

P Easteal

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This submission is from an individual

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Question 1

To ensure the safety of children and their parents from violence making the transition from 'intact' family to post separation family as easy, affordable and safe as possible To meet the variety of communication and value systems within a heterogeneous society

Question 2

Best interests of the child (as always) are paramount. Safety is the over-riding principle One size fits all NOT a principle. Recognition that diversity in the population needs to be translated into procedural diversity Also from Conclusion Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' (in press International Journal of Law, Policy and the Family) While it is not beyond the judiciary to develop sophisticated legal tests, such decision-making does not take place in a vacuum; it certainly does not take place in a space of gender equality. The gender inequalities we have identified as operating when property intersects with violence in the family law system are a reflection of the same societal imbalances between men and women seen more broadly in society. As long as such imbalances exist in society, they will inevitably be mirrored in the legal system (Tolmie et al., 2010: 302). The reality then is that men and women are on unequal ground by the time they enter the family law system as exemplified by women's relative impoverishment following a relationship breakup. For that reason and numerous others already discussed, many women are keen to settle family law disputes, which makes the ground even less level yet. Settlement may be further skewed by women's problematic negotiation of a male dominated legal system. When family violence victimization is added to the equation, these inequities are magnified and likely worsened at key points in the family law processes (Daw, 1995). As it is axiomatic that male dominated legal processes and substantive law favour those with resources and those who can best play its 'games,' women, particularly victims of violence, are less able to either harness or 'work' the legal system. This was illustrated above as we have shown how women's (relative) inability to afford legal representation coupled with vexatious litigation may affect how they fare in hearings. And we have also seen how the relationship between gender, communication, violence and power contribute to an uneven playing field in alternative forms of dispute resolution. So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims

Question 3

n/a - have not published in this area -however as the following questions indicate, there are groups in Australia who have less access to information (and to justice).

Question 4

Am an advocate for collaborative practice Patricia Easteal Jessica Herbert and Jessica Kennedy (2015) Collaborative Practice in Family Law Matters with Coercive Control-type Violence: Preliminary Thoughts from the Practitioner Coalface. *Family Law Review* 5 (1): 13–33. How CP Might Prove Beneficial (in Theory) with Coercive Control? Having looked at how CP works and at obstacles that victims of intimate terrorism may encounter with mediation and litigation, we are interested in identifying reasons why CP might be an effective pathway. Although this question was not asked in the survey, the thematic analysis identified clusters of quotes, which are indicative of what the respondents believe to be potential pluses of CP. Being Able to ‘Morph’ the Process Screening for victims’ fears and perceptions is useful since it can assist the lawyer to understand how the Collaborative process may need to be run; that is, in a way to better enable clients’ effective participation. For example, a multi-disciplinary approach may be used if clients have emotional, communication, or relationship issues that could affect their ability to participate in the Collaborative process. Additionally, if parties need assistance in the process, practitioners can advise them of settlements that utilise professionals, neutral evaluations or non-binding recommendations. One lawyer noted that, ‘Even then [with a history of coercive control], a mental health professional supporting the client may be a realistic option...’ In fact, several respondents agreed with that last comment and the use of a ‘relevantly qualified personal coach’. Thus, after assessing ‘whether the history prevented some equality of bargaining power’ another practitioner looked to see if ‘the assistance from others such as a lawyer or other personal counseling assistance’ could mitigate unfavorable power imbalances. Morphing into multidisciplinary CP is fluid: For instance, the victim might already be seeing a psychologist or counselor or it might be decided during the collaboration that one or both of the parties need some support or assistance to assist our negotiations, and so we might send them off to see someone and that person may or may not be involved in the future of the collaboration. They can operate either within or outside of the process. In addition, lawyers are able to utilise a variety of methods and tools to manage conflicts in CP if violence is significantly affecting negotiations. For instance, one lawyer had used a technique similar to shuttle mediation, where parties were kept separate from each other while their lawyers negotiated on their behalf, but still based on the parties’ interests and without the threat of Court overshadowing the negotiations. Another suggested that ‘forms of “shuttle diplomacy” or [a process whereby] the interaction between the parties [is] highly limited and controlled are possible’. Having a Voice CP may work to empower and validate victims’ experiences in divorce and may give them ‘a voice’. One respondent put it this way: [CP] encourages both parties to deal with the issue of violence and not just ignore it... And, the victim is able to express his/her hopes, goals and fears knowing that the perpetrator will hear them and be encouraged to respond productively by addressing any issues he/she might have. Accordingly, another lawyer described a case where the wife alleged that the husband had always been financially controlling and demeaning of her, and the wife felt ‘empowered by having a voice and being able to “stand up to him” with the protection of the Collaborative framework. Both solicitors work[ed] to ensure that the husband [was] reminded when he [was] acting in this way.’ There was recognition, though, that with cases of coercive control it is important for the victim to become empowered and not have lawyers’ voices dominate: It is particularly important for the lawyers involved not to perpetuate an attitude of coercion or control, which can sometimes happen in a paternalistic way (“I’ll take care of it.” “We [being the lawyers involved] have sorted it out.”) Ideally the goal is for full and informed participation by the client, particularly in financial decision-making. Balancing the Power The CP process aims to address differences in bargaining power. ... the collaborative process itself is inherently designed to take power away from the more dominant of the two parties to enhance the power of the person with less power. This is done with the instruction of the

clients. A negotiation may never be equal, but it will be as close to equal as one can hope to get. As advocates, lawyers may be able to compensate for a client's difficulty in participating in the process. For example, they may assist clients to understand their short and long term goals and interests, whilst offering the necessary support and leadership to enable clients to resolve their dispute. Participants also benefit from the assistance and support they receive during the negotiations when the agreement is being formed. This corresponds with overseas findings: ...input of...legal advice and advocacy is essential for the fair and equitable resolution of many disputes...some family law clients need advocates in order to ensure they are fairly treated by their spouses...to remind them of their legal responsibilities towards their families... One participant indicated that 'power imbalances can be managed much more effectively in a Collaborative context than in [other] contexts'. Another agreed. Collaborative lawyers can encourage and promote greater autonomy: ...in a collaboration...we can bring in the support people that the victim and the perpetrator need. We can understand the nuances of their relationship and manage that. We can help the victim to advocate for themselves and have autonomy. We can manage the process in a way that protects them. The presence of two lawyers can ameliorate the problems discussed earlier that mediators may encounter: It is superior to mediation because, in Collaboration, both parties have a lawyer to support them in their negotiations and it is the role of both lawyers to ensure that the negotiations take place on a level playing field. CP may allow lawyers to work closely with one another and with their client in these cases to manage any power imbalance: ...to make the negotiation a success (an implied agreement of Collaboration), the party who has asserted their power will be expected to reduce it and the interplay between counsel should reduce the power imbalances significantly. The presence of lawyers (particularly if they speak respectfully to one another) and in a neutral space can mean that the aggressor holds themselves in check. We [bring] the parties' focus back to the outcome they both want. We don't allow them a forum to vent on past hurts. Additionally, with CP, lawyers may be able to pre-empt power plays such as threats or subtle behavior that could be a danger signal to the victim, but that would not otherwise be obvious to mediators or judicial officers who haven't been thoroughly briefed by the client. One client chose CP for that reason as 'he wanted to have a forum where the wife [the perpetrator of violence] was not made to feel more adversarial than she already was'. And, if one adheres to the adage that knowledge is power... It is common in our experience for women (including educated, middle class women), to have little knowledge about the financial affairs of the relationship. This situation can be more extreme where the female partner is not working or is less educated than the male partner. Full and frank financial disclosure is essential including women having access to primary documents. For example, not a list of shareholding generated by the husband but an independent document so there is confidence in the financial information. Outcomes Another theme that emerged from our survey responses concerned the outcomes of CP. Although not asked, the view was expressed that the outcomes of a Collaboration may be better than those achieved through the Court system. The 'outcomes are often more creative, because they've been work-shopped ... by all parties' and they are more often adhered to because the outcomes are 'agreed upon by the parties, not ordered by the Court, so the parties can take ownership of the agreement'. 'The process is usually a lot quicker, more thorough, and leaves clients more satisfied than with other processes.' In matters that included violence, that respondent believed that outcomes are able to 'take account of the fact that one party may be feeling disempowered and give recognition to that perception, which is a start to fixing the problem... Parties have control over their own outcome.' Therapeutic Process For victims of violence, a negotiated outcome 'is really important because they are able to gain control of their lives'. Further, it is argued that 'often the parties have done some "healing" along the way and have addressed the issue of violence so that they can move forward'. With the multidisciplinary model of CP

there might be added opportunities for healing: The ability to have a close involvement with professionals on both sides. In addition to helping the abused party cope better with that abuse, mental health help on the other side can help lower the intensity of the anger that gave rise to the abuse. Another lawyer had observed that a multi-disciplinary approach, and the slower pace of CP, helps perpetrators to cope with the process and handle themselves in a respectful manner where the perpetrator sought ‘appropriate counseling... which made the meetings a bit better’. Indeed, CP can offer tools that can help maintain accountability on the part of the perpetrator: Both parties’ lawyers work together which means that the perpetrator’s lawyer is working to correct the power imbalance as well as the victim’s lawyer. We can use all of the same court arsenal, such as protection orders but back it up with therapeutic intervention for the perpetrator to help them gain insight. ... there is much more responsibility placed upon the abuser spouse in an Interest Based/Collaborative system than in any other system. Essentially, the abusive spouse needs to admit there is a problem as well. A perpetrator of family violence may have trouble recognising that the victim has separate needs. CP can help: Parties are encouraged to think about the bigger picture and what is best for them and the other party, rather than what they are ‘entitled to’ which is not always congruent with what is best or in their interest. And, in addition to helping the individuals, it may be therapeutic for the relationship: Collaborative law has the potential for transformative change in the relationship between the parties in the process of the transition to a post-separation relationship. This obviously takes the time and commitment of all parties involved in the process. Potential Difficulties with CP with Antecedents of Coercive Control) CP is not a feasible choice if court involvement is a possibility; for instance if a protection order is likely to be needed. And certainly it is not an option if one party’s safety is at risk. There is also a potential problem with the issue of participation. This is recognized with section 14 of the US Uniform Collaborative Law Act (UCLA). Lawyers are required to take steps to ensure that a decision to participate is informed and voluntary. Macfarlane has expressed concerns about the quality and depth of informed consent. She found that some clients did not seem to fully understand the ramifications of participation, because explanations were too abstract and some lawyers did not have sufficient experience to anticipate potential problems. A purported advantage of CP is that negotiations cost less in time and money than conventional, adversarial representation. However, there are added CP costs incurred with face-to-face sessions, telephone conferences with professionals that may be involved, and intake procedures in assessing suitability. Expenses may accrue when there are many issues to resolve. Consequently, the costs of CP may be higher than in mediation as lawyers and experts are more involved in the stages of client preparation and the four-way meetings. One participant indicated ‘the costs of the Collaborative Law process are dependent upon the clients’ attitudes to the process and outcome’. Another emphasized ‘the risk for a victim of violence to be “trapped” in Collaborative Law with huge costs disadvantages to fully realising her proper entitlement’. Therefore, CP may not be accessible to those with financial constraints, unlike mediation, where Legal Aid and Family Relationship Centres provide Family Dispute Resolution services at reduced costs. In such cases, mediation may be a more viable option if financial assistance is needed. Time may also be an issue as implied in the discussion of costs. During CP sessions, negotiations can become time consuming and research shows that some clients do express frustration with the length of time taken to get to substantive issues. Or, an outcome may not be reached. The one respondent who discussed ‘success rate’ stated that CP cases reached a negotiated outcome in ‘around 90-95%’ of matters in his/her law firm. Settlement may not be reached, though, if either of the lawyers adopt a positional approach in their representation of their client, which stems from their training as an advocate and experience in adversarial practice. They might become caught up with obtaining a successful outcome for their client at the expense of the other party, in which

case the client may turn to mediation or traditional representation. This was the case with one participant's client: no agreement was reached in regards to property settlement because the parties were not willing to co-operate. As a result, 'litigation was needed to get to a point where the other party would provide a realistic response'. Another possible problem has been raised by overseas commentators: victims of violence may 'push for settlement, any settlement to end the conflict'. In addition, pressure to settle may also come from unidentified and unlabeled persistent coercion. If the perpetrator uses tactics to intimidate and manipulate the process, the victim may agree to substantively less favorable terms. A perpetrator may view four way meetings to intimidate the victim, failure to make required disclosures and enlist the lawyers to pressuring the victim to settle. At the same time, victim may be hesitant to disclosure information for fear that it could be used inappropriately. One respondent to our survey confirmed that this may occur: The aggressor got a better deal financially, simply because she wore down the other person. He couldn't withstand her bad behaviour and gave in because he couldn't stand up to her. Theoretically, however, this type of outcome could be avoided if both lawyers are doing their best to ensure that both parties are behaving appropriately, in line with the CP agreement.

Conclusion We asked our respondents whether there was 'anything else [they] would like to add about [their] experience with Collaborative Law in cases involving family violence'. One responded, 'Proceed with caution'. It would appear that, as with mediation and litigation, 'the Collaborative system is not ideal...' for matters that include coercive control or intimate terrorism. If patterns of control are identified either at the onset or at later stages, the lawyers and other professionals involved (in a multidisciplinary team) can assess whether CP is appropriate to use with those particular clients and facts, but there is no 'one size fits all' for determining suitability. Both overseas and in Australia, there is growing recognition that being on the vigilant lookout for control issues/dynamics is of paramount importance. Commentators, CP Associations, and other legal practitioner associations all agree that on-going screening is essential. This became a statutory obligation in the 10 US states that have enacted the Uniform Collaborative Law Act thus far, with section 15(a) dictating that lawyers have a duty to develop and implement screening protocols. However, proper screening appears not to be a current widespread practice. We therefore recommend that screening be mandatory and monitored for compliance and merit. Various screening instruments and protocols have been developed and validated both internationally and in Australia. An example of the latter: the Commonwealth Government quite recently introduced an empirically based and standardised front line framework called the Family Law DOORS (Detection of Overall Risk Screen). This approach has been reviewed and refined by researchers and senior practitioners, both across Australia and internationally. In contrast to specific domestic violence screens, the DOORS uses a very broad definition of risk and encourages the practitioner to assess numerous factors that might be indicative of personal and interpersonal safety risks. The DOORS website describes the framework as a 'tool for systematically identifying multiple risks at the client's point of entry into the service, including being at risk of physical or psychological harm, or of perpetrating harm'. If screening is done, and violence identified, could the process then be made safe? Can the playing field be leveled with enough trust re-established to permit interest-based negotiation? It would appear that the answer is a qualified 'Yes' as described by our survey respondents and as assessed by violence victims who have participated in a somewhat similar dispute resolution project (the Coordinated Family Dispute Resolution (CFDR)). That pilot project aimed to provide FDR in matters with violence and included cross-disciplinary professionals working collaboratively with case management. By using multiple sessions and with screening and legal advice, the aim was to lessen power imbalance. Support professionals and lawyers helped prepare the victim; they were also sometimes present at some or all of the mediation sessions. These professionals reported that

their presence neutralized violent partner's tendency to intimidate and control. And, where mediation sessions were handled carefully, the data from parents indicate that the process could be safe and empower them to make appropriate arrangements for their children, and it even improved the capacity of some to communicate with their ex-partners. We believe that this positive assessment of CFDR bodes well for the potential value of using CP in cases involving family violence. Certainly, some of the lawyers, like the one below, although not asked to assess relative merits, thought that CP was a better process for victims of violence than the alternatives: It is ... better than litigation as it provides a forum in which both victims and perpetrators can receive assistance from experts if necessary, and it avoids the "he says, she says" battle that often occurs in Court and the victim is given a voice. Such viewpoints need to be tested by an evaluative study similar to that done for the CFDR pilot project. Indeed, more research could further illuminate any benefits and/or drawbacks of CP. Such a project might include in-depth interviews with victims, perpetrators, lawyers, and/or other Collaborative professionals who engage in the multi-disciplinary approach. If the sample were large enough, we could learn which model of CP seems to work best with particular facts, personalities and type of coercive control. Another cautionary note: Access to this legal path may be problematic for some survivors of family violence. A victim's economic circumstances may be compromised by the behaviour of their violent party, issues of mental and physical health and/or their capacity to work. Because of the uncertainty associated with the costs of CP, reforms to financial assistance in law and policy should be made for CP to be more accessible to relatively impoverished clients. It would be beneficial if: Legal Aid [were] able to facilitate the Collaborative process, or [if] a modified version of Collaborative Law [could] be run through the Courts, so that those with less money can also have the benefit of this process. Further, in remote Australia, there are few, or none, of the resources required for CP, and it may be less effective in such cases without such resources. We recommend that the Commonwealth Government provide the funding for training of lawyers in CP and for professionals who might be part of the process. Indeed it is important that lawyers practicing CP have been properly trained and fully understand the aim and process of CP. This includes knowing how to negotiate using an interest-based approach, and understanding the dynamic of the CP model and their role in providing advocacy for their client within the CP model. Lawyers also must learn how to negotiate in an open forum (as opposed to a traditional approach) and in having reality testing conversations with their client. Additionally, they need to be fully aware of the sometimes disguised and/or indirect manifestations and effects of coercive control. With these insights, understanding, and skills, the CP legal practitioner can work more effectively at 'morphing' the process, as we described earlier, and can better equalise power differential. Lawyers and other practitioners (if it is multidisciplinary) can then work with the clients to address the dysfunctional dynamic, with all parties focused on how best to divide the 'orange.'

Question 5

Have not published in this area; however I have looked at indigenous sexual assault victims and communication issues. Many of these would be similar for victims of family violence. From a chapter in 2001 book Women and the Law in Australia (LexisNexis) - Chapter 13 INTERSECTIONALITY - INDIGENOUS WOMEN Caroline Norrington Bureaucracy is Not Protection The impact of violence on women is worse if government and legal responses are focused only on the rights of the accused, instead of taking a more holistic approach that also considers risk management for the victim. Tiffany Paterson was beaten almost to death and her face disfigured when her ex-partner, Victor Dunn, 'sawed' at her cheek with a knife, leaving deep lacerations from her mouth to her ear. There was history of violence by Dunn towards Paterson, which had resulted in a restraining order being issued to prevent Dunn from approaching Paterson, and another occasion where Dunn had been sentenced for 9

months with 3 to serve. Paterson, assisted by her Indigenous mother, Christine Christophersen, was active in seeking police and political assistance to protect herself before, during, and after the incident. Nevertheless, she was largely met by bureaucratic processes. Police failed initially to obtain the restraining order (having told Paterson it was not necessary for her to attend court when it was) and then failed to enforce it (saying there was nothing they could do when Dunn approached Paterson as he had not assaulted her). Correctional services failed to stop Dunn making threatening phone calls to Paterson while in custody. When Dunn was conditionally released to a rehabilitation centre, he immediately absconded, and made over 50 phone calls and text messages to Paterson. When Christophersen contacted the rehabilitation centre, she was unable to obtain any information about his status because of 'client privilege'. When Paterson and Christophersen reported the breaches of the DVO to police, the day before the almost-fatal attack: [t]he interviewing officer said the statements that Mum and I made could be interpreted as us being bitches by picking on him. As Mum and I left the Palmerston police station, I heard one of the police officer say 'this is bigger than Ben Hur' like what we were going through was a joke. Dunn ultimately pleaded guilty and was convicted to 13 years imprisonment (8.5 to serve), an unusually high sentence. This was a relief to Paterson, who says: I don't know what I will do when he gets out. Honestly, I'll have to get out of here, I'll have to leave Darwin, leave my family. We are a big family from all over, from Darwin to Katherine to Coburg and Jabiru, and I will have to leave them all. Nevertheless, she was left with permanent physical scars and severe depression. What this case illustrates is that legal and bureaucratic processes conceptualise a criminal case as a dispute between the state and the accused, however in cases involving family violence this disregards the needs of victims and potential victims. The presumption of innocence is an important safeguard of civil liberties, but it also makes the criminal justice system particularly limited in its ability to protect the most vulnerable members of our society. 'Innocent until proven guilty' amounts to 'status quo until proven guilty', or in Paterson's case 'no protection from violence until proven guilty'. When you are an Indigenous woman, the status quo is rarely in your favour. It is therefore important that there are other credible mechanisms for protecting women that do not require such a high threshold of proof. An unusually high proportion of Indigenous women are victims of violent crime, particularly family violence. Many Indigenous women seek legal assistance to obtain protection from violence. Lawyers assist Indigenous women to deal with violence by:

- Assisting them to obtain a restraining order (sometimes known as an RO, AVO, or DVO);
- Providing advice in welfare matters – children may be removed by government authorities if the home poses a risk of violence;
- Giving family law advice about separation – however, 'Aboriginal way' marriages tend to be de facto rather than be heard in the Family Court, and most Indigenous persons do not seek white legal advice or sanction about their separation arrangements;
- Prosecuting violent offences;
- Defending the women if they are prosecuted for behaviour that has arisen out of the violent relationship, including assault and behaviours relating to drinking and homelessness; and
- Assisting Indigenous women who are victims of crime to apply for victims' compensation money.

Other matters where legal assistance can particularly benefit Indigenous women include:

- Assisting them to understand and access financial services, such as banks and superannuation, many of which require filling out of forms in dense financial or legal English;
- Assisting them to understand discrimination law and to lodge complaints;
- Representing Indigenous women who are caught bringing illegal drugs or alcohol into a dry community, something that can happen as a result of family or community pressure.

Helping Indigenous Women Tell Their Stories Evaluating the credibility of witnesses remains a key part of the Australian legal system. Judges, lawyers, and juries develop preconceptions about how people are likely to behave in a given situation, and they use these assumptions when evaluating the evidence in relevant cases. However, as

shown in the case of Cynthia Hickey, what is 'normal behaviour' according to the experience of the predominantly white tribunal of fact may not be normal behaviour to an Indigenous woman. Despite these systemic difficulties, in my experience courts are capable of accepting idiosyncratic stories, if those stories are told clearly and convey an internal logic. So how can you help an Indigenous woman get her story across as effectively as possible? Remember that She is an Individual While lawyers need to be ready to communicate with Indigenous women with little English and poor knowledge of the legal system, there are many Indigenous women who are confident and articulate, and who want you to recognise them as such. When speaking to a client or witness one-on-one, you have the opportunity to gauge her familiarity with English and law, and respond accordingly. To over-simplify your language because she is Indigenous is to see her as a racial stereotype rather than a person. It is therefore important that the very first thing you do is listen to her. Lawyers are trained to listen only for the factual details that are relevant to solving a legal problem, and to filter out other information as being irrelevant. But you should also listen for her style of communication, level of education, and level of personal confidence. Be sensitive to her sense of personal space. This varies between individuals and communities, but be alert to body language that may suggest you are intruding into personal space. Women may expect you to leave more space if you are white or male. If she avoids eye-contact, she may be more comfortable if you sit beside her rather than opposite her. When listening to her, you should note potential communication difficulties. Limited English skills or hearing difficulties (Indigenous people have a high rate of hearing impairment) should be identified early so appropriate arrangements can be to communicate effectively, and to ensure she is able to hear and be heard in the courtroom. Unless her English is as fluent as yours, you should consider whether she needs an interpreter. Be aware that if she has some minimal English skills, she may be too embarrassed to admit she cannot speak English to the level needed to discuss legal topics. The Northern Territory Law Society recommends that lawyers ask compound questions to see if false information is detected and corrected. For example, if she is from a remote community, you might ask her: 'When you were growing up in Sydney, was the food good?' Obtain the names of possible interpreters, so you can check their suitability with her. Interpreters may be unsuitable because they are from another family group which is hostile to her family group, because the interpreter is her 'poison cousin' (a person who is related to the witness in a particular way and who is therefore off-limits to the witness), and because the witness does not feel comfortable discussing certain sensitive matters in front of a particular interpreter, either for cultural or privacy reasons. If she is the accused, she is entitled at common law to have an interpreter if this is necessary to ensure a fair trial. There is no corresponding 'right' for witnesses or victims of crime, which is unfortunate because a great many Indigenous women attend court in this role. Build Trust and Confidence Be conscious of dressing appropriately. Your best court gear may only serve to emphasise difference, particularly at 'bush court' in remote areas. You should consider dressing as simply and informally as you can while still wearing clothes appropriate for the courtroom. Women should be aware that jealousy can be a particular issue in communities, and wearing skin-tight or revealing clothing should be avoided. Female lawyers may also want to avoid looking like they are enjoying themselves too much if talking to a woman's partner. Introduce yourself (your name and role) and establish a rapport with the witness. Ask how she is feeling. Reassure her that it's normal to be a bit nervous. If possible, do not rush her. Silence is an important part of Indigenous communication styles, and indicates respect and thoughtfulness. If you are pressed for time, apologise for being rude and explain you only have a little time in which to talk. If a witness support person or Indigenous liaison officer is available, book this person and arrange for them to attend. Ask her if she has been to court before. If not, explain who will be in the courtroom and what happens. If possible, show her the courtroom in which she

will be appearing and point out where she will be sitting. Alternatively, setting up a 3D space with some chairs and tables to mimic a courtroom can give her a sense of what will occur, even if she has limited English skills. If she will be giving evidence, you can give her the chance to practice entering the 'court', take the oath or affirmation, and answer some introductory questions. Familiarisation with this ritual will help court seem a less alien place. The conventional lawyer's wisdom is to advise the witness to look directly at the magistrate or jury. However, many Indigenous people find continual eye contact disturbing. For Indigenous witnesses, staring at a row of strangers, or a magistrate elevated on a bench, may be unnecessarily distressing and distracting. Many Indigenous witnesses are most comfortable looking straight ahead at the opposite wall. If you observe that she avoids eye-contact, explain that in court you will face each other and practice answering questions in this position.

