



# Appendix A: Mandatory mediation in family law – a review of the literature

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## A.1 Introduction

Reforms to the *FLA* introduced in 2006 by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*Amendment Act*), were described by the then Attorney-General as ‘the most significant changes to the *FLA* since its inception’ (Ruddock, 2005). The package of reforms, which included the s. 60I provisions, are arguably the most controversial changes to the family law system in Australia, generating extensive literature and triggering further legislative reform six years later.

Three aspects of the suite of changes have received particular attention in the literature: (a) the strong emphasis on ‘shared parenting’; (b) the introduction of mandatory family dispute resolution (FDR) as a pre-condition to initiating court proceedings in parenting matters; and (c) the way these and other provisions have played out in the handling of matters involving allegations of family violence and child abuse.

There is a growing body of evidence in Australia regarding the combined effect of the reforms on families requiring assistance to resolve disputes over the care of children, emerging primarily from government-commissioned evaluations. However, there has been little empirical research on the certification process at the core of the s. 60I provisions. Given that the s. 60I provisions are embedded within the broader family law system changes, this literature review explores the context and specifications of the certificates. It also seeks to identify the intended benefits and critiques of the s. 60I provisions, followed by an examination of the empirical evidence of the impacts of such provisions on families and the system more broadly. Where applicable, the review draws on lessons

learnt from pre-litigation compliance regimes in overseas jurisdictions in an effort to enhance understanding of how different policies impact on families and the family law system more broadly.

## A.2 Background

The increasing use of pre-litigation dispute resolution requirements in Australia and overseas jurisdictions stems from widespread dissatisfaction with litigation as a pathway to resolution. Court processes, both in Australia and abroad, have been characterised as too expensive, slow, unequal, uncertain, incomprehensible, fragmented and adversarial (Sourdin, 2012c, p. 21). The critique of the adversarial nature of litigation is of particular relevance to family disputes over children, where it is asserted that acrimony generated in litigation does little to promote cooperative parenting after separation. It is well-documented that entrenched parental acrimony can be harmful to children (Amato & Keith, 1991).

A House of Representatives inquiry into post-separation parenting arrangements initiated by the Howard Government in 2003 provided the impetus for the 2006 reforms (Parliament of the Commonwealth of Australia, 2003). In its final report, the Standing Committee on Family and Community Affairs recommended that mandatory mediation in parenting matters be introduced to limit the involvement of courts to the more difficult cases, namely those involving entrenched conflict, family violence, substance abuse or child abuse (House of Representatives, 2003, p. 63). By encouraging parties to resolve child-related matters prior to accessing courts, the s. 60I reforms were intended to ‘help people in resolving family relationship issues outside of the court system, which is costly and can lead to entrenched conflict’.<sup>202</sup> These objectives

were closely bound up with broader objectives of the Amendment, including:

...ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse.<sup>203</sup>

Though controversial, mandatory alternative dispute resolution (ADR) requirements in the 2006 reforms had precedent both in other areas of Australian civil law and in the family law tradition itself. In Australia, mandatory ADR is prescribed in provisions, for example, of the *Native Title Act 1993* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth), and the *Civil Procedure Act 2005* (NSW). Some state supreme courts in Australia have statutory power to refer litigants to mediation, with or without the parties' consent.<sup>204</sup> Mediation and other ADR modalities have been available as alternatives to litigation in family law disputes for many years. There were a number of legislative and procedural mechanisms in place prior to the 2006 reforms that sought to promote consensus between parties following family breakdown, including both voluntary and compulsory conciliation counselling for children's matters (Gribben, 2001). Now, the family dispute area constitutes by far the largest pre-litigation scheme that mandates attendance in a dispute resolution process in Australia (Sourdin, 2012c, p. 13).

This trend in Australia has been characterised as governance that has moved from the promotion of FDR to the active encouragement of FDR, and more recently, to mandating involvement in the process (Bickerdike, 2007). The following sections situate s.60I processes in the international context and outline the specific provisions of the legislation, prior to engaging in a discussion of the relevant benefits and critiques posed in the literature.

## A.2.1 Situating section 60I certificates in the international context

The introduction of the s.60I provisions is part of a growing trend in Australia and overseas to mandate ADR as a procedural requirement in a range of legal and quasi-judicial contexts (Sourdin, 2012b; Carson, Fehlberg, & Millward, 2013). Such mechanisms most commonly operate in administrative law contexts and non-family related civil law disputes. However, where mandatory ADR has been applied in family law, there is considerable variety between and within countries in the rationale for enacting the provisions, the processes through which parties arrive at ADR, the types of ADR available, and the impacts on families and the broader legal systems.

In England and Wales, mandatory ADR provisions were introduced as part of the UK *Family Law Act 1996* that provided for 'no fault' divorce. The hope was that such measures would save salvageable marriages and provide constructive help for those that were not (Gribben, 2001, p. 2). From 2000 onwards, recipients of legal aid seeking divorce are required to meet with mediators to determine eligibility for mediation prior to commencing legal action (Barlow, Hunter, Smithson, & Ewing, 2014). Further, all divorce applicants were required first to attend an information meeting on the implications of divorce and the processes involved. Since 2011, there was an increased 'expectation' that all parties would attend a Mediation Information and Assessment Meeting (MIAM) prior to making application to the court, though in practice these can be completed individually or jointly. In 2012, this became a requirement, with all parties then required to present a certificate from a mediator (Bloch, McLeod, & Toombs, 2014).

In the United States, mandatory ADR appears to have been introduced largely as an expediency and cost-cutting measure. Since first introduced in California in 1980, the United States has been at the forefront of mandating ADR in family law matters. However, there is a large degree of variation between states: mediation is codified in some states, implemented via state-wide administrative rules in others, and is county-specific in some.<sup>205</sup>

Mandatory mediation for all separating married couples with children under the age of 16 years was introduced in Norway in 1991. These amendments to the *Marriage Act*<sup>206</sup> made attendance at mediation a pre-condition to being granted legal separation and to initiating court proceedings. In 2004, the scheme was extended to unmarried couples, linking participation in mediation with access to welfare support (Tjersland, Gulbrandsen, & Haavind, 2015). Mediation services are provided primarily by a network of government-funded, community-based centres called Family Guidance Offices. Up to seven sessions are provided free of charge, with only the first meeting compulsory. Those parents who fail to reach agreement in mediation have the option of proceeding to traditional litigation, or participation in a further, court-based dispute resolution service. The Norwegian system shares some of the characteristics of the Australian regime, the primary difference being that *all* separating parents are induced to attend, not just those seeking to litigate (Tjersland et al., 2015).

Schemes can involve blanket referrals to mediation as a pre-condition to accessing courts or may only be applicable to some disputants, such as recipients of legal aid in the UK context. In other schemes, referrals can be at the discretion of judicial officers. Some involve referral by courts to court-annexed dispute resolution services, common in the United States, while others, as in Australia and the UK, involve self- or lawyer-referral to community-based services. Some schemes require attendance at information and assessment sessions only (e.g., MIAM in England), while others mandate engagement in the mediation process. Engagement is assessed by varying standards: some require a demonstration of ‘genuine effort’ or ‘good faith’ engagement, while others simply require parties to attest to the steps taken to attempt to resolve the dispute.

More fundamentally, the Australian system is distinguished by its emphasis on community-based services (Parkinson, 2015). The establishment and accessibility of free, or heavily subsidised FDR services (e.g., Family Relationship Centres) in Australia is similar to those of Norway, while both

contrast to the United States, where a court-centric approach is more commonly used (Parkinson, 2015).

While there is insight to be gleaned from overseas processes, understanding the broader social, cultural and political context is likely vital to the successful implementation of policy. For example, in England and Wales, ADR modalities that failed to account for participants’ ethnic diversity and histories of family violence were found inappropriate and unsatisfactory (Gribben, 2001). This insight is explored in 2.4.2 and Table 2.6 in the context of Australia, examining the ways in which Aboriginal and Torres Strait Islanders and migrants have been affected by the *FLA* provisions.

Where possible, this review compares and contrasts the primary characteristics of Australia’s s.60I certification process to similar processes legislated in overseas jurisdictions. (Appendix B contains a summary table of these characteristics from some jurisdictions in the United States, the United Kingdom, and Norway.) Comparing and contrasting other countries’ approaches to implementing ADR in family law matters can help to identify gaps and best practices in the Australian context. To that end, this literature review draws on the international literature to illustrate the ways in which the design and implementation of diverse schemes can impact on the families they are intended to assist, the practitioners and judicial officers who administer them, and the legal systems in which they operate.

## A.2.2 Section 60I provisions

As noted earlier, Section 60I(7) of the *FLA* provides that a court cannot hear an application for a parenting order unless the application is accompanied by a certificate from an FDR practitioner (FDRP). Participants, not courts, receive the certificates from FDRPs, and participants are required to file these certificates with the court when applying for an order under Part VII of the *FLA*.

In issuing a certificate there is no requirement or scope for FDRPs to record their reasons for the decision as part of the certificate or as a separate communication to the court.

The following section provides an overview of the key characteristics of the s.60I certificate provisions: FDR as a pre-condition to litigation, the 'genuine effort' requirement, attendance, the 'appropriateness', the application to parenting disputes only, and the types of dispute resolution services that qualify under the scheme. The last subsection provides an overview of the available exemptions in which applicants do not require certificates and compares these to international practice.

### **Pre-condition to litigation**

Attendance at FDR in parenting matters is mandatory only for those separating couples seeking to litigate their dispute. This policy is in contrast to other jurisdictions, such as Norway, where all separating couples with children are required to attend FDR services, even if they were never married.

