

**A CRITICAL ANALYSIS OF PRACTITIONERS
ISSUING ‘NOT APPROPRIATE FOR FAMILY
DISPUTE RESOLUTION’ CERTIFICATES UNDER
THE *FAMILY LAW ACT 1975* (CTH)**

ABSTRACT

Under the *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) (*‘2008 Regulations’*), family dispute resolution practitioners (*‘FDRPs’*) must conduct an intake assessment to decide whether family dispute resolution (*‘FDR’*) is appropriate and issue a certificate to the parties if it is not, allowing the parties to commence legal proceedings. Whether FDR is appropriate is determined according to the ability of the parties to negotiate freely, based on a series of factors listed in the *2008 Regulations*.¹ However, there is little in the literature which analyses how these provisions are to be applied. Existing research, while underdeveloped, suggests that FDRPs are taking a very wide interpretation of the Regulations and corresponding legislation,² and are confused as to what the Regulations require. This article therefore asks two questions: first, how are the Regulations to be interpreted? Secondly, how should FDRPs be applying these Regulations in practice? This article will argue that a purposive interpretation of the legislative scheme reveals the need for it to be interpreted narrowly and provide guidance as to how the factors listed in the Regulations should be applied in practice consistent with this narrow interpretation. It will contend that the current application of the Regulations does not always conform with best practice outlined in the literature and will make recommendations for amendments.

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¹ *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) reg 25(2) (*‘2008 Regulations’*).

² *Family Law Act 1975* (Cth) s 60I (*‘FLA’*).

I INTRODUCTION

In Australia, before parties can take parenting matters to court,³ they must either attempt FDR⁴ or apply for an exemption with the courts.⁵ FDR has the objective of moving parties away from litigation and towards cooperative parenting 'through the provision of useful information and advice, and effective dispute resolution services'.⁶ This pre-litigation step was introduced in 2006 as a tool to reduce the costs and delays of the family law system,⁷ as well as a way to improve satisfaction levels in agreements compared to the judicial system.⁸

In order to give effect to this pre-litigation step in family law, the *Family Law Act 1975* (Cth) ('FLA') was amended to include a provision which states that a court must not hear an application for parenting matters unless a certificate ('Inappropriate Certificate') has been issued by an FDRP.⁹ If they attempt FDR, parties must obtain an Inappropriate Certificate from an FDRP.¹⁰ There are five certificates which an FDRP may issue: a certificate which outlines that a party attempted FDR, but that the other party failed or refused to attend;¹¹ a certificate which outlines that the FDRP believes that FDR is not appropriate;¹² a certificate which outlines that FDR was attempted and that a genuine effort was made;¹³ a certificate which outlines that FDR

³ The requirement to attempt dispute resolution is currently only a requirement where parties are making an application to resolve parenting disputes: *ibid* pt VII. The same requirement does not currently extend to applications to resolve financial disputes in the event of separation and divorce: *ibid* pt VIII. However, there have been suggestions that similar mandatory pre-litigation steps may be extended to family financial disputes in the future: Australian Law Reform Commission, *Family Law for the Future: an Inquiry into the Family Law System* (Report No 135, March 2019) 257–8.

⁴ *FLA* (n 2) s 60I.

⁵ *Ibid* s 60I(9).

⁶ Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, December 2009) E1.

⁷ See generally Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, *A New Family Law System: Government Response to Every Picture Tells a Story* (Report, June 2005); House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, December 2003).

⁸ See Gay R Clarke and Iyla T Davies, 'ADR — Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7(1) *Queensland University of Technology Law Journal* 81, 87; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214, 216–17.

⁹ *FLA* (n 2) s 60I(7).

¹⁰ *Ibid* s 60I(8).

¹¹ *Ibid* s 60I(8)(a).

¹² *Ibid* s 60I(8)(aa).

¹³ *Ibid* s 60I(8)(b).

was attempted and that a genuine effort was not made;¹⁴ and a certificate which states that FDR commenced but became inappropriate after it started.¹⁵ The Inappropriate Certificate must then be filed with the court registry when making an application for parenting orders.¹⁶

FDR is defined broadly in the *FLA* as a non-judicial process in which an independent practitioner

helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; or helps persons who may apply for a parenting order ... to resolve some or all of their disputes with each other relating to the care of children ...¹⁷

This is a very broad definition and accounts for a number of dispute resolution frameworks, including assisted negotiation, mediation, conciliation, and neutral evaluation. In practice, the vast majority of FDRPs and service providers conduct FDR through mediation.¹⁸

On the one hand, FDR can represent the parties' best chance of resolving parenting issues, as court is often inaccessible for financial reasons or reasons of emotional capacity, and mediation has often been shown to provide better outcomes for parties.¹⁹ The legislature has also made clear that they desire parties to attempt FDR to assist with lowering the stresses on courts, and to lessen the adversarial nature of parenting disputes.²⁰

However, while FDR is often a beneficial process, it is not always appropriate, particularly in cases of family violence.²¹ There is significant literature that outlines the

¹⁴ Ibid s 60I(8)(c).

¹⁵ Ibid s 60I(8)(d).

¹⁶ Ibid s 60I(7).

¹⁷ Ibid ss 10F(a)(i)–(ii).

¹⁸ Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: an Analysis of the Role of the Independent Practitioner' (2008) 8(1) *Queensland University of Technology Law Review* 158, 159.

¹⁹ See, eg, Robert A Hahn and David M Kleist, 'Divorce Mediation: Research and Implications for Family and Couples Counseling' (2000) 8(2) *The Family Journal* 165, 165; Donald T Saposnek, 'Commentary: The Future of the History of Family Mediation Research' (2004) 22(1–2) *Conflict Resolution Quarterly* 37, 50; Joan B Kelly, 'Family Mediation Research: is there Empirical Support for the Field' (2004) 22(1–2) *Conflict Resolution Quarterly* 3, 28.

²⁰ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 1.

