

REVIEW OF THE FAMILY LAW SYSTEM

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Dear Executive Director,

This submission was prepared as part of the course 6000LAW Law Reform at Griffith Law School, Griffith University under the supervision of Ms Kim Weinert. This submission is a result of the joint effort of law students Emma Post, Sarra Davis, Upoma Chowdhury and Andrea Rimovetz.

This submission has responded to questions 3 – 6, 9 – 12, 14 - 17, 19, 23, 24, 26, and 34 – 39. A summary of our recommendations and opinions are as follows:

Access and Engagement

In relation to access and engagement, the authors recommend:

- a) the Australian Government develop a nationwide Family Law Handbook which will contain all information relevant to the family law system and family support services to act as a roadmap for families who are engaging in the family law system and to promote a greater awareness of these resources and initiatives for families, including the AATSI and CALD communities;
- b) the Australian Government, in partnership with stakeholders, develop strategies to build collaboration between AATSI specific service providers and organisations and the mainstream family law system;
- c) The Australian Government develop an outreach program by mainstream services within the family law system to promote access and engagement with the family law system for people living in rural, regional, and remote areas;

- d) the Australian Government develops a strategy for improving access to more culturally appropriate services for AATSI people and better interpreter services in AATSI languages;
- e) the Australian Government develops a strategy for improving interpreter services for CALD communities with knowledge and understanding of family law;
- f) the Australian Government increase it's federal funding to Legal Aid facilities.
- g) the implementation of a national government-backed funding scheme modelled on Australia's Higher Education Contribution Scheme (HECS) to cover all family law legal expenses with an interest free loan.
- h) amend Regulation 7 of the *Family Law Regulation 1984* (Cth) requiring private practitioners to prepare family reports to allow for the return of in-house court consultants.
- i) the creation of specialist clinics to assist self-represented litigants in the jurisdictional and procedural requirements of courtroom advocacy.

Legal Principles in Relation to Parenting and Property

The authors respond to the questions of legal principles in relation to parenting and property.

The authors recommend and provide opinion that:

- (a) the definition of family violence be to expand into including other terms, such as psychological abuse, financial abuse and physical abuse separate from the terms coercive, control or to cause fear;
- (b) the definition of family violence to consider using the term 'relevant relationship' rather than 'family member';
- (c) the term 'presumption' from the presumption of shared equal parental responsibility to be removed from Part VII overall;
- (d) the requirement that any relevant family violence orders to be filed with the court or be made aware to the court during proceedings;
- (e) the term 'parents', 'mother' and 'father' from the objectives and the definition of meaningful relationship to be expanded to include other forms of carers, guardians or anyone else with a close and significant relationship with the children;
- (f) that culture, religion and family structure to be included as a primary consideration to determine the best interest of the children;
- (g) that mediators engage in training to be culturally aware;

- (h) that mediators minimise their control in mediation;
- (i) evaluators of expert reports are to have cultural competence and are free from discriminatory or bias thoughts;
- (j) that the New Zealand's presumption of equal sharing should not be adopted in the Australian family law system;
- (k) in relation to property division, that party's attend a mandatory mediation/conciliation/lawyer-assisted negotiation prior to any court application;
- (l) in relation to property division, safety measures should be implemented in the FLA during the FDR process to ensure just and equitable outcomes;
- (m) in relation to property division, a guideline to be made for courts to follow;
- (n) in relation to property division, the sections related to spouses and sections related to de facto couples should be merged into one set of sections to ensure clarity and comprehensibility; and
- (o) in relation to binding financial agreements, safety measures should be implemented in the FLA to ensure fair outcomes are achieved and provide details of any invalid financial agreements.

Resolution and Adjudication Process

In relation to the resolution and adjudication process, the authors recommend:

- a) a McKenzie Friend approach should be adopted across Australia to promote and assist with individuals who represent themselves and require support;
- b) the structure of dispute resolution should be flexible to protect and meet the needs of families that experience family violence;
- c) mediators should be trained to specialise in family law and family violence;
- d) the greater facilitation of the 'shuttle method' of mediation as a practicable, time-efficient and holistic mode of resolving family disputes. Additionally, the authors support implementation of the Coordinated Family Dispute Resolution (CFDR) model as the preferred method of dispute resolution for family matters involving violence;
- e) that lawyer-assisted conciliation processes for property-related family disputes be a mandatory process prior to filing for court proceedings and lawyer-assisted mediation be made an option for matters relating to family violence; and
- f) the facilitation of a Family Law Handbook in promoting greater access, support and dispute resolution for self-represented litigants.

Children's experiences and perspectives

In relation to children's experiences and perspectives, the authors recommend:

- a) that a collaborative model, incorporating child legal representation and therapeutical counselling, should be implemented in promoting and ensuring that a child's individual perspectives are received by the court.
- b) the implementation of a system of oversight to monitor, review and provide feedback to Family Consultants regarding the genuine incorporation of a child's views into Family Reports.
- c) the increased facilitation of judicial interviewing of children in ensuring more direct recognition of a child's views in family disputes. Additionally, it is proposed that children may submit letters to the court and judicial officers, expressing their views.
- d) the facilitation of the CFDR model for family dispute resolutions involving family violence, in aim of ensuring the greater identification, support and safe resolution of these matters.
- e) that increased funding should be delivered to enable greater facilitation of section 11F assessments under the FLA, in view of ensuring earlier identification of risk factors. Additionally, it is proposed that specialist identification and assessment of risk factors could be conducted through an independently established organisation, whom can then provide advice and support to relevant legal and court professionals.
- f) that the CFDR model be extended to include culturally and linguistically specialised support workers in ensuring the greater support of culturally and linguistically diverse children in family matters.
- g) that preparation and incorporation of cultural reports in family reports should be a mandated process to ensure the greater articulation of the specific needs and circumstances of children from diverse communities.
- h) the establishment of regional advisory boards and conferences comprised of representatives, children and general members of culturally and linguistically diverse communities. This is in view of ensuring the ongoing informed identification and development of culturally sensitive family law processes.

We thank you in advance for taking the time to consider our proposal, and trust you find our submission beneficial to your review.

Kind regards,

E Post, S Davis, U Chowdhury and A Rimovetz.

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I ACCESS AND ENGAGEMENT

- 3 *In what ways could access to information about family law and family law related services, including family violence services, be improved?*
- 4 *How might people with family law related needs be assisted to navigate the family law system?*

Individuals with family law related needs may find it difficult to navigate the family law system and to access relevant information relating to family related services and family violence services. The Productivity Commission's 2014 *Access to Justice Arrangements* Inquiry Report found that people experienced difficulties in accessing information that would assist them in identifying and connecting with relevant legal and non-legal services.¹ This difficulty is increased in situations where there are experiences of family violence, substance abuse, or a history of child abuse. Family breakdowns under any of these circumstance places parties seeking access to the family law system in a volatile position. For women and their children, separation from a violent partner continues to be the most dangerous time in a family breakdown. Many women have felt that accessing and navigating the family law system during their time of need is too complex, and consequently they may become potentially disengaged with the family legal system and may opt to stay with their partner. Professional support is crucial at this time to aid in safe decision making and to ensure, above all, the safety of all parties involved.

Furthermore, families attempting to resolve complex disputes which may involve family violence and child safety issues are required to use and engage with multiple systems and a large number of organisations and service providers. The Australian family law system is fragmented. Some organisations and service providers are controlled by the states and territories (for example, police, child protection agencies, magistrates courts, children's courts), others are the controlled by the Commonwealth (family law courts, FRCs and other FSP funded services), and some are jointly funded (LACs and CLCs).² Accessing the fragmented family law system, or even accessing information about relevant family law and family violence services, can be confusing, complex, frustrating and sometimes unsafe for women experiencing situations of family violence. The reality for a separating family which

¹ Productivity Commission, *Access to Justice Arrangements* Report No 72 (2014) vol 1, Ch 5.

² Ibid 867.

may be experiencing issues of family violence or child abuse, is that there is no single judicial forum that can provide these family members with a comprehensive response to address their disputes.³

According to the Australian Capital Territory's Women's Legal Centre:

What we see is that the overlap between those systems, which are often happening in the same time frame, is not effective and not an accessible system for our clients ... What we see is not only having to stay engaged ... in each of those jurisdictions, but also the extraordinarily different frameworks that each of those courts or sets of legislation require the client to comply with ... You have got clients having to not only get their heads around a whole lot of different processes and court dates and different sets of court documents, but you're also looking at very different legal frameworks for the type of evidence they're having to provide, for the value or the weight that's given to that evidence.⁴

Recommendation:

The authors submit that the Australian Government, in partnership with relevant stakeholders, develop a Family Law Handbook (FLH). The FLH should be the first point of reference for people seeking and/or needing information about family law services and, as such, it should be written in a way that will help people from the most marginalised and vulnerable groups in Australia, and all culturally and linguistically diverse backgrounds.

The FLH should contain information, in plain English and in other languages, about the following areas:

- (a) The family law system in general and people's rights under the law, including:
 - i. legal responses to family violence;
 - ii. domestic violence orders;
 - iii. parenting orders;
 - iv. property disputes;

³ Family Law Council, *Improving Responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (2009) 44.

⁴ Women's Legal Centre (ACT & Region), *Submission to the Family Law Council: Indigenous and Culturally and Linguistically Diverse Clients in the family law system* (2011), 40.

- v. family dispute resolution and mediation;
 - vi. consent orders; and
 - vii. divorce.
- (b) The specific roles, services, and limitations of all relevant government agencies, including;
- i. police;
 - ii. the Family Law Court (FLC);
 - iii. Legal Aid;
 - iv. Relationships Australia;
- (c) A nationwide directory for free legal services, including:
- i. all community legal centres across Australia;
 - ii. Aboriginal and Torres Strait Islander Legal Service;
 - iii. Aboriginal and Torres Strait Islander Women's Legal Service;
 - iv. Aboriginal Legal Service; and
 - v. Women's Legal Service;
- (d) A nationwide directory for crisis support services, including:
- i. free counselling services;
 - ii. alcohol, drug and gambling rehabilitation centres;
 - iii. shelters for women and children facing family violence or child abuse; and
 - iv. details of 24/7 help lines to assist people who are facing difficulty in accessing the family law system and services.
- (e) A user friendly, step by step guide for self-represented litigants on how to:
- i. navigate the FLC's website;
 - ii. identify relevant forms;
 - iii. how to complete out relevant forms; and
 - iv. the costs, and how and where to file the relevant forms.

The FLH will assist people who are experiencing a family breakdown to access information and engage with services. The FLH will act as a 'roadmap' of services (including relevant support services) for people experiencing issues trying to access and engage with the family law system. The FLH should be integrated into current government resources and initiatives already in place. Moreover, the FLH should be accessible online via the FLC website and

Relationships Australia website, at all relevant community legal and family support centres, and all family law practitioner offices. It should be given to all newly arriving culturally and linguistically diverse (CALD) communities (*refer to question 6*), and should be available in remote and rural communities (*refer to question 9*). The FLH will promote a greater awareness of these resources and initiatives for Australian families, as well as AATSI families and CALD communities. The FLH will allow for education and information to be delivered in Aboriginal and Torres Strait Islander (AATSI) languages, plain English and in formats that are appropriate to particular communities and age groups, and will ensure that the information is continuously accessible and delivered in a culturally appropriate manner to AATSI peoples.⁵

⁵ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 97.

- 5 *How can accessibility of the family law system be for Aboriginal and Torres Strait Islander People?*
- 6 *How can the accessibility of the family law system be for people from culturally and linguistically diverse communities?*
- 9 *How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?*

(a) AATSI People

Accessibility to the family law system for AATSI people and people living in remote areas is a pressing issue that needs to be addressed as AATSI make up a large percentage of the population of Australians living in rural, remote and regional areas. In 2011, 45 per cent of people living in very remote areas and 16 per cent of people living in remote areas are AATSI.⁶ In comparison, 98 per cent of non-AATSI Australians live in non-remote areas, while only 2 per cent live in remote areas.⁷ Those living in remote or very remote areas are more likely to be AATSI people, and a greater proportion of those in very remote areas live in multi-family households.⁸ Living in remote areas creates barriers to accessing the FLC and other legal services.⁹ Within some remote communities there are limited access to telecommunications and public transport, or transport in general, which has the effect of inhibiting access and participation with the family law system. In particular, women in remote communities who are experiencing a relationship breakdown with a history of family violence can experience serious difficulties when trying to access family violence services. For many AATSI people living in remote communities it is just not economically feasible or practical to access family law services.

Aside from these geographical barriers, AATSI people face a number of other barriers when it comes to accessing the family law system in Australia. In a report to the Federal Attorney-General, the Family Law Council outlined a number of barriers to accessibility for AATSI

⁶ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census* (31 October 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Article~12>>.

⁷ Ibid.

⁸ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012), 128.

⁹ Ibid 46-48.

people.¹⁰ This report identified key reasons as to why the Indigenous community have little contact and engagement with the family legal system, which included:

- (a) a resistance to engagement and fear of government agencies owing largely to forced removal of children from families and forced relocation from their respective community;
- (b) legal literacy – many had little understanding of how the family legal system worked, nor did they understand the differences between the child protection system and the family legal system;
- (c) language and communication barriers owing to English being the second language for most individuals and thereby understood very little about various court orders and arrangements;
- (d) economic barriers, such as where there is a lack of government funded AATSI specific legal services and in remote areas;
- (e) family violence – many AATSI people have a distrust of government agencies which can prevent them from reporting issues of family violence for the fear of negative repercussions;
- (f) culturally inappropriate family relationship centre models;
- (g) complex and lengthy dispute resolution processes and court processes which can cause disillusionment and disengagement; and
- (h) systematic issues in the ability to effectively meet the complex needs of AATSI people.¹¹

In response to navigating the family law system, in general, the FLH will be available to people in the AATSI community. The FLH will be delivered in AATSI languages, and will ensure that the information is continuously accessible and delivered in a culturally appropriate manner to AATSI peoples. It will outline all the relevant services which can in turn make the process less daunting for AATSI people and can promote engagement with the family law system.

However, given the complex needs of AATSI people and their susceptibility to disengagement, there is a need for strategies that can assist family law system agencies to understand each other's operating frameworks and practice bases as a way of fostering

¹⁰ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012).

¹¹ *Ibid* 40-53.

collaboration and shared understanding.