Where no exceptions apply, a s.60I certificate is a pre-condition to initiating proceedings pertaining to children's matters in the family courts. One of two documents must be filed with an application to initiate proceedings – a certificate from a family dispute resolution practitioner (FDRP) attesting to their compliance or non-compliance with the requirement (outlined in s.60I(8) of the *FLA*), or an affidavit setting out the grounds on which the exemption for the requirement is sought. As such, the scheme established under s.60I of the *FLA* has been referred to as 'categorical' rather than 'discretionary' referral to FDR (Sander 2007; see also Quek, 2009). However, judges retain the discretion to refer parties to FDR notwithstanding the issuing of a certificate, or an application under one of the exceptions to be exempt from the requirement.

### **Genuine effort**

Making a 'genuine effort' is seen as the primary gateway to accessing courts in applications under Part VII of the *FLA* (Kaspiew et al., 2010). Sections.60I(8)(b) and (c) allow for FDRPs to issue two categories of certificates relating to genuine effort: one attesting to the FDRP's determination that 'all attendees made a genuine effort to resolve the issue or issues' and the other attesting to a determination that a party or parties had not made a genuine effort to resolve the issue or issues.

According to the National Alternative Dispute Resolution Advisory Council (NADRAC), attaching the requirement of 'genuine effort' or 'good faith' allows for the rule of law and the public interest in the administration of justice to be better served (NADRAC, 2011). NADRAC also views potential benefits to both participants and practitioners as 'genuine effort' serves 'not as an enforcement tool but as a statement of expectations through which the FDRP can set out the ground rules for the dispute resolution and, where necessary, gently remind participants of conduct expected of them' (NADRAC, 2011, p. 96).

However, others note negative implications of the 'genuine effort' certification process. For example, a court may order parties to further FDR or costs, the latter being of particular relevance to a certificate attesting to 'genuine effort'. As such, although a 'no genuine effort' certificate ostensibly allows parties to initiate court action, it is also evident that parties and their lawyers would prefer to avoid being assessed as having not made a 'genuine effort' (Astor, 2010). There is also concern that receiving a certificate of no genuine effort may deter people from trying FDR at a later stage, and have negative repercussions for the practice of ADR more broadly (Astor, 2008).

Commentators have also raised a number of concerns associated with assessing the conduct of parties involved in FDR. In addition to concerns about the impacts on the neutrality and independence of FDRPs (see 3.3; 6.2), and issues related to the confidentiality of the process, there is also discussion in the literature of the complexity of application of the standard in everyday practice. It is clear from submissions made to the NADRAC review that some practitioners find the genuine effort requirement in s.60I unworkable, described as an 'impossible task' placing 'an unwieldy and difficult burden on practitioners' and as a consequence, the benchmark for determining 'genuine effort' has been kept low (NADRAC, 2011, p. 95). This supports anecdotal reports by Astor (2010) that the difficulty of making an assessment has made practitioners reluctant to issue a certificate on that basis to the extent that some practitioners have never issued a genuine effort certificate.

FDRPs recognise that making a genuine effort to resolve a dispute may be more an issue of capacity rather than will or motivation. Some FDRPs appreciate that certain clients are dealing with complex issues during a tumultuous phase of their lives, which may cause them to determine ‘that any attempt, even simply to attend family dispute resolution, constitutes a genuine effort’ (Astor, 2010, p. 63). This attitude may have even more relevance since the reforms have widened the FDR net to incorporate parents who are not necessarily there by choice.

Some FDRPs also view genuine effort certificates as ‘punitive, harsh and unhelpful’ in what is supposed to be a supportive process, while others question why such an assessment is required when the perception is that courts treat the certificates as little more than a ‘leave pass’ to litigation (NADRAC, 2011, p. 95).

For other commentators, however, the underlying problem is the legislation itself, which is seen to provide little guidance for FDRPs to exercise their capacity to assess genuine effort. The following section explains the controversy of defining genuine effort and how analogous concepts have been invoked to try to enhance understanding of the requirement.

### **Defining ‘genuine effort’**

The literature stresses the need for clarity about the meaning of the phrase ‘genuine effort’ to ensure consistency in FDRP approaches, and therefore fairness to participants in the way the provisions are administered. Yet the *FLA* does not provide a definition of ‘genuine effort’ and there is no case law directly relevant to use of the term in the FDR context. The phrase ‘genuine effort’ appears in other contexts within the *FLA*, and again in the *FDRP Regulations*, but neither has been judicially interpreted (Astor, 2008).<sup>207</sup>

Given the lack of legislative and judicial guidance, soon after the reforms, commentators and practitioners considered that there was a need for practice guidelines, training, protocols and tools to assist FDRPs in implementing this part of the regime, and thereby to promote consistency

(Astor, 2008). This was seen to be of particular importance given the diversity of FDRP services available in Australia, including varying approaches to practice, qualifications of practitioners, geographic location, types of organisation providing the service, and the service delivery models adopted (Astor, 2008). For example, behaviour suggesting failure to make a genuine effort in a time-limited legal aid conference may be more likely to attract a certificate than similar behaviour occurring in more time-intensive therapeutic processes (Astor, 2008, p. 6). Greater clarity and consistency are also necessary to prevent ‘forum shopping’, to avoid challenges to certification decisions, and to inform parties what is expected of them (Astor, 2010, 62). Altobelli (2006) also argues that lack of consistency risks damaging the reputation of FDR as a legislative scheme.

A ‘Fact Sheet’<sup>208</sup> for FDRPs provided by the Australian Government Attorney-General’s Department includes some instruction on how an assessment of effort is to be approached:

**‘Genuine effort’ should be given its ordinary meaning in the context of Part VII of the Family Law Act which deals with children.**

**A genuine effort involves a real, honest exertion or attempt. It must be more than a superficial or token effort, or one that is false, or is pretence. The effort should be one that is realistically directed at resolving the issues that are the subject of the application to a court.**

**The question about whether a genuine effort has been made to resolve issues in a particular case will depend on the circumstances of the case. It is a matter for the professional judgement of an FDR practitioner.**

**Whether the issue in dispute is resolved or not will not necessarily be because one or more people did not make a genuine effort. There may be valid reasons why people have differing views on an issue.**

While useful as an indication of the Department's view of what standards should be applied in issuing certificates relating to genuine effort, this resource cannot be relied on by FDRPs as an authoritative determination. Similarly, as with AAT case law, neither does it advance understanding greatly, given the use of similarly subjective terms such as 'real' and 'honest', and reference to the 'ordinary meaning' of genuine effort (Astor, 2008). Astor (2008) recommended that a definition of 'genuine effort' be developed based on the behaviour of the parties, rather than requiring a subjective assessment.

### **Other interpretations of 'genuine effort'**

The requirement for disputants to demonstrate a bona fide attempt to resolve issues prior to initiating court action exists in other areas of Australian civil law has been identified as a potential source of guidance in interpreting 'genuine effort'.

Section 134 of the *Migration Act 1958* (Cth) requires demonstration of 'genuine effort' in determinations relating to the cancellation of business visas. However, this case law has been seen to have little to contribute given the very different context in which the term applies, the varying ways in which genuine effort is determined depending on the specific facts of each case,<sup>209</sup> and the similarly subjective language used to characterise genuine effort. For example, some judges have called for a degree of effort that is 'beyond that which is purely superficial or token'<sup>210</sup> and another that the term should be given its ordinary meaning (i.e., requiring a 'real and sincere endeavour or strenuous attempt')<sup>211</sup> (Altobelli, 2006; Astor, 2008; NADRAC, 2011).

### **'Genuine steps'**

At the federal level, there is a requirement for some civil litigants to file 'genuine steps' statements prior to commencing legal action pursuant to Section 4 of the *Civil Dispute Resolution Act 2011* (Cth). In the development of the 'genuine steps' requirement, a NADRAC (2009) publication advances the concept 'genuine steps' over the 'genuine effort' nomenclature.

... NADRAC considers that the reference to 'effort' is a much more subjective concept. It may be misinterpreted as applying a standard of conduct to some ADR processes that is inappropriate, particularly in confidential interest-based processes. (NADRAC, 2009, p. 31)

Section 4 (1)(a)–(g) of the Act lists specific examples of steps that constitute 'genuine steps' towards resolving a dispute out of court. Some examples likely have little relevance for parenting orders (e.g., Section 4(1)(a) notifying the other party of the issue and offering to discuss the issue with them). Of more relevance, Section 4(1)(d) implores the party to 'consider' engaging the help of a third party to facilitate the process, and specifically references ADR as one such mechanism. Given that the language of Section 4 calls only for consideration of ADR, and the very different contexts of the disputes at issue, the 'genuine steps' formulation adds little to the interpretation of genuine effort. The concrete examples of 'genuine steps' provided in the legislation, however, may provide a basis for future judiciary efforts to enhance understanding of the genuine effort requirement.

### **'Good faith'**

It has been suggested that guidance on the meaning of 'genuine effort' might come from consideration of the 'good faith' standard, a more common concept used in contract law and some family law jurisdictions overseas where mediation is mandated (e.g., the United States<sup>212</sup>) (Altobelli, 2006; Sourdin, 2012c).

Astor (2008) points to the Native Title case *Western Australia v. Taylor (Njama People)* as the most-cited definition of 'good faith' in which the court listed indicia of bad faith. However, Astor (2008) finds little relevance of these indicia for the family context and believes the concept imports a requirement of reasonableness, which has the potential to create further uncertainty about meaning, particularly when it has been invoked in commercial disputes.

