

# THE NORTHERN TERRITORY – FERTILE GROUND FOR FAMILY GROUP CONFERENCING IN CHILD PROTECTION MATTERS

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Although the policy giving rise to the Stolen Generation ended over 30 years ago, the removal of children from Aboriginal families remains a live issue for Australian governments. This is particularly so in the Northern Territory, where the publication of the *Little Children are Sacred Report* forced the sensitive issue back on the national agenda. A great deal of literature has been written on appropriate state intervention where children have been subject to, or face a real chance of, abuse or neglect. Much of this literature, both Australian and otherwise, suggests that alternative dispute resolution (ADR) in the form of family group conferencing (FGC) is one way to produce positive child protection outcomes for children and families. Various factors suggest that the Northern Territory is fertile ground for a robust FGC scheme in the child protection sphere, namely: historical sensitivities surrounding the removal of Aboriginal children, the social and economic disadvantage of many Aboriginal communities and persisting issues surrounding cross-cultural communication between Aboriginal and non-Aboriginal parties. Yet, the Northern Territory lags behind both its Australian and international counterparts in implementing ADR in child protection matters. The authors propose a model of FGC to meet the specific circumstances of the Northern Territory and suggest that this model of FGC should be adopted as a matter of urgency.

## I. ADR IN CHILD PROTECTION MATTERS

### A. ADR and its Common Forms

The National Alternative Dispute Resolution Advisory Council describes ADR as referring to processes, other than judicial determination, where an independent person attempts to help parties in a dispute to resolve the issues between them.<sup>1</sup> The main forms of ADR in Australia are mediation, conciliation and arbitration.

In both mediations and conciliations, the independent person cannot impose a decision on the parties. Instead the mediator and conciliator attempt to facilitate communication and understanding between the parties so that the parties themselves can reach a mutual agreement on the dispute.<sup>2</sup> Conciliation differs slightly from mediation in that the conciliator can take on an advisory role to the parties.<sup>3</sup> Conciliators can provide advice on matters in dispute and provide potential resolution options.<sup>4</sup> By contrast, in arbitration, the independent person hears evidence and arguments from the parties and makes a decision on the dispute.<sup>5</sup>

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<sup>1</sup> See National Alternative Dispute Resolution Advisory Council, *Your Guide to Dispute Resolution* (2012), 5 <<http://www.nadrac.gov.au/publications/DisputeResolutionGuide/Pages/default.aspx>>.

<sup>2</sup> Australian Mediation Association, *Mediation Explained* (2012) <<http://www.ama.asn.au/mediation-explained/>>.

<sup>3</sup> See National Alternative Dispute Resolution Advisory Council, above n 1, 15; Morgan et al, above n 3, 18-19.

<sup>4</sup> National Alternative Dispute Resolution Advisory Council, above n 3, 15.

<sup>5</sup> Ibid 18.

## **B. Development of ADR in Child Protection Matters**

ADR has long formed part of Australia's dispute resolution landscape.<sup>6</sup> However, it has only been more recently that it has become part of dispute resolution in child protection matters.<sup>7</sup> This emergence has been put down by some commentators to the increasing cost of court procedures associated with child protection proceedings, which can be complex, lengthy and hostile.<sup>8</sup> There have also been a number of State and Federal inquiries and Law Reform Commission Reports that have recommended the adoption of ADR into child protection matters.<sup>9</sup> As a result, all Australian jurisdictions have now introduced or piloted, in some form, ADR in child protection matters.<sup>10</sup>

## **C. Types of ADR in Child Protection Matters**

Pre-hearing conferences are the main form of ADR in child protection matters. Broadly speaking, a pre-hearing conference provides the family of the child and relevant stakeholders an opportunity to decide on an appropriate care plan for the child and avoid the need for court intervention.<sup>11</sup>

One of the main forms of pre-hearing conference is FGC.<sup>12</sup> FGC was developed in New Zealand in the 1980s as a response to criticism that the child protection system in New Zealand did not adequately recognise Maori culture and community, including the important role extended family played in a child's well being.<sup>13</sup> FGC is now adopted in more than 150 jurisdictions, including in the United States and United Kingdom.<sup>14</sup> Although variations between the jurisdictions arise, FGC is generally characterised by a three step process of preparation, conferencing and follow-up, that is designed to achieve a care plan for a child that is realistic, achievable and implemented.<sup>15</sup> The facilitator or convenor of the FGC is always required to remain neutral in their role.<sup>16</sup>

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<sup>6</sup> Rosemary Sheehan, 'Alternative Dispute resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157, 157; Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report No 19 (2010), 216 [7.11].

<sup>7</sup> Morgan et al, above n 3, v.

<sup>8</sup> Sheehan, above n 6, 157.

<sup>9</sup> See, eg, Muriel Bamblett et al, 'Growing them Stronger, Together' (Report, Board of Inquiry into the Child Protection System in the Northern Territory, 18 October 2010) 291-412; Special Commission of Inquiry into Child Protection Services in NSW, Parliament of NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) 465-491; Crime and Misconduct Commission, Parliament of Queensland, *Protecting Children: An inquiry into Abuse of Children in Foster Care* (2004) 213-223, 331; Victorian Law Reform Commission, above n 6, 213-286; Australian Law Reform Commission, *Family Violence - A National Legal Response*, Final Report No 114 (2010) 1073-1085.

<sup>10</sup> Nathan Harris, 'Mapping the adoption of Family Group Conferencing in Australian States and Territories' (Occasional Paper, Australian Centre for Child Protection, 2007) 9.

<sup>11</sup> Morgan et al, above n 3, 17.