²¹ See, eg, Sarah Dobinson and Rebecca Gray, 'A Review of the Literature on Family Dispute Resolution and Family Violence: Identifying Best Practice and Research Objectives for the Next 10 Years' (2016) 30(3) *Australian Journal of Family Law* 180; Hilary Astor, 'Violence and Family Mediation: Policy' (1994) 8(1) *Australian Journal of Family Law* 3.

risk to parties who engage in FDR when it is not appropriate.²² The existing literature focuses heavily on when FDR (especially in the context of facilitative mediation) may not be appropriate for parties where there are issues of violence and coercion. Parties who engage in FDR where they cannot advocate for themselves may be coerced into a harmful or imperfect agreement, or have their interests overridden.²³ Rachael Field argues, for example, that FDR opens the possibility for perpetrators to continue to reinforce and exacerbate their control.²⁴ She further contends that the very process of FDR, and particularly mediation, can serve in practice to disadvantage the weaker party through hiding violence and allowing it to go unchecked.²⁵ This view is supported by Lundy Bancroft, Jay Silverman and Daniel Ritchie, who argue that perpetrators can use the FDR setting to continue to perpetuate domestic violence through actions and negotiating tactics, often reinforced by their lawyers.²⁶ Renata Alexander contends that FDR 'sanitises and decriminalises' domestic violence, keeping the abuse in the private arena.²⁷ There are also concerns that FDR can facilitate forced agreements, where power imbalances become so severe as to become coercive, invalidating the legitimacy of the agreements made. Christine Chinkin and Hilary Astor contend that '[t]he danger is that weaker parties will be unable to assert their position or needs and will accede to agreements which are not in their best interests'.²⁸ As Tony Bogdanoski and others point out, the neutrality requirements of mediators and dispute resolution professionals can have the effect of FDRPs allowing power imbalances to manifest in coercive ways, for fear of

²² See, eg, Rachael Field, 'Family Law Mediation: Process Imbalances Women Should Be Aware of Before They Take Part' (1998) 14(1) *Queensland University of Technology Law Journal* 23; Helen Cleak, Margot Schofield and Andrew Bickerdike, 'Efficacy of Family Mediation and the Role of Family Violence: Study Protocol' (2014) 14(1) *BMC Public Health* 57:1–12; Joan B Kelly and Michael P Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476; Helen Cleak et al, 'Screening for Partner Violence Among Family Mediation Clients: Differentiating Types of Abuse' (2018) 33(7) *Journal of Interpersonal Violence* 1118.

²³ See (n 22) and the sources cited therein.

²⁴ Rachael Field, 'Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(1) *Australian Journal of Family Law* 45, 74 ('Using the Feminist Critique of Mediation').

²⁵ Field, 'Family Law Mediation: Process Imbalances Women Should Be Aware of Before They Take Part' (n 22) 28.

²⁶ Lundy Bancroft, Jay G Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (SAGE Publications, 2nd ed, 2012) 157.

²⁷ Renata Alexander, 'Mediation, Violence and the Family' (1992) 17(6) *Alternative Law Journal* 271, 272.

²⁸ Christine Chinkin and Hilary Astor, 'Alternative Dispute Resolution: Panacea or Problem?' (1990) 1(2) *Polemic* 77, 79.

intervening to one party's benefit.²⁹ Given this, it is vitally important that FDRPs are able to screen parties out of the process when it is not appropriate to conduct an FDR session.

Beyond questions of safety and power dynamics, some commentators have also raised concerns that FDR may not be an appropriate process where the process cannot achieve a satisfactory outcome, such as where there are limited prospects of success due to the severity of the conflict,³⁰ or where one or both parties present as hostile to the dispute resolution process.³¹

The purpose of allowing FDRPs to issue Inappropriate Certificates saying that FDR is not appropriate is to ensure that parties are screened out of the process where it may be harmful. However, it is vitally important that FDRPs are issuing Inappropriate Certificates consistently and based on commonly understood criteria. Without consensus on how Inappropriate Certificates are to be determined, they are likely to be provided inconsistently, creating an unjust system. Tom Altobelli argues that where the issuing of Inappropriate Certificates is inconsistent and arbitrary, there is a risk of the public losing faith in the family law system.³² There is also a concern that where FDRPs make varying assessments on when to offer FDR, it makes 'forum shopping' more likely, where parties go between service providers until someone is willing to offer them the certificate they desire.³³

As such, the goal of any framework governing the Inappropriate Certificates is to strike the correct balance between engaging parties in FDR while protecting parents and children from its potentially adverse outcomes. The success of that goal is impacted by the decisions FDRPs are making on a day-to-day basis.

To this end, under the *2008 Regulations*, FDRPs must conduct a pre-conference meeting before offering FDR to assess its suitability in the matter;³⁴ this is often known as an intake session.³⁵ In this intake session, FDRPs must assess whether

²⁹ See Tony Bogdanoski, 'The "Neutral" Mediator's Perennial Dilemma: to Intervene or Not to Intervene?' (2009) 9(1) *Queensland University of Technology* 26, 27; Hilary Astor, 'Rethinking Neutrality: a Theory to Inform Practice — Part 1' (2000) 11(2) *Australasian Dispute Resolution Journal* 73, 79–80.

³⁰ Clarke and Davies (n 8) 93.

³¹ See John Wade, "Don't Waste My Time on Negotiation and Mediation. This Dispute Needs a Judge." Which Conflicts Need Judges? Which Conflicts Need Filing?' (2001) 1(1) *ALTA Law Research Series* 7:1–30, 11.

³² Tom Altobelli, 'A Generational Change in Family Dispute Resolution in Australia' (2006) 17(3) *Australian Dispute Resolution Journal* 140, 149.

³³ Note that in Hilary Astor, 'Genuine Effort in Family Dispute Resolution' (2010) 16(1) *Family Relationships Quarterly* 3, 3–4, Astor makes a similar argument in the context of the genuine effort certificate.

³⁴ *2008 Regulations* (n 1) reg 25.

³⁵ Linda Kochanski, 'The Importance of an Intake' (2011) 1(1) *Family Law Review* 164, 164.