That this body of knowledge itself contains inconsistencies is perhaps sufficient reason not to invoke the good faith paradigm to enhance understanding of genuine effort. It has also been

emphasised that standards of behaviour vary in different contexts – for example, adversarial behaviours are more acceptable in an industrial relations context than in the context of family law (Sourdin, 2012b). Also, the requirement to demonstrate ‘good faith’ or ‘genuine effort’ in the specific context of FDR could be seen as problematic given the confidentiality of the process, the inadmissibility of statements made by participants, and the particular obligations of practitioners within the process.

Overall, caution should be exercised when using similar concepts to aid in the interpretation of genuine effort, as the terms have been developed in different legislative contexts and can be similarly problematic in their own interpretations.

### **Attendance**

If an individual does not attend FDR, an FDRP may issue one of two categories of certificates. The first is a certificate stating that the person did not attend due to the other party’s refusal or failure to attend, provided for in s. 60I(8)(a).

The AGD urges practitioners to consider whether financial circumstances may have contributed to a party’s inability to attend when determining if a non-attendance certificate is appropriate (AGD, 2012). Failure to do so may result in further financial hardship for the non-attending party, as s 117 permits the court to consider the category of certificate issued when assigning court costs.

As there is no singular or centralised FDR entity, there also exists the potential for multiple certificates of non-attendance (or any other) to be issued for each party from different FDRPs (AGD, 2012). There is no provision in s. 60I barring the issuance of more than one certificate for the same dispute, an omission which effectively allows a person to acquire a further certificate(s) from a different FDRP if the individual is unhappy with the certificate issued (AGD, 2012).

If an FDRP has no information that will enable them to make contact with a person involved in a dispute, s. 60I does not provide for a certificate (AGD, 2012) nor offer guidance as to how FDRPs

should proceed. The Fact Sheet provided by the AGD advises that if the opposing party cannot be contacted, an individual ‘can make an application to the court relying on the exception that one or more of the people to the proceeding is unable to participate effectively’.<sup>213</sup>

The second certificate, provided in s. 60I(8)(aa), may be issued if an individual does not attend based on an FDRP’s determination that the matter is inappropriate for FDR. Factors considered when making determinations of ‘appropriateness’ are discussed next.

### **‘Appropriateness’ for FDR**

FDRPs are charged with determining the suitability of an issue for FDR prior to commencement of services (Family Law Regulations, 2008). If the determination of inappropriateness for FDR is made before services begin, an individual is not required to attend and is issued a s. 60I(8)(aa) certificate. If an FDRP determines a matter is inappropriate for FDR after the individual has attended one or more sessions, a s. 60I(8)(d) certificate should be issued that acknowledges the individual’s attendance and reflects the FDRP’s determination that it would not be appropriate to continue the FDR process. FDRPs are not required to speak to all parties to the dispute prior to determining an issue is inappropriate for FDR (AGD, 2012).

FDR is considered appropriate when any party to a dispute can ‘negotiate freely’ (Family Law Regulations, 2008). According to the *Family Law Regulations (FLR) 2008*, FDRPs must consider whether any of the following six factors may have affected an individual’s ability to negotiate freely:

- a. a history of family violence (if any) among the parties;
- b. the likely safety of the parties;
- c. the equality of bargaining power among the parties;
- d. the risk that a child may suffer abuse;
- e. the emotional, psychological and physical health of the parties;
- f. any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution. (FLR, 2008, Part 7(25)(2))

Similar considerations are exercised in international practice. Qualitative research from England revealed that dominant males showed a preference for mediation over solicitor negotiations, ostensibly due to the perceived ability to continue to exert control over their former partner in face-to-face negotiations; in those cases, mediators can rely on a similar 'inappropriate for mediation' provision to screen out these participants (Barlow et al., 2014). (The potential for gender bias in FDR is discussed further below.)

While the list of considerations outlined in the FLR is useful, the factors are, of course, subject to the interpretation and judgment of the individual FDRP. However, literature on FDRPs' interpretations of 'appropriateness' is scarce.

### Parenting disputes only

The provisions requiring attendance at FDR apply to disputes over children only, although parents are encouraged to resolve any other issues in dispute in mediation as well. In a recent report on access to justice, the Productivity Commission recommended that the requirement be extended to include property and financial matters (Recommendation 24.5, Productivity Commission, 2014, p. 70), an action that had previously been flagged by government.<sup>214</sup>

### Dispute resolution processes

FDR is defined broadly in the *FLA* as

a process (other than a judicial process):

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

(b) in which the practitioner is independent of all of the parties involved in the process.

Thus the Act does not refer to any specific form of dispute resolution process.

Mediation is the process most commonly used in this context, defined by NADRAC (1997, p. 34) as one

...in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

There are a number of variations on this process used in the family law context, with legally-assisted mediation, commonly provided by Legal Aid Commissions (LACs), being the main alternative offered. Other forms of dispute resolution modalities such as arbitration and collaborative processes are not within the scope of the s. 60I scheme.<sup>215</sup>

FDR services provided are not court-annexed, but are provided by a range of community-based and other external agencies. The legislative provisions were accompanied by system changes and greater investment in the sector, with the establishment of 65 Family Relationship Centres (FRCs) in urban and regional centres. There are benefits for clients attending FRCs: they are largely free<sup>216</sup> and easily accessible. They also offer facilitated ('warm') referrals to other useful services for families. FRCs are government-funded, but NGO-operated, with approximately one centre for every 300,000 residents, and located in all the major population centres and regions (Parkinson, 2013). The Centres provide education, support, and counselling to parents going through separation.

Variations of the model of assisted negotiation have been developed and provided either as: distinct modalities (e.g., arbitration, conciliation, legally-assisted mediation, collaborative processes, and child-inclusive practices); specialist approaches (e.g., the Parenting Orders Program, or Coordinated Family Dispute Resolution<sup>217</sup>); or as modified components within the process in matters involving

allegations of violence (e.g., shuttle mediation<sup>218</sup>). In addition, LACs can provide 'legally-assisted FDR' under a grant of legal assistance, and some FRCs work in partnership with LACs and Community Legal Centres (CLCs). The Legal Assistance Partnership Program was introduced in 2009 – this was a pilot program for the development of partnerships between FRCs and legal service providers to assist FRC clients undertaking FDR. An evaluation of the program had positive findings, despite limited uptake (Moloney et al., 2011). Lawyer-assisted mediation and therapeutic processes have been identified as processes that provide useful alternatives to litigation for high-conflict matters (Qu et al., 2014).

The United States has been distinguished from Australia as having a wider range of dispute resolution models that are more facilitative and more directive. These include more rigorous 'triage' processes to ensure parties are referred to the appropriate services (Lande, 2012). Qualitative research conducted by Carson and colleagues (2013) found that solicitors might refer some clients to FDR in an effort to reduce their financial burden and to encourage settlement. However, over half of the participants in that study relied on both FDR and legal services.

### Exceptions

An application to court can be made without a certificate if the parties are applying under an exception provided in s.60I(9)(b)(i)–(iv). Exceptions include cases where there is urgency, family violence, child abuse, or the risk of either occurring.

While most jurisdictions reviewed included a similar exemption for instances of family violence, some schemes provide broader exemption categories that account for practical difficulties that may be experienced by applicants. In the United States there is a range of grounds on which parties can be exempt from participation in mediation, including where parties show 'good cause' or 'undue hardship', in 'extraordinary cases', or where the parties reside too far from a mediation service. In England and Wales, exemptions were similarly largely contingent on practicality. Exemptions applied to instances in which there was no mediator in the area, an applicant had a disability that would prevent attendance, or if an applicant's partner lived more than two hours from a service (Gribben, 2001, p. 4).

However, as stated previously, schemes in the USA vary from state to state, with California, for example, not allowing for any exemptions from the requirement to mediate, including matters involving family violence. Rather, the scheme in that state aims to accommodate all cases by providing modified processes appropriate to the specific circumstances of each family.

## A.3 Arguments for mandatory FDR

The growing trend of mandating ADR processes presupposes benefits associated with the process itself. Although dissension<sup>219</sup> persists, the benefits and utility of mediation as a dispute resolution mechanism, when compared to litigation, have been noted in the literature (Quek, 2009). Benefits identified include a quicker and cheaper process that is more accessible than litigation, and an opportunity for parties to alter process arrangements in accordance with the specificities of their situation. Even when matters are not resolved in mediation, involvement in the process can help parties to narrow the issues in dispute. Consensual processes aim to model constructive approaches to conflict, helping to equip the parties with the skills necessary to resolve the dispute outside the process and to better handle future disputes (Kaspiew et al., 2009; Sourdin, 2012c; Sourdin & Matruglio, 2002).

There are also arguments that mandatory FDR is in the best interests of the child and the parents. Mediation can be a particularly beneficial process in the context of disputes between separated parents over the care of their children, where an ongoing relationship, with a degree of cooperation and communication, is considered optimal for children's wellbeing. Non-adversarial approaches to resolving disputes are likely to be less acrimonious and therefore have the potential to preserve, or at least not to destroy, the relationship between the disputants. Parenting disagreements have been characterised as disputes that raise relational rather than legal issues, and for most separating parents a therapeutic intervention is preferable to litigation (Marlow, 1985; see also Smyth & Moloney, 2003).

Others (e.g., Sourdin, 2012b) have noted the ability for FDR to foster greater collaboration in the system among both disputants and practitioners working in the family law space. The introduction of compulsory ADR has been justified on the basis of improving rates of involvement where there is low awareness and/or uptake of conciliatory processes, and by the claim that mandating the process helps to 'create a normative environment and sponsor more collaborative engagement in ADR' (Sourdin, 2012b, p. 29). However, others take the view that mandated mediation in any context should be viewed as a 'temporary expedient' (Sander, 2007, p. 16); that there should be a compelling reason to introduce it and that it should only be in place while those reasons persist. The argument is that ADR should not continue to be mandated where a culture of conciliatory dispute resolution becomes established (see Quek, 2009, fn. 25, p. 484).

