the questions. This indicated how comfortable the practitioner was with the subject matter: not just the literal meaning of the practitioner’s words, but how practitioners analysed the language of the questions and how practitioners constructed meaning. Further semi-structured interviews allowed for personal interaction between the researcher and the practitioner. In this way, the researcher identified the strengths and weaknesses in their answers; how strongly and how passionate a practitioner was to the answers they gave. This visually confirmed the practitioner’s commitment to their answers. This was important to assess how the background of practitioner and FRC policy affected the practitioner’s personal and professional physiology.

In obtaining the practitioners’ views, the researcher began to understand whether culture was facilitated in FDR and if not, why. However, in qualitative interviews the answers are not a pure ‘yes’ or ‘no’ answer, and much more information is generated along with the answers. In this research, two further important insights were provided: a number of practitioners noted they had never been asked questions on children’s rights before; and practitioners noted they had never thought about the subject of children’s rights to culture. Practitioners noted the questions asked in the interview drew attention to the complexity and importance of culture for children and the possible ramifications for children denied their culture.

H Researcher Reflexivity

One of the most influential and seminal writers about research Morgan, said that the most significant research questions need to be lived, and that research itself can be understood as

a practice journey. In research, we meet ourselves. Since the researcher is the primary ‘instrument’ of data collection and analysis, reflexivity in the researcher’s assumptions and pre-conceptions is essential to understanding the cause and effect of asking specific research questions and then in interpreting the data. By using a qualitative approach, the researcher will invariably project their own values, perceptions and experiences in the interview process. As Haraway claims, the researcher always limits and determines what can be seen. Objectivity is redefined by Haraway to mean that knowledge is partial and context situated. Therefore, the question is not whether the researcher affects the process, but for researchers to develop a protocol of self-assessment and acknowledge their own reflexivity. That is, researchers must recognise that the relationship between cause and effect is multi-directional, where the researcher’s values, beliefs, and interests influence the effect of the research, as the research affects the researcher. The following is a personal acknowledgement that the researcher’s aim during the research was not to allow any personal values to unduly influence the process.

I wish to acknowledge that this research was not merely an interest, but a passion. The researcher’s aim is to bring the subject matter of children’s rights to culture to practitioners of FDR and the managing institutions that provide services to separated or separating parents of all cultural backgrounds. As a legal practitioner supporting mothers and fathers from Indigenous and non-mainstream cultures at FDR, it became disappointingly obvious that culture for children was being skimmed over in lieu of time share orders. While I have a deep respect for practitioners and the work they do, I also recognise that FDR can be culturally sensitive and practitioners culturally competent to manage FDR with sufficient training. I believe that FDR is not just about parents not being able to resolve their dispute; family law itself is about the child’s rights and best interests. One of those rights is culture. While I acknowledge that safety must come first, I argue that discussion on culture need not lead to conflict and harm to the child. Having said that, as a Christian, Middle Eastern mother of five, I do understand the challenges that culture presents for practitioners in FDR and the potential for this to reduce the practitioner’s enthusiasm to inform parents of the child’s cultural rights. Thus, the understanding that practitioners in the majority, valued the child getting to know and enjoy their culture, it is also

689 Gareth Morgan (ed), Beyond Method: Strategies for Social Research (1983), Sage, 51;
691 ibid
692 ibid
suggested that practitioners require culture sensitive education to enable practitioners to develop culture competence. The lack of facilitation of culture at FDR, led to this research.

Two key understandings arise from this study (these will also be repeated in the implications chapter): that practitioner’s were focusing on helping parents resolve their dispute without giving much thought to helping parents address the child’s rights to culture; and secondly, not addressing culture in FDR is detrimental to the legitimacy of mediation practice and the long term effects on children from Indigenous and minority cultures. The practice of FDR is not a job, it is a vocation, and practitioners cannot stay neutral. While I recognise that most participating practitioners have extensive knowledge about the child’s developmental needs, sadly it’s also recognized that putting theory into practice requires practitioners to understand the complexity and diversity of contemporary culture, and that children require culture to formulate a healthy adult identity. As self-appointed child advocates, the neglect to recognise the child’s needs to culture was a derogation of this duty. My own position on the rights of the child to culture is undeniable. I believe, as a legal practitioner interpreting the FLA legislation s60CC (as I am sure many FDR practitioners have reasoned, even without the knowledge of the legislation), that the right is built into the primary consideration of maintaining a meaningful relationship with both parents, as well as the individual rights provisions in s60B. However, this is not enough to ensure children will have the opportunities they need to participate in cultural events and practices and to maintain, if not to grow, within a culture. Specific clauses must be formulated to include these. The way from here is to training. Knowledge is power, and FDR needs expertise; practitioners have FDR skills, now they need training to see past negativity and make a stand for the uniqueness and complexities of family relationships and the dynamics of culture for the child.

It is for the above reasons that I have challenge myself and my family (and my supervisors) for the past two years to bring this subject to the eyes and ears of those persons most in contact with disputing parents and those that have the means and opportunity to change the present state of FDR, the practitioner, the FDR managers and providers and hopefully the legislators who have the power to put in practice what should have been accounted for at the inception of the 2006 amendments to the FLA. However, I can in all honesty say that while my experience in the field initially set the framework for my research, the data and personal experiences with practitioners, despite working with many FDR practitioners in the past, has increased my admiration for them.
I Limitations of the Study

The main limitation of qualitative research is that it relies heavily on the skills, professionalism, and cultural background of the researcher, taking into account the researcher’s biases and individual idiosyncrasies. Other factors involve the researcher’s management skills to collect, maintain, categorise and then interpret the data, as well as the mode of data collection and the particular analysis technique used.\(^{693}\) The size of the participant sample is important as it is through that data we gain our knowledge. However, a limit was experienced due to the type of practice FDR is, with practitioners concerned not to breach their clients’ confidential material. Also, while many practitioners had worked in FDR for many years, as FDR does not keep records, practitioners relied on their memories for detailed accounts. Other limits include issues relating to data gathering, confidentiality and maintenance of anonymity for the practitioners, especially from a small office where a practitioner can be identified by just providing their views.

While some researchers state that qualitative research can establish an underlying reality in the subject matter, they also argue that all research involves subjective perceptions and that the same material, interpreted by two researchers can produce different perspectives.\(^{694}\) McMillan and Schumacher state that validity refers to the degree of congruence between the data generated from the particular phenomena and the realities of the subjects being researched,\(^{695}\) and on the researcher doing the research.

J Ethical Considerations

Over the past six decades it has been generally accepted that any research involving human subjects should be conducted using established and recognised methodological guidelines that include set questions, assessing the participant most suited to answer the question, obtaining ethical approval, and then conducting the research to the terms set out by the ethics committee.

This research follows and was approved by the University of Western Sydney (UWS) Human

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\(^{694}\) M Hammersley, What’s Wrong with Ethnography? (1992) Routledge.

\(^{695}\) JH McMillan and S Schumacher, Research in Education: Evidence-Based Inquiry (2006), Pearson Education.
Ethical Committee’s Guidelines, responding to their ethics procedures and standards that comply with established guidelines, such as the National Statement on Ethical Conduct in Humans Research (2007). The UWS Code of Practice follows the guidelines of the Australian Code for the Responsible Conduct of Research (2007) (ACRCR) together with the UWS Code of Conduct and Conflict of Interest Policy. The requirements of the ACRCR are for institutions to establish procedures and guidelines on good research practice and enforcement procedures if suspicions or allegations exist regarding research misconduct. All forms, questionnaires and approvals on how materials from the interviews were going to be handled, the process of collection, storage and retention, were all registered. All letters and questions were scrutinised and approved by the ethics committee before the invitations were sent to practitioners or FRCs. In compliance with these codes and guidelines, the data collected in this research was immediately named and coded; this was done to avoid memory mistakes, because of the material’s sensitivity. All primary materials and confidential research data are now kept in secure storage.

An important relational aspect of the researcher and practitioner relationship is the correctness of information given to the practitioner about the purpose, intended outcomes, procedures protecting the anonymity and confidentiality of the practitioner. In addition, all information obtained by the researcher must be safe, and the research limitations and benefits clear. All this information was given to practitioners in the formal letter sent to them in the introduction of the process. These factors enabled the practitioner to give informed consent and provide open discussion.

All practitioners were reassured about the maintenance of confidentiality and anonymity, and the disposal methods of all materials after the research was finished and published. Practitioners were also reassured that the researcher understood the sensitivity of the information sought from them, and that the personal opinions of practitioners

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696 From UWS webpage: ‘The broad principles that guide research have been long established. Central to these are the maintenance of high ethical standards, and validity and accuracy in the collection and reporting of data. The responsibility of the research community to the public and to itself is acknowledged. This responsibility is particularly important where professional practice or public policy may be defined or modified in the light of research findings’

697 ‘The Australian Code for the Responsible Conduct of Research (the Code) guides institutions and researchers in responsible research practices and promotes research integrity. It assists institutions in developing their own employee codes of conduct and procedures for the investigation of allegations of research misconduct by providing a comprehensive framework of acceptable academic standards’; University of Western Sydney

would not become public knowledge. This was to avoid harm to the practitioner by respecting the participant’s individuality and autonomy, with the intent of ensuring a relationship based on trust, mutual responsibility and ethical equality. Marshall et al. argued that open and honest disclosure of relevant information from the researcher will encourage a positive relationship between the researcher and practitioner. He also noted that the researcher’s role, level of participation and relationship with the participant can influence findings. Making the practitioner feel at ease meant practitioners were more likely to provide information about their individual and specific cases.

According to Field and Morse, conducting research in one’s profession raises ethical issues of validity and reliability of the data. The idea of conducting qualitative research in an area in which the researcher was familiar does raise possible issues and ethical considerations, such as knowing the procedures used in the centre or understanding the minority group the practitioner is speaking about. These all have the potential to cause an issue; however, understanding the situation from a legal practitioner’s view point is not the same as being in the session with angry parents, together managing disputes and at the same constantly refocusing parents to their obligation to their children’s best interests. The researcher understood the enormous pressure on practitioners and wanted to learn more.

However, the relationship between researcher and institutional body also placed restrictions on the type of information, and use of information. That is, with the need to maintain confidentiality and anonymity, some information could not be published, such as specific organisations or locations of participants.

*K Data Analysis*

Before true analysis of the data can be made, the data must be transcribed or translated from voice recording to text data. However, transcription does not merely put text to words, it is also an integral process of analysis, where the transcriber (in this study the researcher), decides what to transcribe and how to present the data. This has implications for the interpretation of research data. Transcription is the transformation process that connects the

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700 Peggy-Anne Field and JM Morse, *Nursing Research. The Application of Qualitative Approaches* (1992), Chapman & Hall.
interview material to the analysis. Analytically and methodologically, the word should match the recording. While transcription is often part of the analysis process, it also enhances the sharing and re-use of data.\textsuperscript{702} Miles and Huberman\textsuperscript{703} suggest that transcribing interviews immediately is important, as it enables the researcher to ‘re-hear’ the interview and transcribe parts that are difficult to understand, thus eliminating ambiguity. This method was used in this research: immediately after the interview, the researcher replayed the conversation and typed each word meticulously and faithfully.

Data analysis involves looking for meaning in the data collected and then systematically arranging that data into ideas.\textsuperscript{704} It often involves the synthesis and evaluation of the data, then the interpretation of the data, which leads to categorising the data into themes and patterned findings. The approach adopted for this research was the thematic approach; this method will aid in identifying the implicit and explicit ideas within the data.\textsuperscript{705} The initial reading and transcribing of the interviews identified themes and patterns in the research data that ‘jumped out’ because of their intense and critical nature; for example, when practitioners were overly critical or derogatory of culture or particular minority or Indigenous groups. This then allowed the researcher to develop coding categories. Wolcott argues that it is not just mechanical analysis; he calls data analysis ‘mind-work’. That is, the ‘researcher’s always engage their own intellectual capacities to make sense of qualitative data’.\textsuperscript{706}

With each interview being transcribed, themes and categories were already being formulated and recorded. There were many pages of transcribed information, and all of that information needed to be critically assessed, categorised and then carefully interpreted and synthesised into the themes, either already formed or created to suit the data. As an example, in this research the main theme was to discover patterns in the practitioner’s transcripts about culture, about children’s rights and what they believed their responsibilities were towards children’s rights and culture in FDR. This theme was distributed into three headings: practitioner appreciation of culture, practitioner understanding of cultural rights and practitioner understanding of child development and culture. The themes therefore related to: the practitioner’s understandings of culture; what children’s rights actually meant to them; dispute

\textsuperscript{702} ibid at 207.
\textsuperscript{703} Mathew B Miles and AM Huberman, \textit{Qualitative Data Analysis: An Expanded Sourcebook}, (1994), Sage, 2nd edt.
\textsuperscript{706} JA Hatch, \textit{Doing Qualitative Research in Education Settings} (2002), SUNY Press,148.
resolution and being culturally sensitive.

Initially, the themes or categories compiled were broad like ‘culture’, then categories were refined to address a subject matter like ‘how practitioners defined culture’ or ‘Indigenous culture’; each theme was given an identifiable name and each practitioner’s response was placed under that heading. Culture was chosen as a category, not only because it was the subject of study but also because the practitioners understanding of the meaning of ‘culture’ was the determinant factor in whether practitioners were culturally competent in a field where culture was becoming more prominent to the outcome in FDR. In identifying these themes, the researcher was able to begin interpreting the data by finding commonalities and differences between practitioner’s answers, as well as being able to analyse data from practitioners from different FRCs to see whether organisations had an influence of how practitioners assessed their role in the process of FDR. Then, the researcher began to compile what the researcher believed to be meaningful quotations to be used within the body of the findings chapters. In identifying recurring themes and concepts, the researcher was able to develop meaningful labels for the data and this aided in the analysis of information.

To help maintain consistency, validity and clarity of the themes, the researcher used the Nvivo research tool. Gibbs noted that the benefits of computer technology for analysis included organisation of the data, clarity and transparency of the process of analysis.\(^{707}\) By coding and decoding the material, disaggregating the data into manageable components and identifying concepts, categories and themes, the tool enabled the systematic recording of themes and ideas, and allowed detection of patterns in the data. Richards describes decoding as ‘coding that comes from interpretation and reflection on meaning’.\(^{708}\) Strauss and Corbin define coding as ‘the process of breaking down, examining, comparing, conceptualising, and categorising data’\(^{709}\) A thorough and well documented analysis distinguishes credible data from conjecture.\(^{710}\)

It is well understood that the role of the researcher in any research is to recognise that data obtained from interviews and observations are subject to wide variations. Researchers must

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\(^{708}\) Lyn Richards, *Handling Qualitative Data* (2005), Sage, at 94.
provide a balance of narrative between researcher and participant to avoid entangling knowledge and views. In addition, the data was invaluable to aid understanding of whether FDR was suitable in circumstances where practitioners were required to make technical interpretations relating to culture and child development. To further support this analysis, triangulation was used to accurately reflect the situation.

(i) Triangulation

Triangulation is a method used by qualitative researchers to check and establish the validity of their studies. Patton cautions it is a common misconception that the goal of triangulation is to arrive at consistency of data by using multiple perspectives; this is not the case. In Patton’s view, inconsistencies in data are what allow for questioning and opportunities for further research and discovery. Burns and Grove state that the aim of triangulation is to limit biases that can appear in the researcher’s interpretations, using a single method of measurement. The rationale is that if a hypothesis is tested using several sources and it maintains the same foci, then it can be said to have obtained a degree of validity as the research results are not method bound. In this study, the researcher compiled data using notes made during the interview, as well as the recorded interview. When all the interviews were completely transcribed, the data showed that while practitioners provided similar answers to some questions, they had very different outlooks on other topics. For example, from the corresponding questions on ‘what is culture’, the practitioners provided definitions, but also many single word variations to the definition of culture: these words were set in a list for comparison. This showed that practitioners named practices of culture more than any other identifying trait, but that there was no real consistency in the practitioner’s answers. Then relationship lists were made to connect practitioners’ personal and professional backgrounds with the type of answers they gave. This was interesting because it revealed that the practitioner’s professional background was very important to the type and depth of answers given. In explaining this, it seems that while legal practitioners had a more in-depth knowledge of the law surrounding culture for children, they gave the shortest answers to the questions. However, no valid correlations were made between the answers legal practitioners gave, so this

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712 Michael Q Patton, Qualitative Research and Evaluation Methods, (2002), Sage.
713 ibid
715 ibid
line of analysis was not pursued. Overall, there was a great deal of duplication in the views of practitioners from different FRCs on topics such as children’s rights and on the reasons why practitioners were not prepared to facilitate culture for children. As each interview was being recorded and transcribed, similarities in the data became evident, and this was the validation required to justify the hypothesis that FDR was not facilitating the child’s right to culture.\textsuperscript{716}

\section*{Challenges to doing Qualitative Research}

In research that involves exploring social phenomena and examining the meanings given by individuals of their experiences, in the absence of corroborating research, there is always a risk of scepticism about whether the data can firstly, produce an objective contribution to the synthesis of new information;\textsuperscript{717} and secondly, whether the power relations between the researcher and participant can be neutralised. It was these issues that were most challenging for the researcher.

The contribution to the synthesis of knowledge in the field of FDR, and an understanding about how FDR is accommodating the rights of children in general and facilitating the child’s right to culture in particular, is a contemporary theme that has not been addressed in any depth in Australia or elsewhere internationally. Generating new knowledge through the qualitative analysis of data gathered from interviews on practitioner’s reactions to culture at FDR will present a starting point for more research on the process, in relation to the practitioner’s understanding of children’s rights to their cultural identity. Understanding the ideological norms for post-separation families will help practitioners formulate a true idea of the best interests of the child in these circumstances.

Secondly, despite the fact that in qualitative research the researcher/practitioner relationship is one based on democratising the power relations between the two, and that there is an unsaid promise to share control,\textsuperscript{718} it is widely acknowledged by theorists that the researcher has power

over the subject in research. Power redistribution in qualitative contexts can lead to both ethical and methodological complexity. However, power is not always with one party, Karnieli-Miller et al. have identified a number of ethical dilemmas that pose challenges for researchers. In the initial recruitment stage, power is with the researcher, who decides what the thesis question is, what questions will be asked, how long the interviews will be, and in what form. The aim of this stage is to persuade participants to share the researcher’s journey of discovery. The second stage depends on the willingness of the participant to provide open and unreserved information. However, the unsolicited publication of that information, if the participant did not want the information to become public knowledge, raises ethical problems for the researcher. Data analysis and validation are two important issues that could raise several risk issues: the researched data collection and transcription, interpretation and what data to use all present ethical challenges. While it is recognised that interpretation is key in qualitative research, Halse and Honey argue that the practice of interpreting the data privately ‘usually secreted away, buried, concealed and hidden from public scrutiny, gives readers the impression that, “good” research is being done by “good” researchers’. Ethical dilemmas can arise regarding, consent, confidentiality, building rapport with participant and the anonymity of participants and disclosures. There are also challenges that arise from the actual doing of the research; that is, when doing long intensive emotional interviews affect the researcher’s health. The researcher was aware of these complications and was able to monitor the research and researchers personal health for these signs.

M Conclusion

Schram noted that the aim of qualitative research is more problem generation than problem solution. What he meant was one embarks on qualitative research with an idea, but it is a ‘contested work in progress’, and then one discovers new and important information.  

719 ibid.  
720 Orit Karnieli-Miller, Roni Strier, Liat Pessach, Power Relations in Qualitative Research, Qualitative Health, (2009), Volume 19; Number 2  
722 ibid.  
724 Barbara Johnson and J Clarke, ‘Collecting Sensitive Data: The Impact on Researchers’ (2003) 13 Qualitative Health Research 421  
726 ibid at 15  
727 ibid at 7
Evidence about the human experience has inherent limitations compared with data about human behaviour. Firstly, because experience is not directly observable, accounts and consequent data about events depend on the participant’s ability to recognise events as significant aspects of their own experience, and to effectively communicate those to the researcher. This is because people do not have complete access to their experiences; human experience is not a ‘mirror’ reflection of that experience. In addition, reflections on an experience serve to change the experience.\textsuperscript{728} This chapter followed the protocols of qualitative research methodology and presented the rationale for the research. That was to deduce practitioner’s thoughts, culture personal or professional on culture for children. The research process was described, including the semi-structured interviews, why practitioners of FDR were the target source of information, then how the data were correlated using a thematic approach to analyse. An important aspect of qualitative research was found to be the assurance of practitioner anonymity. It concluded that qualitative methodology was the best method to obtain in-depth understanding of FDR. Yet, FDR is still a relatively new process. It is hoped this study will lead to more studies that will prompt changes to FDR, to include culture as a routine question in FDR with all parents.

The evaluation of these aims will be addressed in the three findings chapters that follow.

\textsuperscript{728} ibid at 7
VI RESEARCH FINDINGS: CULTURE

A Introduction

This chapter, along with the next two chapters constitute the three parts of the research findings. Together they give an insight into whether ‘the process of FDR is facilitating the child’s right to culture’. In this chapter, the key research findings addressing the practitioner’s understanding of culture in relation to children will be synthesised. These findings are important; firstly, to show how important practitioners believed culture was to a child and how practitioners addressed culture in FDR and; secondly, to show what practitioners believed their role was in relation to children, culture and children’s’ rights to culture in FDR.

The data presented show that practitioners believed culture was an integral factor in the healthy development of a child’s emotional, social and psychological identity. Practitioners understood that culture is attained through intergenerational cultural transmission and this occurs along multiple developmental planes, both physically and psychologically, and through the mediums of family, school, social learning and language. The loss of culture is therefore understood to have detrimental effects on the child’s adjustments and healthy development. This understanding was the basis of the practitioner’s sensitivity to the effects of family separation and the loss of culture on the child’s wellbeing.

The interviews highlighted that most practitioners acknowledged children had rights to culture, however the dominant discourse reflected an adult focus, because practitioners believed it was the parent’s role to promote cultural connections or any other participatory right for the child, such as the right to make decisions or have an input to the FDR process. Practitioners believed their role was to help parents resolve their dispute. By resolving the parent’s dispute, practitioners believed they were enabling parents to fulfil the needs of the child to culture and indirectly affording the child their rights under the legislation.
While practitioners said they understood the importance of culture to children, many indicated they found culture complex and difficult to comprehend. To add to the complexities of describing and addressing culture, practitioners sometimes confused culture with religion, and had problems distinguishing between culture and the social norms of a community. The data suggests that some practitioners associated culture with fundamentalism, a lack of human rights and negative cultural practices that were harmful to children. This meant that practitioners were often sceptical about the need to promote the right to culture for children from minority cultures, in light of their negative stereotypical assumptions about the parents’ culture. In contrast, practitioners identified the importance of, and seemed prepared to promote, an Indigenous child’s right to know and enjoy culture.

The data suggests that practitioners characterised culture for Indigenous children differently to culture for the children of minority parents. Practitioners recognised the value of Indigenous culture, even though not many had worked with Indigenous clients. In contrast, practitioners believed that culture hindered the assimilation of children from minority cultures into mainstream society, and this was not in the child’s best interests.

This findings chapter is important because they identify the practitioners’ understanding of culture, how practitioners rationalised its importance for children, and the practitioner’s appreciation of children’s right in general. This chapter also provides the framework for discussions in the following two chapters concerning the rights of the child to culture, and the practitioner and process of FDR, respectively.

B The Practitioners’ Responses to ‘What is Culture?’

The focus of this findings chapter is on the practitioner’s understanding of culture. It builds on the literature review on culture and the child in Chapter Two. In general, practitioners provided many explanations of culture; however, there were two views of culture that informed most discussions. One view was that culture consisted of qualities that primarily instilled in children particular behaviours, values and practices, as illustrated here: ‘so the patterns of behaviour, the beliefs, the way people choose to do things’ [Grace]. Secondly, practitioners spoke of culture as being an all encompassing entity that included everything in a person’s life. For this practitioner, culture was listed as components that a person needed to
remain healthy, from the person’s interpersonal relationships to the food they eat. He noted:

Everything from interpersonal relationships especially within family. There can be strong affiliations with certain food groups and practices about expectations of gender roles and relationships between adults, how they perceive the role of kids and all those sorts of things. [Sam]

This approach of identifying culture as a matter of listing components is generally a simplistic insight into what culture is, and does not demonstrate a full appreciation of what children need from culture. It shows that practitioners are culture conscious; however, it also indicates that practitioners grasped at a range of practices to show how diverse their understanding of culture was. This limited view of culture as ‘practices’ devalues the concept to a level of mundane rituals. The next reflection of culture locates culture as an inherent factor in the formation of a child’s identity, as noted by this practitioner: ‘I think it’s just a foundation, its building blocks for a lot of children, they have a right to practice their religion, I just think it’s absolutely vital for forming their identity’. [Sue] This comment indicates firstly, the depth of thought that some practitioners took to describe culture. It also indicates that practitioners understood that culture was intrinsic to the child’s development and that children cannot develop effectively unless they have access to their culture. In addition, it indicates that practitioners were combining religion with culture (see below for discussion on religion).

Arguably, this was also the view of the UNCRC and a founding reason cited by the second reading speeches to the amendment to the FLA, as discussed in Chapter Three. Further, practitioners were reflecting on the complex dynamics between culture and the child’s identity formation, as culture in the protection of the child and as culture in the aid of the child’s transformation into adulthood. One explained:

I think when one perhaps looks at the whole cultural thing as well I think it’s a child’s right to grow and develop into a wholesome wonderful person and that might include that they have a connection with their culture, because culture is a sort of mirror into a particular community and to feeling loved and supported and all the relationships that flow from that’. [Sandra]

The analogy of culture being a mirror reflecting the cultural community of the child shows this practitioner appreciated the strong connection between culture and how children imagine themselves, seeing themselves as being a part of a community that supported the child and the relationships embedded within it. Practitioners understood that children needed to be affiliated with a cultural group, such as a family, to assume their identifiable traits. One
practitioner stated that ‘everything from interpersonal relationships especially within family’. [Sam] However, practitioners also understood that different cultures projected different images of the self differently, as noted here, ‘different sets of values with different sets of cultures’. [Bruce] In this practitioner’s assessment, children born into a family with different cultures had multiple influences. Culture can have an effect on the child’s emotional, cognitive and physical development, and can cause a child stress with each culture providing different insights into what was right and wrong, causing confusion. More importantly practitioners recognised that children need to maintain relational connections with a cultural group to become part of a culture.

However, practitioners appreciated that culture was not merely made up of ‘things’. As this next comment suggests, culture also constitutes a legal and ideological framework for relationships; ‘cultures define conflict, harmony, peace, development’ [Sam]. Culture here incorporates a body of conflicting ideas. However, these ideas reflected the aspirations of all people; going from a state of conflict to an optimum state of development. This definition also infers that culture as a phenomenon is in a constant state of flux. That is, as children move from home to school to social situations, they develop culturally constructed values and attitudes that change over time to help the child adapt to an adult world. As stated here, ‘culture is dynamic, it changes over time and what I found in practice was that sometimes when people went back home after 20 years or something the culture that they had left no longer existed, it moved on’. [Sally]

This statement was a strong indication of the reasons why practitioners had reservations about facilitating culture for children in FDR. As this practitioner noted, parents with a strong sense of minority or Indigenous culture are often caught up trying to maintain a culture they remembered as children. However, being away from their original country, they do not realise that their original culture had evolved to meet the changing needs of that country’s emergent population. In this comment, the practitioner did not believe that facilitating out-dated cultural practices would benefit the child’s best interests.

Then again, practitioners understood culture was not limited to innate objects, but was also the framework for children’s development. In this practitioner’s description, culture, unlike the legislation, was considered a primary consideration. He noted culture aided the development of specific ideas, behaviours, and values and was viewed as meaningful and
positive by members of a particular culture. He elaborated:

Culture is the primary consideration, culture gives the language or the identity of the person; its entitlements or needs become clearer; it has to do with formation; it has to do with right experiences and how to process the negative experiences; different sets of values; whole lot of deeper psychological variables that come into play. [Bruce]

In his summation, the practitioner did not actually name what he thought culture was, but listed the things or elements that constituted culture for him. He spoke of language, which transmits culture within a group, and entitlements and experiences that can only be understood by living a certain way of life. He spoke about values that hold a group together and how culture affects the child’s innate understanding of what to expect and what is expected of them within the family, or the social environment in which the child lives. In his reasoning, these were primary to why a child’s culture should be considered in FDR and parenting plans.

Practitioners reasoned that people conducted their daily life around their culture, speaking through their culture as their culture spoke through them, as described here, ‘look we live out there in a world this is what we all do, it’s the culture and the background we’re all from and live in and eat and sleep and breathe everyday’. [Helen] This practitioner believed that people lived their culture. Therefore, the socialisation of children in the community culture extends to learning the socially acceptable norms and standards of a group, as suggested in this comment, ‘[its’] the way that you deal with people, what’s right and wrong, what’s polite, what is not polite, what is considered to be the right and wrong way to behave, respect for elders’. [Grace] Practitioners reasoned that through these norms, children learn to draw meaning out of different actions and learn to act in specific ways. As this practitioner put it, ‘knowing [culture] from a perspective of “this is who they are” … and a connectedness to actually who they are as a human being’. [Greg] The connectedness this practitioner refers to helps children identify with a culture. This ‘being’ involves children developing an individual sense of who they are. Children’s identity has many factors and this raises the question of whether a particular culture can support the child’s natural growth and development. As one said, ‘culture being something that creates meaning for them (the child), how they identify themselves’. [Harriett] The support children receive from parents, friends and schools helps the child feel supported, and this encourages awareness of culture, develops confidence and individuality. This is important for children, because when children
develop a sense of belonging they feel accepted. This helps children develop attachments, usually to those closest to them, their parents and extended family. Primarily, practitioners concluded that moulding a cultural identity for a child involves a complex relationship between the physical and the indefinable or subtle cultural experiences of the family, as noted here; ‘culture is primary because that is what will give them happiness or security or sense of meaning or what to fall back on in crisis’. [Bruce] Culture in this sense was seen by practitioners as an all encompassing factor that gave purpose and security to a child. However, child development means an evolution of physical, physiological and psychological together to form a child’s identity, and this is supported by the different cultural relationships the child is exposed to.