<sup>12</sup> Family Group Conferencing is also referred to as family group meetings or family care meetings, see Tamara Walsh and Heather Douglas, 'Lawyers' View of Decision-Making in Child Protection Matters: The Tension between Adversarialism and Collaborative Approaches' (2013) 38 *Monash University Law Review* 181, 189.

<sup>13</sup> Chris Cunneen and Terri Libesman, *A Review of International Models for Indigenous Child Protection* (2002) AustLII <<http://www.austlii.edu.au/au/other/IndigLRes/2002/1/>>.

<sup>14</sup> Victorian Law Reform Commission, above n 6, 236; Paul Ban, 'Aboriginal Child Placement Principle and Family Group Conferences' (2010) 58 *Australian Social Work* 384, 390.

<sup>15</sup> Leone Huntsman, Department of Community Services (NSW), *Family Group Conferencing in a child welfare context: Literature Review* (2006) 2-4.

<sup>16</sup> Morag McArthur and Gail Winkworth, 'Family Group Conferencing' (Scoping Paper, Institute of Child Protection Studies, Australian Catholic University, 2006) 10.

At its core, FGC is based on ideas of restorative justice and community development.<sup>17</sup> It emphasises the family as the key decision-maker, therefore encouraging the immediate and extended family of the child to take responsibility for the care and protection of the child.<sup>18</sup> It is this emphasis on the family as key-decision maker that differentiates FGC from mediation.<sup>19</sup>

Another type of ADR in child protection matters is the Aboriginal Care Circles Program. Introduced in New South Wales in 2008 and currently being piloted in Nowra, the program combines principles of FGC and sentencing circles to encourage the development of culturally appropriate solutions for relevant children.<sup>20</sup> A Magistrate can order the holding of a care circle after it has been identified that the child is in need of care and protection.<sup>21</sup> Two care circles are held and attended by the relevant stakeholders, including the child, the child's parents, community representatives (generally respected Elders) and the Magistrate. After the first care circle, a care plan is prepared and then discussed at the second care circle. If agreement is not reached, the matter is referred back for court decision.

## II. CHILD PROTECTION PRACTICE IN THE NORTHERN TERRITORY

In the Northern Territory, Child Protection is regulated by the *Care and Protection of Children Act* (the Act). The Office of Children and Families (OCF) is the current incarnation of the statutory body with the mandate to carry out child protection work under the Act.

The Act currently provides for both mediation conferences arranged by the CEO of OCF and mediation conferences ordered by the court.<sup>22</sup> Under the Act, the CEO may arrange for a mediation conference to be convened for a child if concerns have been raised about the wellbeing of the child, the CEO reasonably believes the conference may address those concerns and the parents or the child are willing to participate in the conference.<sup>23</sup> There is no need for court proceedings to be commenced for CEO arranged mediation conferences to occur and parents and other persons may be invited by the CEO to attend the mediation conference.<sup>24</sup> The mediation conference then aims to arrive at an agreement between the parties on the best means of safeguarding the wellbeing of the child.<sup>25</sup> The *Care and Protection of Children (Mediation Conferences) Regulations* outline the procedural aspects of the mediation conference, including powers and functions of convenors, conduct of the mediation conference and reporting requirements. The provisions in the Act and Regulations relating to CEO arranged mediation conferences commenced on 18 August 2010.

The provisions relating to court ordered mediation conferences are largely identical to the provisions for CEO arranged mediation conferences, although the court can require certain people to attend the

<sup>17</sup> Qwenn Murray, 'Evaluation Report – Family Group Meetings Policy' (Report, Legal Aid Queensland, September 2007) 72; Huntsman, above n 15, 6.

<sup>18</sup> McArthur and Winkworth, above n 16, 6; Bamblett et al, above n 9, 302.

<sup>19</sup> Victorian Law Reform Commission, above n 6, 237.

<sup>20</sup> Hilary Hannam, *Care Circles* (3 May 2010) Australasian Institute of Judicial Administration <<http://www.aija.org.au/NAJ%202010/Papers/Hannam%20H%209a.pdf>>; Bamblett et al, above n 9, 706-712; NSW Attorney General and Justice, *NSW Care Circles – Procedure Guide* (August 2011) Children's Court of New South Wales, 1 <<http://www.childrenscourt.lawlink.nsw.gov.au>>. The common principles of circle sentencing include making criminal sentencing more culturally appropriate, more inclusive of the Indigenous Community and more inclusive of the offender, see Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts – towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review* 415, 435.

<sup>21</sup> See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65A which allows the Children's Court to order the parties to attend an alternative dispute resolution conference; Bamblett et al, above n 9, 711.

<sup>22</sup> *Care and Protection of Children Act 2007* (NT) ss 49, 127.

<sup>23</sup> *Ibid* s 49(1).

<sup>24</sup> *Ibid* ss 49(2), (6).

<sup>25</sup> *Ibid* s 49(4)(d).

conference.<sup>26</sup> However, regulations with respect to the procedural aspects of court ordered mediation conferences have not been enacted. Interestingly, although present from the date of assent of the Act (12 December 2007), the provisions in the Act relating to Court ordered mediation conferences have not yet commenced.<sup>27</sup>

Although the Act makes provision for ADR in child protection matters, CEO and court ordered mediation conferences do not, generally speaking, form an active part in child protection practice in the Northern Territory. A FGC program was piloted in Alice Springs as part of the 'Alice Springs Transformation Plan'. A report into the implementation of this project was released in June 2012 by the Centre for Child Development and Education, Menzies School of Health Research.<sup>28</sup> The report provides hope that FGC can be successfully implemented in the Northern Territory, stating in its summary that:

This pilot of FGC has provided evidence that FGCs can be convened in a timely fashion with Aboriginal families in Alice Springs. Anecdotal feedback from participants has highlighted the high levels of satisfaction with conferences convened to date and the potential transformative power of FGCs.<sup>29</sup>

Despite the report suggesting the FGC pilot was successful, there has been no apparent movement towards a continuation or rollout of FGC across the Territory.