Recommendation:

The authors submit that the Australian Government, in partnership with stakeholders, develop strategies to build collaboration between AATSI specific service providers and organisations and the mainstream family law system.¹²

The authors also submit that the Australian Government, in partnership with relevant stakeholders, develop strategies that assist, as early as is possible, AATSI families and communities experiencing relationship difficulties, family violence and parenting disputes. This strategy should include the development of outreach programs by mainstream services within the family law system.

The authors **recommend** that services such as Relationships Australia and Legal Aid visit regional, remote and rural communities to provide copies of the FLH to promote access and engagement with the family law system. However, because the needs in remote communities are more likely to be for informal mechanisms, culturally relevant mediation services that are more aligned to traditional ways AATSI people have used to resolve family disputes should be implemented into the outreach programs.¹³

To be able to provide these services via the mainstream family law system services already in place, there is a need for better culturally appropriate and interpreter services.

Recommendation:

The authors further submit that the Australian Government, in partnership with relevant stakeholders, develops a strategy for improving access to more culturally appropriate services for AATSI people and better interpreter services in AATSI languages.

The authors **recommend** building an AATSI focused cultural competency and understanding of the application of relevant laws and policies to be implemented into professional development frameworks, Vocational Education and Training and tertiary programs of study

¹² Ibid 99.

¹³ North Australian Aboriginal Justice Agency submission, *Aboriginal Clients in the Family Law System* (2011) 2.

across Australia.¹⁴ The Australian Government should also ensure there is a pool of available interpreters for particular language groups with knowledge and understanding of family law derived either from training provided by local agencies or specialist legal interpreter accreditation developed or approved by National Accreditation Authority for Translators and Interpreters.¹⁵ These services should also be implemented into the outreach program.

(b) Culturally and Linguistically Diverse

Individuals from culturally and linguistically diverse communities (CALD) face a number of similar barriers to accessing the family law system. The Family Law Council's report outlined a number of barriers to accessibility for the CALD community.¹⁶ This report found that the CALD community in general has, the following:

- (a) limited knowledge of the Australian family law system because access to information can be impeded by language and literacy barriers;
- (b) lack of awareness of available services;
- (c) cultural and religious barriers that inhibit help-seeking outside the community;
- (d) negative perceptions of the courts and family relationships services;
- (e) social isolation – CALD women as generally their husbands partake in the Australian workforce, which means women in CALD communities generally have attained a lower level of English speaking proficiency compared to their male partners.;
- (f) lack of collaboration between migrant services and the family law system;
- (g) a fear of government agencies; and
- (h) a lack of culturally responsive services and bicultural personnel, legislative factors and cost and resource issues.¹⁷

This report also found that when CALD clients engage with the family law system concerns were raised about the availability and quality of interpreting services, and this concern has been identified as a barrier to effective participation with the family legal process.¹⁸ Many CALD communities too often rely on inaccurate information from friends and community

¹⁴ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 98.

¹⁵ *Ibid* 11.

¹⁶ Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Backgrounds* (2012).

¹⁷ *Ibid* 4.

¹⁸ Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Backgrounds* (2012), 33-34.

members.¹⁹ When an interpreter is used issues of confidentiality arise, especially when a specific dialect is required as it has exposed some parties to interpreters whom may know other members of their family.²⁰ In a survey by the Family Law Council in relation to CALD communities and issues with the FLC's interpreter service, it was observed that;

- (a) 36 per cent of solicitors identified interpreter services in court as varied; and
- (b) 8 per cent were not at all satisfactory.

The four main reasons identified by this survey was that:

- (a) the same interpreter was used for both sides in a family violence hearing;
- (b) there were difficulties in securing an interpreter;
- (c) the interpreter had strayed from their main purpose and gave legal advice; and
- (d) interpreters did not understand legal concepts.²¹

The FLH can operate to provide comprehensive orientation information about all aspects of the Australian family law system to newly arriving CALD communities.²² The FLH should be provided by the Australian Government to all newly arriving CALD communities and should be translated into their respective languages. Once again, the FLH will act to promote a greater awareness of the family law resources available in Australia for CALD communities. The FLH will ensure that the information is continuously accessible and delivered in a culturally appropriate manner. This will mean that CALD communities are fully aware of their rights under the family law system and the services available to them in Australia. this will encourage engagement by fostering a more positive relationship and understanding of the family law system from the moment CALD communities arrive in Australia.

There is also a need for better interpreter services.

¹⁹ Katie Fraser, *Out of Africa and into Court: The legal problems of African refugees* (Footscray Community Legal Centre, May 2009) 7.

²⁰ In Touch Multicultural Centre Against Family Violence, *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence* (Melbourne: InTouch Inc. Multicultural Centre Against Family Violence, 2010), 24.

²¹ Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Backgrounds* (2012), 34.

²² See page 8.

Recommendation:

The authors further submit that the Australian Government, in partnership with relevant stakeholders, develops a strategy for improving interpreter services for CALD communities.

The Australian Government should ensure there is a pool of available interpreters for each language with knowledge and understanding of family law derived either from training provided by local agencies or specialist legal interpreter accreditation developed or approved by National Accreditation Authority for Translators and Interpreters.²³ These interpreters should be clear on their role as interpreter and should not overstep the boundaries in respect of giving advice as opposed to relaying information. There should be a sufficient amount of interpreters in order for there to be two separate interpreters in matters involving family violence.

²³ Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Backgrounds* (2012), 11.

10 *What changes could be made to the family law system, including the provision of legal services and private reports to reduce the cost to clients for resolving disputes?*

The financial ramifications of family law disputes can be astronomical for separating parties who require legal assistance and assistance from the family court. Research undertaken by the Women's Legal Services in 2015 affirmed it was common for legal fees to exceed costs of \$100,000 for private representation in matters that were ongoing for two-three years.²⁴ These costs are a culmination of various litigation formalities ranging from hourly solicitor fees to family reports and court fees.²⁵ Given the average personal income for separated parents 12 months after separation is \$33,800 for mothers and \$55,000 for fathers,²⁶ this exorbitant financial burden combined with the cost of living is simply unsustainable. The Productivity Commission's Access to Justice Arrangements Report acknowledged financial barriers could impede the facilitation of appropriate justice.²⁷ Parties may neglect seeking legal advice or prematurely settle their case and/or choose to self-represent, potentially generating unsafe or unfair agreements.²⁸

(a) Legal Aid and Funding

The associated costs of litigation combined with limited availability of subsidised legal services and Legal Aid²⁹ can 'impoverish' families.³⁰ For the purpose of this question, the authors have chosen to focus specifically on suggested reforms to Legal Aid accessibility and eligibility. Refer to *questions 23, 24 and 26* to discuss recommendations to expand the role and availability of alternative dispute resolution services to support families in dissolving their disputes in a timely and cost-effective manner.

²⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 60.

²⁵ *Ibid* 61.

²⁶ Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 11.

²⁷ Productivity Commission, *Access to Justice Arrangements (Inquiry Report No 72, Vol 2, 2014)* 856.

²⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 61.

²⁹ Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 35.

³⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 59.

Legal Aid or Community Legal Services exist to provide free legal assistance; however, they are subject to strict eligibility criteria.³¹ Community Legal Services often have a threshold limit of how many times a client can access their services and there are strict time limits placed on consultations.

The functioning of Legal Aid relies on government funding. In 2012-13 public Australian legal assistance providers received around \$730 million dollars in government funding. This only accounted for 0.14 per cent of all government spending.³² Consequently, the eligibility criterion has to be strict, as the services provided through current funding cannot meet the demand.

The National Association of Community Legal Centre's acknowledged the difficulty in satisfying the criteria to access Legal Aid.³³ In Queensland, access to Legal Aid is granted on the basis an individual satisfies the 'means and merits' test (examining a subject's income and assets).³⁴ Rigid in its application, those with a substantially low income, no real assets and rely on Centrelink benefit payments are generally eligible. Each state and territory have similar tests and consequently the realm of Legal Aid is subject to extreme limits and a certain socio-economic demographic.

The Productivity Commission estimated that only 8 per cent of households would meet the income and assets test for Legal Aid.³⁵ This creates inconsistencies for individuals who have a modest level of assets but cannot afford private representation. The National Association of Community Legal Centres noted those who earn less than A\$50,000-\$60,000 a year are often excluded from Legal Aid eligibility.³⁶ Put in the context of legal fees discussed above, the difficulty in accessing the family law system is apparent.

³¹ B Harland, A; Cooper, D; Ratus, Z; Renata, A *Family Law Principles* (Thomas Reuters, 2nd ed, 2016) 300.

³² Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 26.

³³ R. Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 11.

³⁴ Legal Aid Queensland *The Means Test* (2018) <<http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/The-Means-Test>>.

³⁵ Ibid 20.

³⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 127.

Recommendation:

Evidently, it is recommended that the Federal Government increase its funding to Legal Aid. By increasing the funding, it permits the expansion of assisting legal resources. With more available legal resources, the strict eligibility criteria can be relaxed and more individuals can access the services.

Alternatively, the authors agree with discussions made by the Productivity Commission to implement a government-backed funding scheme modelled on Australia's Higher Education Contribution Scheme (HECS) to cover legal expenses with an interest free loan.³⁷ With the implementation of a fee-help scheme, it balances the financial discrepancies of society. Suited more to middle income earners who cannot access Legal Aid, the scheme would allow parties to receive adequate and necessary legal advice and representation. On par with HECS, the proposed scheme would have a certain eligibility criterion, albeit far more relaxed than Legal Aid. For those who qualify for a loan, a percentage of their income will then be deducted to repay the Australian Government.

(b) Private Reports

Expert family reports are an integral component in family law disputes in order for children's views to be heard.³⁸ Regulation 7 of the *Family Law Regulations 1984* (Cth) requires the appointment of a family consultant by the Chief Executive Officer of the Family Court or the Federal Circuit Court to conduct private reports.³⁹ For individuals who have access to Legal Aid, the cost of a family report will be covered by the grant.

The House of Representatives Standing Committee on Social Policy and Legal Affairs (the 'SPLA Committee') noted the costs associated with these reports can be extremely high⁴⁰ as described by the Hon. Professor Nahum Mushin AM as 'exorbitant.'⁴¹ In response, Professor Mushin recommended that the Court's funding to be increased to return to the former

³⁷ Ibid 23.

³⁸ *Family Law Act 1975* (Cth) s 62G(3A)(a)-(b).

³⁹ *Family Law Regulations 1984* (Cth) reg 7.

⁴⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 213.

⁴¹ The Hon. Professor Nahum Mushin AM, *Submission 123* to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into a better family law system to support and protect those affected by family violence* (December 2017) 110.

structure of reports being prepared by in-house family consultants⁴² pre-the 2006 Family Law Amendments.

Recommendation:

Supporting the suggestion made to the SPLA Committee by Professor Mushin, the authors recommend amending Regulation 7 of the *Family Law Regulation*⁴³. Amendments would abolish the requirement of external private practitioners and allow for the return of in-house consultants. Not only does this reduce associated costs for parties, but it also improves ‘consistency across states [as] the Courts can then implement internal consistent reporting practices across the states and ensure relevant professional training is consistent’.⁴⁴

Note the fee-help scheme suggested in *question 10* is also applicable. The interest-free loan would cover all costs associated with obtaining private family reports.

⁴² House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 214.

⁴³ *Family Law Regulations 1984* (Cth) r 7.

⁴⁴ The Community and Public Sector Union *Submission 70* to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into a better family law system to support and protect those affected by family violence* (December 2017) 215.

11 *What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?*

12 *What other changes are needed to support people who do not have legal representation to resolve their family law problems?*

Self-representation has become a significant feature within the family court system.⁴⁵ In 2013-14, one or both parties were unrepresented in 32.8 per cent of applications made before the Federal Circuit Court of Australia.⁴⁶ Further, the 2016 Family Court of Western Australia Annual Review indicated that 44.3 per cent of parenting matters and 19.2 per cent of financial matters involved self-represented litigants.⁴⁷ Reasons vary in each case as to why litigants choose to self-represent, however research suggests that legal costs have become so unaffordable for the average Australian.⁴⁸

The adversarial nature of the court system provides challenges for self-represented litigants to develop a proactive case.⁴⁹ A self-represented party lacks an adequate legal understanding on how to navigate the jurisdictional and procedural formalities.⁵⁰ Evidence shows that half of family law trials in the Federal Circuit Court⁵¹ and the Family Court, Western Australia⁵² were impacted by the inability of self-represented litigants to understand the correct forms to use, file and relevant documentation applicable to the matter that needed to be supplied.⁵³

Refer to the response in *questions 3 and 4*, in which the discussion of implementing a simplified Family Law Handbook is made. Refer to *question 10* to discuss the role of Legal Aid in providing adequate legal assistance for those who do not have sufficient funds for legal representation. Refer to *Question 26* to discuss the implementation of online legal guides and Apps to expand support and minimise costs for self-represented litigants.

⁴⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Final Report* (2016) 22.

⁴⁶ Federal Circuit Court of Australia, *Annual Report 2013-2014*, (Australian Government)

⁴⁷ Family Court of Western Australia, *Family Court of Western Australia Annual Review 2016* (2016) 16.

⁴⁸ J. Dewar, B. Smith & C. Banks, *Litigants in Person in the Family Court of Australia – Research Report No 20* (Family Court of Australia, Canberra, 2000), 11–12.

⁴⁹ A. Harland; D.Cooper; Z.Rathus; A.Renata, *Family Law Principles* (Thomas Reuters Australia 2nd Edition, 2016) 250.

⁵⁰ *Ibid* 250.

⁵¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Final Report* (2016) 22.

⁵² Family Court of Western Australia, *Family Court of Western Australia Annual Review 2016* (2016)

⁵³ T. Tkacukova, 'Communication in Family Court: Financial Remedy Proceedings from the Perspective of Litigants in Person' (2016) 38(4) *Journal of Social Welfare and Family Law* 430, 436.

Recommendation:

Numerous questions throughout this paper have discussed recommendations focused on improving the availability of cost-effective legal assistance and resources. In response to this question, the authors have focused on courtroom advocacy and the necessity of preparing a self-represented litigant for presentation in court.