Practitioners recognised that as children grow and develop their identity, they develop affiliations to groups other than their parents. These affiliations need not be to one group, but may be with many groups. For this practitioner, a child can have a ‘pop culture’ or ‘subculture’ culture(s) that intersect to influence the child’s cultural identity. He noted ‘so there are all these subcultures’. [Bruce] Practitioners spoke of children being drawn to others of the same culture, as illustrated by this next comment, ‘they’re [children] bunched up in groups, whether it’s Islanders, whether it’s Asians whether it’s Arab’s’. [Niles] As this comment suggests, the stronger the affiliation with a group, the safer and more secure and receptive the child is to the influences of that group. Therefore, they will be less receptive to other groups, whether institutional culture in the form of schools, or traditional culture derived from family. Therefore, practitioners understood that subcultural influences are strong, and in the case of a child not being culturally socialised within a safe, positive family culture, then children adapt their actions to suit the culture that provides them with nourishment, a subculture that will accept them, usually social or peer groups.

Practitioners associated culture with concepts like religion, which included values, ‘often culture is cross over with religion’. [Desiree] For one practitioner, culture was the ideological foundation for the beliefs of people. As she notes here, ‘cultural beliefs in regards to religion and cultural beliefs in regards to values’. [Debbie] She reasoned, like many practitioners that took part in this study, culture gave meaning and purpose to the person. Practitioners were drawing interconnections between the ideologies that guided the community, like religion, and culture as an entire way of life. This is illustrated in the following comment, ‘culture means to me more than an ethnicity, or more than their religion, more than the country that
they’re from, its more about the way, the pattern of behaviour’. [Grace] Additionally, this comment illustrates, ‘culture includes religious life, artistic, the festivals, it can include dress and music and language’. [Helen] As can be seen in these two previous comments, practitioners gave a wide variety of answers, and had difficulty pinpointing any definitive meaning to culture.

In their reasoning, practitioners named the sources of culture: the language the child’s parents spoke at home; the traditions, ideologies, even the arts (like music and dance) as ways of living or the ways children grow to learn about their family and environment and the about themselves. The explicitness through which cultural meaning was conveyed in the comments of practitioners suggests that culture is complex, and practitioners generally approached the discussion on culture for children with caution. There is no common understanding of culture that practitioners of FDR can work with. Most practitioners believed culture was not limited to any one element, but was a complex of meanings interwoven to give the distinctive elements of a group. Religion was defined in a number of comments by practitioners, and suggested that practitioners were conscious that religion is a powerful cultural element. Different cultures have different religions and these are based on the ideologies of that community.

The variety of views about culture led to the conclusion that, given that FDR is mandatory and practitioners are now seeing parents from a range of different cultures, not having a framework or criteria by which to address culture will make culture difficult to understand and difficult to work with in FDR. Although practitioners considered culture important, they also considered it was a parent’s role to introduce the subject in FDR. However, practitioners were also apprehensive about how parents might encourage culture for children, and this made them reluctant to facilitate culture in FDR.

**C Culture is Intrinsic to a Child’s Development**

The notion of children’s rights to culture and the inseparable link to a child’s development can only be understood within the context of the child’s family. The data shows that practitioners were aware of the culturally significant issues that affected the child and the implications that culture has for a child’s development. In general, practitioners were aware that children’s
socialisation and acquisition of culture happened on multiple levels: like Cohen’s analogy, culture is a computer program within the human mind. Depending on the program and the programmer, a person ‘receives, stores, organises and uses information’, and learns how, what and where to act. How well a child acquires culture depends on the child’s interpersonal relationships and the purpose of socialisation. Socialisation results in an embedded culture that is the collective understanding of a family or group, and that shapes the child. As this practitioner noted, children’s learning of culture does not stop because parents are separating, ‘generally parents have been together hopefully they’ve had a bit of time together before they separated so they’re already starting to find ways to decide how much they wanted their child introduced to a culture’. [Tanya]

Practitioners believed that the socialisation of the child starts from birth, and is carried out by the people around the child, usually the parents who are with the child constantly. The data also shows that practitioners considered culture to bring stability to a child, the subject of a contested parenting FDR. Practitioners believed that children benefitted from maintaining good relationships with both parents. The maintenance of culture in these conflicted situations became a grounding factor in the child’s life; the routines, practices, rituals, all maintain a level of order for the child. This gives children a level of security, as noted here, ‘culture is primary because that is what will give them happiness or security or sense of meaning or what to fall back on in crisis’. [Bruce] Practitioners believed the transmission of culture is achieved not only by example, but through language. As noted here, ‘language transmits culture and culture shapes who we are’. [Sam]. Language not only reflects or expresses one’s thoughts, but also shapes the very thoughts we wish to express. Early language learning for children therefore contributes in primaryways to learning in all other domains: linguistic, cognitive, social, and emotional, and makes learning at later ages more efficient and easier. Hence, practitioners noted that language reinforced the culture and made it more likely to be transmitted to following generations. In addressing the child’s need to acquire culture, this practitioner makes reference to the right of the child to learn their cultural language. She states, ‘I believe children have a right to understand the language of their parents’. [Sue] This is because practitioners understood that without language, culture cannot exist; as this practitioner mentioned, language is essential for the transmission of

730 ibid
culture, noting that language is the ‘carrier of culture’, and ‘if the language dies the culture dies’ [Sam]. For this practitioner, when children abandon or are not taught their family language they lose their attachment to the culture, and the values of that culture. In practical terms, practitioners understood that with children’s natural integration into the dominant culture through schooling, sporting or social or peer mixing, it was likely that intergenerational gaps in the native language would occur. Gaps in transmission will occur from generation to generation, and this will cause children to move away from a traditional language and therefore culture. As an observation, while culture can be transmitted to the child, culture cannot be translated for the child who does not speak the same language. Culture and language are intrinsically bound, so attempting to transmit cultural practices using a different set of cultural understandings or language is likely to change the meaning of the intended lesson. Culture for practitioners is a developmental tool for the child, ‘culture gives the language or the identity of the person is entitled or needs to become clearer on it has to do with formation’. [Bruce]

For practitioners, the importance of socialisation was that children learned to affiliate with a family or cultural group and this gave the child a sense of belonging. Practitioners’ understanding of culture has already been discussed earlier in this chapter; here discussion will concentrate on how they thought culture affects the child. With the multiple definitions given by practitioners, the one that best describes culture and children was, ‘it’s building blocks for a lot of children’. [Sue] This comment suggests that the cultural scripts (the cultural framework that make up the child persona), that internalise the characteristics and behaviours of the child are designed and reinforced by family and the cultural community. As this practitioner noted, culture gives ‘a child’s blueprints for living and membership to a particular group’. [Susan] These scripts gradually build on and develop as the child matures, emphasising the dependence on family and community and a gradual movement towards the child’s individualism, influencing the child’s identity.

The data shows that practitioners were mindful that children gained culture through acquired everyday learning. As this practitioner remarked, ‘I think part of being a kid is developing into an individual’. [Bruce] As this comment suggests, a child’s culture has many interconnected and interrelated parts and does not rely solely on parents. Children learn culture through observation and instruction, through reinforcement and participation in their daily activities. Practitioners, reinforcing the anthropological view that the mind, if not literally a ‘blank slate’,
is an unbounded and unbiased learning machine, understood that as children mature they learn
to interpret and distinguish different cultural activities for themselves and this helps them take
on the traits that become their distinguishing characteristics. As one noted, ‘I mean knowledge
of it, and understanding the dances and the songs and the stories and things like that at a
child’s level may be useful, my feeling is that it probably won’t be until the child is mature
that they start to identify with a culture’. [Sally]

For another practitioner, children acquire an identity by being allowed to make choices,
‘children will make up their own decisions to the direction they wish to take’. [Connie] One
practitioner made the connection that ‘children’s rights now are children’s choices later’.
[Brea] This is an important observation because practitioners were mindful that the cultural
effects on children are life long. The connection that culture develops a child’s identity and
that transmission of cultural patterns in any society is an on going process of pooled learning.
As noted here, ‘I think that’s an on going journey of learning’. [Susan] This demonstrated an
understanding by practitioners that the role of culture in the process of child development
should be accommodated. That is, socialisation of culture must be flexible enough so the child
can embrace their past, but not so restrictive as to hinder their future development, ‘the
developmental needs of children have to both be connected to their history but also to be able
to move into their future’. [Greg] As this practitioner stated, ‘child’s culture is primary
because that is what will give them happiness or security or sense of meaning’. [Bruce] In
family separation, where relationships are broken apart, the practitioner’s cultural
competencies can focus separating parents on their child’s trauma and interests to produce
amicable parenting arrangements, making practitioners ethnographers of the families they
help. The data shows that practitioners were mindful that culture for children can also
manifest in conflicting situations. Where parents are from different cultural
backgrounds and there is conflict in relation to the child’s cultural upbringing, then
practitioners begin to view culture as the basis of the conflict and it becomes a matter of
‘them’ and ‘us’ or the ‘other’.

D Practitioners’ Role in Family Dispute Resolution with Parents of ‘Other’
Cultures

The primary objective of this section is to evaluate what role culture plays in the practitioner’s
management of FDR with parents of ‘other’ cultural backgrounds; that is, other than the
mainstream culture.

In one account, when asked should practitioners consider culture in FDR, this practitioner noted, ‘I am from a western culture, so I’m always very conscious of something that’s different to how I was raised’. [Harriett] This statement illustrates the collective reaction of practitioners in this study. It shows that practitioners were aware that to understand culture they must first be aware of their own sociocultural limitations as a professional group that manages culturally contextualised dispute resolution. This attitude varied according to the practitioner’s own cultural orientation and beliefs about culture, and their attitudes towards how important culture was for children. As one explained, ‘I think I’ve always been aware of the need to consider culture, as I’ve got an Aboriginal background so I’ve never not been not aware of culture’. [Mick]

On another level, practitioners did acknowledge that when dealing with parents from cultures different to their own, they were aware of their own ethnocentric attitudes. As this practitioner notes, ‘in my own practice I have to remind myself sometimes that the way in which I view the world isn’t necessarily the only way’. [Wendy] With this understanding, practitioners draw attention to the fact that they were conscious of the different cultural perspectives that parents come with to FDR. In this next comment, the practitioner warned against practitioners relying only on the dominant culture paradigm, ‘everyone should be aware that culture plays an impact on our lives, even if it’s the modern culture because otherwise people are under the facade that this is the only way that life is or this is the right way’. [Bea] She believed that ‘people’ have varied cultural scripts and each is as worthy as the other. While she was not addressing cultural differences of opinion on children’s cultural upbringing or the disputes between parents in FDR, this practitioner was speaking about being culturally aware. Her comments consider that there are many different cultures, some conflicting in their ideologies and others more compatible. However, she also refers to modern culture, suggesting maybe it is a neutral culture that has evolved as a result of modern times. These views suggest that practitioners have a wide perspective on culture.

Being open to new and different ways and meanings is realistic, otherwise people have a tendency think their perspective is the only right view, and all others are unacceptable. As this practitioner noted, ‘people get an agenda but often that’s adversarial and often that’s focused on the adults rather than the child’. [Bruce] In general, practitioners understood the
impact of culture on human understanding; they believed that understanding cultural difference is important because culture pervades all negotiations, especially emotive negotiations at FDR. One practitioner had felt first-hand the effect of being different to the parties at FDR. As noted here, ‘cultural difference between the clients or even between myself as an FDR practitioner and the client’ [Tom].

The data indicates practitioners considered that when speaking about culture, they were referring to parents other than parents from non-mainstream cultures, ‘we look at that from a non-western culture not mainstream culture where often those parents don’t even think about culture at all, they just assume their children will be brought up a certain way’ [Henrietta]. The reasoning behind this comment is that the mainstream culture is everywhere. Our education systems, our political systems, our economic systems, media and technology all portray mainstream culture. Naturally a child will absorb what is around them. However, it appears from these comments that practitioners were aware of the differences—the ‘us’ and ‘them’—and preferred the norms of the dominant culture, rejecting the cultural habits of parents from ‘other’ cultures. In unconsciously accepting mainstream norms and standards in FDR, it shows how powerful is the influence of mainstream culture on all people within it, even minority and Indigenous. This also meant that practitioners were inadvertently taking on an elitist position by stereotyping parents as being not within the normal standards of mainstream child upbringing. In another light, most practitioners’ comments show that practitioners were challenged to accept that parents from mainstream culture had culture: mainstream culture was just a ‘matter-of-fact’, as this next comment suggests: ‘[I] recognise that people come from a different cultural background rather than just the average white Anglo-Saxon thing’. [Sam] This reasoning played an important role in defining why practitioners oriented their practice to mainstream cultural practice.

The view of most practitioners was that culture was so natural it should not be subjected to legislation. As this comment suggests, culture is something that occurs throughout the child’s lifetime, from infancy to death. As stated here, ‘so I don’t think it should be enforced or legislated I think it should be invited, and I think that’s a person’s journey in their life’. [Brea] In accepting that the perpetuity of culture is proportionally linked to the aspiration of parents to hand down their culture to their children, then culture becomes a private matter to be dealt with within the family.
Practitioners believed that culture for children was a parental obligation, and the facilitation of culture for the child rested with parents wanting their children to know and enjoy the culture, and not as a result of legislation. Conversely, practitioners were also aware of the limits to respecting the parent’s cultural orientations. This practitioner noted that parents in FDR often try to promote ‘what the family expectations are back in the home country that is actually perceived as being inappropriate or possibly an illegal act here in Australia’. [Greg] In this situation, the practitioner was pragmatic on what standards he should apply in FDR; his response was that any cultural or religious practice considered unacceptable under Australian laws would be rejected due to, as this practitioner noted, ‘what the laws are in Australia’.

Practitioners reasoned that culture should not be a right for children because children are passive recipients to anything their parents want for them. Young children, practitioners reasoned, will accept their parent’s instructions. In facilitating culture for children the practitioner is facilitating the parent’s culture. Therefore, if the practitioner did not believe the parents’ culture to be in the child’s best interests, or that if it did not meet with the moral standards of Australian society, then they would not endorse the culture, nor would they think of facilitating the culture in FDR. Practitioners reasoned that giving children a right to culture is tantamount to giving the parents the authority to demand culture in FDR. As stated here this, ‘[goes] not so much as to rights of the child but to the values of the parents’. [Sally] Practitioners were making assumptions that cultural practices may not benefit children, or may be inconsistent with mainstream practices. In concentrating their answers on the parents they had seen or managed in FDR, practitioners became reluctant to facilitate culture for children. In contrast, practitioners rationalised the question of culture did not rest with the practitioner, but with the parents of the child and their choice as to whether they wanted their child to participate in culture.

**E Family and the Child’s Capacity to Develop Autonomy**

Analysis of the data showed that practitioners rationalised the child’s age and maturity were indicators of whether the child could understand and appreciate culture. Therefore, practitioners believed that the right to culture was a redundant right because children were unable to enforce the entitlement and because enforcement of the child’s right depended on parents: this made practitioners uncomfortable. As this practitioner noted, ‘I don’t believe children have rights, I believe only the individual can do that for themselves so it’s a passive
right’. [Tom] For practitioners, as children gained in age, they developed physical, psychological and emotional competencies. In children, this acquisition occurred between birth and the end of adolescence and transformed the child from a dependant to an autonomous individual with rights. However, practitioners believed that this progress, from dependency to autonomy, was dependant on two factors: the parents’ willingness to realise their children’s standing, and the child’s development of reflective judgement, moral development, or cognitive structural development. As suggested by this practitioner, ‘a part of her dad’s rationale was the freedom that he had experienced as a child, it’s part of that culture the level of comfortability and autonomy that we don’t have in Australian culture at that early age’. [Desiree]. In this parent’s culture, children were given the freedom to move about the community unaccompanied and in relative safety; children therefore developed an understanding of independence at a much younger age and developed competencies necessary to cope with the demands of different circumstances. Nevertheless, for this practitioner the age of the child would have made a difference to the manner in which she conducted her FDR. That is, if the child was older, then the practitioner would have had no trouble facilitating the father’s wishes to give the child unrestricted freedom of movement. The issue for this practitioner was that she saw the child’s age and development as an indication of whether the child had the capacity to cope with the existing arrangements of the parents, and this made the practitioner uncomfortable to facilitate culture for the child.

The data suggests most practitioners believed that children’s capacity and the formation of an identity is conditional on age and maturity levels. As one practitioner observed, regarding children’s understanding of culture, ‘[it] depends on how old they are, when they are young they have very little idea of what it (culture) means often when they got older like in their teenage years they may have started to learn something’ [Scott]. While this practitioner admitted to having very little contact with children, he made assumptions regarding the child’s understanding and appreciation of culture based on his general understanding of child development. Yet this comment was not isolated; practitioners drew on their professional understanding of child development to make connections between the child’s age, capacity and identity. As stated here, ‘it’s a child’s right to know their culture, when they grow up if they don’t want to, I think then it becomes their choice’ [Sue]. Practitioners had an understanding that culture can only become meaningful and relevant to the child when the child had the capacity to appreciate its effects. As noted by this practitioner, ‘my feelings
is that it probably won’t be until the child is mature that they want to start to identify with a culture and will go seek it’ [Sally]. This view may have been why some practitioners believed it would be futile to facilitate discussion on culture between parents in FDR.

Practitioners confirmed that the family group played a significant role in cultivating the growth, development and psychological wellbeing of its children. As stated by this practitioner, ‘it is important for children in their development and growing up to form their identity around what their history is and that has to do with family’. [Gretta] Practitioners equated a healthy development of the child with healthy family relationships. They reasoned that the acquisition of culture for the child depended on many factors but mostly the commitment of parents to their own culture, as expressed by this practitioner:

one of the parents was very passionate about their culture and what it meant and what went with that—the extended family, or the value system and... wanted those values instilled in the child so that sort of heritage, culture can be carried on’. [Sally]

While practitioners were challenged when one parent had strong entrenched cultural demands on the family, practitioners were also pessimistic about parent’s motives, as this comment suggests: ‘the truth is that parents are motivated by what’s best for them the time they want to spend with the child’. [Scott] As this practitioner noted, ‘parents who are focused on wanting an agreement in relation to parenting issues … focused on the time factor that they haven’t thought about the other implications, such as … culture’. [Sam] Yet practitioners assessed that the facilitation of culture is reliant on the time spent with a parent; therefore, helping a parent secure more time is the same as the facilitation of culture for the child, and this justified how practitioners were managing FDR. Practitioners noted that the parent/child relationship and how responsive a child was to their parent’s instructions were important to the child’s acquisition of culture. Practitioners reasoned that if separated parents cannot agree or did not provide the child with cultural socialisation, then children develop separately from the parent’s cultures and are challenged to identify with a particular group. As one noted, ‘unless the parents can understand if they don’t work together on … aspects of raising the child … culture and traditions … then the child could be sort of not knowing who they are’. [Niles] Practitioners emphasised that notwithstanding any legal right a child may have, the child’s connection to parents and that family’s relationship with culture is vital to a child’s formation of a cultural identity. However, practitioners were mindful that young children did not understand the importance of culture, nor could they enforce their rights, so children were
reliant on parents for the enforcement of their rights and the accommodation of their culture. Parents did understand the importance of culture and could make culturally appropriate decisions for their children, if they chose to do so, and this depended on the parents’ connections to their culture. Practitioners concluded that parents focused on securing the time they wanted with children, and during this time they could socialise the child in the manner they wanted.

**F Practitioner or Parent: Who is Responsible for Children’s Culture in Family Dispute Resolution?**

‘We don’t sort of take on an investigative role in regards to what a child needs we can only go by what the parents say’. [Stacie] This comment summed the view of most practitioners in this study. Most practitioners stated that their role as manager of FDR is to resolve issues concerning the parents that are introduced by the parents at FDR. The general consensus by practitioners was that the facilitation of culture is a parental obligation.

Even so, practitioners were conscious that any attempt to facilitate culture in FDR rested on the parents’ desires to accept that intervention. As this next comment suggests, culture was subjective and deeply personal to the individual. As practitioners reasoned, culture remains a personal choice, ‘in the role of a FDRP it’s not for me to direct the other person in their culture, I can’t tell a client how important their culture is to them’. [Tom] Practitioners thought that their role was to facilitate discussion between parents to resolve their disputes, not to introduce subjects that the parents may not have thought of themselves. Practitioners rationalised that not all parents have the same level of commitment to culture, ‘I mean culture is a difficult issue for people and there are degrees of involvement in culture … a new migrant may embrace their culture differently to a second generation child’. [Beth] The data suggested that a person’s culture became diluted over time and so practitioners were hesitant to facilitate culture. However, that can be an oversimplified reason not to facilitate culture, because children need to develop an attachment to their culture from an early age and this depends upon children experiencing culture on a continuous basis to enable children to develop an understanding of the culture.

In FDR, practitioners were concerned about facilitating culture for children because they believed they were not qualified to know what culture, and how much culture, was in the
child’s best interests. As this practitioner noted, her role was to understand ‘what do parents want to pass onto the children and how can the practitioner facilitate the important bits of that culture?’ [Heather] Many practitioners believed that any discussion about culture during FDR must initially come from parents. Understanding that culture is no simple task, practitioners reasoned that as parents understood their children’s goals and needs far better than anyone else, then they should have the responsibility to instigate discussions on culture. Still, there was willingness on the part of all practitioners to facilitate discussion on culture, if parents initiated the subject, ‘if the parents have raised culture, I can’t imagine practitioners not allowing discussion or even encouraging discussion’. [Desiree] This was reaffirmed by another practitioner; as a topic culture was not ordinarily contemplated in FDR until a parent introduced it into the discussions, ‘we are not looking for that (culture), unless it comes up as an issue’. [Tom] Once the issue is introduced, then practitioners believed they could not dismiss the issue; ‘then you can’t not consider culture’. [Tom]

Despite this understanding, practitioners were also cautious about facilitating culture when they did not understand the ramifications of the cultural practices, ‘there is a limit to how much you can know about any given culture not having been a part of it’. [Desiree] This inference is important because it shows that practitioners were aware of their limitations in relation to understanding the complexities of all cultures, and understood that generalising about culture would produce incorrect assumptions and stereotyping. As one practitioner noted, ‘we assume that everybody from an Aboriginal background is the same’. [Sue]; or as stated by another practitioner, ‘one mob’. [Desiree’] The assumptions or stereotyping made by practitioners to identify the parents and their culture became a method of filling in the gaps in the practitioner’s understanding, training and professional education about culture. As this practitioner noted, ‘we cannot know about every culture and how that impacts on children’. [Sue] These comments raised concerns that practitioners needed more culture training to understand culture. As culture is specific and each culture has many facets, to know everything about all cultures would be impossible. The challenge for practitioners therefore was to interpret the child’s cultural needs without disenfranchising the child’s parents’ prerogative to make culture related decisions.

Several solutions were put forward by practitioners to remedy their shortcomings. One practitioner stated that they should simply ask the questions, ‘I have learnt about what was important to them about their culture by asking’. [Sue] Another practitioner suggested it would
be relevant for practitioners to attain, ‘information of whatever cultures are going to be impacting on the practice’. [Connie] With this information, the practitioner explained that she can direct clients to the available resources in their area. In accepting these shortcomings, as one practitioner notes, ‘there is no one size fits all, is there?’ [Beth], practitioners understood it was important for them to be aware of the cultural issues, ‘recognising when you don’t know’, but more importantly recognising what must be done, ‘the main thing I try to do is to be culturally sensitive’. [Beth] These practitioners believed this could be achieved through continued learning and inquiry.

However, learning does not have to come from a book; in identifying a matter with an Indigenous couple, this practitioner discussed the importance of culture for the Indigenous child and how he was able to learn about the culture from the parents and family of the child, as shown by this comment, ‘I had the connected family the grandparents and aunties coming in (FRD) wanting to explain the importance of [culture], the child’s needs to their culture’. [Niles] By his willingness to listen to the family and learn about their culture, this practitioner was willing to accept that culture was an important factor for this family, and was willing to facilitate discussion in FDR. This comment is noteworthy because it shows that practitioners were drawing the connection between children’s ability to access their culture with the family’s ability to nurture and support that connection, and on the community’s willingness to allow this to happen.

G Practitioners Take the Paternalistic Approach in Family Dispute Resolution

The underlying assumption made by a number of practitioners was that culture had components that were harmful to children. These included: harmful child rearing practices, restricting children’s cultural development and the negative effects of culture causing conflict.

Some practitioners reinforced culture’s subsidiary placement to the primary legislative provisions in the FLA. As this practitioner remarks:

I am ranking them in any sort of triage way, is the child’s right to safety, and to live in a place where they are able to love and act with both parents provided it’s a safe environment and I think what flows from that is the child’s right to acknowledge (culture). [Sandra]

Practitioners understood that the child’s safety was their main priority, and then time spent
with parents, and would only respond to children’s cultural needs if parents raised the culture as an element of the dispute that had to be addressed. In the main, practitioners believed some cultural child rearing practices had the potential to be harmful, or at least not beneficial to children. As noted, ‘culture can be a negative tool around parents who believe certain parenting styles are appropriate’. [Harriett] She reasoned that parents using culture as an excuse to provide children with traditional disciplinary parenting was not appropriate for today’s children. In a similar vein, and as discussed above, another practitioner identified that while culture may not be harmful per se, the practices that children are subjected to by parents may not promote the child’s best interests. She noted, ‘I sometimes have questions myself as to whether children benefit from being exposed to the culture that some of their parents expose them to’. [Helen] It appeared from the data that in identifying differences, practitioners were concentrating on those values considered unacceptable by western or mainstream standards. Some views on child rearing by minority parents were not seen as acceptable under western notions of child rearing, and therefore cultural practices were not facilitated.

In addressing the second point, that culture restricts children’s cultural development, some practitioners noted that culture was a bond that drew people together. For example, people will seek out others of similar background, colour, gender or language; as one practitioner explained:

> often the new migrants go into areas … identifiable areas where they live so that they reproduce a degree of their community structure around them… they tried to reconstitute here (Australia) a much stronger cultural continuity’. [Sally]

Some practitioners believed this concentration of culture might limit children’s ability to acculturate into mainstream culture. This practitioner believed that parents wanting their children to remain within a traditional culture, liken culture to ‘growing up in a sort of a twilight zone’ [Sally], and this had the potential to influence children’s broader acculturation. This comment implies that parents were limiting or confining their children’s potential by wanting them to live in the past, within a culture that may not have any identifiable beneficial value to the child. Some practices and rituals from the parent’s birth country that might be useless in their adopted country, or even an obstacle to the child’s development, were seen by practitioners to be redundant, and should not be facilitated.
The third view regarding culture causing personal conflict for children in family separation was a prevalent assumption of practitioners. Practitioners were concerned that parents who placed undue influence on children not to assimilate into mainstream culture were causing children enormous pressure as they developed individuality. As one practitioner noted ‘kids often feel caught between cultures’. [Bruce] The pressure on children to remain within a familial culture was seen by practitioners to be the most dominant cause of intergenerational conflict—that is conflict between generations of the one family from grandparents to children—occurred when members of a family assimilated at different rates into the mainstream culture. The result was sometimes antagonism and a rejection of the family’s cultural expectations by the child. One said ‘grandkids are rapidly assimilating and causing conflict between their expectations and those of the parents’ and grandparents’. [Sam] Practitioners saw that children’s evolution from the traditional familial culture, to adopt the modern or mainstream culture, as a threat to intergenerational relationships. When members of the one family did not adopt the culture of the family’s remaining older members, this was seen as a threat to the family’s culture, initiating the possibility of conflict. The reasons for children adopting mainstream culture are many, but one reason can be because it is easier to function in society and school. Some practitioners drew on their personal experience as teenagers from a minority culture, which helped them connect with the difficulties of children from minority families today. One commented ‘I think children are concerned over their conflicting cultural expectations, like, do they have a choice (to choose a lifestyle) or, are they told to be someone?’ [Bruce] He argued that children are torn between developing in a manner that supported their individualism, in itself is unacceptable in many community cultures, and their position within a minority family with its responsibilities and duties. Having an insider’s view of a child’s personal dilemma has far reaching connotations; it shows that practitioners were able to provide personal insight into difficult matters. It also suggests that the hardship this practitioner experienced growing up as part of a minority culture within a mainstream culture would make him hesitant to facilitate culture for children growing up today, trying to assimilate within mainstream society.

Some practitioners believed that some parents used culture as a weapon in their interrelationship conflict, rather than to benefit their child. One commented of raising culture, ‘sometimes it can just be out of wanting to hurt the other parent not to enable the child to engage in culture’. [Donna] Practitioners realised that when parents in conflict denied the child recourse to the other parent’s culture, they put the parent/child relationship with the other parent at risk, and
would possibly desensitise the child to culture. Taken in context, as this practitioner noted, ‘dad was very patriarchal and controlling and much more traditional … and there was very significant conflict between whose aspirations would rule in relation to how the children was raised’. [Sam] In these types of cases, practitioners were reluctant to facilitate the child’s right to culture because practitioners felt that the cultural orientation of the father was not suited to the Australian lifestyle and was harmful to the child. The practitioner’s use of the words ‘patriarchal’ and ‘controlling’ show that practitioners were careful not to encourage facilitation of culture when children would be placed in such environments, which many believed to be unhealthy for the child.

Practitioners understood that parents’ motivations were a major contributing factor to whether practitioners facilitated culture in FDR or not. That is, if practitioners understood the parents were genuinely concerned about their children’s loss of culture and this culture was to the benefit of children, then practitioners were more able to see the value of facilitating culture. However, as this practitioner noted, in complex FDRs where culture is one of the central points in contention, cultural values and standards become a non-negotiable element of the discussion between parents, and parents become positional for personal gain. In this next comment, a practitioner describes the problems caused when parents are unable to separate their own hurt from their role as parent and the child’s wellbeing, using culture as a weapon to hurt the other parent. As noted here, ‘it’s a danger that it will be culture at all costs rather than culture in a way that the parents agree is appropriate given the circumstances’. [Sam] In these positional FDRs, practitioners noted that parents were not prepared to make the connection between their conflict about the child’s culture and the detriment that their stance may cause the child. That is, parents were prepared to use children’s culture as a weapon against the other parent, despite knowing their actions may cause harm to the child. In understanding these dynamics, practitioners are better equipped to understand the dynamics of culture and child development and conflict. In these situations, practitioners are in a better position to manage and influence culture/conflict laden FDR and thus assist the development of parenting plans that appease the parents, but are in the child’s best interests.