Another more prevalent and compelling reason for governments to introduce such schemes is to reduce court lists, thereby improving efficiencies and minimising cost.<sup>220</sup>

## A.4 Arguments against mandatory FDR

Mandating mediation in any context, and in family law disputes in particular, is contested on a number of grounds. Among the more serious is the argument that making access to the courts conditional on attendance at mediation, and setting standards on the nature of parties' engagement with the process, violates the fundamental rights of the disputants to have their dispute handled in the forum of their choosing (Parker, 2014; see also Quek, 2009, p. 498). Other fundamental critiques include that mandating mediation is antithetical to the fundamental principles underscoring mediation, that it can pose particular risks to victims of family violence, and that the perceived benefits of mandatory FDR (reduced costs and enhanced efficiencies) are overstated.

The following section addresses these critiques individually, drawing on international literature to guide the debate and provide additional context to complex issues.

### A.4.1 A barrier to accessing courts?

Some opponents of s. 60I argue that the certifications constitute a barrier to accessing justice that violates their fundamental rights (Parker, 2014; see also Quek, 2009, p. 498). This was the view of the court in the English case of *Halsey v. Milton Keynes Gen. Hosp.* (2004), where it was held that to compel truly unwilling parties to ADR infringed their rights under Article 6 of the European Convention on Human Rights.

Requirements to attend FDR in the Australian context, and the discretionary power of the courts under the *FLA* to order parties back to FDR notwithstanding the issuing of a certificate, have also been criticised as causing delay and additional cost in matters where consensual resolution was never likely to occur (Sourdin, 2012c, p. 23). Other commentators have argued that justice does not only reside in the courts, and that access to the courts is not denied by attendance requirements but simply deferred (Sourdin, 2012a; Quek, 2009). A recent inquiry by the Productivity Commission (PC) concluded that mandating attendance at services offering FDR models which have limited capacity to meet the needs of those families with multiple and complex needs is where the equity and access to justice issue arises (Productivity Commission, 2014).

Boyarin (2012) has also observed that, unlike in the United States where a multi-stage, triaged system is implemented, there are limited options in Australia for those parties who are screened out of mediation. In addition, concerns have been raised about limited access to legal avenues that may potentially cause parties to agree to unfair, inappropriate and potentially unsafe care arrangements for children (Boyarin, 2012).

### A.4.2 Is mandatory FDR counter to the core principles of mediation?

A further critique of mandatory FDR is that it is fundamentally opposed to the core principles of mediation: neutrality, and voluntary participation (Polak, 2009). Polak (2009) has staunchly challenged the 'moral legitimacy' of FDR given the increasing pressure on mediators to conform to standardised

procedures that threaten the exercise of these two central tenets of mediation.

The next section addresses those principles and the implications of mandatory FDR for the participants, the practitioners, and the practice of mediation generally.

### **Neutrality**

Neutrality is not an absolute concept in the practice of mediation but treated flexibly by mediators due to different ADR modalities, organisational policies, individual practices and circumstances relevant to the particular dispute (Astor, 2007; Polak, 2009). Astor (2007) identified four elements of neutrality for mediators, namely that a mediator should: (a) be in control of the process but not the outcome of mediation; (b) not exercise favouritism towards one disputant over another; (c) not be influenced by financial or personal connections; and (d) be free from the influence of government.

Though FDRPs may act without bias towards either party to the dispute, both Astor (2007) and Polak (2009) view the neutrality paradigm as being compromised by legislative requirements that are increasingly institutionalising mediation practice. One such example is the provision that FDRPs in FRCs provide an hour of FDR free of charge, thereby pressuring mediators and parties to reach a resolution within that timeframe.

Polak (2009) further believes that the *FLA*'s definition of the role of the FDR practitioner to act in the best interest of the child is problematic. Not only does Polak (2009) challenge the idea that the mediator can know the best interests of the child, but also argues that the mandate to act in such interest inherently contradicts the notion of mediator neutrality. In essence, the considerations underpinning mandatory FDR are also those which prevent FDRPs from being neutral.

### **Voluntariness and coercion**

Many observers also contend that the term 'mandatory mediation' directly opposes mediation's central tenet of voluntariness (Polak, 2009; Quek, 2009). Considerable attention is given in the FDR literature to the question of whether disputants can

or should be forced to participate in conciliatory processes premised on voluntariness, or whether to do so makes an oxymoron of the term 'mandatory mediation' (Quek, 2009). The voluntariness of a party to participate in mandatory mediation may be compromised by pressure from either the other party to the dispute or the government. The potential for pressure from the other party to participate in mediation could be attributed to lack of other affordable options and/or to satisfy the pre-condition of receiving legal aid.

Pressure from government authority is different, particularly in the context of court-ordered mediation (Tjersland et al., 2015, p. 12), and mandatory participation in FDR has been described by some as coercive. The distinction has been drawn between being coerced *into* mediation, and *in* mediation (Boyarin, 2012, p. 15; Sander, 2007, n. 7; Quek, 2009, p. 481). Participants are only mandated to attend, but not to reach an agreement. However, some scholars argue that one may influence the other (Quek, 2009, fn. 30, p. 485). There is mixed evidence as to the influence of coercion on settlement rates. Studies comparing rates of mandatory and voluntary mediation suggest that where there is a higher degree of coercion, there is a link with higher settlement rate.<sup>221</sup> Other studies have found no difference in settlement rates, and two studies found higher settlement rates in voluntary mediations (Quek, 2009, fn. 35, p. 486). Quek (2009) concluded that concern about coercion in the process cannot be discounted, and that the greater the degree of 'mandatoriness' associated with the ADR scheme, the greater the risk that compulsion to attend influences the practice of coercion within the negotiation process.

Boyarin (2012) identified three layers of potential coercion in mandated ADR schemes, namely:

- *in the design of the intervention* – i.e., the degree to which the processes are directive or whether they incorporate opportunities for the parties to exercise autonomy (e.g., to opt out of the scheme, to choose their own mediator, to apply for an extension of time to mediate, or to lodge a complaint about the process);

- *in the way in which the intervention is delivered* (i.e., looking at the model of dispute resolution provided, the influence of policy and statutory directives, and issues at the organisational and practitioner level); and
- *in the manner in which the parties are assigned to processes* (i.e., the screening and certification processes that apply).

In relation to intervention design issues, there is great diversity among mandated ADR schemes. Within this diversity there are varying degrees of coercion imposed on disputants, described by commentators as a 'continuum of mandatoriness' (Sourdin, 2005; Quek, 2009). Quek asserts that only at the far end of this continuum<sup>222</sup> are mandated schemes likely to be incompatible with the fundamental principles of mediation (Quek, 2009, p. 490).

Some have argued that in light of concerns about the impact of coercion on conciliatory dispute resolution processes, it is important when developing a mandated system to minimise characteristics that can increase coercion. Quek (2009, p. 491) identified three design characteristics in particular that are likely to impact negatively on participant voluntariness: (a) arbitrary referral of cases to mediation (which is more likely to happen via a categorical referral process, but can also result from discretionary pathways); (b) the imposition of excessive sanctions for failure to comply; and (c) excessive scrutiny of the parties' participation in mediation, thereby potentially affecting the conduct of the parties within the process. Standards of compliance with the provisions that are neither clear nor objective (e.g., the genuine effort requirement) are also seen to increase risk of encroachment on participant voluntariness (Quek, 2009).

It is interesting to note, however, that the potential for parties to benefit from the mandatory process exists despite their reluctance to participate. While there is evidence that disputants report higher satisfaction with the process when there is no compulsion to attend (Guthrie & Levin, 1998), other studies from the United States have demonstrated that participants who were compelled to attend nonetheless benefited from their engagement with the process (Pearson & Thoennes, 1985; see also Quek, 2009, p. 483).

## **Risk to victims of family violence**

There are risks associated with mandating the process of mediation in family disputes, particularly where there is a history or ongoing concerns of family violence. Although the presence of family violence figures both as a reason for exemption and as a factor in determining appropriateness by FDRPs, the FDR process remains an option for those who have experienced family violence to negotiate out of court.

There is generally a high prevalence of family violence among disputing separating parents. Indeed, family violence has been described as the 'core business' of family relationship services, lawyers, and courts (Moloney et al., 2007; Qu et al., 2014, p. 157; see also Bagshaw et al., 2010; De Maio et al., 2012; Kaspiew et al., 2009). Family violence is recognised as being an important correlate of relationship breakdown (Bagshaw et al., 2011). It is well-established that violence does not necessarily end at separation, and that the act of separation can trigger an escalation of violence and abuse in the short term (Brown, Frederico, Hewitt, & Sheehan, 1998; Bagshaw, 2003; Bagshaw, Quinn & Schmidt, 2006).

The evidence also shows that a high proportion of families in the general population of separating parents have other complex needs. A significant percentage of recently separated parents (half of mothers and close to one-third of fathers) struggle with issues such as mental health problems, alcohol or other substance misuse, gambling and other addictions.<sup>223</sup> There is also considerable overlap between the presence of these complex issues and reports of family violence (ACG, 2013; Kaspiew et al., 2010).