The lack ADR in child protection matters was identified both in the Report of the Board Inquiry into the Child Protection System in the Northern Territory (*Growing Them Stronger, Together Report*), published in 2010, and more recently, in the Issues Paper associated with the Major Review of the Act, published in 2012.<sup>30</sup> The *Growing Them Stronger, Together Report* recommended that the following occur within 18 months of the publication of the Report:

- Introduction of an Aboriginal FGC Model and/or culturally appropriate decision-making models;<sup>31</sup> and
- CEO and Court ordered mediation conferences form an active part of the child protections system.<sup>32</sup>

Instead, child protection matters in the Northern Territory continue to be largely resolved before the courts or through informal arrangements, including what are described as 'family way placements'.<sup>33</sup> Chief Magistrate of the Northern Territory Local Court, Hannam CM has described family way placements as involving OCF reaching 'a (usually unwritten) agreement with the family that the child will be removed from a parent or placed with another family member as a substitute for bringing an application for a protection order before the Court'.<sup>34</sup> A number of commentators, including Hannam

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<sup>26</sup> Ibid s 127(3)(b)(ii).

<sup>27</sup> As at the date of publication of this article, no commencement date for s 127 has been gazetted.

<sup>28</sup> Fiona Arney et al, 'Report on the Implementation of Family Group Conferencing with Aboriginal Families in Alice Springs' (Report, Centre for Child Development and Education, Menzies School of Health Research, 2012).

<sup>29</sup> Ibid 42.

<sup>30</sup> Department of Children and Families (NT), *Major Review of the Care and Protection of Children Act – Issues Paper* (2012); Bamblett et al, above n 9, 706-712.

<sup>31</sup> Bamblett et al, above n 9, 304 [Recommendation 8.3].

<sup>32</sup> Ibid 389 [Recommendation 10.7].

<sup>33</sup> Ibid 331. See also, Office of Children's Commissioner (NT), *Annual Report 2011-2012* (2012) 146.

<sup>34</sup> Hilary Hannam, 'Child Protection law and practice in the Northern Territory and implications for the Court' (2013) 22(3) *Journal of Judicial Administration* 146, 149.

CM, have expressed concern about the legality and propriety of family way placements and whether they result in placements that are in the child's best interests.<sup>35</sup>

### III. WHY FGC SHOULD BE ADOPTED IN THE NORTHERN TERRITORY

In light of the above discussion, the adoption of FGC in child protection matters in the Northern Territory would be in line with practices in other Australian and overseas jurisdictions as well as the recommendations of the *Growing Them Stronger, Together Report*. It may also lead to a more robust child protection landscape, as it is likely to curb the use of informal arrangements such as family way placements. Of course, the implementation of FGC must be appropriate to the demographics and child protection issues within that jurisdiction.

The adoption of FGC in Northern Territory is appropriate when considering the nature of child protection cases in this jurisdiction. Despite the fact that approximately 27% of the Northern Territory population is Indigenous,<sup>36</sup> the Annual Report of the Children's Commissioner for 2011/2012 found that of the 695 children in care in the Northern Territory, as at 30 June 2012, 570 were Aboriginal.<sup>37</sup> The Report also found that Aboriginal Children were subject to an increasing rate of repeat substantiations within a 12 month period, raising questions about the nature and effectiveness of services provided to these children.<sup>38</sup> A number of reports have identified the benefits of FGC for Aboriginal families.<sup>39</sup> Data is emerging that suggests that FGC, when compared to court ordered outcomes, results in higher levels of reunification of children with parents, more kinship placements and better family unity.<sup>40</sup> Although further study into the outcomes of FGC is required to fully substantiate such conclusions,<sup>41</sup> it appears FGC may assist to reduce the number of Aboriginal children placed into care and, where removal is necessary, ensure Aboriginal children are, wherever possible, placed in the care of Aboriginal people and in close proximity to their family and community. This aligns with what is commonly referred to as the 'Aboriginal Placement Principal', which is legislatively enshrined under section 12 of the Act.<sup>42</sup>

Some commentators have raised concerns with the use of FGC in child protection matters. These concerns include: a lack of procedural fairness, confidentiality of the process and failure to recognise power imbalances within family groups as well as between family and stakeholders.<sup>43</sup> Most commentators agree, however, that with appropriate safeguards, these concerns can be overcome.<sup>44</sup> As is discussed further below, the FGC model proposed by the authors ensures appropriate safeguards would be in place to overcome such concerns.

### IV. WHEN FGC SHOULD BE USED

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<sup>35</sup> Ibid 149-50; Bamblett et al, above n 9, 331.

<sup>36</sup> Australian Bureau of Statistics, *2011 Census Counts – Aboriginal and Torres Strait Islander Peoples*, (22 August 2012), <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011>>.

<sup>37</sup> Office of Children's Commissioner (NT), above n 33, 112-113.

<sup>38</sup> Ibid 98.

<sup>39</sup> Victorian Law Reform Commission, above n 6, 216-17.

<sup>40</sup> McArthur and Winkworth, above n 16, 12; Morgan et al, above n 3, 21.

<sup>41</sup> Morgan et al, above n 3, 22.

<sup>42</sup> Office of Children's Commissioner (NT), above n 33, 115.