\textbf{H How Conscious were Practitioners of Aboriginality?}

Practitioners had a heightened sense of culture for Indigenous children; as one remarked, ‘for me Indigenous rights are just so vital absolutely vital because we are not going
to bring about full reconciliation until we fully embrace and celebrate Aboriginal culture and the child’s rights’. [Sue] Many of the practitioners believed, despite not working with Indigenous families, that they were obligated to facilitate culture for the Indigenous child in recognition of the past acts of government. Practitioners felt they had a moral duty to facilitate Indigenous culture for the Indigenous child. Apart from this heightened sense of moral obligation, practitioners reported that their training contained a component on Indigenous culture, and this was important for them to bring Indigenous culture to the forefront of their thinking when doing FDR with Indigenous parents. One explained they recalled ‘a study component that specifically address[ed] cultural needs of an Aboriginal child or TS [Torres Strait] Islander’. [Terri]

Many practitioners acknowledged they had limited exposure and no first-hand experience with parents of minority or indigenous backgrounds. Despite their lack of practical experience, practitioners were aware of the detrimental effects of loss of culture, as this comment shows:

I guess the information we know from around the world about separating people from their culture, I guess the on-going potential psychological damage that could do to people and the dislocation the sense of alienation from the society around them they are not part of their history’. [Greg]

This perspective conveys a general sense that practitioners had knowledge and concern towards the loss of Indigenous culture. Other practitioners observed that ‘we do tend to have a bit more sensitivity to the local culture’. [Tanya] One practitioner drew a parallel between Indigenous child displacement and studies on adoptees to understand the effects of displacement on children. As this practitioner empathises, not knowing one’s culture is like a child not knowing their birth parents, ‘I guess it’s like a child growing up that’s been adopted needing to know where am I from or my origins or what’s my background, who am I, what am I’. [Niles] This is a powerful statement on loss by a practitioner and it acknowledges that relationships are foundational to give any child a strong sense of their own cultural history and traditions and connections. The proposition is that culture helps the child build a positive cultural identity. Even when children are removed from their parent’s culture at an early age, as in the adoption of an infant, the suggestion is that children still feel a sense of loss and are more likely to feel displaced.

Even so, practitioners were aware that training on its own is only part of the practitioner’s responsibility to the facilitation of culture, as stated here: ‘All accredited FDRPs have to have
cultural training … at least of the Torres Strait Islander culture, although that’s rudimentary because you have to have the exposure … or you have been involved in the community’. [Mick] Practitioners acknowledged that this component of cultural competency was the hardest to achieve. The reasons some practitioners gave to not working with Indigenous parents was not based on their own lack of training or cultural insensitivity, but was due to the failure of Indigenous parents using the service, so a lack of practical dealings with Indigenous parents. The main reason given by practitioners for this failure was that Indigenous parents mistrusted white institutional help because of the history of harm to Indigenous communities as a result of the colonisation. As this practitioner noted, ‘that Aboriginal and Torres Strait Islander families don’t engage in mainstream mediation services, for us it’s been a difficult area to work with because you know of the issues of trust and all of those sorts of things’. [Stacie]

On the whole, the findings demonstrated that practitioners found indigenous culture hard to understand, ‘it’s, a very difficult area to navigate’ [Tom]. Many practitioners stated that they consciously avoided the subject of culture with Aboriginal clients believing that it’s still a very sensitive subject for many indigenous clients, as suggested by this remarks, ‘for Stolen Generation (the pain) is still paramount so why would we go to a place that talks about parenting if that’s still sensitive’ [Bruce]. The combined effects, the sensitivity to indigenous history, the lack of first-hand experience and the lack of culture training with indigenous parents, indicate why they found it such a challenging issue to address.

_I Conclusion_

Children are culturally constructed beings, and given the magnitude of cultural influence on children’s daily experiences, not having regard for these cultural influences in development of children is inexcusable.731 The data show that practitioners did understand the importance of culture for children; however, practitioners found the subject hard to address in FDR for several reasons. Firstly, culture was found to be subjective to the individual and each individual has a different commitment to culture. Secondly, the data show that practitioners were conscious of culture and understood how children gained culture, and were able to articulate that understanding in relation to the effects of culture on a child’s physiological and linguistic development. However, practitioners were reluctant to facilitate culture for

731 National Research Council and Institute of Medicine (2000).
children at FDR because practitioners found the concept of culture difficult to define, identify and associated it with negative connotations that ultimately limited their capacity to facilitate cultural discussions between parents at FDR. Further, the data suggest that practitioners lacked confidence in their ability to adequately manage FDR when culture was prominent in the dispute. This is consistent with the literature by Armstrong, that practitioners from FRCs lacked confidence when working with parents from a non-mainstream culture.732

While it is important to note that FDR is provided according to the policy and practice principles and accreditation of the individual facility or FRC, arrangements informing FDR procedures will vary according to the nature of the dispute and the practitioner managing it. It stands to reason that the practitioners’ acceptance of differences will promote insights, self-awareness and cultural competence. An understanding of culture is a necessary step in the process, to ensure that aspects of cultural life are made available to the child within the parenting plans, and this will aid in the development of the child’s identity.

In summary, a key focus of this chapter was to draw a connection between the practitioners’ understanding of culture for the child and the facilitation of culture for children through the FDR process. The discussion revealed that practitioners, while maintaining the objective to provide a culturally competent practice, were found to have an imperfect understanding of culture. Practitioners found culture complex, and at times conflated culture with religion, thus confusing social practices with moral and cultural norms. The chapter provided that the practitioner’s reliance on the child’s age, maturity and level of competence meant that practitioners undervalued the importance of the child’s status as an individual, and placed culture in the background of child development behind parental prerogative. This failed to take into account the child’s cultural needs meant that practitioners were challenged with the idea of children being exposed to the culture of their parents without having the requisite experience to reject practices that would seem incompatible with mainstream culture.

While there will be some overlap between chapters, because the material is not exclusive to any one heading, the next chapter will discuss the rights of the child to culture. To do this, the chapter will present data relating to the practitioner’s understanding of the laws that relate to the child’s rights to culture in both international conventions and the *FLA* 1975. The chapter will present the data on what practitioners believed the terms ‘best interest’ and ‘child focused’ meant and whether practitioners believed children had a right to culture, or whether they believed it was the parents’ obligation to provide the same.
VII RESEARCH: CHILDREN’S RIGHTS

A Introduction

In Chapter Six of the research findings, practitioners, while sensitive to the child’s need for culture, had an imperfect understanding of culture as it related to children’s development. They understood their role was to provide a forum for parents to decide whether to facilitate culture for their children, and thus undervalued the importance of the child’s status as an individual, behind parental prerogative.

In this chapter, data will be presented to adduce whether practitioners understood and appreciated that in both the UNCRC and the FLA, children are granted human and legal rights, respectively, to culture. 733 This chapter will present the practitioners’ understanding of the right to culture, what that means in relation to the child, and will then assess whether practitioners even believed children could be considered rights holders. The chapter will then present data to show how practitioners addressed the principle of the child’s best interests and whether culture was one of the factors considered within the principle, despite culture being recognised by both the UNCRC and the FLA that guide FDR. The chapter then concludes by showing practitioners believed that children’s rights translated into parental prerogative and this limited the practitioners involvement in facilitating culture as a right for children and their liability towards the child’s best interests.

Since the inception of the UNCRC, there has been a steady shift to recognise the child as a rights holder and an individual with social agency. This idea has challenged protectionists, who reason that children are ‘not-full citizens’ but ‘citizens in the making’. 734 They argue that children do not have the capacity to make rational decisions and for the majority of their first 18 years are still in need of protection and guidance. This view contradicts child rights advocates, who state that children in the main are social actors in their own right, possess agency and have the capacity to participate in social and cultural life. Even so, as established in Chapter Three, both the UNCRC and the FLA now acknowledge that children have social,

733 UNCRC Preamble, Articles 30, 31; Family Law Act 1975(Cth) s60B(2), s60CC
economic, cultural and participation rights, albeit conditional on the child’s evolving capacities. The only right that these instruments grant unconditionally is the right to protection.

The chapter will provide data to show that practitioners were cautious to frame children as rights holders, and while they often used the word ‘rights’ in their assessment, practitioners were unsure that ‘rights for children’ actually existed in practice. In particular, they were unsure what their obligations were in relation to children’s right to enjoy their culture. Practitioners in the main considered that their role in FDR, as discussed in Chapter Four, was to support parents in the resolution of their dispute and engage parents to support their children’s cultural needs.

Data will be presented to show how practitioners interpreted the child’s rights to culture in relation to the child’s best interest’s principle. It will further outline the factors that constrained the practitioner from acknowledging the child as a full holder of rights. The data will show that, despite numerous studies showing culture to be fundamental to a child’s development of identity, practitioners were challenged to accept that the right to culture was a factor that promoted the child’s best interests.

This chapter is important because it establishes that practitioners, despite acknowledging their primary role in FDR is to promote the child’s best interests, misinterpreted their objective in managing child focused FDR from a perspective of helping parents resolve all or some of their dispute, and not from the perspective of advocating the child’s right’s. However, in understanding that culture holds a secondary standing in the legislative provisions that guide what factors make up the child’s best interests, practitioners were hesitant to prioritise culture over the primary considerations of safety and time with parents. The general suggestion is that legislative responses to the goal of providing the child with substantive rights to culture have been passive. This may explain why practitioners felt uneasy facilitating culture as a right for children in FDR.

B How Practitioners Interpreted Rights

The focus of this section is to view whether and how practitioners recognised the child’s rights to culture, and what challenges they confronted in relation to the facilitation of children’s cultural rights in FDR. In Chapter Three, the literature review presented an overview of the thesis question, ‘does FDR facilitate the child’s rights to culture’ by providing the scholarly
debate and explanations of the concept of children’s rights and how the *UNCRC* and the *FLA* addressed the child’s rights to culture.

Human rights treaties, such as the *UNCRC*, now promote all civil, cultural, economic, political and social rights as being interdependent and indivisible. Cultural rights denote the protection of the cultural, religious, racial or linguistic background of a group. However, by definition cultural rights do not impose one cultural standard; they set minimal protections necessary for the preservation of human dignity and are only limited to the point at which the action infringes on another human right. This means that cultural rights cannot be used to justify any act that would violate another person’s (adult or child) human rights or fundamental freedoms. The difference between human rights to culture and legal rights to culture is that the latter ensures an individual or group has the legislative right to know and enjoy their culture.

However ensuring that the right to culture is not violated requires the governing body to set indicators and benchmarks and a monitoring system for the detection of violations.

While children’s rights are a relatively new concept, not until the *UNCRC* did children become known as individual rights holders, and despite Australia’s ratification of the *UNCRC* in 1989, the concept of children as having rights has challenged the practitioner of FDR. The data suggests that practitioners accepted that the *UNCRC* sets universally agreed upon obligations and standards for children, independent of adults. A number of practitioners associated children’s rights to culture with the *UNCRC*; that is, that governments and decision makers must take into account that culture is a human right. As stated, ‘the rights and the backing of the structure of the *FLA* on the charter on the rights of the child [*UNCRC*]’ [Sam], even stating that culture for the child was an ‘inalienable right’. [Terri] However, practitioners were unsure about the concept of children having legal rights, ‘I don’t know if there is any legal right’ [Sally], distinguishing that children might have rights, although uncertain if they were of a legal nature. However the data suggests that the views of practitioners in relation to whether children were rights holders were varied. The data shows that practitioners, irrespective of professional background, translated rights in notional terms; that is, they accepted that children had rights, yet only in theory. Children’s incapacity to enforce those rights invalidated

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735  *UNCRC* Preamble  
the child’s right holder status in practice. As one practitioner noted, ‘the child has a right to
know and have an awareness of their culture. I think the parents determine the degree to which
they are exposed to their culture’. [Beth] This reasoning meant that practitioners were
associating children as dependants of a family group and not separate individuals. Nor did
practitioners draw a connection that inalienable rights are those rights that cannot be changed,
reduced or replaced. For most practitioners, rights for children were still an ‘abstract’, an ideal
framed in paternalistic notions of protectionism. The majority of practitioners used the word
‘rights’ arbitrarily and synonymously with something that is morally correct or truthful, but
depended on adults for its credibility.

As this next comment indicates, practitioners were not interpreting children’s ‘rights’ as
conventional rights that grant persons entitlements: ‘it may be a right in that they need to
know their sort of heritage or cultural origins’. [Sally] As the data suggests, practitioners
expressed a protectionist ideology and were minimising the child’s rights, by reasoning that
rights require enforcement and children cannot enforce their rights. This practitioner
illustrates this view when he states, ‘because a right needs to be enforced and advocated for
and I believe only the individual can do that for themselves’. [Tom] By using this
reasoning, practitioners implied that children’s rights amounted to passive rights. That is, rights
are held in trust by adult carers and applied on children’s behalf, as described in this comment,
‘I don’t believe children have rights, I believe we have obligations towards them which is
a semantic difference but a political one’. [Tom] This interpretation of rights is a serious
misconception of children’s rights, because it places children’s rights as less than the rights of
adults and makes adults responsible to advocate for children, a notion reminiscent of the old
adage ‘children should be seen but not heard’. By attaching children’s rights to the discretion
of their parents, practitioners were giving credence to the thought that children are their
parents’ property, vulnerable until they reach adulthood.

However, the question is whether the practitioner’s beliefs, values and practices in prioritising
the family unit over children’s rights, as the main domain in which children’s rights are
contained, represents a challenge to the facilitation of the child’s cultural rights in FDR? It
seems to be so, with practitioners reasoning that the child’s development as an individual is
enmeshed within their family group. As one commented, ‘it’s probably about the parent’s
culture rather than the child’s culture’. [Sally] In her reasoning, this practitioner draws attention
to the child’s culture being that of their parents, and thus any entitlement of that culture would
be an endorsement of the parent’s culture. Another practitioner reiterates this thought and confirms that in nurturing the child’s culture and observing the child’s legal rights to culture, practitioners are establishing the parents’ right to pass on their cultural heritage to their child; as stated, ‘the parents’ input around culture is really important, it’s the parents’ rights more so than the child’s’. [Amanda] However, these practitioners disregard the idea that cultural rights are a collective entitlement, but the child’s right to culture is an individual claim upon society. This next comment illustrates this thought: ‘in a cultural context you know having the extended family having the obligations and duties to relatives and sort of community obligations’. [Sally] It was this type of understanding by practitioners that decided whether children had rights autonomous of their family. The decision by this practitioner that children were not separate to the family, and in an Indigenous sense, their community, threatened the facilitation of culture for the child. By identifying children as recipients of family obligations, this practitioner reduced the child’s statutory entitlements to a factor of the child’s development and took away the child’s power to determine for themselves any of the existing rights to protection, participation, personal or development.

Further, practitioners appreciated that under the FLA, culture is the right of children irrespective of parental ability or willingness to enforce the right. This practitioner recognised that, ‘You (parents) have the responsibilities; your children have the rights’. [Sandra] Practitioners noted that parents interpreted the rights of their children as a right giving them the legal standing to make culture related decisions on behalf of their children. Other practitioners were frustrated by the attitude that some parents presented with at FDR in relation to children’s rights. One practitioner explained, ‘what I am struggling with is the idea of the autonomy of parents to make a decision about their children’s culture and the child’s right to have exposure to their culture’. [Beth] As this practitioner argued, parents were using the right to demand their own wants and needs and not those of their children. However, pivotal to this assumption is that parents have always had the discretion to make choices and decisions on behalf of their children, being the natural people to advance the child’s welfare. As this statement suggests, ‘if it’s the child’s right, then we’re saying it’s the parents responsibility even if the parent doesn’t value that’. [Tanya] In this understanding, the practitioner confirms that the key role of parents is as guardians and advocates of their own children’s rights, and that giving children rights does not undermine or compromise that role. These conflicting statements show that practitioners struggled with the idea of rights and how and in what context to use the word. However, in making culture a ‘right’ per se’ for children, practitioners, like the legislating
bodies that created the right, believed that parental discretion would be curbed and the implementation of the right to culture would not be contingent on the willingness of the parents to recognise that right.

The main issue for practitioners was the fundamental connection between rights and accountability, as this practitioner stated, ‘obviously with rights come responsibility’. [Terri] Practitioners reasoned that for children to have rights they would have to be able to enforce those rights. Therefore, the grant of right’s for children was a mere policy measure to combat child abuse and to give children the status of rights holder, so that responsible adults could enforce their rights. In the main, practitioners were endorsing the right of parents to decide for children and believed that culture was the primary responsibility of the parents, as stated, ‘I mean the legislation is there, the legislation is clear, the child has a right to know and have an awareness of their culture. I think the parents determine the degree to which they are exposed to their culture’. [Beth]

Practitioners acknowledged that child’s rights existed in theory, even referring to rights in the *FLA*; however, practitioners believed these rights were conditional on a number of factors: age, maturity, parents and the child’s cultural context. That is, practitioners recognised that parents in different cultures like minority or Indigenous cultures had different expectations of their children than parents of children in the mainstream culture. This awareness also made practitioners hesitant to facilitate culture. Practitioners saw that it was parent’s natural right to recognise the child by ensuring their child had rights to cultural, social and education.

C The Difficulty Practitioners had Implementing Rights for Children

The data shows that most practitioners were aware of the provisions that guide the making of children’s plans in the child’s best interests, as noted in this statement, ‘look at the *FLA* primary considerations s60CC2 (a)(b), particularly 2(b)’, [Mick], or even in this commentary, ‘under Family Law legislation children have a right to know about their culture and have every opportunity to participate in any cultural events and celebrations and festivals’. [Brea] And practitioners were able to give answers based on the rights framework within the legislation; however, practitioners found it difficult to implement the provisions to the *FLA* and the child’s rights to culture because they seemed to have trouble interpreting those provisions in terms of the FDR framework. As noted by this practitioner the ‘Australian law provides
we are going to need to look at our FDR practices and improve how we do things’. [Harriett]

Practitioners recognised that rights for children existed, however practitioners believed that the legislation was for judicially decided matters and was incompatible with the focus of FDR, which was to allow practions to empower parents to self-determine their own resolution. Practitioners interpreted the legislation as meaning that children had a right to experience culture and this translated to children maintaining a meaningful relationship with the parents, so that the parent allowed the child to have connections with others of that culture. As stated here, ‘it means that a child of given cultural background has a right to understand and associate with people of that culture’. [Sam] The issue for practitioners was that they looked past the legislation at the ramifications of the legislation towards children’s right to associate with others of that culture. Most practitioners interpreted the provisions literally as relating to culture and rights, as secondary considerations to the child’s right to spend time with parents and subsequent to the right to safety, she noted, ‘when you talked about the right …it’s not the paramount one in terms of my understanding it’s a relationship with both parents and of course the safety issue, so it’s just one additional consideration’. [Tanya] This understanding that the right to culture is secondary or additional to other children’s rights was seen by practitioners to diminish the importance of the right and made the right secondary in the thoughts of practitioners and in the context of FDR.

In general, practitioners were challenged to view children as rights holders, at the same time they knew that children had rights; this dichotomous situation had many practitioners contradicting themselves, as in this comment, ‘I guess for a start its enshrined in the legislation, under Family Law legislation children have a right to know about their culture that the parents might feel able and willing to share with them and involve them in’. [Brea] It is a legal right that enables enforcement, but it is also parental choice that relies on discretion. This meant that practitioners were troubled about implementing the right to culture in practice. Primarily, practitioners believed their duty was to the child’s best interests. ‘Best interests’ will be discussed below; here practitioners did not believe they were legally obligated to use the legislation to manage FDR that outlined the child’s best interests, other than to instruct parents that the legislation required them to explain what a meaningful relationship meant and this was also a matter of interpretation. The data shows that the decision to facilitate culture depended on how prominent culture was to the discussions and how observant the practitioner was to the need to address culture. This became a matter of how culturally sensitive the practitioner was.
D The Practitioners’ Practice Obligations

The role of practitioner does not require any specific disciplinary requirement for practice in Australia, apart from holding a relevant qualification under the Vocational Graduate Diploma and training modules, following the regulations under the *FLA* Regulations 2008 and staying true to the relevant practice standards. When practitioners answered questions referring to how they managed FDR, it was these regulations and standards that practitioners were referring to; as here, ‘the *FLA* already has information in there, I think it’s just a matter of how that translates into your practice and that’s professional education’. [Wendy] The translation this practitioner is referring to is more a matter of her educational background rather than the *FLA*. With more than half the practitioners that participated in this research having sociology, psychology or counselling training, it became clear from the data that educational background affected how practitioners translated, not just the *FLA* provisions, but also what culture, cultural rights, violence and abuse meant and how culture effected the parents’ negotiation. Practitioners were approaching FDR from their own understanding of these concepts and this affected how much emphasis they put on the importance of culture for the child and the different familial relationship types. As reflected in this practitioner’s practice, ‘I have a sociology background and even though most FDRP’s would say they think it’s important, a child’s right to their culture, like with anything I think is how foremost it sits in your mind when you do the work’. [Gretta] In circumstances where culture was an underlying issue in the FDR, the ability of practitioners to detect and deal with culture became a matter that relied on the cultural competence of the practitioner.

As this next comment indicates, providing rights to children is not without its problems. The main issue for practitioners amounted to how practitioners would implement the right in practice, as this comment suggests, ‘Oh it sounds good but in practice it’s got some enormous problems just thinking in context of FDR’. [Sally] Her statement reflected two presumptions: that the child’s rights to culture would be problematic to negotiate in FDR because they require parental accord; and secondly, facilitation of culture in FDR would require a combined effort by practitioners and parents. Most fundamentally, practitioners believed that rights for children required a collective effort from society, not just governments and legislation, as noted in this comment, ‘holistically the whole society have to talk in a certain language’. [Bruce] As this practitioner suggests, there will be need for a ‘cultural’ change to the social outlook on children for the legislation on children’s rights to make any real impact on their
rights. By consolidating this view, practitioners believed that children would become recognised as being stakeholders in the provision of culture in FDR rather than merely beneficiaries of the process. That is, to build the capacity of the child to rights holder, there must be a collective change to the perception that the provision granting cultural rights to children is dependent on parents, this requires support by practitioners, their organisation and the legal system, ‘if the discussion and wording with legislation and case law focused on the actual right of the child to have their culture as opposed to a responsibility’. [Terri]

However, as misinterpreted by this comment, the legislation is directed at children’s rights and not the obligations of responsible adults. This comment shows that practitioners did not have a good understanding of the legislation surrounding children’s rights and were interpreting the legislation according to their role in FDR and their individual disciplinary backgrounds. Practitioners in FDR were not focusing their attention on the legislation: firstly because most were not legal practitioners and did not need to; and secondly practitioners were focusing on pacifying the parents conflict to enable parents to focus on their children. As he stated, ‘the whole idea of restorative justice you have someone you can trust and believe in to normalise you’. [Bruce] Practitioners believed in diffusing the conflict dynamics between the parents, then parents could concentrate on the child’s development and make child focused decisions on their behalf.

From the data, it appeared that in FDR a number of deeply embedded assumptions were seen to be held by all practitioners: firstly, that best interests means the child’s safety is essentially an uncontested priority; secondly, the right to a meaningful relationship with parents takes secondary placing with culture being described as, ‘so it’s just one additional consideration’. [Tanya] In the main, practitioners understood that the child’s right to know and enjoy their culture is a parental decision and unless a practitioner considered the decision was not in the child’s best interests then it becomes a matter of discretion as to whether the practitioner intervenes or not, this matter will be discussed in ‘The Effect of Children’s Rights on the Family’, below.

**E How Practitioners Translated the Child’s Best Interest**

The evaluation of how practitioners interpreted the child’s best interest are relevant to show the practitioner’s perceptions of whether the right to enjoy culture was among the factors that
practitioners associated with best interests, and what weight practitioners accorded the right in
FDR. Children’s best interests are contained in Part VII FLA s60CC and s60B, which
provide a layered approach to rights intended to guide decision makers when interpreting what
‘best interest’ means. These provisions place the child’s relationship with parents and the child’s
safety as the primary factors; culture is a principle underlying the Objects of the FLA.
Practitioners asserted that culture was within the factors that made up the child’s best
interests, as here noted, ‘I mean there is in no way in which you can address the paramount
principle of best interest if you are failing to address the factor of culture when it is
inheritably so important within a child’s upbringing’. [Terri] However, in understanding that
culture as a social construct is foundational, the practitioner made culture a paramount factor
and a primary focus in the determination of the child’s best interests at FDR. Despite this
acknowledgement, the issue for practitioners became a question of how to implement culture in
children’s plans to allow its benefits to help the child develop a healthy identity. Practitioners
went about interpreting best interests by focusing on ranking the child’s rights in order of
what they thought to be important to the child, as this comment suggests, ‘all the children’s
rights are important … I am ranking them in any sort of triage way is the child’s right to
safety, and to live in a place where they are able to love and act with both parents’. [Sandra]
However, what constitutes the best interests of the child in FDR depends on the context in
which it is used. That is, practitioners were assessing best interests depending on the facts of the
individual child’s case, making best interest a situational notion.

Practitioners understood the construction of the child’s best interests as the paramount
consideration in all children’s matters in the FLA, yet practitioners reasoned there were many
issues that must be considered, and then these factors must be assessed against each other to
identify which were in the child’s best interests. As noted here, ‘there are so many different
tensions of different things to consider in the best interests of the child’ [Tanya],
practitioners were challenged to distinguish between the meaning of the child’s best interests
and the child’s right to culture. However, practitioners were better able to integrate the child’s
cultural needs as part of the child’s best interests, rather than implement culture as a right. As
this next comment shows, ‘part of the problem with rights is that its prescribed, we have to
consider the child’s best interest as prescribed, if it is relevant to the parent then we have to
consider it’. [Tom] It appears by this remark that the practitioner was having difficulty
differentiating, not only between the two concepts, rights and best interests but also between his
duty to the child’s interest or to the parents’ rights to make decisions for their children, thus
making children’s rights conditional on parental autonomy. This not only limits the potential of these concepts but confuses their implementation. Nonetheless, this belief is not a reflection of any universal standard on the nature of the phrase. As stated here, ‘everyone believes they have the best interests of the child in mind’. [Bruce] The undefined phrase ‘best interests’ has resulted in a lack of uniform use. As this practitioner stated, ‘I mean a very fundamental part of that is whether culture is actually a significant factor in relation to considering the best interests of the child’. [Harriett] In this context, the practitioner is assessing the validity of best interest by viewing best interests in this manner: she doubts the benefit of culture for the child. Although this view seems to limit the importance of culture within the meaning of best interests for children, other practitioners were translating best interests as a standard to distinguish between interests that were acceptable and those that were harmful to the child. As this comment indicates, ‘I think a child’s cultural rights could be in conflict with the consideration of what’s in the best interests in other ways’. [Helen] Arguably, again this practitioner is placing culture in doubt and as a factor that may not be in the child’s best interests. However, the test for determining best interest is the objective test and this means that practitioners use discretion in deciding what is best in the child’s upbringing. In the event practitioners find culture to conflict with what is believed to be in the best interests of the child, then culture will not be facilitated in FDR.

F What Factors Affect the Practitioner’s Understanding of Best Interests?

Practitioners gave meaning to the concept of best interests according to their understanding of the common usage of the words, ‘best’ and ‘interest’, and as reflective of the practitioners’ own professional background and training. As this remark suggests, practitioners rationalised best interest against their understanding of the rules that regulated that profession, ‘so for me it’s about thinking about the legislation as a background and then thinking in FDR context’, [Beth] and this meant that in determining best interests, practitioners were advising parents on the relevance of focusing on the child’s needs from a sociology or psychology framework with the child’s stability and development in mind rather than the legislation.

However, even as practitioners of FDR, the data shows that there was no consistency in how practitioners identified the elements that constituted best interest. Even so, there was a general agreement that a comprehensive definition of best interests was not required because the principle is subjective and amendable to each child’s circumstances, as this data suggests, ‘best interests in these contexts is a subjective thing’. [Tom] Further, the data shows
that practitioners also realised that the meaning they gave to best interests was highly subjective and depended on a multitude of factors from professional qualifications to personal culture, as stated here, ‘I think it’s very healthy to be aware of those value systems that you carry with you and to be very careful that what you’re thinking is the best interests of children isn’t overly coloured by your own values and experiences’. [Wendy] In understanding her own limitations to interpreting what best interest meant, this practitioner suggested that the best interest of the child can be used to determine where in the hierarchy of children’s rights culture fits.

Even so, the data shows that in interpreting best interests, practitioners reverted to their training, with legal practitioners preferring to use the list as outlined in the legislation, such as, ‘s60B(2)(e) and s60 CC (3)(h) in deciding what was in the children’s best interest, and the ideas that a court must consider’. [Beth] For social scientists and counsellors, the interests that promoted the relationship between children, parents and culture was important. These practitioners spoke in terms of the qualities that aided the child’s developmental needs, ‘it’s absolutely vital for forming their identity’. [Sue] While arguably the best interests of the child vary between children, from age to age and depending on the child’s family and culture, it is widely recognised in this study and research conducted by Armstrong\(^\text{738}\) that culture is essential to the child’s identity and helps the child maintain a connectedness with family and cultural group and this gives children, as previously stated, security and stability.

For practitioners, a major factor that determines the child’s best interests is the parent/child relationship; as this practitioner reasoned, ‘best interests may be that the child have a meaningful relationship with one/both parents and then their right to continue to enjoy their culture’. [Beth] Reflecting the many familial circumstances in Australian society, in general practitioners understood that no two families were the same in their needs for their children, and decision making was best left to the parents who were in a better position to understand their children’s best interests. As this suggests, ‘what family means, for example Aboriginal, Italian, Maltese whatever, the importance of family and how that’s going to affect the outcome for the children’. [Brea] The challenge presented for practitioners was to take into account the individual family and individual child’s circumstances to assess

whether culture could be considered within the objectives of a child’s best interests. That meant focusing on key considerations, identity, family bonding and healthy development to promote the child’s rights to culture.