Do Your Homework If you are seeking women's perspectives within a community, some background knowledge about the community is essential. It will help you to navigate community politics and adopt a culturally appropriate response. Bodies that provide services to the community in an ongoing capacity may be particularly helpful in summarising and translating such knowledge in a way you can understand (eg. Aboriginal Legal Organisations, women's legal services, women's shelters, community councils, interpreters, Witness Assistance Services, Aboriginal Community Police Officers, police who have been resident in the community for some time, and Aboriginal land councils). Beware that many of these groups will be exposed to only a narrow interest group within the community or be pursuing a particular agenda, and so it is worth consulting with a variety of persons. Key points you may wish to find out:

- How large is the community?
- What languages are spoken?
- What are the key groups or families?
- Is there any current or ongoing tension between these groups?
- Who are the community leaders (both male and female)?

If your role is very narrow (ie. prosecute / defend a particular case), background knowledge about the community may not assist you greatly; you need to judge whether community context is likely to impact on case, or whether the facts are closely defined. Learning more about the community will seldom hurt if you have time to do so. If you regularly work with women from a particular community or area, look for cross-cultural training specific to that area.

Avoid Putting Words into Her Mouth Indigenous persons sometimes agree with propositions put to them by those in authority, regardless of whether the proposition is true, because this is considered the polite thing to do. This phenomenon, known as 'gratuitous concurrence', is well documented, and has been used by courts since the mid-1970s to exclude confessions by Indigenous suspects where the suspect has merely agreed with a series of propositions put by police. Gratuitous concurrence can also be a problem for lawyers. I once had the following conversation with an Indigenous client (who was raised in an urban environment with English as a first language):

Me: Do you want to plead guilty or not guilty? Client: Yeah. Me: Not guilty? Client: Yeah? Me: Or guilty? Client: Yeah, that one I reckon. After further discussion of the meaning of the concepts, we clarified that he actually wanted to plead not guilty. Strategies to ensure an Indigenous person is giving their own version of events, and not just agreeing politely with what you say include:

- Give her the opportunity to narrate her version of events as freely as possible. Avoid signalling your opinions about what she is saying, being aware not only of your verbal cues, but of your body language.
- Avoid leading questions. If you find you have asked a leading question and get a 'yeah' response which you think may be a result of gratuitous concurrence, try putting a contradictory position to see if that also meets with agreement.
- Ask her to explain what she means in her own words. Aside from gratuitous concurrence, you should elicit her own words because they are authentic, and authenticity is compelling. If she uses words that you are unfamiliar with, or she gives familiar words a different meaning, use your proofing sessions to clarify what she is getting at. That way you will be ready to explain what she means to the court with a few well-placed

questions, while letting her concentrate on remembering and telling her story. If she will be pleading guilty, consider how you can incorporate her words into the plea in mitigation. If she is the victim in a case being resolved by way of plea, incorporate her words into the Crown Facts as much as possible. I spoke to one victim who was very upset that an early draft of the Crown Facts were written in bland language 'that defused itself, kept falling back in and collapsing on itself.' Assist Her to Convey What She Means to Say Indigenous witnesses may have a particularly hard time conveying times and dates, measurements such as distances, and complex physical descriptions. Some of these difficulties are caused by conceptual differences between white and Indigenous culture, and some is caused by the stress of speaking in another language in the strange forum of court. It is therefore important to give her tools to make this communication easier. Obtain photographs of key locations and objects. It is far easier and more effective for a witness to point at a photograph of a physical location and say, 'We were here', than to attempt to describe it verbally. Avoid asking her to estimate time in seconds/minutes/hours, or distances in metres. Instead, ask her to use points of reference with which she is familiar. For a short event, you could ask her to visualise it happening, and then to say, 'Stop' when the event is over. For a longer event find other points of reference, such as 'the time it takes to walk from x to y', meal times, the number of days and nights that passed, or key dates such as birthdays, funerals, pay day, and religious holidays. Get independent measurements of distances where possible, or ask her to point at an object which represents how far away the thing was that she is describing. Find an Expert You may consider obtaining expert cultural evidence which helps put an Indigenous woman's evidence in context. An expert need not have academic qualifications (eg. an anthropologist), so long as they have specialist knowledge that an ordinary person would not have. Aboriginal trackers have been recognised as experts. A good choice of cultural expert would: • Have expertise about the particular community in question; • Have spent significant amounts of time in the community; • Be familiar with relevant ethnographic literature; and • Make a genuine effort to give impartial opinions, not to advocate for a particular side. You should find an expert that has knowledge and experience of women's perspectives, and object to experts that focus on male perspectives to the exclusion of women, since their expertise does not extend to the relevant area of expertise. At common law, in order for expert evidence to be admissible, as discussed in Chapter 7, the court must be satisfied the expert has special skills or knowledge that can assist the jury to reach a more accurate decision. This is known as the 'common knowledge rule'. It prohibits expert evidence about ordinary behaviour and community standards, although not of the behaviour and standards of a particular distinctive group in society. Australian courts have held the following cultural evidence admissible: • Evidence about the political structure of Lebanon and the lack of law and order, to help evaluate whether the accused was under duress in a drug importation case; • Evidence about the social, cultural, and religious upbringing of children in the Lebanese/Australian community, to help evaluate the effect of proposed family orders upon the interests of the children; and • The significance of infertility to an Indigenous woman, to help evaluate the harm caused in a medical negligence case. The more counter-intuitive the expert evidence would be to the 'ordinary person', the stronger the argument that the evidence is not a matter of common knowledge. Section 80 of the Uniform Evidence Act (UEA) abolishes the common knowledge rule. However, the witness must still be an expert in a recognised area of expertise, which is by definition not an area of common knowledge, so in a roundabout way the common knowledge rule still applies. Section 72 allows experts to give evidence about Indigenous culture, even if the basis of that evidence is hearsay, and section 78A allows Indigenous witnesses to give evidence about the laws and customs of their culture even when this would usually be excluded as 'opinion evidence'. Explain the Legal Process Over the last couple of years, the Aboriginal Resource and Development Services Inc (ARDS) undertook

interviews with 200 Yolngu people to obtain data on Yolngu understanding of white legal language and processes. Of the persons interviewed, 95% were unable to correctly identify common English legal terms such as 'charge', 'sentence', 'guilty', 'fine', 'alleged', or 'consent'. A prosecutor was understood to be a 'persecutor' and the judge was understood to be a 'dictator'. There was little understanding that a judge was required to be neutral and follow due process. Of the 18 people who commented on the word 'guilty', only half of the responses were correct. The majority of the incorrect responses associated 'not guilty' with incarceration and the word 'guilty' with being released! When the word 'bail' was presented in a legal context, 80% of the 25 people interviewed about the word did not understand its meaning. The common incorrect responses showed a belief that getting bail meant that a person had been 'bailed out of trouble', and was therefore free to go and not return. This misunderstanding no doubt contributes to the very high rate of Indigenous bailees failing to appear for court, and consequently to an unnecessarily high rate of Indigenous people on remand to ensure their attendance at court. To make sure your client understands a court order:

- Always ensure that someone has taken the time to explain the court order to your client. The court staff may do little more than ask the (usually illiterate) bailee to sign the paper setting out the terms and conditions.
- Be aware that an Indigenous client with limited English skills may have only picked up from the magistrate's speech, the words: 'You are free to go'.
- For bail or conditional sentences, key concepts to convey in plain English are:
 - o The matter (or 'trouble') is not finished.
 - o You have to... [conditions of release].
 - o If you don't [conditions of release], the police will lock you up.
- Ensure your client understands by having them repeat back their understanding of the order in their own words.
- Explain the next court date using a frame of reference with which the client is familiar.

Family Violence Orders When assisting Indigenous women to apply for a restraining order, it is important to explain:

- The order is not granted automatically;
- The role of telling her story in order to obtain the order, and how the judge will listen to her story as well as the defendant's story in order to decide what happens; and
- The consequences to the defendant if the order is granted. The orders should facilitate the outcome she is really after. Full non-contact orders are seldom viable in close-knit communities, or where kids must be regularly transferred between the parties. It is unwise to get an order 'not to approach after consuming alcohol' if the applicant and the defendant intend to continue drinking together. Apply for Vulnerable Witness Measures Indigenous women giving evidence of domestic violence or sexual assaults are typically entitled to vulnerable witness measures (see Chapter 10). For Indigenous women with limited English skills, giving evidence via CCTV can be difficult, because the quality of audio and sound received through CCTV can lead to miscommunication, as well as creating an even more alien environment. Using a screen and a closed court may be preferable. Cross-Examination Indigenous women can be particularly vulnerable to the aggressive, intimidating, and overly-complex questions that are typically asked during cross-examination. Most jurisdictions now have legislation which permits you to object to questions that harass or intimidate the witness. (see Chapter 6 for discussion in the context of sexual assault.) Gratuitous concurrence has been recognised by the courts as a reason for restricting leading questions in the cross-examination of Indigenous witnesses. However, this only applies if it can be established that the witness has a cultural background that would lead to gratuitous concurrence, not merely from the fact that he or she is biologically Indigenous. Under s192(2) of the Uniform Evidence Act, 'unfairness' to a witness is a ground for disallowing or limiting a question. In New South Wales, Spigelman CJ has been particularly outspoken in encouraging judges to restrict cross-examination of vulnerable complainants: Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve

treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance. However, if you are the prosecutor, you should be aware that counsel for the accused is allowed a great deal of latitude in cross-examination, and if cross-examination is too closely constrained there is a good possibility of a conviction being quashed on appeal, which results in the victim facing the distress of giving evidence at a re-trial. Unfair cross-examination of an accused is also grounds for appeal.

Question 6

Have not published in this area; however I have looked at specific issues for CALD women and domestic violence. From Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) I have used this holistic/kaleidoscopic image to emphasise how gender affects interactions as a victim, witness, litigant or defendant engaged with a social institution (law) that is male dominated. To that extent, the presentation has been largely essentialist. This was a deliberate decision. I wanted to stress the commonalities of women's experiences. In other words, there is a huge lens in that kaleidoscope which we can label gender. Being born female in a patriarchal society does result in some commonalities in oppression, marginalisation and exclusion. We have seen ample examples of how the madonna/whore dichotomy and how being 'other' in definition of personality traits impacts upon many facets of women's experiences with the law—perhaps most predominantly in their lack of credibility. I would note though that my lumping of women into one monolithic category could be an act of 'intellectual convenience' and a means of avoiding 'chaos and mindless pluralism'. But, it is not just a culture dominated by men. In the first chapter, I mentioned class, race and ethnicity and employed the term 'dominocentric' to indicate domination by 'white' middle class males. Aside from those traits, there are many other socio-demographic factors that constitute the dominants in Australian culture—age, sexuality, physical and mental ability—to name a few—again with the caveat that I am essentialising each. For example, I will be generalising about values and experiences of interaction with Australian mainstream institutions and communities by non-English speaking and culturally diverse (NESC) women when in fact there are differences derived from their specific culturally holistic background. I am over-simplifying and homogenising in order to communicate ideas. I leave it to the reader to decide if the end justifies the means.... The most pervasive image provided by overseas-born survivors and by practitioners is that of the culturally and linguistically diverse women's isolation. Erosion of self-esteem and its shadow of shame can be more extreme and more easily facilitated when the victim is isolated. Further, beliefs that negate the concept of marital rape may be more common in some migrant cultures so that some overseas-born victims of rape in marriage would be more apt neither not to identify the act as violence nor to take the blame. In addition, some societies, including many Asian cultures, socialise women to believe that they have no rights to divorce or to custody of children. Norms emphasise the need to remain married no matter what, on pain of stigma and ostracism. In Vietnam, men have the right to hit their wives so it was accepted. There is an adage, "If you married with a dog you have to follow him for all you life." Another cultural value might emphasise keeping quiet about spouse abuse or, at the most, just disclosing within the extended family. Accessing Assistance In my research, women from Pacific, Asia, Middle East and Latin America cultural backgrounds were identified by practitioners as having particular difficulties in contacting the police. Some were unable to ring because they could not speak English—68.6% of the refuge residents born outside of Australia spoke a language other than English in their home. Of these, 42.9% spoke a European language, 37.6% an Asian language, 15.8% Middle Eastern, and 3.8% a Pacific language. Almost one half (45.4%) of the migrants required an interpreter. Language is not the only obstacle. Turning to the police can be especially hard for women who come from countries where law enforcement officers function differently than in Australia and

hence are to be feared and mistrusted. Many do not know that the police here are supposed to intervene in domestic violence situations. And, some report concern about potential prejudice or racism. Inability to access police help or any other service can be increased by a lack of knowledge concerning legal rights or the potential assisting agencies. Or, they may only have a negative image of the service, often provided by their sole conduit of information - the husband. (eg. Told that refugees are run by radical feminist lesbians). In my study, solicitors, refuge workers and ethnic welfare staff all concurred that isolation and lack of support were particularly acute among women sponsored by non-Asian men. Three of the four sponsored brides in my sample of victim interviewees had very little idea of what their rights were. Their violent husbands took advantage of their lack of knowledge, using threats and false information to control the wives' behaviour and stop them from leaving. Indeed, fear of deportation, despite domestic violence provisions, may play a role in keeping sponsored (primarily Asian) migrants from accessing help. Others may feel stuck by their need to provide financial support to their families in the homeland and a sense of debt towards the sponsor. Even if they do reach out to the law for help, as we'll see next, the immigrant women may confront racism, ethnocentrism, along with sexism. Strategies, which are based solely on the experiences of "Anglo-Australian" women, are limited in their assistance to women of non-English speaking backgrounds. Whilst there are similarities for women of all cultures and races in their experience of domestic violence, additional barriers exist which must be addressed before effective assistance can be provided for women of non-English speaking backgrounds... culture and race impact on a woman's access to appropriate assistance with domestic violence. An observational research of Victorian magistrates found many examples such biases invoked when NESB women try to obtain Orders types, concluding that magistrates were apt to look at the culturally unfamiliar woman and her culture instead of the violence of the perpetrator. A number of examples illustrate this emphasis. A Turkish woman had her application turned down since the magistrate advised that she should have been familiar with 'the extreme patriarchal nature of her culture'; the violence was held to be the natural and expected outcome of these social norms. In a similar vein, a Fijian woman was denied an Order because her husband's lawyer said that in Fiji there were no equivalent laws. The magistrate talked about cultural tolerance. Yet in another case, an Asian woman was lectured about the Court's dominocentric view of women's position in Asian cultures and was told she should learn not to be so passive. One Court officer coercing a Muslim woman, through threatening to throw the case out, to swear on a bible saying it was the same as the Koran. In another, a Turkish woman did not make eye contact with the Magistrate, which he interpreted as an indication that her testimony was false. No intervention order was granted. The observers also identified numerous instances of what could be defined as racist or, at the least, culturally insensitive practices. In the context of language, a Greek woman was denied a request for an interpreter on the basis that the magistrate thought her 16 year old daughter could do it whilst a Croatian woman was given a Serbian interpreter and then refused to speak since this would hurt her in the community. Her silence was translated by the Court as indicating a lack of urgent need for legal intervention. Believing that it would be asking for too much, one Vietnamese woman did not request an interpreter. After clarifying that he found her English incomprehensible, the Magistrate asked her to 'act' out the violence. Similarly, workers in Queensland report many occasions where women have been to court without an interpreter present and therefore have received Orders without knowledge of what they meant. In that state, judges and magistrates have discretion in determining whether or not an interpreter will be used in court. A similar failure to appreciate other cultures relativistically and holistically is evident when we look at Immigration law and domestic violence. Remedies were enacted to ameliorate the plight of women who migrated to Australia as the fiance or spouse of an Australian citizen who then

abused them and acted to have them denied permanent residency if they left the violent home. They were eligible to apply for permanent residency if they could show a restraining order, a Family Law Act injunction or a court conviction or finding of guilt against the sponsor for assault. This was modified more in 1995. To broaden the means of establishing that violence had taken place, the Regulation added 'acceptable evidence that violence has been suffered' to the other means of proof. Acceptable evidence had to consist of a statutory declaration by the person who has experienced the violence and two by 'competent people (or one declaration by a 'competent' person and a police record of assault). A competent person for the purpose of violence against an adult includes practitioners such as doctors and psychologists plus women's service staff like the coordinator of a woman's refuge. The two 'expert' stat decs must be from different categories or occupations. Obvious problems remain for some immigrant battered women. One is their inability to obtain the evidence due to their fear, shame and lack of access to services. This was recognised in one tribunal review: The Tribunal considers that the explanations are reasonable and provide an adequate view of circumstances in which the Applicant felt both distressed and shamed to bring these matters to the attention of various authorities... It is not uncommon in cases of domestic violence for the full picture not to emerge for some time after the events. This is because of the attendant distress and trauma and the different manner in which some people deal with these circumstances Further, the 'stat dec' process is only available if an actual visa application has been made. According to a lawyer (interviewed for this chapter) who worked for a number of years in a community legal centre dealing with these issues, some men only obtain one visitor or fiance visa for the woman and do not make a second application. Thus, she unwittingly becomes an illegal immigrant. A sponsor may also allege that the woman only married him for a visa. In at least one case that the solicitor had been involved with, such an allegation weighted more heavily than the history of violence and the woman's visa was cancelled.

Question 7

Have not done research in this area; however in the 2010 book I edited, *Women and the Law in Australia* (LexisNexis) there is a chapter on women with disabilities by Leanne Dowse, Carolyn Frohmader and Helen Meekosha and I copy and paste some relevant extracts:

Disabled Women and the Law: Violence Disabled women and girls experience discrimination and negative stereotypes from both a gender and disability perspective. This perpetuates and legitimises not only the multiple forms of violence perpetrated against them, but also the failure of governments to recognise and take action on the issue. Despite increasing recognition of, and attention to, gender based violence as the 'most widespread human rights abuse in the world, violence against disabled women and girls continues in a culture of silence, denial and apathy. The issues for disabled women have largely been excluded from most generic violence prevention policies and from broader responses to the issue of women and violence. In Australia, disabled women continue to experience high levels of both domestic and family violence and sexual assault and have high levels of unmet needs in terms of access to targeted and related community support services. They tend to be subjected to violence for significantly longer periods of time; violence takes many forms and there is a wider range of perpetrators. Fewer pathways to safety exist and they are therefore less likely to report experiences of violence. Although the forms of violence for disabled women are similar to those for women generally, disabled women often experience different dimensions to physical, psychological, and sexual violence – such as those that are derived from their sexuality, including for example, control of reproduction and menstruation. Disabled women who rely on personal care assistance are likely to be subject to frequent violence and abuse, ranging from neglect, poor care and rough treatment through to verbal, physical and sexual abuse. Disabled women are at greater risk of abuse such as institutional abuse, chemical restraint, drug use, forced/coerced sterilisation, medical exploitation,

humiliation, and harassment. A number of factors increase the vulnerability of disabled women to violence. These may include their impairment (such as inability to communicate using conventional means), dependence on others, fear of disclosure, and lack of economic independence, knowledge of their rights and services and support. They may also experience low self-esteem and lack assertiveness. Australian legislation, policy and services that focus on the broader issue of violence against women, indicate a prevailing lack of awareness about the complexity of issues facing disabled women. For example, some Australian States and Territories have legislation which deals with domestic situations and non-domestic situations in separate pieces of legislation; others have continued to include domestic violence within the Criminal Code and other Acts. Most of the legislation defines what constitutes a 'domestic relationship' and some of these definitions are more inclusive than others, including for example, gay, lesbian and transgender relationships, siblings, children, non-partner family members, and so on. Some also include 'informal care relationships' which apply to domestic support and personal care relationships provided without fee or reward, and which are not under an employment relationship between the persons; and/or not on behalf of another person or an organisation. Many of the current laws do not contain definitions that specifically encompass the range of settings in which disabled women may live, such as group or nursing homes. Because these experiences may not fit either traditional, or contemporary definitions, violence often goes unidentified or unaddressed. It is possible for disabled women who experience violence to take measures such as apprehended or personal violence orders. However, in practice, for women with intellectual impairments who live in group homes, recognition of their specific support needs is limited. Access to effective protection is dependent on mediation and intervention by others such as staff or carers, who may also be the perpetrators of the violence of abuse. The lack of inclusive services and programs for disabled women experiencing or at risk of experiencing violence is well documented. There are limited support options for those who do escape violence. Recovering from the trauma of victimisation, and rebuilding their lives as independent, active, valued members of society is a difficult challenge. Of the services that do exist (such as refuges, shelters, crisis services, emergency housing, legal services, health and medical services, and other violence prevention services) a number of specific issues have been identified which make access for disabled women in Australia particularly problematic:

- whilst violence is a significant presence in the lives of large numbers of disabled women in Australia, many do not recognise it as a crime, are unaware of the services and options available to them and/or lack the confidence to seek help and support.
- experience in community support services suggests that accessible information and communication is very limited in terms of both content and format of information available.
- the physical means of fleeing a violent situation, (such as accessible transportation), are often unavailable. Crisis services do not necessarily have accessible transport nor are they able to assist a woman to physically leave the violent situation.
- the unlikelihood of being referred to a refuge because it is assumed that such agencies do not or are unable to cater for their needs.

The Supported Accommodation Assistance Program (SAAP) (replaced in January 2009 by the National Affordable Housing Agreement) was the Federal Government's main homeless program and as such funded services including refuges, shelters, and crisis services. The systematic exclusion of disabled women from such services has been documented for more than two decades. In 2004, the New South Wales Ombudsman undertook an inquiry into New South Wales SAAP agencies to determine the extent of, and reasons for, exclusion from SAAP. Disabled people, including people with physical impairments, intellectual impairments, acquired brain injuries, along with people with mental illness - were one of the most significant groups affected by exclusion from SAAP. The Inquiry found that a significant

proportion of exclusions were based on 'global' policies of turning away all individuals belonging to a particular population group or sharing similar characteristics with a group.
Question 8

Have not done research in this area; however have edited several books which include a chapter on LGBTIQ women and obstacles to accessing justice. Chapter 21 Janice Ristock Sexual Assault in Intimate Same-sex Relationships . . . 259 in Louise McOrmond-Plummer, Patricia Easteal and Jennifer Levy-Peck (eds) (2014) *Intimate Partner Sexual Violence: A Multidisciplinary Approach to Survivor Support and System Change* Jessica Kingsley Publishers, London, 336 pages. And Anna Chapman* CHAPTER 15 LESBIANS, SAME SEX ATTRACTED WOMEN, AND LAW in *Women and the Law in Australia* (LexisNexis 2010) It is important to acknowledge, at this point, that the legal rights and protections that have been enacted for same sex attracted women are only as good as they become alive in people's lives. There is much to suggest the existence of substantial barriers for lesbians in seeking to access the law. An example is found in anti-discrimination law, where grounds of 'homosexuality', 'sexual preference' and 'sexual orientation' have existed for many years. Despite high levels of discrimination and harassment in areas of life covered under the different statutory schemes, women have not lodged many complaints under these grounds. There may be many reasons for women's reluctance to use law and legal mechanisms to resolve disputes. Most of the legal changes that have brought formal equality to lesbians have occurred over the past 10 years or so. Thus, a potential woman client may simply not be aware of the relevant legal changes. Or, she may feel a level of distrust in the ability of the legal system to deal with her situation in an appropriate manner. In the past, courts and adjudicators have, across a range of jurisdictions, distorted and devalued lesbian lives and same sex relationships. Older women were young adults at a time when discrimination against them on the ground of their sexual preference was common and completely lawful, where mothers lost custody of their children because they were in lesbian relationships, and where there were no effective legal avenues to challenge harassment and vilification on the street, at school, from neighbours, and from the police. Certainly outreach programs of equal opportunity bodies, and the establishment of liaison officers within police forces over the last 10 years has gone some considerable way to countering these experiences, but the existence of some remaining cultural reluctance to trust the legal system, by lesbians, and perhaps especially older lesbians, would not be surprising. A final factor in using law is a need to be prepared to identify publicly as a lesbian, or as a woman in a same sex intimate relationship, where that is relevant. That course continues to present difficulty for many women, who may face hostile reactions and ostracism from their parents and siblings, work colleagues and social networks. Social values continue to devalue identities and relationships that are not heterosexual, as reflected in anti-lesbian abuse, harassment and violence that remain at high levels with one report finding that just under half the lesbian respondents had experienced one or more forms of homophobic abuse, harassment or violence in the past 12 months, including verbal abuse, being spat at, offensive gestures, being followed, and threatened or attempted physical attack.