<sup>43</sup> Victorian Law Reform Commission, above n 6, 216, 261.

<sup>44</sup> Ibid 216-17.

When it is appropriate for FGC to be used in child protection matters,<sup>45</sup> as well as the issues which can be addressed at FGC,<sup>46</sup> are matters of debate between commentators. The authors suggest that FGC should be utilised at any stage during OCF involvement with a family and should be underpinned by two rebuttable presumptions:

1. that all child protection matters in which OCF are considering applying for a protection order should first have been dealt with by FGC;<sup>47</sup> and
2. where a FGC plan is prepared which alters the ‘daily care and control’ or ‘parental responsibility’ of a child, the court must approve the FGC plan, with the presumption being that the plan will be adopted.<sup>48</sup>

The flow chart in Figure 1 below details how this process would work.



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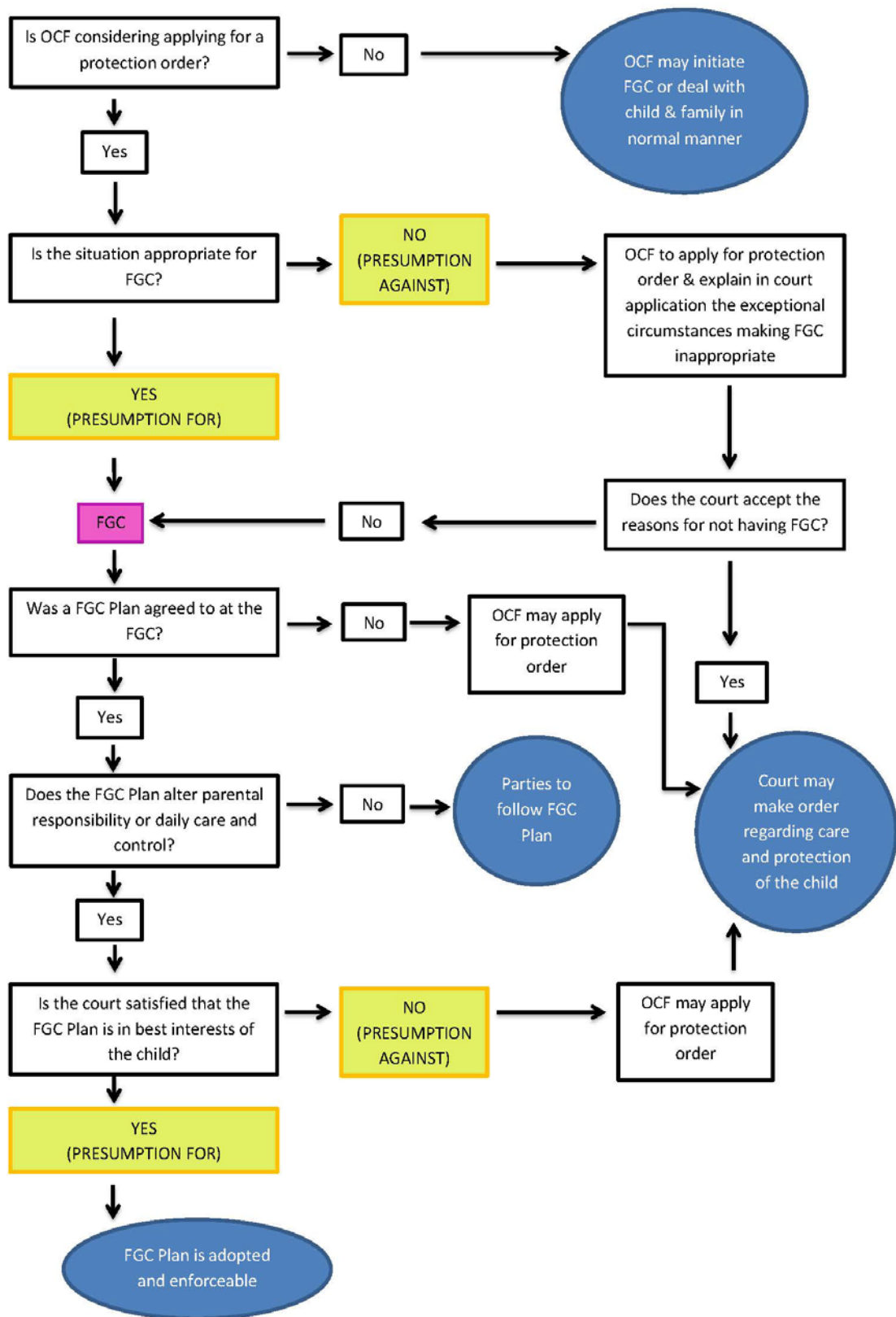
<sup>45</sup> Morgan et al, above n 3, 26.

<sup>46</sup> Anthony Vassallo, ‘Mediation in Care Matters – a review of the Outcome Literature’ (2011) 5 *Children’s Law News* 1, 7.

<sup>47</sup> This aligns with Victorian Law Reform Commission’s proposal, see Victorian Law Reform Commission, above n 6, 253 [7.221].

<sup>48</sup> In New South Wales, where a care plan produced during ADR allocates parental responsibility to a person other than a child’s parents, the courts must make an order giving effect to the plan, see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38(2). Similarly, in the ACT, the court may register a family court agreement which alters daily care responsibility or long-term care responsibility for a child, see *Children and Young People Act 2008* (ACT) ss 390-3. The VLRC also recommended that ADR agreements become consent orders in court, see Victorian Law Reform Commission, above n 6, 265 [7.293] [Proposal 1.9(f)(i)]. See generally Walsh and Douglas, above n 12, 209.