Therefore, the authors recommend the implementation of specialist clinics to provide training for parties whom self-represent. This is akin to Canada's National Self-Represented Litigants Project (NSRLP).⁵⁴ Funded by the Law Foundation of Ontario and the University of Windsor; the NSRLP promotes access to justice for all Canadians by providing free resources to assist self-represented litigants and enhance their understanding of procedural requirements.⁵⁵ In accordance with the NSRLP, the proposed clinics will prepare the litigant for courtroom advocacy by providing coaching services and consolations.

⁵⁴ National Self-Represented Litigants Project, *About the NSRLP* <<https://representingyourselfcanada.com/about-the-nsrpl/>> (2017).

⁵⁵ *Ibid.*

II LEGAL PRINCIPLES IN RELATION TO PARENTING AND PROPERTY

14 *What changes to the provisions in Part VII of the FLA could be made to produce the best outcomes for children?*

15 *What changes could be made to the definition of family violence, or other provisions regarding family violence, in the FLA to better support decision making about the safety of children and their families?*

(a) Definition of Family Violence

Under the *Family Law Act 1975* (Cth) (FLA), family violence is defined under section 4AB to involve behaviour that is violent, threatening, coercive or controls a member of the person's family or causes them to be fearful.⁵⁶ Subsection (2) provides examples of behaviour that may constitute family violence, and this list is not exhaustive.⁵⁷ Zoe Rathus' paper entitled *Shifting Language and Meanings Between Social Science and the Law*,⁵⁸ argued that the structure of the current definition of family violence requires 'overarching features of coercion, control or fear, and the linguistic links of coercion and control American typology literature about family violence renders it vulnerable to a different, and possibly narrower, interpretation'.⁵⁹ Subsequently, Rathus argues that the definition operates in an exclusionary manner.⁶⁰ In other words, the current definition of family violence only constitutes behaviours such as emotional abuse or physical abuse as family violence if it was coercive, controlling or to cause the person fear. This narrows the definition and excludes other forms of domestic violence.

The Issue Paper has noted that the definition of family violence is not consistent across Australian jurisdictions. Inconsistency of this definitions can be seen in Table 1.

⁵⁶ *Family Law Act 1975* (Cth) s 4AB(1).

⁵⁷ *Ibid* s 4AB(2).

⁵⁸ Zoe Rathus, 'Shifting language and meanings between social science and the law' (2013) 36(2) *UNSW Law Journal* 359.

⁵⁹ *Ibid* 360.

⁶⁰ *Ibid* 387.

TABLE 1: Various Definition of Domestic and/or Family Violence across Australian Jurisdictions

Jurisdiction	Definition
Australian Capital Territory ⁶¹	<p><i>Family violence</i> means—</p> <p>(a) Any of the following behaviour by a person in relation to a family member of the person:</p> <ul style="list-style-type: none"> (i) Physical violence or abuse; (ii) Sexual violence or abuse; (iii) Emotional or psychological abuse; (iv) Economic abuse; (v) Threatening behaviour; (vi) Coercion or any other behaviour that— <ul style="list-style-type: none"> (A) Controls or dominates the family member; and (B) Causes the family member to feel fear for the safety or wellbeing of the family member or another person; or <p>(b) Behaviour that causes a child to hear, witness or otherwise be exposed to behaviour mentioned in paragraph (a), of the effects of the behaviour.</p>
New South Wales ⁶²	<p>In this Act, <i>domestic violence offence</i> means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.</p>
Northern Territory ⁶³	<p>Domestic violence is any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:</p> <ul style="list-style-type: none"> (a) Conduct causing harm; (b) Damaging property, including the injury or death of an animal; (c) Intimidation; (d) Stalking; (e) Economic abuse; (f) Attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).
Queensland ⁶⁴	<p><i>Domestic violence</i> means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that—</p> <ul style="list-style-type: none"> (a) Is physically or sexually abusive; or (b) Is emotionally or psychologically abusive; or (c) Is economically abusive; or (d) Is threatening; or (e) Is coercive; or (f) In any other way controls or dominates the second person and causes that second person to fear for the second person's safety or wellbeing or that of someone else.
South Australia ⁶⁵	<p>(1) <i>Abuse</i> may take many forms including physical, sexual, emotional,</p>

⁶¹ *Family Violence Act 2016* (ACT) s 8(1).

⁶² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

⁶³ *Domestic and Family Violence Act 2007* (NT) s 5.

⁶⁴ *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1).

	<p>psychological or economic abuse.</p> <p>(2) An act is an act of abuse against a person if it results or is intended to result in—</p> <ul style="list-style-type: none"> (a) Physical injury; or (b) Emotional or psychological harm; or (c) An unreasonable and non-consensual denial of financial, social or personal autonomy; or (d) Damage to property in the ownership or possession of the person or used otherwise enjoyed by the person.
Tasmania ⁶⁶	<p>In this Act—</p> <p>Family violence means—</p> <ul style="list-style-type: none"> (a) Any of the following types of conduct committed by a person, directly or indirectly, against that person’s spouse or partner: <ul style="list-style-type: none"> (i) Assault, including sexual assault; (ii) Threats, coercion, intimidation or verbal abuse; (iii) Abduction; (iv) Stalking within the definition of section 192 of the Criminal Code; (v) Attempting or threatening to commit conduct referred to in subparagraphs (i), (ii), (iii) or (iv); or (b) Any of the following: <ul style="list-style-type: none"> (i) Economic abuse; (ii) Emotional abuse or intimidation; (iii) Contravening an external family violence order, an interim FVO, an FVO or an PFVO; or (c) Any damage caused by a person, directly or indirectly, to any property— <ul style="list-style-type: none"> (i) Jointly owned by that person and his or her spouse or partner; or (ii) Owned by that person’s spouse or partner; or (iii) Owned by an affected child.
Victoria ⁶⁷	<p>For the purposes of this Act, family violence is—</p> <ul style="list-style-type: none"> (a) Behaviour by a person towards a family member of that person if that behaviour— <ul style="list-style-type: none"> (i) Is physically or sexually abusive; or (ii) Is emotionally or psychologically abusive; or (iii) Is economically abusive; or (iv) Is threatening; or (v) Is coercive; or (vi) In any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or (b) Behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).
Western Australia ⁶⁸	<p>A reference in this Act to family violence is a reference to—</p> <ul style="list-style-type: none"> (a) Violence, or a threat of violence, by a person towards a family member of

⁶⁵ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

⁶⁶ *Family Violence Act 2004* (Tas) s 7.

⁶⁷ *Family Violence Protection Act 2008* (Vic) s 5(1).

⁶⁸ *Restraining Orders Act 1997* (WA) s 5A(1).

	<p>the person; or</p> <p>(b) Any other behaviour by the person that coerces or controls the family member or causes the member to be fearful.</p>
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Comparatively, Queensland's definition uses the terms 'person', 'first person' and 'second person' and this is the same in New South Wales and Northern Territory. The terms 'person' broadens the definition in regard as to whom may be a victim and a perpetrator. Tasmania takes a narrower approach by identifying the person as 'person's spouse or partner'. This term is not appropriate in cases of domestic and family violence as it excludes abuse against children or other members that may live with the person. In Victoria and the Australian Capital Territory ('ACT'), the definition uses the terms 'family member'.

However, the term 'family member' is vague and subjective as each individual may have a different perception of what constitutes as 'family'.⁶⁹ Queensland's Act defines 'relevant relationship' as an intimate personal relationship, family relationship and an informal care relationship.⁷⁰ Each of these terms are further defined under the Queensland Act.⁷¹

Family relationship has been further defined to include a subjectivity test to determine whom is a relative. The legislation stipulates that a relative is someone who regards the person's relative or regards themselves as a relative.⁷² The Queensland law does well in expanding their definition to include relationships that are beyond family into considering informal care relationship (whether related or not) and intimate relationships. The term used in the Act is highly important as 'family' of a child may not be the traditional ideology of mother and father but can include guardians that are not biological or legal parents. Therefore, it is recommended that the Commission considers following the definition under Queensland. Otherwise, if the term 'family' is being used, then **we recommend** that a definition of family is provided.

The World Health Organisation ('WHO') defines intimate partner violence as 'any behaviour within an intimate relationship that causes physical, psychological, or sexual harm those in the relationship'.⁷³ This includes physical violence, sexual violence, emotional or

⁶⁹ Bryan Strong and Theodore Cohen, *The Marriage and Family Experience: Intimate Relationships in a Changing Society* (Cengage Learning, 12th ed, 2013) 4.

⁷⁰ *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

⁷¹ *Ibid.*

⁷² *Ibid* s 19(4).

⁷³ World Health Organisation, *Intimate Partner Violence* (2012) 1, <http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=C70E63F98434C1C66406E1B1C242A720?sequence=1>.

psychological abuse or controlling behaviour.⁷⁴ This definition differs from the definition under the FLA. WHO categorises physical abuse, psychological abuse and controlling behaviour as separate behaviours of intimate partner violence. This is similar to majority of definitions across Australian jurisdictions. The current definition of family violence requires evidence that the behaviour, such as physical abuse or emotional abuse, was coercive, controlling or may lead for victims to be fearful of their abusers.⁷⁵ The requirement of coerce, control and fear narrows what constitutes as domestic and family violence. In other words, if a person was physically abusive to another but it cannot be proven that the behaviour was to coerce, control or cause fear to the other person, would that mean the act was not family violence?

The Family Violence Committee noted that ‘family violence takes many forms and, when framing parenting orders, it is important to differentiate between the types of violence’.⁷⁶ By incorporating emotional and psychological abuse as well as economic abuse into the family violence definition, this will broaden what constitutes as family violence. This will expand the power of the family court to provide adequate court orders that works consistently with the type of violence present within the child’s family.

Recommendation:

Therefore, it is recommended that the new definition of family violence should be guided by Victoria, Queensland and ACT’s definition of including physical abuse, economic abuse, emotional and psychological abuse separate from coercive, controlling behaviour or to cause fear. Further, to consider using the terms ‘relevant relationship’ and ‘persons’ instead to broaden the definition.

Alternatively, if ‘family member’ would be used, that a definition of ‘family member’ be included.

⁷⁴ Ibid.

⁷⁵ Family Violence Committee of the Family Court of Australia, *Family Violence Best Practice Principles* (Family Court of Australia, 2013) 6.

⁷⁶ Family Court of Australia, *Family violence: best practice principles* (December 2015) 7 <http://www.familycourt.gov.au/wps/wcm/connect/d9871c17-4c5d-4545-8f12-9c6062a59b34/FVBPP_3.2+December2015_web.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-d9871c17-4c5d-4545-8f12-9c6062a59b34-lrukF1y>.

(b) Presumption of Equal Shared Responsibility

The case of *Goode v Goode* identified that the first step is to presume that it is in the child's best interest for both parents to have equal, shared parental responsibility.⁷⁷ This presumption is rebuttable if there are reasonable grounds to believe that one parent has engaged in family violence or child abuse.⁷⁸ Even if the presumption of equal time does not apply, the court may still consider equal or substantial significant time between parent and child.⁷⁹ Helen Rhoades', John Dewar's and Nareeda Lewers's found that in many cases involving parenting orders, the presumption of shared parental responsibility rarely applied to most matters.⁸⁰ Kaspiew et al identified that courts are willing to provide sole responsibility and no shared time to parents where family violence is serious.⁸¹ However, the law may be confusing and misunderstood by many separating couples to believe both parents have a right to shared time. Research has indicated that children that has a history of family violence are experiencing ongoing negative impact of family violence, irrespective of their care arrangement.⁸² It was also found that 24 – 25 per cent who had a share care regime reported that they have been physically hurt by the other parent.⁸³ The presumption of equal time is not appropriate in cases of family violence as it can be translated that one parent or a child cannot be protected from the abusive parent.

Despite the exception under section 61DA(2) of the FLA, Rathus argues that 'some judges will argue away the exceptions, drawn into the goodness of shared parenting for children, believing, or at least embracing, the fiction of the lego-science'.⁸⁴ Belinda Fehlberg and Christine Millward heard one participant had an equal-time shared-care arrangement ordered

⁷⁷ *Goode v Goode* (2006) 36 Fam LR 422, 435 [43].

⁷⁸ *Family Law Act 1975* (Cth) s 61DA(2); and *Goode v Goode* (2006) 36 Fam LR 422, 435 [43].

⁷⁹ *Goode v Goode* (2006) 36 Fam LR 422, [65].

⁸⁰ Helen Rhoades, John Dewar and Nareeda Lewers, 'Can Part VII of the Family Law Act do what is asked for it?' (2014) 4 Fam Law Review 150, 157.

⁸¹ Rae Kaspiew et al, *Court outcomes project* (Australian Institute of Family Studies, 2015) 99.

⁸² Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 262; Belinda Fehlberg et al, 'Legislating for shared time parenting after separation: A research review' (2011) 25(3) *International Journal of Law, Policy and the Family* 318, 323 – 325; Jennifer Baxter, Ruth Weston and Lixia Qu, 'Family structure, co-parental relationship quality, post-separation paternal involvement and children's emotional wellbeing (2011) 17 *Journal of Family Studies* 86, 95; and Rae Kaspiew et al, *Court outcomes project* (Australian Institute of Family Studies, 2015)

⁸³ Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 165.

⁸⁴ Zoe Rathus, 'Social issue or 'lego-science'? Presumptions, politics, parenting and the new family law' (2010) 10(2) *Queensland University of Technology Law Journal* 164, 181.

by the Family Court.⁸⁵ The participant was not happy of the order as the other party had mental health problems and was physically violent in the past. Fran commented:

...in regards to parenting there wasn't a whole lot I could do because I had never reported [family violence] over the years and I think even I had reported it, it probably wouldn't have made much difference anyway because the courts want that shared care.⁸⁶

Rathus further comments that data indicates that the exceptions of the presumption are often being ignored and an order of shared time arrangement is being made are, in reality, not in children's best interest.⁸⁷ The presumption undermines that each case is different and parental responsibility and shared time should be determined on the unique facts of the case. The regretful consequence of the presumption being misunderstood may shift the balance of power during mediation. To understand what is in the best interest of the children is also to identify the relationship between parents and the effect it may have on children.

Recommendation:

The term 'presumption' should be removed. The Act should allow the decision of parental responsibility or equal or substantial and significant time to be decided upon the best interest of the children and what is reasonably practicable.

***See response to question 16 which discusses parental responsibility in different family structures.*

⁸⁵ Alan Hayes and Daryl Higgins, *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 238.

⁸⁶ Ibid 238.