Question 9

Have not published in this area; however I have looked at specific issues for rural women who experience sexual harassment. Some of these findings would be relevant. Perhaps the most important finding of our research is summarised below concerning the masculine character of many remote areas and the added obstacles inherent in such sub-cultures Skye Saunders and Patricia Easteal (2013) *I Just Think it all Comes Down to How the Girl Behaves as to How She is Treated: Sexual Harassment Survival Behaviours and Workplace Thinking in Rural Australia*. Justice Connections. Patricia Easteal (ed). Cambridge Scholars Publishing, Newcastle upon Tyne, UK, pp 106-128. A Rural Landscape Drenched in

Masculinity Australian rural mythology continues to revere 'male dominance' as a norm, which is ingrained in daily rural life. Masculinity is celebrated as being the essence of rural spirit and 'is typically constituted in rural sites and spaces as visible marker of strength, courage and power, in familiar symbolic representations of the farmer, the frontier settler, the hunter, the stockman and the cowboy'. It is also known that through engagement in heavy manual labour (which is a feature of rural life and which 'involves physical effort and often shared dangers'), a type of 'group solidarity and a spirit of masculine camaraderie is created'. They believe that Jack is as good as his master, or even better; that mates must never bludge on one another; that a man's word is his bond; that women are inferior to men; and that the company of mates is preferable to the company of women. However, the opportunities for expressing such values and beliefs are severely limited. . In combination with the ethos of male power in the bush, some academics and commentators have considered that the general 'dangers of bush life' render the rural space as 'no place for a woman.' Skye Saunders and Patricia Easteal (2013) *The Nature, Pervasiveness and Manifestations of Sexual Harassment in Rural Australia: Does 'Masculinity' of Workplace Make a Difference?* *Women's Studies International Forum* 40: 121–131. A similar masculine ethos can be found in the Australian bush. Mythology continues to revere the time-honoured culture of male dominance as a norm which is ingrained in daily rural life (Hogg & Carrington, 2006; Sharma & Rees, 2007). Masculinity is upheld as being the essence of rural spirit and 'is typically constituted in rural sites and spaces as visible marker of strength, courage and power, in familiar symbolic representations of the farmer, the frontier settler, the hunter, the stockman and the cowboy' (Hogg & Carrington, 2006, p. 164). Combined with this observation of the male as being the strong and powerful figure of the bush, there is a well-documented ongoing and romanticised regard for rural Australia as being the realm in which wholesome, old-fashioned values can thrive (Barclay, Donnermeyer, & Hogg, 2007, p. 7). This rural culture which 'favours men's domination over women' (Jamieson & Wendt, 2008, p 48) also upholds 'mateship' as a valued 'code of conduct amongst men stressing equality and friendship' (Colling, 1992, p. vii). Miriam Dixon proposes that the subordination of Australian women has historical foundations and that 'we have never outgrown the former attitude, and our women are still deeply, if unconsciously, impoverished by this dominant cultural characteristic' (Dixon, 1999, p. 12). Despite the speculation that the cultural dynamics of mateship may be shifting to 'women as mates' in some circumstances (Denis, 2004, p. 20), whilst men are essentially socialised to be competitive at an individual level, mateship transcends this so that men will band together for a common purpose in response to an external threat (Colling, 1992, p. 10). The presence of women in an environment, which is traditionally 'male' may be considered a real 'threat'. This is largely because 'there is much about rural production and culture that reflects social constructions of hegemonic masculinity' (Hogg & Carrington, 2006, p. 164). Where external threats are perceived, 'violence can become a way of enforcing boundaries, exercising power, asserting honour, policing boundaries and demanding deference in the face of sweeping challenges to the traditional masculine architecture of rural life' (Carrington in Barclay et al., 2007, p. 93). It is understood too that this pattern 'will only serve to further entrench that culture and many of its negative, perhaps destructive features, such as heavy drinking and violence' (Barclay et al., 2007, p. 101). Similarly, Margaret Alston highlights that rural women who fall victim to gendered harms face an assortment of concerns that city-based victims may not, and which are a function of their geographical isolation (see generally Alston, 1997, p. 16 and Alston, 1995, p. 143). The types of concerns might include being subject to community gossip or being unable to locate appropriate support services after gendered harm has been experienced.

Question 10 n/a

Question 11 n/a

Question 12 n/a

Question 13 n/a

Question 14

Relying on 1 published journal article (and another under consideration) which show how important the family consultant evidence is and make recommendations for change. Please note that footnotes do not carry over and would be happy to email the PDFS FROM Patricia Easteal and Dimian Grey (2013) Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary. Australian Journal of Family Law 27: 59–77. Quality of Corroborative Evidence and Assessment of Risk of Harm The quality of corroborative evidence appears to be a crucial deciding factor in making an order of no time or supervised time. In particular, as found in earlier research, expert opinion from the Family Consultant and by medical specialists such child psychiatrists seems important in influencing judicial officers. For instance, the Family Report evidence in one of the exposure cases with the atypical order of no time, emphasized the harm of exposure: Each of the parties needs to be cognizant of the research that suggests that children exposed to on-going family conflict and violence are prone to suffer adverse consequences in their emotional and cognitive development. Depression, anxiety, as well as other cognitive and temperament problems are commonly seen in such children. X is already showing signs of mental health distress especially anxiety, self harm and hypervigilance which will only exacerbate if she becomes further implicated in the adult dispute or is exposed to further conflict between her parents. In another example, Sheenan & Sheenan, strong corroborating evidence included remarks by a judge in sentencing the father for assault of his ex wife. Further, the father stated to a psychologist that ‘[referring to the mother] I wish I’d shot her in the head.’ The evidence provided by the Family Consultant indicated that the father had limited parenting capacity, which Cronin J found to be ‘powerful and persuasive.’ Indeed such expert evidence concerning the effects of exposure can be very important. Field & Bowers involved the father repeatedly making unfounded allegations of sexual abuse by the mother, including the children kissing her pregnant stomach. A psychiatrist assessed the father’s behaviour and stated that his allegations truly represented a desire to re-partner with the mother. Three psychologists discussed the father’s negative impact upon the children resulting in the discounting of the father’s contradictory assertions. Justice Cronin ordered the father to have no contact, otherwise than agreed by the wife, because ‘the husband’s obsession, appalling negative behaviour and lack of insight’ would prevent the children from having the opportunity to become well-rounded adults. Medical evidence was also relied upon in Daplyn & Nessa. A father was ordered to have no contact with his ten-year-old child due to on-going litigation and parental conflict, to which the child had been exposed. A deciding factor in the judge’s reasoning seemed to be the evidence of two medical practitioners that the child was ‘acutely aware of the dysfunctional dynamic and conflict between the parties which has adversely affected him.’ The child had expressed his view to the doctor that he would be ‘unsafe if he spent time with the father.’ In Langley & Camp, a matter that used the new June 2012 provisions also heard by Scarlett FM, a mentally ill father was given supervised contact with his son even though he (the father) had a number of psychotic episodes and an apprehended violence order had been in place protecting the mother. The Family Consultant indicated that the father was ‘...attentive, gentle and affectionate.’ This expert opinion, combined with a community treatment order, may have contributed to Scarlett FM’s decision: I am satisfied that there is a benefit to the child in having a meaningful relationship with his father, but the avoidance of risk of harm to the child must take priority’. AND FROM EASTEAL AND GREY 2013 Conclusion Orders of no time or even for only supervised time are not the norm in cases involving allegations of either child abuse or exposure. Those parents who were ordered to have no time with their

children were either extremely violent towards their partners, had abused their children, or were mentally unwell. It appears that these parents' behaviour was so extreme that judges considered that court orders prohibiting the behaviour would have been ineffectual and so posed an unacceptable risk. Supervised time with the child(ren) appears to be ordered if the parent appears to accept responsibility for their actions and seeks treatment, thereby showing the risk of harm to their children has been mitigated. Indeed as these cases have shown, the critical question that the judicial officers are responding to is whether there is an unacceptable risk of harm to the child in seeing the parent. As recently stated by Deputy Chief Justice Faulks, 'children cannot be an experiment.' Orders cannot be made on the basis of 'let's see what happens'. Chisholm agrees with such a sentiment: that determinations about unacceptable risk are 'based on a whole set of factual findings about the child and much else; those findings would have to be based on evidence, or agreed facts.' In our sample, 'facts' were provided by Family Consultants, police investigations and subsequent criminal charges, expert testimony or facts agreed between the parties. This illustrates the importance of corroborating evidence in the assessment of allegations and the risk of harm the alleged behaviour presents to a child. However, when judicial officers make findings of fact and weigh those findings in the exercise of their discretion within the FLA framework: 'ultimately, the weight attached to each factor as set out at s.60CC is a matter of discretion.'

In the recent matter of *Lauder & Doran*, Murphy J agreed, stating that 'best interests are values not facts' in deciding that there was potential for an emotional relationship despite the father's criminal behaviour. His decision to order supervised contact even though one of the medical reports indicated that 'the mother's problems diminish her ability to buffer [the child from] the father's issues' highlights the importance of individual judicial officers' discretion. Thus to some extent their individual understanding and views about the harms of family violence may act as a filter in assessing the 'facts' – even those provided by the experts. Exposure to family violence, or its after effects, does not seem to be attributed the same level of potential harm to children as direct abuse, especially sexual interference with a child. In two thirds of the 15 matters with child exposure, unsupervised time was ordered as compared to 43% of the matters involving child abuse alone. This is despite research clearly showing that exposure to family violence is extremely harmful to children and that family violence is correlated with a heightened risk of child abuse. The latter is illustrated in our sample with about one third of child abuse allegations also including allegations of exposure or violence occurring between adults. As discussed earlier, the 2012 amendment prioritised the primary consideration of protection of the child over the promotion of child/parent contact and broadened the definition of exposure. Is legislative change enough though? The outcomes in the four post amendment cases were varied. One resulted in an order of no time in one until the child turned 13 and then could see her father if she wished to. In both *Wyatt* and in *Langley and Camp* discussed earlier *Scarlett FM* ordered supervised time, stating that, 'The Family Law Act has recently been amended to give greater weight to concerns about family violence.' In the fourth, the Federal Magistrate decided that the father could not file a Notice of Child Abuse, Family Violence or Risk of Family Violence since the father would need to be coerced, controlled or in fear when the mother kept the child from him for such an act to constitute family violence. The small number of cases is of course too limited to allow for any conclusions about the effect of legislative prioritising of child protection. It does allow us though to conclude that decision-making in these types of cases continues to involve judicial assessment of coercion, control, fear, violence and measurement of harm and risk. Therefore, the crucial question is how do judicial officers define and gradate harm and how do they understand the dynamics and manifestation of family violence? Chisholm has recommended: That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts

administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence. Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence that exposure is far broader than witnessing and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation and/or a violent partner may repeat such behaviour with a new partner. 'Programmes involving a consistent coordination of police, court staff and human service providers...' could play an important role in changing attitudes. To this end, it is likely that policy directions such as the Family Violence Best Practice Principles and initiatives such as the Magellan Program work in conjunction with legislation to better protect children. It is interesting though that none of the 30 child abuse cases in our sample were on the Magellan list. Evidently the abuse was not deemed as serious enough or the party or lawyer did not facilitate the process by completing the requisite Form 4. With Magellan, 'the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or the Court family consultant.' Perhaps seriousness of physical abuse is a measurement or assessment best left to Family Counsellors and child protection workers who would be better able to investigate thoroughly allegations if these matters were routinely put on the Magellan List without the lodgement of a form 4. The guidelines for Magellan also do not consider exposure as an injury that qualifies the matter for inclusion on the List: The parameters of the Magellan project are quite clear. Emotional abuse is not included, nor is the child being a witness to domestic violence. There must be a clear allegation that a child has been sexually abused or seriously physically abused. Yet as we write above, the psychological research has shown that 'with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence.' Witnessing is mentioned in the recommendations of the National Council's Plan for Australia to Reduce Violence against Women and their Children suggesting that Commonwealth and State and Territory governments need to work together to ensure that the National Framework for Protecting Australia's Children meets the needs of children who witness and/or experience domestic and family violence. This includes State and Territory child protection agencies working with Commonwealth agencies or Courts. Therefore, we recommend that in addition to the word 'serious' being deleted, that the program should be expanded to include family violence matters in which there is the risk of witnessing or exposure harms. A uniform integrated response would better ensure that informed investigation of individual cases would take place, translating into more in-depth and uniform child welfare expert evidence to better inform judicial perceptions of risk of harm. There are resource issues for the State, Territory and Commonwealth Governments in implementing this recommendation; however we believe such a multi-disciplinary response would be a most worthwhile investment in promoting family law processes and reasoning that are in harmony with the National Child Protection Framework's aim to ensure that 'Australia's children and young people are safe and well.' AND from an article presently undergoing review, Alicia Prest, Patricia Eastal and Fanny Thornton, 'When the Mother-child Tie in Parenting Orders is Outweighed by Other Factors: A Snapshot in Time' (submitted). Conclusion We have looked here at a sample of instances where a child is placed in the care of the father, in most cases, or another person whom the Court considers to have a genuine interest in, or pre-existing involvement with the welfare, care and development of the child. We found that this outcome took place in

some instances despite the mother having been the primary carer of, and/or the primary attachment figure to, the child and/or despite a maternal relationship that was characterised as positive. These were outweighed by a view that the child(ren) would be at an unacceptable risk of harm in a mother's care because of some sort of maternal dysfunction or an inability to acknowledge (and/or treat) its impact on her parenting capacity. The type of maternal harm we identified the most was emotional—frequently the mothers' inability to facilitate a meaningful relationship between the father and his child(ren). This permeated almost every best interest consideration, even where her inability to facilitate such a relationship between the father and child(ren) correlated with the mother's allegations or her genuine belief that he posed a risk of physical, usually sexual, harm to their child. This finding is somewhat ironic in the context of the 2012 amendments to the Family Law Act 1975 (Cth). These provisions were enacted to redress what was seen as the gendered consequences of the 2006 amendments' emphasis on meaningful relationship. Therefore the 2012 aims included clarifying that protection from harm was to be prioritised above the meaningful relationship consideration with provisions such as the 'friendly parent' repealed in order to encourage disclosure of family violence and safety concerns, thus better ensuring that protection of the child trumped maintaining parental ties with allegedly abusive fathers. In our sample, though, the courts are seemingly prioritising protection of the child from the risk of psychological harm by the mother due to her failure to facilitate a meaningful ties with a father over the risk of alleged physical or sexual harm by the father. We see this as a serious concern and conclude by highlighting several related issues and offering suggestions for change.

Evidentiary issues Inconsistencies in, and indeed the indeterminate nature of, family law make it difficult to predict how allegations of abuse will be treated in family law proceedings. Despite it being held that victims of domestic violence do not have to 'provide corroborative evidence of some fact, to have their evidence of assault accepted', unless 'strong probative evidence' of family violence is available to support the allegations, the Court may be unable to ascertain on the balance of probabilities that an alleged abuse has occurred. Certainly, in the sample judgments the courts were not swayed to limit time between the father and child where the mother's allegations could not be adequately corroborated with her evidence consistently held to be inadmissible, unfounded or unaccepted. However, there was sufficient evidence to support a finding of the mother's incapacity to facilitate a relationship between the father and child and the psychologically damaging effects of that incapacity. This is a finding which we believe warrants a special inquiry by the Commonwealth Attorney-General. Submissions and a roundtable could bring together the experiences and insights of academic and legal practitioner experts with the aim of informing possible legislative amendments to the Family Law Rules or interim non-legislative requirements, such as a Practice Direction. The Inquiry would seek ways to ensure that the standards of evidence and the applicable tests evolve beyond those already provided for at common law, including those in *M v M*. It could also decide if and how Courts could be required to give such allegations considerable weight unless there is a significant fact or circumstance, such as proof that the mother is not a credible witness, to minimise that weight. ICL and family consultant Judicial decision-making is influenced by the ICL's views and a Family Consultant's evidence. As the ICL receives a Family Consultant's report, there is arguably some nexus between a Family Consultant's recommendations and the ICL's proposed Orders, which in cases where the father was granted responsibility for, and primary care of, the children, were mostly in favour of the father. The ICL appears to be highly regarded by the Court, so there to be a chain of influence taking place. Our concern here is that the responsibility for assessing the parent-child relationships lies with a sole Family Consultant who, in an artificial and strained environment, may be observing a relationship dynamic that may not be reflective of the mother and child's previous 'normal' relationship. This is even more likely the case in

circumstances where the mother and child have not seen each other for a period because of a prior suspension of that time, for example as a result of interim orders pending the Family Consultant's report. We suggest that consultations with the families in parenting proceedings could be undertaken outside of sterile office environments and otherwise unnatural settings. Both the parent and child(ren) could feel more relaxed with each other at home, a park or some other child-friendly venue which would be conducive to producing their usual behaviour with each other. Also, to increase the likelihood that the Family Consultant(s) obtain an accurate understanding of the mother-child relationship or observe the redevelopment (or not) of the mother-child relationship, observations and interviews ought not to be a one-off, particularly in circumstances where the child has not seen his or her mother for a period. Further, we recommend that a minimum of two Family Consultants separately assess the children and their relationships with their parents (and/or any other person applying for Parenting Orders or relevant to proceedings) on separate occasions to gauge whether their observations are consistent. If there is disparity between the two reports, then there should be an option to engage a third Family Consultant to undertake a final assessment, with the most consistent findings of the three reports being given greater weight by the Courts. The counter-arguments to this would likely include access to Family Consultants, associated costs and over-interviewing of the child. Family Consultants appointed by the Court incur no cost, but there can be significant delays to access those Family Consultants. Private Family Report Writers may be more accessible in terms of availability, but are costly at approximately (\$3,000 - \$9,000.00) which may be unaffordable for many parents. Government could assist by covering all or part of the costs for private consultants or by providing funding for more Court appointed consultants. Any reluctance to fund these measures or concerns about the child being over-interviewed should be allayed and outweighed by the need to ensure that decisions made about the care of and responsibility for Australian children are indeed made in the best interests of the child. Assisting parents at risk of losing time with their child(ren) In *O'Connor & Barker*, with reference to the range of factors which attributed to a mother's dysfunction, Curtain J said: This court is seeing more and more cases with these type (sic) of problems... It requires the involvement of social workers, psychologists, psychiatrists and general practitioners to assist the parents where there is a combination of mental ill-health, illicit drug abuse and violence. Further, in many cases, the court remained open to considering a benefit to the children in having a meaningful relationship with their mother providing that she could either change her attitude towards the father-child relationship, or by having her approach closely monitored through supervision. We would suggest therefore that a collaborative approach is necessary to ensure that both the underlying issues are adequately addressed in parenting matters. We end with a few ideas on how to do so. A government-funded fact sheet could be developed to be placed in family law firms, care and protection agencies, and other sites such as Relationships Australia offices, setting out the attributes of a 'good' parent according to the judiciary and what parents should do or avoid doing in order to retain unsupervised time and a meaningful relationship with their children post-separation. Concurrently, legal practitioners should be advising their clients to engage the necessary assistance as described by Curtain J, to help them address any matters which may be identified as dysfunction prior to Court proceedings, so that if those matters are raised they can demonstrate the mother's recognition of her flaws and that the issues have been resolved. That non-legal assistance can be promoted by law firms (and some already do) promoting inter-disciplinary networks of professionals in each of the abovementioned fields so that where there is a need, their clients will have access to those services.

Have looked peripherally at this question in a few publications. Again please note that footnotes are not migrating and am able to email any pubs of interest Patricia Easta and Dimian Grey (2013) Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary. Australian Journal of Family Law 27: 59–77. Conclusion Orders of no time or even for only supervised time are not the norm in cases involving allegations of either child abuse or exposure. Those parents who were ordered to have no time with their children were either extremely violent towards their partners, had abused their children, or were mentally unwell. It appears that these parents' behaviour was so extreme that judges considered that court orders prohibiting the behaviour would have been ineffectual and so posed an unacceptable risk. Supervised time with the child(ren) appears to be ordered if the parent appears to accept responsibility for their actions and seeks treatment, thereby showing the risk of harm to their children has been mitigated. Indeed as these cases have shown, the critical question that the judicial officers are responding to is whether there is an unacceptable risk of harm to the child in seeing the parent. As recently stated by Deputy Chief Justice Faulks, 'children cannot be an experiment.' Orders cannot be made on the basis of 'let's see what happens'. Chisholm agrees with such a sentiment: that determinations about unacceptable risk are 'based on a whole set of factual findings about the child and much else; those findings would have to be based on evidence, or agreed facts.' In our sample, 'facts' were provided by Family Consultants, police investigations and subsequent criminal charges, expert testimony or facts agreed between the parties. This illustrates the importance of corroborating evidence in the assessment of allegations and the risk of harm the alleged behaviour presents to a child. However, when judicial officers make findings of fact and weigh those findings in the exercise of their discretion within the FLA framework: 'ultimately, the weight attached to each factor as set out at s.60CC is a matter of discretion.' In the recent matter of *Lauder & Doran*, Murphy J agreed, stating that 'best interests are values not facts' in deciding that there was potential for an emotional relationship despite the father's criminal behaviour. His decision to order supervised contact even though one of the medical reports indicated that 'the mother's problems diminish her ability to buffer [the child from] the father's issues' highlights the importance of individual judicial officers' discretion. Thus to some extent their individual understanding and views about the harms of family violence may act as a filter in assessing the 'facts' – even those provided by the experts. Exposure to family violence, or its after effects, does not seem to be attributed the same level of potential harm to children as direct abuse, especially sexual interference with a child. In two thirds of the 15 matters with child exposure, unsupervised time was ordered as compared to 43% of the matters involving child abuse alone. This is despite research clearly showing that exposure to family violence is extremely harmful to children and that family violence is correlated with a heightened risk of child abuse. The latter is illustrated in our sample with about one third of child abuse allegations also including allegations of exposure or violence occurring between adults. As discussed earlier, the 2012 amendment prioritised the primary consideration of protection of the child over the promotion of child/parent contact and broadened the definition of exposure. Is legislative change enough though? The outcomes in the four post amendment cases were varied. One resulted in an order of no time in one until the child turned 13 and then could see her father if she wished to. In both *Wyatt* and in *Langley and Camp* discussed earlier Scarlett FM ordered supervised time, stating that, 'The Family Law Act has recently been amended to give greater weight to concerns about family violence.' In the fourth, the Federal Magistrate decided that the father could not file a Notice of Child Abuse, Family Violence or Risk of Family Violence since the father would need to be coerced, controlled or in fear when the mother kept the child from him for such an act to constitute family violence. The small number of cases is of course too limited to allow for any conclusions about the effect of

legislative prioritising of child protection. It does allow us though to conclude that decision-making in these types of cases continues to involve judicial assessment of coercion, control, fear, violence and measurement of harm and risk. Therefore, the crucial question is how do judicial officers define and gradate harm and how do they understand the dynamics and manifestation of family violence? Chisholm has recommended: That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence. Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence that exposure is far broader than witnessing and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation and/or a violent partner may repeat such behaviour with a new partner. 'Programmes involving a consistent coordination of police, court staff and human service providers...' could play an important role in changing attitudes. To this end, it is likely that policy directions such as the Family Violence Best Practice Principles and initiatives such as the Magellan Program work in conjunction with legislation to better protect children. It is interesting though that none of the 30 child abuse cases in our sample were on the Magellan list. Evidently the abuse was not deemed as serious enough or the party or lawyer did not facilitate the process by completing the requisite Form 4. With Magellan, 'the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or the Court family consultant.' Perhaps seriousness of physical abuse is a measurement or assessment best left to Family Counsellors and child protection workers who would be better able to investigate thoroughly allegations if these matters were routinely put on the Magellan List without the lodgement of a form 4. The guidelines for Magellan also do not consider exposure as an injury that qualifies the matter for inclusion on the List: The parameters of the Magellan project are quite clear. Emotional abuse is not included, nor is the child being a witness to domestic violence. There must be a clear allegation that a child has been sexually abused or seriously physically abused. Yet as we write above, the psychological research has shown that 'with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence.' Witnessing is mentioned in the recommendations of the National Council's Plan for Australia to Reduce Violence against Women and their Children suggesting that Commonwealth and State and Territory governments need to work together to ensure that the National Framework for Protecting Australia's Children meets the needs of children who witness and/or experience domestic and family violence. This includes State and Territory child protection agencies working with Commonwealth agencies or Courts. Therefore, we recommend that in addition to the word 'serious' being deleted, that the program should be expanded to include family violence matters in which there is the risk of witnessing or exposure harms. A uniform integrated response would better ensure that informed investigation of individual cases would take place, translating into more in-depth and uniform child welfare expert evidence to better inform judicial perceptions of risk of harm. There are resource issues for the State, Territory and Commonwealth Governments in implementing this recommendation; however we believe such a multi-disciplinary response would be a most worthwhile investment in promoting family law processes and reasoning that are in harmony with the National Child Protection Framework's aim to ensure that