Figure 1



### ***A. Purpose of Rebuttable Presumptions***

Adopting a FGC model in accordance with Figure 1 will ensure that FGC becomes a mainstay in child protection practice in the Northern Territory. This is because OCF workers are more likely to utilise FGC where there is a legislative requirement to follow such a procedure.<sup>49</sup> Without being legislatively required, there may be a natural resistance among professionals to change from their learned way of working.<sup>50</sup> However, the Figure 1 model does not limit FGC to matters where a protection order is being contemplated. The authors suggest that FGC is more likely to be successful if FGC principles are more broadly integrated into OFC protocols and practice. For example, OCF workers should be encouraged to engage in FGC earlier rather than later,<sup>51</sup> as research suggests that FGC may be more successful if it is engaged at an early stage of involvement by a child welfare department.<sup>52</sup>

### ***B. Exceptional Circumstances***

The model suggested in Figure 1 requires FGC to be used in all cases before an application is made to the court for a protection order, unless there are exceptional circumstances. This is in line with a 2010 proposal for FGC by the Victorian Law Reform Commission.<sup>53</sup>

It is often suggested that certain matters, such as those involving sexual abuse, family violence or where parents have mental health problems, should not be dealt with by FGC.<sup>54</sup> However, it is not clear from the literature that such categories of cases should always be considered inappropriate for FGC. To the contrary, some research suggests matters falling into such categories may be dealt with more successfully through FGC rather than through traditional child protection methods.<sup>55</sup>

Of course, exemptions to using FGC need to be available in some circumstances.<sup>56</sup> The model suggested in Figure 1 allows OCF to apply to the court for a protection order without first engaging in FGC, but OCF must explain why it was not appropriate in that instance. We suggest that clear guidelines should be published as to when a case is not appropriate for FGC, to be followed by OCF and the courts.<sup>57</sup> Circumstances might include: where the application is for a temporary protection

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<sup>49</sup> Nathan Harris, 'Family group conferencing in Australia 15 years on' (2008) 27 *Child Abuse Prevention Issues* 1, 8.

<sup>50</sup> Hayley Boxall et al, 'Evaluation of Family Group Conferencing pilot program' (Research and Public Policy Series Report No 121, Australian Institute of Criminology, 2012) v; Huntsman, above n 15, 10-11.

<sup>51</sup> See generally Australian Law Reform Commission, above n 9, 1077 [23.82]-[23.84]; Morgan et al, above n 3, xx [Recommendation 9].

<sup>52</sup> Marilee Sherry, 'What have we learned about family group conferencing and case management practices?' (2008) 23(4) *American Humane* 20, 32.

<sup>53</sup> Victorian Law Reform Commission, above n 6, 253 [7.221].

<sup>54</sup> Huntsman, above n 15, 5; Vassallo, above n 46, 7; Australian Law Reform Commission, above n 9, 1075 [23.76], 1078 [23.86], 1082 [23.104]-[23.105]; Morgan et al, above n 3, 41-42.

<sup>55</sup> Vassallo, above n 46, 6-8; Peter Boshier, 'Family Group Conferences and the Judicial Process: What Judges take notice of, and some new thoughts' (Paper presented at Te Hokinga Mai Conference, Wellington, New Zealand, 28 November 2006) 1; Morgan et al, above n 3, 43. See also the discussion of Dr Michelle Meyer's research at Victorian Law Reform Commission, above n 6, 252.

<sup>56</sup> This is similar to the 'family care meeting' model used in South Australia, see *Children's Protection Act 1993* (SA) s 27(2). See generally Marie Connolly, 'Fifteen Years of Family Group Conferencing: Coordinators Talk About Their Experiences in Aotearoa New Zealand' (2006) 36 *British Journal of Social Work* 523, 536; Victorian Law Reform Commission, above n 6, 251 [7.207].

<sup>57</sup> Morgan et al, above n 3, xx [Recommendation 6]; Victorian Law Reform Commission, above n 6, 252.



order of 14 days or less and the proposed order is urgently needed to safeguard the wellbeing of the child,<sup>58</sup> or where the parents or relevant family members are not willing to engage in FGC.<sup>59</sup>

### *C. Court Involvement in FGC Plans*

Section 10 of the Act provides that, when a decision involving a child is made, the best interests of the child are the paramount concern.

Giving the court the power to adopt or reject FGC plans which alter parental responsibility or care arrangements alleviates the main concern related to FGC in child protection matters, being that the plans agreed to may not be in the best interests of the child.<sup>60</sup> It would also ease concerns that FGC lacks procedural fairness or judicial oversight and that they are difficult to enforce.<sup>61</sup>

The *Growing Them Stronger, Together Report* recommended that the determination of whether a child is in need of protection should not be a matter for family groups. Instead, family groups should merely be consulted about other issues, such as options for the long term care of a child.<sup>62</sup> While the FGC model suggested here would not provide for a determination to be made that a child is in need of protection, parties would in effect make a determination on that issue, because a FGC plan which altered parental responsibility or the care of a child is only likely to be reached where all parties agree that the child is in need of protection. By giving the court a supervisory role, to ensure that care plans are in the best interests of the child, this concern in the *Growing Them Stronger, Together Report* is addressed.