⁸⁷ Zoe Rathus, 'Social issue or 'lego-science'? Presumptions, politics, parenting and the new family law' (2010) 10(2) *Queensland University of Technology Law Journal* 164, 181.

(c) Informing the Court of Family Violence Orders

Section 60CF of the FLA states that parties must inform the court of any family violence order that applies to the child or a member of the child's family.⁸⁸ Further, section 60CF(3) provides that a failure to inform the court of such an order does not affect the validity of any other order made.⁸⁹ This section is inadequate and potentially dangerous as court orders may contradict with family violence orders. Examples 1 and 2 below demonstrate circumstances of what could occur if the court was not aware of any family violence orders.

EXAMPLE 1

Parent A failed to inform the court of a family or domestic violence order against Parent B. This order may include serious abuse by Parent B towards Parent A and the child. The family violence order stipulates that Parent B is unable to be notified of Parent A's location and cannot be within fifty metre radius of Parent A's workplace and the child's school. If the Court made an order that permitted Parent B to access the child's school grounds and be in contact with Parent A, this may run the risk of the child being exposed to family violence or experience family violence themselves.

EXAMPLE 2

Parent A has obtained a violence order made against Parent B. However, due to the fear of harassment or further abuse, Parent A decides not to notify the court of any family violence or family violence orders in relation to the matter. The Court may make an Order that contravenes the family violence orders and potentially runs the risk of harming the child and Parent A.

If a situation occurred in Example 1, the order would remain valid despite the family violence order. Parent A in Example 1 would be exposed to further risk of violence. If the family violence order was presented to the court, not only would the court make an order consistent with the FVO, the court would be made aware of the complexity and serious nature of the family violence present in the family. Example 2, on the other hand, demonstrates a clear imbalance of power within the Family Court. The FLA should aim to maintain a balance of power.

⁸⁸ *Family Law Act 1975* (Cth) s 60CF(1).

⁸⁹ *Family Law Act 1975* (Cth) s 60CF(3).

***See response 14(d).*

Recommendation:

We recommend that any family violence orders *must* be filed with the court as soon as practicable or been made aware during court proceedings. Alternatively, this should be investigated by the risk assessor.

(d) Independent Children's Lawyers

Independent Children's Lawyers (ICL) are legal representations that act in the best interest of the children.

***Children's views and opinion relation with ICL is further discussed under response to questions 34, 35 and 36(b).*

(e) Expert Report

An expert report should include multiple opinions for the court to consider. For example, the nature and structure of the family of the child in such matter, the best interest of the child, conflict between carers of child and many more.

***Refer to response to question 16(e).*

16 *What changes could be made to Part VII of the FLA to enable it to apply consistently to all children irrespective of their family structure?*

The family structure and cultural or religious background influences a caregiver's belief and their respective parenting styles, which directly affects the best interest of the children.⁹⁰ Under the Act, sections 60CC(3)(g) and 60CC(3)(h) stipulates that the court must consider the lifestyle, culture and traditions of family members to determine the child's best interest. These two sections are an additional consideration from the primary considerations.⁹¹ The primary considerations are the benefit of the child having a meaningful relation with both parents and the need to protect the child from physical or psychological harm.⁹²

The law is unable to deny the child's right to enjoy their own culture, profess and practice of their own religion and use their own language.⁹³ Therefore, it is important for there to be an understanding of the needs of diverse families, including children, from minority cultures and family structure.

(a) Family Diversity

(i) Family Structure

The Australian Bureau of Statistics found in 2012-13 that out of all families, 58 per cent of families are ones with resident children of any age.⁹⁴ Out of the 58 per cent, 78 percent had dependent children, 22 per cent had non-dependent children only. Table 2 identifies the types of family structures found by the Australian Bureau of Statistics in 2011. Table 2, however, does not consider the close relationships the child may maintain with members who are not biologically related to the child.

⁹⁰ Sarah Wise and Lisa da Silva, 'Differential parenting of children from diverse cultural backgrounds attending child care' (Research Paper No 39, Australian Institute of Family Studies, 2007) 2.

⁹¹ *Family Law Act 1975* (Cth) s 60CC(3).

⁹² *Ibid* s 60CC(2).

⁹³ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Art 30.

⁹⁴ Australian Bureau of Statistics, *Family Characteristics and Transitions, Australia, 2012-13*, Cat no 442.0, ABS, Canberra, 2015 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4442.0>>.

**TABLE 2: 2011 Australian Census of Children Under 15 Years
Family Structure and Living Conditions⁹⁵**

Types of Family Structure Children Live In	Percentage households in 2012-13 in Australia (%)
Two biological or adoptive parents	71%
Single mother	19%
Single father	2%
Biological/Adoptive Mother and Stepfather	4%
Biological/Adoptive Father and Stepmother	1%
Foster parents or another relative	2%

(ii) *Culture & Religion*

Many Australians immigrated from approximately 200 countries and the population represents more than 300 ethnic ancestries. The Australian Bureau of Statistics found that one in four individuals in Australia were born outside of Australia.⁹⁶ Australia is rich with various cultures. One person in a certain cultural group may, however, differ from another person's culture in the same cultural group. Culture is an integral part of an individual's lifestyle and plays a role in a person's life, involving a person's norm, attitudes and their purpose to their social interaction.⁹⁷ Culture is a form of integrity and community identity and this should not be considered lightly by the court.

(iii) *How Should the FLA Apply Consistently to All Types of Families?*

The current law limits its consideration on biological or adoptive parents. Structures and cultures of families are expanding and changing, and the law must complement the structure of society. Zemans notes that a rigid set of guidelines would narrow the judicial discretion or family law process, which may ultimately cause an inflexible application of the law.⁹⁸ In the case of *KAM v MJR; JIG (Intervener)*,⁹⁹ the applicant, KAM, sought an order to have contact with the child. The applicant was in a homosexual relationship with the biological mother and she was in a meaningful relationship with the child. Post-separation, the applicant maintained

⁹⁵ Jennifer Baxtor, *The modern Australian family* (2016) Australian Institute of Family Studies, 2 <<https://aifs.gov.au/sites/default/files/families-week2016-final-20160517.pdf>>.

⁹⁶ Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016*, Cat no 2024.0, ABS, Canberra, 2016 <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2024.0Main%20Features22016?opendocument&tabname=Summary&prodno=2024.0&issue=2016&num=&view=>>>.

⁹⁷ Amber Chew, 'Judicial consideration of culture in child-related proceedings under the Family Law Act 1975 (Cth)' (2007) 21 *Australian Journal of Family Law* 173, 175.

⁹⁸ Frederick Zemans, 'The Issue of Cultural Diversity in Custody Disputes' (1983) 32 *Reports of Family Law* 50, 74.

⁹⁹ (1999) FLC 92-847.

contact with the child, however, the biological parents objected to their relationship. The parents argued that KAM was not a carer or held any parental role. The court rejected the parents' arguments and found that KAM should be able to continue her relationship with the child for the child's best interest. This case provides a clear demonstration that a meaningful relationship with a child is not limited only to parents. Section 60B(2) of the FLA unfairly provides that a child is to have a meaningful relationship with both parents but neglects any relationship that may be significant to a child. Clearly, the law is not reflected towards family with diverse structures, but is limited to the traditional nuclear family.

Recommendation:

The terms of 'parents', 'mother' and 'father' be expanded to include other forms of carers, guardians or anyone else that holds a close and significant relationship to the child.

Further, the dissenting judgement in *Goudge and Goudge*¹⁰⁰ noted that it is not the court's role to express a preference of one cultural background over another. Chief Justice Elizabeth Evatt went on to explain that for Aboriginal culture, in particular, the child's Aboriginal origins and the loss of contact from the child's tradition and cultural practice is particularly important for Indigenous children.¹⁰¹ The CRC provides that the state shall not deny the right of the child to enjoy their own culture, to profess or practice their own religion or use their own language.¹⁰² Section 60CC(3) of the FLA provides that this right is an additional consideration to the child's best interest.

Recommendation:

Sufficient weight should be given to the child and parents culture, and this could be achieved by including the children's culture and family diversity as a primary consideration to determine the best interest of the child. Given the wide range of culture in Australia, each matter is likely to involve a different family structure. However, it is emphasised that evidence of family violence is to be given greater weight.

¹⁰⁰ *In the Marriage of Goudge* (1984) 54 ALR 514.

¹⁰¹ *Ibid* 527.

¹⁰² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

(b) Family Dispute Resolution and Culture

Section 60I of the Act provides that all parties must make a genuine effort to resolve dispute by attending family dispute resolution ('FDR') before applying for a Part VII order.¹⁰³ Culture plays a significant part in negotiations and mediations as culture may influence each party's reasoning, opinions and disputes.¹⁰⁴ Awareness of a party's structure, belief and norms are vital to ensure ethical and legal obligations are maintained by the mediator. The support of the children's right and interests are the paramount consideration.¹⁰⁵

Mediators should understand and recognise cultural norms and beliefs to identify the context of the mediation and determine, if required, any accommodations or interventions to facilitate the process of the mediation.

Recommendation:

Mediators should have culture awareness training. Susan Armstrong stated that mediators should understand how to minimise their control in FDR, and allow the parties of the dispute to control the process.¹⁰⁶ By minimising the mediator's control, the risk of the mediator being biased or judging any parties would be reduced.¹⁰⁷ Armstrong identified that mediators may be influenced by their own cultural frames and may affect their control in mediation.¹⁰⁸ The ability to structure and direct the mediation that would be suitable to their needs. However, this risk may be reduced if mediators are trained to be culturally aware and respectful towards each family structure, culture and religion.

¹⁰³ *Family Law Act 1975* (Cth) s 60I(1).

¹⁰⁴ Susan Armstrong, 'Accommodating culture in family dispute resolution: What, why and how?' (2010) 20 *Journal of Judicial Administration* 167, 169.

¹⁰⁵ *Ibid* 170.

¹⁰⁶ *Ibid* 174.

¹⁰⁷ Susan Armstrong, 'Recognition and relationality with families and children from minority cultural and faith backgrounds in Australian family dispute resolution' (2015) 29 *Australian Journal of Family Law* 203, 230.

¹⁰⁸ *Ibid*.

(c) Presumption of Shared Equal Parental Responsibility

Rathus argues that the presumption of shared equal parental responsibility is inclusionary.¹⁰⁹ Structure and culture of family has changed significantly in Australia and the presumption may not complement the structure of the home to its intention. Studies found that after the 2006 reform, equal shared parental responsibility orders have increased from 76.3 per cent to 86.5 per cent.¹¹⁰ Judges have reported that the presumption of shared parental responsibility is frequently rebutted as parties are unable to work together and to undertake the decision-making process.¹¹¹

The case of *Stuart and Stuart*,¹¹² a parenting order was being made involving two girls aged six and three at the time of hearing. The mother in this case was a devoted Christian with a strong ethos of religious adherence, whereas the father was an atheist.¹¹³ There was evidence to indicate there was parental conflict and the mother submitted that the father would intend to affect the children's relationship to their religious belief and values.¹¹⁴ However, the trial judge found that 'a shared care arrangement between the parties... would bring a degree of certainty... to the day to day living of the parties and to their daughters'.¹¹⁵ It has been suggested that these orders fall within the stereotypical ideologies of the nuclear family, however, the reality is that these shared time and responsibility does not indicate to be in the best interest of children.

Recommendation:

The presumption should be removed. This test does not reflect all structures and culture of families in Australia, but rather, a selected few. Shared responsibility should only be ordered in circumstances where it is reasonably practicable and in the best interest of the children.

¹⁰⁹ Zoe Rathus, 'Social issue or 'lego-science'? Presumptions, politics, parenting and the new family law' (2010) 10(2) *Queensland University of Technology Law Journal* 164, 175.

¹¹⁰ R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 187.

¹¹¹ Helen Rhoades, John Dewar and Nareeda Lewers, 'Can Part VII of the Family Law Act do what is asked for it?' (2014) 4 *Family Law Review* 150, 157.

¹¹² *Stuart and Stuart* [2008] FMCAfam 177.

¹¹³ *Ibid* [10].

¹¹⁴ *Ibid* [7].

¹¹⁵ *Ibid* [24].

(d) Implied Presumption of Equal Time

The presumption of equal time has been widely criticised. The decision of *Goode and Goode*,¹¹⁶ the Full Court made the finding that:

...there is legislative intent evinced in favour of *substantial involvement* of both parents in their children's lives, both as to *parental responsibility* and as to *time* spent with children.¹¹⁷

Section 65DAA of the FLA provides the court the power to consider child spending equal time or substantial and significant time with each parent in certain circumstances. The Court must consider where parents have equal shared responsibility to consider equal time as in the best interest of the child and reasonably practicable.¹¹⁸ Research has found an overwhelming struggle with the presumption of equal time. One piece of research which conducted interviews with children in shared time arrangements found the following:

- some responses indicated their positive experience with the regular routine, but for others it was unbearable and inflexible;
- positive responses indicated they felt loved by both parents and saw that shared care was the manifestation of this, however, others have identified that they felt like a 'terrible burden because they became responsible for the emotional well-being of their parents'; and
- the positive reactions stated that the regime is excellent, and it was fair for their parents, however, others thought it was dreadful and overwhelmingly unfair.¹¹⁹

McIntosh's study indicated that there was high conflict between parents who implemented shared care time arrangements than any other arrangements.¹²⁰ It was also found that children from shared time arrangements suffered 'high rates of problem behaviours and poor persistence in activities and exploration'.¹²¹ McIntosh argued that this may be due from the

¹¹⁶ *Goode and Goode* (2006) FLC ¶93-286.

¹¹⁷ *Ibid* [72].

¹¹⁸ *Family Law Act 1975* (Cth) s 65DAA.

¹¹⁹ B Neal, J Flowerdew and C Smart, 'Drifting Towards Shared Residence?' [2003] *Family Law* 904, 905.

¹²⁰ J McIntosh et al, *Post-separation Parenting Arrangements and Developmental Outcomes for Infants and Children – Collected Reports* (Family Transitions, 2010) 40.

¹²¹ *Ibid* 156.

repeated disruptions to the children's regimes. However, shared time orders have increased from 4 per cent to 34 per cent.¹²²

Zoe Rathus made comments that an order of equal time, or substantial and significant time, or should only be made in situations where the parents live sufficiently close for children to be able to attend ordinary daily activities, parents are able to cooperate and communicate at a sufficient level and there is no history or present serious family violence.¹²³ We agree with Rathus.