**G Practitioner as Child Advocate v. Neutrality**

As practitioners strove to understand the individual needs of the child, sought to advance the child’s individual rights by encouraging parents to focus on collaborative and cooperative post-separation parenting, intended to help parents reach agreements that were in the ‘best interests of the children, practitioners have become known as the child’s advocate. McIntosh and Moloney indicate that child advocacy is a central part of child focused practice and practitioners should not be neutral in their management of FDR, but tilted in favour of the child.\(^{739}\) Rhoades et al. showed that practitioners believed their primary obligation was to the child, although they did remain committed to neutrality. Practitioners in this study considered their role as proactive, to promote the child’s ‘conditional’ rights and as child advocates in FDR. As this practitioner stated, ‘the FDRP, even though it’s not situated in legislation I guess I act as an advocate for the rights of the child’. [Stacie] This was further supported by this next statement, ‘part of my job is to always try and be the advocate for the child’. [Bruce] Albeit, this consciousness created tension for the practitioner who was challenged to resolve the practical conflict between working with the parents and promoting the child’s best interests, especially when the parents were incapable or unwilling to do so. As one practitioners observed, ‘ultimately all you’re doing is facilitating an environment where by they can consider what’s best for their own child’. [Yonne] Practitioners understood that their role was limited to helping parents recognise their children’s interests (unlike child consultants who can speak for the child). In recognising that within each culture parents decide what is considered to be the ‘best interests’ of the child, practitioners felt they were in a position of having to work through the parents to actualise best interests for children. At times, this meant having to recalibrate their other obligations to the principles of neutrality and self-determination for parents to do that. This was expressed by a practitioner, who said, ‘I guess that’s the hard part the balancing between us feeling like we need to kind of not impose but

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\(^{739}\) Jenny McIntosh and L Moloney L are the co-authors of a multimedia package consisting of a DVD, *Dialogues with Separated Parents: Child Focused Dispute Resolution and Companion Handbook*, Creating Child Focused Dialogues with Separated Parents (Australian Government Attorney-General's Department, Children in Focus, 2006) <http://www.childreninfocus.org/resources.html>.
intervene in that way whether we allow parents to judge the extent of how much the parenting plan looks specifically cultural’. [Harriett]

Despite the legislation requiring practitioners to ‘help parents’ while remaining, ‘Independent of all the parties involved in the processes’ the practitioner’s regulatory duty is to advise parents of the best interest principle and what that entails. This confusion is further emphasised by the practitioner’s ethical obligations under the practice standards state that practitioners are to remain ‘procedurally fair’ and conduct FDR in an impartial manner. However, in the above comment the practitioner was pained to remain neutral in a situation, and was balancing her intervention with parental autonomy. Albeit, practitioners are now duty bound by the FLA to advise parents of the child’s best interests and those factors within the legislation referring to ‘equal shared responsibility’ and ‘meaningful relationship with both of the child's parents’. This new advisory role meant that practitioners cannot remain neutral as to the process of FDR. The practitioner’s duty to help parents to resolve their disputes was a further indication of the practitioner’s proactive participation in the FDR. As this next comment suggests, practitioners were mindful not to intervene in the content of the dispute, but were able to help as far as process, that is directing the procedure:

I think there is a danger for FDRPs to be imposing their mind-set and expectations on the nature of the issues discussed and the outcomes that people reach so while I agree 100% that the FDRP’s need to be mindful of it and supportive of those discussion they shouldn’t direct or attempt to be part of those discussions. [Sam]

Further, the role of practitioner is to help parents generate options and facilitate discussions so that parents can help themselves to reach an agreement.

In general, practitioners held nuanced and layered understandings and expectations about their role as child advocates. Practitioners believed a child focused practice contributed positively to the discussions and the overall wellbeing of the child. At times, practitioners found it difficult to move between several discursive levels of practice to balance their role as child advocate and as protector of the child’s physical and physiological wellbeing, and their role as a facilitator who ‘helps’ parents in FDR. However, practitioners did not always know

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740 FLA s10F: Definition of family dispute resolution
741 FLA s60CC: How a court determines what is in a child's best interests
‘how to help’ parents or to assist children. As one practitioner commented, their roles as child advocate had many limitations, one being that they do not even see the child and are expected to know what is in the child’s best interests, ‘how can you adequately represent children or anybody who you’ve never had any contact with at all, I don’t believe it is possible and I think it’s a big failing in our system at the moment’. [Heather] The assumption is that practitioners will advocate for the rights of a child who cannot advocate for themselves. As children grow and acquire maturity and independence, correspondingly then the child’s needs for an appointed child advocate will reduce.

H Practitioners’ Role and Conflicted Parents

The essence of FDR is that parents are in dispute over an interpersonal issue, whether that be children or property. As noted in this comment, ‘look parents don’t come to us unless they can’t agree on their children parenting’. [Amanda] Family separation and conflict are culture laden and each family will respond to conflict in a unique and dynamic manner, but where conflict is present between parents, practitioners must be able to tactfully manage FDR to ensure children’s best interests are being served. Parents who can come to an agreement amicably benefit not only themselves but their children. However, another practitioner noted that in families where parents were from different cultures, the risk of conflict was high. As noted, ‘again the only time that would come up is if the mixed marriages, the cultural differences that drives parents apart depending on how far apart’. [Niles] It would seem that such an understanding is crucial when practitioners are asked to facilitate culture for children. Also noted in this scenario, ‘where both parents are from different cultures and both had different religions and the child was bought up with the one set of beliefs, now after separation that all changed’. [Yvonne] Therefore, any promotion of the child’s right to culture would translate into the parents being able to agree on a course of culture specific child rearing provisions in the parenting plans, ‘unless the parents can understand if they don’t work together on aspect of raising the child between the culture and traditions … the child could not know who they are’. [Niles] Promoting participation in the other parent’s cultural traditions requires parents to put aside their problems to focus on decision making beneficial to the child. However, practitioners considered that the whole purpose of FDR was to untangle entrenched family disputes, as noted by this next comment, ‘the children being able to embrace their culture would pre-suppose that the parents are able to work together’. [Sandra] These are important insights by practitioners
because they mean that practitioners were sceptical that parents at FDR could concentrate on their children’s best interests, as opposed to their own. Adding to the complexity, practitioners understood that children’s cultural rights required the contribution of parents to foster and enable the right because children received their primary socialisation through their parents, as stated here, ‘I think you can only be guided by what the parents aspire to for their child’. [Heather] The combined effect of these commentaries suggests that practitioners were struggling with the idea of children having rights separate to their parents. While rights can be interpreted in many ways, practitioners emphasised the protectionist theory of rights translating children’s rights to lawful obligations on the parents. In helping parents resolve their disputes, which were about their children, they were facilitating children’s rights in that manner.

In conflicted FDR, practitioners felt obliged to help parents realise the effects that the separation and changes will have on the child’s adjustment. The data suggests that practitioners believed their role was educative and directive. That is, in situations where the dispute contained many culture related issues and high conflict, practitioners as child advocates were not able to put aside their humanity to stay neutral. In these situations, practitioners noted they were able to redirect the parent’s negotiation to focus on the different needs of the child. As this next comment suggests, practitioners when faced with extremely difficult to manage FDR, reported that they were forced to put aside their hands off, neutral demeanour, to refocus parents on their role of parenting:

in various stages of reality testing (parents) capacity (to focus on child), and even in sometimes saying to the client I’m not hearing where you are focusing on the child and maybe FDR is not what you need and often that’s a kind of a wakeup call. [Bruce]

Practitioners reported in some circumstances involving intense cultural and religious ideologies they were practical and resigned to the FDR. In these situations, practitioners issued s60I certificates and direct the parties to more appropriate services:

where it’s an issue that relates to ethnic and religious culture … they (parents) normally become really entrenched in their positions, when that happens we normally refer them off to the court process because its beyond our ability to mediate’. [Greg]

The realisation that not all matters were suitable for FDR is important because it means practitioners were reasonable regarding their abilities to resolve all disputes. Despite
practitioners training in, among other things, the issues of power imbalance within families, family violence and other imbalances are difficult issues to assess. Nonetheless, in a field that is increasingly dealing with parents from a multicultural perspective, practitioners must evaluate the impact of these issues on the parties and whether the resultant child’s plan will be in the child’s best interests and the agreements fair between the parents. The proposition is that practitioners are aware that being culturally competent and sensitive to difference is important; they do not have to necessarily abandon principles of self-determination and neutrality, ‘I can put myself into someone’s shoes but as a mediator I can’t take a side’. [Harriett] Consequently, practitioners understood that parents acknowledging culture will have important implications for the child’s sense of wellbeing and happiness. Even though practitioners were at times frustrated with the idea of parental prerogative in children’s matters, practitioners also believed that parents had the discretion to raise their children in any manner they saw fit, as stated here, ‘I’m one that greatly believes in the self-determination of parents’. [Desiree] Parental self-determination is the basis of facilitative mediation used in FDR and its philosophy encourages parents to focus their interest-based negotiations on their children’s concerns and interests; the practitioner’s role is to help parents separate their own pain from their children best interests.

I Practitioners’ views on how Age Affects Rights

A child’s age denotes a child’s competency, that is, the level of skill, knowledge, or ability enabling the child to take on the task at hand and to understand what they are doing and why. Competency is not static and grows with the child’s age. Under the UNCRC and FLA a child is considered competent at age 18 years. Practitioners understood that the right surrounding children’s competence and entitlement to rights was framed as ‘children have a right to their culture when they grow up’. [Sue] This view that children’s age is the influencing factor in whether children have the capacity, (capacity being the term that refers to the child’s ability to communicate for themselves and rationally organise information) to participate in making rational decisions is important for two reasons. It sets limit on parental intervention for children that are able to decide for themselves (however for themselves is also a precondition on parents discretion) and it also saves children from arbitrary decision making. The data suggests that practitioners understood that children needed to develop their identity to experience a sense of wellbeing. However, practitioners also determined that as children mature their parent’s expectations of them will grow proportionately. Children’s abilities or
competencies and the pressure that parents place on children, will at times affect the child’s right to form the child’s individual identity. As stated by this practitioner, ‘it’s a different kind of cultural expectation with the child’s maturity level or individuality depending on the age of the child’. [Desiree’] Expectation in this comment refers to the cultural expectation of the child’s parents. While different parents will place different expectations on children, practitioners mentioned over achieving in education, participating in cultural traditions and practices that are taught to the child as part of their socialisation process, ‘an expectation that she would be responsible beyond her years’. [Desiree] These expectations grow and get more complicated as children grow. Adult expectations about manners, language skills, and behavioural patterns of children change when children reach certain levels of age and maturity. Maturity denotes capacity and this subsequently denotes independence to make rational decisions about their future cultural participation. Practitioners believed that dependency diminished as the child gained competence, as this thought indicates, ‘I’ve spoken to children who would have been in their teenage years and they have been old enough to know what the issue [culture] is’. [Scott] Practitioners believed that the attainment of emotional consistency and cognitive capabilities central to recognising the child as an autonomous actor involves a broad range of activities, as stated in this statement, ‘when children are young they have very little idea of what culture means often in their teenage years they may have started to learn something, but it depends on your environment, on your school, on your circle of friends’. [Scott]

These variables, it is suggested, are a major reason for the rationale used by practitioners in taking on a paternalistic view of childhood, a biological period in the life of the child. Practitioners believed that during this time children cannot be considered rights holders. Practitioners reasoned that young children are not in a position psychologically to be making decisions about the right to culture, because they have not reached a stage of cognitive development to understand what culture is: ‘the child was very young, can you envisage if that child was a little bit older maybe the child’s cultural rights would be important’, [Niles] This comment shows that practitioners were aware of the connection between age and cognitive understanding. By conceptualising the child’s different levels of engagement in culture, this practitioner invited parents to understand that children’s needs varied with age and this is important for two reasons. Firstly, as children mature they require less socialisation by parents. Secondly, the need to recognise the right to culture would become less important, mainly because children will become increasingly involved in
the production of cultural meaning and will have the ability to assert that their rights be identified and respected. In the case of young children, practitioners believed that any actions taken by the child will be influenced by the parent and this negates any value to giving young children rights; as stated, ‘depending on their age of course, I’m sort of looking at older kids not sort of the younger ones, the younger ones will do what mum and dad say in the main’. [Niles] That is, practitioners believed that in general children’s rights are entangled with their capacity to act as autonomous agents; however, in younger children this then translates into what the parents want for the child. By using this rationale in FDR, practitioners relieved themselves from the responsibility of acting as child advocates on behalf of children to facilitate culture.

Practitioners were also aware that parents take their children’s cultural socialisation for granted, as she continues, ‘I think parents need to be more in tune with the cultural needs of the child’. [Stacie] and as noted by a number of practitioners, it is only after parents separate does culture become an issue in the dispute. However, practitioners were also discerning in that they believed that parents must begin to take children’s views into consideration when making decisions on their behalf, ‘rather than necessarily making it culture specific for children there should be broader cultural awareness, and an awareness that as children mature their needs for culture also changes’. [Sandra] In concluding that children evolve to meet the social and cultural influences that impact on them, this practitioner remarked that the right to culture should also not be a standard immutable right, but be understood in terms of the child’s evolving values and standards. As stated here, ‘to experience the level [of culture] that is appropriate for age but also appropriate for the child’s own desires’. [Sally] This point is important because it connects the child’s developmental needs for culture with the child’s personal authority to choose how much of the culture they want. In this next comment the practitioner viewed the gradual handing over of authority to the child by parents. In this case the child had attained a stage that denoted the child had reached maturity; she was in her teenage years. However, it also posed a challenge for the parents that the child had rights independent of the parents. By asserting her will even though she still needed her parents to accommodate her wishes, this young girl was affirming her individuality and as this practitioner notes, ‘a situation where a teenager has been wanting to explore certain cultural activities so the parents have obviously had to think about accommodating to the idea’. [Helen]
Reinforcing the child’s autonomous wishes encourages the child’s right to form an identity and preserves the child’s dignity, even though it is generally agreed that children’s rights are still subordinate to parent’s rights in many other ways. There is no explicit guide as to when competence occurs in a child’s life, as this depends on the parent-child relationship and the child’s circumstances. Yet the issue of rights under the FLA is not dependent on age, although it is dependent on enforceability. Therefore, in FDR practitioners have the opportunity to put greater weight on advising parents that the meaningful relationship found in the primary considerations could involve children’s cultural rights, because that is what will deepen the child’s connection with the family as they mature.

**J How Practitioners Rated Children’s Autonomy**

Practitioners understood that the rhetoric of rights is closely associated with principles of empowerment. By acknowledging children’s rights, practitioners were acknowledging children’s capacity as a social agent was also recognised. However, practitioners questioned the rationale of giving children rights when in reality practitioners believed children did not have power. That is, only individuals with social agency can exert power, influence or enforce rights and are considered rights holders. The data shows the practitioners preferring to frame children’s rights in moral or paternalistic ideological terms, as this practitioner noted,

‘I don’t know whether framing thing in terms of rights for children is the right way or whether it should be framing in terms of obligations because it’s that eternal question of power and powerlessness really, paternalistic as well’. [Tom]

However, there was another reason practitioners were concerned about children’s rights to culture in FDR. Practitioners reasoned that child dependency on parents negates children’s autonomy and further cements the idea that children are ‘future adults’ and are not able to make rational decisions in their childhood situation. Practitioners argued that as children are under the guidance and control of parents or carers, then any decision making made by the child could not be considered an autonomous act. As this practitioner noted, interdependence of the child on their parents means the child will follow the directions of parents and this has the potential to become, ‘the minefield between the right of the child and does the child have the capacity to make a judgement that is not affected by manipulation’. [Bruce] As this comment infers, children’s reliance on their parents to make decisions on their behalf has made practitioners lose confidence that children’s views on any matter of
importance, such as those decisions on to the child’s wellbeing, can be unfettered. In contrast, practitioners stated that children’s involvement is rare because of the FDR policy that requires parents to approve their children’s involvement in the FDR discussions, whether by child consultant or in person in the child responsive model of FDR. As one practitioner noted, most FRCs have a policy where they ask the parents whether they want their children to provide their views on the subject or to participate, ‘we have policy that we should see the parents together first before we decide whether we should have a child consultation so it immediately reduces the number of potential children we see dramatically’. [Greg]

While this may be a valuable practice to protect children considered immature by their parents, studies have shown that even young children are able to contribute to enlighten the FDR with what the child needs to be happy. Practitioners, while not completely denying the claim that young children can benefit the FDR, believed that including children in FDR was incompatible with the paternalistic approach to safeguarding the child from decision making. However, the inclusion of mature children was in one account welcomed, as noted:

I think if we put more emphasis on conciliation and involvement of children in the discussion, where age appropriate … that children more involved in the process in terms of addressing their cultural needs and through addressing their needs that itself is educating them how important it is. [Tanya]

Even this does not guarantee the child as rights holder will be respected in FDR, because there are no prerequisites or obligations on practitioners in FDR that state children’s views are to be given priority, as one practitioner noted, ‘unless a child is old enough and understands and participates in the child inclusive programmes, their views are merely considered, but may not be acted on’. [Debbie] This again places in doubt the concept of children’s rights to participation, to culture or anything else; from this comment it appears that children’s rights remain solely within the domain of the family. While child participation is now recognised to benefit the child, emotionally and physically, with the formation of plans that are more in tune with the child’s needs and wants, there is always a fear that making children participate in decision making in conflicted family FDR will cause detriment to the child. However, the comments above show that practitioners had empathy for the child and understood that children (depending on age) wanted to have a say. However it is important

that parents support decision making and not use manipulation to gauge loyalty from the child. Further, children’s input in FDR can benefit the family because children see the conflict from a distance: they can assess their parent’s positions because they are privy to the conflict that has occurred and that is being played out in front of them. Sometimes parents cannot see past their own agenda and children’s input can clarify the child’s best interests and help produce plans more conducive to the child’s needs. Operating from a welfare paradigm allows for a limited notion of children’s agency; this depends on the child’s circumstances and parental consent, and is doing the child a disservice in FDR.

**K The Effect of Children’s Rights on the Family**

Practitioners acknowledged that in a broad sense the recognition of a child as rights holder should correspondingly diminish the right of parents to make decisions on behalf of their child. However, in practice the attainment of autonomy for the child and the weakening of the hold of parents was seen by practitioners to have several differing effects, as stated here about children’s loyalties, ‘as they grow up if they feel torn between one culture and another and how they manage that’. [Harriet] Practitioners recognised that children in family dispute are often caught between their parents struggle. As stated, children often feel that any decision making by them will affect their parents, either to align with one parent against the other or to alienate one parent and so children are often left with a dilemma between what they want and their loyalties to each parent. Further, the development of children’s agency as discussed in Chapter Three is now seen as a true indication of a society’s democratic nature, however in FDR, child agency is seen by practitioners as a source of conflict with the parents, as noted here, ‘I think it is a right that is important, that its recognised and acknowledged, but it’s important to look at the effect its making, if any real beneficial changes can be made’. [Grace] Practitioners believed that children’s rights, while acknowledging that those rights existed, did not contribute beneficially to the family’s dynamics. Practitioners were challenged to recognise them and even more challenged in how to apply them. This practitioner’s comments suggest that practitioners, even in recognising that a right to culture exists, were still focused on how that right would affect the child and the family. However, this thought, that children’s rights to culture cannot bring beneficial changes, negates the fact that children need to be socialised by their parents to help them develop an individual identity. Children are also resilient and can adjust to the changes in their family dynamics and culture; for the child in times of conflicted
interpersonal relationships, culture can provide the stability the child needs.

Other practitioners reasoned that children’s rights are an oxymoron because children were not a class of people who could enforce their rights or were able to access those rights, due to the child’s perceived vulnerability, insufficient understanding and lack of legal competence, as this practitioner continued to say, ‘but the obvious thing is in terms of their physicality’. [Stacie] That is, practitioners believed the actual physical size of the child’s body meant they were vulnerable developmentally and in social contexts. This made practitioners view children as being incomplete and in need of protection. In FDR, practitioners pointed out that children are faceless individuals and all decisions made for them are made through the parents, ‘something we have to consider when we are coming up with a parenting plan that it’s the parents that decide and the child is mainly going to live with it [the plan]’. [Connie]

Practitioners explained that the regulative framework of FDR requires that practitioners ‘help’ parents resolve ‘their’ dispute, and by doing so, the intent is that practitioners help the whole family, especially young children who rely on parents for everything. As stated here, ‘there is a legal impetus there for FDRP to be guided by the parents negotiating, the parenting arrangement because it’s whatever they bring to us as a FDRP that we follow’. [Stacie] By this interpretation, practitioners were challenged to change their focus from parental prerogative to children’s rights. In that respect, practitioners understood that children’s rights are an anomaly, a legal entitlement that is conditional on parents recognising and enforcing the right for children.

In this next example, the practitioner saw culture as an obstacle to the child’s autonomy, when he associated culture with the ‘place’ of children in some cultures, as his comment shows, ‘a strong affiliation to a culture can mean the relationships between adults and how adults perceive the role of kids’. [Sam] By this interpretation of the child’s role within the family it can be understood that children do not have standing and by implication have nominal rights. However, this can also be interpreted from the perspective that children have all the rights. This means that children’s rights may not be conditional on the child’s development but based on a legal entitlement due to their humanity. It may be that in making the rights of the child paramount within the family context, legislators were viewing children from a perspective of the most vulnerable members of the family, and thus granting them rights (nominal or not) was intended to bring attention to that vulnerability. By alluding to children’s vulnerability, legislators were also stating that children require the greatest legal protection,
which would be fulfilled by granting children rights.

L Conclusion

This chapter presented data to show that the changes in 2006 to the *FLA* to provide children with a right to culture is challenging for practitioners in FDR. This is mainly because the notion of children’s rights is still an ‘abstract’, an ideal framed in paternalistic notions of protectionism. Practitioners in this study, in the majority, spoke in terms of children’s rights, but did not accept the idea of children possessing rights, reasoning that children were not a class of people who could enforce those rights. Therefore, children’s rights are an ideal that is failing to gain real substance in FDR because children still lack the status of social agency and their participation in FDR is random.

Yet practitioners accepted that rights were earned through age and maturity and placed the onus on a child’s capacity to challenge parental rights; although neither were compelling reasons to disqualify the child’s right to cultural inheritance. Despite this acknowledgement, in a number of commentaries practitioners disputed over whether rights was the correct term to use in relation to children, given that the very capacity to express those rights by children resulted in them being subjected to manipulation and pressure by parents. The implication of these comments suggest that practitioners struggled with the rhetoric on children’s rights to culture in Australia, believing children’s rights translated indirectly into rights for parents or other responsible adults. Alternatively, practitioners argued that children should be given age appropriate rights, and although practitioners could not agree to what extent, they did agree that without the capacity to invoke these rights, they merely act as hollow statements reflecting claims on behalf of children to be observed, at the indulgence of individual adults, usually parents. A key challenge for practitioners managing child focused FDR was to keep parents focused away from their own self-seeking negotiations, to ‘hear the voice of the child’ long enough to produce parenting plans that incorporate the child’s best interests.

Practitioners in this study also exhibited difficulty in reconciling the rights of the child with the best interests of the child tenet. Whereas practitioners understood that the ‘best interest of the child’ was the overarching principle in all matters concerning children, practitioners also understood that the nature of families and the interests of the individual child are relative
to the family’s social and cultural circumstances. In FDR, where the bulk of contested children’s cases are now resolved, a one size fits all solution is inappropriate and is unlikely to meet the best interests of the child standard. Practitioners relied on their own understanding of best interests and this led to a lack of conformity in usage and in the determination of whether a children’s right to culture lay within that description. Despite the difficulty practitioners had in defining best interests, practitioners did believe that the term has come to mean ‘what’s good for the child’, as assessed on an objective basis by those most connected to the child, their parents. Finally practitioners, while acknowledging their primary duty is to the child’s best interests, confused rights with parental prerogative. At the same time, practitioners were aware of the dichotomised relations between children’s rights and parental rights and while practitioners were prepared to support the child’s right to assert themselves and formulate a new individual identity, they were hesitant to support rights for children at the cost of what was in the best interest of the family. In FDR, the rights of the child to culture depended on the practitioner’s abilities to realise the benefit of culture for the child. The practitioner and the traits that enable the practitioner to disentangle complex and often intractable disputes to promote the child’s best interests will be discussed in the next chapter.
VIII RESEARCH: THE PRACTITIONER AND THE PROCESS

A Introduction

In the previous two research findings, Chapters Six and Seven on culture and cultural rights respectively, data was presented to show how practitioners interpreted culture as a concept, culture as integral to child development and culture as a right for children in the UNCRC and Australia’s FLA 1975 (Cth).

The findings from these chapters demonstrated that practitioners gave a wide interpretation to the meaning of culture. While most practitioners understood and appreciated the importance of culture for children’s development, practitioners were challenged to reconcile the right to culture with the principle of best interests; had difficulty separating between children’s rights and parental obligations; and were resigned to the notion that the child’s age and level of competence were determinant in the acknowledgement that children were right’s holders. Both Chapter Six and Seven explored the practitioners’ perceptions of the child’s anomalous position in the FDR process, children as rights holders and children as in need of agency and protection. While discussion touched on practitioner neutrality, independence and parental self- determination, these topics will be addressed in this chapter from the perspective of the practitioner’s thoughts on their abilities as managers in emotive high conflict FDR.

More importantly, the chapter will present data to show how the process of FDR, with its protocols and time restrictions, inhibits the capacity to firstly, identify and secondly to respond to cultural difference, making the facilitation of the child’s rights to culture problematic. Then discussion will address what practitioners believed to be their primary role in FDR and how they resolved the conflict between their role(s). The chapter will argue that practitioners were challenged to manage complex FDR; practitioners had difficulty distinguishing between culture and religious ideologies. The chapter will argue that when practitioners attempt to deconstruct the conflict between the parties in FDR they are usually faced with entrenched understandings of culture as norms, standards and values that support power structures and gendered roles, making constructive negotiation in FDR almost impossible.
The chapter will present the factors that make up the practitioner’s duties, those legal duties in the form of the FLA obligations to help parents and their Regulatory duties to advise parents, as well as the practice standards devised and monitored by the service provider. The practitioner’s ethical obligations mandate that practitioners remain neutral, fair and independent of the dispute and the parents, maintain and encourage self-determination in the parents and manage child focused FDR. However, despite these obligations and the new accreditation requirements for practitioners, practitioners still seem to lack the confidence to manage FDR with parents of non-mainstream cultures, and find it challenging to facilitate culture for children in FDR. This chapter will therefore ask practitioners their thoughts on what the solution may be for them to reach a stage of cultural competence, to help parents from non-mainstream cultures. As these influences went to limiting the practitioner’s abilities to implement culture in FDR, the chapter will start by providing the practitioners’ views on why the facilitation of culture in FDR was so difficult.

B Prelude to the Process of FDR.

FDR is now considered the prime dispute resolution process in contested children’s cases in Australia. Since the amendments in 2006, FDR has become mandatory in all children’s matters, except in cases where there are allegations or risk of violence or child abuse. The most common form of FDR is mediation in the form of a facilitative/evaluative model, and this is premised on facilitating discussion between disputing parents, but at the same time evaluating the genuineness of those discussions to produce a child focused parenting plan that is in the child’s best interests. This model traditionally involves practitioners respecting the principles of self-determination and empowerment for parents, while remaining neutral. The position of practitioner is aided with the introduction of pre-assessment intake and screening; if the matter meets the approval of intake staff, the matter is then assessed by the practitioner who will take carriage of the matter till completion. The practitioner’s legal and ethical responsibilities will guide the practitioner throughout the process to ensure consistency and legitimacy of the process. Despite these policy and practice safeguards, practitioners are finding it difficult to facilitate children’s rights to enjoy their culture. A discussion of the three phases of FDR is necessary to assess why.
C Intake–Assessment

This section will briefly discuss the intake and the misconception of many practitioners as to its value, and will then incorporate discussion of the practitioner’s first session with the parents to give a fuller view of the pre-FDR processes.

Before proceeding to provide FDR, service providers must conduct an intake; this is where the information collected relating to the parents’ social demographics and current life circumstances is collected either over the phone or face-to-face over the counter using a set questionnaire. Intake is the initial opportunity to collect information about clients and to assess whether the matter is suitable to proceed to FDR. The information gathered relates to: any power imbalances between the parties, whether the parties can negotiate freely, whether there is a history of violence, or whether any emotional, psychological or physical health problems exist. The session asks questions relating to the issues in dispute, the culture, language or religion of the parties and each parent is interviewed separately. If, after considering these matters, the intake staffer is not satisfied that a matter is suitable for FDR, the staffer will refer the matter to a more suitable service. Moreover, intake is seen to be a normalising experience for parents because it is often the first time parents have discussed their dispute with someone outside the family. The work that intake staff undertake is important because it outlines the legal requirements as provided under Regulation 25 for the assessment and provides parents with information on the best mode of dispute resolution for them. Children are a major part of the intake questions. Here staff ask about matters relating to the children’s relationship with the parents, questions on living arrangements, coping mechanisms, school progress; and then staff explore with parents the children’s interests, needs and concerns. Most importantly at intake, staff ask parents whether they are willing to ‘hear’ their children in the mediation and staff explain the benefits of understanding the child’s views.

When practitioners were asked about what they thought of the intake process and whether it was a suitable process to detect the cultural orientation of the parent, their responses provided a useful insight. Most practitioners considered intake to be a fact finding process where support staff recorded answers to a pre-set questionnaire; as this practitioner commented, ‘I mean to be

completely frank it very much sort of just ticking the box within the intake process’. [Terri]
There was acknowledgement by a number of practitioners that intake is a stage of discovery
and any information gained at this stage can assist to determine whether the matter will
ultimately go to FDR or not; as this practitioner noted, ‘intake they ask, what’s your
ancestry and what’s the language youspeak at home, and always questions around domestic
violence or things like that’. [Amanda] Practitioners also understood intake to be a screening
process by which the questions asked seek to determine whether there is violence or harm in
the once intimate relationship. Even though screening for violence at intake is also a matter of
ticking off several boxes, it gives practitioners some indication of the makeup of the
relationship, as noted by practitioners prior to assessment, ‘I can at least see ticked boxes
and I at least am able to, even if on a rudimentary basis of understanding of what the issue is
about’. [Mick] These comments suggest that practitioners had little idea of the method of
intake or the importance of this initial process.

Intake is an information gathering process that centres on ensuring that if parents attend the
FDR there are no issues of fear, intimidation or power imbalances between them and that the
screening process has completed its checks and the parties’ safety is ensured. The
information gathered at intake helps practitioners prepare for the main session of FDR.
Information relating to culture, if not directly asked, is usually concealed under questions
about language and religion. Even though language is a common question asked at intake, it is
often a good indicator of cultural orientation and the affiliations of cultural groups. This is so
despite the reliance on language restricting one’s view of culture and has the potential to
overlook the subtle elements that can hide a minority culture. That is, people can speak many
languages but they may only identify with one culture.