The level of judicial oversight suggested in this model is not dissimilar to that used in New Zealand.<sup>63</sup> Although judges in New Zealand ‘place significant weight on FGC plans and generally follow their recommendations’,<sup>64</sup> they also refuse to follow, in whole or in part, FGC plans where the plans are not in the best interests of the children.<sup>65</sup> This places focus on family resolutions to care and protection issues, with state intervention by the courts reduced to situations where it is necessary.<sup>66</sup> In 2006 Peter Boshier, then Principal Family Court Judge in New Zealand, said at a conference about this level of judicial oversight of FGC plans:

This is a safeguard against the FGC coming to a binding decision based on an imperfect grasp of the facts, or on expediency, or disproportionately influenced by a sense of family loyalty. It is also a safeguard against the uncritical acceptance of fashionable or ephemeral ideals.<sup>67</sup>

If the court refuses to adopt a FGC plan, the parties may attempt to rectify their plan and return to court to resolve any issues identified by the court. Alternatively, at this stage OCF could apply for

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<sup>58</sup> This is part of the current criteria for a ‘Temporary Protection Order’ under the *Care and Protection of Children Act 2007* (NT) s 103(1)(a)(ii).

<sup>59</sup> Aligns with Victorian Law Reform Commission’s recommendation, see Victorian Law Reform Commission, above n 6, 251 [7.207].

<sup>60</sup> Ibid 262-263; Vassallo, above n 46, 13; Australian Law Reform Commission, above n 9, 1073 [23.69].

<sup>61</sup> See generally Australian Law Reform Commission, above n 9, 1075 [23.75]; Walsh and Douglas, above n 12, 184, 192-198; Victorian Law Reform Commission, above n 6, 263.

<sup>62</sup> Bamblett et al, above n 9, 712.

<sup>63</sup> *Children, Young Persons, and Their Families Act 1989* (NZ) ss 70, 72.

<sup>64</sup> Boshier, above n 55, 22.

<sup>65</sup> *Re Children* (1990) 6 FRNZ 55, 55.

<sup>66</sup> Boshier, above n 55, 22.

<sup>67</sup> Ibid 4.

protection order. OCF would be able to seek daily care and control of children at this time, as is the case currently when the court adjourns an application for a child protection order at a court mention.

## V. FORM FGC SHOULD TAKE

In a review by the Australian Institute of Criminology (AIC) of two pilot court referred ADR programs in the care and protection jurisdiction of NSW, the following table of key principles was listed:<sup>68</sup>

Principles for the implementation of court-referred ADR for care and protection matters	
<b>Stakeholder involvement in planning processes</b>	Key stakeholder groups should be provided with the opportunity to participate in planning processes and should be represented on any steering committee
<b>Stakeholder 'buy-in'</b>	Stakeholder commitment to the program should be encouraged from the outset and throughout the life of the program
<b>Program oversight</b>	Programs should be supported by sufficient staffing and a program director or coordinator who oversees the implementation and management of the program
<b>Clear eligibility criteria</b>	Clear eligibility criteria should be established from the outset of the program and reflect program resources. In particular, these criteria should consider issues of consent, violence and power imbalances
<b>Appropriate timing of referrals</b>	Referrals should be made as early as possible but should also allow time for all the parties to form an opinion and respond to any reports
<b>Trained and competent conference convenors</b>	Conference convenors should have experience in ADR processes, have excellent communication skills and be culturally sensitive. Conference convenors should be supported by ongoing and intensive training
<b>Attendance of important parties</b>	All the important parties in a matter should attend the conference and child protection workers should be in a position to authorise any agreement and negotiate a range of outcomes
<b>Clear expectations of participants</b>	Parties should be prepared to attend a conference and have a clear understanding of what will be expected of them. In particular, they should be encouraged to listen, negotiate in good faith and show respect for the other parties
<b>Confidentiality of proceedings</b>	Any discussions and notes taken during a conference should be covered by clear confidentiality protocols that are understood by all the parties. Any agreement reached during the conference should not be confidential to allow reporting to the court
<b>Cultural appropriateness</b>	The ethnicity and cultural needs of the families should be dealt with sensitively by the conference convenor and the processes adapted to suit the needs of the family
<b>Sustainability</b>	Clear data collection protocols should be established during the early program development and implementation stages to facilitate ongoing evaluation of the program

While the AIC review was looking at two models of court referred ADR in care and protection matters, the principles espoused are largely relevant to the model of FGC being proposed by the authors. Taking the AIC principles as a general starting point, the section below addresses some issues which would be directly relevant to the implementation of FGC in the Northern Territory.

<sup>68</sup> Morgan et al, above n 3, 23 [Table 3].

Considerations in the Northern Territory are necessarily different to other jurisdictions, in part because of the involvement of Aboriginal children in the child protection system. In 2011-2012:

- 75% of notifications involved Aboriginal children;<sup>69</sup> and
- 84% of children in out of home care were Aboriginal.<sup>70</sup>

While it must be acknowledged that Aboriginal children in the Northern Territory are placed out of home at the lower level as a percentage of all Aboriginal children within that jurisdiction, when compared with other jurisdictions,<sup>71</sup> placement of Aboriginal children in out of home care has been significantly rising since 2008.<sup>72</sup>

### **A. Stakeholder 'Buy-In'**

Solid training around change in OCF practice would be important,<sup>73</sup> including around the empowerment of families.<sup>74</sup> Training should deal with cross cultural issues, such as the differing approaches to family structures in Aboriginal communities.<sup>75</sup>

### **B. Trained and Competent Conference Convenors**

The need to adapt ADR mechanisms for Aboriginal children and families has been noted by the Australian Law Reform Commission.<sup>76</sup>

It is important that the convener is independent and is viewed that way by everyone involved in FGC.<sup>77</sup> This is because it is more likely that past experiences with the justice system will mean that Aboriginal people are sceptical about the convener's independence from OCF.<sup>78</sup> Some FGC models in other jurisdictions require convenors to be legally qualified,<sup>79</sup> however, the authors suggest that it is more important that the convenors are adequately trained, particularly in cross-cultural issues, rather than legally qualified.<sup>80</sup> This will mean that convenors and OCF case managers will need extensive training before the implementation of FGC, as well as ongoing support.<sup>81</sup>

Power imbalance between the parties is one of the potential problems with a FGC model.<sup>82</sup> To combat this, it would be preferable to have Aboriginal convenors, or convenors with extensive knowledge of

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<sup>69</sup> Office of Children's Commissioner (NT), above n 33, 106.