Recommendation:

Term 'presumption' should be removed. The question of time shared should be based on the unique facts of each case. We support the idea of shared time, however, only in situations where it is reasonably practicable and in the best interest of the children.

(e) Expert Reports

The use of expert reports provides a unique insight on the structure, culture and traditions of the family. The unique diversity of culture, linguistic and ethnicity of families requires evaluators to investigate the complex relationships among culture, family dynamics, parenting practices and child rearing expectations.

Recommendation:

Evaluators should have a thorough cultural competence to ensure and obtain a compelling report regarding the cultural structure of the parent and child. It is important that evaluators are free from discriminatory or bias thoughts to avoid misdiagnosis.

¹²² R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 132.

¹²³ Zoe Rathus, 'Social issue or 'lego-science'? Presumptions, politics, parenting and the new family law' (2010) 10(2) *Queensland University of Technology Law Journal* 164, 174.

17 What changes could be made to the provisions in the FLA governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Australia holds the highest discretionary system for the division of property post-separation.¹²⁴ The Family Court is facing high demand for adjudication and governmental budget pressures.¹²⁵

(a) New Zealand's Presumption of Equal Sharing

The Issues Paper have requested comment and opinions on Australia adopting the New Zealand's presumption of equal sharing in property division matters. New Zealand holds the general presumption that each partner is entitled to an equal share of the property, which includes the family home, the family chattels and any other relationship property.¹²⁶ There are exceptions to the equal sharing presumption in New Zealand. These exceptions include where there would be an injustice; the relationship is shorter than three years; income of one partner is significantly higher than the other partner, there are successive; and contemporaneous relationships and where one partner made contributions post-separation.¹²⁷ The purpose and true value of the presumption is in the ideology that men and women have equal status. This ideology treats contributions made by each party made equally. The Law Commission made comments that the of equal sharing is appropriate in contemporary New Zealand.¹²⁸ Although this sounds promising, we recommend against the presumption for the two following reasons, an individual's connection to a property would be shared equally and neglecting other contributions.

(i) Connection to property

Issues will arise in the separation of, for example, their family home, if the presumption was adopted. One party may have a significant connection to the family home, but this presumption means the family home must be shared equally between parties.¹²⁹ This emotional attachment is not only limited to family home but may include holiday home, or

¹²⁴ Thomas Oldham and Patrick Parkinson, 'Evaluating judicial discretion – Family property law in Australia and the USA compared' (2016) 30 *Australian Journal of Family Law* 134, 135.

¹²⁵ *Ibid.*

¹²⁶ *Property (Relationships) Act 1976* (NZ) s 11(1).

¹²⁷ *Ibid* s 13.

¹²⁸ Law Commission, *Diving relationship property – time for change?*, Issues Paper 41 (2017) 245.

¹²⁹ S Mallet, 'Understanding Home: A critical review of the literature' (2004) 52(1) *The Sociological Review* 62, 64; and G Crown (ed), *Home and family: Creating the domestic sphere* (Macmillan, 1989) 14.

previous homes. Natalier and Fehlberg argued that home holds psychological and emotional connections.¹³⁰ It is inappropriate to justify economic division of the family when one party holds a strong attachment to a particular property.

(ii) Neglecting other Considerations

Further, the presumption regards that financial contributions are equal to non-monetary contributions. As explained earlier in the report, the presumption is incompatible with a case by case assessment. Each matter is different, and they are to be determined by their own facts. The presumption would place an undesirable effect that couples are compelled to divide property into fifty-fifty shares. Therefore, the presumption may neglect a party's contribution or capacity to live if they have incapable of working professionally. Regardless, the current law already follows the ideology that financial contributions are equal to non-monetary contributions. Yet, majority of cases do not make a finding of equal share of property assets.¹³¹ Various other factors are considered in property matters, including one party's competence to work and dependent individuals under the party's care. If there was a presumption of equal share, it would neglect all other factors such as the disadvantage one party may experience from such order. Property settlements in Australia must ensure that each order is just and equitable, otherwise the order is not justified.¹³² Studies have found that 62 per cent of participants to a survey believed that the property division was fair, compared with 35 per cent who said otherwise.¹³³ Majority reported that the property order that was arranged was satisfactory.¹³⁴ If equal share is not the general finding in Australian Courts, we fail to see what the purpose would be if Australia implemented this presumption. Additionally, the exception of the New Zealand law does not include family violence or abuse.

(b) Family Violence and Property

In *Kennon & Kennon*, the Full Court made comments that where there is a presence of violence towards one party it can have significant adverse impact on the party's

¹³⁰ Kristin Natalier and Belinda Fehlberg, 'Children's experiences of 'home' and 'homemaking' after parents separate: A new conceptual frame for listening and supporting adjustment' (2016) 29(2) *Australian Journal of Family Law* 111, 118.

¹³¹ Rae Kaspiew and Lixia Qu, 'Property division after separation: Recent research evidence' (2016) 30 *Australian Journal of Family Law* 1.

¹³² *Family Law Act 1975* (Cth) s 79(2).

¹³³ Rae Kaspiew and Lixia Qu, 'Property division after separation: Recent research evidence' (2016) 30 *Australian Journal of Family Law* 1, 21 – 22.

¹³⁴ *Ibid* 24.

contribution.¹³⁵ Trial judges must take family violence into consideration as ‘negative contributions’. Victims of violence have often experienced trauma, distress in all functioning and detachment.¹³⁶ According to the Victorian Government, domestic violence can cause severe and persistent effects on their physical and mental health. The leading risk factor for most Victorian women contributing to death, disability or illness is family violence.¹³⁷ Not only could these physical and mental health affect the contributions made into the relationship but could also affect their way of living post-separation. Evidence suggests that a large number of victims of violence who left their home are homeless¹³⁸ and unable to find work.¹³⁹ Further research has found that victims of violence were unable to work and thus, after separation it was difficult to ‘enter or re-enter the workforce’.¹⁴⁰

EXAMPLE 3

Parent A is a recent migrant to Australia and is the primary carer for her young son in a substantial shared-care arrangement as per the Family Court Order. Parent A was experienced family violence from her ex-husband, Parent B, which were highly controlling behaviours. Parent B financially abused Parent A by forcing Parent A to take out loans under her name for Parent B.

Post separation, Parent A was unable to afford legal advice on the property division because the parenting order costed her \$5,000. Therefore, all of their assets, worth \$1.3 million, were under Parent B’s name and Parent A was left with paying off personal loans.

¹³⁵ Kennon and Kennon (1997) FLC 92-757.

¹³⁶ I Evans, *Battle-scars: Long term effects of prior domestic violence*, Monash University: Centre for Women’s Studies and Gender Research, 2007, 18.

¹³⁷ Liesl Mitchell, *Domestic violence in Australia – An overview of the issues* (23 November 2011) Psychocare, 23 <<https://www.psychocare.org/uploads/6/0/5/7/6057461/dvaustralia.pdf>>.

¹³⁸ Ibid; and Australia’s National Research Organisation for Women’s Safety, *Violence against women: Key statistics* (2012) <<https://anrows.org.au/sites/default/files/Violence-Against-Australian-Women-Key-Statistics.pdf>>.

¹³⁹ Liesl Mitchell, *Domestic violence in Australia – An overview of the issues* (23 November 2011) Psychocare, 28 <<https://www.psychocare.org/uploads/6/0/5/7/6057461/dvaustralia.pdf>>.

¹⁴⁰ Ibid 29.

Example three is based on a true experience described by a participant in Belinda Fehlberg and Christine Millward's study.¹⁴¹ Proper protections must be enacted in the FLA to prevent this situation occurring again. As suggested under *response to question 26(b)*, we recommend that party's go through a mandatory mediation, conciliation or lawyer-assisted negotiation. This would also assist with the issue of high demand in family law courts. Australia should aim to expand the awareness of free legal services, such as legal aid, to ensure that parties are not being disadvantaged. Alternatively, we recommend any safety provisions under the FLA to ensure that each property division is just and equitable. *Please refer to response of question 19.*

Recommendation:

The presumption should not to be made, however, providing a guideline for the courts to follow would be beneficial. The law regarding property settlement is unclear as decisions about settlement is to the court's discretion. A guided approach that is much clearer would assist the legal profession to provide accurate advice on what would be the probable outcome if they went to court. Alternatively, we recommend a consideration of adopting a compulsory FDR attempt before attending Court, one similar to parenting orders.

(c) De Facto and Spouse Sections

The FLA have separated property division sections that relates to spouses or de facto couples. However, these sections are almost identical except for the terms 'spouses' or 'de facto couples' used.

Recommendation:

As there are such large similarities in both sections, it would improve the clarity and comprehensibility of the FLA to combine both sections into one.

¹⁴¹ Alan Hayes and Daryl Higgins, *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 240.

19 *What changes could be made to the provisions in the FLA governing binding financial agreement to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?*

(a) The Complexity of the Law

Courts have found that many individuals do not follow the minimum requirements for a financial agreement to be binding.¹⁴² However, laws have implemented a few exceptions as to which agreement will remain binding despite not meeting each requirement stipulated under section 90G of the FLA. Despite the FLA reforms in 2010, binding financial agreements remain complex. Campbell argued that ‘due to the uncertainties and risk of professional negligence claims, it is prudent to avoid them altogether and, where possible, obtain orders rather than use financial agreement.’¹⁴³

(b) How to Promote Fair Outcomes?

The case of *Thorne v Kennedy*¹⁴⁴ concerns a prenuptial agreement signed four days prior to the parties’ wedding.¹⁴⁵ Ms Thorne was advised by an independent solicitor advised not to sign this agreement as it was drawn to solely protect Mr Kennedy’s assets.¹⁴⁶ Mr Kennedy informed Ms Thorne that they would not marry unless she signed the contract.¹⁴⁷ Feeling obliged and given that wedding preparations were well advanced, Ms Thorne signed the contract.¹⁴⁸ The couple separated in 2011, after less than four years.¹⁴⁹ The Court overturned the primary judge’s decision for setting the aside the agreement. The Full Court found that the agreement should not have been set aside because of duress, undue influence or unconscionable conduct.¹⁵⁰

¹⁴² *Family Law Act 1975* (Cth) s 90G(1).

¹⁴³ Jacqueline Campbell, ‘More laws but less certainty in financial agreements’ (2012) 50(7) *Law Society Journal* 58, 61.

¹⁴⁴ (2017) 350 ALR 1.

¹⁴⁵ *Ibid* 6 [13].

¹⁴⁶ *Ibid* 6 [12].

¹⁴⁷ *Ibid* 23 [74].

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid* 6 [15].

¹⁵⁰ *Ibid* 3 [2].

Recommendation:

Provisions should be included to ensure that binding financial agreements follows a particular set of rules that provides sufficient time to consider the legal effect the agreement has. We also recommend that to promote fair outcomes, that each contract must ensure that the contract achieves fair outcomes otherwise, the contract would become void. For example, there must be a benefit for both parties in the financial agreement to achieve fair outcomes. Furthermore, the law should intend to implement some exceptions where financial agreements would not be found binding, without limiting equitable remedies.

III RESOLUTION AND ADJUDICATION PROCESS

23 *How can parties who have experienced family violence or abuse be better supported at court?*

24 *Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?*

(a) Imbalance of Power

There is the high chance there being an imbalance of power by the perpetrator in cases involving family violence. Mayer suggests that for ‘the purpose of understanding the dynamics of conflict, power may be defined as the ability to get one’s needs met and to further one’s goals.’¹⁵¹ The imbalance of power undermines the benefits of mediation and the outcome will be distorted.¹⁵² The risks involved for victims and perpetrators in dispute resolution settings is the chance of victims being silenced, intimidated and exposed to further violence.¹⁵³ This may lead to victims reaching an agreement that they would have otherwise have not made if it were not for the fear.

Further, many victims of family violence suffer trauma and psychological distress.¹⁵⁴ Therefore the presence of family violence has the effect of hampering the victim’s contributions in court or family dispute resolution. Research has found that participants who reported family violence ‘indicated that physical and sexual violence ceased after separation, but emotional and financial abuse often continued’.¹⁵⁵

¹⁵¹ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner’s Guide* (Jossey-Bass, 2000) 50.

¹⁵² Sarah Dobinson and Rebecca Gray, ‘A review of the literature on family dispute resolution and family violence: identifying best practice and research objectives for the next 10 years’ (2016) 30 *Australian Journal of Family Law* 180, 183.

¹⁵³ Rachel Field, ‘Mediation and the art of power (Im)Balancing’ (1996) 12 *Queensland University of Technology Law Journal* 264, 265.

¹⁵⁴ Patricia Easteal, Catherine Warden and Lisa Young, ‘The Kennon ‘factor’: Issues of indeterminacy and floodgates’ (2014) 28 *Australian Journal of Family Law* 1, 3.

¹⁵⁵ Alan Hayes and Daryl Higgins, *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 238.

Recommendation:

A McKenzie Friend approach should be promoted to assist with this situation. A McKenzie friend is a person who assists an individual that presents themselves. They sit next to the party, take notes, offer non-legal advice and prompt to ask particular questions. The assistance of a McKenzie friend can provide support to individuals especially when there is an imbalance of power. Otherwise, recommendations made under *sub-part (b)* made under this question should be considered.

(b) Structure of Dispute Resolution

Dispute resolution should not be abandoned entirely, especially in cases where there is presence of family violence. In our view, dispute resolution should not be attempted in cases where there is evidence of severe and intense family violence, deeming either party not being cooperative for whatever reason.

Recommendation:

Despite this type of violence, other violence may continue to dispute resolution if the structure was amended to support all parties involved. Examples of dispute resolution includes the following:

- adoption of shuttle mediation across Australia;
- conduct risk assessment on separate days to increase the likelihood of disclosure;
 - There are reasonable explanations on why a victim of family violence would not disclose the violence the victim experiences. Conducting risk assessments and interviewing with the victim, the likelihood that the victim would disclose any family violence related information is high.
- allowing vulnerable party to speak first in mediation; and
- taking breaks in session to reduce stress and speak privately with the victim to check whether they feel understood, respected and safe to continue.