Even so, some practitioners noted that intake questions were not consistent across the sector.
The questions on cultural background often concentrated on Indigenous culture(s), as noted
by this next comment, ‘I guess at intake, the parents are asked if they identify as Aboriginal
or TS Islanders’. [Beth] In this manner intake becomes, for most practitioners, a filtering and
gathering system and the questions it asks while general in context, make up the basis for a
more effective assessment, generally the second stage in the process. Yet the data shows that
some practitioners do their own intake, and as this next comment suggests, the practitioner
is able to ask all the questions that they believe to be important to the FDR because they take
the matter to FDR: ‘we do our own intake … we should be considerate of people’s cultures in
all facets in our work. We’re talking to people and understanding their backgrounds and their needs’. [Marge] By giving one practitioner the responsibility of the entire matter there is more opportunity to extend the scope of the questions at intake to make a more comprehensive determination of the issues involved.

In the context of ‘just ticking boxes’, [Gretta] the data suggested that most practitioners were confident with the process and the manner in which it is completed, understanding that the relevant questions and checks had been completed in readiness for FDR. However, they also recognised that culture was an important element of the parents’ personality and intake questions should be revised to be more culture aware; as noted, ‘but for intake more than for anything else I think we are moving to that awareness but I think we have to talk, we have to ‘walk the walk’, a bit more to implement that awareness’. [Sandra]

The next stage is for practitioners to commence their preparation for the first meeting with the parents, ‘prior to meeting the clients in FDR, we would normally have established a good picture around any cultural issues through those questions’. [Harriett] The Practitioner’s Assessment is the second level of interaction, but usually at the first meeting between the practitioner and parents, each parent is seen separately. This stage is said to separate the process from the content of the FDR, where practitioners hear the individual parent’s stories and explain the process of FDR. The practitioner can at this stage make the second assessment about whether the matter is suitable for FDR. The suggestion is that while intake aided the consciousness of FDR staff to the relevance of culture in the dispute, these findings are only preliminary and are not enough to make affirmative deductions as to whether culture was relevant to the dispute. The practitioner’s session attempts to answer the questions that intake could not, as stated here, ‘formalised questions about their country of origin, the family where they were born, what’s the major language that’s spoken at home or do they have a second language’. [Greg]

Alternatively, because this first session is also the first face-to-face meeting with the clients, practitioners are able to detect visually the parent and then ask more probing specific questions about the parent’s language, culture and religion. By these answers the practitioner is able to detect whether culture is an issue and if so, what issues need to be addressed. As this next comment indicates, culture is usually detected as an addendum to other issues in dispute:
if culture comes up it will come up indirectly and it will come indirectly about the issues we are actually screening for and that triggers obviously your thoughts in anticipation of mediation … and whether there are cross cultures you see that often it will come up somebody will say something about it. [Tom]

This session leaves practitioners in a better position to carry out the FDR because practitioners have already established how they will use the relevant information relating to the language spoken and cultural background in the FDR. As this practitioner noted, parents are eager to tell someone their problems, so practitioners usually become familiar with the issues that will be discussed at FDR, ‘we try to give enough space for the client themselves to be able to tell us the stories in their own perspectives, about what bought them to where they are and what’s happened in their family’. [Greg]

Further, this stage is more consistent in its form and content than intake because the same practitioner has carriage of the matter and any assessments made in the format, the questions and the content of discussion are all retained by the practitioner for the main FDR. This is important because if practitioners identify that culture is an issue, the culture aware or sensitive practitioner can strategize the session to account for these details. As one practitioner stated, ‘we ask how long have they been in the country how detached are they or how diluted is their culture to them all this sort of stuff, this has a bearing on how receptive the parent is’. [Niles] In this stage, practitioners are able to assess the degree of commitment a parent has to their culture. In hearing the stories of each parent, practitioners can start to understand the parent’s issues and their concerns. Once parents are receptive to the practitioner’s mode of management, then practitioners can introduce the idea of the rights of children to enjoy their culture which is then carried through to the main FDR. As this practitioner noted, ‘in the pre-FDR it’s about looking at the future and what parents are hoping to achieve for their children and for a lot of people that’s to do with culture and that would need to be explored in the FDR process’. [Debbie]

The data suggests that at this stage when parents are open to issues relating to the dispute, the practitioner can actively ‘help’ parents to understand the importance of culture for the child. As this next comment suggests, the practitioner was conscious of his influence to introduce the issues that may be presented at the main session, ‘in the pre-family dispute resolution session that’s where I as the FDRP have a lot of capacity if we are connected with the parent or maybe look at their intent and to see how that intent is focused on the child’. [Bruce]
By requiring parents to negotiate over their child’s future care in a certain manner and by focusing discussions on the child’s development and future cultural socialisation, practitioners are seen to assist parents make workable arrangements that address their children’s needs, ‘my role as a mediator is to help people identify the issues and seek out potential for resolution’. [Sam] Here also, practitioners can detect any issue that has escaped the intake, like intergenerational conflict over family culture, and work with parents to formulate a plan that would benefit all members of the family and set boundaries for family interaction in the future. Issues of culture are important to detect at this stage as the practitioner, having understood the dispute dynamics, the issues, and interests of the parents involved, can assess their own abilities to manage the session. If the issues are not appropriate for FDR, such as violence attached to culture, then the practitioner can refer the matter to someone else or prepare alternative modes of managing the session, ‘I usually try, if the family is Aboriginal or any other culture, I try and find a co-mediator who is part of that culture, so the deficiencies I might have in cultural understandings, can be balanced’. [Heather] While co-mediators offer a range of advantages from expert knowledge to sharing the workload, there are also disadvantages in that the practitioner must share the decision making and the advice given to parents. In this next comment the practitioner was suggesting that within the organisation she works in they do things more efficiently than other FRCs, as she explained, ‘prior to mediation we do intakes because our approach is very child focused what’s in the best interests of the child and in that regard probably I would think that cultural identity is very important and I would raise it’. [Gretta] In the main, all service providers have relatively the same format of procedures, intake and practitioner assessment, although with some providers the practitioner does their own assessment and in other places the process is divided between two areas of the facility.

The processes of intake and first practitioner session ensure that a matter is appropriate for FDR. That is, the screening has proved safe and the assessment has been completed to identify the family’s needs and concerns. While this is not the only time these questions are asked, for practitioners not doing their own intake, these questions prompt further questions in the second practitioner’s session. Questions relating to culture at this stage are very important to explore how parenting styles differ and the differences in values and standards on parenting:
because parents are in FDR because they are in conflict and one of the conflicts may well be about you
know difference significance of their certain cultural things and family and values … parents who believe
certain parenting styles are appropriate. [Helen]

The answer to this question allows the practitioner to assess what type of conflicts may be present and whether the conflicts in relation to cultural values or interests and needs.

The adoption of pre-determined and formalised intake accords with the objectives of fairness. The pre-practitioner sessions are more flexible and the practitioner has the capacity to respond to the individual parent’s needs, building options and strategies and giving advice as to the child’s best interests. Cultural awareness is critical at each stage, with the movement of the matter to the FDR the adoption by the practitioner of a culturally competent stance will detract from the image of FDR as a western oriented process only suited to white middle aged men.

**D Exploring the Main FDR Session**

This section will address the issues that arise during the main FDR relating to why practitioners are not facilitating culture for children.

In the main FDR session, this is where parents meet to reflect on the issues that have been sourced as being in contention and with the help of the practitioner resolve their conflict that would otherwise inhibit the child’s healthy adjustment and development and produce parenting plans in the child’s best interests. In the main session, the practitioner is said to have control over how the FDR will be managed, while the content of issues and the importance of culture to the discussions are with the parents. At this stage, practitioners have several statutory obligations that they must complete before beginning the discussion. These include giving ‘advice’ to parties in connection with making plans that reflect equal time shared parenting arrangements. However, if this is not assessed by the practitioner to be a reasonable arrangement because of time restrictions, or distance between the parent’s residences, then practitioners must discuss whether ‘substantial and significant time’ would suit the circumstances better. It is here that practitioners can see how parents interact with each other and how parents describe their culture, as shown in this comment, ‘people might talk about aspects of special occasions that are really important’. [Helen] While the initial meetings occurred at the pre FDR session, these were conducted on a one parent at a time basis, at FDR parents meet and it is here that significant differences can be detected by the practitioner: body positioning, mannerisms, voice projections. As this practitioner suggested, all practitioners
would be aware at this stage of cultural disputes so practitioners must take the initiative to explore with parents their positions:

All accredited FDRPs should have some cultural training to be aware of the issues, the issues are there, unless they are aware of the issue they’re not going to know about it, they need to fish a little bit, find out exactly why are people taking this positioning. [Mick]

As noted, mixed cultural families are becoming common in FDR and therefore knowledge of culture is increasingly becoming more relevant, ‘having an awareness of their cultural heritage … parents come from different cultural backgrounds, which seems to be increasingly common’. [Beth] Whereas the data shows that most practitioners were conscious of these differences in the main session, the culmination of information, collected from both the intake and the assessment, in the main FDR help the practitioner generate purposive options suited to these circumstances.

In a number of comments, practitioners noted the inappropriateness of FDR in matters that concerned non-mainstream cultures. As this practitioner argues, the style of FDR used in Australia, its particular processes and protocols, may not be suitable for all the issues that parents present with at FDR:

in relation to FDR practice even our mediation model in many ways is based very much on Anglo-Saxon, certainly a white western model of families and relationships, even the practitioners are coming from a well-educated middle class background. [Wendy]

While current methods of FDR are said to be more conducive to engage with parents from mainstream cultures, practitioner awareness of this fact is important to balance any incompatibility that may present in FDR for non-mainstream parents. On a different level, the above comment also shows the cultural context of the practitioner in FDR, specific in her cultural values, norms, and standards and working on the understanding of her own assumptions and biases about minority and Indigenous parents. This evaluation of the practice is meaningful; it shows that practitioners are culturally competent to realise their own shortcomings with culture. It also show an awareness and professional capacity to provide parents of non-mainstream and Indigenous origins an individualised service to counter the dynamism of culture and the complexity that can arise as a result of one or both parents being from different cultural origins. As this next comment suggests, practitioners were reflecting on their own cultural self to provide parents with appropriate FDR, ‘we live in a multi-ethnic and multicultural nation in Australia... I think we all come from complicated cultural backgrounds’. [Heather] Practitioners understood the significance of culture in the family
dispute; however, they also realised that facilitating cultural rights for children was very complex. The reason practitioners postulated was that parents from different cultural backgrounds have different outlooks on life and child rearing practices; while this may not have been an issue during the partnership, after family separation these become strong dispute issues, as noted here:

someone who identifies as Aboriginal or TS Islander … is partnered with someone who has very little understanding of that culture … quite problematic for the parents to be able to resolve that themselves because they have very different understandings and are coming at it from very different perspectives. [Beth]

In these situations, the practitioner’s role is to clear the ‘forest from the trees’ that is, to sort the issues into identifiable issues to help parents concentrate on their child. However, culture is a complex issue and many practitioners found the issues difficult to identify and work with.

**E Practitioners and Complex Family Dispute Resolutions**

Practitioners found that managing FDR when parents presented with disputes involving a combination of issues, such as culture and religion, made the FDR much harder to resolve. The reason practitioners noted was because religious and cultural beliefs affect the core ideological foundations of a parents’ culture, ‘culture is cross over with religion to a certain extent certainly in the harder matters I deal with, if the parents are from different cultures and different religions conflict often comes up … because religion is a major part of culture’. [Desiree] In most cases, practitioners recognised that the concerned disputes of fundamental moral beliefs and assumptions. In these circumstances, practitioners also realised that even when a plan was compiled, parents were often left with significant post-settlement barriers to the implementation of the plans, ‘parenting plans, not orders’. [Grace] This is obviously a major concern for practitioners. Practitioners argued that any conflict and resultant plans that concerned the culture or religious beliefs of the parent would be hard to resolve because religious manifestations are based on absolutes: right versus wrong and black verses white, where there are no grey areas, ‘a different religion between the two parents and where they have quite competing values about that and that normally, they become really entrenched in their positions’. [Greg] The intractable nature lies in the fact that religious disputes are based on subjective values and rigidly held beliefs, and standards that are not held by all people, ‘between opposing expectations of the parents, the issue of religion
obviously often comes in’. [Sam] Therefore, they tend to make compromising difficult in the long term. In this next scenario, a practitioner was not able to help parents compromise their positions, which frustrated the situation and led to a failed FDR:

ones that very rarely make it to the full mediation process, is where it’s a combined an ethnic and religious culture where you might have quite a different religion between the two parents and where they have quite competing values they normally become really entrenched in their positions. [Greg]

However, it is also the role of a practitioner to know their limitations and in situations that are beyond their capabilities, then practitioners reported that litigation was a more suited venue:

when it’s a combined ethnic and religious culture… and where they have quite competing values … they normally become really entrenched in their positions, when that happens we normally refer them off to the court process because its beyond our ability to mediate. [Greg]

In FDR where the dispute contained elements of both culture and religious ideologies, practitioners were challenged to support the multiple and variable understandings relating to each parent. Practitioners in these contexts positioned themselves away from the discussions by redefining the conflict as unsuitable for FDR and issuing parents with s60I certificates enabling parents to seek judicial determination. Practitioners recognised that disputes involving elements of culture, religion, values, standards and ideologies, signal conflict about identity and these often became entrenched. In this next comment, the practitioner identifies the cause of the conflict, ‘dad was expecting that the children would be raised in much stricter religious terms than mum was, that he was much more determined to keep the power and mum was challenging that’. [Sam] This example is pertinent for two reasons; firstly, the idea of attachment to one’s culture or religion (this will be discussed later in the chapter), secondly, the breaking down of gendered roles in long standing patriarchal cultures and this is causing an imbalance in the status quo within a family and subsequent conflict. As the practitioners noted that when the father’s cultural hold on the family became threatened, that is, when the parent believes his children may no longer be a part of his cultural heritage or that children will adopt values different to him, then his emotions became extreme and in these cases practitioners reported that FDR becomes complex and hard to manage. As this suggests, ‘culture can heighten the emotions and heighten one’s intellect in the sense that the problems in navigating this are often great intellectually … and it becomes very difficult area to navigate’. [Tom] Raised emotions obstruct sensitive negotiations over children and this often leads to a failed negotiation or in the production of unfavourable agreements.
Other issues that have hampered the facilitation of culture for children are disputes that have a combination of differences in general, that is issues with more than one dimension like culture, religion, set gendered roles and violence, ‘we do get quite a lot of mixed marriages coming to mediation, it might be either different backgrounds, or different religious backgrounds, and we only know about violence when we talk to them’. [Amanda] Where practitioners encounter a mix of potential conflict precursors, like these mentioned above, the outcome of the FDR depends on the awareness of practitioners to guide parents past the differences to remind them of their mutual goal that is, to negotiate a child focused parenting plan. Developing cultural competence, acceptance and cultural knowledge helps practitioners reduce the impact of conflicted family separations on children’s wellbeing.

(i) The Identification of Culture

In a multicultural nation such as Australia, practitioners understood that as a result of changes to the FLA, they would be managing FDR with parents from non-mainstream cultures. In this recognition, practitioners were attempting to meet those challenges, ‘people come to the FRCs so I certainly think that practitioners should be aware of the culture … if there’s any conflict and … if there is power issues between the parents’. [Wendy] As practitioners were managing FDR with parents from non-mainstream backgrounds in unfamiliar cultural negotiations, practitioners had to draw on their professional and technical knowledge, as well as their personal strength and know how of traditional collectivist values, to neutralise the emotions and stabilise parents to a stage of negotiation that is child focused. This not only makes management of FDR challenging, but puts enormous strain on the practitioner’s physiological and psychological health to confront unreasonable parents, as described here, ‘I don’t think it really is up to the parents and their motivation, other than training and awareness in how to challenge reluctant, not reluctant, a defiant parent, a prohibitive parent, that’s the right word, about culture’. [Tom]

However, in this comment the practitioner takes into account, but then puts aside the parent’s motives as being irrelevant; yet for a parent in negotiations over their children’s future, parent’s motives are highly relevant to the issue of dispute resolution. Practitioners must be able to identify the parent’s orientations before making judgements as to a parent’s intent. Cultural analysts describe the differences in how people emphasise responses as the individualism/collectivism continuum. Where individualism favours individual
autonomy, initiative and authority in decision making, collectivists generally value group cohesion and harmony.\textsuperscript{744} In this case, the practitioner’s interpretation of a ‘defiant or prohibitive parent’ can be based on misinterpretation of these values or be steeped in stereotypical assumptions. Culture affects how parents define the dispute, the problems and the solution; however, culture also affects the meanings and importance of these situations.\textsuperscript{745} Problems arise when parents or practitioners from different cultures attach different measures of importance onto the same event. A practical solution to being caught in a FDR where you are unfamiliar with the culture is as this practitioner noted, ‘with the Anglo-Saxon children there’s that concern about attachment and there’s a kind of different cultural thing there and for me as an FDRP is about being guided by the parents’. [Tanya] Being guided by the parent helps practitioners and gives the process legitimacy, so that practitioners understand the cultural context of the parents. Identifying the differences in FDR is a major part of a practitioner’s role.

One form of identification discussed by practitioners was that of the child’s development of a cultural identity during their childhood, as this practitioner reasoned, the longer children have been within a family, the more attached children become to the culture of that family, ‘allegiance to a family means an allegiance to a culture or allegiance to a way of life’. [Tom] In other words, practitioners recognised that children’s socialisation into a culture was dependent on the parents reinforcement of culture. For parents, the dispute therefore becomes a fight for the existence of the family identity and these are seen by practitioners to cause the greatest conflict between parents. In another comment the practitioner was concerned about understanding the attachments people have to their culture, ‘what we have to learn about is that person’s attachment to their culture and the need for their children to practice some of that culture, we need to ask them, what’s important to them’. [Sue] In understanding the importance of culture, practitioners were surmising on the different levels of attachment parents had to their culture and the effect that had on FDR, and on their style of negotiation, ‘for every one that there is a continuum of participation if you like and there

\textsuperscript{744} ‘Collectivism is the idea that the individual’s life belongs not to him but to the group or society of which he is merely a part, that he has no rights, and that he must sacrifice his values and goals for the group’s “greater good”; from: ” John Dewey, “The Ethics of Democracy,” in The Early Works of John Dewey, Volume 1, 1882–1898: Early Essays and Leibniz’s New Essays, 1882–1888, edited by Jo Ann Boydston and George E. Axetell (2008), Carbondale, IL: Southern Illinois University Press, p. 232.

are some that are passionately participating in a traditional culture and so they will voice their views’. [Desiree] The suggestion is that not all parents want to discuss culture and not all parents want their children to be a part of a particular culture. As this practitioner noted, culture is a subjective element in the lives of the family members and if culture was important then parents would voice their opinions. It is when parents become rigid and demanding that this requires practitioners to use skills to break down the barriers to communications between the parents.

In these situations, the practitioner’s skills, power and influence will define whether the practitioner has the ability to refocus conflicted parents to their children, instead of on their own cultural needs. However, this also means that practitioners will have to identify ‘resistance’ from ‘culture’ and ‘emotion’ from ‘influence’. That is, culture influences and often determines the options that are available to a parent, based on their standards and norms. Practitioners must be culturally competent and prepared to develop a tentative understanding about the needs and interests of the parents that attend FDR, to make reasoned educated evaluations instead of a hasty incorrect assumption or stereotype. This is especially important when practitioners are now empowered to issue s60I certificates for parents they assess as not negotiating in good faith.

(ii) Identifying Solutions

When asked what practitioners thought would assist them to help clients from non-mainstream cultures, practitioners stressed that in general, most practitioners have had training amounting to cultural awareness, ‘we all have some training around cultural awareness and the importance of culture’. [Amanda] However, practitioners stated that their training did not address children and cultural rights, as this comment suggests, ‘we’ve all attended culture and diversity training and to tell you the truth I don’t remember it being brought up as a specific point, that the children’s right’. [Grace] Accordingly, practitioners were pragmatic and named specific cultural training as enabling them to understand the particular cultures, ‘specific training or for the development of more specific tools on how to canvas this subject area’. [Sue] In identifying the cultural underpinnings and idiosyncrasies of a parent’s culture and the context and positioning of parents in a dispute concerning culture, practitioners develop an insight into the culture and this becomes an asset during FDR. However, while this comment may be practical to understanding the underlying assumptions and foundations of particular
cultures and how culture affects the child, concentrating training in one culture will only help if parents from that region attend FDR. In those cases, practitioners are more apt to correctly interpret the actions of the parents; however, it restricts the practitioner’s understanding of other cultures. Other practitioners were aware of the dangers of stereotyping parents and cultures, ‘be imposing um stereotypical white middle class Anglo expectations about things...’ [Sam] this awareness is important to develop, especially for practitioners with little culture training as it prevents practitioners pre-empting a parent’s reactions and mindset.

In addition, training in problem solving techniques to help parents from non-mainstream cultures focus their energies on the cultural rights of children was also suggested, ‘I think training, I don’t know what that would look like to get me off the sort of platitudes of we are different and how do we encourage to not be judgemental’. [Sandra] For this practitioner the solution was training to enable her to become familiar with the effects of culture on people in FDR. This would allow her to somehow develop a culturally competent multicultural practice and most importantly, empathy for different cultures. However, attitudes and beliefs are themselves based on cultural expectations of the other; cultural competence is not based on merely having knowledge or being able to skilfully manage a situation with parents of non-mainstream cultures. Cultural competence is the ability to interact effectively with people of different cultures. It is not by having knowledge of different cultural groups or even by being a part of a particular cultural group that provides all the answers a practitioner needs to manage FDR with parents of non-mainstream cultures. It is a combination of all these traits that will help advance the consciousness of the practitioner. Practitioners understood the importance of being culturally competent in FDR, but at the same time wondered how effective their present training, education and practice were to real FDR situations with parents of Indigenous or minority cultures. As this next comment suggests, without practice to put into effect the training, practitioners would still struggle, ‘because you have the exposure of … or you have been involved in the community its certainly going to help you understand, I think training will assist’. [Mick]

Further, education and training in culture studies will help practitioners understand that parents may be affiliated to many cultural groups: ethnic, religious, professional, ‘I’ve got lots of training but it’s kind of hard to know how much or what specifically that you can never learn everything there’s always more’. [Amanda] This comment is significant because it shows that despite extensive training, culture is still a complex and difficult area to practice in. As this
practitioner notes, education may not be the answer, practitioners need to attain practical training to dislodge some of the underlying assumptions that people in general attach to different cultures. By understanding these assumptions, practitioners can then learn how to make the process more malleable to accommodate culture and tailor the process to the parent’s culture. In this manner, the information gathered will be directly on the issues important to the parent.

A suggestion provided by practitioners is to develop competencies through using information kits on various cultures. That would help practitioners increase awareness of the cultural practices that might be relevant to children, and therefore to begin conversations with parents about this. Practitioners noted that the use of culture specific information would help, ‘printed material that looks at children within other cultural context’. [Terri] For this practitioner, printed information would guide her in her understanding of the outward practices and traditions of a culture. Other mechanisms might be having a registers available for practitioners from different cultural backgrounds, as this practitioner noted, ‘developing an indigenous practitioner database’. [Wendy] Yet all these suggestions presume that: firstly there is sufficient expertise available, that members of a culture are proficient in all aspects of a culture and are able to competently communicate and explain the different unique concepts of a culture to others; and secondly, that cultural dimensions are immutable, which again is an unreliable premise and may not produce the cultural competence required to address all cultural questions in FDR. Another suggestion made is to have lists, ‘various different checks and lists that different practitioner’s use’. [Amanda] These check lists appear to be listed characteristics of different cultures that a practitioner can check off to identify whether a person fits within a category or culture; how effective any of these suggestions are, is a trial in the waiting. Nonetheless, standardising a culture is not an effective method of predicting how a particular family within a culture may view their traditions. The Christian Middle Eastern culture (which is a contradiction itself), particularly my own family structure, can serve as an example. The differences between the cultural affiliations of my five children, all Australian born with ages ranging from 33 to 21 years, range from extreme to very similar, that is, my older children have a strong sense of culture and enjoy being with others from the same culture, while my younger children have become more absorbed within the mainstream culture. Their affiliation with the Middle Easter culture is strained and only on rear occasions, to please me, will they participate in any cultural practice or event. Despite all being socialised in a very similar fashion, their differences in language proficiency and
identification with extended family is extreme; however, they are all very similar in observing
the traditional practices and assuming responsibility for immediate family members. As for
best interests, this translated to family affiliations for the older children and independence for
the younger. So sharing a culture does not necessarily mean one shared an outlook on
what is best in any given circumstance.

A more effective method suggested by practitioners to the problem of identifying
culture or enhancing the skills base of the practitioner, to reduce stereotyping anomalies, is
working with cultural or religious communities and organisations. As noted in this next
comment, ‘working with professionals/organisations from different cultures so that we have
some mechanisms available for us’ [Harriett], having a cooperative agreement with these
organisations would provide practitioners with the practical knowledge of many cultures.
Similarly, practitioners were prepared to ask for help and accept help from parents from non-
mainstream cultures, as noted here, ‘it would be great if we had more people we could refer to
or to contract in and say we’ve got a family and we need some help’. [Harriett] Even so, the
challenge lies in finding a middle ground by which to process adjustments and adaptations
to manage FDR with parents from non-mainstream cultures. One way, it was suggested would
be to have resources where a practitioner could access on-site that is, within the
practitioner’s place of employment, to effectively addressing the cultural needs of parents. In
situations where practitioners do not have the relevant learning, being able to initiate
discussion between parents may be enough for parents to continue the discussions
away from FDR to reach a child beneficial arrangement, ‘what we do is try to do is create an
open dialogue where there is always room for resolution’. [Stacie] For more innovative ways
of enhancing cultural competence, practitioners suggested co-mediating with practitioners that
have specific culture knowledge to identify culture related emotions and actions, ‘Awareness
and professional partnering, if we are going to be able to respond to Indigenous families
coming into the family law system... and Aboriginal mediators’. [Harriett] This could involve
the introduction of a co-partnering system, whereby another practitioner who understood the
cultural orientation of the parents would work with practitioners that lack cultural knowledge.
This practitioner notes, ‘I try and find a co-mediator who’s part of that culture, so the
deficiencies I might have in cultural understandings, you know can be balanced’. [Heather]
By balancing this practitioner’s knowledge of the process of FDR with the culture specific
knowledge of the co-mediator, it is assumed that the parents are offered a much more
comprehensive service. In other accounts, practitioners mentioned consulting with other
family members to try and find an integrated solution for the family’s problem, ‘I think that’s only possible with people working with you around a family’. [Harriett] In drawing attention to the variety in many cultures, practitioners had to draw on the expertise of other professionals. In this next example, practitioners mentioned child counsellors to aid in her understanding of the cultural needs of the child, ‘she’s done cultural awareness training and all that thing so I’m sure that she would be considering the impact of culture for those children’. [Amanda] Other practitioners named working in partnership with persons from within the organisation that had more expertise on cultural issues.

In summary, practitioners are looking to acquire culturally specific knowledge and are thinking of innovative ways to do so; however, the difficulties that practitioners face in FDR with parents from non-mainstream cultures are not merely associated with identification of culture. It seems the issue is the need to acquire a deeper understanding of the different parents and their specific cultural needs and then to bring their understandings closer to their duty to their child.

F The Time Factor in Family Dispute Resolution

‘Parenting cases are a timing issue’. [Scott] In this section, time will be addressed from two perspectives: substantial or significant time of parenting plans and the time of the process. Practitioners found that in the majority, parents conflicted over time; the time each parent would spend with the children. From a different perspective, practitioners were concentrating on negotiations remaining within the time allocated for each FDR, which is approximately three to four hours. As this comment suggests, a father’s position on time is that the longer the child has with him, the more time he has to socialise his child in his culture, ‘it was a clash of cultures and it was a fight for time with the children to keep them in their culture’. [Tom] Similarly, as this practitioner remarks, parents in FDR concentrate on the time element without considering the child’s best interests. Practitioners argued that in their negotiations, parents do not take into account how difficult it is for a child to go between two distinct and different cultural families:

the divide between the child spending time with one parent who may be of an Anglo cultures, white Australian culture and the other parent is from a very different cultural background and then try to actually incorporate that into the on-going family, it’s a lot easier if both parents are from the same ethnic culture. [Greg]

As this practitioner noted, while children are resilient, having two distinct and
competing cultures can put a strain on the child’s psychology. The issue is for parents to take that feature into consideration when ‘pulling and tagging’ at the child during family conflict and this was one reason that detracted from the importance of facilitating culture for children in FDR.

Practitioners also spoke of taking time from one parent to accommodate the child’s inclusion in culture with the other; as here, ‘at what point does a cultural right influence what may have been parental time in the normal circumstance’. [Tom] However, in these circumstances ‘time’ became a tool of the parent wanting the child to be culturally socialized and this aggravates practitioners. Practitioners commented that time used in this manner is unfair time distribution that has the potential to cause conflict. Other practitioners addressed the time factor from a position of them having to help the parents more to adjust the plan to make it work, ‘there was competing rights, the right to have a meaningful relationship with the dad and then their right to continue to enjoy their culture so there was two competing rights’. [Beth] It was also seen as a conflict between the child’s primary and secondary considerations in the FLA, between meaningful time with a parent against culture and the question of whether culture was as important as taking time from a parent, and what was in the child’s best interests in those circumstances.

The other use of time in this section is the time given to a main session in FDR. Practitioners found that time restricted the parents being able to fully express their positions or to effectively produce good outcomes, ‘as long as we don’t try to rush the process and approach … they are normally happy to listen’. [Greg] The provision of only three to four hours was seen by practitioners to hamper how much sensitive attention a practitioner was able to provide parents, before having to rush them to the next point in the discussions, ‘the procedures and protocols you know is about three hours at the moment and there is just so much we can do in that time’. [Brea] Practitioners were troubled that time mandated how important the negotiations were; by placing a time restriction on the negotiations, parents felt obliged to complete everything they had to say with the time limits, and these activities were supposed to produce agreements that would last until their children became 18 years.