Other issues identified in the literature relevant to the application of the s. 60I provisions where family violence is present are:

- Deficiencies in referral and screening processes that may increase the risk that inappropriate cases are retained within the mediation process (Kaspiew et al., 2009);
- The timing of FDR (i.e., closer to the time of separation is known to be a more dangerous period for women and children when family violence is present) may result in risks to the safety and wellbeing of participants (Braff & Sneddon, 2007; Field, 2006);

- Lack of accountability due to privacy and confidentiality within the process means that systemic problems, injustices, undue pressure, power imbalances and unfair outcomes may be kept hidden and unaddressed. In some cases there is a recognised tension between settlement and justice; and
- Pressure may be exerted on victims of violence to participate and to reach agreement (Kaspiew et al., 2009). Failure to address power imbalances and to protect parties within the process against dangers such as coercion to settle and tactical abuse (Field, 2006; Kelly, 1995) increases the risk of inappropriate arrangements that jeopardise the safety and wellbeing of victims and their children.

The issue of family violence poses a critical risk that will be explored further below.

### **Feminist critique**

Feminist critique of FDR posits that women's economic, social, and psychological vulnerabilities in a patriarchal society are heightened after separation, and engaging in mediation presents particular risks for women that are magnified when family violence is present (Field, 2006; Field & Crowe, 2007).

Much then depends on the skill of the mediator to ensure the physical safety of individuals in the FDR process. FDRPs must possess a level of understanding of the dynamics and effects of family violence and the degree to which the mediation process can effectively accommodate matters involving family violence, and address power imbalance and safety concerns. Given the 'future focus' of the process, a mediator may minimise the significance of histories of violence or abuse and heighten risk factors associated with ongoing parent/child contact. In addition, gendered assumptions about women's behaviour may influence FDRPs' assessments of 'genuine effort', even if unconsciously (Field, 2006).

Included in the 2006 reforms were changes that sought to give the issue of family violence greater prominence in the *FLA* (e.g., in the consideration of children's 'best interests'). However, other provisions in the *FLA*, particularly those relating to shared parenting, were seen to have the effect of marginalising family violence in the family law

system (Rathus, 2007). This problem was addressed in the amendments of 2012.

Concerns about family violence and gender bias are not unique to the Australian experience of FDR. Research from England suggests that perceptions of gender bias in mediation are pervasive, 'strongly held and hard to shift' (Barlow et al., 2014, p. 11). Interestingly, the same research also revealed that men in mediation felt the system was biased against them, noting that most mediators there are female (Barlow et al., 2014).

### **Barriers to Indigenous and CALD access and participation**

As mentioned above, an early critique of mandatory FDR in England and Wales was its failure to account for participants' ethnic diversity (Gribben, 2001). A specific example provided was that of the inability of some participants to attend group sessions with people of the opposite sex (Gribben, 2001).

Similar findings have emerged in Australia. Akin Ojelabi and colleagues (2012) explored barriers to access and participation in FDR experienced by culturally and linguistically diverse (CALD) communities – specifically Turkish, Iraqi and Lebanese individuals who had received services from an FRC in Victoria. According to the authors, culture influences attitudes towards marriage, reconciliation and divorce, as well as the more fundamental identification of a dispute (Akin Ojelabi et al., 2012). Their research found structural (i.e., lack of awareness of services available; fear of authority; and a preference to hide or contain conflict within the family unit) and service-related (e.g., cultural inappropriateness, and lack of cultural diversity in staff) barriers in addition to the cultural barriers discussed in depth. Cultural barriers identified included 'differences in social norms relating to families, traditional gender roles and fear or past negative experience of contact with authorities' (Akin Ojelabi et al., 2012, p. 79).

Findings of the ACG (2013) evaluation also noted barriers to accessing Family Support Programs (FSP) more broadly by Indigenous and CALD populations. For CALD users, barriers identified include cultural attitudes and mistrust of family relationship services and government-funded

agencies in general. For Aboriginal and Torres Strait Islanders, government mistrust was coupled with the 'cumulative impact of entrenched and intergenerational disadvantage' (ACG, 2013, p. 54). Other barriers included limited specialised services in regional areas, and the inability to meet the complex needs of service users (ACG, 2013). However, ACG (2013) also noted improvements in service delivery to these populations, including employment of bilingual and Aboriginal engagement officers or FDRPs, and collaboration with other service providers with prior experience working with individuals from these groups (ACG, 2013).

### **Limited scope of certificates**

As noted above, the law does not provide for FDRPs to record or publish their reasons for issuing or not issuing a certificate, or for providing one category of certificate rather than another.

There is controversy as to whether certificates should contain more information from an FDRP. An Australian Law Reform Commission (ALRC) report challenged whether the certification process in its current form constitutes a wasted opportunity for communicating important information, particularly in the event of family violence or child abuse, that could help to guide the court in a resource-scarce environment (ALRC, 2010). Currently, communications made during FDR can only be admissible in court in specific circumstances outlined in s 10H of the *FLA* relating to the protection of children.

Advocates for expanding the disclosures in a certificate cite the ability of FDRPs to provide corroborative information based on disclosures from involved parties of the presence of family violence in the early stages of proceedings in an area that is often difficult to prove (NADRAC, 2011). These communications are also seen to present an opportunity to assist the court in assessing risks and determining what services would best suit the parties (Family Law Council, 2009).

However, opponents argue that broader communication around the issuance of certificates could undermine the fundamental characteristics of FDR that distinguish it from court processes by introducing adversarial and forensic aspects to their

role and threatening neutrality. There is also the risk that certificates may have undue influence over the substantive outcome of the case, and associated implications for fairness if an order is made as to costs based on certificates showing no 'genuine effort' (Chisholm, 2009). More fundamentally, there are ethical issues around confidentiality that may discourage the open and honest sharing of information in FDR processes (NADRAC, 2011). There are also practical issues associated with more expansive communications, including greater costs for FDRPs associated with additional time needed to fulfil extra reporting requirements (NADRAC, 2011). There are also anecdotal fears that FDRPs could be open to cross-examination relating to decisions made about certificates – potentially long after a certificate is issued – although little evidence has been provided to substantiate this concern. It is possible that this issue might arise more frequently if more 'no genuine effort' certificates were issued.

Although there is a general view favouring greater information sharing between FDRPs and the courts in relation to the presence of family violence and child abuse, not all believe that the certification process is the best mechanism for that communication (NADRAC, 2011; ALRC, 2010). Some have suggested that a database that can be accessed by family law professionals may present a more appropriate vehicle for sharing information as to the potential risk of family violence or child abuse. Other suggestions include the addition of a second certificate that would go directly to the court that parties would not be able to see, and building a risk-assessment framework (agreed upon between the FDRPs and courts) into the certificate. Such suggestions, however, do little to address concerns of piercing FDRP neutrality and the threat of undue influence in the judicial process.

### **Insufficient benefits**

A final, fundamental critique of the mandatory mediation process is that it does not deliver on two of the primary objectives for which it was established: (a) to create a less adversarial environment in family law; and (b) to enhance efficiencies. Opponents in the US context argue that there are few, if any, benefits for parties associated with the process to warrant imposing a barrier for disputants to

access the courts, particularly for those unlikely to reach agreement (Baron, 2010; McIsaac, 2010; Salem, 2009). Others have argued that mandating mediation can result in front-loading of work and therefore impose greater costs and delay for those cases unlikely to settle. Contrary to arguments that mandating mediation can reduce case law and increase efficiencies (Sourdin, 2012c, p. 34), others suggest that mandating mediation in inappropriate cases may set those cases on a path to failure, potentially escalating the conflict (Boyarin, 2012).

## A.5 Impacts on the family law system

Research, reviews, and evaluations conducted in the wake of the 2006 and 2012 reforms to the *FLA* have contributed to our understanding of pathways and outcomes for families accessing family law services following separation. Studies undertaken by the Australian Institute of Family Studies (AIFS), and in particular the three waves of the Longitudinal Study of Separated Families (LSSF) (Kaspiew et al., 2009; Qu & Weston, 2010; Qu et al., 2014) provide rich data on service use, and how the certification processes introduced in the *FLA* have impacted on the system more broadly.

This section explores the empirical evidence of how the Australian legal system and its practitioners have been affected by the s.60I certificate process. It will also explore the degree to which the s.60I provisions could be said to have achieved their stated objectives, and respond to the critiques outlined in the previous section.

### A.5.1 FDR uptake

Following the reforms of 2006, which included s. 60I, there was a swift and marked decline in applications to the family courts for parenting orders, and a corresponding increase in the uptake of non-litigious dispute resolution services.

Court data indicate that applications in children's matters and matters involving children and property decreased by 32% in the five-year period from 2005 to 2011 (Kaspiew et al., 2009, pp. 304–305; Parkinson, 2013).<sup>224</sup> Since then, court filing rates

have increased to a point more 'in line with divorce numbers' (Allen Consulting Group, 2013). In the three years following the 2006 reforms, the use of FDR services increased significantly — an increase of 57% for existing and expanded FDR services, and 336% for the network of FRCs (Kaspiew et al., 2009). The use of ancillary services such as children's contact centres, parenting order programs, men's and family relationship services, specialist family violence services, and counselling also increased (Kaspiew et al., 2009). Furthermore, there is evidence that participation in FDR is leading to a significant proportion of separating parents reaching agreement, either as a direct result of the FDR process or through discussions between themselves subsequent to involvement in mediation.

As indicated above, in addition to changes to the law, the package of reforms included the rollout of new services and the expansion of some existing early intervention and post-separation services (Qu et al., 2014). Close to two-thirds of family mediation or dispute resolution conducted in the first three years after the reforms was provided by FRCs, with the rest by Legal Aid, lawyers and courts (10%), private counselling or mediation services (12%) and over the phone<sup>225</sup> (2%) (Kaspiew et al., 2009; Parkinson, 2013). The most common service used across the 3 waves of the LSSF was FRCs (Qu et al., 2014, p. 158).