(c) Shuttle Mediation

Shuttle mediation can be implemented in cases where agreement on ‘ground rules’ or other forms of methods are not appropriate for the matter. Shuttle mediation is a process where each party is located in separate rooms and the mediator ‘shuttles’ between each party. The mediator’s role is to convey each party’s opinions, ideas and offers.¹⁵⁶ This process is beneficial to protect parties from harm.¹⁵⁷ Shuttle mediation may be an appropriate solution as it prevents any conflict arising if the parties were directly mediating with each other. This form of mediation is already used in the ACT. The Magistrate Courts in the ACT has identified that ‘95 per cent of family violence related matters... are settled and only 5 per cent go before magistrate for hearing.’¹⁵⁸ There have been success in shuttle mediation in ACT which is beneficial for the court demand and party’s due to the low cost of mediation. Therefore, we **recommend** implementing shuttle mediation as an option within the family law system.

*** Please refer to question 26(a), 37 and 38 for more information regarding implementing shuttle mediation.*

(d) Mediator Training

The role of the mediator is vital when parties engage with FDR especially where family violence is present. As Baylis and Carroll argued, the ability for mediators to be able to employ appropriate interventions and strategies depends on their training.¹⁵⁹ Training on the identification and management of family violence will ensure that best practice and services are met.¹⁶⁰ Furthermore, if mediators were trained in understanding how to treat each matter based on the type of violence involved, will likely provide a safer and appropriate mediation.

Recommendation:

We highly recommend that mediation is to be conducted by trained mediators only. We also suggest the idea of implementing a mediation course that specialises in family law.

¹⁵⁶ Mieke Brandon, ‘Use and abuse of private session and shuttle in mediation and conciliation’ (2005) 8(3) *ADR Bulletin* 1, 4.

¹⁵⁷ Mieke Brandon and Tom Stodulka, ‘A comparative analysis of the practice of mediation and conciliation in family dispute resolution’ (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 194, 199.

¹⁵⁸ Damien Carrick, ‘Shuttle mediation for family violence cases in ACT’, *Australian Broadcasting Corporation Radio National* (online) 27 February 2018 < <http://www.abc.net.au/radionational/programs/lawreport/act-family-violence-orders/9486246>>.

¹⁵⁹ Claire Baylis and Robyn Carroll, ‘Power issues in mediation’ (2005) 7(8) *ADR Bulletin* 1, 5.

¹⁶⁰ Sian Green, ‘Effectively managing the impact of family violence on mediation in the Family Law context’ (2017) 28 *Australian Dispute Resolution Journal* 155, 159.

(e) Collaborative Resolutions

(i) Screening and Risk Assessment

The current regulation for FDR must conduct a screening and assessment to determine the suitability of FDR. Regulation 25 provides that they may make a decision after considers a list of factors, including a history of family violence, the likely safety of the parties, equality of bargaining power, risks that a child may experience, emotional, psychological or physical health of parties or any other matters the practitioner may find relevant.¹⁶¹ This assessment is conducted by an FDR Practitioner.

Screening and risk assessment are fundamentally important in assessing the serious nature of the family violence present between parties. Family violence can be complex and can incorporate diverse range of behaviours (see response to question 14). These assessments should be conducted by highly trained professionals where they can identify any safeguards to ensure the best possible environment is made for appropriate FDR. In cases where family violence is identified, Olson suggests that screeners should investigate into the perpetrator and victim's description of their relationship.¹⁶²

Recommendation:

Where family violence is not identified, we recommend that idea that speaking to the parties on multiple occasions on separate days to be considered to ensure investigation is done thoroughly. This may allow the victim to open up to the assessor if they met the assessor on more than one occasion.

¹⁶¹ *Family Law (Family Dispute Resolution Practitioners) Regulations 1984* (Cth) r 25.

¹⁶² K B Olson, 'Screening for intimate partner violence in mediation' (2013) 20 *Dispute Resolution Magazine* 25, 27.

(ii) *Lawyer-assisted Mediation*

Rhoades concluded in her research that in matters involving family violence, greater collaboration between lawyers and mediators, including presence of lawyers at mediation, is needed as it would offer benefits to the client.¹⁶³ Researchers has recommended that lawyers participation in ADR may ‘effect the parties to be ‘cooperative’ and facilitate settlement’.¹⁶⁴ Lawyers also alleviate some of the obstacles to settlements (such as emotional issues or distress), thereby encouraging clients to settle.’¹⁶⁵ If the FDR process was structured to be more formal, such as with the involvement of lawyers in mediation, the chances of imbalance of power would be reduced.

Recommendation:

As an alternative to the previous recommendations, we recommend considering a more formal approach to mediation involving domestic violence, such as lawyer-assisted mediation.

¹⁶³ H Rhoades, H Astor and A Sanson, *Enhancing Inter-professional Relationships in a Changing Family Law System: Final Report* (University of Melbourne, 2008) 50 – 53.

¹⁶⁴ Oren Gazal-Ayal and Ronen Perry, ‘Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes’ (2014) 39 *Journal of the American Bar Foundation* 791,797.

¹⁶⁵ *Ibid.*

26 *In what ways could non-adjudicative dispute processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?*

Following the 2006 amendments, the FLA entails that family dispute resolution (FDR) services must be engaged in by families in matters concerning child arrangements, prior to filing for court proceedings.¹⁶⁶ While family dispute resolution, in relation to property and financial matters is not a mandated process required to be engaged in prior to filing an application to the court,¹⁶⁷ there are obvious benefits to engaging in alternative dispute resolution services where settlements can be reached in a speedier and more cost-efficient way.¹⁶⁸ The authors make the following recommendations in regards to the possible methods of FDR in aim of achieving greater resolution of child and property related disputes in a safe, cost-efficient and timely manner.

(a) Family Dispute Resolution Pertaining to Child-Related Matters

The model proposed is the ‘Coordinated Family Dispute Resolution’, which was initially piloted throughout Australia in 2010 to 2012.¹⁶⁹ Particularly in the context of family violence, the model provides a four-phase approach to ensuring that risk-factors are identified. Through this model, clients and children are prepared for the process through the appointment of relevant support persons and legal representatives. Moreover, appropriate methods of negotiation are facilitated to reach a safe, quick and empowering resolution.¹⁷⁰ This model is further discussed below in *Questions 37 and 38*.

Alternatively, and/or in addition to this, the Victorian model of dispute resolution for family law matters is also recommended.¹⁷¹ Particularly, a child-inclusive mediation programme facilitated in Melbourne, involves separate child interviewers to interview children, whom then “shuttle” into a mediation session with parents to discuss the child’s perspectives

¹⁶⁶ *Family Law Act 1975* (Cth) s 60I.

¹⁶⁷ *Ibid*; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 and 128 (2010) 988.

¹⁶⁸ Sarah Dobinson and Rebecca Gray, ‘A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years’ (2016) 30 *Australian Journal of Family Law* 180, 181-184.

¹⁶⁹ Rachael Field, ‘A Call for a Safe Model of Family Mediation’ (2016) 28 *Bond Law Review* 83, 86.

¹⁷⁰ *Ibid* 85-87.

¹⁷¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 75.

regarding relevant family arrangements.¹⁷² From the initial intake process, parents are briefed on the importance of including a child's voice in mediation to assist parents to better understand their child's specific concerns and views pertaining to divorce and family arrangements.¹⁷³ Following on from this, children are interviewed through processes involving drawings, play and discussion, which explore and are reflective of a child's views and opinions regarding relevant family matters.¹⁷⁴ These interviewers then "shuttle" into a mediation session with parents to provide their assessment of the impact of the relevant family situation upon the child, and discuss the views, concerns and feedback provided by children.¹⁷⁵ Following the pilot of this model, a majority of participating parents indicated feeling positive and relieved that their children were able to 'off-load' their views, feelings and feedback to a person outside of the family.¹⁷⁶ Moreover, parents also reported that this model positively impacted on their ability to approach and speak with their children, as well as gain a better insight into the needs of their children.¹⁷⁷

Dispute resolution processes are cost-effective and time-conscious alternatives to engaging in court proceedings. A number of children who have engaged with this model of dispute resolution have reported 'unequivocal benefits from speaking with the child interviewer and having their ideas, worries and questions conveyed separately to their parents'.¹⁷⁸ Moreover, particularly in the context of family disputes, often involving children, the 'shuttle' model of mediation has added benefits of facilitating dispute resolution in a practicable, sensitive, empowering and safe manner for all stakeholders concerned.¹⁷⁹ It is thus proposed that this model is more widely facilitated in family law matters, in assisting children to express their particular views, as well as assist parents in gaining a better insight and understanding of their

¹⁷² Family Services Branch of the Commonwealth Attorney-General's Department, Australian Department of Social Services, *Child inclusive practice in family and child counselling and family and child mediation* (1998) <<https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/child-inclusive-practice-in-family-and-child-counselling-and-family-and-child-mediation-0?HTML>>; Nicola Taylor, 'What do we know about involving children and young people in family law decision making? A research update' (2006) 20 *Australian Journal of Family Law* 154, 156.

¹⁷³ Jennifer McIntosh, 'Child-inclusive divorce mediation: Report on a qualitative research study' (2000) 18(1) *Mediation Quarterly* 57.

¹⁷⁴ *Ibid* 58.

¹⁷⁵ *Ibid* 57-58.

¹⁷⁶ *Ibid* 61-63.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* 65.

¹⁷⁹ Queensland Law Society, *All aboard the shuttle? Pros and cons of the shuttle approach to family mediation* (November 2015) 1-2 <http://www.qls.com.au/files/0f605ca1-4335-4dc1-9d73-a54f00b37291/Proctor_2015_November_pp40-41.pdf>; Nicola Taylor, 'What do we know about involving children and young people in family law decision making? A research update' (2006) 20 *Australian Journal of Family Law* 154, 156.

children's needs. In the Victorian model, the needs expressed by parents in their separate mediation session were initially recorded on a whiteboard, remaining in clear written format throughout the session.¹⁸⁰ Furthermore, after interviewing children, child interviewers consulted with parents in order to verbally relay feedback provided by children.¹⁸¹ This feedback also included adding a third written statement, a child's expressed feedback, on the same whiteboard, which ensured that all statements remained in clear perspective and focus throughout the mediation session.¹⁸²

Recommendation:

The authors commend the coordinated Family Dispute Resolution model and propose that this process of communicating a child's views to parents be implemented.

(b) Family Dispute Resolution Pertaining to Property-Related Matters

Recommendation:

Noting the particular success and practicable benefits of the Access Resolve method, a program that is provided by Family and Relationship Services Australia in conjunction with the Federal Circuit Court,¹⁸³ it is recommended that a similar program be implemented and more widely facilitated in family law matters involving property disputes.

This model follows a lawyer-assisted conciliation approach whereby the court will refer parties and cases involving property disputes to attend a lawyer-assisted conciliation session.¹⁸⁴ Similar to processes for child-related disputes, prior to engaging in mediation, a trained intake officer may initially arrange a conference with each party to assess if there are any risk factors that may require specialist or alternative modes of dispute service (e.g. family violence issues).¹⁸⁵ Following this, parties are required to prepare, exchange and ensure that

¹⁸⁰ Jennifer McIntosh, 'Child-inclusive divorce mediation: Report on a qualitative research study' (2000) 18(1) *Mediation Quarterly* 58-59.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 75.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

all relevant information pertaining to a property dispute be sent to the conciliator seven days prior to the designated lawyer-assisted conciliation session.¹⁸⁶

Furthermore, this model permits, and actively encourages, clients to be legally represented and supported throughout the sessions.¹⁸⁷ In this regard, relevant stakeholders have reported that this allowed them to participate and contribute to sessions in a more respectful and facilitative way.¹⁸⁸ Moreover, the model also provided them with greater support during the preparation and exchange of information, and assisted them in reaching clarified details, leading to the drafting of more satisfactory agreements.¹⁸⁹ It is reported that 500 cases are dealt with through the use of this model throughout Australia each year, and settlements rates currently rest at over 70 per cent.¹⁹⁰ Therefore, it is proposed that such a model be mandated and rolled out as a national scheme within the Australian federal family law system. Given its significant success rate, mandating lawyer-assisted conciliation as a requirement prior to filing for court-proceedings undoubtedly combines the benefits of similar methods (i.e. mediation), which are cost-effective and time-efficient, with the benefit of active legal representation and support for parties involved in property-related family law disputes.¹⁹¹

(c) Self-Represented Litigants

In terms of offering expanded support for timely and cost-effective way dispute resolution to self-represented litigants, as submitted earlier, the implementation of online legal guides should be made available to self-represented litigants through the FLH.

***Please refer to Questions 3 and 4 in relation to the FLH.*

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Sarah Dobinson and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years' (2016) 30 *Australian Journal of Family Law* 180, 184.

IV CHILDREN'S EXPERIENCE AND PERSPECTIVES

34 *How can children's experiences of participation in court processes be improved?*

35 *What changes are needed to ensure children are informed about the outcome of court processes that affect them?*

36 *What mechanisms are best adapted to ensure children's views are heard in court proceedings?*

(a) Rights of the Child

Family law processes and systems necessarily invoke obligations under the *United Nations Convention on the Rights of the Child* (UNCROC).¹⁹² Australia is presently a party to this convention, having ratified and therefore has agreed to implement the rights contained through legislative, administrative and other necessary measures.¹⁹³ Where the court's approach to family law matters under the FLA is to always consider the best interests of the child to be paramount,¹⁹⁴ the FLA is in furtherance of the rights that are to be afforded to children as expressed under the UNCROC. What is of particular importance is the UNCROC's ambit to: include rights pertaining to a child's right; to participate in any judicial or administrative process that may affect him/her directly or indirectly;¹⁹⁵ to express their views freely in all these matters;¹⁹⁶ to make his/her view known in these proceedings;¹⁹⁷ and, to have access to information.¹⁹⁸ Australia's fulfilment of these obligations can be improved through the implementation of processes and mechanisms that may enhance a child's participation within family court processes. Specifically, as the authors will put forward, implementing a collaborative model of FDR, systems of oversight and promoting greater facilitation of judicial interviewing, may improve a child's experience in family law matters.

¹⁹² *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁹³ Michelle Fernando, 'Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada' (2014) 52 *Family Court Review* 46, 47.

¹⁹⁴ *Family Law Act 1975* (Cth) s 60CA.

¹⁹⁵ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

¹⁹⁶ *Ibid* art 12-13.

¹⁹⁷ *Ibid* art 9.

¹⁹⁸ *Ibid* art 17.