Another practitioner outlined the difficulty that practitioners were under to satisfy their responsibilities to children and parents within a limited session, ‘it’s quite difficult because there is only so much you can do but I think to have the awareness that you need to be open
to, to the parents input around culture is really, yes it’s really important’. [Amanda] Time must account for the important issues affecting the dispute. Practitioners understood that confining discussions to ‘time spent with the child’ or on the parents’ personal agenda is counterproductive to the time issue and produces sub-sufficient plans. As this practitioner notes, FDR can work to make specific plans for children’s culture within the time given, ‘I’ve worked out arrangements that helps parents to certain significant cultural events are recognised even if the children are with the other parent’. [Harriett] Another practitioner reasons that a method of alleviating the stress of producing long lasting plans is that the plans should not take on a one-time-all-or-nothing response. As this practitioner commented, compiling an overly rigid plan is insensitive to the child’s evolving needs; a better format is to make it a graduated plan over a few sessions of FDR, ‘we try to make parenting plans that are not just one piece of paper that last forever but is developmental’; he goes on ‘trial this for three weeks or three months or one month and let’s see what happens and then come back and fine tune it’. [Bruce] By these suggestions, practitioners were offering parents various options to help them relieve their stress and it shows that practitioners are proficient in FDR strategies.

Nevertheless, the problem may not be the time issue, the issue may be that parents are not using the time constructively and this relies on the skills of the practitioner. In understanding the meanings behind the parents’ communications and demands, a culturally sensitive practitioner can sort out the meaningful from the meaningless. In finding the common ground between the parents, the child’s right to know and enjoy their culture, the practitioner can focus parents away from the meaningless often hurtful negotiations that concern the self and to the child’s best interests.

G The Challenges that Culture Presented to Practitioners

The risk practitioner’s face when cultural differences arise in FDR is to create stereotypes by comparing the shared characteristics of people within different cultures to give meaning to the parents and their actions. While generalisations and stereotyping can help practitioners develop an understanding, albeit limited understandings of parents culture as it constructs parents to an image, there is a danger that the type associated with the culture does not reflect the individual parent. As shown in this next comment, the threat of using collective characterisation to simplify cultural groups has a derogatory effect, ‘when you walk in the shopping centres you know where different ethnic groups, there’re bunched up in groups’. [Bruce] These inferences based on this practitioner’s existing knowledge are used to
reduce the uncertainty about the situation. Of course, the less one knows about the culture, usually means the more one uses stereotypical generalisations. In this comment, it meant that the practitioner was over compensating his lack of specific knowledge for stereotyping. This comment is important because it tells us that practitioners do not have all the answers, by projecting the bad group behaviour of ethnic or Indigenous teenagers, it shows that practitioners are having a hard time understanding culture and therefore seeing the value of facilitation of culture for children in FDR. Another reason put forward for this practitioner’s use of stereotyping is that he is out of date with today’s generation of youth, and this is another argument for child inclusive FDR, discussed below.

Self-reflection by practitioners is a good method of acknowledging differences. The ability to self-reflect on one’s own beliefs and attitudes, is basically to know yourself before you can know others, as this practitioner makes clear, ‘I think it’s very healthy to be aware of those value systems that you carry with you’. [Wendy] Working within a complex field like FDR, culturally competent practitioners learn to work with many viewpoint and with the variety of cultures with which parents present. However, some practitioners provided a relativistic approach to certain cultures, as this observation makes clear, and this makes self-reflection an important skill for practitioners to separate the parent’s issues from those of the practitioners, ‘I have to remind myself sometimes that the way in which I view the world isn’t necessarily the only way and that other cultures may have slightly different ways in which they parent their children but are still equally valid. [Wendy] A challenge for practitioners was in maintaining an objective view of the cultural practices of some parents and in acknowledging their own ethnocentric beliefs. As here stated, ‘I suppose coming from my white middle class background I sometimes have questions myself as to whether children benefit from being exposed to the culture that some of their parents expose them to’. [Helen].

One method that service providers used to promote greater awareness of culture on the family in FDR was to have regular structured staff conversations. As this next comment suggests, practitioners as well as other FRC staff often discuss issues that affect the organisational efficiency of FDR:

I would anticipate and expect that all of the staff in all of the areas are mindful of these [cultural] things at all times and it’s the sort of thing that we would often have conversations about; peer supervision, individual supervision, conversations around the table and the lunch staff room.
This aids practitioners to openly discuss issues relating to culture in FDR and it is a way of disseminating knowledge within the group.

The gaining of cultural competence was identified as a key component to practitioners working with parents of non-mainstream cultures. In this comment the practitioner believed that competence was reached when practitioners were at a stage where they, ‘are thinking about mediation to actually be conscious of bringing it in as one of the points to consider as a matter of routine’. [Harriett] However, the inclusion of culture as a routine practice requires a change in practice, not necessarily a change to policy. This would necessitate that practitioners become more than aware of culture in FDR; practitioners need to become culturally competent. In this manner practitioners are seen to ‘continuously strive to achieve the ability to effectively work within the cultural context of an individual, family, or community from a diverse cultural /ethnic background’. Developing general principles to guide the practitioner’s practice is necessary to help practitioners with strategies on how to best develop culturally sensitive methods of detecting and facilitating culture for children. The strong argument for practitioners developing culturally competent skills is that decisions made for the facilitation of culture for the child are based on sound cultural competence of the individual child’s cultural developmental and psychological needs. Instead of focusing on understanding the parent’s demands or cultural idiosyncrasies, the practitioner considers the child’s needs in the circumstances.

**H The Principles that Guide Practitioners**

This section will provide data to show that the changes to the role of practitioner as a result of the amendments in the 2006 FLA have put the practitioner’s traditional role of independent and neutral mediator in conflict with their new legal obligations to act as advisor to parents in FDR and this has correspondingly put in doubt the principles of autonomy and self-determination for parents.

According to s10F FLA, practitioners are to remain independent of the parties at FDR, however in s63DA FLA, practitioners are legally bound to advise parents of the

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elements in s60CC denoting the child’s best interests. While these provisions meant that practitioners struggled to retain their belief in the core notions of procedural fairness, impartiality and independence in their management of FDR. Practitioners maintained that FDR was based on parental self-determination, ‘we can’t make decisions we can only help parents make decisions’.[Sue] In relation to the principle of neutrality, it was noted that practitioners identified that their role in FDR as set by the regulations, was to provide parents with a framework by which to negotiate in a child focused manner to reach an agreement that is in the child’s best interests and to help parents retain some control over the final outcome. However another practitioner set the limits of their independence; were trying to get the parents to mediate in the best interest of the children and unless it’s something that’s really obviously you know putting the child in an unsafe situation we need to rely on parents to say what’s in their children’s best interests and how parents are going to bring their kids up. [Tanya]

Whereas the principle of neutrality reinforces the philosophy of party self-determination that enables parents to control the content and the outcome of their dispute, in practice, practitioners acknowledged they were prepared to intervene to introduce the child’s rights to culture to parental discussion ‘if you want to have a culturally intensive practice which you know we aim to do then maybe we need to be more proactive in raising in the session rather relying on the client themselves to raise it’. [Donna] Other practitioners disputed the claim that practitioners can stay neutral at FDR because practitioners were overseeing that the decisions made by parents for their children were in the child’s best interests, as this comment suggests ‘I’ve actually got the capacity to help parents renegotiate with each other that is a bit more child focused’. [Bruce] As this practitioner makes clear, practitioners help parents resolve some or all of their dispute, and this meant redirecting parents, by using a reframing technique to reconnect the parents with what is best for their children, ‘you are constantly reframe to say well a good parenting plans has to take your child into account’. [Bruce]

However practitioners recognise that being able to help parents also has its limitations. As this comment shows, practitioners were minded that their role was to facilitate discussion between parents, enabling them to produce child focused plans. In this next comment the practitioner outlines what she believes to be her duties in FDR, ‘with FDRPs there a sense of having to be impartial and a need to be careful not to unduly influence the mediation process’ [Greta]; however, she goes on to say, ‘probably I would think that cultural identity is very
important in that and I would raise it’. [Greta] From these remarks it appears that practitioners were confused as to what neutrality and impartiality meant and worked on the basis of intervening just enough to ensure the child’s best interests were met. This line of reasoning is not unusual; practitioners were aware that in private dispute resolution, a process that addresses the family’s most intimate issues, their role is to identify and manage power imbalances, the different perceptions of conflict and conflict resolution and the expectations that different cultures place on gender roles. Therefore, the restriction that practitioners must remain neutral in the technical sense is not feasible because practitioners must normalise the parties at FDR; further, practitioners must evaluate how parents negotiate and also must advise parents as to what best interest means.

In this next comment, it appears that practitioners were interpreting neutrality as having to be politically correct, that is not to ask questions that may offend some cultures, ‘we’ve heard it being sort of you know offensive of or you look like you losing your impartiality by asking the questions’. [Sue] This comment seems to imply that practitioners should not become familiar with either of the parents. The consequences of practitioners doing this will mean that practitioners disassociate the parent from the person, that is make parents faceless people and merely facilitate the FDR in the absence of any humanity. However, if practitioners are to help parents in their most sensitive time, then a practitioner must become familiar with the human parent to understand their needs and the needs of their children. Further still, practitioners were confusing the meaning of neutrality with being non-prejudice, using the word to rationalise their role in FDR with parents of non-mainstream culture, ‘looking at diversity and stuff’, accepting that difference is just that it’s not right, no it’s not wrong, we don’t have a right to judge’. [Sue]

In summary, the data shows that practitioners were challenged to reconcile the principle of neutrality with their obligations to the child’s best interests. Practitioners found it hard to remain independent of the communication and negotiation between parents because practitioners had to help parents with the final terms of settlement. This conundrum meant that practitioners were under much pressure to remain neutral and independent and to trust that parents knew their children well enough to make plans in the child’s best interests and were developmentally appropriate for the child. Hence it was this recognition, that a family’s culture affects the family, that meant practitioners were resigned to the notion that parents had the last word on cultural rights, ‘but ultimately I believe its parental responsibility’. [Sam]
Practitioners believed in reality the process is parent oriented and centred on the parents’ prerogative to decide whether culture was important or not. As this practitioner so eloquently noted, ‘so if the parents don’t see it as an issue the question is so why do we need to be raising it as part of the FDR process’. [Sam] The dilemma for practitioners therefore was that they did not see the children’; any advocacy they did for this ‘mythical’ child, was seen to be for parents and this seemed to dim practitioner’s enthusiasm. In the next part practitioners address this seemingly problematic issue.

I The Benefits and Pitfalls of Child Focused FDR and Child Inclusive FDR?

FDR in Australia is a child focused process; the aim of government was to create an environment that supports disputing parents make decisions that consider the child’s ‘psycho-developmental needs’ of the individual child.\(^{747}\) The process is also designed to help parents preserve a relationship so as to help children adjust to their parent’s separation.\(^{748}\) Whereas child inclusive practices consult the child on their personal experiences of the family separation and attempts to incorporate the child’s needs. This information is then relayed to the parents to be considered when making child appropriate decisions.\(^{749}\) The data in this section will address the practitioners thoughts on child focused FDR and whether they believed that parents are able to refocused away from their own pain to concentrate discussions on the child’s best interests.

Acknowledging their dual roles of advocate of children’s rights, but also their legal duty in the \textit{FLA} to ‘help parents affected by dispute resolve some or all of their dispute’,\(^{750}\) practitioners believe that the regulations took away their freedom to manage in any real sense for the child’s best interests. In the main practitioners believed that the process generally failed to draw attention to the child’s abilities to make any beneficial contribution to the outcome of FDR. Thus practitioners felt that the legislative directions to help parents meant dividing their loyalties between parents and children, leaving practitioners confused as to how to balance between the two roles. In most commentaries the data suggests that practitioners chose the

\(^{747}\) Paper for, ‘Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors’ 2007, Australian Institute of Family Studies.\(^{748}\) ibid\(^{749}\) ibid\(^{750}\) \textit{FLA} 10F (definition of ‘Family Dispute’).
latter legal role of helping parents, over their ethical obligation to act as a child’s advocate. This next comment highlights the view that contrary to the FLA that recognises children as rights holders, children are seldom seen and only randomly heard in FDR, as here stated:

in the FRC we don’t do a lot of child consultations because the policy is that we should see the parents together first before we decide whether we should have a child consultation, so it immediately reduces the number of potential children we see dramatically. [Greg]

The argument is that practitioners believed it is difficult to facilitate culture for children when children views, in the main, are not considered in FDR. As the above comment suggests, any input by children’s in FDR is a parent’s choice. For practitioners, the concept of children having rights, like the right to culture, and parents respecting that right when making decisions for their children, is a notional idea that needed to be addressed and changed. As this practitioner noted, how can parents make good plans without their children’s input, ‘well a good parenting plan has to take your child into account, so if you don’t know how your child is feeling how can you make it work’. [Bruce] That is, at present children have no direct input in FDR unless there is parental approval and this was seen by practitioners to defeat the idea of children being rights holders, ‘there are a number of preconditions and they include that both mum and dad are both in agreement with child consultation’. [Sam] This view promotes the belief in parental prerogative and contradicts the thought that children are social agents.

However, practitioners were also sceptical that child inclusive FDR would benefit the relationship between parents and child, as one practitioner noted, ‘we don’t know how the child is reacting, whether the chid is actually digging in locking horns with mum and dad because they want to fit in with another group’. [Niles] Here the practitioner is aware that children, as they grow and mature will form separate identities to their parents and their parents culture, consulting with mature adolescents about a particular cultural heritage may cause friction between parents and children. On the other hand, practitioners recognized that even young children have the potential to provide an insight into the dispute, how it is affecting them and what they would like to parenting plans to address. In this next comment the practitioner describes how a child consultant may help a child to express those wishes,

‘we have a child consultant here so when she talks to children, the younger they are the more she would use play but she would talk in general terms what their experience is I’m sure and she’s done cultural awareness training and all that thing so I’m sure that she would be considering the impact of culture for those children’. [Gretta]
In the main practitioners noted that they didn’t practice child inclusive FDR mainly because; the children of the relationship were too young to participate in any meaningful way. As this comment suggests, ‘the children were young, they didn’t fall within the bracket that they would understand’. [Tom] And, secondly, because practitioners are under both legal and ethical obligations to perform their FDR according to the practice standards set by their respective employer. These obligations mandate the type of FDR to be used, as well as the rules pertaining to children’s participation, as this next comment suggests, ‘in making the process more child inclusive instead of just child focused, well that’s fine but again that would change the dynamics of how we operate here’. [Niles] By following institutional protocol that uses child focused FDR and not directing participation by the child as in child inclusive FDR, practitioners were limited in the information they had to interpret what was best for the individual child. This made the prospect of facilitating culture for children in FDR, especially young adolescents, difficult.

J Conclusion

The data suggests that, ‘FDR and FDRP are synonymous’ [Debbie], that is, one affects the other, whether that be the process being too restrictive in its protocols or that the practitioner believed they did not have the requisite training and abilities to manage a FDR to meet the needs of the parent. Each reciprocally affects the resultant management of the FDR and the plans that are drawn. The data suggests that the practitioner’s role has not met the challenges set by the legislation; that is, to create a practice that recognises the the child’s best interests, as stated in s60B and s60CC, meet the standards of, ‘the paramount consideration’. Why? There is a lack of recognition by practitioners that children have rights to culture, or any other right, separate to the obligations of their parents to fulfil those rights; this denies the legislative safeguards set by the FLA to promote the efficiency of children.

The data infers that intake for the practitioner was no more than a form filling exercise that gave practitioners only basic details of the matter. In fact, intake is the first contact point for parents and is most important for the collection of relevant information regarding the dispute, language, culture (mostly cultural heritage of indigenous culture); it also provides parents with information about the practice of FDR, the role of practitioner, the rules surrounding confidentiality and more importantly whether parents agree to hear the child’s opinion. In the event the matter is found to be inappropriate for FDR because the parents
failed to meet the standards of family violence screening, then the intake staff can provide the family with referrals to other more suitable services. The next stage is the practitioner’s session. Practitioners found this stage to be more flexible. This is where practitioners meet the parents face-to-face and discuss their individual needs for their children; here practitioners assess the parent’s genuineness about the matters under dispute and listen to the parents. The FDR is the first time parents are brought together to negotiate their needs, interests, fears and hopes.

The second part of the discussion the chapter presented was directed at the practitioner’s legal duty under the FLA and the FLA Regulations 2008 and the numerous ethical obligations practitioners carry with them. The practitioner was found to have two main but conflicted legal obligations: helping parents resolve their dispute while remaining independent of the parties at FDR and giving advice to parents on the factors that amounted to the child’s best interests, and these included; encouraging parents to maintain a meaningful relationship with both parents post-separation and the factors considered additional factors of which culture is one. In the main, the practitioner’s role was found to have a number of important ethical obligations. First is the principle of neutrality. While practitioners interpreted this principle to mean practitioner independence, in reality, the legislative obligation of evaluating the parent’s genuineness in negotiation and the policy obligations to advise parents of the child’s best interests meant that practitioners could not claim to be truly independent. However, neutrality could also mean being fair or unbiased towards the parents. The chapter argued that practitioners found it hard to interpret what neutrality meant, but resolved that their role was to retain control over the procedure in FDR and parents retained control over the children’s future parenting. This separation between parents and practitioner allowed the practitioner to concentrate on providing parents with help in FDR while not overly interfering with the parent’s decision making responsibility to make decisions for their children’s future best interests. This is central to the idea of parental self-determination and empowerment and gives the process legitimacy.

The chapter concluded by outlining the professional practice and ethical challenges that practitioners encountered in facilitating/or not, children’s right to culture and concluded that in FDR, theory did not meet practice, as practitioners were challenged to accept that children had rights to culture and were resigned to rely on parents to make all important decision for their children. This suggested that practitioners were not confident to facilitate culture for children because they were restricted by their lack of cultural knowledge. This was seen in their
struggle with complex FDR; those that contained a mixture of factors like culture and religion. In these FDR, even practitioners noted that they required a more comprehensive framework of culturally intensive competencies to enable them to work with culture at FDR. Secondly, practitioners commented on the constraints of time, time in terms of the length of the FDR process and time in terms of taking away from parents what would normally be their time with the child to accommodate the child’s rights to culture. It was found that practitioners struggled to interpret whether time with parents is more important than culture for the child, reasoning that time with parents translated to culture for parents. Thirdly, practitioners reasoned that in cases where children are at an age to speak for themselves, then making parenting plans and facilitating culture in their absence was not in their best interests. Finally, practitioners believed in the value of culture for children; in this respect practitioners focused on helping parents resolve their disputes so that parents could produce plans that would enable the child’s cultural development and wellbeing.

In conclusion, practitioners gave several insightful and innovative solutions to remedy the lack of culture specific knowledge: these amounted to lists, data bases, professional affiliations and co-partnering. While all these suggestions have a valid place in FDR, it was concluded that practitioner’s require intensive cultural competency training and cultural sensitive training to bring culture to the fore-front of the practitioners mind that culture should be addressed in FDR. However it was shown that even culture awareness was not enough for practitioners to facilitate culture in FDR for children, ‘for practitioners it would just be an awareness in the back of their minds that there is this issue of culture and that it has to be addressed in appropriate situations.’ [Tanya] Unless practitioners reached a level of culture competence to understand why children need culture to develop into healthy adults and why they should facilitate the child's rights to culture in FDR, then practitioners cannot fulfill their legal nor ethical obligations to the child.
IX THE RESEARCH IMPLICATIONS

A Preface

In recent years Australia, as a signatory to the *UNCRC*, has attempted to meet its obligations to the child by reforming the *FLA* to recognise children as rights holders, including culture as a right for all children and making FDR mandatory for parents in contested childrens matters. These obligations also extend to protect, respect and fulfil all the child’s fundamental rights to protection, provision and participation, and this translates to ensuring that the child is given full access to social, educational, economic and cultural rights, regardless of their socio-economic circumstances. Therefore, this final chapter will draw together, summarise and articulate the findings, present the themes and provide the reader with the implications drawn from the research that investigated whether FDR is facilitating the child’s right to culture.

B Introduction

The central premise of this thesis is to show that culture as a right for children is a necessary inclusion in the *FLA*. In understanding that culture is essential to the formation of a child’s identity, this study sought to understand the practitioners understanding of the specific nature of culture and whether practitioners recognised and appreciated that culture affected the child on many levels. Finally, how practitioners addressed the dynamics of FDR, culture and children’s rights.

Guided by the principle in Article 3 of the *UNCRC*, the child’s ‘best interests’ as the paramount consideration in all children’s matters, Australia’s focus turned to provide the child with rights to promote their healthy development and wellbeing. The introduction of amendments to the *FLA* in 2006 made several radical changes to the manner in which parents sought relief for their contested children’s matters. The introduction of mandatory FDR was an attempt by the legislature to shift parents away from litigation to private self-help remedies in FDR. The inclusion in s60CC and

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751 UNCRC Article 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
752 Family Law (Shared Parental Responsibility) Act 2006, s60 Childrens matters
753 s60CC FLA: How a court determines what is in a child’s best interests
s60B FLA,\textsuperscript{754} was Australia’s contribution to the child’s right to know and enjoy their culture and to do so with others of that culture.

The study sought to address a gap in the literature on children’s right to culture within the reforms to FDR in Australia. Despite the limitations of this study, the data produced from this research will contribute to the understanding of whether FDR is a culturally sensitive process and practitioners culturally competent to recognise and facilitate children’s rights to culture. In light of the findings of this research, this chapter will provide recommendations for future changes in the FDR area of the \textit{FLA}, to better ensure that children’s rights to culture are facilitated in FDR.

The reason the study sought practitioners of FDR was because they have become one of the foci of the amendments to Part VII of the \textit{FLA in 2006}. That is, the 2006 amendments to the \textit{FLA} changed the once non-interventionist role of practitioners to make practitioners the gatekeepers of the litigation system in the children’s matters that were assessed not suitable for FDR. These matters were assessed not suitable either because of family violence or abuse, or they contained a complex of serious issues, for example, culture and religious ideologies. This new authoritative role for practitioners meant that practitioners are now obligated to assess whether parents are infact negotiating in a child focused manner and if the resultant parenting plans are in the child’s best interest. This new role has also heightened interest in how effective the process of FDR is to resolve disputes when used by parents from non-mainstream communities. Although in recent years research has been carried out on practitioner’s responsiveness to culture in FDR, what is not yet clear and has not been investigated is the impact of FDR on the child’s rights to culture.

\textit{C Overview of the Key Interpretive Findings}

Practitioners play a critical role in compiling with parents the framework of discussions in FDR. While practitioners appreciated that culture was important for children, they generally found culture difficult to facilitate in FDR, almost impossible to manage complex multidimensional FDR and were challenged to accept children as rights holders.

\textsuperscript{754} s60B FLA: Objects of Part and principles underlying it
The findings show that practitioners were not confident to define culture for the child. Discussions in Chapter Two and research findings Chapters Six and Eight suggest that practitioners working in FDR viewed culture for children as more inherent than academic; that is, practitioners believed that the transmission of culture for children was a natural process dependent on how parents chose to socialise their children. Paradoxically, practitioners struggled to interpret culture for the child, providing a plethora of definitions; each practitioner interpreted culture for children according to their professional cultural awareness and personal cultural background.

In Chapter Six, practitioners acknowledged that culture was hard to define; this was not unusual, as even academia has not settled on a definition of culture. Even so, practitioners associated culture with human social behaviour, and appreciated that culture is a multi-layering of macro and micro traits, conjoining traditions, practices with social interaction and language, with religion and spirituality, cultural standards and norms. In agreement with the literature review from Chapter 2, a number of practitioners in this study related culture to the connectedness that culture creates between people within a group that distinguishes them from other groups. Not necessarily confined to birth groups, but also those groups that we choose to belong to, such as religious or social groups. Data suggests that practitioners interpreted culture as the framework through which members of a group attribute meaning to life within the wider community. Essential to this understanding is that children must be exposed to these practices, enabling them to appreciate and learn, and to draw meaning from these practices. Practitioners were aware that the child’s natural patterns of growth and developmental abilities

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759 Joseph Call, M Carpenter, & M Tomasello, ‘Copying results and copying actions in the process of social learning: chimpanzees (Pan troglodytes) and human children (Homo sapiens)’, (2005), Animal Cognition, Volume 8, Number 3, Page 151
are acquired through active participation and associations with cultural, social and peer groups. Practitioners also acknowledged that children’s acquisition of culture is selective; as children grow they become discerning as to what they can identify with and what they wish to retain from their family culture, my own children were used as an example of this point. Practitioners appreciated that culture regulated the child’s formulation of a cultural identity with individual traits and personal value systems separate to their parents, as discussed in Chapter Two. However, practitioners found it increasingly difficult to comprehend the significance of understanding different cultural relationships: the relationship between the parent’s practices, expectations, values and social norms and the child’s future cultural wellbeing; and the relationship between institutional expectations of parents and how this influenced parental behaviour. The latter relationship is significant to FDR because it shows that parents within the FDR can be influenced by the process and the practitioner.

While practitioners understood the importance of culture for the child and drew on their professional, educational and cultural background to define culture, the findings show that practitioners mostly attributed culture as something operational. That is, it involved the practices, religion, language, dance, arts, and even cooking and food. Practitioners conceptualised culture to be things like the family’s norms, standards and values, how the family lives and reasons. Culture is transmitted inter-generationally by members of a family or group to the child through mechanisms such as observation, language and the use of repetitious learning.

While practitioners understood that cultural socialisation typically occurred within the family, they were also pragmatic that children learn culture and learn to socialise in their communities. So practitioners reasoned that cultural socialisation is not the exclusive domain of the family, but a combined effort between the home, school and society. With a number of practitioners drawing attention to the multi-layering effect of culture, factors including family migration and intermarriage and religious affiliations can give the child a ‘duality of cultures’ or even a multicultural identity. These varying views support the argument that culture was a complex construction for practitioners who struggled to make sense of its affects for children.

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761 ibid
From the participants in the study, only one practitioner drew the connection between culture and loss, and child symptomology, and concluded that children would suffer if they were separated from their culture. Another practitioner mentioned in passing the loss that children feel when they are adopted and do not know their original birth parents. However, these ideas were not substantially discussed and the practitioners moved onto other issues.

A central consideration for practitioners was the legitimacy of the cultural practice and the responsiveness of the child. This is significant because it suggested that practitioners were considering culture from the viewpoint of the child and the effects of culture on the child, and not necessarily as associated with the family. However, practitioners recognised that even within a family, individuals can have ‘a continuum of participation’; in other words, some individuals can have a more intensive connection with their culture than others, and this raised the question for practitioners as to how much culture parents wanted to hand down to their children. This view led most practitioners to question the value of facilitating culture for children, reasoning that if parents did not consider culture important enough to raise at FDR, ‘why should we’, as one practitioner put it. Yet this attitude is likely to affect the cultural continuity for the child. In the understanding that the degree to which a child is exposed to a practice, the more likely it will be that the child will adopt the practice. Further, the practitioner’s cavalier attitude challenges child developmental theory suggesting that children benefit from the acquisition of culture to build meaningful relationships and develop attachments. This finding validates the point made by a number of practitioners that children are not able to develop an attachment to a family’s culture because of family separation and conflict, and this puts children at risk of forming negative interpersonal relationships and developing a negative sense of self.

D Refining the Practitioner’s understanding of Culture’s Rights in Family Dispute Resolution

This section considers the practitioners’ understanding of the rights of the child to culture and whether the practitioner is facilitating the right for children in FDR. The data suggests that practitioners understood childhood as socially constructed stages in the child’s life influenced by the changing political, social and global environments and by ideological and cultural perspectives. The recognition that childhood is a stage in the child’s life that requires respect and protection by adults, has prompted legislative bodies to make significant amendments to international and domestic laws to recognise that children not only need protection, provision and
participation rights, but that children are social actors with rights.

However it will be argued that Australia’s initiatives in seeking to change the child’s status from possessions of the family to having rights lacked direction in practice. This argument is based on three contentions: firstly Australia’s ratification of the UNCRC only resulted in piecemeal inclusions of its Articles into domestic legislation. Australian initiatives in the FLA that placed children’s rights to culture in Part VII FLA in a hierarchy of tiered rights of primary and secondary considerations and Objects and Principles, culture being one of the principles, has complicated the interpretation of children’s rights and best interest and reduced the importance of culture for children. Secondly, the underlying premise of the FLA is that children’s best interests are the paramount consideration in all matters concerning children, yet children are only given rights qualified against their age and degree of maturity. Thirdly, the introduction of a less adversarial family dispute resolution regime in mandatory FDR to counter the effects of litigation on the family under the management of practitioners with only a rudimentary understanding of the law surrounding the child’s best interests, has further reduced the likelihood of culture being facilitated for children. Each will be addressed in turn.

(i) Rights Regime Surrounding Children’s Rights

The changes that were introduced to FDR in 2006 were significant to reduce the symptomology of family separation and to optimise the sustainability of meaningful relationships for children. Even as practitioners recognised that rights for children were essential to guarantee the child’s protection, provision and their rights to participation, the data shows that practitioners were confused about how children’s rights could be facilitated, had difficulty in reconciling rights with the notion of best interests and were resigned to substituting parental obligations for children’s rights. The concepts of rights and personal autonomy are now human rights for the child, and are thought to be the basis of a democratic society. The findings show that practitioners struggled with the idea of children having rights. Practitioners reasoned that rights were legal entitlements and one must be able to enforce those rights to be considered a rights holder. However, the grant of rights in the UNCRC and FLA are not conditional on responsibilities. That is, rights for children are inherent rights, independent of sex, country of origin, or political affiliations. Despite this qualification, practitioners reasoned that the children’s rights were not an absolute right.

because all rights in the **UNCRC** and the **FLA** were interrelated and interdependent with the child’s other rights, such as the right to safety. Further, practitioners argued that children’s rights are conditional on the child’s age and evolving capacities. As the findings from this study demonstrated, the consequences for placing these restrictions on children’s rights relegated children rights to a secondary position, after parental rights and encouraged the thought that children were conceptually undeveloped and in need of adult supervision.