‘Australia's children and young people are safe and well.’ SECOND CONCLUSION comes from 2008 article and to some extent the 2012 amendments may have addressed our concerns Patricia Easteal and Kate Harkins (2008) *Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act*. *Australian Journal of Family Law* 22: 259–278. *Are We There Yet?* Our study shows that a smaller proportion of those who go to Court with a proposal for a relocation have been allowed to relocate since the 2006 legislative amendments. As predicted, it would seem that the increased focus on a meaningful involvement by both parents and a child might make it harder for parents who are the primary carers to relocate than in the earlier legislative environment. Determining which, if any, specific legislative change has created the shift is difficult due to the lack of uniformity of judicial approaches that we have noted. Overall, pre 2006 and post 2006, the judges provide comments in regard to the individual considerations, indicating somewhat impressionistically how the facts led to their weightings of the different sections and subsections. However, within the judgment’s concluding remarks it is often difficult to assess which considerations have been the most persuasive and ultimately determinative in regards to a child’s best interests. Sometimes it is not even clear whether the primary considerations have been weighed more heavily than the additional ones. Indeed, determinations do involve a great deal of judicial discretion. The interpretations of ‘substantial and significant time’ and of ‘meaningful relationship’ vary tremendously. As one reads the facts of a case and the judge’s discussion of the two tiers, s 61DA, s 65DAA and the objects, unless the Court finds that there has been violence that would be detrimental to the child’s best interests, it is seldom evident what the judge’s decision is going to be until it is spelled out. Intuitively however in reading through the 50 cases, one does get the ‘feel’ that the judges are incorporating the new objects of Part VII into their reasoning. As expressed by Brown FM in *P & P* ‘the rationale underlying s 61DA and the practical consequences which flow from it, by means of section 65DAA ... are matters which are underpinned by the object enunciated in s 60B(1)(a).’ Accordingly, in determining a child’s best interests, many judges have seemingly integrated the importance attached to the principles set out in the object provisions and taken the intention for children to have a ‘meaningful involvement with both parents’ into account- particularly in cases where children have a strong relationship with both parents and there is no history of family violence. This is evidenced in *Bryans and Frank-Bryans* where Strickland J stated ‘it is imperative that these objects, principles and considerations be given appropriate weight’ and *PBC & LMC* where Sexton FM highlighted that ‘the legislation makes clear that the children must be the focus of the inquiry. It is a primary consideration that both parents remain significantly and meaningfully involved in the children’s lives ... I must ascertain the children’s best interests with reference to the objects of the Act. Those objects include children having the benefit of both their parents having a meaningful involvement in their lives to the maximum extent consistent with their best interests.’ Our findings reveal the important connection between the two primary considerations with violence, when acknowledged by the Court, trumping ‘meaningful relationship with both parents.’ However, we must note again that there were relatively fewer cases in the post-amendment sample in which the mother wanting to move alleged a history of family violence. This is one of the more interesting and unexpected findings of our study. Perhaps the ‘gatekeepers’ are advising clients that relocations are more likely to be allowed where there is family violence, leading to these matters not getting to court, or perhaps movers who have experienced family violence are more reluctant to make such allegations in the post-2006 legislative climate. Our results though must be regarded as preliminary given the limitations of small sized comparison groups. Inferences drawn from small samples are necessarily tenuous because the observed effects may be a result of chance events. Larger samples are needed to remove the influence of these random effects and to provide the power

needed for multiple test comparisons and to control for the effects of confounding variables such as distance, age of children, registry and violence. Further, a larger dataset could test Parkinson's suggestion that 'clusters of judges who work together in the same location' may be applying different 'interpretations of the law and beliefs about the best interests of children.' However, the number of cases available for analysis is limited by the amount of time that passed since the amendments. Increasing the number of cases by sampling at a later time and by extending the pre-amendment time period is problematic. First, as the range of dates over which cases are heard increases so does the likelihood that results will be influenced by significant case law, such as the High Court case of *U v U* in September 2002, and by social and political changes, not related to the legislation. Given the persistence of indeterminacy in relocation decision-making, new Full Court or High Court decisions are likely to provide more guidance on how the amendments should be applied. Second, new legislation may be enacted before there have been enough cases to provide the numbers needed for more detailed analysis. The Family Law Council has identified a need for a specific relocation section to be drafted. Parkinson recommends a different provision that would offer 'guidance on outcomes of some relocation cases to trial judges...'. Both new case law and new legislation will confound the effect of the 2006 amendments on relocation decisions. Researchers are thus presented with a dilemma. In family law the best interests of the child are paramount, but how the law should be applied to protect those interests is not obvious. As a consequence there is a high level of indeterminacy in the legislation and a wide range of judicial interpretation. This can introduce bias when the effects of legislative change are assessed from a small sample of cases. At the same time relatively frequent legislative change and significant case law makes it impossible to obtain large sample sizes without introducing new influences that confound the interpretation of results. Thus, in this area where the impact of legislation is of such concern, the mutable nature of family law curtails our ability to accurately assess the effects of specific legislative changes.

Question 16 Not sure what this question is asking?

Question 17

Relying on 1 published journal article (and another under consideration) which show how important the family consultant evidence is and make recommendations for change. Please note that footnotes do not carry over and would be happy to email the PDFS Conclusion with Young and Carline Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' (accepted International Journal of Law, Policy and the Family, 32(2)) VI. A BETTER WAY OF ADDRESSING VIOLENCE AND PROPERTY – THE NEED FOR SOCIAL AND LEGAL REFORM The evidence is clear that family violence intersects with family property settlements and there is a degree of both judicial and academic support for the proposition that this should be reflected in the way courts decide property matters. There has been little legislative appetite for significant family property law reform in recent decades and so the judiciary have stepped in to fill the vacuum with *Kennon*. However, we have seen overt judicial discomfort, and confusion, with the way *Kennon* addresses violence. Easteal et al's (2014) analysis concluded that the *Kennon* principle: • Is ill-defined • Has thus been the subject of conflicting interpretations, and • Is rarely raised and often not raised even when the facts might suggest it should be, suggesting lawyers are either not familiar with it, or not comfortable raising it Our analysis of the relevant 2015-2016 case law reinforces these concerns. While it is not beyond the judiciary to develop sophisticated legal tests, such decision-making does not take place in a vacuum; it certainly does not take place in a space of gender equality. The gender inequalities we have identified as operating when property intersects with violence in the family law system are a reflection of the same societal imbalances between men and women seen more broadly in society. As long as such imbalances exist in society, they will inevitably be mirrored in the legal system (Tolmie et al.,

2010: 302). The reality then is that men and women are on unequal ground by the time they enter the family law system as exemplified by women's relative impoverishment following a relationship breakup. For that reason and numerous others already discussed, many women are keen to settle family law disputes, which makes the ground even less level yet. Settlement may be further skewed by women's problematic negotiation of a male dominated legal system. When family violence victimization is added to the equation, these inequities are magnified and likely worsened at key points in the family law processes (Daw, 1995). As it is axiomatic that male dominated legal processes and substantive law favour those with resources and those who can best play its 'games,' women, particularly victims of violence, are less able to either harness or 'work' the legal system. This was illustrated above as we have shown how women's (relative) inability to afford legal representation coupled with vexatious litigation may affect how they fare in hearings. And we have also seen how the relationship between gender, communication, violence and power contribute to an uneven playing field in alternative forms of dispute resolution. So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims. In relation to legislative reform, since ambiguity in substantive laws produces 'a sieve through which the dominants' values penetrate' (Easteal, 2001: 233), any legal provisions will need to be carefully drafted. The experience with drafting problems of the 2006 shared parenting reforms (O'Brien, 2010) suggests great attention needs to be paid to the precise wording used. However, it is key that – as with those parenting reforms – a comprehensive approach, that also addresses process, is adopted rather than just amending the key substantive provisions. For example:

- The Family Law Rules 2004 (Cth) regarding property could provide the same notifiers of violence that exist in relation to parenting matters. Currently, in parenting matters the Rules require the filing of a specified notice under Rule 2.04 where a parent alleges there has been, or there is a risk of, family violence, by one of the parties.
- Rule 10.15A, which requires lawyers to ensure that consent orders address how any concerns of violence are addressed by the orders sought, could be extended so that where, during a hearing, a property order is sought by consent, and there have been allegations of violence, there is an obligation on the alleged victim's lawyer to address the court as to the impact on their client's consent, if any, of the alleged violence.
- Changes in case management processes could be adopted which ensure property cases with alleged violence are identifiable so that pre-trial processes minimize unwanted contact.
- The operation of the Family Violence Best Practice Principles – which presently only apply to parenting matters – could be adapted to cover financial disputes.
- The family violence 'benchbook' could have its modest section on family violence and property expanded to deal in more depth with the particular issues relevant to property.
- The role of mediation (currently 'family dispute resolution' in Australia) could be reconsidered as there is evidence that appropriately structured mediation can provide benefits where family violence is an issue (Kaspiew et al., 2012). As we indicated at the outset, the time is ripe for the ALRC to consider this issue. If minded to reform property law, the ALRC may recommend wholesale reform or simply consider amendments to the existing framework. In either case, as far as the treatment of family violence goes, it is questionable whether there is much to be gained from looking to other jurisdictions. Like Australia, England and Wales has a highly discretionary model. The key criteria are set down in Matrimonial Causes Act 1973 s25, which includes eight non-hierarchical factors a court is to take into account, one being 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. To some extent this factor reflects the residual influence of

fault in that jurisdiction, but in addition to other matters it does allow violence to be considered. The question then becomes whether the violence was ‘inequitable to disregard’; case law indicates that only exceptionally severe forms of domestic abuse will qualify—for example, attempted murder, wounding and attempted rape. Disconcertingly, ‘lesser’ forms of violence will be disregarded. Hence, in *S v S* (Non-Matrimonial Property: Conduct), despite convictions for assault occasioning actual bodily harm, the conduct was not construed as being sufficiently grave to be inequitable to disregard. Thus, ‘it is only in the gravest of cases - generally those in which the life of one party has been placed in jeopardy - that the courts have accepted that such conduct should influence the outcome of an application’ (Inglis, 2003: 185). This problematically limits the application of the ‘conduct’ factor and in doing so the courts ‘have failed to reflect society’s increasing condemnation of such behaviour’ (Inglis, 2003: 185). Indeed, arguably it normalizes a certain amount of violence in a relationship. It is unlikely the Australian legislature would want to walk down that road. In Scotland, where there is more direction on how property matters should be decided, the sole opening for consideration of violence is s11(7) of the Family Law (Scotland) Act 1985. This only permits conduct to be considered if it has ‘adversely affected the financial resources which are relevant to the decision’ or ‘it would be manifestly inequitable to leave the conduct out of account’. The first of those provisions would have limited applicability given its direct tie to the value of the assets and the second is akin to the UK fault provision. Fault is also the only basis for considering violence in property matters in the US and civil law jurisdictions rely on tort law and do not see family violence as a property issue, though violence might be relevant to some of the ancillary remedies. Similarly, in Canada, it is only the consequences of violence that can be factored in, through recognition of the impact of violence on a spouse’s future employability (Kelly, 2009). Thus, if the ALRC recommends legislative reform directly addressing violence and family property, whether in the context of wholesale, or more modest property reforms, it will be in new territory. We suggest this requires novel ways of thinking about these intertwined issues. If the current framework remains, there is no reason a provision requiring the court to take violence into account cannot specify a range of relevant considerations. Existing considerations such as future needs impacts and impact on contributions could be included. But a specific provision could also identify family violence as a ‘negative’ contribution, in the context of contributions to both family wealth and the welfare of the family. While the Australian Full Court has been wary about accepting compensation as a general goal of property proceedings, this does not mean a principle of compensation cannot be explicitly imported in respect of violence. At one level this could be to recognize an assault to save separate expensive civil proceedings, but that would not need to be the limit of recognition of compensation. If the ALRC recommends more fundamental reform of property, then this provides an opportunity to reconsider, and make explicit, the principles underpinning family property law, in the same way that Part VII dealing with parenting disputes does. While the FLA does not specifically state that its ‘future needs’ component of a property settlement has the purpose of compensating relationship generated economic disadvantage, this is precisely what it does, and what it is intended to do. One option might be an underlying principle of compensating relationship generated disadvantage (not solely economic, as for example in Scotland), which could inform any specific provision on family violence (as well as provisions dealing with more directly financial matters) allowing for a broader consideration of the harms victims of violence suffer. Of course, this would not have to be in place of any direct provisions allowing for victims of violence to claim some compensatory payment as part of a property settlement. As noted above, there could be a variety of ways family violence is considered, just as is the case in the Australian provisions on parenting disputes. There may understandably be some caution about reverting to what seems a fault-based paradigm. However, careful drafting can allay this concern,

because the issue at hand is neither what caused the relationship breakdown nor some notion of punishment. Family property law is, at its heart, remedial. It seeks to avoid the inequities that would arise in certain interpersonal relationships if the normal rules of property prevailed. Those financial inequities arise out of the same dynamics and power imbalances that make women so vulnerable to violence within their family; they are not distinct, but rather intertwined issues. Any provisions would thus simply provide statutory recognition of, and recompense for, this. Whatever legislative route is taken, the issue of proof of violence remains problematic. And while law reform and professional training are required for change, they are not sufficient. Changing the Family Law Act, even if accompanied by increased understanding of the manifestations, dynamics and effects of domestic violence, does not address the underlying systemic inequities facing victims of violence in property matters. The existence of unwritten gendered subtexts limits the ability of effectuating change simply through rewording substantive law. However, these are not reasons for not providing the best possible solutions available for victims of violence – they are simply caveats.

Question 18 Have not researched or written on this topic

Question 19 Am currently supervising an Honours student who is looking at BFAs

Question 20

Haven't researched or written about these issues but would reiterate what Lisa Young, Anna Carline and I conclude in Conclusion with Young and Carline Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' (accepted International Journal of Law, Policy and the Family) While it is not beyond the judiciary to develop sophisticated legal tests, such decision-making does not take place in a vacuum; it certainly does not take place in a space of gender equality. The gender inequalities we have identified as operating when property intersects with violence in the family law system are a reflection of the same societal imbalances between men and women seen more broadly in society. As long as such imbalances exist in society, they will inevitably be mirrored in the legal system (Tolmie et al., 2010: 302). The reality then is that men and women are on unequal ground by the time they enter the family law system as exemplified by women's relative impoverishment following a relationship breakup. For that reason and numerous others already discussed, many women are keen to settle family law disputes, which makes the ground even less level yet. Settlement may be further skewed by women's problematic negotiation of a male dominated legal system. When family violence victimization is added to the equation, these inequities are magnified and likely worsened at key points in the family law processes (Daw, 1995). As it is axiomatic that male dominated legal processes and substantive law favour those with resources and those who can best play its 'games,' women, particularly victims of violence, are less able to either harness or 'work' the legal system. This was illustrated above as we have shown how women's (relative) inability to afford legal representation coupled with vexatious litigation may affect how they fare in hearings. And we have also seen how the relationship between gender, communication, violence and power contribute to an uneven playing field in alternative forms of dispute resolution. So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims

Question 21

DRAFT OF PAPER SUBMITTED TO FAMILY LAW REVIEW Was revised for publication in: Patricia Easteal Jessica Herbert, and Jessica Kennedy 2015 'Collaborative Practice in Family Law Matters with Coercive Control-type Violence: Preliminary Thoughts

from the Practitioner Coalface,' 5 (1) Family Law Review: 13-33. Please note that footnotes do not carry over and would be happy to email the PDFS Collaborative Practice in Family Law Matters with Coercive Control-type Family Violence A Canberra-based Pilot Study Patricia Easteal*, Jessica Herbert and Jessica Kennedy Abstract Collaborative Practice (CP) has been promoted as a method of dispute resolution in family law. It represents a shift away from litigation, towards a formally contracted negotiation process involving lawyers, relevant professionals and their clients. It is now practised to some extent in all Australian states and territories, excluding Tasmania. Having examined some of the issues with other pathways (mediation and court proceedings), we are particularly interested in whether CP might be appropriate in some matters involving the coercive control type of family violence (coercive control). To this end, we use overseas and Australian academic literature to learn about the principles and processes of CP in general and how they would apply to matters involving family violence. We also look at the experiential-based views of a small, targeted, sample of lawyers. Our findings identify the importance of: screening; suitability criteria; how CP can be modified to deal most effectively with a power imbalance; and, its potential benefits and risks. We conclude that family lawyers must screen carefully for patterns of control, and for suitability, by asking if the victim is capable of participating and whether the perpetrator is capable of responding to the ex-partner's needs. With diligent, on-going, assessment, management, monitoring and support by lawyers and other professionals trained in both CP and family violence, it may be a feasible option that could provide the victim with safety and a 'voice'. *Corresponding author Professor Patricia Easteal AM School of Law and Justice University of Canberra patricia.easteal@canberra.edu.au Collaborative Practice in Family Law Matters with Coercive Control-type Family Violence Preliminary Thoughts from the Practitioner Coalface Introduction Collaborative Practice (CP) is a form of lawyer-assisted dispute resolution. Since its introduction in 2005, CP has been promoted as a method of dispute resolution in family law and is now practised in all states and territories of Australia, excluding Tasmania. CP has represented a shift away from litigation, towards a formally contracted negotiation process involving lawyers, relevant professionals and their clients. In family matters this has the potential for reduced legal costs, faster resolutions, creative solutions, and less hostile negotiations. CP, it is argued, provides a potential for achieving better outcomes because its integrative approach allows for attendance to the needs and interests of both parties. Voegele and colleagues argue that the utilisation of the Collaborative process has an inherent healing potential for families. CP is said to be able to respond to the high levels of stress and lowered coping abilities experienced during divorce disputes. Further, it has been described as a process that has 'integrity, empowers clients, and helps families move through difficult transitions'. Questions have been raised, though, by overseas commentators about the suitability of CP for clients with mental, emotional or physical vulnerabilities, who may not be capable of properly participating because of fear or intimidation. It is argued too that CP may be unsuccessful if parties feel extreme hostility towards each other and/or have particularly poor communication skills. Thus, the consensus in the North American literature is that the personal motivation of the parties, their trustworthiness, and whether there has been family violence, are also important factors in assessing how or whether the process should be used. Whether CP is appropriate for matters that include family violence is a very relevant question in the Australian context given the frequency of such allegations in cases that enter the domain of family law. For example, one study found that approximately 65% of mothers and 53% of fathers involved in the family law system indicated that their partner had been either emotionally or physically abusive towards them. It is also an important question since the other post-separation dispute settlement pathways may be problematised by effects of violence. These include (but are not limited to): feelings of powerlessness, low self-esteem, anxiety, substance abuse, PTSD,

depression, fear of having any sort of contact with an abusive partner, and an impaired capacity for paid employment, which has arisen as a result of these mental and physical health issues, or because victims are prevented from working whilst in the relationship and lack experience. Such effects may be particularly germane in the context of coercive controlling violence, with its accoutrements of domination, intimidation, control, and its propensity to escalate. Could CP be a possible resolution mechanism for this group in which there has been coercive controlling violence? There is little Australian academic research on CP and none on how it works if there is family violence. Therefore, to answer that question, we rely upon overseas studies and on responses from a small sample of practitioners who have experience with CP. In addition to seeing if this type of resolution could be appropriate if coercive control-type violence is identified, we also aim to add to the Australian academic literature concerning CP. Learning More about CP from a Sample of Lawyers Who Use It

Since our aim was to collect experiential evidence about CP and how it is practised in Australia and then to theorise about how it could work (or not) with family violence, we used a targeted, purposive sample. Put quite simply, we wanted to learn from those at the 'coalface' about their use of CP and their opinions about and/or experiences of using it when family violence has been alleged or acknowledged. In late 2013 and early 2014, email invitations to participate in an online survey were sent to all of the 16 lawyers who belonged to the Collaborative Practice Canberra Group and to three other lawyers known to the researchers to have relevant experience. We ended up with eight respondents: six were from the Practice Group. Each respondent had received training in CP and seven had used CP in at least one matter where a party had alleged violence. Aside from CP, each respondent's work experience included involvement in mediation and acting as an advocate in Court proceedings. We were interested in their practices and assessment of CP in general and specifically in cases of family violence. Open-ended questions aimed to ascertain their observations and views about when CP is appropriate with different types of family violence and how CP could be modified if family violence is evident. Other questions concerned screening of parties' suitability for CP and the practitioners' experiences/comparison with other family law processes (and violence) when violence is admitted or alleged. Responses were examined qualitatively using an 'open-coding' approach. Because of small sample size and brevity of the answers, this process was informal and unstructured, but did involve studying every line of the eight surveys to determine what exactly had been said and to label each passage with an adequate code or label. These codes emerged as 'power', 'control', 'suitability', 'advantages', 'disadvantages', 'modification' and 'outcomes.' We then converted answers to tabular form based on these theses and used footnotes to cluster extracts relevant to each. Limitations of the Sample Data

Since the aim was to access people who had practised or were currently using CP, it is likely that those who participated are consciously or unconsciously biased in their views of its potential value. This could be an inevitable outcome of practitioners being 'true believers' given its relative fledgling status in this country and the fact that two law firms in the ACT were the pioneers and foundation champions of CP's use in Australia. As important as it is to recognise potential biases, it is also important though to note that we are not making conclusions about the utility of CP based upon the respondents' opinions. We use the respondents' experiences and their ideas in order to provide a description of how best to determine the suitability of CP in a specific matter and to predict how CP might fit in the smorgasbord of dispute resolution options. Another caveat: we wanted to keep the survey very brief to attract busy respondents. The design of the instrument did not require a respondent to share step-by-step processes and experiences with CP. For instance, we did not ask specific questions about the type of CP used, although respondents did discuss some of the appropriate contexts for having other professionals on the CP team. We are therefore unable to identify associations between

successful outcomes and particular models. Our results should be regarded as preliminary. About CP CP's distinguishing feature is the 'commitment to good-faith negotiations focused on settlement, without court intervention or even the threat of litigation'. The disqualification provision in the CP contract states that if either party chooses to withdraw from the CP process, both lawyers (and their firms) and any experts involved are automatically terminated from representing the parties in court proceedings, leaving the parties to seek new legal representation. The retainer agreement or collaborative contract thus changes the context of negotiations by providing a strong incentive to come to an early, collaborative settlement. Parties and lawyers involved in the process are able to focus on resolving the dispute openly without the concern that litigation may be commenced. Pauline Tesler, an American pioneer in CP, believes that lawyers who are not contractually barred from taking an issue to court tend to decide too quickly that the issue should be taken to a third party for resolution. It is her view that the disqualification clause acts as an incentive to remain committed to the negotiation process. The formal written commitment to engage in good faith also aims to decrease suspicion and paranoia. The retainer agreement though might be a source of tension for some collaborative lawyers and clients. Parties may feel pressured to settle under inappropriate circumstances in fear that clients would have to find and retain new representation if the process were to break down. Another aspect of CP is its fluidity. 'The collaborative model is dynamic in that it evolves over time'... and 'it is always possible to modify the structural components of the collaborative system to suit the client's needs'. Hence, debriefing meetings involve discussion between the lawyers (and experts if involved) about how the parties engaged in the process and how the next ('four way') meeting, should be conducted.

Different Models of CP

When the client has decided to engage in CP, he/she will meet with their lawyer to prepare for the first meeting with the other party. This usually involves the lawyer explaining to the client the process involved and an in-depth discussion of the client's interests and objectives. Discussions might also be made at this stage, or in consult with the other party's lawyer prior to the commencement of the collaboration, about what professionals – if any - to add to the process. There are theoretically three approaches: a lawyer only model, a lawyer referral model and a team model. The lawyer only model involves clients and their lawyers meeting in a series of 4-way meetings to try to reach a resolution. Any other professionals, such as accountants and mental health providers, are involved only as an expert or consultant. The next two models are multi-disciplinary and include lawyers and other jointly retained neutral professionals. With the lawyer referral model, the lawyer refers his/her client to additional professionals such as a financial consultant or accountant or mental health professional to assist as necessary at any stage of the process. The strict team model comprises an interdisciplinary group of professionals appointed at the outset of the matter by the parties. They include the two legal professionals, a neutral financial specialist, two mental health coaches (each spouse selects her or his own coach), and a specialist who advocates for the child(ren). The engagement of allied practitioners can provide significant benefit to clients and lawyers within the process and, if necessary, separate meetings with other professionals can explore further issues or concerns the client/s may have: ...lawyers...can concentrate on skills such as problem solving, communication and negotiation, whilst the other professionals look after the client's emotional, financial and social needs. In Canberra (and throughout Australia), most CP lawyers tend to practise either the lawyer only model of CP or, from the survey responses, it seems that most use a referral model. There is mutability as it is not known at the outset whether or not the CP will be multidisciplinary. Generally, the practice in Canberra is to agree to the collaborative process, determine between the lawyers at the beginning whether there is any obvious need for third party involvement at the first 4-way meeting, and, if not, identify any need for other professionals at the first or subsequent meetings. It might be

evident before the first meeting that one or both parties are going to need additional help such as a mental health support person, or coach. This could be discussed with the other lawyer to determine how such a professional could be involved. It may then also become obvious at the initial session, or at subsequent ones, that some financial or child expert advice is required.