FDR is appropriate and, if so, the best methods by which to conduct it.³⁶ FDRPs must not conduct an FDR session if it is not appropriate to do so.³⁷ If the FDRP deems that FDR is not appropriate under the *2008 Regulations*, they may issue an Inappropriate Certificate which, when filed at the registry with an application, allows parties to commence parenting proceedings in court.³⁸

However, while the literature provides a rich discussion of when FDR may be unsafe or coercive generally, and some other commentary outlines situations in which FDR generally may not be appropriate,³⁹ there is surprisingly little commentary on how the *2008 Regulations* are to be understood and interpreted. This helps to explain why recent research, while limited, suggests that FDRPs are often confused about how the Regulations should be interpreted in practice.⁴⁰

As such, this article will add to the literature with two key contributions. First, it will take a purposive approach to legislative interpretation to analyse how FDRPs should understand the Regulations. Part II will give a brief background and overview of the FDR framework. Part III will outline the existing research on how FDRPs are applying the Regulations in practice and will argue that FDRPs sometimes act outside of their legislative scope of authority in issuing Inappropriate Certificates. Part IV will explain and apply the purposive approach of legislative interpretation to the *2008 Regulations*. It will find that they are intended to be interpreted narrowly and should only apply to considerations where parties lack an ability to negotiate freely.

Secondly, this article will provide some guiding thoughts as to how the factors listed in the *2008 Regulations* might best be applied in practice and will undertake a comparative analysis as to how this framework applies to best practice guidelines supported by the literature. Part V will summarise the existing literature on how assessments for FDR should be conducted and apply this literature to the *2008 Regulations*. This serves both to support FDRPs in understanding how the literature may be applied in practice, as well as to argue that some of the suggested guides for best practice advocated in the literature sit outside the authority given to FDRPs in the *2008 Regulations*. Part VI will offer some concluding thoughts and argue that further discussion is required as to when FDR is and is not appropriate, and that the Regulations require amendment to better conform with best practice.

³⁶ Ibid.

³⁷ *2008 Regulations* (n 1) reg 25(1).

³⁸ *FLA* (n 2) s 60I(7).

³⁹ See, eg, Linda Fisher and Mieke Brandon, *Mediating with Families* (Thomson Reuters, 3rd ed, 2012); Clarke and Davies (n 8) 93; Laurence Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012).

⁴⁰ Bruce Smyth et al, ‘Certifying Mediation: A Study of Section 60I Certificates’ (Working Paper No 2/2017, Centre for Social Research and Methods, Australian National University, November 2017) 25.

II OVERVIEW OF THE FAMILY DISPUTE RESOLUTION FRAMEWORK

It is a cornerstone of the modern Australian family law framework that FDR must be attempted as a pre-litigation step unless an exemption is sought.⁴¹ FDR has the objective of moving parties away from litigation and towards cooperative parenting ‘through the provision of useful information and advice, and effective dispute resolution services’.⁴² This pre-litigation step was recommended by the House of Representatives Standing Committee on Family and Community Affairs (‘the House Standing Committee’) in a 2003 review of the family law system, as a tool to reduce costs and delays.⁴³ FDR was also seen as a way to improve satisfaction levels in agreements compared to the judicial system.⁴⁴ In order to effect this pre-litigation step in family law, Parliament introduced a provision in the *FLA* which states that a court must not hear an application for parenting matters unless a certificate has been issued by an FDRP.⁴⁵

Whilst Parliament accepted that FDR should be required before an application could be made, it also recognised that there were times where FDR would be inappropriate.⁴⁶ These concerns have been raised since at least the early 1990s. Field credits much of the awareness of the potential for power imbalances in mediation with Astor’s work in the early 1990s, including a 1991 position paper prepared for the National Committee on Violence Against Women.⁴⁷ In 1994, Astor explicitly advocated for mediation being considered inappropriate in cases of family violence, save for ‘a test based on the capacity of the parties to negotiate’.⁴⁸ This supported a test proposed by Susan Gribben.⁴⁹

This dominant language of identifying concerns with weaker parties engaging in ADR, predominately through a test of ‘power imbalances’, was ultimately codified in the 1995 amendments to the *FLA*.⁵⁰ These amendments explicitly encouraged

⁴¹ See House of Representatives Standing Committee on Family and Community Affairs (n 7); Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7).

⁴² Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6).

⁴³ See House of Representatives Standing Committee on Family and Community Affairs (n 7) 58.

⁴⁴ See Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 105; Wayne (n 8) 214.

⁴⁵ *FLA* (n 2) s 60I(7).

⁴⁶ See Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 9.

⁴⁷ Rachael Field, ‘Mediation and the Art of Power (Im)Balancing’ (1996) 12(1) *Queensland University of Technology Law Journal* 264, 264.

⁴⁸ Astor, ‘Violence and Family Mediation: Policy’ (n 21) 18.

⁴⁹ Susan Gribben, ‘Mediation of Family Disputes’ (1992) 6(2) *Australian Journal of Family Law* 126, 132.

⁵⁰ *Family Law Reform Act 1995* (Cth) (‘*Family Law Reform Act*’).

ADR (which it referred to as primary dispute resolution) without making mediation a requirement.⁵¹ Amendments to the Regulations obliged FDRPs to consider power imbalances in deciding whether to offer dispute resolution.⁵² Nevertheless, even with the introduction of this legislation, there was a concern that this process was inappropriate for women separating from abusive partners.⁵³ The Australian Law Reform Commission ('ALRC'), at the time, wrote that 'the legal system's tolerance of violence against women underwrites women's inequality before the law'.⁵⁴

With the 2003 recommendation from the House Standing Committee to make ADR a pre-litigation requirement, many saw ADR as an even greater risk to vulnerable parties who would have no choice but to attempt FDR. For example, Field argued that the suggested amendments were likely to manifest in post-separation injustices for women:

This is the challenge for the ... [mediation profession]: to seek to ensure that the good aspects of their professional practice are not compromised by the Government's inappropriate policy decision to mandate mediation in circumstances where it can be bad, or get ugly, for women.⁵⁵

To address these concerns, the House Standing Committee recommended that an exemption should be made 'when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal'.⁵⁶ The majority of the suggested exemptions were codified in s 60I(9) of the *FLA*, and allow parties to apply directly to court by submitting an affidavit explaining why they believe an exemption applies, bypassing FDR entirely.⁵⁷

However, it appears that these exemptions are being used less than anticipated: a 2009 review of the reforms found that lawyers are often unsure whether their clients will be accepted under an exemption, and therefore may send them to FDR to receive a certificate as an 'insurance policy'.⁵⁸ In practice, lawyers may also simply believe that the process of attending FDR and obtaining a certificate is easier, quicker, and

⁵¹ Ibid ss 14D–14E.