(b) Independent Children's Lawyers

One of the most common methods which the court uses to hear the experiences and perspectives of a child involved in family law matters is through the evidence presented by Independent Children's Lawyers (ICL)¹⁹⁹. ICLs are legal representatives which are not appointed as a child's actual lawyer and as such,²⁰⁰ they will act in accordance with their own independent assessment of what constitutes as the best interests of the child in a given matter.²⁰¹ ICLs are obligated to ensure that a child's views are expressed however, if these views do not accord with an ICLs view of what constitutes as the child's best interests, an ICL will advocate against these expressed views.²⁰² Given this, evidence indicates that children are often left frustrated and disappointed with an ICLs failure to express their experiences and views in some situations where an ICL has deemed it to be contrary to the best interests of the child.²⁰³ In a recent study conducted by the Australian Institute of Family Studies, a majority of young persons and children expressed the need for greater interaction by appointed ICLs, particularly for the purpose of explaining how their views are communicated to the court, and what outcomes are achieved.²⁰⁴ A proposal made to the Standing Committee on Social Policy and Legal Affairs advocated for the implementation of a model combining legal representation of children with a clinical approach.²⁰⁵

Canada piloted such a model, through the Speaking for Themselves project, which involved partnerships between counsellors and legal advocates for young persons in family matters (particularly high conflict matters involving family violence).²⁰⁶ The role of counsellors in the project required them to interact with children, assisting them to explore their feelings, and develop coping mechanisms for dealing with family conflicts and traumas.²⁰⁷ Counsellors would provide a clinical assessment to decision-makers in family matters, reflecting the

¹⁹⁹ *Family Law Act 1975* (Cth) s 68L-68LA.

²⁰⁰ *Ibid* s 68LA(4)(a)

²⁰¹ *Ibid* s 68LA(2)(a)-(b).

²⁰² Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 39.

²⁰³ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) [13.55]; Justice Diana Bryant, 'The role of the Family Court in promoting child-centred practice (2006) 20 *Australian Journal of Family Law* 127, 137-138; Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 39.

²⁰⁴ Rae Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, Australian Institute of Family Studies, 2013) 49.

²⁰⁵ ACT Human Rights Commission, Submission No 33 to Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into a better family law system to support and protect those affected by family violence*, 3 May 2017, 7-8.

²⁰⁶ Sarah Fotheringham, Jean Dunbar and Dale Hensley, 'Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence' (2013) 28 *Journal of Family Violence* 311, 314.

²⁰⁷ *Ibid* 315.

child's views, as well as recommendations of appropriate arrangements reflective of what may be a child's best interests.²⁰⁸ Similarly, while also ensuring the emotional, physical and psychological well-being of a child, the role of lawyers in the project was to advocate a child's rights, needs, interests and views and ensure these were reflected in family outcomes.²⁰⁹ Lawyers were able to take one of two approaches in regards to their involvement in the model. First, a lawyer could act as a child's legal representative, owing duties of competency, loyalty and confidentiality to their child clients.²¹⁰ Importantly, this would entail that, unlike Australia's approach pertaining to ICLs, lawyers would not be acting independent of the child; rather, they would be actively advocating for the rights, interests and views of the child.²¹¹ The other approach permitted lawyers to act as *amicus curiae* ('friend of the court'), acting as the representative of the court (and independent of the child), with the responsibility to assist the court in hearing the child's views.²¹²

Recommendation:

This collaborate model should be implemented in Australia, with amendments in respect to the role assumed by lawyers. The authors propose that lawyers should act as representatives of the child, in ensuring that a child does not become the mouthpiece of a professional's independent assessments, or the exclusive views of their parents.

The project resulted in positive outcomes. Out of a sample of 41 family participants, 37 cases involving parenting issues were resolved or litigation was terminated following provision of the counsellor's assessments.²¹³ Evaluations also indicated that a child's best interests and personal views were communicated to the decision-makers in 97.5 per cent of the cases.²¹⁴ Children were interviewed regarding their experiences of the partnership between counsellors and lawyers with significantly positive outcomes.²¹⁵ Children expressed satisfaction with the fact that lawyers were actively listening, voicing their views and advocating for their

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid 318.

²¹⁴ Dale Hensley and Jean Dunbar, 'Towards Best Practice in Balancing Children's Rights & Best Interests in High-Conflict Families and Lessons Learned from the Speaking for Themselves Pilot Project' in Sanjeev Anand (ed), *Paradoxes of Children's Rights: Essays in Honour of Professor Nicholas Bala* (Irwin Law, 2011) 9-10.

²¹⁵ Sarah Fotheringham, Jean Dunbar and Dale Hensley, 'Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence' (2013) 28 *Journal of Family Violence* 311, 319.

interests, independent of their parents who were often ‘too caught up’ in their own battles to listen to their children.²¹⁶ Moreover, children provided positive reviews with the role of counsellors, who assisted them to not only express their views and concerns, but develop efficient strategies to cope throughout family disputes.²¹⁷

(c) Family Reports

Expert Family Reports are another means that permit children’s views to be heard.²¹⁸ A court will often appoint a family consultant to meet with children and parents, observe family interactions and dynamics, and prepare a comprehensive report with recommendations to the court on arrangements they believe will represent the best interests of a child.²¹⁹ While family consultants, in meeting with children, will ascertain their views to be included in the report, children have reported feeling dissatisfied and frustrated with the outcome of these reports.²²⁰ Specifically, they report feeling that their views have been filtered or reinterpreted, generalised, or not taken seriously by report writers.²²¹ Evidence suggests that a main cause for this dissatisfaction pertains to the way in which situations are dealt with by adults and professionals, in their lack of interaction and inclusion of children.²²² Therefore, it is vital to ensure that relevant professionals and adult stakeholders act ‘with children rather than on or about them and, in the process, to give their views legitimacy’.²²³ Where research indicates that the relationship between children and professionals are critical, it is vital to ensure that family law professionals and adults do not treat children as ‘blanket formulations’ or ‘assume a commonality of children’s experiences’.²²⁴

The authors propose a system of oversight that monitors the performance of these professionals in preparing reports to the court incorporating views of children. The Office of the Children’s Lawyer (OCL), a publicly funded office in Canada representing the legal

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ *Family Law Act 1975* (Cth) s 62G(3A)(a)-(b).

²¹⁹ Michelle Fernando, ‘Hearing Children in Family Law Proceedings’ (2014) 124 *Precedent* 38, 39.

²²⁰ Ibid.

²²¹ Ibid.

²²² Nicola Taylor, ‘What do we know about involving children and young people in family law decision making? A research update’ (2006) 20 *Australian Journal of Family Law* 154, 162-163; Justice Diana Bryant, ‘The role of the Family Court in promoting child-centred practice (2006) 20 *Australian Journal of Family Law* 127, 134-135.

²²³ Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood: Families and divorce* (Polity Press, 2001) 14; Nicola Taylor, ‘What do we know about involving children and young people in family law decision making? A research update’ (2006) 20 *Australian Journal of Family Law* 154, 159.

²²⁴ Nicola Taylor, ‘What do we know about involving children and young people in family law decision making? A research update’ (2006) 20 *Australian Journal of Family Law* 154, 161.

interests of children, provides such a system.²²⁵ The OCL in Ontario has a panel of twelve in-house lawyers, whom act as regional supervisors responsible for overseeing the work undertaken by child representatives.²²⁶ A six-month review cycle is followed.²²⁷ In addition to requiring child representatives to submit of a brief evaluation of an individual case, a supervisor will assess and evaluate the representative in regards to, for example:

- how many meetings with the child were conducted;
- whether the position/views assumed by the representative can be considered appropriate in regards to the case;
- whether the representative has gathered enough sufficient information from the child and collateral sources effectively inform the position/view taken; and
- whether ongoing involvement was required by the representative in the case.²²⁸

Importantly, such a system of monitoring ensures that the work produced by representatives are reviewed, greater ensuring that the quality of the undertaken work is reflective of information drawn from children, as well as supporting collateral sources.²²⁹

Recommendation:

The authors propose that this model of monitoring should be implemented in Australia, and extended to include the overseeing of reports being produced by expert report writers. This will permit supervisors to review and provide feedback to professionals, on how approaches to representing children, or preparing reports, can be improved to ensure the views of children are effectively and organically communicated to decision-makers.

²²⁵ Michelle Fernando, 'Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand and Canada' (2014) 52 *Family Court Review* 46, 52.

²²⁶ Kylie Beckhouse, 'To Investigate Legal Representation Schemes for Children in the US, Canada and the UK – Administration, Delivery and Innovation' (Churchill Foundation, 2015) 54.

²²⁷ Ibid.

²²⁸ Ibid 54-55.

²²⁹ Ibid.

*(d) Judicial Interviews***Recommendation:**

A child's views may also be heard by way of direct meetings with judicial officers of the courts.²³⁰ The authors propose that this method should be more widely facilitated by judicial officers throughout Australia.

The authors further propose that this method be extended to permit children to write directly to judicial officers, in addition, or as an alternative, to judicial interviewing.

Through this particular method, children are more directly involved in court proceedings and communicate their experiences and views to the court through meetings with judicial officers.²³¹ However, as research indicates, judicial meetings with children in relevant proceedings occurs very infrequently in Australia.²³² In a 2014 study, 86.4 per cent of the respondent judicial officers interviewed, indicated that they had never communicated with a child, by way of an interview, for the purpose of directly hearing a child's views regarding family law proceedings.²³³ This is in stark contrast to other jurisdictions such as Germany, where judicial interviews are commonplace,²³⁴ as well as New Zealand, where a 2009 survey indicated that 65 per cent of respondent judicial officers often, or always, elected to interview children in parenting disputes.²³⁵ While it may be argued that children may be intimidated by the prospect of being interviewed by too many adult professionals, studies strongly suggest that children are in favour of having the opportunity to speak directly with judicial officers.²³⁶ Specifically, studies have indicated that these interviews present children with a greater opportunity to have their views directly heard by the decision-makers in relevant proceedings.²³⁷ While Australian judges have been reluctant to meet with children due to legitimate concerns that they may not retain the appropriate skills and training to properly

²³⁰ *Family Law Rules 2004* (Cth) r 15.03.

²³¹ *Ibid.*

²³² Michelle Fernando, 'Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand and Canada' (2014) 52 *Family Court Review* 46, 49.

²³³ Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 40.

²³⁴ Justice Diana Bryant, 'The role of the Family Court in promoting child-centred practice (2006) 20 *Australian Journal of Family Law* 127, 134.

²³⁵ Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 40.

²³⁶ Patrick Parkinson, Judy Cashmore and Judi Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84, 89; Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 40.

²³⁷ *Ibid.*

communicate and interpret the views of interviewed children, many have also recognised the undeniable benefits to directly hearing a child's views.²³⁸ Such benefits include that there is no filtering from third parties and moreover, directly seeing and hearing a child may assist a judge in focusing on a child's particular needs and best interests.²³⁹

Recommendation:

Where courts already offer regular training to judicial officers, it is proposed that such training be extended to include components that better assist judges in interviewing children effectively and holistically to elicit and interpret views communicated by children.²⁴⁰

It is further proposed that children may also be provided with the opportunity to submit letters to the court.

Scotland follows such processes that allows children to submit F9 Forms expressing their views, directly to decision-makers, as well as write letters addressed to the court.²⁴¹ This is an appropriate alternative for situations where a child may be too young, or too intimidated with the prospect of engaging in direct interviews with a judicial officer. This model is also supportive of research indicating that children wish to engage in 'assymetrical reciprocity', whereby they expect their views, experiences, and opinions to be received by decision-makers but that adults are to take responsibility in reaching decisions.²⁴²

²³⁸ Michelle Fernando, 'Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand and Canada' (2014) 52 *Family Court Review* 46, 49; *ZN v YH and the Child Representative* (2002) FLC 93-101, [109].

²³⁹ Michelle Fernando, 'Hearing Children in Family Law Proceedings' (2014) 124 *Precedent* 38, 40.

²⁴⁰ *ZN v YH and the Child Representative* (2002) FLC 93-101, [109]; Justice Diana Bryant, 'The role of the Family Court in promoting child-centred practice (2006) 20 *Australian Journal of Family Law* 127, 134.

²⁴¹ Kirsteen Mackay, 'The Treatment of the Views of Children in Private Law Children Contact Disputes Where there is a History of Domestic Abuse' (Scotland's Commissioner for Children & Young People, 2013) 10-11.

²⁴² Nicola Taylor, 'What do we know about involving children and young people in family law decision making? A research update' (2006) 20 *Australian Journal of Family Law* 154, 159.

37 *How can children be supported to participate in family dispute resolution processes?*

38 *Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?*

(a) Dispute resolution process

Particular issues in regard to including children in family law decision-making and dispute resolutions arise in situations of domestic and family violence. Post-2006 amendments to the FLA requires that parties engage in family dispute services before proceeding to court.²⁴³ However, the FLA provides an exception to families engaging in family dispute services where there are reasonable grounds to suspect child abuse or instances of family violence.²⁴⁴ Despite this, evidence suggests that parties engaging in dispute resolution have, or are experiencing violence within their relationships,²⁴⁵ which poses concerns to safety to child participants in these situations. Where family violence is characterised by instances of control and coercion, contemporary traditional models of mediation may not be workable, fair or safe for victims and their children.²⁴⁶ Mediation requires parties who are on equal footing, to negotiate, a history, or presence of family violence is a significant indicator of power imbalance.²⁴⁷ There is an existing tension where, on the one hand, parties wish to engage in FDR as it is a faster and less daunting alternative to court proceedings; and on the other hand, parties also wish to avoid exposing children to risk.²⁴⁸

²⁴³ *Family Law Act 1975* (Cth) s 60I.

²⁴⁴ *Ibid* s 60I(8)(d), s 60I(9)b).

²⁴⁵ Sarah Dobinson and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years' (2016) 30 *Australian Journal of Family Law* 180, 180-181; Dale Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49, 54.

²⁴⁶ Sarah Dobinson and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years' (2016) 30 *Australian Journal of Family Law* 180, 183-184.

²⁴⁷ *Ibid* 181.

²⁴⁸ *Ibid* 182.