Interest-Based Negotiation With all CP approaches, the lawyers and clients (and other professionals, if multi-disciplinary) negotiate with the active participation of both clients. Meetings are designed to encourage constructive negotiation and allow each participant to speak and to discuss all issues. Parties are encouraged by their lawyers to devise solutions aimed at satisfying their interests and goals, as well as those of the family. This is known as an interest-based negotiating approach. In agreeing that ‘win-win’ goals are preferred, the process has the potential to promote imaginative and creative thinking among all participants. A metaphor is an orange: the wife wants to make orange juice and the husband wants to make some potpourri. If the matter went to court, the Judge might decide that the orange be cut in half. Both parties would end up with half of the orange, but neither of them might have enough of the orange to do what they had hoped to do. However, if the couple sat down to understand each other’s interests, they could realise that the wife might only need the flesh of the orange to make the juice, and the husband only requiring the rind to make his potpourri. If they reach an agreement based on their interests, they will both have what they need.

[CP]...combines the positive problem solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation... giving rise to potentialities not generally found in other dispute resolution models. An interest-based approach can be compared to decisions made by the court based on law and facts rather than needs and interests. It provides scope for the parties to devise settlement options together without limiting negotiations to what a court might order. Accordingly, CP may give parties the ‘best of both worlds’ by providing not only advocacy support but also legal advocacy with a non-litigious focus on settlement. While lawyers retain an alliance with their clients, they work with the opposing lawyer as a team to help their clients reach shared goals. There is collaboration between the two sides with information gathered by both lawyers and clients, and shared with the team during meetings. This increases the efficiency of the negotiation, as there is greater transparency and no duplication of documents/information. Therefore, co-operation is a major feature of CP – between both clients and lawyers. In practice then mistrust between lawyers and other professionals and mistrust between the parties has obvious implications for the collaborative process. One wonders then an interest-based negotiation could work if there is coercive control family violence involved? We look at this question after providing a brief overview of existing dispute settlement pathways and their potential limitations for cases involving these types of antecedents. Why Look at CP for Victims of Family Violence? Coercive Violence Matters: When and Why Mediation might not be Appropriate Screening and risk assessment are crucial to identifying specific patterns of control and any psychological and financial impacts of violence. Such assessment must be ongoing to ensure the continual safety of the victim and the family because the dynamics of the relationship or violence may change after separation, possibly increasing in severity. Alcohol and substance abuse, psychological problems, and prior arrests of a victim’s ex-partner are commonly listed as risk factors in family law matters. These indicators should be considered along with other factors such as past assaults, threats, access to weapons, jealousy or preoccupation with the ex-partner, and stalking behaviours. The presence of multiple indicators could signal difficult and high-risk cases, and indicate that measures of protection are needed for the victim and their children. If violence is identified with screening, does that mean that FDR is necessarily inappropriate: in theory, not always. Mediation involves the parties talking about their own perspectives, needs and interests in order to come together to form an agreement on what is supposed to be a level playing field. The mediator acts as the

neutral third party and has the power to determine how the matter will be handled and how the parties are best protected during the process. Victims are theoretically empowered because of the primary principle of self-determination, where parties have the ability to advocate their own resolution in the dispute, without being coerced or having a decision imposed upon them. In addition, mediation can potentially save costs for parties who cannot afford litigation; has the capacity to preserve relationships between parents for the benefit of children; and has the potential to take into account emotional issues and interests, as opposed to only legal rights and principles. For mediation to be effective, however, each person is required to listen to and to understand the other party; communicate effectively; obtain relevant information and advice; absorb new information and advice; put forward proposals and options; and represent their own interests. Often, an impact of coercive control is the diminishment of self-confidence and, in some cases, victims experience cognitive, emotional and behavioural effects that could impact on their ability to advocate for themselves and obstruct the mediation process. Victims may lose their ability to respond to their partner or ex-partner effectively and display an essentially passive reaction. They may be in a position of appeasing a violent partner or making compromises to their own safety and wellbeing to facilitate a relationship between a perpetrator of violence and the children. Further, participants may not believe they are entitled to a fair deal and might negotiate for what they think they are able to get rather than an outcome which is just or equitable, or which protects them. In such contexts, a perpetrator might still be able to coerce, intimidate, threaten, and deny the victim's interests. Accordingly, it is argued that FDR could be unsuitable for relationships involving power imbalances when those dynamics are recreated during the dispute process as power imbalances can serve to undermine self-determination. There are also other issues in relation to communication in mediation. There may be gender differences that disadvantage females; these are likely exacerbated when there has been violence. Women, and especially those who have been victims of violence, have been observed to use language associated with powerlessness, speaking in hesitant, indirect and self-effacing language. Further, women have been identified as 'soft negotiators' with a style more likely to be collaborative and conciliatory. In comparison, it has been suggested that men are generally more competitive and confrontational in their interaction style during negotiations and more likely to interrupt and control the conversational topic. There are also findings that males tend to maximize their interests while females focus their concern on relationships as opposed to their own personal rewards. In theory, mediators neutralise these power imbalances associated with gender and violence. In practice, however, it is dangerous to assume that they are always able to redress these issues satisfactorily. There is evidence that often victims of family violence are not aware that their experiences are not normal, and some perpetrators may be 'manipulative and highly skilled at presenting positive public images of self'. As such, in the absence of information about the history of the relationship, through inappropriate or lack of screening implementation, coupled with their role of impartiality, mediators may fail to detect trigger words or actions and be unable to manage the presence of controlling violence in the mediation process. Indeed, a mediator may find it difficult to adequately protect the disadvantaged party when there is a conflict between the mediator's 'commitment to help all parties and a desire to ensure that all can satisfy their interests fairly and effectively'. Thus, one respondent in our sample expressed a concern that victims 'might be alone with their abuser with someone who is attempting to maintain impartiality, when impartiality is not appropriate'. The Courts and Coercive Control Victims As noted earlier, according to statute, parties with a history of violence are able to bypass the otherwise required FDR process and make direct use of court processes. Perhaps this is why the 'heavier' users of the Courts have been identified as those for whom family violence, safety concerns, mental health problems, and addiction issues are relevant. Accordingly, in the US, it has been found that parties who

are fearful of continued or increased violence may secure more protection and parenting outcomes through the traditional court system because of the focus on fact-finding and the ability to enforce orders. Under the Family Law Act 1975 (Cth), the Family Courts play an important role in parenting matters (and) where there are allegations of family violence. The powers and obligations judges have under this piece of legislation demonstrate that there are theoretical mechanisms for enabling family violence and abuse to be taken into account properly. However, research suggests that there may be at times a gap between the legislation and its implementation. For example, the evidentiary standard of proof for family violence in family law matters must be made out on the civil standard of the balance of probabilities, not the criminal standard of beyond reasonable doubt. That is, 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found'. Factors that must be considered when making a finding about family violence include the 'seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding'. The Full Court of the Family Court has acknowledged the discreet and secretive nature of violence and has found that violence can be substantiated 'without there being corroborative evidence from a third party, document or admission'. However, as the Victorian Law Reform Commission (VLRC) has noted, giving evidence is 'one of the most intimidating and distressing aspects of the legal system for people who are subject to violence'. Victims of violence may not readily disclose their abuse due to feeling ashamed or fearful and because they tend to regard themselves as lacking credibility. Some participants in the court process may also not feel safe enough to speak freely about the abuse whilst in public and in the presence of their ex-partner. Victims may find it difficult to experience ongoing exposure to their perpetrators because of lengthy family law processes and complex outcomes. Certainly the adversarial system can lead to an exacerbation of an already dangerous conflict. This is problematic given that in one study, approximately one in five parents (17 percent of fathers and 21 percent of mothers) reported safety concerns associated with ongoing contact with their child's other parent. Further, family law professionals are not always aware of the complexities of coercive control and the tactics used by abusers during court processes. In fact, abusive ex-partners may use litigation as a forum to control and maintain power over their victims. Victims have reported experiencing their perpetrators' manipulation of the family law system through repeated litigation and refusal to negotiate. Abusers may also use strategic self-representation to further control their victims: Victims are required to give evidence in litigation, and this can be quite distressing for them, and may impact on the quality of evidence they are able to give. This is especially so if the perpetrator is self-represented as he is then able to personally cross-examine the victim. Hence, one survey respondent noted that 'the idea that the litigation system corrects power imbalances is... farcical – if anything it exacerbates it... victims of violence... may be re-victimised in that process'. Another stated that where a history of family violence results in unequal bargaining power, 'litigation, written negotiation or mediation are not necessarily superior options [to CP]'. A third lawyer expanded on that theme: The litigation process is an institutionalized form of power (violence is a form of power) and as a consequence, the recipient spouse does not function well in such an environment... As well, the aggressive nature of litigation may in fact inflame the violent/abusive person in their behaviour. An additional issue for victims of violence might be their financial circumstances. They may be unable to pursue legal matters in the Courts because of the costs involved, or unable to afford private representation, and the quality of their legal advice may be compromised. CP and Family Violence It would seem then that both mediation and litigation might present some obstacles for victims of violence, which brings us to the question: What about CP? Although Macfarlane found in her US study that most of the participants agreed that they would not

take on a case that involved family violence, it was not simply a question of ‘if family violence – then not CP’. Those who continue to use ‘tactics of coercion and control to intimidate and manipulate the process’ would be problematic within a collaborative process. The eight respondents in the current survey agreed. Their responses shied away from focusing on violence as a monolithic entity. Instead they focused on power inequity and the potential but not insurmountable issues for CP with such an imbalance. Screening for CP Overseas research has identified the importance of scrutinizing the power and control dynamics in the relationship. There is recognition too that the type of violence is critical in distinguishing the violence of victims in abusive relationships from the violence of perpetrators. Each respondent agreed that screening was needed to determine if the effects of controlling-type of violence could affect the client’s ability to participate: both the victim and the perpetrator. It is important to screen for family violence and to fully understand the dynamics of the violence before any decision is made to enter into Collaborative Law. Accordingly, respondents mentioned ‘whether either party [is] unable to participate or advocate for themselves’ and ‘whether either party lacks adequate insight into their behavior and the impact it may have on the other person.’ It should be noted that although lawyers ultimately have the discretion in deciding whether it is appropriate to proceed with CP to resolve family matters, the clients also have to agree that it is the process that they wish to pursue: ‘Ultimately it is the choice of a client as to whether collaboration should proceed’. ‘Clients need to be willing to collaborate after being fully informed about the process and what it involves.’ Since victims of coercive violence may deny or minimize violence, it is essential that family law professionals screen continuously using face-to-face interviews and written questionnaires, monitoring control indicators, and searching court or public records. One-on-one sessions between practitioners and their clients appear to be the best way to ensure that victims feel safe and comfortable in disclosing violence, as disclosure of coercion can be facilitated by ‘establishing a trusted relationship with an open and empathic listener’. In this way ‘the parties are able to make safe, strategic and informed decisions about disclosure of violence’ without the fear of disclosing in front of the perpetrator. None of the Canberra respondents reported using a screening instrument. Instead they employ their own line of questioning which may be informed by one of the formal protocols such as the recently introduced DOORS program. One lawyer ‘tease[s] out the family history a bit, [to] see if there [is] a dominant/submission type dynamic first, and if so, explore how they dealt with the conflict in the past’. That lawyer identified that the issues looked for during the screening process include: A dynamic between the parties that would cause an unreasonable power imbalance being in the same room. Could they, notwithstanding the history, freely consent to the process and make decisions with the assistance of a lawyer knowing the history being present? Another practitioner had developed a list of warning signs (s)he looked for as indicative of power imbalances: whether the client: • Felt scared of the other party; • Felt that there were things they could not say to the other party (other than because of common decency); • Described in disagreements with the other party that they (the client) would give in rather than advocate for their position; • Experienced physical violence as opposed to verbal or mental abuse; • Described being isolated from family and friends and breakdown of other relationships while in the married-type relationship; • Felt undermined and worthless; • Felt that the other person would do as they were told/could be controlled; • Was unrelentingly critical of the other person/described them as having no value; or • Described having been physical, emotionally or psychologically violent towards the other person.

A Question of Suitability: Lawyers and Clients Decide As we mentioned above, the first meeting between lawyer and client generally involves a dialogue to educate the client about the separation process, dispute resolution and collaborative law, specifically. At that time, practitioners can make additional referrals for clients to assist the clients to determine

whether CP is suitable for them. Collaborative lawyers also make judgments about whether or not, or how, to undertake CP, and this is often based on information either directly or indirectly acquired in that first meeting with a client. As one respondent stated, 'It requires a robust conversation with the client about their real options'. Another noted, 'If there is violence, [clients] need to understand how the process works, be able to compare it to the court process or other processes available, and make an informed decision to proceed.' Further, if there is a solicitor acting for the other party, the victim's lawyer can ask 'them whether they think it's suitable having heard the other party's story'. The client may express the view that CP is possible; however: it is important to have a realistic view about the capacity of the clients to negotiate ... For example, some women want to be able to negotiate but with the profile of the other party and the history, an experienced lawyer will know that isn't going to happen ...' The impact that the outcome of the screening assessment has on the way that the collaboration is run may differ depending on the issues that need to be addressed. For example, if the matter is a purely financial negotiation and there has been violence in the relationship, it may be that the lawyers take note of this, and understand that there may be a power imbalance that they will have to deal with, but proceed without directly addressing the issue in the collaboration. Alternatively, if the case involves parenting matters, the violence would likely be something that would need to be specifically addressed within the collaboration. These decisions are affected not by whether there was coercive control type of violence in itself but on its potential effects in the particular matter. For instance, one practitioner believed that it was 'not just the history' but whether 'the client is able to make decisions with the assistance of legal advice' (or if the client): [cannot] cope with the presence of the other party... [or has] some mental health issues that may preclude an equal footing in a four-way conference. Indeed, the bottom line is the client's ability to be on a level playing field, their well-being, and their ability to be in the same room as the perpetrator: The most important issue is whether the client is capable of handling a collaborative process once you fully explain to them about the prospect of meeting directly with the other spouse, etc. Secondly, you should always ensure that the client has received the support they need. Often, the question is their readiness and the contrition of the other spouse. Certainly in making decisions about CP, as we have seen, a primary consideration is clients' ability to work together. A history of family violence may make that so problematic and irreparable, even with CP lawyers and other professionals, that Collaboration is inappropriate. One lawyer in our study felt that CP was an option in these circumstances if 'the violence and/or the dynamics of coercion and control [is] acknowledged by the perpetrator'. Another agreed, and would assess how much insight the client had into the effect of their behaviour and how the other person might feel. Further, the parties and lawyers need to ascertain if there is sufficient trust. A lack of trust between separating partners could be an issue in CP as the parties are required to form a mutually acceptable agreement through a co-operative process. If the client was totally mistrusting of the spouse, or wanting to hide information from them, or want to teach them a lesson, or something else, I would probably not recommend CP. Ultimately, we are trying to get a win/win situation, but if the client just wants to pay the other back, they are not entering into the CP with the right mind set and it probably won't work. If the playing field can be leveled and the legacy of coercive control acknowledged, then 'with appropriate safeguards and with the client fully understanding' CP could in fact be a good option: The test I think is whether Collaboration is better to the alternative, which is lawyer-lead negotiation, or court, and the answer, is yes. I've had cases involving serious family violence in litigation and it was an entirely horrible experience for my client (the victim). Courts and the adversarial process are not designed to help victims and give them the support they need nor have any rehabilitative effect on perpetrators. As a general rule victims of violence do not make good witnesses. It seems that CP could be

beneficial where ‘people have to continue to interact (e.g. [they] have children [together]) - they need to learn new ways to communicate and redefine their relationship’. That need to deescalate the situation was seen in one case as trumping issues of ‘taunting and physical altercations’ within the parties’ previous relationship as the dynamics of running the allegations in court were perceived as ‘more inflammatory than collaborating with a lawyer from each side present... (we were) able to resolve the issue of children’s matters by reference to an already existing parenting arrangement’. How CP Might Prove Beneficial (in Theory) with Coercive Control? Having looked at how CP works and at obstacles that victims of intimate terrorism may encounter with mediation and litigation, we are interested in identifying reasons why CP might be an effective pathway. Although this question was not asked in the survey, the thematic analysis identified clusters of quotes, which are indicative of what the respondents believe to be potential pluses of CP. Being Able to ‘Morph’ the Process Screening for victims’ fears and perceptions is useful since it can assist the lawyer to understand how the Collaborative process may need to be run; that is, in a way to better enable clients’ effective participation. For example, a multi-disciplinary approach may be used if clients have emotional, communication, or relationship issues that could affect their ability to participate in the Collaborative process. Additionally, if parties need assistance in the process, practitioners can advise them of settlements that utilise professionals, neutral evaluations or non-binding recommendations. One lawyer noted that, ‘Even then [with a history of coercive control], a mental health professional supporting the client may be a realistic option...’ In fact, several respondents agreed with that last comment and the use of a ‘relevantly qualified personal coach’. Thus, after assessing ‘whether the history prevented some equality of bargaining power’ another practitioner looked to see if ‘the assistance from others such as a lawyer or other personal counseling assistance’ could mitigate unfavorable power imbalances. Morphing into multidisciplinary CP is fluid: For instance, the victim might already be seeing a psychologist or counselor or it might be decided during the collaboration that one or both of the parties need some support or assistance to assist our negotiations, and so we might send them off to see someone and that person may or may not be involved in the future of the collaboration. They can operate either within or outside of the process. In addition, lawyers are able to utilise a variety of methods and tools to manage conflicts in CP if violence is significantly affecting negotiations. For instance, one lawyer had used a technique similar to shuttle mediation, where parties were kept separate from each other while their lawyers negotiated on their behalf, but still based on the parties’ interests and without the threat of Court overshadowing the negotiations. Another suggested that ‘forms of “shuttle diplomacy” or [a process whereby] the interaction between the parties [is] highly limited and controlled are possible’. Having a Voice CP may work to empower and validate victims’ experiences in divorce and may give them ‘a voice’. One respondent put it this way: [CP] encourages both parties to deal with the issue of violence and not just ignore it...And, the victim is able to express his/her hopes, goals and fears knowing that the perpetrator will hear them and be encouraged to respond productively by addressing any issues he/she might have. Accordingly, another lawyer described a case where the wife alleged that the husband had always been financially controlling and demeaning of her, and the wife felt ‘empowered by having a voice and being able to “stand up to him” with the protection of the Collaborative framework. Both solicitors work[ed] to ensure that the husband [was] reminded when he [was] acting in this way.’ There was recognition, though, that with cases of coercive control it is important for the victim to become empowered and not have lawyers’ voices dominate: It is particularly important for the lawyers involved not to perpetuate an attitude of coercion or control, which can sometimes happen in a paternalistic way (“I’ll take care of it.” “We [being the lawyers involved] have sorted it out.”) Ideally the goal is for full and informed participation by the client, particularly in financial decision-

making. Balancing the Power The CP process aims to address differences in bargaining power. ... the collaborative process itself is inherently designed to take power away from the more dominant of the two parties to enhance the power of the person with less power. This is done with the instruction of the clients. A negotiation may never be equal, but it will be as close to equal as one can hope to get. As advocates, lawyers may be able to compensate for a client's difficulty in participating in the process. For example, they may assist clients to understand their short and long term goals and interests, whilst offering the necessary support and leadership to enable clients to resolve their dispute. Participants also benefit from the assistance and support they receive during the negotiations when the agreement is being formed. This corresponds with overseas findings: ...input of...legal advice and advocacy is essential for the fair and equitable resolution of many disputes...some family law clients need advocates in order to ensure they are fairly treated by their spouses...to remind them of their legal responsibilities towards their families... One participant indicated that 'power imbalances can be managed much more effectively in a Collaborative context than in [other] contexts'. Another agreed. Collaborative lawyers can encourage and promote greater autonomy: ...in a collaboration...we can bring in the support people that the victim and the perpetrator need. We can understand the nuances of their relationship and manage that. We can help the victim to advocate for themselves and have autonomy. We can manage the process in a way that protects them. The presence of two lawyers can ameliorate the problems discussed earlier that mediators may encounter: It is superior to mediation because, in Collaboration, both parties have a lawyer to support them in their negotiations and it is the role of both lawyers to ensure that the negotiations take place on a level playing field. CP may allow lawyers to work closely with one another and with their client in these cases to manage any power imbalance: ...to make the negotiation a success (an implied agreement of Collaboration), the party who has asserted their power will be expected to reduce it and the interplay between counsel should reduce the power imbalances significantly. The presence of lawyers (particularly if they speak respectfully to one another) and in a neutral space can mean that the aggressor holds themselves in check. We [bring] the parties' focus back to the outcome they both want. We don't allow them a forum to vent on past hurts. Additionally, with CP, lawyers may be able to pre-empt power plays such as threats or subtle behavior that could be a danger signal to the victim, but that would not otherwise be obvious to mediators or judicial officers who haven't been thoroughly briefed by the client. One client chose CP for that reason as 'he wanted to have a forum where the wife [the perpetrator of violence] was not made to feel more adversarial than she already was'. And, if one adheres to the adage that knowledge is power... It is common in our experience for women (including educated, middle class women), to have little knowledge about the financial affairs of the relationship. This situation can be more extreme where the female partner is not working or is less educated than the male partner. Full and frank financial disclosure is essential including women having access to primary documents. For example, not a list of shareholding generated by the husband but an independent document so there is confidence in the financial information. Outcomes Another theme that emerged from our survey responses concerned the outcomes of CP. Although not asked, the view was expressed that the outcomes of a Collaboration may be better than those achieved through the Court system. The 'outcomes are often more creative, because they've been work-shopped ... by all parties' and they are more often adhered to because the outcomes are 'agreed upon by the parties, not ordered by the Court, so the parties can take ownership of the agreement'. 'The process is usually a lot quicker, more thorough, and leaves clients more satisfied than with other processes.' In matters that included violence, that respondent believed that outcomes are able to 'take account of the fact that one party may be feeling disempowered and give recognition to that perception, which is a start to fixing the problem... Parties have control over their own

outcome.’ Therapeutic Process For victims of violence, a negotiated outcome ‘is really important because they are able to gain control of their lives’. Further, it is argued that ‘often the parties have done some "healing" along the way and have addressed the issue of violence so that they can move forward’. With the multidisciplinary model of CP there might be added opportunities for healing: The ability to have a close involvement with professionals on both sides. In addition to helping the abused party cope better with that abuse, mental health help on the other side can help lower the intensity of the anger that gave rise to the abuse. Another lawyer had observed that a multi-disciplinary approach, and the slower pace of CP, helps perpetrators to cope with the process and handle themselves in a respectful manner where the perpetrator sought ‘appropriate counseling...which made the meetings a bit better’. Indeed, CP can offer tools that can help maintain accountability on the part of the perpetrator: Both parties’ lawyers work together which means that the perpetrator’s lawyer is working to correct the power imbalance as well as the victim’s lawyer. We can use all of the same court arsenal, such as protection orders but back it up with therapeutic intervention for the perpetrator to help them gain insight. ... there is much more responsibility placed upon the abuser spouse in an Interest Based/Collaborative system than in any other system. Essentially, the abusive spouse needs to admit there is a problem as well. A perpetrator of family violence may have trouble recognising that the victim has separate needs. CP can help: Parties are encouraged to think about the bigger picture and what is best for them and the other party, rather than what they are ‘entitled to’ which is not always congruent with what is best or in their interest. And, in addition to helping the individuals, it may be therapeutic for the relationship: Collaborative law has the potential for transformative change in the relationship between the parties in the process of the transition to a post-separation relationship. This obviously takes the time and commitment of all parties involved in the process. Potential Difficulties with CP with Antecedents of Coercive Control) CP is not a feasible choice if court involvement is a possibility; for instance if a protection order is likely to be needed. And certainly it is not an option if one party’s safety is at risk. There is also a potential problem with the issue of participation. This is recognized with section 14 of the US Uniform Collaborative Law Act (UCLA). Lawyers are required to take steps to ensure that a decision to participate is informed and voluntary. Macfarlane has expressed concerns about the quality and depth of informed consent. She found that some clients did not seem to fully understand the ramifications of participation, because explanations were too abstract and some lawyers did not have sufficient experience to anticipate potential problems. A purported advantage of CP is that negotiations cost less in time and money than conventional, adversarial representation. However, there are added CP costs incurred with face-to-face sessions, telephone conferences with professionals that may be involved, and intake procedures in assessing suitability. Expenses may accrue when there are many issues to resolve. Consequently, the costs of CP may be higher than in mediation as lawyers and experts are more involved in the stages of client preparation and the four-way meetings. One participant indicated ‘the costs of the Collaborative Law process are dependent upon the clients’ attitudes to the process and outcome’. Another emphasized ‘the risk for a victim of violence to be “trapped” in Collaborative Law with huge costs disadvantages to fully realising her proper entitlement’. Therefore, CP may not be accessible to those with financial constraints, unlike mediation, where Legal Aid and Family Relationship Centres provide Family Dispute Resolution services at reduced costs. In such cases, mediation may be a more viable option if financial assistance is needed. Time may also be an issue as implied in the discussion of costs. During CP sessions, negotiations can become time consuming and research shows that some clients do express frustration with the length of time taken to get to substantive issues. Or, an outcome may not be reached. The one respondent who discussed ‘success rate’ stated that CP cases reached a negotiated outcome in ‘around 90-95%’ of