⁵² *Family Law Reform Act* (n 50) s 19P; *Family Law Regulations 1984* (Cth) reg 62 ('1984 Regulations'), as inserted by *Family Law Regulations (Amendment) 1996* (Cth) reg 20.

⁵³ See Helen Rhoades, Reg Graycare, and Margaret Harrison, *The Family Law Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community and Expectations* (Interim Report, Family Court of Australia, April 1999) 14.

⁵⁴ Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System* (Interim Report No 67, March 1994) 1.

⁵⁵ Field, 'Using the Feminist Critique of Mediation' (n 24) 78.

⁵⁶ House of Representatives Standing Committee on Family and Community Affairs (n 7) [3.72].

⁵⁷ *FLA* (n 2) s 60I(9).

⁵⁸ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 110.

cheaper than applying for an exemption and having to argue its merits in court. FDRPs have also expressed frustration with the number of parties presenting to FDR with advice from other lawyers to obtain a certificate at mediation, rather than rely on the exemptions in the *FLA*.⁵⁹ Helen Cleak and Andrew Bickerdike have found that ‘cases involving family violence were specifically exempt from the requirement to attend FDR prior to court, although in reality the majority of separating parents were encouraged to attempt FDR first’.⁶⁰

One further reason a party may not apply for an exemption, even where FDR is clearly unsuitable, is that there is little case law to assist parties in understanding whether their application for an exemption would be granted; the case law that does exist provides little clarity. There is little case law to support how such provisions are to be interpreted. Put simply, the court must be ‘satisfied that there are reasonable grounds to believe that’ one of the exemptions applies to allow parties to move directly to litigation.⁶¹ This determination is usually made by a registrar in an *ex parte*, interlocutory manner, and is subject to judicial appeal.⁶²

In *Carpenter v Carpenter*, it was considered that a delay of a couple of months for an FDR provider to facilitate FDR did not make it inappropriate on the grounds that parties were unable to participate.⁶³ Judge Harman went on to comment that the ‘effective operation of [the] Court’ is affected when FDR is not engaged in circumstances where it is appropriate,⁶⁴ and ‘[e]xemptions from attending FDR are not intended to be handed out like sweets at a children’s party or as a simple reward for having asked’.⁶⁵ In *Conlon v Conlon* it was found that some relocation cases may justify an exemption, but that the bare fact that a parent had unilaterally relocated was not sufficient to justify an exemption.⁶⁶ This may be somewhat contrasted with *Martin v Harding*, where the parties’ separation for a number of months was a significant factor in granting an exemption on the grounds of urgency.⁶⁷ A number of other factors, including the lack of access and time spent with the children being granted to the father, his professional football career which kept him geographically a long way from the family, and the escalated nature of the conflict, also contributed

⁵⁹ Smyth et al (n 40) 28.

⁶⁰ Helen Cleak and Andrew Bickerdike, ‘One Way or Many Ways: Screening for Family Violence in Family Mediation’ (2016) 98(1) *Family Matters* 16, 16.

⁶¹ *FLA* (n 2) s 60I(9)(b).

⁶² *Federal Circuit Court Rules 2001* (Cth) r 20.00A; *Carpenter v Carpenter* (2018) 337 FLR 95, 96 [9] (*‘Carpenter’*).

⁶³ *Carpenter* (n 62) 97 [18].

⁶⁴ *Ibid* 97 [19].

⁶⁵ *Ibid* 99 [27].

⁶⁶ *Conlon v Conlon* [2019] FCCA 2195, [37] (Judge Terry).

⁶⁷ *Martin v Harding* [2007] FamCA 1040, [6].

to the decision.⁶⁸ Justice Young also asserted that this decision had to be made in the best interests of the children.⁶⁹

In *Weaver v Cantrell*, it was established that there is no general exemption or catch-all provision listed in the exemptions.⁷⁰ Federal Magistrate Wilson also took what must be said to be an extremely generous interpretation of the definition of family violence, and asserted that he could apply the exemption on the basis of a single act of one parent raising their voice to their child.⁷¹ By this logic, any party who can point to an occasion where they slightly over-disciplined their child would have sufficient grounds for the exemption to apply. As such, while the judicial approach to the exceptions appears inconsistent, the exceptions seem to be constructed quite broadly. It will be shown below that this is inconsistent with how the legislative scheme should be understood. It becomes clear that the nature and application of the exemptions to FDR are ill-defined and may be contributing to their lack of use by parties.

The lack of utilisation of the exemptions by parties puts further pressure on FDRPs to ensure that they are screening parties out of FDR when it is not appropriate. In order to address concerns with mandating FDR as a pre-filing requirement, FDRPs are required to screen parties prior to offering FDR under s 60I(8)(aa) of the *FLA*, which states that an FDRP may issue a certificate

to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers ... that it would not be appropriate to conduct the proposed family dispute resolution ...⁷²

A certificate may also be issued if the FDR session has commenced, and the FDRP considers that it would not be appropriate to continue.⁷³ In issuing an Inappropriate Certificate, the FDRP is required to be satisfied that an assessment has been conducted of the parties to the dispute, and that FDR is not appropriate.⁷⁴ In determining whether FDR is appropriate, and before issuing a certificate, FDRPs *must* have regard to reg 25 of the *2008 Regulations*.⁷⁵

Regulation 25(2) of the *2008 Regulations* states:

- (2) In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been

⁶⁸ Ibid [12].

⁶⁹ Ibid.

⁷⁰ *Weaver v Cantrell* [2008] FMCAfam 961, [14].

⁷¹ Ibid [20]–[22].

⁷² *FLA* (n 2) s 60I(8)(aa).

⁷³ Ibid s 60I(8)(d).