<sup>70</sup> Ibid 114.

<sup>71</sup> Ibid 113.

<sup>72</sup> Ibid 113.

<sup>73</sup> McArthur and Winkworth, above n 16, 24.

<sup>74</sup> Connolly, above n 56, 531.

<sup>75</sup> See generally Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, (2012) 79; Morgan et al, above n 3, xx [Recommendation 11].

<sup>76</sup> Australian Law Reform Commission, above n 9, 1084 [23.111].

<sup>77</sup> Walsh and Douglas, above n 12, 209; Victorian Law Reform Commission, above n 6, 256.

<sup>78</sup> Family Law Council, above n 75, 54.

<sup>79</sup> Vassallo, above n 46, 8.

<sup>80</sup> Regarding the importance of cultural appropriateness, see Australian Law Reform Commission, above n 9, 1079-1080 [23.91]-[23.95].

<sup>81</sup> Ibid 1082 [23.104], 1084 [23.110], 1085 [Recommendation 23-10]; Boxall et al, above n 50, 56; Morgan et al, above n 3, xix [Recommendation 4]; Victorian Law Reform Commission, above n 6, 218-222 [7.39] [Proposal 1.2].

<sup>82</sup> Sherry, above n 52, 31-32; Vassallo, above n 46, 13; Australian Law Reform Commission, above n 9, 1073, [23.69]; Walsh and Douglas, above n 12, 184.

Aboriginal people in the Northern Territory.<sup>83</sup> Having Aboriginal convenors or support workers at a conference, who are likely to be aware of other culturally significant power imbalances or social concepts, such as the idea of ‘poison cousin’ relationships or the importance of the Stolen Generation, is likely to make the FGC process more successful in the Northern Territory.<sup>84</sup>

### *C. Attendance of Important Parties*

One of the strengths of FGC is that it has the ability to involve a wider range of family or important people in a child’s life.<sup>85</sup> Choosing who will be involved in the conference will also be one of the greatest challenges for FGC convenors.<sup>86</sup> FGC convenors should ensure they ascertain the relevant people before the conference and encourage and support their attendance.<sup>87</sup> The effective involvement of families can occur, even in the face of complex or conflicted relationships, but is more likely to be successful where the convenor heavily invests in coaching the family about the FGC process during the preparation phase.<sup>88</sup>

Involvement of wider family, Aboriginal Elders or key figures in the community is also likely to result in better outcomes in FGC plans<sup>89</sup> and lead to a greater sense of empowerment among families and communities.<sup>90</sup> Collaborative approaches, with families and stakeholder groups, are more likely to lead to positive perceptions of OCF within the community.<sup>91</sup>

Interpreters should be utilised wherever required but should be trained extensively about their role, including about the importance of remaining neutral.<sup>92</sup>

The authors suggest that children should not be involved in FGC as a matter of course, but that the convenor should consider whether it is appropriate and practical on a case-by-case basis. This aligns with past recommendations of the Australian Law Reform Commission.<sup>93</sup> In all cases, the child’s views should be canvassed at the conference to the greatest extent possible,<sup>94</sup> and where appropriate, by a legal representative.<sup>95</sup>

Legal representation should be available for parents,<sup>96</sup> but not mandated.<sup>97</sup> We suggest legal representation be available at all times, because of the large number of parents in the Northern

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<sup>83</sup> Boxall et al, above n 50, 32; Victorian Aboriginal Legal Service Co-operative Ltd, Submission No 38 to Victorian Law Reform Commission, *Protection Applications in the Children’s Court*, 2010, 25.

<sup>84</sup> Vassallo, above n 46, 12.

<sup>85</sup> Sherry, above n 52, 29-30.

<sup>86</sup> Ibid 29.

<sup>87</sup> Boxall et al, above n 50, 32; Morgan et al, above n 3, 65-67.

<sup>88</sup> Paul Ban, ‘Dialogue and alignment in preparing families for family group conferences’ (2009) 20 *Alternative Dispute Resolution Journal* 33, 33-34; Walsh and Douglas, above n 12, 208-209. Regarding the failure to engage with Aboriginal families in decision making about children, see Bamblett et al, above n 9, 302.

<sup>89</sup> Family Law Council, above n 75, 73; Boxall et al, above n 50, 32, 65.

<sup>90</sup> See Victorian Law Reform Commission, above n 6, 246 for discussion on Rumbalara Aboriginal Cooperative Limited’s program involving Aboriginal families and community members in decision making regarding placement of Aboriginal children.

<sup>91</sup> Family Law Council, above n 75, 50, 73.

<sup>92</sup> Connolly, above n 56, 531.

<sup>93</sup> Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Final Report No 84 (1997) [16.19].

<sup>94</sup> Boxall et al, above n 50, 29; Victorian Law Reform Commission, above n 6, 259.

<sup>95</sup> Victorian Law Reform Commission, above n 6, 224 [7.47]-[7.48], 229.

<sup>96</sup> Ibid 222-3, 233 [7.99] [Proposal 1.3]; Australian Law Reform Commission, above n 9, 1083 [23.109]; Victorian Aboriginal Legal Service Co-operative Ltd, above n 83, 26.