matters in his/her law firm. Settlement may not be reached, though, if either of the lawyers adopt a positional approach in their representation of their client, which stems from their training as an advocate and experience in adversarial practice. They might become caught up with obtaining a successful outcome for their client at the expense of the other party, in which case the client may turn to mediation or traditional representation. This was the case with one participant's client: no agreement was reached in regards to property settlement because the parties were not willing to co-operate. As a result, 'litigation was needed to get to a point where the other party would provide a realistic response'. Another possible problem has been raised by overseas commentators: victims of violence may 'push for settlement, any settlement to end the conflict'. In addition, pressure to settle may also come from unidentified and unlabeled persistent coercion. If the perpetrator uses tactics to intimidate and manipulate the process, the victim may agree to substantively less favorable terms. A perpetrator may view four way meetings to intimidate the victim, failure to make required disclosures and enlist the lawyers to pressuring the victim to settle. At the same time, victim may be hesitant to disclosure information for fear that it could be used inappropriately. One respondent to our survey confirmed that this may occur: The aggressor got a better deal financially, simply because she wore down the other person. He couldn't withstand her bad behaviour and gave in because he couldn't stand up to her. Theoretically, however, this type of outcome could be avoided if both lawyers are doing their best to ensure that both parties are behaving appropriately, in line with the CP agreement. Conclusion We asked our respondents whether there was 'anything else [they] would like to add about [their] experience with Collaborative Law in cases involving family violence'. One responded, 'Proceed with caution'. It would appear that, as with mediation and litigation, 'the Collaborative system is not ideal...' for matters that include coercive control or intimate terrorism. If patterns of control are identified either at the onset or at later stages, the lawyers and other professionals involved (in a multidisciplinary team) can assess whether CP is appropriate to use with those particular clients and facts, but there is no 'one size fits all' for determining suitability. Both overseas and in Australia, there is growing recognition that being on the vigilant lookout for control issues/dynamics is of paramount importance. Commentators, CP Associations, and other legal practitioner associations all agree that on-going screening is essential. This became a statutory obligation in the 10 US states that have enacted the Uniform Collaborative Law Act thus far, with section 15(a) dictating that lawyers have a duty to develop and implement screening protocols. However, proper screening appears not to be a current widespread practice. We therefore recommend that screening be mandatory and monitored for compliance and merit. Various screening instruments and protocols have been developed and validated both internationally and in Australia. An example of the latter: the Commonwealth Government quite recently introduced an empirically based and standardised front line framework called the Family Law DOORS (Detection of Overall Risk Screen). This approach has been reviewed and refined by researchers and senior practitioners, both across Australia and internationally. In contrast to specific domestic violence screens, the DOORS uses a very broad definition of risk and encourages the practitioner to assess numerous factors that might be indicative of personal and interpersonal safety risks. The DOORS website describes the framework as a 'tool for systematically identifying multiple risks at the client's point of entry into the service, including being at risk of physical or psychological harm, or of perpetrating harm'. If screening is done, and violence identified, could the process then be made safe? Can the playing field be leveled with enough trust re-established to permit interest-based negotiation? It would appear that the answer is a qualified 'Yes' as described by our survey respondents and as assessed by violence victims who have participated in a somewhat similar dispute resolution project (the Coordinated Family Dispute Resolution (CFDR)). That pilot project aimed to provide FDR in matters with violence and included

cross-disciplinary professionals working collaboratively with case management. By using multiple sessions and with screening and legal advice, the aim was to lessen power imbalance. Support professionals and lawyers helped prepare the victim; they were also sometimes present at some or all of the mediation sessions. These professionals reported that their presence neutralized violent partner's tendency to intimidate and control. And, where mediation sessions were handled carefully, the data from parents indicate that the process could be safe and empower them to make appropriate arrangements for their children, and it even improved the capacity of some to communicate with their ex-partners. We believe that this positive assessment of CFDR bodes well for the potential value of using CP in cases involving family violence. Certainly, some of the lawyers, like the one below, although not asked to assess relative merits, thought that CP was a better process for victims of violence than the alternatives: It is ... better than litigation as it provides a forum in which both victims and perpetrators can receive assistance from experts if necessary, and it avoids the "he says, she says" battle that often occurs in Court and the victim is given a voice. Such viewpoints need to be tested by an evaluative study similar to that done for the CFDR pilot project. Indeed, more research could further illuminate any benefits and/or drawbacks of CP. Such a project might include in-depth interviews with victims, perpetrators, lawyers, and/or other Collaborative professionals who engage in the multi-disciplinary approach. If the sample were large enough, we could learn which model of CP seems to work best with particular facts, personalities and type of coercive control. Another cautionary note: Access to this legal path may be problematic for some survivors of family violence. A victim's economic circumstances may be compromised by the behaviour of their violent party, issues of mental and physical health and/or their capacity to work. Because of the uncertainty associated with the costs of CP, reforms to financial assistance in law and policy should be made for CP to be more accessible to relatively impoverished clients. It would be beneficial if: Legal Aid [were] able to facilitate the Collaborative process, or [if] a modified version of Collaborative Law [could] be run through the Courts, so that those with less money can also have the benefit of this process. Further, in remote Australia, there are few, or none, of the resources required for CP, and it may be less effective in such cases without such resources. We recommend that the Commonwealth Government provide the funding for training of lawyers in CP and for professionals who might be part of the process. Indeed it is important that lawyers practicing CP have been properly trained and fully understand the aim and process of CP. This includes knowing how to negotiate using an interest-based approach, and understanding the dynamic of the CP model and their role in providing advocacy for their client within the CP model. Lawyers also must learn how to negotiate in an open forum (as opposed to a traditional approach) and in having reality testing conversations with their client. Additionally, they need to be fully aware of the sometimes disguised and/or indirect manifestations and effects of coercive control. With these insights, understanding, and skills, the CP legal practitioner can work more effectively at 'morphing' the process, as we described earlier, and can better equalise power differential. Lawyers and other practitioners (if it is multidisciplinary) can then work with the clients to address the dysfunctional dynamic, with all parties focused on how best to divide the 'orange.'

Question 22 n/a

Question 23

Yes and perhaps collaborative practice could be part of the answer Patricia Easteal Jessica Herbert and Jessica Kennedy (2015) Collaborative Practice in Family Law Matters with Coercive Control-type Violence: Preliminary Thoughts from the Practitioner Coalface. *Family Law Review* 5 (1): 13–33. How CP Might Prove Beneficial (in Theory) with Coercive Control? Having looked at how CP works and at obstacles that victims of intimate terrorism may encounter with mediation and litigation, we are interested in identifying

reasons why CP might be an effective pathway. Although this question was not asked in the survey, the thematic analysis identified clusters of quotes, which are indicative of what the respondents believe to be potential pluses of CP. Being Able to ‘Morph’ the Process Screening for victims’ fears and perceptions is useful since it can assist the lawyer to understand how the Collaborative process may need to be run; that is, in a way to better enable clients’ effective participation. For example, a multi-disciplinary approach may be used if clients have emotional, communication, or relationship issues that could affect their ability to participate in the Collaborative process. Additionally, if parties need assistance in the process, practitioners can advise them of settlements that utilise professionals, neutral evaluations or non-binding recommendations. One lawyer noted that, ‘Even then [with a history of coercive control], a mental health professional supporting the client may be a realistic option...’ In fact, several respondents agreed with that last comment and the use of a ‘relevantly qualified personal coach’. Thus, after assessing ‘whether the history prevented some equality of bargaining power’ another practitioner looked to see if ‘the assistance from others such as a lawyer or other personal counseling assistance’ could mitigate unfavorable power imbalances. Morphing into multidisciplinary CP is fluid: For instance, the victim might already be seeing a psychologist or counselor or it might be decided during the collaboration that one or both of the parties need some support or assistance to assist our negotiations, and so we might send them off to see someone and that person may or may not be involved in the future of the collaboration. They can operate either within or outside of the process. In addition, lawyers are able to utilise a variety of methods and tools to manage conflicts in CP if violence is significantly affecting negotiations. For instance, one lawyer had used a technique similar to shuttle mediation, where parties were kept separate from each other while their lawyers negotiated on their behalf, but still based on the parties’ interests and without the threat of Court overshadowing the negotiations. Another suggested that ‘forms of “shuttle diplomacy” or [a process whereby] the interaction between the parties [is] highly limited and controlled are possible’. Having a Voice CP may work to empower and validate victims’ experiences in divorce and may give them ‘a voice’. One respondent put it this way: [CP] encourages both parties to deal with the issue of violence and not just ignore it...And, the victim is able to express his/her hopes, goals and fears knowing that the perpetrator will hear them and be encouraged to respond productively by addressing any issues he/she might have. Accordingly, another lawyer described a case where the wife alleged that the husband had always been financially controlling and demeaning of her, and the wife felt ‘empowered by having a voice and being able to “stand up to him” with the protection of the Collaborative framework. Both solicitors work[ed] to ensure that the husband [was] reminded when he [was] acting in this way.’ There was recognition, though, that with cases of coercive control it is important for the victim to become empowered and not have lawyers’ voices dominate: It is particularly important for the lawyers involved not to perpetuate an attitude of coercion or control, which can sometimes happen in a paternalistic way (“I’ll take care of it.” “We [being the lawyers involved] have sorted it out.”) Ideally the goal is for full and informed participation by the client, particularly in financial decision-making. Balancing the Power The CP process aims to address differences in bargaining power. ... the collaborative process itself is inherently designed to take power away from the more dominant of the two parties to enhance the power of the person with less power. This is done with the instruction of the clients. A negotiation may never be equal, but it will be as close to equal as one can hope to get. As advocates, lawyers may be able to compensate for a client’s difficulty in participating in the process. For example, they may assist clients to understand their short and long term goals and interests, whilst offering the necessary support and leadership to enable clients to resolve their dispute. Participants also benefit from the assistance and support they receive during the negotiations when the agreement is being

formed. This corresponds with overseas findings: ...input of...legal advice and advocacy is essential for the fair and equitable resolution of many disputes...some family law clients need advocates in order to ensure they are fairly treated by their spouses...to remind them of their legal responsibilities towards their families... One participant indicated that 'power imbalances can be managed much more effectively in a Collaborative context than in [other] contexts'. Another agreed. Collaborative lawyers can encourage and promote greater autonomy: ...in a collaboration...we can bring in the support people that the victim and the perpetrator need. We can understand the nuances of their relationship and manage that. We can help the victim to advocate for themselves and have autonomy. We can manage the process in a way that protects them. The presence of two lawyers can ameliorate the problems discussed earlier that mediators may encounter: It is superior to mediation because, in Collaboration, both parties have a lawyer to support them in their negotiations and it is the role of both lawyers to ensure that the negotiations take place on a level playing field. CP may allow lawyers to work closely with one another and with their client in these cases to manage any power imbalance: ...to make the negotiation a success (an implied agreement of Collaboration), the party who has asserted their power will be expected to reduce it and the interplay between counsel should reduce the power imbalances significantly. The presence of lawyers (particularly if they speak respectfully to one another) and in a neutral space can mean that the aggressor holds themselves in check. We [bring] the parties' focus back to the outcome they both want. We don't allow them a forum to vent on past hurts. Additionally, with CP, lawyers may be able to pre-empt power plays such as threats or subtle behavior that could be a danger signal to the victim, but that would not otherwise be obvious to mediators or judicial officers who haven't been thoroughly briefed by the client. One client chose CP for that reason as 'he wanted to have a forum where the wife [the perpetrator of violence] was not made to feel more adversarial than she already was'. And, if one adheres to the adage that knowledge is power... It is common in our experience for women (including educated, middle class women), to have little knowledge about the financial affairs of the relationship. This situation can be more extreme where the female partner is not working or is less educated than the male partner. Full and frank financial disclosure is essential including women having access to primary documents. For example, not a list of shareholding generated by the husband but an independent document so there is confidence in the financial information. Outcomes Another theme that emerged from our survey responses concerned the outcomes of CP. Although not asked, the view was expressed that the outcomes of a Collaboration may be better than those achieved through the Court system. The 'outcomes are often more creative, because they've been work-shopped ... by all parties' and they are more often adhered to because the outcomes are 'agreed upon by the parties, not ordered by the Court, so the parties can take ownership of the agreement'. 'The process is usually a lot quicker, more thorough, and leaves clients more satisfied than with other processes.' In matters that included violence, that respondent believed that outcomes are able to 'take account of the fact that one party may be feeling disempowered and give recognition to that perception, which is a start to fixing the problem... Parties have control over their own outcome.' Therapeutic Process For victims of violence, a negotiated outcome 'is really important because they are able to gain control of their lives'. Further, it is argued that 'often the parties have done some "healing" along the way and have addressed the issue of violence so that they can move forward'. With the multidisciplinary model of CP there might be added opportunities for healing: The ability to have a close involvement with professionals on both sides. In addition to helping the abused party cope better with that abuse, mental health help on the other side can help lower the intensity of the anger that gave rise to the abuse. Another lawyer had observed that a multi-disciplinary approach, and the slower pace of CP, helps perpetrators to cope with the process and handle themselves in a respectful manner where the

perpetrator sought 'appropriate counseling... which made the meetings a bit better'. Indeed, CP can offer tools that can help maintain accountability on the part of the perpetrator: Both parties' lawyers work together which means that the perpetrator's lawyer is working to correct the power imbalance as well as the victim's lawyer. We can use all of the same court arsenal, such as protection orders but back it up with therapeutic intervention for the perpetrator to help them gain insight. ... there is much more responsibility placed upon the abuser spouse in an Interest Based/Collaborative system than in any other system. Essentially, the abusive spouse needs to admit there is a problem as well. A perpetrator of family violence may have trouble recognising that the victim has separate needs. CP can help: Parties are encouraged to think about the bigger picture and what is best for them and the other party, rather than what they are 'entitled to' which is not always congruent with what is best or in their interest. And, in addition to helping the individuals, it may be therapeutic for the relationship: Collaborative law has the potential for transformative change in the relationship between the parties in the process of the transition to a post-separation relationship. This obviously takes the time and commitment of all parties involved in the process. Potential Difficulties with CP with Antecedents of Coercive Control) CP is not a feasible choice if court involvement is a possibility; for instance if a protection order is likely to be needed. And certainly it is not an option if one party's safety is at risk. There is also a potential problem with the issue of participation. This is recognized with section 14 of the US Uniform Collaborative Law Act (UCLA). Lawyers are required to take steps to ensure that a decision to participate is informed and voluntary. Macfarlane has expressed concerns about the quality and depth of informed consent. She found that some clients did not seem to fully understand the ramifications of participation, because explanations were too abstract and some lawyers did not have sufficient experience to anticipate potential problems. A purported advantage of CP is that negotiations cost less in time and money than conventional, adversarial representation. However, there are added CP costs incurred with face-to-face sessions, telephone conferences with professionals that may be involved, and intake procedures in assessing suitability. Expenses may accrue when there are many issues to resolve. Consequently, the costs of CP may be higher than in mediation as lawyers and experts are more involved in the stages of client preparation and the four-way meetings. One participant indicated 'the costs of the Collaborative Law process are dependent upon the clients' attitudes to the process and outcome'. Another emphasized 'the risk for a victim of violence to be "trapped" in Collaborative Law with huge costs disadvantages to fully realising her proper entitlement'. Therefore, CP may not be accessible to those with financial constraints, unlike mediation, where Legal Aid and Family Relationship Centres provide Family Dispute Resolution services at reduced costs. In such cases, mediation may be a more viable option if financial assistance is needed. Time may also be an issue as implied in the discussion of costs. During CP sessions, negotiations can become time consuming and research shows that some clients do express frustration with the length of time taken to get to substantive issues. Or, an outcome may not be reached. The one respondent who discussed 'success rate' stated that CP cases reached a negotiated outcome in 'around 90-95%' of matters in his/her law firm. Settlement may not be reached, though, if either of the lawyers adopt a positional approach in their representation of their client, which stems from their training as an advocate and experience in adversarial practice. They might become caught up with obtaining a successful outcome for their client at the expense of the other party, in which case the client may turn to mediation or traditional representation. This was the case with one participant's client: no agreement was reached in regards to property settlement because the parties were not willing to co-operate. As a result, 'litigation was needed to get to a point where the other party would provide a realistic response'. Another possible problem has been raised by overseas commentators: victims of violence may 'push for settlement, any

settlement to end the conflict'. In addition, pressure to settle may also come from unidentified and unlabeled persistent coercion. If the perpetrator uses tactics to intimidate and manipulate the process, the victim may agree to substantively less favorable terms. A perpetrator may view four way meetings to intimidate the victim, failure to make required disclosures and enlist the lawyers to pressuring the victim to settle. At the same time, victim may be hesitant to disclosure information for fear that it could be used inappropriately. One respondent to our survey confirmed that this may occur: The aggressor got a better deal financially, simply because she wore down the other person. He couldn't withstand her bad behaviour and gave in because he couldn't stand up to her. Theoretically, however, this type of outcome could be avoided if both lawyers are doing their best to ensure that both parties are behaving appropriately, in line with the CP agreement. Conclusion We asked our respondents whether there was 'anything else [they] would like to add about [their] experience with Collaborative Law in cases involving family violence'. One responded, 'Proceed with caution'. It would appear that, as with mediation and litigation, 'the Collaborative system is not ideal...' for matters that include coercive control or intimate terrorism. If patterns of control are identified either at the onset or at later stages, the lawyers and other professionals involved (in a multidisciplinary team) can assess whether CP is appropriate to use with those particular clients and facts, but there is no 'one size fits all' for determining suitability. Both overseas and in Australia, there is growing recognition that being on the vigilant lookout for control issues/dynamics is of paramount importance. Commentators, CP Associations, and other legal practitioner associations all agree that on-going screening is essential. This became a statutory obligation in the 10 US states that have enacted the Uniform Collaborative Law Act thus far, with section 15(a) dictating that lawyers have a duty to develop and implement screening protocols. However, proper screening appears not to be a current widespread practice. We therefore recommend that screening be mandatory and monitored for compliance and merit. Various screening instruments and protocols have been developed and validated both internationally and in Australia. An example of the latter: the Commonwealth Government quite recently introduced an empirically based and standardised front line framework called the Family Law DOORS (Detection of Overall Risk Screen). This approach has been reviewed and refined by researchers and senior practitioners, both across Australia and internationally. In contrast to specific domestic violence screens, the DOORS uses a very broad definition of risk and encourages the practitioner to assess numerous factors that might be indicative of personal and interpersonal safety risks. The DOORS website describes the framework as a 'tool for systematically identifying multiple risks at the client's point of entry into the service, including being at risk of physical or psychological harm, or of perpetrating harm'. If screening is done, and violence identified, could the process then be made safe? Can the playing field be leveled with enough trust re-established to permit interest-based negotiation? It would appear that the answer is a qualified 'Yes' as described by our survey respondents and as assessed by violence victims who have participated in a somewhat similar dispute resolution project (the Coordinated Family Dispute Resolution (CFDR)). That pilot project aimed to provide FDR in matters with violence and included cross-disciplinary professionals working collaboratively with case management. By using multiple sessions and with screening and legal advice, the aim was to lessen power imbalance. Support professionals and lawyers helped prepare the victim; they were also sometimes present at some or all of the mediation sessions. These professionals reported that their presence neutralized violent partner's tendency to intimidate and control. And, where mediation sessions were handled carefully, the data from parents indicate that the process could be safe and empower them to make appropriate arrangements for their children, and it even improved the capacity of some to communicate with their ex-partners. We believe that this positive assessment of CFDR bodes well for the potential value of using CP in cases

involving family violence. Certainly, some of the lawyers, like the one below, although not asked to assess relative merits, thought that CP was a better process for victims of violence than the alternatives: It is ... better than litigation as it provides a forum in which both victims and perpetrators can receive assistance from experts if necessary, and it avoids the "he says, she says" battle that often occurs in Court and the victim is given a voice. Such viewpoints need to be tested by an evaluative study similar to that done for the CFDR pilot project. Indeed, more research could further illuminate any benefits and/or drawbacks of CP. Such a project might include in-depth interviews with victims, perpetrators, lawyers, and/or other Collaborative professionals who engage in the multi-disciplinary approach. If the sample were large enough, we could learn which model of CP seems to work best with particular facts, personalities and type of coercive control. Another cautionary note: Access to this legal path may be problematic for some survivors of family violence. A victim's economic circumstances may be compromised by the behaviour of their violent party, issues of mental and physical health and/or their capacity to work. Because of the uncertainty associated with the costs of CP, reforms to financial assistance in law and policy should be made for CP to be more accessible to relatively impoverished clients. It would be beneficial if: Legal Aid [were] able to facilitate the Collaborative process, or [if] a modified version of Collaborative Law [could] be run through the Courts, so that those with less money can also have the benefit of this process. Further, in remote Australia, there are few, or none, of the resources required for CP, and it may be less effective in such cases without such resources. We recommend that the Commonwealth Government provide the funding for training of lawyers in CP and for professionals who might be part of the process. Indeed it is important that lawyers practicing CP have been properly trained and fully understand the aim and process of CP. This includes knowing how to negotiate using an interest-based approach, and understanding the dynamic of the CP model and their role in providing advocacy for their client within the CP model. Lawyers also must learn how to negotiate in an open forum (as opposed to a traditional approach) and in having reality testing conversations with their client. Additionally, they need to be fully aware of the sometimes disguised and/or indirect manifestations and effects of coercive control. With these insights, understanding, and skills, the CP legal practitioner can work more effectively at 'morphing' the process, as we described earlier, and can better equalise power differential. Lawyers and other practitioners (if it is multidisciplinary) can then work with the clients to address the dysfunctional dynamic, with all parties focused on how best to divide the 'orange.'

Question 24

Yes. SAME RESPONSE AS Q 21, Q 23 DRAFT OF PAPER SUBMITTED TO FAMILY LAW REVIEW Was revised for publication Please note that footnotes do not carry over and would be happy to email the PDFS Patricia Eastal Jessica Herbert and Jessica Kennedy (2015) Collaborative Practice in Family Law Matters with Coercive Control-type Violence: Preliminary Thoughts from the Practitioner Coalface. Family Law Review 5 (1): 13–33. Introduction Collaborative Practice (CP) is a form of lawyer-assisted dispute resolution. Since its introduction in 2005, CP has been promoted as a method of dispute resolution in family law and is now practised in all states and territories of Australia, excluding Tasmania. CP has represented a shift away from litigation, towards a formally contracted negotiation process involving lawyers, relevant professionals and their clients. In family matters this has the potential for reduced legal costs, faster resolutions, creative solutions, and less hostile negotiations. CP, it is argued, provides a potential for achieving better outcomes because its integrative approach allows for attendance to the needs and interests of both parties. Voegelé and colleagues argue that the utilisation of the Collaborative process has an inherent healing potential for families. CP is said to be able to respond to the high levels of stress and lowered coping abilities experienced during divorce disputes. Further, it has been described as a

process that has ‘integrity, empowers clients, and helps families move through difficult transitions’. Questions have been raised, though, by overseas commentators about the suitability of CP for clients with mental, emotional or physical vulnerabilities, who may not be capable of properly participating because of fear or intimidation. It is argued too that CP may be unsuccessful if parties feel extreme hostility towards each other and/or have particularly poor communication skills. Thus, the consensus in the North American literature is that the personal motivation of the parties, their trustworthiness, and whether there has been family violence, are also important factors in assessing how or whether the process should be used. Whether CP is appropriate for matters that include family violence is a very relevant question in the Australian context given the frequency of such allegations in cases that enter the domain of family law. For example, one study found that approximately 65% of mothers and 53% of fathers involved in the family law system indicated that their partner had been either emotionally or physically abusive towards them. It is also an important question since the other post-separation dispute settlement pathways may be problematised by effects of violence. These include (but are not limited to): feelings of powerlessness, low self-esteem, anxiety, substance abuse, PTSD, depression, fear of having any sort of contact with an abusive partner, and an impaired capacity for paid employment, which has arisen as a result of these mental and physical health issues, or because victims are prevented from working whilst in the relationship and lack experience. Such effects may be particularly germane in the context of coercive controlling violence, with its accoutrements of domination, intimidation, control, and its propensity to escalate. Could CP be a possible resolution mechanism for this group in which there has been coercive controlling violence? There is little Australian academic research on CP and none on how it works if there is family violence. Therefore, to answer that question, we rely upon overseas studies and on responses from a small sample of practitioners who have experience with CP. In addition to seeing if this type of resolution could be appropriate if coercive control-type violence is identified, we also aim to add to the Australian academic literature concerning CP. Learning More about CP from a Sample of Lawyers Who Use It Since our aim was to collect experiential evidence about CP and how it is practised in Australia and then to theorise about how it could work (or not) with family violence, we used a targeted, purposive sample. Put quite simply, we wanted to learn from those at the ‘coalface’ about their use of CP and their opinions about and/or experiences of using it when family violence has been alleged or acknowledged. In late 2013 and early 2014, email invitations to participate in an online survey were sent to all of the 16 lawyers who belonged to the Collaborative Practice Canberra Group and to three other lawyers known to the researchers to have relevant experience. We ended up with eight respondents: six were from the Practice Group. Each respondent had received training in CP and seven had used CP in at least one matter where a party had alleged violence. Aside from CP, each respondent’s work experience included involvement in mediation and acting as an advocate in Court proceedings. We were interested in their practices and assessment of CP in general and specifically in cases of family violence. Open-ended questions aimed to ascertain their observations and views about when CP is appropriate with different types of family violence and how CP could be modified if family violence is evident. Other questions concerned screening of parties’ suitability for CP and the practitioners’ experiences/comparison with other family law processes (and violence) when violence is admitted or alleged. Responses were examined qualitatively using an ‘open-coding’ approach. Because of small sample size and brevity of the answers, this process was informal and unstructured, but did involve studying every line of the eight surveys to determine what exactly had been said and to label each passage with an adequate code or label. These codes emerged as ‘power’, ‘control’, ‘suitability’, ‘advantages’, ‘disadvantages’, ‘modification’ and ‘outcomes.’ We then converted answers to tabular form based on these theses and used

footnotes to cluster extracts relevant to each. Limitations of the Sample Data Since the aim was to access people who had practised or were currently using CP, it is likely that those who participated are consciously or unconsciously biased in their views of its potential value. This could be an inevitable outcome of practitioners being 'true believers' given its relative fledgling status in this country and the fact that two law firms in the ACT were the pioneers and foundation champions of CP's use in Australia. As important as it is to recognise potential biases, it is also important though to note that we are not making conclusions about the utility of CP based upon the respondents' opinions. We use the respondents' experiences and their ideas in order to provide a description of how best to determine the suitability of CP in a specific matter and to predict how CP might fit in the smorgasbord of dispute resolution options. Another caveat: we wanted to keep the survey very brief to attract busy respondents. The design of the instrument did not require a respondent to share step-by-step processes and experiences with CP. For instance, we did not ask specific questions about the type of CP used, although respondents did discuss some of the appropriate contexts for having other professionals on the CP team. We are therefore unable to identify associations between successful outcomes and particular models. Our results should be regarded as preliminary.