⁷⁴ *2008 Regulations* (n 1) regs 25(1)–(2).

⁷⁵ Ibid reg 26(2).

given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

- (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.⁷⁶

This regulation provides an overarching criterion that FDRPs must consider: whether the parties can negotiate freely. It also provides sub-factors that the practitioner may consider in forming their view of the overarching criterion. If, having considered these factors, the FDRP is not satisfied that FDR is appropriate, FDRPs *must not* offer FDR.⁷⁷ This provision has the effect of placing the onus on FDRPs to be satisfied that parties can freely negotiate, and not on the parties to prove that they cannot. Under the *2008 Regulations*, FDRPs must undergo training in family violence and supporting vulnerable parties.⁷⁸

Further reforms were also implemented through the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) ('*2012 Act*') to improve the family law system's response to family violence. This reform expanded the definitions of family violence and abuse, as well as clarifying that protection of children is to weigh greater than the right of the children to have a relationship with both parents.⁷⁹ In their review of the *2012 Act*, the Australian Institute of Family Studies found that FDRPs had improved in screening for violence, but that nearly three in ten parents were still not being asked about family violence and safety concerns when using a formal pathway such as FDR.⁸⁰ As such, it is clear that screening for violence in FDR still requires further development and understanding from FDRPs.

While there is significant literature which highlights the risks to parties engaging in FDR, and in the development of screening processes, there is little commentary which explains how this research interacts with the *2008 Regulations*, and what

⁷⁶ Ibid reg 25(2); *FLA* (n 2) s 60I.

⁷⁷ *FLA* (n 2) s 60I; *2008 Regulations* (n 1) reg 25(4).

⁷⁸ *2008 Regulations* (n 1) reg 3.

⁷⁹ Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) 2.

⁸⁰ Ibid 75.

they require of FDRPs. Before turning to this question, this article will outline the evidence available on how FDRPs are applying these provisions in practice.

III PRACTITIONERS’ CURRENT APPLICATION OF THE REGULATIONS

There has only been one major qualitative review which considered how FDRPs make determinations to issue Inappropriate Certificates. Conducted by Smyth et al this study was completed in 2017 and involved interviews with 27 FDRPs from the relationship services organisation Interrelate.⁸¹ The researchers conducted telephone interviews with the FDRPs asking semi-structured questions about their experiences in issuing Inappropriate Certificates under the *FLA*.⁸² While the study did find that many FDRPs made determinations to issue Inappropriate Certificates on the grounds that negotiating ability may be affected, it also concluded that

[s]ome factors outside the legislative instruments appear to be affecting decisions. The factors include, in particular, best interests of the children (variously perceived by FDRPs), organisational policy, fear of complaints, and perceptions about what will lie ahead for clients if a certificate (or particular category of certificate) is issued, particularly when the FDRP perceives that the client does not have the financial resources to go to court.⁸³

The FDRPs interviewed seemed to use a range of benchmark questions for making a determination of whether FDR was inappropriate: will FDR do the parties more good than harm? Are the parties safe? Is this the best process for them?⁸⁴ The only other qualitative studies to have examined assessments in FDR are the evaluations of the 2006 and 2012 law reforms, though they do not really discuss application of the assessment criteria under reg 25 outside of how assessments are made regarding violence.⁸⁵ In the evaluation of the 2006 reforms, it was noted that the question of what was next for the parties played a role in how FDRPs chose to assess matters.⁸⁶ The ALRC also found that FDRPs were inconsistent and arbitrary in their assessments, although this view was mostly within the context of screening assessments during intake regarding violence.⁸⁷ In submissions to the ALRC, some organisations outlined their view that the current certificate process is confusing and inconsistently

⁸¹ Smyth et al (n 40) xii.

⁸² Ibid 19.

⁸³ Ibid xii.

⁸⁴ Ibid 22–8.

⁸⁵ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6); Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments* (n 79).

⁸⁶ Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (n 6) 110.

⁸⁷ Australian Law Reform Commission, *Family Violence — A National Legal Response* (Report No 114, October 2010) 997.

applied.⁸⁸ CatholicCare Victoria and Tasmania stated that ‘sometimes FDRPs are confused about the extent of their discretion to issue a[n] [Inappropriate Certificate]’.⁸⁹ Partnerships Victoria further suggested that ‘too many cases either get an exemption or a section 60I certificate in parenting cases.’⁹⁰

Not only are FDRPs issuing Inappropriate Certificates on grounds which have little to do with safety, they also appear to have varying conceptions of what may constitute safety concerns or power imbalances. While some FDRPs were ‘all for giving [FDR] a go’,⁹¹ so long as the parties are confident in being able to have a discussion, for others ‘the presence of some of the factors set out in [reg] 25(2) result in an automatic determination that FDR is not appropriate’.⁹²

Is it clear that FDRPs have differing viewpoints as to how the Regulations are to be interpreted, and that many are confused about their scope of authority to issue Inappropriate Certificates. The obvious deduction from the literature is that some FDRPs are not making their assessments through the framework of assessing parties’ capacity to negotiate. Because of this, they may be issuing Inappropriate Certificates based on *any* factor which they feel is acting as a barrier to the process. This may be because they believe the *2008 Regulations* allow them unlimited discretion to make assessments based on their reading of the catch-all provision.⁹³ This view is also reinforced by the Attorney-General’s fact sheet on screening and assessment for FDRPs.⁹⁴ This fact sheet outlines that FDRPs should be considering each of the factors in reg 25(2), but makes no mention of the overarching criterion of the ability to negotiate freely.⁹⁵ FDRPs may well be seeing this as support for the view that they therefore have unlimited discretion about when to issue Inappropriate Certificates.

This is concerning, because it increases the probability that FDRPs are acting inconsistently and arbitrarily. The following section will therefore look specifically at the reg 25(2) factors to examine what considerations should be made when making a not appropriate for FDR assessment under the *2008 Regulations*.

⁸⁸ See CatholicCare Victoria & Tasmania, Submission No 115 to Australian Law Reform Commission, *Issues Paper 48* (May 2018) 6.

⁸⁹ *Ibid.*

⁹⁰ Partnerships Victoria, Submission No 307 to Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (October 2018) 18.