### Variations in service delivery and quality

While much research has been undertaken to assess the usage of different FDR modalities, considerably less has been done to assess the variations in the quality of service delivery models across FRCs. There is great variation across the range of FDR services available, even between FRCs, in the quality of services and skill of individual practitioners or modalities that are currently available, and in the relative affordability of those services.<sup>226</sup>

Prior to the reforms, FDRPs in family and relationship support services were more likely to encounter voluntary clients who had not retained lawyers (Rhoades, 2010); the mandatory FDR scheme has created a more heterogeneous client base with complex needs requiring a different approach and skill set. Research from England and

Wales revealed that mandatory provisions exposed mediators to a larger range of ethnically diverse clients with whom mediators had little willingness or requisite cultural understanding to provide adequate service (Gribben, 2001).

While there is a push towards greater standardisation among professionals in the field, there remains inconsistency in the standards and skill levels of FDRPs (ALRC, 2010; ACG, 2013). The Family Law Regulations (FLR, 2008) outline the obligations of FDRPs and establish a voluntary national mediation accreditation scheme, and FDRPs issuing certificates must be registered with the Attorney-General's Department.<sup>227</sup> Some services offered through the FRC are also subject to a performance framework to ensure that services adhere to quality standards of practice, including appropriate screening and assessment, supervision, professional development and ongoing training (Bickerdike, 2007). Despite these requirements, many have called for more consistency in the standards and training of FDRPs, who can issue certificates across the different modalities available in the s.60I scheme. The ALRC in particular has brought attention to deficiencies in the provision of FDR services, calling for the need to improve protocols, screening tools, and training, including and especially for lawyers.

This aspect warrants further research, particularly given the high volume of cases assigned to FDRPs and their accountability for assessing and interpreting 'genuine effort' subject to the difficulties outlined in the *Other interpretations of 'genuine effort'* section above. There is also need for further research given the literature attesting that the modalities and ways in which conflict is handled within the process plays an important role in the outcomes that are achieved (Kaspiew et al., 2009; Poitras & Raines, 2013; Tjersland et al., 2015).

### **A.5.2 Increased scope and accountability for FDRPs**

A related consequence of the certification requirements and the associated rise in FDR uptake has been the increased scope and accountability of FDRPs. Accompanying the increasing popularity of the services are fears that FDRPs can be sued for decisions made in the issuance of certificates by

disgruntled parties. This has become a significant concern given that the immunity of FDRPs was removed in the 2006 reforms (Astor, 2008; Fehlberg & Behrens, 2008); it may be particularly relevant where, as pointed out by Astor (2008), one party's failure to engage in a meaningful way with the process could see them liable for the entire costs of subsequent litigation (Astor, 2008).

### **A.5.3 Cross-professional collaboration**

Given that the vast majority of FDR clients also retain a lawyer (Kaspiew et al., 2009), there is an awareness of the importance of monitoring the ways in which the certification process has affected the professional landscape and culture of collaborative family law in Australia, and the related impacts on the experience of and outcomes for disputants.

Drawing on the work of Astor (2005, 2007), Rhoades (2010) has noted that although many FDRPs and lawyers reported positive relationships, a culture of mutual mistrust persisted between the two groups. Successful, collaborative relationships 'were underpinned by a 'complementary services' approach, in which lawyers and mediators saw themselves as contributing different but equally important skills and expertise to the dispute resolution process' (Rhoades, 2010, p. 186).

Where there exists a complementary services approach, the certification scheme can lead to better cross-professional relationships, greater trust, and improved knowledge and skills. Moreover, lawyers working collaboratively with FDRPs are able to learn more about screening and appropriate handling of family violence matters (Rhoades, 2010).

There is a need for ongoing and expanded research in this area in order to gauge and foster a culture of collaboration across the profession, and to evaluate the associated impacts on the experience and outcomes for clients.

## **A.6 Impacts on families**

Findings from three waves of AIFS evaluations (Qu et al., 2014) and a number of smaller government-commissioned studies and evaluations shed some light on how processes used to divert

separating parents through the designated dispute resolution pathways impact on families. They provide interesting, complex snapshots of the effect of the reforms on:

- decisions parents make about service pathways used to resolve disputes over children;
- decisions parents make about arrangements for their children in the process of using those services, and the resulting outcomes for children and families; and
- the experiences of service users navigating the family law system, and their level of satisfaction with the interaction.

Studies from overseas jurisdictions with similar statutory schemes add to our growing understanding of the effect of such schemes on service users, and on families with complex needs in particular. The next section explores the empirical evidence of how Australian families have been impacted by the s. 60I certificate process.

### A.6.1 Pathways

The reduction in applications to family law courts to settle disputes over children and the corresponding increase in the use of FDR (as discussed above), clearly indicates an increase in the use of non-litigious pathways by separating parents. Fewer parenting disputes are being resolved primarily by the use of legal services and more are achieving resolution primarily via assistance from family relationship services (Kaspiew et al., 2009). For many parents, formal services play a minimal role in resolution of the dispute. For participants in the LSSF, the most common pathways to resolve disputes was through inter-parental discussions or ‘it just happened’.<sup>228</sup>

Findings from the three waves of the LSSF provide further detail about what services parents who separated post-2006 were accessing following their attempt at mediation, and the impact of the issuing or non-issuing of a certificate on their dispute resolution trajectories. Parents in Wave 1 of the survey were asked a series of questions about services used to resolve issues relating to children, outcomes of the processes, and whether a s. 60I certificate was issued by an FDRP. Approximately 26% of the mothers and 31% of the fathers<sup>229</sup>

reported that they and the other parent had ‘attempted family dispute resolution or mediation’.<sup>230</sup> Parents who had attempted FDR were asked about the outcome of the process, primarily in terms of whether or not an agreement had been made. These parents fell into three categories:

- those who had reached agreement at the time of FDR (39.4%), referred to here as the *agreement group*;
- those who did not reach agreement at the time of FDR and did not receive a certificate from the FDRP (30.6%), referred to here as the *no certificate group*; and
- those who did not reach agreement at the time of FDR and received a certificate (21%), referred to as the *certificate group*.

This categorisation sheds light on what Kaspiew and colleagues (2009) described as ‘post-FDR trajectories’, including the time taken to reach agreement, subsequent service pathways, and the durability of agreements associated with these pathways.

For the *agreement group* (i.e., those who had reached agreement at the time they attended FDR), 74.4% reported at Wave 1 that arrangements had been negotiated at the time of the survey; 19.3% reported they were in the process of determining arrangements; and only 6.3% reported that nothing had been resolved at the time of first survey. The main pathways used to resolve matters after their initial attempt at FDR were:

- counselling, mediation or FDR (48.3%);
- discussions between themselves (35.4%); and
- lawyers or courts (approximately 10%).

For the *no certificate group*, around two-thirds (65.2%) reported at Wave 1 that arrangements had been agreed by the time of the survey; 23% reported that they were in the process of sorting out arrangements; and 11.9% reported that nothing had been determined. Of those who had reached agreement, the main pathways to resolution after attempting FDR were:

- discussions between themselves (60.5%);
- lawyers or courts (20.6%); and
- counselling, mediation or FDR (5.7%).

For the *certificate group*,<sup>231</sup> just over one-third (36%) reported at Wave 1 that the current situation was that they had resolved matters; 46.9% were still in the process of settling arrangements; and 16.8% reported that nothing had been resolved. Of those who had reached agreement at the time of the survey, the primary pathways were via courts (29.6%); lawyers (25.6 %); and discussions between themselves (22.8%).

It was evident from the LSSF data that there is a high degree of fluidity in negotiating parenting arrangements. Consistent with findings from Wave 1, where an original arrangement had been revised or an arrangement had first been reached at Wave 2, the main pathway used to do so was via discussions with the other parent. Overall, inter-parental discussions and ‘it just happened’ were the most common main pathways reported across the three waves, with the next most common being ‘counselling, mediation or dispute resolution’ (Qu et al., 2014, p. xvi). For parents still working out their arrangements at Wave 2 and 3, formal services were more likely to be used. At Wave 2, a quarter of these parents nominated courts as the main pathway; a fifth nominated counselling, mediation or FDR; and 14% relied primarily on lawyers.

A declining percentage of parents reported they attempted FDR across the three waves. Around 20–25% of parents at Wave 2, and 15% at Wave 3 reported having attempted FDR compared to 26–31% at Wave 1. The agreement rate from the more recent attempts at FDR was similar to Wave 1, but there was a higher percentage of parents given a certificate at Waves 2 and 3. It was unsurprising to see that over time, access to courts and lawyers as the main pathway to resolution increased – between Waves 1 and 3 reports of courts as the main pathway increased the most, and reports of lawyers doubled. These findings correlate with the increase in percentages of parents reporting they were issued with a s.60I certificate – approximately 20% of parents in Wave 1, 30% in Wave 2, and over 40% in Wave 3. This finding suggests ‘increasing case complexity over time’ but may in part be due to changes in the practice of FDRPs in issuing certificates (Qu et al., 2014, p. 157).

## **Pathways for families with complex needs**

Data from several of the 17 studies forming part of the 2009 AIFS evaluation indicate that families with a history of family violence are heavier users of family law services and are commonly dealing with other complex issues involving mental health, substance abuse and addiction (Kaspiew et al., 2009). Responses in the LSSF (Wave 1) show that certificates were more likely to be issued in matters associated with respondents who reported incidents of family violence occurring prior to separation. The highest proportion of certificates issued in the AIFS sample was in matters where physical abuse prior to separation had been reported (26%), and the lowest proportion (10%) was where no reports of physical or emotional abuse were reported (Kaspiew et al., 2010, p. 46).