About CP CP's distinguishing feature is the 'commitment to good-faith negotiations focused on settlement, without court intervention or even the threat of litigation'. The disqualification provision in the CP contract states that if either party chooses to withdraw from the CP process, both lawyers (and their firms) and any experts involved are automatically terminated from representing the parties in court proceedings, leaving the parties to seek new legal representation. The retainer agreement or collaborative contract thus changes the context of negotiations by providing a strong incentive to come to an early, collaborative settlement. Parties and lawyers involved in the process are able to focus on resolving the dispute openly without the concern that litigation may be commenced. Pauline Tesler, an American pioneer in CP, believes that lawyers who are not contractually barred from taking an issue to court tend to decide too quickly that the issue should be taken to a third party for resolution. It is her view that the disqualification clause acts as an incentive to remain committed to the negotiation process. The formal written commitment to engage in good faith also aims to decrease suspicion and paranoia. The retainer agreement though might be a source of tension for some collaborative lawyers and clients. Parties may feel pressured to settle under inappropriate circumstances in fear that clients would have to find and retain new representation if the process were to break down. Another aspect of CP is its fluidity. 'The collaborative model is dynamic in that it evolves over time'... and 'it is always possible to modify the structural components of the collaborative system to suit the client's needs'. Hence, debriefing meetings involve discussion between the lawyers (and experts if involved) about how the parties engaged in the process and how the next ('four way') meeting, should be conducted.

Different Models of CP When the client has decided to engage in CP, he/she will meet with their lawyer to prepare for the first meeting with the other party. This usually involves the lawyer explaining to the client the process involved and an in-depth discussion of the client's interests and objectives. Discussions might also be made at this stage, or in consult with the other party's lawyer prior to the commencement of the collaboration, about what professionals – if any - to add to the process. There are theoretically three approaches: a lawyer only model, a lawyer referral model and a team model. The lawyer only model involves clients and their lawyers meeting in a series of 4-way meetings to try to reach a resolution. Any other professionals, such as accountants and mental health providers, are involved only as an expert or consultant. The next two models are multi-disciplinary and include lawyers and other jointly retained neutral professionals. With the lawyer referral model, the lawyer refers his/her client to additional professionals such as a financial consultant or accountant or mental health professional to assist as necessary at any stage of

the process. The strict team model comprises an interdisciplinary group of professionals appointed at the outset of the matter by the parties. They include the two legal professionals, a neutral financial specialist, two mental health coaches (each spouse selects her or his own coach), and a specialist who advocates for the child(ren). The engagement of allied practitioners can provide significant benefit to clients and lawyers within the process and, if necessary, separate meetings with other professionals can explore further issues or concerns the client/s may have: ...lawyers...can concentrate on skills such as problem solving, communication and negotiation, whilst the other professionals look after the client's emotional, financial and social needs. In Canberra (and throughout Australia), most CP lawyers tend to practise either the lawyer only model of CP or, from the survey responses, it seems that most use a referral model. There is mutability as it is not known at the outset whether or not the CP will be multidisciplinary. Generally, the practice in Canberra is to agree to the collaborative process, determine between the lawyers at the beginning whether there is any obvious need for third party involvement at the first 4-way meeting, and, if not, identify any need for other professionals at the first or subsequent meetings. It might be evident before the first meeting that one or both parties are going to need additional help such as a mental health support person, or coach. This could be discussed with the other lawyer to determine how such a professional could be involved. It may then also become obvious at the initial session, or at subsequent ones, that some financial or child expert advice is required.

Interest-Based Negotiation With all CP approaches, the lawyers and clients (and other professionals, if multi-disciplinary) negotiate with the active participation of both clients. Meetings are designed to encourage constructive negotiation and allow each participant to speak and to discuss all issues. Parties are encouraged by their lawyers to devise solutions aimed at satisfying their interests and goals, as well as those of the family. This is known as an interest-based negotiating approach. In agreeing that 'win-win' goals are preferred, the process has the potential to promote imaginative and creative thinking among all participants. A metaphor is an orange: the wife wants to make orange juice and the husband wants to make some potpourri. If the matter went to court, the Judge might decide that the orange be cut in half. Both parties would end up with half of the orange, but neither of them might have enough of the orange to do what they had hoped to do. However, if the couple sat down to understand each other's interests, they could realise that the wife might only need the flesh of the orange to make the juice, and the husband only requiring the rind to make his potpourri. If they reach an agreement based on their interests, they will both have what they need.

[CP]...combines the positive problem solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation... giving rise to potentialities not generally found in other dispute resolution models. An interest-based approach can be compared to decisions made by the court based on law and facts rather than needs and interests. It provides scope for the parties to devise settlement options together without limiting negotiations to what a court might order. Accordingly, CP may give parties the 'best of both worlds' by providing not only advocacy support but also legal advocacy with a non-litigious focus on settlement. While lawyers retain an alliance with their clients, they work with the opposing lawyer as a team to help their clients reach shared goals. There is collaboration between the two sides with information gathered by both lawyers and clients, and shared with the team during meetings. This increases the efficiency of the negotiation, as there is greater transparency and no duplication of documents/information. Therefore, co-operation is a major feature of CP – between both clients and lawyers. In practice then mistrust between lawyers and other professionals and mistrust between the parties has obvious implications for the collaborative process. One wonders then an interest-based negotiation could work if there is coercive control family violence involved? We look at this question after providing a brief overview of existing dispute settlement pathways and their

potential limitations for cases involving these types of antecedents. Why Look at CP for Victims of Family Violence? Coercive Violence Matters: When and Why Mediation might not be Appropriate Screening and risk assessment are crucial to identifying specific patterns of control and any psychological and financial impacts of violence. Such assessment must be ongoing to ensure the continual safety of the victim and the family because the dynamics of the relationship or violence may change after separation, possibly increasing in severity. Alcohol and substance abuse, psychological problems, and prior arrests of a victim's ex-partner are commonly listed as risk factors in family law matters. These indicators should be considered along with other factors such as past assaults, threats, access to weapons, jealousy or preoccupation with the ex-partner, and stalking behaviours. The presence of multiple indicators could signal difficult and high-risk cases, and indicate that measures of protection are needed for the victim and their children. If violence is identified with screening, does that mean that FDR is necessarily inappropriate: in theory, not always. Mediation involves the parties talking about their own perspectives, needs and interests in order to come together to form an agreement on what is supposed to be a level playing field. The mediator acts as the neutral third party and has the power to determine how the matter will be handled and how the parties are best protected during the process. Victims are theoretically empowered because of the primary principle of self-determination, where parties have the ability to advocate their own resolution in the dispute, without being coerced or having a decision imposed upon them. In addition, mediation can potentially save costs for parties who cannot afford litigation; has the capacity to preserve relationships between parents for the benefit of children; and has the potential to take into account emotional issues and interests, as opposed to only legal rights and principles. For mediation to be effective, however, each person is required to listen to and to understand the other party; communicate effectively; obtain relevant information and advice; absorb new information and advice; put forward proposals and options; and represent their own interests. Often, an impact of coercive control is the diminishment of self-confidence and, in some cases, victims experience cognitive, emotional and behavioural effects that could impact on their ability to advocate for themselves and obstruct the mediation process. Victims may lose their ability to respond to their partner or ex-partner effectively and display an essentially passive reaction. They may be in a position of appeasing a violent partner or making compromises to their own safety and wellbeing to facilitate a relationship between a perpetrator of violence and the children. Further, participants may not believe they are entitled to a fair deal and might negotiate for what they think they are able to get rather than an outcome which is just or equitable, or which protects them. In such contexts, a perpetrator might still be able to coerce, intimidate, threaten, and deny the victim's interests. Accordingly, it is argued that FDR could be unsuitable for relationships involving power imbalances when those dynamics are recreated during the dispute process as power imbalances can serve to undermine self-determination. There are also other issues in relation to communication in mediation. There may be gender differences that disadvantage females; these are likely exacerbated when there has been violence. Women, and especially those who have been victims of violence, have been observed to use language associated with powerlessness, speaking in hesitant, indirect and self-effacing language. Further, women have been identified as 'soft negotiators' with a style more likely to be collaborative and conciliatory. In comparison, it has been suggested that men are generally more competitive and confrontational in their interaction style during negotiations and more likely to interrupt and control the conversational topic. There are also findings that males tend to maximize their interests while females focus their concern on relationships as opposed to their own personal rewards. In theory, mediators neutralise these power imbalances associated with gender and violence. In practice, however, it is dangerous to assume that they are always able to redress these issues satisfactorily. There is evidence that often victims of family violence

are not aware that their experiences are not normal, and some perpetrators may be ‘manipulative and highly skilled at presenting positive public images of self’. As such, in the absence of information about the history of the relationship, through inappropriate or lack of screening implementation, coupled with their role of impartiality, mediators may fail to detect trigger words or actions and be unable to manage the presence of controlling violence in the mediation process. Indeed, a mediator may find it difficult to adequately protect the disadvantaged party when there is a conflict between the mediator’s ‘commitment to help all parties and a desire to ensure that all can satisfy their interests fairly and effectively’. Thus, one respondent in our sample expressed a concern that victims ‘might be alone with their abuser with someone who is attempting to maintain impartiality, when impartiality is not appropriate’. The Courts and Coercive Control Victims As noted earlier, according to statute, parties with a history of violence are able to bypass the otherwise required FDR process and make direct use of court processes. Perhaps this is why the ‘heavier’ users of the Courts have been identified as those for whom family violence, safety concerns, mental health problems, and addiction issues are relevant. Accordingly, in the US, it has been found that parties who are fearful of continued or increased violence may secure more protection and parenting outcomes through the traditional court system because of the focus on fact-finding and the ability to enforce orders. Under the Family Law Act 1975 (Cth), the Family Courts play an important role in parenting matters (and) where there are allegations of family violence. The powers and obligations judges have under this piece of legislation demonstrate that there are theoretical mechanisms for enabling family violence and abuse to be taken into account properly. However, research suggests that there may be at times a gap between the legislation and its implementation. For example, the evidentiary standard of proof for family violence in family law matters must be made out on the civil standard of the balance of probabilities, not the criminal standard of beyond reasonable doubt. That is, ‘when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found’. Factors that must be considered when making a finding about family violence include the ‘seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding’. The Full Court of the Family Court has acknowledged the discreet and secretive nature of violence and has found that violence can be substantiated ‘without there being corroborative evidence from a third party, document or admission’. However, as the Victorian Law Reform Commission (VLRC) has noted, giving evidence is ‘one of the most intimidating and distressing aspects of the legal system for people who are subject to violence’. Victims of violence may not readily disclose their abuse due to feeling ashamed or fearful and because they tend to regard themselves as lacking credibility. Some participants in the court process may also not feel safe enough to speak freely about the abuse whilst in public and in the presence of their ex-partner. Victims may find it difficult to experience ongoing exposure to their perpetrators because of lengthy family law processes and complex outcomes. Certainly the adversarial system can lead to an exacerbation of an already dangerous conflict. This is problematic given that in one study, approximately one in five parents (17 percent of fathers and 21 percent of mothers) reported safety concerns associated with ongoing contact with their child’s other parent. Further, family law professionals are not always aware of the complexities of coercive control and the tactics used by abusers during court processes. In fact, abusive ex-partners may use litigation as a forum to control and maintain power over their victims. Victims have reported experiencing their perpetrators’ manipulation of the family law system through repeated litigation and refusal to negotiate. Abusers may also use strategic self-representation to further control their victims: Victims are required to give evidence in litigation, and this can be quite distressing for them, and may impact on the quality of evidence they are able to give. This is especially so if the perpetrator is self-

represented as he is then able to personally cross-examine the victim. Hence, one survey respondent noted that ‘the idea that the litigation system corrects power imbalances is... farcical – if anything it exacerbates it... victims of violence... may be re-victimised in that process’. Another stated that where a history of family violence results in unequal bargaining power, ‘litigation, written negotiation or mediation are not necessarily superior options [to CP]’. A third lawyer expanded on that theme: The litigation process is an institutionalized form of power (violence is a form of power) and as a consequence, the recipient spouse does not function well in such an environment... As well, the aggressive nature of litigation may in fact inflame the violent/abusive person in their behaviour. An additional issue for victims of violence might be their financial circumstances. They may be unable to pursue legal matters in the Courts because of the costs involved, or unable to afford private representation, and the quality of their legal advice may be compromised. CP and Family Violence It would seem then that both mediation and litigation might present some obstacles for victims of violence, which brings us to the question: What about CP? Although Macfarlane found in her US study that most of the participants agreed that they would not take on a case that involved family violence, it was not simply a question of ‘if family violence – then not CP’. Those who continue to use ‘tactics of coercion and control to intimidate and manipulate the process’ would be problematic within a collaborative process. The eight respondents in the current survey agreed. Their responses shied away from focusing on violence as a monolithic entity. Instead they focused on power inequity and the potential but not insurmountable issues for CP with such an imbalance. Screening for CP Overseas research has identified the importance of scrutinizing the power and control dynamics in the relationship. There is recognition too that the type of violence is critical in distinguishing the violence of victims in abusive relationships from the violence of perpetrators. Each respondent agreed that screening was needed to determine if the effects of controlling-type of violence could affect the client’s ability to participate: both the victim and the perpetrator. It is important to screen for family violence and to fully understand the dynamics of the violence before any decision is made to enter into Collaborative Law. Accordingly, respondents mentioned ‘whether either party [is] unable to participate or advocate for themselves’ and ‘whether either party lacks adequate insight into their behavior and the impact it may have on the other person.’ It should be noted that although lawyers ultimately have the discretion in deciding whether it is appropriate to proceed with CP to resolve family matters, the clients also have to agree that it is the process that they wish to pursue: ‘Ultimately it is the choice of a client as to whether collaboration should proceed’. ‘Clients need to be willing to collaborate after being fully informed about the process and what it involves.’ Since victims of coercive violence may deny or minimize violence, it is essential that family law professionals screen continuously using face-to-face interviews and written questionnaires, monitoring control indicators, and searching court or public records. One-on-one sessions between practitioners and their clients appear to be the best way to ensure that victims feel safe and comfortable in disclosing violence, as disclosure of coercion can be facilitated by ‘establishing a trusted relationship with an open and empathic listener’. In this way ‘the parties are able to make safe, strategic and informed decisions about disclosure of violence’ without the fear of disclosing in front of the perpetrator. None of the Canberra respondents reported using a screening instrument. Instead they employ their own line of questioning which may be informed by one of the formal protocols such as the recently introduced DOORS program. One lawyer ‘tease[s] out the family history a bit, [to] see if there [is] a dominant/submission type dynamic first, and if so, explore how they dealt with the conflict in the past’. That lawyer identified that the issues looked for during the screening process include: A dynamic between the parties that would cause an unreasonable power imbalance being in the same room. Could they, notwithstanding the history, freely

consent to the process and make decisions with the assistance of a lawyer knowing the history being present? Another practitioner had developed a list of warning signs (s)he looked for as indicative of power imbalances: whether the client:

- Felt scared of the other party;
- Felt that there were things they could not say to the other party (other than because of common decency);
- Described in disagreements with the other party that they (the client) would give in rather than advocate for their position;
- Experienced physical violence as opposed to verbal or mental abuse;
- Described being isolated from family and friends and breakdown of other relationships while in the married-type relationship;
- Felt undermined and worthless;
- Felt that the other person would do as they were told/could be controlled;
- Was unrelentingly critical of the other person/described them as having no value; or
- Described having been physical, emotionally or psychologically violent towards the other person.

A Question of Suitability: Lawyers and Clients Decide As we mentioned above, the first meeting between lawyer and client generally involves a dialogue to educate the client about the separation process, dispute resolution and collaborative law, specifically. At that time, practitioners can make additional referrals for clients to assist the clients to determine whether CP is suitable for them. Collaborative lawyers also make judgments about whether or not, or how, to undertake CP, and this is often based on information either directly or indirectly acquired in that first meeting with a client. As one respondent stated, 'It requires a robust conversation with the client about their real options'. Another noted, 'If there is violence, [clients] need to understand how the process works, be able to compare it to the court process or other processes available, and make an informed decision to proceed.'

Further, if there is a solicitor acting for the other party, the victim's lawyer can ask 'them whether they think it's suitable having heard the other party's story'. The client may express the view that CP is possible; however: it is important to have a realistic view about the capacity of the clients to negotiate ... For example, some women want to be able to negotiate but with the profile of the other party and the history, an experienced lawyer will know that isn't going to happen ...' The impact that the outcome of the screening assessment has on the way that the collaboration is run may differ depending on the issues that need to be addressed. For example, if the matter is a purely financial negotiation and there has been violence in the relationship, it may be that the lawyers take note of this, and understand that there may be a power imbalance that they will have to deal with, but proceed without directly addressing the issue in the collaboration. Alternatively, if the case involves parenting matters, the violence would likely be something that would need to be specifically addressed within the collaboration. These decisions are affected not by whether there was coercive control type of violence in itself but on its potential effects in the particular matter. For instance, one practitioner believed that it was 'not just the history' but whether 'the client is able to make decisions with the assistance of legal advice' (or if the client): [cannot] cope with the presence of the other party... [or has] some mental health issues that may preclude an equal footing in a four-way conference. Indeed, the bottom line is the client's ability to be on a level playing field, their well-being, and their ability to be in the same room as the perpetrator: The most important issue is whether the client is capable of handling a collaborative process once you fully explain to them about the prospect of meeting directly with the other spouse, etc. Secondly, you should always ensure that the client has received the support they need. Often, the question is their readiness and the contrition of the other spouse. Certainly in making decisions about CP, as we have seen, a primary consideration is clients' ability to work together. A history of family violence may make that so problematic and irreparable, even with CP lawyers and other professionals, that Collaboration is inappropriate. One lawyer in our study felt that CP was an option in these circumstances if 'the violence and/or the dynamics of coercion and control [is] acknowledged by the perpetrator'. Another agreed, and would assess how much insight the client had into the effect of their behaviour

and how the other person might feel. Further, the parties and lawyers need to ascertain if there is sufficient trust. A lack of trust between separating partners could be an issue in CP as the parties are required to form a mutually acceptable agreement through a co-operative process. If the client was totally mistrusting of the spouse, or wanting to hide information from them, or want to teach them a lesson, or something else, I would probably not recommend CP. Ultimately, we are trying to get a win/win situation, but if the client just wants to pay the other back, they are not entering into the CP with the right mind set and it probably won't work. If the playing field can be leveled and the legacy of coercive control acknowledged, then 'with appropriate safeguards and with the client fully understanding' CP could in fact be a good option: The test I think is whether Collaboration is better to the alternative, which is lawyer-lead negotiation, or court, and the answer, is yes. I've had cases involving serious family violence in litigation and it was an entirely horrible experience for my client (the victim). Courts and the adversarial process are not designed to help victims and give them the support they need nor have any rehabilitative effect on perpetrators. As a general rule victims of violence do not make good witnesses. It seems that CP could be beneficial where 'people have to continue to interact (e.g. [they] have children [together]) - they need to learn new ways to communicate and redefine their relationship'. That need to deescalate the situation was seen in one case as trumping issues of 'taunting and physical altercations' within the parties' previous relationship as the dynamics of running the allegations in court were perceived as 'more inflammatory than collaborating with a lawyer from each side present... (we were) able to resolve the issue of children's matters by reference to an already existing parenting arrangement'. How CP Might Prove Beneficial (in Theory) with Coercive Control? Having looked at how CP works and at obstacles that victims of intimate terrorism may encounter with mediation and litigation, we are interested in identifying reasons why CP might be an effective pathway. Although this question was not asked in the survey, the thematic analysis identified clusters of quotes, which are indicative of what the respondents believe to be potential pluses of CP. Being Able to 'Morph' the Process Screening for victims' fears and perceptions is useful since it can assist the lawyer to understand how the Collaborative process may need to be run; that is, in a way to better enable clients' effective participation. For example, a multi-disciplinary approach may be used if clients have emotional, communication, or relationship issues that could affect their ability to participate in the Collaborative process. Additionally, if parties need assistance in the process, practitioners can advise them of settlements that utilise professionals, neutral evaluations or non-binding recommendations. One lawyer noted that, 'Even then [with a history of coercive control], a mental health professional supporting the client may be a realistic option...' In fact, several respondents agreed with that last comment and the use of a 'relevantly qualified personal coach'. Thus, after assessing 'whether the history prevented some equality of bargaining power' another practitioner looked to see if 'the assistance from others such as a lawyer or other personal counseling assistance' could mitigate unfavorable power imbalances. Morphing into multidisciplinary CP is fluid: For instance, the victim might already be seeing a psychologist or counselor or it might be decided during the collaboration that one or both of the parties need some support or assistance to assist our negotiations, and so we might send them off to see someone and that person may or may not be involved in the future of the collaboration. They can operate either within or outside of the process. In addition, lawyers are able to utilise a variety of methods and tools to manage conflicts in CP if violence is significantly affecting negotiations. For instance, one lawyer had used a technique similar to shuttle mediation, where parties were kept separate from each other while their lawyers negotiated on their behalf, but still based on the parties' interests and without the threat of Court overshadowing the negotiations. Another suggested that 'forms of "shuttle diplomacy" or [a process whereby] the interaction between the parties [is]

highly limited and controlled are possible'. Having a Voice CP may work to empower and validate victims' experiences in divorce and may give them 'a voice'. One respondent put it this way: [CP] encourages both parties to deal with the issue of violence and not just ignore it...And, the victim is able to express his/her hopes, goals and fears knowing that the perpetrator will hear them and be encouraged to respond productively by addressing any issues he/she might have. Accordingly, another lawyer described a case where the wife alleged that the husband had always been financially controlling and demeaning of her, and the wife felt 'empowered by having a voice and being able to "stand up to him" with the protection of the Collaborative framework. Both solicitors work[ed] to ensure that the husband [was] reminded when he [was] acting in this way.' There was recognition, though, that with cases of coercive control it is important for the victim to become empowered and not have lawyers' voices dominate: It is particularly important for the lawyers involved not to perpetuate an attitude of coercion or control, which can sometimes happen in a paternalistic way ("I'll take care of it." "We [being the lawyers involved] have sorted it out.") Ideally the goal is for full and informed participation by the client, particularly in financial decision-making. Balancing the Power The CP process aims to address differences in bargaining power. ... the collaborative process itself is inherently designed to take power away from the more dominant of the two parties to enhance the power of the person with less power. This is done with the instruction of the clients. A negotiation may never be equal, but it will be as close to equal as one can hope to get. As advocates, lawyers may be able to compensate for a client's difficulty in participating in the process. For example, they may assist clients to understand their short and long term goals and interests, whilst offering the necessary support and leadership to enable clients to resolve their dispute. Participants also benefit from the assistance and support they receive during the negotiations when the agreement is being formed. This corresponds with overseas findings: ...input of...legal advice and advocacy is essential for the fair and equitable resolution of many disputes...some family law clients need advocates in order to ensure they are fairly treated by their spouses...to remind them of their legal responsibilities towards their families... One participant indicated that 'power imbalances can be managed much more effectively in a Collaborative context than in [other] contexts'. Another agreed. Collaborative lawyers can encourage and promote greater autonomy: ...in a collaboration...we can bring in the support people that the victim and the perpetrator need. We can understand the nuances of their relationship and manage that. We can help the victim to advocate for themselves and have autonomy. We can manage the process in a way that protects them. The presence of two lawyers can ameliorate the problems discussed earlier that mediators may encounter: It is superior to mediation because, in Collaboration, both parties have a lawyer to support them in their negotiations and it is the role of both lawyers to ensure that the negotiations take place on a level playing field. CP may allow lawyers to work closely with one another and with their client in these cases to manage any power imbalance: ...to make the negotiation a success (an implied agreement of Collaboration), the party who has asserted their power will be expected to reduce it and the interplay between counsel should reduce the power imbalances significantly. The presence of lawyers (particularly if they speak respectfully to one another) and in a neutral space can mean that the aggressor holds himself in check. We [bring] the parties' focus back to the outcome they both want. We don't allow them a forum to vent on past hurts. Additionally, with CP, lawyers may be able to pre-empt power plays such as threats or subtle behavior that could be a danger signal to the victim, but that would not otherwise be obvious to mediators or judicial officers who haven't been thoroughly briefed by the client. One client chose CP for that reason as 'he wanted to have a forum where the wife [the perpetrator of violence] was not made to feel more adversarial than she already was'. And, if one adheres to the adage that knowledge is power... It is common in our experience for women (including educated,