⁹¹ Smyth et al (n 40) 24.

⁹² *Ibid* 25.

⁹³ *2008 Regulations* (n 1) reg 25(2)(f).

⁹⁴ Commonwealth Attorney-General’s Department, *Screening and Assessment for Family Dispute Resolution* (Fact Sheet) <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Documents/Fact-sheet-on-screening-and-assessment.PDF>>.

⁹⁵ *Ibid.*

IV INTERPRETING THE REGULATIONS SURROUNDING ‘NOT APPROPRIATE’ ASSESSMENTS

A Methodology of Interpreting Legislation

In Australia, legislation is to be interpreted in a manner which ‘best achieve[s] the purpose or object of the Act’ (‘the purposive approach’).⁹⁶ In considering how to determine the purpose or object of an Act, courts have settled on a ‘contextual approach’.⁹⁷ Articulated by the High Court of Australia in *CIC Insurance Ltd v Bankstown Football Club Ltd*, this approach places the context of the legislation as a consideration in the first instance and gives a wide view of ‘context’ to include such things as the existing state of the law and the mischief the law was intended to rectify.⁹⁸

This approach is often conducted through a three-step test: first, interpret the statutory text; second, consider the broader context; third, consider the purpose of the legislation.⁹⁹ Justice Middleton refers to statutory interpretation as ‘mostly common sense’, stating that ‘[t]he starting point should always be to look at the words, their context, and the purpose of the legislation, then applying that to produce a result that is both fair and workable in the particular fact situation you have before you.’¹⁰⁰ This has also received support from the Hon Michael Kirby¹⁰¹ and Jeffrey Barnes, who have evidenced its acceptance and application in a number of High Court of Australia cases.¹⁰²

B Interpreting the Regulations

1 Text-Based Interpretation

The overarching criterion provided in the Regulations is that FDRPs must consider a party’s ability to negotiate freely. What does it mean to consider a party’s ability to

⁹⁶ *Act Interpretation Act 1901* (Cth) s 15AA (‘*Acts Interpretation Act*’).

⁹⁷ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

⁹⁸ *Ibid* 408.

⁹⁹ See *Comcare v Martin* (2016) 258 CLR 467; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1. See also Dennis Charles Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 63–5.

¹⁰⁰ Justice John Middleton, ‘Statutory Interpretation: Mostly Common Sense?’ (2017) 40(2) *Melbourne University Law Review* 626, 632.

¹⁰¹ Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35(1) *Melbourne University Law Review* 113, 131–2.

¹⁰² Jeffrey Barnes, ‘Contextualism: The Modern Approach to Statutory Interpretation’ (2018) *University of New South Wales Law Journal* 37, 45; *Mansfield v The Queen* (2012) 247 CLR 86.

do so? According to the *Macquarie Dictionary*, ability means ‘the power or capacity that is in a living thing which makes it possible for them to do something’.¹⁰³ This might be divided into two sub-questions: first, does the person have the *capacity* to negotiate; second, does the person have the *power* to negotiate? It is useful to think of the question of capacity as a reference to the internal factors of the individual, such as their skills, capacity to reason, or capacity to articulate the situation before them. On the other hand, power refers to a person’s capacity to *act* in a particular manner.¹⁰⁴ As such, power refers to external factors, such as whether one party feels safe or intimidated by the other party. As such, the overarching criterion of the *Regulations* is concerned with FDRPs forming a view on whether or not a party has the capacity to understand and interpret assertions being made by the FDRP and other parties during an FDR session, and whether they can act in their own interests on that understanding.

In order to assess this overarching question, FDRPs are provided several factors in the *2008 Regulations* to assess against, including a catch-all provision which allows them to consider any other matter they deem necessary.¹⁰⁵ An initial textual reading of the provision might suggest that the practitioner is able to decide to offer an Inappropriate Certificate on any ground they see fit, given the wording of the catch-all provision.

However, the principles of statutory interpretation would suggest otherwise. According to the principle of *noscitur a sociis*, words should not be determined alone, but rather according to the surrounding or accompanying words.¹⁰⁶ The *2008 Regulations* very clearly outline the overarching consideration FDRPs are making when considering this list: ‘whether the ability of any party to negotiate freely in the dispute is affected’.¹⁰⁷ As such, the *Regulations* limit ‘any other matter’ to be any other matter which may limit a party’s ability to negotiate freely.¹⁰⁸

Moreover, the principle of *eiusdem generis* states that where general words follow a list of particular factors, the general words are restricted to matters of the same class as those specifically listed.¹⁰⁹ The matters listed in regs 25(2)(a)–(e) are situated in the class of barriers to free negotiation. As such, these statutory interpretation principles support an interpretation of the catch-all provision which limits its operation to matters affecting a party’s ability to negotiate freely.

¹⁰³ *Macquarie Dictionary* (online at 24 April 2015) ‘ability’ (def 1).

¹⁰⁴ *Ibid* ‘power’ (def 1).

¹⁰⁵ *2008 Regulations* (n 1) reg 25(2)(f).

¹⁰⁶ *Encyclopaedic Australian Legal Dictionary* (online at 30 April 2020) ‘noscitur a sociis’.

¹⁰⁷ *2008 Regulations* (n 1) reg 25(2).

¹⁰⁸ *Ibid* reg 25(2)(f).

¹⁰⁹ *Macquarie Dictionary* (n 103) ‘eiusdem generis’.