**(ii) Children’s Best Interests are the Paramount Consideration**

The findings in Chapters Three, Seven and Eight showed that practitioners found children’s rights complex and situation-based. This is because the grant of rights to children in the **UNCRC** and **FLA** are broad and do not contain definitions or interpretations of the main concepts, the child’s best interest, children’s rights or culture. These instruments provide associated rights in the form of considerations based on the child’s needs and interests, and expect decision makers and practitioners to skilfully make determinations based on the child’s individual circumstances. This is further complicated by the placement of the child’s best interests within a hierarchy of tiered rights of primary and secondary considerations and Objects and Principles. While the meaning of the child’s best interests is now found within these legal provisions, the **FLA** leaves the determination of these terms to the decision maker’s subjective understanding. This risks decision makers basing their interpretations on generalised knowledge of children and childhood, thus reducing children’s rights to a standardised list of paternalistic needs. Practitioners reasoned that the concept of ‘best interests’ does not denote any legal right for the child and reduced children’s rights to interest-based practices that do not harm the child. In the context of FDR, the process is understood by practitioners to focus on helping parents bring about child focused parenting plans that are in the child’s best interests.

The findings show that practitioners from 2008 must meet accreditation standards to practice FDR, as well as the statutory duties in the **FLA** and **FLA Regulations**. However, most practitioners are not legal practitioners and while they are provided with a component of law within their vocational training, practitioners reported that the rights in the **FLA** are difficult to interpret and even harder to implement in practice. Despite their lack of legal training, practitioners now must interpret what best interest’s means in the legislation for parents in lay terms, having regard to the primary considerations in the **FLA**. These instructions extend to encouraging parents to implement equal shared responsibility for their children, a meaningful relationship with the child
and the factors that constitute physical or psychological harm. In addition, they assist parents to adopt cooperative parenting arrangements that will help their child’s developmental needs. Ensuring that parents understand the changes to the family law makes the task of managing FDR and the production of parenting orders in the best interest of the child much more complicated.

The data shows that practitioners found it hard to distinguish between rights and best interests. Yet the whole idea of children’s rights is to protect their interests. While practitioners acknowledged that their primary obligation is to the child’s best interests, they found interpreting best interests hard to do in practice. Despite most practitioners knowing the relevant legislative provisions that contained the concept of the child’s best interests, most practitioners were not familiar with the provisions that supported the concept. That is, the provisions contained in s60CC and s60B, as discussed in Chapter Three and Seven. Those practitioners with legal degrees were able to recite the provision; however, no practitioners drew the connection between rights and interests. This was mainly because practitioners, after advising parents of the child’s primary legislative rights that included equal shared time arrangement and the collection of rights that set out the obligations and responsibilities of parents towards the child’s safety, were unsure how to fit cultural identity under those provisions. Even though practitioners identified the right to an identity as a paramount consideration for children they were confused as to whether culture came before time arrangements with parents or within it. Was time with parents actually time within a culture? Nonetheless the child’s best interests in both the UNCRC and the FLA are considered ‘paramount’ considerations, and are not merely to be balanced against other competing interests, but are distinct rights.

Practitioners argued that despite advising parents of the child’s best interests, in practice, parents were too absorbed in obtaining for themselves the most time, so that they disregarded whether the time allocation was in their children’s best interests. Despite this thought, all practitioners were resigned to the notion that culture should not be a right but an obligation on the parents and proceeded to justify reasons for its non-inclusion in FDR. In fact, practitioners confirmed that the term ‘children’s rights’ was an oxymoron because the right depended on parents or responsible adults for realisation and this was one reason why children’s rights were merely acknowledged not facilitated.
(iii) Family Dispute Resolution as Primary

The findings show that the 2006 amendments made major changes to family law in Australia. The introduction of FDR as the PDR process in family law was seen as a necessary change to counter the ill effects of parental conflict on children’s symptomology. FDR is described as a process ‘other than a judicial process’ and practitioners duties as ‘helping parents resolve some or all of their disputes with the practitioner remaining independent of the parties. The amendments also introduced culture as a right for all children in Australia. As a human right, culture is now recognised by practitioners as an important element for the wellbeing and development of a child’s identity. Culture is now included in the Preamble and several Articles in the UNCRC and after its ratification in Australia in 1990, the right to culture is now included in the 2006 amendments to the FLA in s60B (2) (e) and s60CC(3).

E Factors Limiting the Facilitation of Culture

In Chapter Six, the data indicated that despite practitioners associating culture with a holistic sense of connectedness and cohesiveness for the child with their family and community, practitioners also assessed that culture could provide a risk to the wellbeing of the child. The findings in Chapters Six and Seven show that far beyond the conventions and protocols of FDR, practitioners approach the subject of culture in dispute resolution from the understanding: firstly, from their own cultural perspective; secondly, that children should know and enjoy their culture but children’s best interests means they should assimilate into mainstream; and, thirdly that culture in FDR equated to conflict.

(i) How Culture Constructs Reality

Cohen on culture contends, ‘culture constructs reality; different cultures construct reality differently; communication across cultures pits different constructions of reality against each other’.764 Put simply, the practitioners are socio-cultural beings constructing their reality or perceptions of the FDR, the parents and the cultural orientation of parents can have a significant impact on the outcome of FDR. While there are different perceptions or conceptions about reality, reality does not change; however, people will interpret reality from their own

culturally situated understanding. In the findings in Chapters Four & Eight, a number of factors were found to limit the facilitation of culture for children. The view that FDR was better suited to mainstream culture and was based on western ideologies. The findings suggest that practitioners recognised that the model used in FDR, facilitative evaluative mediation, is centred on problem solving approaches and is driven by the understanding that parents who attend FDR are individuals in pursuit of their own separate self-interests. At the same time, practitioners also reasoned that this model may not suit parents from non-mainstream cultures and this can mean that their issues with culture may not be addressed. In understanding the importance of culture in FDR, practitioners were self-reflecting about their position in a culture fuelled FDR. Being conscious of their own cultural influence is a necessary trait in FDR because practitioners manage FDR according to their own educational, cultural and professional training. In these situations there is a risk that the cultural perspectives of the practitioner may influence the dispute and the resolution. The findings show that culturally competent practitioners use this knowledge and adjust the FDR process to accommodate discussion on culture in FDR.

(ii) *Is Culture in the Child’s Best Interests*

The findings support the suggestion that practitioners were hesitant to facilitate culture for children because culture was hard to understand and challenged the practitioner’s competence to manage child focused FDR where the child was of a minority culture. Practitioners recognised that children’s cultural socialization was primarily from within the family; the success of a family’s socialisation is measured by how strong a child develops an attachment to a culture and that family group. Practitioners reasoned that children learn to identify with a culture when they are able to make connections with that culture. Although children’s identity is deeply influenced by many sources, school, peers, media, technology that give children a different and sometimes conflicting view of the world to their familial culture. The data shows that practitioners were culturally aware that children’s activities outside the home made them more prone to acculturate into the mainstream culture faster than their parents. As children grow they learn to appreciate culture and or discern the parts of the culture that they decide are ‘outdated’. The culling of cultural traditions is a way of formulating an individual identity. This reinforcement of different cultural knowledge becomes the child’s truths and reinventing the child’s individual identity at times causing intergenerational dissonance within the family. The findings suggested that practitioners understood that culture was a continuum and each family and individual was unique in their observance of culture. Practitioners were concerned that
facilitating culture in plans of young adolescent children in circumstances where the child had already started to formulate an individual identity may not constitute the best interests of the child and this prevented practitioners from facilitating discussion on the child’s rights to culture in FDR.

(iii) Culture causes Conflict

Practitioners reasoned that a child’s cultural identity was an extension and perspective of their parent’s culture and in facilitating culture for the child; practitioners were facilitating the parent’s culture. Children born into a multicultural family are not mono-cultural but have many cultural influences, the findings suggested that in family dispute, the hybrid of culturally enhanced child rearing practices once considered normal, become a matter of contention between the parents. In FDR this contention gave rise to another barrier in the resolution process. The findings suggest that culture presented practitioners with a challenge when the dispute was multidimensional, that is when culture was interconnected with religious ideologies and violence associated with gender roles. Discussion from Chapters Six, Seven and Eight show that practitioners lacked confidence to help parents of non-mainstream cultures resolve complex culturally based issues at FDR. This was a prime reason practitioners were relying on their own cultural perspective to balance their own lack of knowledge and a major contributing factor to why are not facilitating culture for children.

A central issue concerning practitioners was that FDR is based on culturally established norms of dispute resolution that were seen by practitioners to be incompatible with many minority and Indigenous cultures and this had the potential to cause misunderstanding and conflict between the parents and between parents and themselves. In their acknowledgment that in some cases cultural practices produced inappropriate parenting, meant that practitioners often dismissed generations of culture, traditions, values and standards and this affected the mode of management in FDR and influenced whether practitioners facilitated culture in FDR. This line of reasoning, was seen to be an important finding because it shows that practitioners were differentiating parenting styles in different cultures and defining childrearing from the practitioners own cultural perspectives. Practitioners made subjective determination that children would be ‘better off with another’, rationalizing that in normalising the child’s sociocultural behaviours to mainstream culture, children would have a better future. In contrast, to the findings in Chapter Seven that show practitioners recognised that children’s culture can be a source of strength for children, culture was seen by practitioners to be a major factor in the
marginalisation of children in school and in society in general and drew from their own cultural background to show how difficult it can be for children of non-mainstream cultures. This rational meant that practitioners were Justifying their view that children’s best interests would be met if they assimilated within the mainstream culture, providing credence to the practitioner’s conscious decision to not facilitate culture for children.

The findings indicate that practitioners, despite finding culture difficult to understand in relation to child development, have a legal obligation to advise parents of the factors associated with the child’s best interests and to acknowledge the child’s rights to culture. In these cases, the findings suggest an urgent need to reassess the capacity of FDR to effect and enhance the cultural needs of children and families from non-mainstream cultures.

F Practitioner’s Understanding of the Effects of Culture Laden Conflict on Child Development

The findings show that practitioners struggled with the idea of facilitating culture for children in post-separation parenting plans because of the effects that culture laden conflict can cause to children’s psychological and physiological wellbeing. Practitioners recognised that the place for child socialisation is traditionally the family, where children find a rich source of nurturance and protection. However, practitioners recognised that these ideals are not always the case when parents separate and are in dispute. Practitioners understood that conflict and violence caused as a result of cultural differences within the family can be devastating on children. The data shows that practitioners were culturally sensitive and responsive to violence much more than to culture. One reason for this heightened awareness of violence may be that their training is centred on family relationships and violence. Studies conducted by Rachael Field in 2009 on domestic violence, and Rees and Pease in 2005 on violence within the migrant family, confirm the findings of this study suggesting that victims, usually women and children, require listening, patience and acceptance from culturally sensitive practitioners to feel they are safe and are able to participate in the FDR. These studies confirm what the findings suggest: that the way a practitioner conducts FDR can empower parents or entrench and


exacerbate patriarchal control in negotiations. With studies such as these and the practitioner’s training in violence screening, the family home that was once the safe haven for perpetrators of violence is no more, as violence is no longer tolerated. The issue for practitioners now is to detect conflict associated with cultural practices. This not easy because, as discussion in Chapter Three and Seven indicate, victims of cultural violence do not usually present to authorities because of the elements of language skills, shame, fear of being ostracised by family and community, and basically not knowing their legal rights.

Nevertheless, practitioners recognised that culture can mask violence, abuse and power differences and this can affect the prospects of reaching a satisfactory settlement. Some of the effects that negative cultural relations can produce are: culture generating strong, emotional responses in FDR as a result of cultural or religious differences; patriarchal control of family; family conflict because of children assimilating into mainstream culture; and culture imposing constraints on the individual child’s behaviour. The findings suggest that in these cases the practitioner was challenged to separate the culture from the conflict. Despite understanding that parents at FDR are there because they are in dispute, practitioners believed that culture added another dimension. Practitioners reported that when parents believe their core beliefs, religious ideologies, values and fundamental perceptions and assumptions about child rearing are challenged by their ex-partner or even by the practitioner, then parents become entrenched and FDR becomes very difficult to resolve. Practitioners were also concerned that conflict over the child’s cultural heritage, or more correctly, the child’s assimilation into mainstream culture, was said by practitioners to undermine the parent/child relationship and cause intergenerational conflict. Practitioners believed that all parents aspire to give their children particular parenting or developmental goals. As these goals are shaped by the parent’s particular culture, it means that once the child adopts these behaviours, values and standards they become part of the child’s cultural repertoire and are passed onto their own children. When children decide to adopt another culture, this is seen as a challenge to the parent’s authority and culture. The findings suggest that practitioners were rationalising that when a minority culture lives within a mainstream dominant culture, children will be shaped by numerous physical and social influences. The longer a child lives within this culture the more indoctrinated they will become and gradually they will move away from a traditional culture.

On child development, practitioners reasoned that they were not confident to take a proactive role to facilitate culture for children in FDR; they suggested that if culture is one of the factors in the dynamics of the separation, then its effect on the child will reflect the internal and external
turmoil affecting the family. In family separation and family conflict, practitioners were aware that the dynamics of a family will change and this will affect the degree and manner in which a child’s culture is transmitted to the child. By this reasoning, practitioners reinforced the awareness that the child’s cultural development is primarily carried out by the family, and thus parents are the natural people to decide whether they wanted their children to be a part of that culture. Subsequently, this meant that practitioners absolved themselves from the obligation of facilitating culture in FDR and made culture the personal and individual responsibility of parents or responsible care givers

(i) Hearing the Child

Chapter Eight of the findings supported the notion that most practitioners do want to hear from the child before facilitating culture. However, this view was not consistent throughout the interviews. The data in Chapters Three and Seven shows that FDR is a parent centred practice, where parents’ decision making is central. The reasons given by practitioners in FDR were that parents provided the content of the dispute and made all decisions for their children; any invitation to include children in FDR must be approved by the parents. In the number of situations where practitioners did see children they noted that the meeting was beneficial to both parents, practitioner and to child. For those practitioners who reported wanting a child inclusive practice but because of institutional policy were not able to see children, their response was that, children should be heard before parents decided on the content and inclusion of culture in their future parenting plans. These practitioners reflected an understanding about children’s development and the growing needs of the child. There were also practitioners who did not want to see children; they were happy to allow parents to make decisions for their children in the thought that parents know their children’s abilities and can decide what is in the child’s best interests.

However, in circumstances where the child’s rights to culture conflicted with the parents’ rights to disregard discussions on culture, the findings show that practitioners opted to rely on parents to make the final decision relating to the child’s culture. This finding is significant because it shows that practitioners appreciated culture and appreciated that children can make reasoned decisions on culture. However, when real action was necessary to realise children rights to culture, practitioners were not taking the initiative to bring culture to the forefront of parental negotiations. This meant culture was not being facilitated for the child.
As an extension of that thought, practitioners interpreted that their obligations towards the child as child advocates did not mean that they took on an active role in facilitating the child’s rights to culture. The findings affirm that child advocacy meant that practitioners were constantly refocusing parents to discussions on the child. Whereas service providers varied in their approaches and policy procedures on how they ran FDR and whether they provided families with child focused or child inclusive services, the usual practice in FRCs is that they employ trained child representatives or child counsellors. These representatives then bring the child’s voice into the FDR, if not the child.

(ii) The Principles that Guide the Practitioner in Practice

Practitioners struggled with the notion of children’s rights. Practitioners reasoned that rights are an entitlement to those who can assert their rights and children were not of this class of individuals. This caused tension for the practitioner who reasoned that their statutory obligations did not extend to facilitating the rights of children to culture but to help parents resolve most or all of their disputes so that parents can decide whether they wanted to culturally socialize their own children. Practitioners in general believed in and upheld the core tenets of FDR (remain independent, neutral of the parties to allow parents to self-determine their dispute). However, despite independence and neutrality being core principles of mediation, the data shows that practitioners had problems interpreting these terms. In this study, and in a number of previous studies conducted by Rhodes et al., practitioners used the term neutrality interchangeably with impartiality and independence, although these terms do not mean the same thing. Technically independence means not having any interest in the dispute content or any resulting parenting plans and neutrality and impartiality means being fair and not placing too much emphasis on one side as opposed to the other in FDR. Despite this, the study found practitioners to be neither independent nor neutral of the dispute. A reason for this is because practitioners are now statutorily obligated to advise parents of the elements that constitute the child’s best interests. In this respect, practitioners have to make subjective interpretations of the provisions of best interests to explain these provisions to parent in layman terms.

Despite their statutory and ethical obligations, a number of practitioners in this study raised

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conflicted and disturbing propositions: in the first scenario, a practitioner in her attempt to remain independent, allowed the production of plans that in her subjective opinion contained inclusions of culture that were not in the child’s best interest. Her comments were, ‘who are we to judge’. In contrast, in the second scenario a number of practitioners stated they would be prepared to breach their duty to remain independent to raise the child’s right to culture in FDR. In both these scenarios, it shows the level of difficulty that practitioners had in understanding their obligations under the legislation, which stated a practitioner in their advisory role is to give advice to parents on matters that relate to the, ‘care, welfare or development of the child’. In both scenarios, the presumption is made by practitioners that advising parents of their children’s right to culture is has the capacity to obscure the child’s rights to culture. Further it is a misinterpretation of their role as managers of FDR, and shows that practitioners were straining to translate the legislation surrounding their duty under 63DA ‘Obligations of advisors’, into practice. FLA s63C(2)(i) and s63DA(2)(d) provide that practitioners are statutorily obliged to inform parents in regard to (d), ‘matters that may be dealt with in a parenting plan’ and these matters can contain (i) ‘any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child’. The suggestion therefore is that practitioners misunderstand of the meaning of ‘independent’ under s10F(b) under the legislation, has the potential, in situations where practitioners were advising parents of the issues that are in the child’s best interests, to incorrectly instruct parents in their duties to the child. The misinterpretation of the legislation indicates a limitation of the practitioners’ understanding of their legal and ethical duties to the child and the child’s rights to culture.

The main reason practitioners cited for remaining non-interventionist was to respect the parents’ rights to self-determine their children’s plans, and for parents to take responsibility for the decisions they make within the plans. Yet the findings indicate that most practitioners were ‘challenging’ parents in relation to their cultural constructions of children’s best interests, to refocus the parent to concentrate on considering the quality of the relationships with the child, instead of negotiating to secure time for themselves.

768 s63C(2)(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.
769 ibid
770 s63D(2)(d) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2).
771 FLA s63DA, s63C.
772 FLA s10F(b) in which the practitioner is independent of all of the parties involved in the process.
Discussions in Chapters Six, Seven and Eight support the finding that practitioners understood that being culturally competent translated to being empathetic to a parent’s culture, being respectful, acknowledging differences and being responsive to those differences. Yet the data shows that despite the practitioner’s negative experiences in FDR with parents of non-mainstream culture, practitioners are generally committed to the idea of managing a culturally competent practice. However, they lacked confidence because practitioners did not have the technical abilities to manage FDR with parents of non-mainstream cultures. Even so, practitioners reported in Chapters Six and Seven that respecting cultural diversity does not mean accepting all the cultural practices that parents want to pass to their children. The findings revealed that practitioner’s interpretation of a culturally competent FDR meant that practitioners should adopt a problem solving approach in FDR to help parents resolve their dispute. However, as discussed in Chapters Two and Three, many community cultures are interest-based and do not approach dispute resolution from a position of resolving the entire dispute, but from the view of keeping the family or community peace. By using the problem solving approach, practitioners are not considering the literature that describes individuals from collectivist cultures and their needs for dispute resolution to restore the connectedness and community cohesion that the dispute caused. It also indicates that practitioners were substantially limited in their abilities to connect with parents from these cultures and this affects the parents’ responsiveness to instructions on how to make decisions that relate to their children’s ‘best interests’. In understanding the difference between individualist cultures that promote individualism and personal freedom, such as that practiced in FDR and the approach of many minority and Indigenous cultures, practitioners are able to ‘shift’ parents and reconstruct entrenched mind sets.

The findings in Chapters Six and Eight show that practitioners were challenged to manage FDR when parents presented with multi-context-FDR. That is, when parents had a number of complex issues relating to the parents culture, religion, incompatible child rearing practices. In these situations, practitioners reported that the immutable differences between the parents were beyond the scope of FDR and practitioners were under qualified and under trained to help parents resolve the dispute. In these situations, practitioners reported that parents were given s60l certificates and this enabled them to seek judicial determinations. However, practitioners also distinguished between practices that reflected a contemporary political character and those that reflected and legitimised and promoted the child’s best interests to Australian
standards. These practitioners stated that culture or specific actions pertaining to a community that were not compatible with Australian standards of acceptable or legal practices, would not be facilitated. Practitioners were discerning that parents at FDR had inconsistent value positions in relation to their children’s upbringing and this warranted that practitioners did not facilitate culture for the child.

The reason practitioners rationalised was that if culture is the cause of their conflict, then facilitating culture in parenting plans would result in long term conflict between the parents. In contrast to this, other practitioners reasoned that culture was unique to the family; each family had its own subculture or continuum of culture and so parents are in a better position to decide what is best for the child. For another practitioner, the findings show that her inaction to advise parents of the potential harm that could arise for the child as a result of the cultural element within the plans has ethical ramifications. In speculating why this may have been the case, two reasons are provided: firstly the practitioner was not able to untangle the complexity of culture for the family; secondly, the practitioner did not understand the relationship dynamics and the complexity of culture on those dynamics. Either way the practitioner failed to facilitate culture for the child.

In 2000, a social philosopher Stuart Hampshire in his book *Justice Is Conflict*, concluded that ‘The skilful management of conflicts [is] among the highest of human skills’. Practitioners serve as agents of dispute resolution, reconciling the reality of the parties with the reality of the situation. Although practitioners noted in Chapter Eight that universal justice is not possible whether in FDR or any other process, ‘because there never will be such a harmony’ from discussion in Chapter Eight it was understood by practitioners that doing justice in FDR meant working towards obtaining the best interests of the child by managing child focused FDR.

In Chapters Four and Eight, an analysis of FDR described it as a non-judicable process intended to help parents resolve their dispute, managed by a neutral third party, mediation or in FDR a practitioner. The findings show that practitioners used a form of FDR that was between facilitative, one that encouraged parties to generate their own settlement options. Evaluative FDR (using ‘reality checks) proposed options to move parents in a particular direction if the

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774 ibid at 406.
discussions became entrenched. With no professional guidelines to indicate what and to what extent practitioners can ‘help’ parents during FDR, practitioners interpreted this as an open invitation to use their discretion. Despite the data from Chapter Three showing that practitioners interpreted their role and duties as independent third parties that ‘help’ parents resolve their dispute, in Chapter Eight, practitioners reported holding an authoritative position in FDR with the power to ‘make them renegotiate’ as one practitioner noted. The suggestion in this statement is critical to the question, does FDR facilitate the child’s rights to culture?, because it draws attention to the fact that practitioners were confused as to what ‘help’ means and that practitioners were placing personal subjective interpretations on the level of ‘help’ that a practitioner can give parents in FDR. The findings provide evidence that practitioners are as independent as they chose to be, based on the understanding that FDR is a private, confidential process. The findings show that practitioners were wavering between providing arm’s length guidance or taking a proactive stance. However, practitioners also noted that this depended on the circumstances of the FDR, the level of conflict between the parents and the responsiveness of parents to the child’s best interests.

The above discussions are the findings from the research conducted to ascertain whether FDR facilities the child’s rights to culture and the cultural competence of practitioner to detect, interpret and help resolve disputes with parents of non-mainstream cultures. The combined findings suggest that generally, practitioners were culturally sensitive and competent. However, they lacked the requisite training to manage multifaceted or highly conflicted, culturally contextualised FDR, and this left them challenged, unprepared, and sometimes frustrated at not being able to help parents. This meant that children were not being afforded their rights to a healthy cultural identity.

**G Themes that Guide the Findings**

This study is complex and multifaceted. Initially it provided an overview of the practitioners’ understanding of culture, and from that understanding it attempted to show whether practitioners understood that culture was vital to a child’s formation of an individual identity, and thus whether practitioners were prepared to facilitate culture in FDR between parents. It then proceeded to show whether practitioners understood children’s rights and why practitioners were pained to accept that children were able to hold rights. The main aim of this study was to investigate whether FDR was facilitating children’s rights to culture and to show the limitations and challenges that hindered that right.
The thesis argued that, despite now being under an obligation to meet accreditation standards that requires practitioners to improve and maintain their skills based training, practitioners still have a limited knowledge base of culture and are restricted by their inadequate training to manage FDR with parents from non-mainstream cultures. Despite practitioners acknowledging that culture is the ‘mirror’ by which one sees themselves and that humans reflect the culture in which they are born into, practitioners managed FDR in a manner that attempted to normalise children’s needs and generalise children’s relationships with their parents. The thesis argues that practitioners blamed culture for the disputes and not the differences between people. That is, people of the same culture may disagree on certain aspects of children’s upbringing and this may cause conflict; however, the conflict was caused by a difference of opinion, not their culture. The thesis concluded that culture is complex and practitioners were not confident to facilitate culture in the parent’s discussions.775

The remaining section will address the implications from these findings and themes.

H Implications

The assumption implicit in the legislation is that children have a right to culture and that culture will be facilitated for children in any dispute resolution process that parents use to resolve their contested children’s matters.776 However, as the findings show this is not the case in FDR. The implication from these findings is that children of parents not of mainstream culture will suffer a loss of culture. While the result of this loss is not yet known, because of the lack of investigative work in this area of family law, if the reports on the Stolen Generation and research into interracial or transnational adoptions are any indication, then children of minority cultures will suffer similar symptomology. This is a clear indication that children of Indigenous and minority cultures should be granted every opportunity to practice and enjoy their culture. The interrelation between culture and the child’s need for a full and cohesive sense of identity was established in Chapters Two and Six, and the relationship between loss of culture and child adjustment has been addressed in Chapters Three and Seven. The affirmative results obtained from these findings provide the basis for the implications. These implications are significant enough to indicate that the investigation into whether FDR was facilitating the

The right of the child to culture was necessary. The next part will provide the themes and their implications.

I The Challenge of Identifying Culture

Despite practitioners being culturally sensitive to the importance of culture to the development of a child’s healthy identity, practitioners were challenged to identify culture for children; thus, their corresponding obligations to facilitate culture in FDR, diminished. The discussion in Chapter Two shows that culture plays a crucial part in all human development. An-Naim suggests that culture is the primary component in the socialisation of children, amounting to learnt and shared behaviour and is instrumental in how a family prepares their children for adulthood. As Ronen suggests, this is because children learn ‘who they are’ by sharing experiences with others of their family and within a community. In accepting these definitions, most practitioners appreciated that culture played an important role in the family’s dynamics and in the formation of a child’s identity. Confirming that the child’s family and community comprise the child’s starting points in the socialisation of a culture.

Thus, the implication for practitioners was to develop specific culturally sensitive strategies to enable alternative interpretations of cultural norms and standards in FDR to meet the needs of non-mainstream parents. Adopting procedural universality is neither practical nor conducive to the realisation of responsive management of FDR. Given the integral and dynamic relationship between culture and children’s development, the practitioners’ understanding of this relationship will help implement procedural reform and process standards appropriate to their practice.

The recommendation is to format and include, within the accreditation competency components, a component on culture. This should be accompanied by a component in practical training, or proof of work with minority or Indigenous parents, and a higher education qualification in culture or related courses, for all newly accredited practitioners. For those in the field, continuing cultural training and its related practical components is vital.

The second theme was that practitioners believed that, while culture was important for children in theory, and believed that children should know and enjoy their culture, they lacked cultural competence and confidence and were not prepared to facilitate culture in practice. Practitioners believed that culture was necessary for the child’s development in theory. However, the premise of facilitating culture in FDR so that it can be included in parenting plans was inferred by most practitioners to be not in the child’s best interests. The implication was that practitioners did not understand the necessity of culture or the urgency of facilitating culture for children at a young age. Practitioners dismissed culture in FDR and assumed children would attain culture as they matured and began to understand its worth and this influenced the practitioner’s corresponding obligations towards facilitating culture for children.

Contemporary sociology of childhood from Chapter Two suggests that children’s development is torn between two concepts: the understanding that children all have common developmental stages across age cohorts; and the understanding that children develop in context and proportionate to the level of support given. It was the intersection of these constructions of children that practitioners accepted; children were vulnerable, dependent and in need of adult supervision, but attained independence and future citizenship as they matured. In reasoning that children’s independence is bound to children’s capacities, practitioners employed a protectionist interpretation of childhood that determined the parameters of childhood and the child’s agency. It was this idea that challenged the practitioners’ understanding that children were rights holders.

Nevertheless, the data shows that for many practitioners, culture was a family’s history, traditions and heritage. By associating culture in this manner, practitioners believed that culture preserved old and often unsuitable ways of living in Australian society, as stated in Chapter Six by a practitioner, culture places children ‘in a twilight zone’, in limbo, a type of frozen existence where nothing changes. It was these misinterpretations of how culture affected childhood that undervalued the potential of culture’s influence on children’s personhood and development.

The implication of these thoughts and misunderstandings is that practitioners are not understanding the underlying premise of the legislation that there are 5 principles that
underly the objects of the 2006 FLA, as stated in Section 60B(2), children’s rights to enjoy their culture is one. The implication of this ignorance means that children are denied their rights to culture, and their cultural heritage. In normalising the child’s culture, practitioners failed to distinguish between culture beneficial for the child and detrimental culture, reducing minority culture to a component that caused inter-relational conflict. In this understanding, practitioners re-established the fundamental western values system of FDR, and cultures other than western culture were not believed to be in the child’s best interests.

K The Rights Debate

In accepting that children developed capacity with age, practitioners dismissed the notion that children could be considered rights holders in any traditional sense. The implication is that; children’s rights were not an easy concept to grasp for practitioners and even harder to implement.

Practitioners reasoned that as children could not invoke their rights to culture nor make any claim against those who violated their rights children’s rights become a contentious claim on society carried by responsible adults as obligations. In one sense practitioners argued this was problematic when seeing children as future adults. Reasoning that children had no present rights, children’s rights became subsumed within the rights of the family. Further, practitioners agreed that the relationship of need between children and their parents was unavoidable because of children’s vulnerability, reasoning this was a natural implication of the relationship. However, this view had strong implications for the facilitation of culture in FDR. By defining children’s abilities and rights according to their age and maturity, practitioners placed the western ideal of a ‘normal’ childhood as a prerequisite for child autonomy and thus restricted children’s rights.