Survey respondents with a history of pre-separation physical assault were also more likely to use courts to resolve issues relating to children, and court users were more likely to report a history of family violence (Kaspiew et al., 2010, p. 44). For those participants who reported that at the Wave 1 survey the issues in dispute had been resolved, 48% of those nominating court as the main pathway to resolution had pre-separation experiences of physical hurt, compared with 12% who reported resolving disputes through discussions between themselves (Kaspiew et al., 2010, p. 44). A more recent study found that separated parents with family violence concerns were eight times more likely to report that courts were the main pathway used than those who had no experience of family violence (Kaspiew et al., 2012).

Families with a history of family violence are also more likely to use FDR services than those unaffected by violence. As indicated earlier, 85% of respondents to the AIFS Wave 1 LSSF survey who had attempted FDR stated that there had been incidents of physical or emotional abuse prior to separation (Kaspiew et al., 2009).<sup>232</sup> This figure is considerably higher than the percentage of parents who reported violence across the wider AIFS sample (i.e., 53% of fathers and 65% of mothers). Only one-sixth of parents who attempted FDR made no reports of violence at any of the three stages of the survey (Qu et al., 2014, p. 158).

Parents with a history of physical or emotional violence were much more likely to have attempted FDR than those with no history of abuse (41% of those reporting physical abuse and 35% of those reporting emotional abuse, compared to 15% of those who reported no violence) (Kaspiew et al., 2009, p. 100).

The high rate for undertaking FDR by families who have experienced violence, in spite of the fact that a history or risk of violence or abuse of a child provides grounds for parties to be exempt from participating in FDR (via court determination or issuing of a certificate), suggests that several factors may be at play. First, lawyers are not effectively triaging matters, but are referring matters clearly inappropriate for mediation to FDR services. If, as the AIFS data suggest, FRCs are the first point of contact for a large number of separating parents whose 'capacity to mediate is likely to be severely compromised by fear and abuse' (Kaspiew et al., 2010, p. 45), there is also likely to be greater potential for such matters to be inappropriately retained in the process. Qualitative responses from both parents and lawyers in LSSF and other data (Bagshaw et al., 2011) support the assumption that matters that are inappropriate for FDR due to a history of family violence are nonetheless proceeding to mediation. Around 40% of FDRPs responding to an AIFS survey estimated that 'about a quarter' of all clients who attend FDR services are subsequently found to be unsuitable for the process. However, an even greater number of FDRPs (up to 45%) estimated that fewer than this were screened out (Kaspiew et al., 2009, p. 106).

Evaluations acknowledge that making decisions about appropriateness for FDR is a complex and sophisticated process in an often uncertain situation. FDRPs are required to make clinical judgements about a range of factors throughout their interaction with clients, including what approach is likely to be in the best interests of the children; how the parties themselves perceive the violence; and whether it would be safe to proceed with FDR at any given moment with certain safeguards in place (Kaspiew et al., 2010, p. 47).

While there is seen to be a more systematic approach to screening since the 2006 reforms (Kaspiew et al., 2009), deficiencies in handling matters involving family violence in the FDR context remain. Kaspiew and colleagues (2010) advocate for greater caution in the way these matters are dealt with by FDR services, and for refinement of both screening processes and mediation practice in matters involving violence, with the suggestion of perhaps offering more intensive support (Qu et al., 2014). Similar conclusions arise from other studies with service users, indicating that FL services did 'not offer sufficient or relevant intervention' for families affected by violence (Bagshaw et al., 2010, p. 2).

Findings from Wave 1 of LSSF also provide surprising insight on patterns of service use for families with concerns about family violence who negotiate shared-time arrangements. These parents were found to be more likely to have used formal assistance including FDR, lawyers and courts: 13–17% reported mediation or FDR as the main pathway used, compared with 6–7% of parents with shared-time with no safety concerns (Kaspiew et al., 2010, p. 42). They also used lawyers more frequently than those parents with shared-time arrangements and no safety concerns (15–18% compared with 4–5%) (Kaspiew et al., 2010, p. 42).

## A.6.2 Outcomes

Data from the three waves of the LSSF also provide insight on agreement rates, durability, type of agreements reached, and parental perceptions of child wellbeing associated with the various pathways.

The overall rate of resolution of parenting matters at each wave of the survey was consistently high – starting at just under three-quarters of respondents at Wave 1 and dropping to two-thirds at Wave 3 (Qu et al., 2014, p. 156).<sup>233</sup> As indicated earlier, high rates of agreement resulting from FDR were also recorded. At Wave 1, around two-fifths of parents who used FDR were able to reach agreement and avoid legal proceedings<sup>234</sup> (Kaspiew et al., 2009), and this figure remained relatively constant across the three waves (Qu et al., 2014, p. 157). Agreements reached in FDR soon after separation

also appeared to be durable in the short term although, as discussed below, greater flexibility in arrangements was evident in the longer term (Qu & Weston, 2010). Only 6% of those who reached agreement in FDR reported at Wave 1 that issues had not been resolved at the time of the interview (just over a year after separation).

The majority of those who did not reach agreement at FDR and did not receive a certificate from the FDR practitioner (the 'no certificate' group) had nonetheless managed to resolve their parenting issues close to a year following separation (Wave 1), and had done so mainly through discussions between themselves (Kaspiew et al., 2009). For those parents at Wave 1 who were in the process of sorting out issues or who had not sorted anything out, a small majority reported having resolved issues by Wave 3 (Qu et al., 2014, p. 158). Overall, the pattern of 'sorting things out' by the no certificate group was similar across the three waves of the LSSF to the group that reached agreement in FDR at the outset (Qu et al., 2014).

An emerging picture from the three waves of the LSSF is that negotiated care arrangements for children are often renegotiated over time. Of those who reported that the parenting issues were sorted out in Wave 1, just over half (54%) consistently reported agreement at each interview. The percentage of those who reported agreement initially dropped to half at Wave 2. While it rose to three-quarters at Wave 3, a large minority of these parents had changed the arrangements between waves. For those parents at Wave 1 who were in the process of negotiating issues or who had not resolved anything, a small majority reported having reached agreement on issues by Wave 3 (Qu et al., 2014, p. 158). As pointed out by Qu and Weston (2010), this demonstrates that negotiating parenting arrangements following separation is a 'dynamic process', with care arrangements for children requiring adjustment and renegotiation as the developmental needs of children, and the circumstances of their parents, change (see also Qu et al., 2014). Findings suggest that 'from the point of view of their children's welfare, many former couples need to have the capacity to continue to negotiate parenting arrangements in a positive or at least non-destructive manner' (Qu et al., 2014, p. 158).

As is the case with other findings from the AIFS evaluation, the largely positive picture of high agreement rates overall is tempered by evidence of poorer outcomes for families with more complex issues and higher levels of conflict. Among the certificate group, less than a quarter (23%) at all three waves reported that parenting arrangements had been decided (Qu et al., 2014, p. xvi): resolution was less common and was taking longer. Outcomes for families at the more difficult end of the spectrum are discussed in the following section.

### **Outcomes for families with complex needs**

Not surprisingly, cases where there is a history of family violence have been found to be less likely to reach agreement, and to take longer to establish (Kaspiew et al., 2010; Moloney et al., 2010).<sup>235</sup> For the one-fifth of parents at Wave 1 attempting FDR who received a certificate, the majority had not resolved matters, either by agreement or by court order, up to a year following separation. For this group, lawyers and courts provided the primary dispute resolution pathway (Kaspiew et al., 2009, p. 362). Absence of physical violence (reports of being physically hurt by the other parent prior to separation) increased the chance of agreement being reached in FDR and reduced the likelihood of receiving a certificate from an FDRP (as low as 10% in Wave 1). Close to half (48%) of the group who reached agreement in FDR reported no violence, compared to 36% of those who reported physical abuse (Moloney et al., 2010, p. 46).

Notwithstanding this evidence, two-fifths of those who reported emotional abuse, and more than a third of those who reported physical abuse, reported reaching agreement through FDR at the first interview. This evidence has prompted questions about the nature and quality of arrangements being made in FDR, with commentators calling the way in which matters involving family violence are handled in the family law system 'cause for concern' (Bagshaw et al., 2010 p. 98) that can lead to greater potential for compromised safety for participants and inappropriate decisions being made about the care of children (Bagshaw et al., 2010; Kaspiew et al., 2009). The majority of survey respondents (68.7% of women and 52.2% of men) in Bagshaw and colleagues' (2010) study reported that they had not been able to achieve suitable, safe parenting arrangements via their engagement with the family

law system (Bagshaw et al., 2010, p. 6). High-needs clients, especially those where a certificate is issued, can struggle with difficult and unresolved issues for extended periods.

Research evidence from overseas supports the view that mandated mediation and the mechanisms established to administer it have failed in high conflict cases (Tjersland et al., 2015). In Norway, three out of four parents undertaking mandatory mediation have minor or no conflict, while one in four have serious conflict (Tjersland et al., 2015). That research indicated that in high-conflict cases, 63% did not reach agreement compared with 12% of middle- and low-conflict cases. At 18 months' follow-up, more than half of the high-conflict cases had still not reached agreement (Tjersland et al., 2015). Again, the international evidence points to the potential for harm for women and victims of violence, with some US studies finding that women who reported family violence to dispute resolution practitioners received less favourable custody awards (Braaf & Sneddon, 2007, p. 8).

### A.6.3 Cost

Though reduced cost and judicial efficiency are two significant benefits touted by proponents of the certification process, little evidence has been provided to indicate that these objectives have indeed been achieved. There is nonetheless some suggestion that the certification process has enabled agreements to be reached in instances where people who could not afford lawyers and do not qualify for legal aid may not have previously been able to pursue specialist assistance in their matter. A report from the Auditor-General found that the process is largely 'meeting the needs of many people who would not have gone on to court at all due to their lack of financial resources' (ACG, 2013, p. 51; Productivity Commission, 2014).