2 Context- and Purpose-Based Interpretation

This provision must next be considered in line with the rest of the legislation to ensure such a construction is consistent.¹¹⁰ Section 60I(1) of the *FLA* states that

[t]he object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

This would seem to indicate that the legislature wished to narrow the circumstances in which parties were able not to engage in FDR, putting the onus on FDRPs only to issue Inappropriate Certificates when necessary. Further, s 63B of the *FLA* explicitly encourages parents to reach an agreement and use the legal system as a last resort.¹¹¹

The *Acts Interpretation Act 1901* (Cth) outlines a number of related materials which can be considered in interpreting legislation, including second reading speeches and explanatory memoranda.¹¹² The Minister’s second reading speech states simply that the requirement to mediate ‘does not apply where there is family violence or abuse’.¹¹³ In the Explanatory Memorandum, the government stated that

the mediator must consider whether the ability of any party to negotiate freely is affected ... It is envisaged that the regulation to be made for the purposes of paragraph 60I(8)(aa) will largely reproduce the factors currently set out in regulation 62.¹¹⁴

Here, the Explanatory Memorandum explains that the *2008 Regulations* sought to reproduce the language in the existing legislation. That legislation was the *Family Law Regulations 1984* (Cth) (*‘1984 Regulations’*). The *2008 Regulations* contain substantially similar wording as the *1984 Regulations*.¹¹⁵

The screening language reproduced from the *1984 Regulations* was introduced under the *Family Law Reform Act 1995* (Cth) (*‘1995 Act’*).¹¹⁶ The *1995 Act’s* Explanatory Memorandum states that

¹¹⁰ Pearce and Geddes (n 99) 63–5.

¹¹¹ *FLA* (n 2) s 63B.

¹¹² *Acts Interpretation Act* (n 96) s 15AB.

¹¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 10 (Philip Ruddock, Attorney-General).

¹¹⁴ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) 22.

¹¹⁵ *1984 Regulations* (n 52) reg 62.

¹¹⁶ *Family Law Reform Act* (n 50) s 25.

the regulations will make provision for instances where mediation is contraindicated such as a power imbalance between the parties where that power imbalance cannot be redressed, for example in cases of family violence.¹¹⁷

As such, the wording of the Regulations intended to focus on the criterion of whether the parties can negotiate freely. It is also clear that the legislature in the original drafting of the Regulations, and especially in the 2006 amendments, intended to place an onus on FDRPs to attempt to address these power imbalances before declining to offer dispute resolution.

There are two clear conclusions to draw from the textual and contextual reading of interpretations. First, there is little evidence to suggest that consideration should be given to broader questions of whether to offer FDR outside of considerations surrounding safety. This interpretation is also supported by case law. In *Madsen v Fancher*, Judge Harman stated that

[t]he intention of Parliament is clear being that litigants must, save in cases of urgency, family violence and abuse, endeavour to resolve parenting disputes between themselves without the need for intervention by the Court.¹¹⁸

In *Rastall v Ball*, Riethmuller FM referred to the Regulations as a ‘safety valve’ provision.¹¹⁹ His Honour dismissed the right of the practitioner to not offer a session just because they felt it would not be productive, arguing that this would render the provisions of the *FLA* providing for compulsory participation impotent.¹²⁰

Secondly, even questions of safety are constrained into a narrower question of whether there is an ability to negotiate freely. It is clear that the onus is on FDRPs to attempt to find workable solutions to offer FDR before issuing Inappropriate Certificates. This narrow interpretation will now be applied to the wording of the *2008 Regulations*.

V APPLYING THE REGULATIONS TO PRACTICE

In applying a narrow interpretation to the *2008 Regulations*, it is important to recognise that this interpretation only applies to FDRPs issuance of Inappropriate Certificates. Under the *2008 Regulations*, if satisfied that FDR is appropriate, the practitioner *may* offer family dispute resolution.¹²¹ This is to say that a practitioner is not obligated to offer a session; they may choose not to offer FDR. They may also choose to delay offering FDR until the parties have completed certain steps, such as seeking counselling or legal advice. However, in order to access the Inappropriate

¹¹⁷ Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) 18.

¹¹⁸ *Madsen v Fancher* [2016] FCCA 142, [16].

¹¹⁹ *Rastall v Ball* (2010) 44 Fam LR 256, 266–7 [40].

¹²⁰ *Ibid.*

¹²¹ *2008 Regulations* (n 1) reg 25(3).

Certificates to commence legal proceedings, the FDRP must be satisfied that parties do not have the ability to negotiate freely. In this section, I consider the factors FDRPs can (and cannot) consider in making that assessment.

A History of Violence & Equality of Negotiating Power

There is little doubt that FDRPs will routinely be required to assess parties that present with a history of violence, with recent research suggesting that up to 85% of respondents attempting FDR had experienced emotional or physical violence in their relationship.¹²² There are competing views in the literature as to how a history of violence should be considered by FDRPs in assessing the appropriateness of FDR. Alexander argues that mediation is unsuitable in *all* cases where there has been family violence, and that mediation is inappropriate in all family law matters due to the inability for FDRPs to screen properly for violence and the inherent inequalities in all violent relationships.¹²³ Astor argues that any allegation of substantial family violence deems mediation unsuitable, save for a narrow set of scenarios where the weaker party may make free and consenting decisions.¹²⁴ She argues that screening processes are not a sufficient barrier to protect the weaker party, and that agreements which may appear acceptable to the mediator can in fact be unfair or dangerous, as disempowered parties 'negotiate for what they think they can get, rather than an outcome which is just or equitable or which protects their safety'.¹²⁵ She further argues that there is an inability for a consensual agreement, even where parties are placed in separate rooms (known as a 'shuttle' session).¹²⁶ She notes that dispute resolution requires parties to be open to engaging with each other and desirable of settling the dispute through compromise, and that these actions are usually beyond the ambit of perpetrators.¹²⁷

While a history of family violence is the most obvious manifestation of a power imbalance in negotiation, there are many others. Control over decision-making can occur in relationships, even where violence (especially physical violence) never existed. According to Bernard Mayer, power can be habitual, informational, or formal.¹²⁸ It may be based on resources, on personal aptitudes, or the ability and willingness to cause discomfort to another.¹²⁹ One party may be significantly more

¹²² Lawrie Moloney et al, 'Mandatory Dispute Resolution and the 2006 Family Law Reforms: Use, Outcomes, Links to Other Pathways, and the Impact of Family Violence' (2010) 16(3) *Journal of Family Studies* 192, 195.

¹²³ Alexander (n 27) 271.

¹²⁴ Astor, 'Violence and Family Mediation: Policy' (n 21) 3.

¹²⁵ Ibid 5.

¹²⁶ Ibid 6.

¹²⁷ Ibid.