Territory with cultural and linguistic barriers to effective participation in the child protection system.<sup>98</sup> In a conference where the parties are considering altering the parental responsibility or care arrangements of a child, parents and other relevant attendees at the conference should be encouraged to seek legal advice or representation.<sup>99</sup> This will address various concerns about FGC, including that the evidence of protection concerns may be ‘dubious in nature.’<sup>100</sup>

#### **D. Confidentiality of Proceedings**

Issues of confidentiality may be heightened in FGC involving Aboriginal families.<sup>101</sup> Best practice would require the conference to be confidential, with the exception that the plan be available to later inform the court.<sup>102</sup> The convenor will have to seek the family’s acceptance for certain confidentiality to be waived in order to allow the conference to be open and effective. However, all parties should be clear on the confidential nature of the conference and that it is only the plan that will be available to the court afterward.<sup>103</sup>

#### **E. Cultural Appropriateness**

With the high level of Aboriginal families involved in the child protection system in the Northern Territory, cultural issues will necessarily need to be considered at any conference.

FGC convenors should ask families whether they have certain cultural considerations they wish to discuss at the conference such as who is going to teach the child certain Aboriginal ceremonies.<sup>104</sup> Convenors should also ask families whether they want the conference to be held in community,<sup>105</sup> and with any particular formalities, such as a smoking ceremony.<sup>106</sup>

Conferences should be as long as is reasonably required for the family to come up with FGC Plans that address the protection concerns of OCF.<sup>107</sup> In other jurisdictions, three hours has been suggested as a standard amount of time for FGC,<sup>108</sup> however, it is likely that more time would be needed in the Northern Territory, particularly where interpreters and support workers will often be required.

#### **F. The FGC Plan**

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<sup>97</sup> Victorian Law Reform Commission, above n 6, 230 [7.80]. Cf at 230 [7.82], where the VLRC recommended that the convenor should decide whether it’s appropriate for lawyers to attend.

<sup>98</sup> For a discussion of the importance of lawyers for parents with culturally and linguistically diverse backgrounds, see *ibid* 231.

<sup>99</sup> Morgan et al, above n 3, xxi [Recommendation 14]. See also *ibid* 230 [7.79].

<sup>100</sup> Walsh and Douglas, above n 12, 199.

<sup>101</sup> Loretta Kelly, ‘Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments’ (2002) 5(14) *Indigenous Law Bulletin* 7; Victorian Aboriginal Legal Service Co-operative Ltd, above n 83, 27.

<sup>102</sup> Boxall et al, above n 50, 31. See Victorian Law Reform Commission, above n 6, 261, where the VLRC made a recommendation that there be a further exception that confidentiality is lost in the case of unlawful conduct at the conference.

<sup>103</sup> Morgan et al, above n 3, xxii [Recommendation 18].

<sup>104</sup> Boxall et al, above n 50, 32-33.

<sup>105</sup> Morgan et al, above n 3, xxi [Recommendation 11], 69; Victorian Aboriginal Legal Service Co-operative Ltd, above n 83, 27; *ibid* 32.

<sup>106</sup> Boxall et al, above n 50, 32.

<sup>107</sup> *Ibid* 30.

<sup>108</sup> *Ibid*; Morgan et al, above n 3, xxi [Recommendation 16].

FGC plans should be detailed, including setting out what considerations were taken into account to reach the plan and what actions each party is responsible for under the FGC plan.<sup>109</sup> FGC plans should avoid responsibilities, on both family members and OCF, which cannot be practically followed, to reduce the chance that the plan will fail.<sup>110</sup>

### ***G. Ongoing Funding***

The security of funding for FGC was a key concern of the report into the Alice Springs pilot FGC program.<sup>111</sup> For FGC plans to be successfully implemented, support services have to be available to families and have to be well funded.<sup>112</sup> In general, children and families in remote areas have significantly less services available to them.<sup>113</sup> Being that many Aboriginal families in the Northern Territory live in remote and rural locations, this is something that will need to be addressed and considered in the implementation of any FGC program.

The tendency of government to cut funding to support services must be tempered with the knowledge that a system of FGC may reduce costs associated with lengthy court procedures and of foster carers through increased kinship care arrangements. It is possible that, when all factors are taken into account, a FGC program could be cost neutral or cheaper than a traditional child protection regime.<sup>114</sup>

## **VI. CONCLUSION**

As the number of Aboriginal children placed in care increases, questions about the effectiveness and cultural appropriateness of current child protection practice in the Northern Territory will intensify. Many jurisdictions have now adopted FGC to address concerns that the removal of children from family and kinship groups is often not in the best interests of children. Although the Act contains mechanisms for ADR in child protection matters and a program of FGC was successfully piloted in Alice Springs, there is little indication that FGC, or any form of ADR, is going to form part of mainstream practice in child protection practice in the Northern Territory. The authors suggest that this must change, and a form of FGC specifically tailored to the characteristics of the Northern Territory must be adopted as a matter of urgency to ensure that the best interests of the child remains the paramount considering in child protection matters.

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<sup>109</sup> Boshier, above n 55, 10.

<sup>110</sup> See generally *ibid* 15-16; Boxall et al, above n 50, 40-1. See also *AD v SD FC LHTT FAM 2005-032-000746* 31 October 2005.

<sup>111</sup> Arney et al, above n 28, 42.

<sup>112</sup> Australian Institute of Family Studies, Submission No 40 to Victorian Law Reform Commission, *Protection Applications in the Children's Court*, 2010, 14; Boxall et al, above n 50, 9.

<sup>113</sup> Vassallo, above n 46, 10.

<sup>114</sup> *Ibid* 5.16.