Recommendation:

A specific model of mediation to be implemented which combines the widely recognised benefits of FDR – its cost effectiveness, flexibility, quicker resolution rates, less adversarial and empowering structure – with a more holistic and safer model for victims and their children.²⁴⁹

The Coordinated Family Dispute Resolution model (CFDR) should be incorporated and rolled out nationally, as the preferred alternate method of mediation to be used in situations involving family and domestic violence. The model was piloted in 2010 to 2012 throughout Australia,²⁵⁰ however it is proposed that it should be reintroduced as an important measure to support children during FDR processes, by ensuring the appropriate screening of family violence instances in FDR, which may then be addressed using an appropriate model of mediation that ensures safety of child participants while also providing them with a voice.²⁵¹

The model provides four main stages and requires that a specialist children's practitioner be involved throughout the process. Initially, a CFDR mediator will conduct the intake of parties and refer matters for specialist domestic and family violence assessment.²⁵² Importantly, this initial stage of the CFDR model requires that any instance of family or domestic violence be explicitly acknowledged by parties, which is a progressive step to ensuring that the appropriate training and approaches can be taken by professionals involved in these matters.²⁵³ The next stage of the model provides parties with legal advice, communication, and mediation workshop sessions with the aim of more effectively preparing them for the following mediation phase of the model.²⁵⁴ The third stage thus involves the participation of parties in the CFDR mediation session.²⁵⁵ Through an assessment of the individual needs of the parties and children involved, legal representatives for the parties, along with other support specialists (such as, family violence specialists, social workers, child counsellors, and

²⁴⁹ Sarah Dobinson and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years' (2016) 30 *Australian Journal of Family Law* 180, 183-184; Rachael Field, 'A Call for a Safe Model of Family Mediation' (2016) 28 *Bond Law Review* 83, 87-88.

²⁵⁰ Rachael Field, 'A Call for a Safe Model of Family Mediation' (2016) 28 *Bond Law Review* 83, 86.

²⁵¹ *Ibid* 88.

²⁵² *Ibid* 86.

²⁵³ *Ibid*.

²⁵⁴ *Ibid* 87.

²⁵⁵ *Ibid*.

psychologists) may be arranged to be present during the mediation to assist in facilitating a safe and power-balanced mediation session.

Even outside of this particular model, there are benefits of engaging in collaborative work with lawyers in FDR processes.²⁵⁶ Specifically, lawyers can equalise power imbalances in mediation sessions by more effectively explaining to victims, their legal responsibilities and rights.²⁵⁷ Drawing on earlier recommendations explored in ‘*Questions 23 and 24*’, a lawyer may also be able to assist parents in identifying and discussing their best interests, which are necessary considerations in determining practicable and safe arrangements for their children. Recognising the success of the shuttle mediation model used in Victoria, the CFDR model incorporates shuttle mediation as an available method by which CFDR could, and the authors propose should, be conducted.²⁵⁸ Where evidence suggests that a child holds strong views in regards to their needs and views regarding post-separation care, the CFDR model is an appropriate and empowering model which can provide specialist support and counselling to children in situations of family violence.²⁵⁹

Moreover, this is in line with child-inclusive approaches whereby, the shuttle method can be a progressive step to facilitating a safe environment, specialist support and opportunity for children express their views to a child consultant. **It is recommended** that these expressed views and experiences be conveyed to adult parties, who receive further assistance and support in focusing on their children’s needs throughout the CFDR mediation attendance stage. CFDR is a model that aims to provide safe, holistic, empowering and practicable resolutions for all parties on a long-term basis. With the consent of parties, the model also offers follow-up sessions at the one to three months mark, and again at nine to ten months. The purpose of this is to assess whether there are any further risks, address any safety concerns, and to discuss any ongoing needs or support services for the parties and their children.²⁶⁰

²⁵⁶ Sarah Dobinson and Rebecca Gray, ‘A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years’ (2016) 30 *Australian Journal of Family Law* 180, 185.

²⁵⁷ Ibid.

²⁵⁸ Rachael Field, ‘A Call for a Safe Model of Family Mediation’ (2016) 28 *Bond Law Review* 83, 87.

²⁵⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 141; Justice Diana Bryant, ‘The role of the Family Court in promoting child-centred practice (2006) 20 *Australian Journal of Family Law* 127, 137-138; Nicola Taylor, ‘What do we know about involving children and young people in family law decision making? A research update’ (2006) 20 *Australian Journal of Family Law* 154, 156; Judy Cashmore and Andrew O’Brien, ‘Facilitating Participation of Children and Young People in Care’ (2001) 26(4) *Children Australia* 10, 10-15.

²⁶⁰ Rachael Field, ‘A Call for a Safe Model of Family Mediation’ (2016) 28 *Bond Law Review* 83, 87-88.

(b) Decision-making process

Discussion surrounding safe child participation, and how risks can be managed in legal proceedings has also been a topic of contemporary policy debate throughout Australian jurisdictions in recent years.²⁶¹

The Family Law Council, in a recent report, commended the section 11F assessments mechanism that is currently provided under the FLA.²⁶² The provision permits judicial officers to order parties and their child/children to attend a conference with a court-based family consultant.²⁶³ Stated in its 2014-2015 annual report, the Federal Circuit Court provides that appointments with family consultants, in matters involving children, are aimed to:

- identify relevant risk factors, which may relate to risks posed by: mental health factors, presence of family violence or abuse, and alcohol /substance abuse;
- identify the relevant issues that are in dispute;
- identify the potential or likelihood for negotiation or resolution; and
- identify options pertaining to case management and referrals, which could potentially advance the matter.²⁶⁴

Similarly, as with dispute processes, the section 11F mechanism aims to identify risk factors at an earlier stage, whereby a consultant may be able to assist parties in reaching an appropriate agreement, or make appropriate referrals to services offering support. Through the conduction of Child Dispute and Child Inclusive conferences, a consultant is able to bring a child's views, experiences, wishes and feelings into greater focus, and to particularly assist parents in becoming aware of, and focusing upon the impact this dispute is having on their children.²⁶⁵ Upon conclusion of these sessions, a consultant is required to prepare a memorandum advising the court of the status of the dispute and to make appropriate recommendations regarding the process and management of the matter through court proceedings where parties have been unable to resolve disputes.²⁶⁶ Already posited in other submissions, increased funding and resourcing for the increased facilitation of the section

²⁶¹ Cathy Humphreys and Caroline Bradbury-Jones, 'Domestic Abuse and Safeguarding Children: Focus, Response and Intervention (2015) 24(4) *Child Abuse Review* 231, 231-232.

²⁶² Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 36.

²⁶³ *Family Law Act 1975* (Cth) s 11F.

²⁶⁴ Federal Circuit of Australia, *Annual Report 14/15* (2015), 76.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

11F mechanism is proposed where evidence suggests that under-resourcing has prevented its greater use.²⁶⁷ Through early risk screening of family law matters by professionals, it will ensure the greater protection of parties and their children, whereby appropriate processes and support services can be recommended to ensure that children are still able to safely participate in legal proceedings.²⁶⁸

Another option to identifying and addressing risks consistently during early family law proceedings, as already recommended earlier in ‘Question 23 and 24’, is to ensure that highly trained FDR practitioners consistently conduct screening and risk assessments of dispute parties.²⁶⁹

Recommendation:

As recommended, methods such as speaking to the parties separately over a period of days can be implemented where it may enable victims to more readily make disclosures to a risk screener.

Moreover, as also further recommended, these highly skilled screeners should also endeavour to investigate the particular dynamics of the relationship between a perpetrator’s and victim’s relationship description.²⁷⁰

In furtherance of this recommendation, a model similar to the Children and Family Court Advisory and Support Service (CAFCASS) can be implemented into Australia. CAFCASS is a non-government organisation currently operating in England and Wales,²⁷¹ and has statutory powers and responsibilities to safeguard children in situations where parenting applications have been filed under the *Children Act 1989*.²⁷² These applications, with the

²⁶⁷ Victoria Legal Aid, Submission to Family Law Council, *Inquiry into Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, October 2015, 16; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 37.

²⁶⁸ Sarah Dobinson and Rebecca Gray, ‘A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years’ (2016) 30 *Australian Journal of Family Law* 180, 183-184.

²⁶⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 37.

²⁷⁰ K B Olson, ‘Screening for intimate partner violence in mediation’ (2013) 20 *Dispute Resolution Magazine* 25, 27.

²⁷¹ *Criminal Justice and Court Services Act 2000* (UK) s 12; see also, Cafcass, *About Cafcass* (2017) <<https://www.cafcass.gov.uk/about-cafcass/>>.

²⁷² *Children Act 1989* (UK) s 16A.

relevant accompanying forms, will also be submitted to an independent CAFCASS unit,²⁷³ permitting CAFCASS to conduct specialist screening of matters to identify risks (which includes cross-checking police and child protection reports, criminal convictions, etc.). This will assist the CAFCASS officer in providing the appropriate advice and support to the court, practitioners and clients as to how family safety should best be ensured.²⁷⁴ The Family Court, Western Australia, has taken a similar approach to CAFCASS, whereby family consultants are appointed to matters that involve children,²⁷⁵ and have the ability to screen, and report risks, to the court regarding a family matter by liaising with police and child protection departments in regards to a family's involvement with these processes.²⁷⁶

Recommendation:

It is proposed that an independent CAFCASS model also be adapted and facilitated throughout Australia, whereby risks to families would be more adequately addressed through early identification. This model would also ensure that legal professionals and the courts are notified of such risk factors, and expert advice and support could be offered to these professionals regarding safety planning and how matters should proceed through the courts.²⁷⁷

²⁷³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 37.

²⁷⁴ Ibid.

²⁷⁵ Ibid 36.

²⁷⁶ Rae Kaspiew et al, *Court Outcomes Project – Evaluation of the 2012 Family Violence Amendments* (Australian Institute of Family Studies, 2015) 26.

²⁷⁷ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 37.

39 *What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?*

Furthermore, it is recognised that cultural, community life, and experiences with the family law system, may differ for children within AATSI communities, compared to children under western culture. A recent study posed a question to AATSI participants regarding whether they believed their cultural needs were properly considered: by the court, during proceedings; report writers, in writing Family Reports; and, by Independent Children’s Lawyers.²⁷⁸ The responses were, in each case, that AATSI participants indicated that they felt these needs were not being adequately met.²⁷⁹ Commonly raised reasons for this dissatisfaction by AATSI participants pertained to the lack sensitivity, understanding and adequate assessment of cultural issues by professionals.²⁸⁰ Additionally to the proposed FLH, and as will be discussed, the authors recommend that the CFR model for FDR processes involve culturally and linguistically diverse child participants. Moreover, it is proposed that preparation of cultural reports, for inclusion in family law reports, should be a mandated process.

Recommendation:

As recommended earlier in ‘Access and Engagement’, we propose that a family law handbook would be a practicable tool that could assist families, and their children, in accessing culturally and linguistically sensitive family law support services.

***Please refer to the responses provided for Questions 3 through to 9 for discussion regarding the family law handbook model.*

In furtherance of the family law handbook, we recommend the CFR model for FDR processes involving culturally and linguistically diverse child participants. Moreover, we propose that preparation of cultural reports, for inclusion in family law reports, should be a mandated process.

²⁷⁸ Stephen Ralph and Leisha Lister, ‘Indigenous Australians & Family Law Litigation: Indigenous Perspectives on Access to Justice’ (Research Report, Federal Circuit Court of Australia, 2011) 25-27.

²⁷⁹ Ibid.

²⁸⁰ Ibid 47-49.

(a) Family Dispute Resolution Processes

Discussed in *Questions 37 and 38* (please refer to this section for discussion of this model), we commend the CFDR as a safe and interest-balanced mode of mediation. Results from a recent study indicated that AATSI participants were less likely to attend dispute resolution services at Family Relationship Centres than non-Indigenous participants.²⁸¹ From that same study, family violence was found as being one of the most important issues in family disputes for Indigenous participants.²⁸² Already noted, the CFDR model can provide specific legal and support services (i.e. lawyers, child counsellors, psychologists, etc.) to offer support during mediation sessions. Therefore, the authors recommend that this model can be expanded to include culturally and linguistically specialised support workers (e.g. AATSI family workers, interpreters, etc.) whom can be present to assist and communicate, through written and verbal feedback, the particularly unique needs of children throughout family disputes. It is proposed that these professionals should possess requisite training and qualifications in communicating with children, so as to ensure that a child's views are efficiently explored and articulated. A process of appointment that could be implemented is to require that, along with requisite training, that these specialists are also approved by the family court. This is in view of ensuring that the most specialised professionals, with means of developed communicative and cultural understanding, are appointed to effectively assess and communicate the unique needs of diverse children.

Recommendation:

We recommend that this model can be expanded to include culturally and linguistically specialised support workers (e.g. AATSI family workers, interpreters, etc.) whom can be present to assist and communicate, through written and verbal feedback, the particularly unique needs of children throughout family disputes.

²⁸¹ Ibid 18.

²⁸² Ibid 19.

(b) Cultural Reports

A 2015 report noted the fact that there is a lack of any contemporary requirement for cultural plans to be prepared in relation to AATSI children in family law matters.²⁸³ We recommend that cultural reports should be a mandated process to be conducted and included in family reports. This recommendation aims to ensure the greater understanding and articulation of the unique and specific cultural needs of AATSI children. Recently, organisations such as, Aqua Dreaming and National Aboriginal & Torres Strait Islander Legal Services (NATSILS) recommended that such cultural reports should involve a consultation phase with Elders and Grandmothers of these communities.²⁸⁴ We support and recommend implementation of this measure in view of ensuring that unique cultural needs and experiences of children from AATSI communities are adequately articulated in family reports, so that appropriately informed arrangements may be reached by the courts.

Recommendation:

We support and recommend implementation of this measure in view of ensuring that unique cultural needs and experiences of children from AATSI communities are adequately articulated in family reports, so that appropriately informed arrangements may be reached by the courts.

²⁸³ Family Law Council, *Interim Report to the Attorney-General in response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) 35.

²⁸⁴ *Ibid* 148.

(c) Advisory Panels

We commend and propose the establishment of regional conferences and advisory boards, in view of ensuring the ongoing identification of culturally sensitive and safe methods of participation for AATSI and diverse communities.²⁸⁵ Representatives, children and general members of these communities will be able to offer valuable insight and recommendations for the ongoing development of culturally and linguistically sensitive, methods for family law arrangements and resolution.²⁸⁶

Recommendation:

We recommend the establishment of regional conferences and advisory boards to be implemented into the Australian family law system.

²⁸⁵ Ibid 149.

²⁸⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (2016) 152-153.