The rights discourse in Chapter Three emphasised that rights are a universal entitlement. The requirement to enforce rights was interpreted by practitioners as critical to the grant of rights; this meant that practitioners were challenged by the idea that children had rights. This view

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779 Section 60B(2) five principles which underlie the objects of the Act: children’s right to ‘know and be cared for by both parents’; children’s rights to ‘spend time on a regular basis’ with both parents and other significant people including grandparents; the obligation on parents to ‘jointly share duties and responsibilities’; an obligation on parents to ‘agree about the future parenting of their children; and children’s rights to enjoy their culture.
promoted practitioners to recognise children’s ‘moral’ right to culture, if not their legal rights to culture. The implication of this finding meant that practitioners could justify the right to culture for the child while maintaining that children were dependent on parents to fulfil those rights. That is, by parents making decisions for the child, practitioners believed this allowed children to develop unhindered by adult responsibilities. However, Chisholm and McIntosh notes that by legislation making best interests the paramount consideration in children’s matters, the legislation gave children the potential to trump the rights of parents. To guide the promotion of rights for children, the FLA introduced an archetype of rights contained in Part VII to correspond with the UNCRC Articles that contain the child’s rights to provision, protection and participation. Culture is considered a second generation right in the UNCRC because of its participatory category. In the FLA cultural rights are contained in the list of how to interpret best interests in s60CC and in a specific provision for all children in Australia, s60B of the Objects of the FLA. All rights for children are considered to be interrelated and interwoven where one category of rights supports another. However, protection rights were affirmed by practitioners to take priority in Australian family law. Correspondingly, new changes to the definition of violence and abuse were introduced to the FLA 1975, (Cth) with the inclusion of s4AB. Ss4AB(2)(j) now includes, ‘prevention from family members making or keeping connections with his or her family, friends or culture’, as violence. The implication of this new definition means that practitioners must become familiar with this expanded definition to know that deprivation of culture is now violence and children must be protected from the same.

A number of strategies are put forward; with rights there cannot be one single pathway to remedy the failure of the law to account for the most vulnerable of citizens, our children. A multidimensional approach is suggested, in conjunction with the training of practitioners in how to interpret the legislation and on-going educational programmes for practitioners. This is much like continuing legal education for legal practitioners, a clarification of the legislative provisions that house the child’s best interests, definitions and frameworks. In conclusion, as an in-house remedy, suggested by a practitioner in this study, practitioners should have regular and

782 Part VII Childrens matters, s60CC, s60B
783 s4AB Definition of family violence etc. (2) (i) preventing the family member from making or keeping connections with his or her family, friends or culture;
extensive staff dissemination presentations within each office, create an environment of openness about difficult or unusual FDR, and foster bi-lateral agreements with local cultural community.

I The Child’s Best Interest

The concept of the child’s best interests now guides international and domestic law in the FLA. Part VII FLA provides that in any assessment concerning a child, the child’s best interests must be paramount. However, practitioners were confused as to their obligations to the child; whether the child’s rights to culture or protection from unsafe cultural practices not in the child’s best interests. The implication is that practitioners rejected the idea that the child’s rights to culture were in the child’s best interest in FDR.

According to Rogers and Wrightsman,784 western legal thought is premised on society’s obligations to nurture the child. This thought became the underlying principle of the UNCRC in Article 3, as discussed in Chapter Three and in the FLA provisions guiding judicial decision making. The Principle allows for subjective decision making to take into account the child’s individual circumstance, unlike rights that are universal and objective, applying equally to all. The principle of best interests was thought by practitioners to mean the prioritisation of protection from harm, time with family, schooling and play. When practitioners were not sure of what best interests was in any particular circumstance, a number of practitioners turned their thoughts to practices that were less detrimental to children. The implication of these remarks meant that practitioners were focusing on the intent of the parents, rather than on the child’s best interest, ignoring the plurality of children’s circumstances, their needs and the link between children’s culture and wellbeing. This means that the position of rights in FDR should be clarified and restricted. It is recommended that practitioners should make themselves familiar with the legislative directives outlining cultural rights, violence and abuse and understand that their non-facilitation of culture is a direct violation of those rights. To remedy this failing, practitioners must be provided with legal training to enhance their cultural awareness of the provisions that surround children’s rights to culture, safety, and association, and cultural competence practical training to ensure practitioners are able to manage culture with parents from non-mainstream cultures. Further, FRCs can implement some of the suggestions that practitioners provided in this study, provide co- partnering in FDR, informational seminars,

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784 Carl M Rogers, S L Wrightsman Above n 773
databases of relevant external organisations and those that hold specialised qualifications in the relevant areas.

**M Ethical Dilemmas**

An important theme that arose from the findings was that practitioners not only faced professional and legal challenges in managing FDR with parents of non-mainstream culture, but practitioners also experienced ethical challenges. The first was the dilemma of holding dual but incompatible roles in FDR: one to advocate for the child’s rights to culture; and the other to help parents self-determine their children’s matters. The implication is that practitioners prioritised the parent’s subjective interpretation of the principle of the child’s ‘best interests’ and compromised the child’s cultural rights for parental rights.

The second ethical dilemma concerns the practitioner’s role in FDR as advisor and evaluator of parental negotiations, and their statutory duty to remain neutral and independent of the parties in FDR. The philosophy of FDR is to empower parents to make decisions on their children’s best interests and for practitioners to encourage parents to take responsibility for those decisions. The amendments in 2006 to the FLA signalled a shift to the role of the FDR practitioner, under s 63DA obligation of advisor and the Regulations regs 28(1)(a) a practitioner must now give the parents advice as to the legal presumption of equal shared parental; the subject matter of the parents dispute; to give procedural advice and the rules of confidentiality; the application of the law surrounding the child’s best interests and depending on the practitioners profession, advise as to the law, child development, the psychology of the child. Parents are encouraged to negotiate in a child focused manner. However, in entrenched negotiations the practitioner can assist parents by redefining the boundaries of their discussions, refocusing parents on the child and reframing comments to facilitate cooperative and constructive communications. Further, practitioners must now also evaluate during the practitioner pre-FDR session and the FDR whether parents are make a ‘genuine effort’ to resolve their dispute, and if not to issue a s60I certificate allowing them to file court proceedings. Given all these activities, practitioners are also expected to remain

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785 *FLA* s10F (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other

786 Family Law (Family Dispute Resolution Practitioners) Regulations 2008; Reg 28 requires family dispute resolution practitioners to ensure that specified information is provided to each party to the family dispute resolution before the dispute resolution is conducted
independent and neutral. The implication of these conflicting responsibilities is that practitioners are using discretion in their management of FDR. They rely on their training to know how much intervention is needed to help parents gain control of their settlement. Practitioners reported that the core philosophy in FDR is that parents self-determine their children’s plans, but also acknowledged that they can influence this determination and this raises the question of why practitioners chose not to influence the facilitation of culture for children in FDR.

The implications of practitioners’ independence, neutrality or impartiality is to allow parents to self-determine their parenting plans; giving parents power to reclaim their children’s future living arrangements, schooling, and medical care is important for parents to regain some stability in their lives and their children’s. However, expecting practitioners to remain lifeless and disconnected is unreasonable and restrictive to managing a highly emotive profession like FDR. A recommendation is to provide practitioners with culture specific education to help practitioners gain cultural competence; continuous training in FDR techniques and legal interpretation, combining these three areas will ensure practitioners gain proficiency to work with indigenous and parents from minority cultures; be able to facilitate culture between disputing parents by understanding the cultural idiosyncracies of their clients and to understand their legal duty to the child, respectively. While there can never be enough training and education in a field such as FDR, Chapter 4 and 8 discussed the minimum Regulatory requirements for the accreditation of practitioners. Continuous practice ensures that practitioners know when to intervene and when to stand back and allow parents to formulate their own child responsive plans thus upholding and respecting the core values of parental self-determination and practitioner independence.

N Training the Practitioner

The most important theme is practitioner training. The implication of attending training development and on-going FDR education means that practitioners will develop in areas of legal knowledge and interpretation, cultural practices and child development. Providing training for practitioners enables practitioners to identify critical turning points in FDR and assist parents to understand the importance of constructing child responsive plans that ensure a child’s rights to culture are not displaced by parental conflict.

787 Family Law Regulations 1984 (Cth) reg 58.FDRPs, registered with the Commonwealth Attorney-General’s Department. Family Law (Family Dispute Resolution Practitioners) Regulations 2008
The maintenance of professional standards by FRCs through adequate cultural training is a way of disseminating knowledge essential for the management of FDR with parents of indigenous and minority cultures. Even while cultural competence training is not a standard course offered to practitioners, most practitioners do receive rudimentary training on how to respond to culture. The implication of too little training means practitioners have to rely on their own knowledge base to generate culturally relevant options with parents at FDR. That is, options that will not be in contradiction with any cultural practices or traditions. This also means that practitioners need to be self-aware of their own personal bias and prejudices; cultural competency training will assist practitioners in this endeavour.

From 2008, practitioners must meet the accreditation requirements set out in the Family Law (FDR Practitioners) Regulations 2008. This is the completion of the Vocation Diploma in FDR or the higher education provider equivalent. Otherwise, a practitioner must have qualification or accreditation under the National Mediator Accreditation System (NMAS) and competency in the six compulsory units from the Vocational Graduate Diploma (or the higher education provider equivalent). The aim is to provide practitioners with practical and technical skills in conflict management, problem solving methodologies and ADR.

As Essed noted, ‘culture is not cause but context’. The suggestion is that culture depends not only on interpretation, but also self-awareness and reflection. While most practitioners had knowledge of the legislation surrounding the rights of the child to culture, practitioners also understood that training had its limitations and no practitioner could ever learn all the cultures and subcultures that exist. Even so, the implication of cultural competency training means that practitioners can manage FDR with the idea of legitimising the cultural practice for the child. When practitioners understand a culture they are better able to respect the standards and norms of that culture. Understanding a parent’s view point from the relevant cultural context means that children’s rights to culture must be implemented according to the national or local circumstances that relate to the child. Practitioners gain cultural efficiency when they understand

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788 Philomena Essed, Diversity: Gender, Color and Culture (University of Massachusetts Press, 1993).
790 Susan Armstrong, Enhancing Access to Family Dispute Resolution for Families from Culturally and Linguistically Diverse Backgrounds, (2010b), Australian Family Relationships Clearinghouse Briefing No 18, 1-23
and address the specific cultural needs of families. The implication of unfamiliarity is said to lead practitioners to ignorance and this can ‘breed fear’ about a culture, which alternatively often ‘breeds contempt’. In these situations, practitioners turn to stereotyping parents and culture to give meaning to the parent’s actions. Avruch and Black note that individual level prejudices arise when we see others as ‘less than us’ instead of ‘different to us’ When translated into organisational practice, this acknowledges some parents’ cultures and builds prejudice against others. Striving to have a culturally sensitive practice requires an awareness of the cultural needs, ethnicity, and religious beliefs of those families that attend FDR.

Drawing from the above suggestions, the recommendation is to reduce the stress on practitioners by strengthening the practitioner’s position in FDR with specific training to meet the demands of an ever growing field. The suggestions from practitioners on how they could gain cultural competence include supplementing the practitioner’s educational and practice standards with culture specific developmental forums, practice workshops and observational training (sitting in with practitioners who manage FDR with parents from minority or Indigenous cultures). Training can also take the form of continuing further education with practitioners. In conjunction with the competency courses that practitioners must now do in conflict management; problem solving methodologies and culture specific education and practice based training, would compliment the practitioners knowledge on the child’s rights to culture. This inclusion will also legitimise children’s rights and culture for the child. It also brings to the forefront the practitioners obligations to advocate for the child and this means that practitioner’s must facilitate culture for children during FDR.

O Indigenous Culture

While the focus of the study was minority children, it is appropriate here to document the practitioner’s stance on Indigenous cultures and why Indigenous culture was so prominent in the minds of practitioners despite many not working with Indigenous parents. In this study Practitioners reported that even though they had not worked with Indigenous clients, there was a personal and institutional focus on the Indigenous child’s need to maintain cultural

792 Susan F Law, Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation, (2009), 20 ADRJ 162-171 at p 164
793 Kevin Avruch and P Black, ‘Conflict Resolution in Intercultural Settings: Problems and Prospects’ in D Sandole and H van der Merwe (eds), Conflict Resolution Theory and Practice: Integration and Application, (1993), St. Martin’s Press.
connections and community connectedness.

The acknowledgement by practitioners in this study that Indigenous culture was different to and required more attention than minority cultures, equated to a misconception of their role and promoted cultural differentiation instead of recognition of human diversity in FDR. The implication was that practitioners made the connection between Indigenous culture and the best interests of the child, while practitioners were reserved about facilitating minority cultures, believing it would endanger the long term prospects of the child to become a productive healthy adult in Australian society. The sum of these views was that practitioners did not have the requisite understanding of minority cultures, and while there was an acknowledgement that culture was subjective, practitioners focused their views on the negative cultural traits and child rearing practices. Practitioners did not give attention to the intra-group variations within cultures nor the specific cultural interests of children of minority cultures.

The recommendation is to achieve consistency in any actions taken with Aboriginal or Torres Strait Islander peoples. That is, practitioners must be consistent in their endeavours to promote the child’s and families’ individual cultural needs, the significance of this recommendation is that consistency promotes legitimacy and reduces bias or unfair treatment. Consistency can be achieved with familiarity, education and practical training. This can be achieved by fostering agreements with local Indigenous communities, collecting specific cultural information on those Indigenous nations and formulating co-alliances with the elders of the nations to work to help their individual communities. Collecting nation specific information and compiling data bases for guidance, arranging seminars and vocational guidance lectures is another suggestion. Familiarity breeds respect.

P The Time Element

This section will address ‘Time’ in two contexts: The criticism by practitioners about the length of time the process took and secondly, time within a parenting plan to accommodate the child’s rights to culture.

While practitioners understood that family separation is a time of significant emotional stress, the main FDR process only gives families a three to four hour session, and expects that parents will be able to reach a point where they can negotiate civilly to make child focused plans for their children. Taking into consideration that practitioners are managing the
sometimes unreasonable expectations of parents, these sessions are too short. The recommendation is to make the session flexible; if no resolution is reached in the three to four hour allocation of time, then the session should be rescheduled when parents have had time to reconsider their positions. Additionally, when considering a parent from a non-mainstream culture who may lack language skills, may need an interpreter or does just not understand the directions given to them in the session, then the FDR should be extended with more breaks and private sessions to help the parent adjust. The use of interpreters is also time consuming and should be factored into the time given at FDR.

The second element of this discussion is the time granted within a parenting plan (or ‘extra time’ as some practitioners in the study were commenting) given to a parent to accommodate the cultural socialisation of their child. Practitioners were aware that time spent with the child, in the form of equal, substantial or significant time was one of the main discussion points in FDR. Yet many practitioners were reflecting on how much time was sufficient time to appease each parent in FDR. To maintain attachment bonds between the child and both parents and therefore to minimise the trauma caused to the child as a result of the family separation, or to socialise the child within the culture of one parent thus taking away ‘time’ from the other parent. There is no exact answer for these questions; they depend on the age of the child, the responsiveness of the family to culture, the relationship between parent and child and the relationship between both parents and extended family. While practitioners are now under a statutory duty to advise parents on matters that constitute violence and to encourage parents to think about equal time share, the findings suggest that despite this advice, parents were often self centered in wanting to occupy more time with the child. Alternatively, practitioner’s noted in this regard that time a parent gains with a child is time within that parents culture for the child.

The recommendation is that time is a valuable commodity in family separation and parenting orders, and each parent is entitled to equal time. Extra time taken by one parent so as to include the child within a cultural events or time taken for the child to attend special language or religious schools constitutes time taken away from a parent. The recommendation is that any time taken to accommodate the child’s rights to culture must be highlighted within the plan to avoid future conflict between parents and this time must be compensated for at a time mutually suitable between the parents.
A significant finding was that practitioners choose not to facilitate culture for children in FDR. Practitioners believed that culture would stagnate a child’s natural ability to assimilate within mainstream culture and this would be detrimental to a child’s best interests. The findings show that a number of practitioners were subrogating their ideas for the child’s voice, that is, practitioners were superimposing their own beliefs of what a young adolescent child might argue when culture is imposed on them by their families or in parenting plans. In these situations practitioners believed that it was necessary to hear from the child on whether they wanted to be included in the culture of their parents and this was not possible within the practice of FDR in many centers.

Whereas the prominent form of FDR, child focused, allows the practitioner to direct parents to focus their negotiations on the child, child inclusive FDR allows for the child’s voice to be heard, albeit through a child counselor. However, child inclusive FDRs are not common, and are dependent on the child being willing and able to give an opinion. The understandable reason given by practitioners in defence of child focused FDR as opposed to child inclusive FDR was the safety of the child. Many practitioners noted that children could suffer trauma when placed in a situation where they have to make decisions that may be prejudicial to one parent as opposed to the other parent and this may leave the child open to reprisal by the parent.

The recommendations is to make FDR more child inclusive, ensure that parents understand the importance of listening to their child post separation, ensuring the child’s safety from parents after the child’s wishes have been revealed. This can be done by practitioners by discussing with parents in a culturally sensitive manner, the effects of family conflict and separation on children; screening the child for competence and any signs of fear or trauma before the interview and always allowing the child to change their mind at any time before the consultation to mitigate any negative effect for the child.

**R Conclusion and Significance of the Findings**

The research addressed the question of whether FDR was facilitating the child’s rights to culture. The research findings are contextualised by the literature review and discourse on the practitioner’s legal and ethical obligations to facilitate discussion on culture in FDR. Throughout the research attention was centered on the focus group, the FDR practitioner, and on the
practitioner’s capabilities to manage culturally competent FDR; the practitioners understanding of culture and the practitioner’s preparedness to facilitate culture in FDR for the wellbeing of the child from minority and Indigenous cultures.

Despite the changes to the FLA in 2006 and the emphasis given to the introduction of FDR and the practitioners new interventionist role, as well as children’s rights to culture in Part VII, there is debate as to whether theory can translate into practice. Most practitioners were knowledgable in their answers to, what is culture? as one practitioner noted, ‘culture was the mirror into the soul’. The cultural socialisation of the child was understood by practitioners to be the indoctrination of the child on multiple levels, primarily from within the familial culture by parents and extended family, then schools, peer groups and society in general. Practitioners summed that culture for the child was a human right necessary to formulate the child’s distinct human identity, however not a legal right requiring enforcement.

Despite the UNCRC and the FLA recognizing children as having protection, provision and participation rights, with culture as an element that promotes the child’s ‘harmonious wellbeing’, practitioners described ‘rights’ as an entitlement, qualifying childrens rights on the child’s age and maturity level. Practitioners concerned that because children were still in a transitional stage of life, that is, within a stage of development in the child’s life governed by time, economics, technology, politics and culture, children rights transformed into adult or parental obligations towards the child. Essential to these findings was that practitioners presented their views according to their own cultural and professional training and reasoning that, by all standards, parents know the child’s best interests better than anyone else. In consciously choosing not to facilitate culture for children in FDR practitioners preferred to adopt the paternalistic view of children’s rights placing parental self determination above the FLA construction of children as rights holders.

Critical review of the data shows that the idea of rights for children challenged practitioner’s sensibilities. The implication of reducing children’s rights to academia meant that children and childrens rights were not taken seriously. Culture as a human right extends to knowing, enjoying and conserving culture. This is despite conflict, differences in gendered roles, social class, and religion and with children, and the ease with which children assimilated into mainstream culture. However the thesis put forward the argument that practitioners were not opposed to culture per se, practitioners were concerned that culture would stagnate the child’s movement
into mainstream society and the child’s ability to adopt and live a separate culture and thus develop an individual identity. Practitioners identifying culture as a major cause of tension between parents and children—the movement of the child away from the familial culture highlighting the abandonment by the child of the family’s signature identity and a rejection of the parents’ way of life.

However practitioners, despite not directly dealing with children in FDR, also acknowledged that children did not often understand that the loss of culture would be detriment to their own future development and enjoyment of life. By this acknowledgment, practitioners must now make changes to the way they manage FDR. The privacy of the process must not hide the inadequacy of the practice. As managers of FDR, it is their responsibility to gain the training, gain insight, and gain cultural sensitivity and cultural competence. Children’s developmental needs mandate that the right to culture just like their need to understand basic academic knowledge and develop skills to survive; builds their character and sense of self. In this understanding, three final thoughts must be put forward:

1. That practitioner’s must become more active in promoting the child’s rights to culture in FDR. The provision of culture will help empower children with opportunities to understand not only themselves, but also their parents and their community. Enabling children to live their culture encourages the child’s best interests and gives meaning to their lives.

2. That the present FDR Regualtions must reflect the communities changing demographics. The provision of the FLA and Regulations must become more intensive to include culture competency training and legal interpretations training for all practitioners wishing to work in the Family law, FDR field.

3. The thought that children could not be rights holders in the here and now because children were still in a period of innocence, dependency, on a journey from immaturity to autonomous adulthood, has up to this day deprived children of their rights, this excuse must no longer be accepted in todays technological perspective. Practitioners must work more closely with parents to educate parents of the child’s rights and this includes culture.

This thesis is contemporary and relevant to the climate of FDR in Australia. The concerns about the practitioner lack of cultural competence, given Australia’s historical journey with the Stolen Generation are valid and the research has produced significant data to shown that it is
possible for these same conclusions to resurface with Australia’s minority children in years to come.

This thesis is unique because it makes the connection between, childrens human rights to culture, childrens legal rights to culture, FDR and the practitioner. However in the absence of noteworthy changes to the FDR Regulatory regime to reconceptualise how to prepare practitioners for FDR with parents from minority or indigenous cultures, the field of FDR will become increasingly unable to meet the needs of its clientele. The Thesis proposes a paradigm shift not only in the legislation and its regulations but also in the manner practitioners address childrens rights to culture in FDR and in their understanding of what constitutes the wellbeing of the child born to minority or indigenous parents.
My own reflection:

Culture cannot be described and that’s what makes it so special, each of us is a culture, that’s what makes us so individual. Children start life in their parent’s culture but along the way they become their own culture … but you can’t go forward without knowing your past. Depriving children of knowing their past is depriving them of understanding themselves in the future.
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**Legislation**

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*Family Law Amendment (Shared Parental Responsibility Bill 2006) (Cth) (SPR Act),*

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Family Law (Family Dispute Resolution Practitioners) Regulations 2008


**Conventions**


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United Nations International Children's Emergency Fund (UNICEF) 1946

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6th World Congress on Family Law and children’s Rights in Australia (2013), the Theme of the Congress is 'Building Bridges - From Principle to Reality" Sydney Convention Centre.
APPENDICES

Appendix I

Locked Bag 1797
Penrith South DC NSW 1797
Australia
www.uws.edu.au/researchservices

Human Research Ethics
Committee Office of Research
Services Building K1, Penrith
Campus
Tel +61 2 4736 2835 Fax +61 2 4736 2905

Participant Information Sheet (General)

An information sheet, which is tailored in format and language appropriate for the category of participant - adult, child, young adult, should be developed.

Note: If not all of the text in the row is visible please 'click your cursor' anywhere on the page to expand the row. To view guidance on what is required in each section 'hover your cursor' over the bold text. Further instructions are on the last page of this form.

Project Title:

**Does the Process of Family Dispute Resolution facilitate the Childs Rights to Culture?**

Who is carrying out the study?

Bethaina Dababneh from the School of Law at the University of Western Sydney (UWS).

You are invited to participate in a study conducted by the UWS School of Law. What is the study about?

The purpose of the study is ascertain whether the process of Family Dispute Resolution is accommodating the rights of the child to know and enjoy their culture.
What does the study involve?

The study involves participation in an interview in person or on the phone at a time to be arranged with the researcher. You will be asked questions about your experience of working with families from culturally and linguistically diverse backgrounds. The interview will be recorded and transcribed.

How much time will the study take?

The interview will take about one hour.

Will the study benefit me?

Your participation in the research will benefit us by providing information which may ultimately improve family law service provision for children from families from culturally and linguistically diverse backgrounds. Participants in this research will benefit by knowing that information offered may assist improve the content of parenting plans to give children the choice to know and enjoy their culture and this may ultimately improve services to family as a whole.

Will the study involve any discomfort for me?

The interview should not involve any direct discomfort for you the participant. Minor inconvenience could be experienced because the research will take approximately one hour of your time for the interview. Although the benefits of participation are expected to outweigh any inconvenience. There is also a chance that participants may feel defensive about their level of expertise in providing for the child's best interests. Again, this may be a good outcome as it may prompt participants to improve their knowledge base of children's rights and culture.

How is this study being paid for?

The study is being paid for by the University of Western Sydney, School of Law

Will anyone else know the results? How will the results be disseminated?

Only the researcher and her supervisors will have access to information provided by participants. The information you provide in the interview will be used to develop a PhD thesis. It is likely that information arising from the report will be publicly available, and elements of it will be published in academic journals. The identity of research participants will not be disclosed in any report or publication about the research.

Can I withdraw from the study?

Participation is entirely voluntary. You are not obliged to be involved and if you do participate - you can withdraw at any time without giving any reason and without any consequences.
Can I tell other people about the study?

Yes, you can tell other people about the study by providing them with the chief investigator's contact details. They can contact the chief investigator to discuss their participation in the research project and obtain an information sheet.

What if I require further information? What if I have a complaint?

If you require any further information or you would like to discuss the project at any stage, please don't hesitate to contact Dr Susan Armstrong (Supervisor) or Dr Scott Mann (Supervisor). E-mail addresses are sm.armstrong@uws.edu.au and S.Mann@uws.edu.au respectively.

If you have any complaints or reservations about the ethical conduct of this research, you may contact the Ethics Committee through the Office of Research Services on Tel 02-4736 0229 Fax 02-4736 0905 or email humanethics@uws.edu.au. Any issues you raise will be treated in confidence and investigated fully, and you will be informed of the outcome.

If you agree to participate in this study, you will be asked to sign the Participant Consent Form.

HOW TO FILL IN AN INTERACTIVE PDF FORM

1. If necessary, select either the Hand tool or the Select tool.

2. (Optional) To make form fields easier to identify, click the Highlight Fields button on the document message bar. Form fields appear with a coloured background (light blue by default), and all required form fields are outlined in another colour (red by default).

3. Click in the first form field you want to fill in, either to select that option or to place a curser in the field so you can start typing.

4. After making a selection or entering text, do any of the following: To accept the form field change and go to the next or previous field - Press Tab or Shift+Tab

To select the previous radio button in a group of radio buttons - Press the Up or Left arrow key

To select the next radio button - Press the Down or Right arrow key

To reject the form field change and deselect the current form field - Press Esc

To accept your typing and deselect the field in a single-line text box - Press Enter (Windows) or Return (Mac OS)

To turn the check box on or off - Press Enter or Return

To create a paragraph return in the same form field - Press Enter or Return

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To accept the change and deselect the current form field in all cases - Press Enter

To change the text formatting

For bold, italics etc, go to 'view' in the top menu and then go to 'toolbars' and select the 'properties toolbar'. When you click into a text box, the 'properties toolbar' will then be visible so that you can edit the font Type, Size, Underline, Style (Bold, Italic, Strikethrough) and Colour. For Paragraphs you can edit the Alignment, Indents and Spacing.
Appendix II

UWS HUMAN RESEARCH ETHICS COMMITTEE

14 October 2011

Doctor Susan Armstrong,
School of Law

Dear Susan and Bethaina,

I wish to formally advise you that the Human Research Ethics Committee has approved your research proposal **H9143**

*Does the Process of Family Dispute Resolution facilitate the Childs Rights to Culture?*

until 1 January 2013 with the provision of a progress report annually and a final report on completion.

Please quote the project number and title as indicated above on all correspondence related to this project.

This protocol covers the following researchers: Susan Armstrong, Scott Mann, Bethaina Dababneh.

Yours sincerely

Dr Anne Abraham
Chair, UWS Human Research Ethics Committee
Appendix III

Interview Questions

1. Thinking about your FDR practice, can you explain when you are aware of the need to consider culture?

2. What does a child’s “right to know and enjoy his or her culture” mean to you?

3. Thinking about your FDR practice, can you think of any times when you had to consider, or help parents consider, a child’s right to know and enjoy his or her culture?

4. Do you think FDRPs should consider this right in their FDR practice?

5. Thinking about your FDR practice, have you ever had to consider, or help parents to consider an indigenous child’s right to know and enjoy his or her culture? Can you tell me what happened?

6. In the examples you have described, have the child’s cultural rights conflicted with a child’s other rights or best interests in any way?

7. Are you aware how children’s cultural rights are considered in other parts of the FDR process? EG Intake, child consultations, parent education etc? Can you tell me how this works?

8. In your practice have children ever been consulted about their right to know and enjoy their culture? How has this been done?

9. Is there anything that would help you or other FDRPs to support children’s right to know and enjoy their culture in the FDR process?

10. Do you think other changes are needed to ensure that children’s right to know and enjoy their culture is considered in FDR processes? What changes do you think would make a difference?

11. Is there any other comment you would like to make about children’s right to know and enjoy their culture in the FDR process?
INVITATION TO PARTICIPATE IN RESEARCH

To Managers and Practitioners of Family Dispute Resolution,

My name is Beth Dababneh, a private legal practitioner working in Family Law in NSW. I am enrolled in a Ph D in the School of Law at the University of Western Sydney, under the supervision of Dr Susan Armstrong and Dr Scott Mann. My research investigates

**Does the Process of Family Dispute Resolution facilitate the Child’s Rights to Culture?**

This study has been approved by the University of Western Sydney Human Research Ethics Committee. The Approval number is H9143

This letter invites Family Dispute Resolution Practitioners to participate in the research. The research has the approval of the University of Western Sydney Human Research Ethics Committee (HREC). Participation will involve an interview in person or on the telephone for approximately an hour. The researcher is based in Sydney, so local participants have the opportunity to participate in an interview in person if preferred. Participants in other states will generally be interviewed by phone.

If you are interested in participating in this research, please:

1. Read the attached information and question sheet;
2. Complete the Consent Form; and
3. Provide contact details so I may contact you to arrange an interview time.
If you have any further questions, please do not hesitate to contact Beth Dababneh on:

a. Phone: (02) 8786 1463; or Fax (02) 8786 1474; or b. Email: 16912869@student.uws.edu.au

 c. Post your forms to: 11 Gawler Place, Bossley Park NSW 2176

Yours Truly

Beth Dababneh
(LLB (Hons), GCPT, MDR (Hons)) Lawyer