Given the diversity of FDR services and related costs, and emerging evidence as to the disparate timeframes associated with families with complex circumstances, there is a clear need to pay greater attention to the financial impact of the certification process on families.

### A.6.4 Family violence

Family violence and child abuse constitute the most problematic issues dealt with by family law systems in Australia and overseas (Kaspiew et al., 2010; Ver Steegh & Dalton, 2008). Discussion of the s. 60I provisions, and the *FLA* more broadly, cannot occur without considering the implications of family violence for victims navigating the family law system, and for their children.

This section only provides an overview of issues around family violence in the family law system. More specific discussion of the issues family law raises in the application of s. 60I provisions can be found in the sections relating to assessing 'genuine effort' and the impact of the reforms in matters involving family violence.

The s. 60I provisions and other provisions in the reform package sought to provide greater protection for victims of child abuse and family violence. However, as noted by Braaf and Sneddon (2007, p. 6):

**their efficacy is governed by the context in which they are applied. That is, their implementation is affected by the level of training of professionals in the family law system, available resources, availability of family violence services, the orientation of the legislation towards dispute resolution and equal shared parenting, interpretation by staff and the perceptions of clients themselves.**

This is concerning given the relative importance of FDR for victims of family violence, particularly in the context of a system in which family violence was 'disbelieved, ignored, minimised, or sometimes accepted but put to one side in the ultimate decision' through court processes (Bagshaw et al., 2010, p. 6).

Reviews of FRSP-funded services, including FRCs, found deficiencies in the handling of matters involving family violence. These deficiencies include lack of consistency in response to family violence (e.g., some FDRPs were less equipped to deal with these matters), family violence not being identified, and where identified not being adequately addressed (ACG, 2013). While 8% of service users

reported family violence, only 0.8% of all service activities involved referral to a family violence service; and although more than 3% presented with reports of childhood physical/emotional abuse, only 0.2% of service activities involved referral to child protection services (ACG, 2013, p. 31).

Others have argued that mediation has come to be viewed as an increasingly sophisticated process that can accommodate and manage cases involving violence and abuse (Bickerdike, 2007). Safeguards can be put in place to ensure safety and address power imbalance, including more nuanced intake proceedings and ways of assessing capacity to negotiate; safety planning; shuttle mediation; presence of a support person; coaching; more breaks; and more private sessions (Bickerdike, 2007).

An older study conducted prior to the 2012 reforms demonstrated that women had a more positive experience of the mediation process, and were more satisfied with the outcomes where there was: a history of emotional abuse only; a one-off physical threat, or threats only; considerable time since separation; individual counselling; reports of no longer feeling intimidated; feeling confident about legal advice; and where they knew what they could expect from settlement (Keys Young, 1996).

In summary, the literature supports the argument that additional safeguards and eligibility requirements could minimise the risks to women and children in the FDR process and address feminist critiques of the process.

### **Family violence changes of 2012**

Amendments to the *FLA* that came into effect in 2012<sup>236</sup> were 'intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children' (Kaspiew et al., 2015, p. 97). The package of reforms comprised legislative and non-legislative measures, including training intended to equip family counsellors and lawyers to better identify family violence and keep children safe, as to work towards a standardised framework for assessing and screening family violence.

According to Sifris and Parker (2014, p. 18), the 2012 reforms, which aimed to improve responses to disputes involving children in cases of violence and abuse, and thereby ameliorate the combined effect of the 2006 package of reforms, 'merely tinkered around the edges'. Failure to make changes to two fundamental aspects of the 2006 reforms, mandatory participation in FDR and the application of the presumption of equal shared parenting to matters involving violence, led Sifris and Parker (2014) to conclude that the legislation will continue to be largely impotent in improving responses to family violence while these two aspects of the 2006 reform package remain unchanged.

Although more time is necessary to gauge the impact of the 2012 reforms, some have already noted potential implications of the reforms on the settlement of issues through FDR channels. Kaspiew and colleagues (2015, p. 21) assert that 'the changed legal dynamics, with the shift in advisers' obligations (s 60D) and the enactment of the 'tie-breaker' provision (s 60CC2A), could also mean that greater clarity in the law supports settlement using FDR in some situations to a greater extent than before'.

### **A.6.5 Satisfaction with the process**

AIFS evaluation findings and the ACG (2013) study relating to client satisfaction with the processes after the 2006 reforms were largely positive. 'A majority of service users surveyed considered that their parenting agreements were workable and that they were better equipped to manage family relationships' (ACG, 2013, p. xii). Similarly, at Wave 3 of the LSSF, about 80% of parents who had used services in the previous two years reported that the services were very or somewhat helpful (Kaspiew et al., 2009). This was confirmed in a later AIFS survey of parents who separated after the 2006 reforms but before the implementation of the 2012 reforms to the *FLA* (De Maio et al., 2012). Parents were asked to respond to a number of statements relating to the degree to which the processes worked for them, the other parent, and their children. Positive appraisals were recorded for the majority of respondents across all pathways, except in relation to the use of lawyers and courts (which 47% and 41% of fathers rated positively). However, a gender breakdown indicates that fathers tended to be less satisfied than mothers across all pathways (De Maio et al., 2012).

There is evidence that a significant minority remain dissatisfied with the services they receive, with around one-fifth of both fathers and mothers reporting that the services used were 'not at all helpful to them' (Qu et al., 2014, p. 65). Reasons were not sought as to why these parents found services unhelpful, and further qualitative research would provide valuable insight as to why participants remained dissatisfied. For Qu and colleagues (2014), there are myriad factors that may underscore these negative perceptions, including those related to the individual client (readiness to participate, client expectations, good match of service to needs) or to the service or system response (quality of service, or degree of coordination between service providers). The services most commonly rated as not helpful were FRCs and the courts, with lawyers and legal services least likely to be described as unhelpful. Once again, the degree to which these responses relate to the nature of the role played by the particular service provider warrants further investigation.

Qu and colleagues (2014) also found that the vast majority of parents (84.5%) who used discussions with the other parent as the main pathway to sort out issues reported that this worked well for them. The second favoured pathway was FDR, with two-thirds (66.5%) of parents reporting a favourable response to FDR on that measure. Although more than three quarters of mothers were satisfied with how FDR had worked for them, with an even higher percentage reporting that it worked well for their children (82.1%), considerably fewer fathers expressed satisfaction (57%) but reported much higher satisfaction for how the process worked for their children (74%). Smaller percentages of parents who were still in the process of sorting out arrangements agreed with the statements put to them. For those nominating mediation or FDR as the main pathway, only 40% of mothers and 48% of fathers expressed satisfaction with how the process was working for them (De Maio et al., 2012, p. 76).

A different picture emerged, however, from reports of client satisfaction where there is a history of family violence or current safety concerns.

### **Views of families with complex needs**

Parents' views of their encounters with the family law system and the way in which experiences of family violence impacted on trajectories and decisions after separation were explored in a

2009 study by Bagshaw and colleagues (2010). The study sought the views of approximately 1,100 participants, 10% children and 90% adults, who had been affected by separation after 1995 or 2006. It is important to note that the study was based on a purposive (i.e., non-probability) sample of adults and children who had experienced family violence. Data were collected primarily using an online survey, supplemented by some telephone interviews. The findings paint a bleak picture of widespread dissatisfaction with services intended to assist parents affected by family violence and abuse to resolve parenting disputes, including FDR services.

Respondents expressed the view that concerns about family violence raised during FDR were not properly addressed (Bagshaw et al., 2010, p. 103). Only 10% of participants with family violence concerns reported being exempted by FDR, with some feeling that they should not have been, or that more could have been done during mediation to counter power imbalances in the couple dynamic (Bagshaw et al., 2010, p. 98). Parents reported that the presence of family violence affected the decisions they made in FDR and in litigation. Many participants observed disincentives to reporting the violence in the process, including feeling that they weren't believed, and that their concerns about safety were not taken seriously (Bagshaw et al., 2010, p. 81).

Parent reports from the first wave of the LSSF regarding fears for personal safety within the FDR process paint a similar picture. In total, 29% of a sample of 2,335 clients from family relationship services said they felt afraid of the person about whom they were attending the service. Of these: 65% felt that their fears had been addressed;<sup>237</sup> 23% said they sometimes felt afraid of that person during the session; and '24% experienced threats or abuse outside the service while attending the service' (Kaspiew et al., 2010, p. 46).<sup>238</sup> Given that the vast majority (70–90%) of FDRPs were confident in their ability to work with families where violence or safety concerns were an issue, there appears to be a disparity between the perceptions of the professionals working with clients affected by violence and the clients themselves (Kaspiew et al., 2010, p. 46).

## A.7 Conclusions

While much attention has been paid in the literature to diverse family outcomes and pathways in the FDR process, far less attention has been devoted to understanding the specific certification mechanisms that may be related to this diversity. Research that explores FDRPs' decision-making processes, particularly their interpretations of 'genuine effort' and 'appropriateness', would greatly improve understanding of (a) contemporary mediation processes and outcomes in Australia – particularly in relation to the issuing of s. 60I certificates; (b) how allegations of family violence and abuse are handled in the certification process; and (c) ways in which services for families with complex needs might be improved.

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## Legislation

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*Civil Procedure Act 2005* (NSW)

*Family Law Act 1975* (Cth)

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

*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)

*Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth)

*Family Law Regulations 1984* (Cth)

*Native Title Act 1993* (Cth)

*Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth)