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Question 1

Role Creating a problem solving framework to provide support to separating families; Providing families with the most appropriate dispute resolution and support services for their particular needs at the earliest possible stage; Advancing the safety, healthy development and economic support of children; Providing children and young people with a voice in decision-making in parenting arrangements that impact upon them in line with their age, level of maturity and understanding; Protecting adult's rights to physical and psychological safety and equitable distribution of resources. Objectives To educate the community about what is involved in the proper parenting of children so that they will be safe and well cared for and can grow and develop to be physically and psychologically healthy adults; To educate parents about the damaging impacts of family violence, abuse and sustained high conflict between separated parents and families and its impact on victims and family members, including children exposed to such abuse and conflict. To educate parents about their responsibilities in relation to post-separation parenting, including the obligation to financially support their children and the obligation to cooperatively co-parent and assist their children maintain a relationship with the other parent, where appropriate. Some principles derived from Noel Semple and Nick Bala, 'Reforming Ontario's Family Justice System: An Evidence-Based Approach' (Association of Family and Conciliation Courts, 2013) 4–6.

Question 2

Ensuring separating parents and partners have access to affordable and cost-effective dispute resolution processes and support services in both parenting and financial matters at the earliest stage possible To assist separating parents to recognise the importance to children of having a meaningful relationship with both their parents provided that they will be physically and psychologically safe and healthy and adequately cared for in both households; To assist separating parents to develop and maintain positive co-parenting relationships, where appropriate; To assist separating parents to come to parenting arrangements that will be in their children's best interests and be appropriate taking into account their children's ages, developmental stages and personalities and other health, educational and extra-curricular interests; To educate parents about their responsibilities in relation to parenting, including the obligation to financially support their children and the obligation to assist to maintain their relationship with the other parent, where appropriate; To ensure that children can have the benefit of learning about and maintaining links with their cultural heritage.

Question 3

When parents separate at the moment they don't have to register this separation date anywhere. If they were required to formally register their separation date, for example, with a Family Relationship Centre, this could then trigger some obligations. For example, if they have children they could be required to attend or complete a parenting course online about post-separation parenting and the importance of cooperative co-parenting. This may mean that some parents then realise at this early stage in their separation the importance of putting their children first and how damaging it may be to their children for a parent to speak negatively in front of children about the other parent or to stop their children from seeing the other parent where there is no reason to do so. It would also provide a formal "holding bay"

for the date of separation if there is any future disagreement about this. At this early stage people could also be given information about support services and mediation services so they are aware of what assistance could be provided to them. There could also be greater accessibility and visibility of available support and mediation services, particularly at the courts.

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To remove the adversarial nature of the system so that parents do not become pitted against each other in a process that escalates the conflict in the separating family. To move to a more inquisitorial problem solving model where parties don't immediately file court documents but their information is taken in via an intake system as is used by mediation service providers and then they are referred to the most appropriate dispute resolution option eg parenting education, mediation, support services for substance abuse, arbitration (if mediation not appropriate in a financial case) or to a registrar for further case management. Parties at the outset would not file court documents and then respond with court allegations in more court documents which immediately inflames the dispute. It would assist if the intake officers have legal backgrounds and experience in the family law system as they are familiar with the types of issues that arise and the legal issues that may be relevant eg previous FCC orders, parenting plans, state domestic violence and child protection orders, parole conditions etc. The legal intake officers can then refer to staff with social science expertise if people need certain assistance, for example, parents in high conflict who need assistance in learning how to positively co-parent (or parents could be referred to an education program). Parents need to be directed at a very early stage into parenting programs that address damaging behaviours that will have detrimental impacts on their children. If this triage system was attached to the court it would more effective as parents would be more inclined to follow the allocated pathway if they are directed by court staff.

Question 11

If this intake approach was adopted litigants who are not represented would not be disadvantaged as they would be assisted by the intake officer who will gather the relevant information, the parties will not be responsible for supplying the relevant information. From intake the case can then be directed into the correct pathway whether that be a parenting program, mediation, arbitration or to a process initially managed by a registrar. This would leave judicial officers to manage the more complex matters and not to have to be involved in cases that can be more easily resolved.

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The key sections used to determine parenting cases are ss 60B, 60CA, 60CC, s61DA and s65DAA. Section 61DA directs the court to consider certain time arrangements and whether they are in children's best interests and reasonably practical. Section 65DAA then provides more guidance about the application. The difficulty that has resulted in practice from the 2006 amendments to the Family Law Act, particularly the s61DA presumption, is that many parents have interpreted it in terms of their rights to equal time (R Chisholm, Family Courts Violence Review 2009) and this has in my experience greatly impacted on negotiations in family dispute resolution. I have been a family mediator since 1993 and as soon as the 2006

amendments were covered in the media, parents started interpreting the amendments in that way. It immediately impacted on the proposals that parties brought to family dispute resolution. It also means that some parents come to FDR with proposals that are not child focused and will place a lot of stress on children, particularly very young children who have been cared for the majority of the time by one parent. My submission would be that s61DA and 65DAA should be deleted and that the FLA return to stating that the best interests are paramount in s60CA and that the best interests are determined by working through the best interest factors in s60CC. It should be made clearer in the drafting that the primary considerations are the overarching considerations, that is, the benefit to children of meaningful relationships with both parents and protection from harm and continue to make clear that protection from harm is to be accorded more weight by the court. These additions in the 2006 amendments have been beneficial in that, in family dispute resolution and when lawyers are providing legal advice, FDRPs and lawyers can focus parents on their children's rights to meaningful relationships with both parents provided they are safe and adequately cared for. The current first additional consideration, being children's views being taken into account in accordance with the child's age, maturity and level of understanding, should remain however there should be specific direction as to the role of Independent children's lawyers (ICLs) and what role they should play in putting forward the child's best interests. There is great inconsistency between states as to the role ICLs take and whether they come into contact with children, whether they explain their role and also assist in explaining why certain decisions have been made eg if parents reach agreement at FDR. There should be a consistent approach around Australia and at the very least ICs should meet their children when they are of an appropriate age, for example primary school age and above, and explain their role to them. This would assist in protecting the mental health of children involved in the family law system which is an issue of increasing concern. Also there should be a consistent approach to family reports around Australia. What is missing from Part VII and the current best interest factors is that it does not align with the now vast body of social science research that provides guidance as to what considerations should be taken into account in working out arrangements that will benefit children, particularly when they are very young, for example in the 0-3 age group. For example J McIntosh et al, Parental separation and overnight care of young children: Part 2 Putting Theory Into Practice (2014) 52(2) Family Court Review 256. These considerations include what arrangements children have been used to prior to separation and what arrangements will benefit children taking into account their attachment to a primary carer or carers. Other aspects that the research highlights is the co-parenting relationship as the research reflects that the amount of conflict between parents and their ability to put their own needs aside and to be child focused will impact on what parenting arrangements work best. The addition of a best interest factor as to, "the quality of the co-parenting relationship" would highlight to parents the importance of this for their children and the damaging effects of continuing high conflict on their children. A frequent concern in family dispute resolution is parents in high conflict who are focused on the conflict between each other and then unable to be child focused. This can be the case many years after separation and can be affecting their child's mental health. I submit that there should be a new sub-section in s60CC being, "The quality of the co-parenting relationship" and it should include: The ability of each of the child's parents and any other person significantly involved in the child's care to co-operate with the other parent and any other person significantly involved in the child's care to cooperatively co-parent the child to ensure that: (i) They communicate civilly and respectfully with each other and about each other and significant family members; (ii) Conflict between parents is kept to a minimum and that the child is not exposed to conflict between parents and to adult conversations involving decision-making about the child; (iii) Where possible, consistency of routine in important

areas such as in bedtime and meal time schedules for young children; (iv) Supportive transitions between parents; (iv) That the child has access to all he or she needs for day to day care, health, educational and extra curricular activities in both households. Also the current (f) parental capacity sub-section should be provided with more detail as a major issue now in family dispute resolution, particularly in cases going to legal aid conferences, is capacity to parent where there are drug and alcohol issues, issues of family violence and the physical and psychological health of both parents and their children. For example it could be redrafted as follows: The capacity of each of the child's parents and any other person who will be significantly involved in the care of the child (including any step-parent, grandparent, relative or carer) to: (i) Ensure that the child is safe, adequately supervised and cared for; (ii) Provide for the needs of the child, including in relation to his or her developmental, health (both physical and psychological), emotional and educational needs; (ii) Be child focused and prioritise the needs of the child; (iv) Seek help from health, education and support services when needed for the child and ensure that the child is taken to required appointments; (v) If a parent has alcohol, drug and / or mental health or physical health issues, to manage these issues, engage with appropriate treatment and support and to ensure that the child's safety, supervision and physical and psychological health is maintained. These factors are derived from the above McIntosh et al research and the presentation by April O'Mara, Family Consultant, Psychologist and FDRP, Children's Developmental Needs and Appropriate Parenting arrangements. Amendments to the FLA In Relation to Family Dispute Resolution In relation to FDR sections 10H and 10J of the FLA needs to be amended to clarify that generally information gathered in intake is confidential. Parties need to feel secure when participating in intake and be assured that their information is confidential. The decision of Rastall and Ball [2010] FMCAfam 1290 has made clear that generally information gathered in intake is not confidential and will be admissible in court as intake is not considered part of the FDR process. The sections need to be amended to state that generally information gathered in intake is not confidential and that the only information that will be admissible in court (apart from information that raises issues of harm to a person, child or property or for ICL to do their job properly) will be the information that led the FDRP to decide on the appropriate section 60I(8) certificate when after conducting intake the FDRP decides that mediation is not appropriate or that there was a refusal to attend FDR. Also section 10J and 10E should be amended so that any threats made by a party in FDR or counselling will be admissible in court. For public policy reasons and for the safety of parties participating in FDR threats to harm should not be protected by these sections. See the points raised in: D Cooper, Inconsistencies in and the inadequacies of the family counselling and FDR confidentiality and admissibility provisions: The need for reform (2014) 4 Family Law Review 213

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The system could do more to encourage people to mediate before going to court. There should be compulsory mediation in financial matters so that people have to file a section 60I FDR certificate before filing an application for financial orders in court. In parenting matters there is currently compulsory FDR however more could be done to ensure that more people engage in FDR before filing a parenting application as research has shown that FDR is under utilised in children's cases. See: Judge Joe Harman, "Should Mediation Be The First Step In All Family Law Act Proceedings?" (2016) 27 ADRJ 17 and D Cooper, "Family Dispute

Resolution: Pro Bono Dispute Resolution and the Federal Circuit Court: Lessons Learned" (2016) 6 Family Law Review 230. One issue at the moment is that under s60I(8) of the FLA some FDRPs are issuing "refusal to attend" FDR certificates when both parties are attempting to organise FDR but with different providers. For example, party A has approached a Family Relationships Centre (FRC) and the process is in train but the FRC has a long waiting list and there is going to be a delay. Then party B has approached a private practitioner who will charge many thousands of dollars for a mediation. Party A says they cannot afford to pay half of the private mediator's fee. Some private mediators will then issue a s60I refusal cert stating that party A has refused to attend mediation and then party B can file a parenting application in court. The section or FDRP regulations could be amended to provide that if party B wants to proceed with the private mediator then party B could pay the full cost, for example. As a FDRP I approach party B to see if party B will fund the full cost but not all FDRPs are doing this. Also if party A and party B get into a dispute about which FDRP provider to proceed to mediation with there could be provisions in the regulations to resolve this dispute. Another issue is that there are very long waiting lists at some community mediation providers. Issues to be looked at here are: whether community mediation services are adequately funded and whether community mediation services have pragmatic intake and FDR screening policies that process clients in a efficient enough manner. Also, if more funding is directed into FDR in the future what are the best mediation providers to fund? For example if there needs to be more funding for children's and financial cases perhaps funding should also be directed to the Federal Circuit Court to set up in-house or external mediation panels so that mediators have expertise to mediate property and child support issues and also can be mediated in a timely way, particularly if urgent matters are directed through the court registry. In the community sector most mediators have social science backgrounds and either do not feel confident mediating financial issues or their employers have policies that prohibit the mediation of financial issues. This has meant that there has been a real gap in the affordable marketplace of mediation providers who can mediate basic property and financial issues. Legal aid funding has been very restricted in property matters due to the prioritising of children's matters, however, sometimes financial and parenting issues are linked and if property issues can be resolved and for example a parent is able to finalise property settlement so they can stay in the family home this can provide greater finality and security for children and young people. The 2006 amendments and emphasis on FDR have to some extent changed the culture and ensured that more family law clients participate in FDR. However what I have seen in practice is that there are also a number of matters that are at the callover stage which should have gone to FDR but have not. I have encountered this when volunteering in the Queensland Family Law Practitioners Association Pro Bono Family Mediation Scheme in the Brisbane FCC where pro bono mediation is offered at the callover stage when a case is about to be set down for a final hearing. In some of these matters the parties have never been to mediation and should have eg their lawyers have obtained them an exemption but the case was suitable for mediation or the parties obtained an exemption eg there was a recovery order sought but if an urgent mediation has been held (and resources would have to be such that it could be set up urgently) the case may have resolved. My experience is too that some lawyers are now trained in mediation and dispute resolution and are very settlement focused but there are still a number of lawyers that are highly adversarial and are not providing their clients with settlement focused advice even at callover stage. Suggestions to change the culture for family lawyers: Family Law is not a compulsory subject in the undergraduate law degree and should be. I have encountered many family lawyers who did not study family law in their LLB as they did not want to practise in this area but then when they get into practice they find there is a large amount of work in the area. Family Law should be made a compulsory subject in the LLB and the Priestly 11 amended so that Family Law and Dispute Resolution

are compulsory subjects. Also for those applying to be family law accredited specialists with Law Societies there should be a dispute resolution component in their assessment. For practising family lawyers generally most would benefit from mediation and negotiation training and this can assist with changing an adversarial mindset into a more collaborative one.

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Suggestions to ensure more clients participate in dispute resolution. Simplistically clients can be divided into those who can afford to pay for mediation and those who cannot or can only afford minimal fees. At the moment the choice is simplistically mediation at community centres with either no fees or small fees but often long waiting lists. Also many of these services screen out any issues of family violence eg parties with a state domestic violence order and many do not mediate financial disputes. At the other end of the spectrum some private mediators are charging high fees of many thousand dollars for a mediation and some parties cannot afford this. There needs to be services available for the "gap in the middle" that can be offered in a timely way. These could be offered by in house mediators available at the FCC or by private mediators who charge fixed fees and are regulated in terms of their qualifications. This would ensure affordable and quality service. Examples: Mediation available at FCC More mediation available at the door of the court: That the Federal Circuit Court create a panel of mediators that can be called on to mediate. That the fees be fixed for a half day and a full day. That the mediators all be accredited and registered FDRPs. This qualification now ensures that the mediator has training in a broad range of areas such as in parenting, property and child support law, children's developmental needs and being child focused, domestic and family violence dynamics, and in mediating in this range of areas including in property, financial and child support disputes. More mediation at Legal Aid Commissions More funding for legal aid commissions for mediation in child and property matters, this will assist clients who cannot afford lawyers as clients have to be financially eligible for legal aid

Question 22

The best option for small property matters in mediation. For example that legal aid commissions be funded for mediations in property matters (as at present there is very little mediation in family law property in legal aid offices in Queensland due to funding restrictions) and that the FCC create a mediation panel to be available available for small property matters at a reasonable fixed fee. The greatest challenge in property matters is that people are assisted to gather together their financial information. Also there could be funding for other organisations to run sustainable mediation services. For example at the Queensland University of Technology we run a Family Mediation Service that assists us to provide our trainee FDRPs with their supervised practice hours as FDRPs are now required to complete 50 hrs of supervised practice to become accredited and registered. We take on children's and simple property cases and charge parties \$250. This is an example of a service is that is targeted at people in the middle who can afford to pay for a mediation but cannot afford the high costs of some private mediators. We have undergraduate law students who assist us with intake and the gathering of initial information such as the income, assets and liabilities of parties going to a property mediation.

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Legally assisted FDR can be a good option for victims of violence and abuse provided that the lawyers assisting are trained to provide legal representation in mediation. Legally assisted FDR is currently available to people eligible for legal aid through the legal aid conferencing program. To be effective advocates in FDR lawyers must understand the mediation process and also their role in the process. In this sort of process an intake process must also assess

whether mediation is an appropriate process. My experience is that many victims would prefer to participate in mediation than to go to court however they do need an experienced lawyer who is supportive of them, prepares them for the process and who understands their role in the process. There needs to be more training of lawyers to represent clients in dispute resolution as when they understand that their role in such a process is not an adversarial one they can be very helpful in supporting their client and in achieving settlement.

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Parenting cases One option would be that rather than a party completing a court document when they have a family law issue would be that it take more of a dispute resolution process line. For example, party A completes a brief assessment sheet setting out the issues they need to have resolved and some basic background information. The case is then handled like a potential mediation in that party A is contacted by phone for an intake interview to provide more information as occurs in a mediation. Party B is also contacted to provide the same level of information. It is an inquisitorial format in that the "intake officer" who could have a family law legal background is gathering the relevant information about the issues in dispute and the relevant history. It is also a "triage approach" in that the case can then be allocated the resources needed for the issues in dispute. In some cases a mediation could be organised and the case may settle at mediation. In other cases where there are more complex issues, for example, if there are concerns that the child will not be safe with one parent due to allegations of drug use this issue could be investigated. This would be a different way of approaching concerns as at present concerns become "allegations" and sometimes a lot of public money spent in appointing an ICL and then having a family report written when if the concerns could have been investigated at the outset they could have been resolved or addressed in some way eg. the other parent may admit their drug issues and be willing to seek some help for them. The parent could then be referred to support services. At this point too if parents are in very high conflict which may be damaging for their children they could be allocated to a social scientist for some counselling so that these sorts of issues could be addressed early on. Or they could be referred to group parenting sessions about co-parenting etc before their intake progresses to a mediation. More complex matters could be appointed to for example a registrar, particularly if any decisions need to be made in the interim if the parents can't reach agreement.

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Arbitration could be the second point of call after mediation for both parenting and financial cases. It would be best though if mediation is the first point of call, although if an intake is performed and people in a financial case are in very high conflict and it seems unlikely they will agree at mediation the intake officer could refer their case direct to arbitration.

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A more inquisitorial system could be used so that parents and families are referred earlier to assistance and support where allegations are made that are accepted by parties. For example if the above "intake" and "triage" model is used and there are issues of family violence that are admitted by the perpetrator the parties can be referred to support eg appropriate services for victims and perpetrators and also assisted to develop a child focused parenting arrangement that will be safe for the victim and children if appropriate.

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It would be good to have integration of services and follow up as to whether parents have participated in programs if they have been ordered to eg if they were ordered to participate in a parenting orders program that there is some follow up that they do so. This is particularly

the case when court orders have been made as whether the order then works and the parents make the parenting arrangements work will greatly impact on their children.

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Children's views should remain the first additional consideration in section 60CC of the FLA. Also I think that young people would consider the system to be fairer if there was an age from which their views were given more weight, for example, children 14 and over, as although their views still need to be taken into account in the context of what is in their best interests, I consider that young people have a right to have some more formal involvement in the court proceedings. For example, if the ICL system ensured that the ICL met with the young person and put their views forward or the Judge met with them and took their views into consideration and then there was a formal process for explaining the decision made to the young person they may feel that they have had more of a voice in the proceedings. It is also important that children and young people have someone that they can talk to about what is going on for them and that if they are having difficulties with coping with their parent's separation or with the high conflict that they have someone to support them. There needs to be a uniform system of training, accreditation and regulation of Independent Children's Lawyers (ICLs) and Family Report Writers throughout Australia. At the moment the practices vary in each State and Territory and among registries. The FLA and/ or the regulations could set out clearly the expectations of ICLs in relation to what sort of direct involvement they should have with children and young people and what body should oversee the regulation and training. This role can directly impact on the mental health of young people involved in the family law system and should be more clearly and tightly regulated. The same is the case with Family Reports, there needs to be more central regulation of this role and the expectations of family report writers and particularly on the fees that should be charged so that they remain affordable as the very high demand for family reports has meant that some fees for private reports have become extremely high. For research on the concerns about ICLs and their participation and involvement with children and young people see for example Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008). R Carson et al, "The Role and Efficacy of Independent Children's Lawyers (2014) 94 Family Matters 58 and Kaspiew, R., Carson, R., Moore, S., De Maio, J., Deblaquiere, J., & Horsfall, B. (2013). *Independent Children's Lawyer Study: Final report* (1st ed.). Canberra: AttorneyGeneral's Department. Retrieved from

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There could be greater use of the child inclusive model of mediation where children are spoken to by a "child consultant" and the child consultant then feeds appropriate information back to the FDRP and parents. For example Legal Aid Victoria have used a model called "Kids Talk". However this model should only be used when the child consultant and FDRP are trained to appropriately use this the child inclusive model as the primary concern is ensuring that children are not exposed to negative implications from their parents from expressing their perspectives. My experience is that different organisations around Australia seem to have different views about what "child inclusive" means and that the McIntosh model where children are not directly involved in mediation but speak to a child consultant about their perspectives appears to be the model with most merit. However, it may be appropriate for young people of for example 14 and over to directly participate in a mediation and this could be assessed by a legally qualified intake officer. For example legal aid

commissions often deal with families with the most vulnerable children and could be funded to implement this model.

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In dispute resolution processes such as mediation, professionals need to be trained in how to talk to children and also how to feed back children's perspectives to parents appropriately. Parents need to go through an intake process and if there are concerns about how parents will react to children's perspectives the professional feeding back to the parent must be very careful in what information they give them, for example, McIntosh has suggested the information may need to be kept very general eg "your child is really suffering from the high conflict" so that a parent doesn't react negatively to a child after a feedback session.

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Family lawyers should have knowledge of the key principles in the Family Law Act and how they interact and of the relevant state domestic violence and child protection legislation. They should also have knowledge of the dynamics of family violence and of children's developmental needs at various key stages of their development and of the social science research providing recommendations on appropriate parenting arrangements particularly for very young children in the 0-3 age bracket. They are then able to explain to their clients what a meaningful relationship may be for children of different ages eg small amounts of time may be appropriate for a young baby and for a teenager it may not be every second weekend but going to watch their sporting game and sharing a meal with them. They need mediation / dispute resolution training so they can think creatively with option generation and move their clients from positions to interests. They also need information on different referral agencies and on available parenting courses, parenting education and mental health services available for parents and children and on the availability of government funded contact centres and other supervised contact services.

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Judicial officers and Registrars should have knowledge of the dynamics of family violence and of children's developmental needs at various key stages of development and of the social science research providing recommendations on appropriate parenting arrangements particularly for very young children in the 0-3 age bracket so that they can explain to their clients what a meaningful relationship may be for children of different ages. They could benefit from mediation / dispute resolution training so as a large part of their case management role is assisting clients to move towards settlement. They also need information on different referral agencies and on available parenting courses, parenting education and mental health services available for parents and children and on the availability of government funded contact centres and other supervised contact services.

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Family lawyers, judicial officers, family consultants and mediators working in the family law system are all exposed to very high conflict and trauma. This impacts on these professionals and they need opportunities to debrief and to reflect on how they can distance themselves at the end of their day and de-stress. They can set up formal systems themselves with other colleagues and within their organisations to provide time for debriefing and also talking to colleagues about how they handled a particular case and what they may do differently next time.

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Other comments?