middle class women), to have little knowledge about the financial affairs of the relationship. This situation can be more extreme where the female partner is not working or is less educated than the male partner. Full and frank financial disclosure is essential including women having access to primary documents. For example, not a list of shareholding generated by the husband but an independent document so there is confidence in the financial information. Outcomes Another theme that emerged from our survey responses concerned the outcomes of CP. Although not asked, the view was expressed that the outcomes of a Collaboration may be better than those achieved through the Court system. The 'outcomes are often more creative, because they've been work-shopped ... by all parties' and they are more often adhered to because the outcomes are 'agreed upon by the parties, not ordered by the Court, so the parties can take ownership of the agreement'. 'The process is usually a lot quicker, more thorough, and leaves clients more satisfied than with other processes.' In matters that included violence, that respondent believed that outcomes are able to 'take account of the fact that one party may be feeling disempowered and give recognition to that perception, which is a start to fixing the problem... Parties have control over their own outcome.' Therapeutic Process For victims of violence, a negotiated outcome 'is really important because they are able to gain control of their lives'. Further, it is argued that 'often the parties have done some "healing" along the way and have addressed the issue of violence so that they can move forward'. With the multidisciplinary model of CP there might be added opportunities for healing: The ability to have a close involvement with professionals on both sides. In addition to helping the abused party cope better with that abuse, mental health help on the other side can help lower the intensity of the anger that gave rise to the abuse. Another lawyer had observed that a multi-disciplinary approach, and the slower pace of CP, helps perpetrators to cope with the process and handle themselves in a respectful manner where the perpetrator sought 'appropriate counseling... which made the meetings a bit better'. Indeed, CP can offer tools that can help maintain accountability on the part of the perpetrator: Both parties' lawyers work together which means that the perpetrator's lawyer is working to correct the power imbalance as well as the victim's lawyer. We can use all of the same court arsenal, such as protection orders but back it up with therapeutic intervention for the perpetrator to help them gain insight. ... there is much more responsibility placed upon the abuser spouse in an Interest Based/Collaborative system than in any other system. Essentially, the abusive spouse needs to admit there is a problem as well. A perpetrator of family violence may have trouble recognising that the victim has separate needs. CP can help: Parties are encouraged to think about the bigger picture and what is best for them and the other party, rather than what they are 'entitled to' which is not always congruent with what is best or in their interest. And, in addition to helping the individuals, it may be therapeutic for the relationship: Collaborative law has the potential for transformative change in the relationship between the parties in the process of the transition to a post-separation relationship. This obviously takes the time and commitment of all parties involved in the process. Potential Difficulties with CP with Antecedents of Coercive Control) CP is not a feasible choice if court involvement is a possibility; for instance if a protection order is likely to be needed. And certainly it is not an option if one party's safety is at risk. There is also a potential problem with the issue of participation. This is recognized with section 14 of the US Uniform Collaborative Law Act (UCLA). Lawyers are required to take steps to ensure that a decision to participate is informed and voluntary. Macfarlane has expressed concerns about the quality and depth of informed consent. She found that some clients did not seem to fully understand the ramifications of participation, because explanations were too abstract and some lawyers did not have sufficient experience to anticipate potential problems. A purported advantage of CP is that negotiations cost less in time and money than conventional, adversarial representation. However, there are added CP costs incurred with face-to-face

sessions, telephone conferences with professionals that may be involved, and intake procedures in assessing suitability. Expenses may accrue when there are many issues to resolve. Consequently, the costs of CP may be higher than in mediation as lawyers and experts are more involved in the stages of client preparation and the four-way meetings. One participant indicated 'the costs of the Collaborative Law process are dependent upon the clients' attitudes to the process and outcome'. Another emphasized 'the risk for a victim of violence to be "trapped" in Collaborative Law with huge costs disadvantages to fully realising her proper entitlement'. Therefore, CP may not be accessible to those with financial constraints, unlike mediation, where Legal Aid and Family Relationship Centres provide Family Dispute Resolution services at reduced costs. In such cases, mediation may be a more viable option if financial assistance is needed. Time may also be an issue as implied in the discussion of costs. During CP sessions, negotiations can become time consuming and research shows that some clients do express frustration with the length of time taken to get to substantive issues. Or, an outcome may not be reached. The one respondent who discussed 'success rate' stated that CP cases reached a negotiated outcome in 'around 90-95%' of matters in his/her law firm. Settlement may not be reached, though, if either of the lawyers adopt a positional approach in their representation of their client, which stems from their training as an advocate and experience in adversarial practice. They might become caught up with obtaining a successful outcome for their client at the expense of the other party, in which case the client may turn to mediation or traditional representation. This was the case with one participant's client: no agreement was reached in regards to property settlement because the parties were not willing to co-operate. As a result, 'litigation was needed to get to a point where the other party would provide a realistic response'. Another possible problem has been raised by overseas commentators: victims of violence may 'push for settlement, any settlement to end the conflict'. In addition, pressure to settle may also come from unidentified and unlabeled persistent coercion. If the perpetrator uses tactics to intimidate and manipulate the process, the victim may agree to substantively less favorable terms. A perpetrator may view four way meetings to intimidate the victim, failure to make required disclosures and enlist the lawyers to pressuring the victim to settle. At the same time, victim may be hesitant to disclosure information for fear that it could be used inappropriately. One respondent to our survey confirmed that this may occur: The aggressor got a better deal financially, simply because she wore down the other person. He couldn't withstand her bad behaviour and gave in because he couldn't stand up to her. Theoretically, however, this type of outcome could be avoided if both lawyers are doing their best to ensure that both parties are behaving appropriately, in line with the CP agreement. Conclusion We asked our respondents whether there was 'anything else [they] would like to add about [their] experience with Collaborative Law in cases involving family violence'. One responded, 'Proceed with caution'. It would appear that, as with mediation and litigation, 'the Collaborative system is not ideal...' for matters that include coercive control or intimate terrorism. If patterns of control are identified either at the onset or at later stages, the lawyers and other professionals involved (in a multidisciplinary team) can assess whether CP is appropriate to use with those particular clients and facts, but there is no 'one size fits all' for determining suitability. Both overseas and in Australia, there is growing recognition that being on the vigilant lookout for control issues/dynamics is of paramount importance. Commentators, CP Associations, and other legal practitioner associations all agree that on-going screening is essential. This became a statutory obligation in the 10 US states that have enacted the Uniform Collaborative Law Act thus far, with section 15(a) dictating that lawyers have a duty to develop and implement screening protocols. However, proper screening appears not to be a current widespread practice. We therefore recommend that screening be mandatory and monitored for compliance and merit. Various screening instruments and protocols have been developed and

validated both internationally and in Australia. An example of the latter: the Commonwealth Government quite recently introduced an empirically based and standardised front line framework called the Family Law DOORS (Detection of Overall Risk Screen). This approach has been reviewed and refined by researchers and senior practitioners, both across Australia and internationally. In contrast to specific domestic violence screens, the DOORS uses a very broad definition of risk and encourages the practitioner to assess numerous factors that might be indicative of personal and interpersonal safety risks. The DOORS website describes the framework as a 'tool for systematically identifying multiple risks at the client's point of entry into the service, including being at risk of physical or psychological harm, or of perpetrating harm'. If screening is done, and violence identified, could the process then be made safe? Can the playing field be leveled with enough trust re-established to permit interest-based negotiation? It would appear that the answer is a qualified 'Yes' as described by our survey respondents and as assessed by violence victims who have participated in a somewhat similar dispute resolution project (the Coordinated Family Dispute Resolution (CFDR)). That pilot project aimed to provide FDR in matters with violence and included cross-disciplinary professionals working collaboratively with case management. By using multiple sessions and with screening and legal advice, the aim was to lessen power imbalance. Support professionals and lawyers helped prepare the victim; they were also sometimes present at some or all of the mediation sessions. These professionals reported that their presence neutralized violent partner's tendency to intimidate and control. And, where mediation sessions were handled carefully, the data from parents indicate that the process could be safe and empower them to make appropriate arrangements for their children, and it even improved the capacity of some to communicate with their ex-partners. We believe that this positive assessment of CFDR bodes well for the potential value of using CP in cases involving family violence. Certainly, some of the lawyers, like the one below, although not asked to assess relative merits, thought that CP was a better process for victims of violence than the alternatives: It is ... better than litigation as it provides a forum in which both victims and perpetrators can receive assistance from experts if necessary, and it avoids the "he says, she says" battle that often occurs in Court and the victim is given a voice. Such viewpoints need to be tested by an evaluative study similar to that done for the CFDR pilot project. Indeed, more research could further illuminate any benefits and/or drawbacks of CP. Such a project might include in-depth interviews with victims, perpetrators, lawyers, and/or other Collaborative professionals who engage in the multi-disciplinary approach. If the sample were large enough, we could learn which model of CP seems to work best with particular facts, personalities and type of coercive control. Another cautionary note: Access to this legal path may be problematic for some survivors of family violence. A victim's economic circumstances may be compromised by the behaviour of their violent party, issues of mental and physical health and/or their capacity to work. Because of the uncertainty associated with the costs of CP, reforms to financial assistance in law and policy should be made for CP to be more accessible to relatively impoverished clients. It would be beneficial if: Legal Aid [were] able to facilitate the Collaborative process, or [if] a modified version of Collaborative Law [could] be run through the Courts, so that those with less money can also have the benefit of this process. Further, in remote Australia, there are few, or none, of the resources required for CP, and it may be less effective in such cases without such resources. We recommend that the Commonwealth Government provide the funding for training of lawyers in CP and for professionals who might be part of the process. Indeed it is important that lawyers practicing CP have been properly trained and fully understand the aim and process of CP. This includes knowing how to negotiate using an interest-based approach, and understanding the dynamic of the CP model and their role in providing advocacy for their client within the CP model. Lawyers also must learn how to negotiate in an open forum (as

opposed to a traditional approach) and in having reality testing conversations with their client. Additionally, they need to be fully aware of the sometimes disguised and/or indirect manifestations and effects of coercive control. With these insights, understanding, and skills, the CP legal practitioner can work more effectively at ‘morphing’ the process, as we described earlier, and can better equalise power differential. Lawyers and other practitioners (if it is multidisciplinary) can then work with the clients to address the dysfunctional dynamic, with all parties focused on how best to divide the ‘orange.’

Question 25

Footnotes are not copying - see Emma Fitch and Patricia Easteal (2017) ‘Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims,’ *Family Law Review*, 7, 103-115. Emma Fitch and Patricia Easteal (2017) ‘Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims,’ *Family Law Review*, 7, 103-115. **SUGGESTIONS TO BETTER PROTECT THE NON-VEXATIOUS PARTY: LEGISLATIVE** Marsden v Winch, as discussed above, demonstrates that even in the small percentage of cases where a vexatious litigant is declared, and a profound effect on the other party is acknowledged, the legislation at times still does not provide adequate protections. Although the right to appeal is reserved for all individuals, this example suggests that the right should be measured, and that where it is clear that a party has experienced severe mental health issues or suffering from the litigation, that legislative safeguards should be improved or better used to prevent litigation and further appeals, We note however that any proposed reform must maintain a balance between allowing access to justice and protecting vulnerable parties from vexatious behaviour. **LOWERING THE STANDARD TO DECLARE A VEXATIOUS LITIGANT** One potential reform pathway was the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 which proposed a new s 45A, to replace s 118 of the FLA, to clarify and modernise the powers of courts to summarily dismiss unmeritorious applications. This Bill did not proceed due to the Parliament’s prorogation on 17 April 2016, and dissolution on 9 May 2016 (Parliament of Australia, 2016). Subsection 45A(3) would have lowered the standard set by previous case law by empowering the court to dismiss the proceedings, and that they need not be hopeless or bound to fail. Subsection 45A(4) also would have empowered the court to dismiss all or part of the proceedings if they are frivolous, vexatious or an abuse of process. Another potential area for statutory change is to introduce provisions that lower the standard for a person to be declared as vexatious specifically where a history of violence exists or the vexatious-like behaviour is such that it can be considered coercive or violent in itself with a FLA amending provision that recognises VL in exceptional circumstances as an expression of violence or coercive control. This would be based on a ‘precautionary principle’ as in environmental law, where it is argued that action should be taken to protect the environment and biodiversity, and that a lack of evidence that harm has or will be done cannot justify inaction. Precaution is justified, as once the harm is done, it cannot be undone, or it is extremely difficult to reverse. Such an approach is also supported by utilitarian theory. Further, the precautionary approach is consistent with the eggshell skull rule in criminal law, in that the survivor should be taken as they are found. For example, a traumatised survivor of violence with a low income may have less tolerance and ability than someone of a different background or circumstances to deal with a vexatious party. The focus shifts to the hardship caused to the non-vexatious party. **ADDING VEXATIOUS LITIGATION TO S 60CC** To address the underlying assumption that harm caused to one parent is considered a separate issue to the best interests of the child (or, paradoxically, that the perpetrator parent having involvement with the child supersedes that harm), vexatious behaviour could be considered as a part of s 60CC(2)(b), allowing the court to take into consideration any effect that the litigation has on the child. This is not about

stopping parents from seeing their children...it is not about stopping them from having the right to cross examine...it is about protecting victims of violence in order to assist them to recover and heal from their trauma and be the best parents they can be for their children [Eleanor's narrative]. If this change was made, in considering the best interests of the child, the court could take into account the indirect effects of the vexatious behaviour upon the victim-parent's parenting ability and therefore on the child. This at the least would act as a deterrent for litigants in cases involving children. By including a consideration of vexatiousness in the legislation, an active protection is put in place whereby courts can take action to prevent parties from coercive and controlling behaviour within the justice system.

REFORM OF CROSS-EXAMINATION BY SELF-REPRESENTED LITIGANTS There are currently clauses that allow a Judge to use their discretion as to whether this cross-examination occurs. This is not sufficient... real law changes need to happen. This man did so many cruel and hurtful things to me, criminal events....we need the law to firmly state that this should never happen [Eleanor's narrative]. Indeed, the FLA could be amended to introduce a provision that prohibits cross-examination by a self-represented party where violence is suspected. However, the requirement should not be for violence to have to be proven since it is an acknowledged problem that violence is inherently difficult to prove. As with the willingness to accept some vexatious litigants in exchange for an open democratic system, a similar trade off with a lack of corroboration could be accepted for the number of individuals it would protect. This is again consistent with the precautionary principle—the absence of evidence showing violence should not justify a lack of protection or action. Legal representation for non-vexatious parties could be appointed for the purpose of cross-examination only, or for any procedure that includes direct contact with the vexatious party. In this way, victims might be better protected from perpetrators' exertion of control, which can manifest in ways in addition to face-to-face contact, including by telephone or videoconference during cross-examination. Another way that is used in Norway to preclude cross-examination by a self-represented party is to have the cross-examination conducted and video-recorded in advance of the trial by a suitable third party who is not necessarily a lawyer. Such a model does not require transformation to an inquisitorial system but allows the benefits of non-adversarial examination to be achieved. This has particular merit in the family law space, which has been said to be inquisitorial within the adversarial system. Not unexpectedly, there are counter-arguments to these different suggestions. Appointing legal representation for the purpose of one part of the process may mean that parties are disadvantaged by having legal representation who may not be across all issues of the case. Others argue that it is the role of judicial officers, to a degree, to assist self-represented litigants in court. However, the judge's help does not protect vulnerable parties from the re-traumatisation that may result from being directly questioned by their alleged perpetrator. And, some might contend that allowing any of these processes to happen where violence is alleged and not necessarily proven may unfairly prejudice the court against the alleged perpetrator. To avoid this actual or perceived prejudice, the judicial officer could make a direction to the court that the alternative procedure acts as a protection to alleged survivors of violence, and does not in any way assume or suggest guilt on behalf of the alleged perpetrator, until that fact is substantiated in evidence.

SUGGESTIONS FOR BETTER PROTECTING THE NON-VEXATIOUS PARTY: COURT PROCESSES Court staff do have a role to play in shielding individuals from vexatious proceedings; however, concerns have been articulated concerning the adequacy and the resourcing of the systems necessary for this role to be actualised. When respondents reported how satisfied they were with the information, tools and methods available to manage VL, they gave a mean rating of 4.8 with 10 being the most satisfied and 1 the least. They provided numerous suggestions, outlined next, on how to improve family court procedures to better protect the non-vexatious party.

Case Management Approaches to managing vexatious litigants must be coordinated from a number of perspectives so that dealings with litigants by judicial officers and legal practitioners as well as mental health professionals can be consistent. More streamlined case management could facilitate this synchronicity. It is therefore important for legal practitioners to know what case management options are available. Some respondents referred to the need for increased human resourcing such as appointing more family law Judges and/or having case managers to advise and assist in issues such as the following: • lack of merit; • applications for a summary dismissal; • applications for leave to appear personally with no appearance by the client; • adverse costs orders and the intent to seek such orders; • submissions to the Court that the proceedings are without merit; • reliable witnesses to provide the court with credible information; • non- engagement with the vexatious litigant; • evidence of patterns that are used in the proceedings, as they often reflect patterns of behaviour in the relationship; • the creation of a barrier between the client and the vexatious litigant so the client is only involved where absolutely necessary; • arrangements that provide minimal involvement with the other party. Such case management techniques could better protect and empower non-vexatious clients (who may have also experienced other violence).

Improved Communication Between (and Within) Courts Almost all respondents (1, 2, 3, 5, 6, 8 and 9) reported that of the vexatious proceedings observed, they were aware of concurrent litigation proceeding in other courts or tribunals. One example of this was one vexatious litigant who had instigated proceedings in the Queensland Civil and Administrative Tribunal, Magistrates Court, District Court, Supreme Court, Court of Appeal, Social Security Appeals Tribunal, Federal Magistrates Court, Federal Court, Full Court of the Family Court and the High Court. There may be scope to save court resources if there were better communication between different courts, to declare litigants across multiple jurisdictions. Once a litigant was declared as vexatious, that person could be required to seek leave of the court in other jurisdictions to be able to instigate proceedings. This approach would mean that they wouldn't automatically be barred from instigating other proceedings, as that would not be appropriate. It would act as a 'barrier' to draw attention to the court that the litigant had previously been vexatious. It would be a matter for each jurisdiction to determine how this was used in future proceedings. A possibility is a 'three strike' approach. Enhanced communication could also protect survivors from avoiding what took place for Eleanor: I was granted an intervention order on the grounds it was not safe to have my perpetrator near me... A week later I was back in that same courtroom for family law proceedings [Eleanor's narrative]. To complement this, legal practitioners would need to be diligent in identifying coercive and controlling behaviour, including where a party may be targeting other people that are close to the survivor party, and to make this known to the court. A possible solution is that rather than simply dealing with this situation under general vexatious orders, the court could take into account that this was occurring in the context of the other connected litigation, and for there to be legislative reforms that allow for the court to take this into account when making orders relating to the litigant.

REFORM OF COSTS ORDERS Respondents provided quite a few suggestions concerning costs. These included: making severe costs orders with an uplift for exemplary costs (noting that this could run the risk of more appeals, where it might be possible to demonstrate lack of merit); more liberal use of adverse costs orders and parties not bearing their own costs; and the removal of filing fee exemptions for vexatious litigations. Respondent 1 pointed out though that by the time it is appropriate to apply for a vexatious litigant order, the non-vexatious party has already incurred substantial costs so it may not be financially viable to apply for those orders. A solution to this could be parties being allowed to apply for leave from the court to seek vexatious litigant orders with those costs borne by the vexatious party, if successfully declared as such. Note this could be quite effective if the standard were lowered reducing the difficulty of declaring a party as

vexatious. We suggest that these orders could be at the discretion of the judicial officer. More information, training and guidance would increase efficacy. For instance, a judicial officer needs to know if the party applying for those orders is in financial hardship with orders only granted if satisfied that the party may be put under further financial strain if the orders are not granted. OTHER PROCESS CHANGES Respondent 2 suggested that the court needs to provide clearer limits and sanctions: The system needs to change and there needs to be specific limits on how someone can make a contravention or urgent application... the legislation needs to change to be more specific as opposed to its current vagueness. What does 'frequently' mean exactly? And Judges must mandatorily have penalties assigned if they find the specific number of times has been exceeded without reasonable excuse [Female, over 10 years' experience, violence suspected in both cases]. We would add that court processes could be further improved nationally by adopting recommendations made to the Victorian Royal Commission into Family Violence including: that prospective cross-applicants should be required to seek leave of the court to make a cross-application; the prohibition of cross-applications by consent; and a requirement for family law registrars to assess the merits of an application more thoroughly before filing it. Family violence intervention order application case management could be improved to ensure that applications are complete and properly prosecuted. FACILITATING POSITIVE CHANGE: TRAINING Research has suggested that while the FLA requires that attention be given to family violence, courts are reliant on the evidence that is brought before them. This means family lawyers play an integral role in identifying and adducing the evidence. Lawyers need to understand that some victims of family violence might be reluctant to disclose it, or disclose it in detail, unless the demeanour of the lawyer is such as to give them confidence, or unless the lawyer asks specific questions. Lawyers, and judicial officers, and perhaps others, might learn to become more sensitive to the impact of their manner, and way of speaking, on people who have been exposed to violence, especially those from non-mainstream communities. Better screening tools and approaches to deal with violence are required to educate family law practitioners and judicial officers with professional development programs that include understanding coercive control. This could be facilitated by amending the Legal Profession Uniform Law to add IPV education requirements with all practitioners mandated to complete as a part of their continuing legal education (see, eg, Legal Profession Uniform Conduct (Barristers) Rules 2015; Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015, etc). Such training could also examine how to identify vexatious-like behaviour, the remedies available, and appropriate referrals for support services. Education is also important for the perpetrators of coercive control-type VL. They must have these behaviours explained to them and remedial action taken. Mental health issues may be evident and so a properly qualified professional, such as one that is trained in domestic violence, can teach concepts such as proportionality, reasonableness and acceptance to this type of vexatious litigator. However, a challenge remains that the professional will need to have extensive knowledge of the court system and the case itself in order to gently show the perpetrator that the behaviour is disproportionate to the circumstances (as research has shown that some vexatious litigants are unable to recognise the disproportion). CONCLUSION Some academics regard vexatious litigants as 'a small but bearable price that society has incurred for itself and should be willing to tolerate for the sake of certain democratic values...that the cases will never go away, and are just a cost of democracy.' Others consider that the public cost of democracy is truly borne by the public justice system alone, and not by the individual aggrieved parties. This view serves to normalise coercive behaviour, and implies that the cost of being traumatised in exchange for a democratic system is one that the community is willing to bear. Further, it removes the accountability and responsibility of perpetrators, assuming that taking advantage of another is something inherent to democracy. This begs the question concerning

what improvements can be made to the system so it is more resilient against being used as a means of coercive control. For example, by characterising some extreme cases of vexatiousness as violence, the coercive behaviour can be taken into account when considering the best interests of the child. Perhaps this approach could play a role both in preventing vexatiousness through deterrence, as well as in creating real consequences for litigants who abuse their right to access the courts. There is a contextual caveat though. The issues presented here concerning VL are reflective of the current state of the family law system, where issues of power imbalance can tip either end of the scale. It stands that all efforts should be made to strike the right balance between protecting vulnerable parties and providing access to justice with a requisite amount of evidence required before a party is barred from litigation, or before their contact with their children is affected. The system must avoid unfairly demonising innocent parties, for example, based on a lack of evidence. Appreciating that the perfect balance cannot be struck in each case, the court should err on the side of caution and follow a precautionary principle, founded on utilitarian theory, that it is better to act to protect parties from vexatious litigation than it is to justify inaction based on a lack of evidence. Indeed, it is inherently better to protect a vulnerable party from harm, even where the evidence may be unclear, than it is to allow the possibility of harm.

Question 26 See response to Question 24

Question 27 n/a

Question 28 n/a

Question 29 Haven't done research or written about this question

Question 30 n/a

Question 31

Question 32

Question 33

Question 34

Question 35

Question 36

Question 37

Question 38

Question 39

Question 40 Research!

Question 41

Question 42

Question 43

Question 44

Question 45

Question 46

Question 47

Other comments?

File

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