¹²⁸ Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16(1) *Mediation Quarterly* 75, 78.

¹²⁹ Ibid.

articulate or assertive.¹³⁰ Structurally, one party may have access to finances or access to the children.¹³¹ Imbalances may also be cultural¹³² or gendered.¹³³

On the other hand, victims of family violence may find the capacity to advocate for themselves empowering in FDR settings, and such benefits might apply to victims of domestic violence if the process can be conducted safely.¹³⁴ In considering the impact that family violence can have on vulnerable parties, Field notes the benefits that FDR can have on women generally. FDR empowers women to make their own decisions, rejects gendered norms of power and assumes an equality between the parties, and recognises women's autonomy and voice, giving them the opportunity to be heard and validated.¹³⁵ These assumed benefits to FDR must not blind an FDRP to the risks of vulnerable parties in the FDR process.

At the other end of the spectrum, Wade argues that 'inequality of bargaining power' is 'a shibboleth and catch-cry'.¹³⁶ He argues that

the phrase 'inequality of bargaining power' is repeated ad nauseam as a reason for alleging the ethical unsuitability of certain types of negotiations or mediations. An analysis of power suggests that this phrase should not be used blithely. Power imbalances are more complex than first meets the eye, are always present, and are not necessarily adjusted satisfactorily by switching to another procedure. Many lawyers involved in family litigation are well aware of various forms of power imbalance in the sometimes (ironically) idealised court process. The label of 'inequality of bargaining power' is fashionably epidemic; but the remedy may often (though not always) be worse than the disease.¹³⁷

He cautions that FDRPs should be careful not to 'overreact' to questions of bargaining inequality, and that understanding the complex dynamics of power can assist FDRPs to facilitate the FDR process. He supports Jay Folberg and Alison Taylor's test to define when power imbalances are significant enough to warrant termination of the session, being that '[m]ediators are not charged with the responsibility of balancing

¹³⁰ George Verghese Kurien, 'Critique of Myths of Mediation' (1995) 6(1) *Australasian Dispute Resolution Journal* 43, 54.

¹³¹ Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post Separation Financial Outcomes' (2000) 14(2) *Australian Family Law Journal* 102, 113, 115.

¹³² Dimitrios Eliades, 'Power in Mediation — Some Reflections' (1999) 2(1) *ADR Bulletin* 4, 5.

¹³³ Field, 'Mediation and the Art of Power (Im)Balancing' (n 47) 267–8.

¹³⁴ Rachael Field, 'A Call for a Safe Model of Family Mediation' (2016) 28(1) *Bond Law Review* 83, 84–5.

¹³⁵ Rachael Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21(3) *Australasian Dispute Resolution Journal* 185, 186–7.

¹³⁶ John Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 8(1) *Australian Journal of Family Law* 40, 57.

¹³⁷ *Ibid* 40.

all relationships. They must ensure, however, that participants are not railroaded into choices that are unconscionable’.¹³⁸

Significant research has been conducted to find a workable framework for FDRPs to assess a party’s power to negotiate. The current literature is overwhelmingly focussed on attempting to find tools to assist FDRPs to make better assessments. For example, Joan Kelly and Michael Johnson recognise that family violence history is complex and multifaceted, and advocate for a ‘nuanced’ approach to assessing parties within it.¹³⁹ However, there is no one defined assessment tool for FDRPs to use, and there is concern that some FDRPs are not using assessment tools in FDR sessions.¹⁴⁰

The Attorney-General’s fact sheet refers FDRPs to the Detection of Overall Risk assessment framework,¹⁴¹ though most organisations tend to construct their own screening processes. Sarah Dobinson and Rebecca Gray note that the literature agrees that safety measures are useful tools in FDR, and that screening processes are important, but that there is significant disagreement over the methods by which such screening practices are to occur.¹⁴² They also note the reality of non-disclosure for many victims of domestic violence, be it because they genuinely wish to engage in FDR, feelings of shame, not understanding that what occurred is family violence, or fear of not being believed.¹⁴³ However, again there is no formal or consistent guidance for FDRPs on how to approach these situations. KPMG have suggested the development of nationally consistent approaches and standards in this area, though this recommendation has not been implemented.¹⁴⁴

So how might FDRPs discharge their obligations under the legislative scheme to attempt to find a workable framework for FDR, while also ensuring that parties possess the ability to negotiate freely? In considering how equality of bargaining power affects parties’ capacity to negotiate, FDRPs should be aware that there is never perfect equality between the parties;¹⁴⁵ rather, mediators should instead be satisfied that imbalances in parties’ bargaining power are not so extreme as to inhibit a party’s ability to negotiate freely.

¹³⁸ Ibid 57.

¹³⁹ See Joan B Kelly and Michael P Johnson, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) 46(3) *Family Court Review* 476, 494; Peter G Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plan’ (2008) 46(3) *Family Court Review* 500; Cleak et al (n 22); Katherine A Fowler and Drew Westen, ‘Subtyping Male Perpetrators of Intimate Partner Violence’ (2011) 26(4) *Journal of Interpersonal Violence* 607.

¹⁴⁰ Cleak and Bickerdike (n 60) 23–4.

¹⁴¹ Commonwealth Attorney-General’s Department (n 94).

¹⁴² Dobinson and Gray (n 21) 203–4.

¹⁴³ Ibid 185–6.

¹⁴⁴ KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (Report, December 2008) 75.

¹⁴⁵ Mayer (n 128) 85.

Linda Kochanski suggests investigating with both parties how arguments between them tend to resolve, to get an understanding of whether parties can bargain with each other.¹⁴⁶ Field suggests that FDRPs start with caution in encouraging FDR for victims of family violence, and suggests that FDRPs must prepare parties thoroughly for participation in the process by providing both parties with clear understandings of their expectations and requirements of the process, including collaboration and assisting with option generation, as well as laying down very clear and understood ground rules.¹⁴⁷ Dobinson encourages FDRPs to recognise the relational context of the negotiations, asking the FDRP to consider if the relationship between the parties is a healthy, interdependent relationship or an unhealthy, oppressive one.¹⁴⁸ She claims that

the nature of a relationship cannot be garnered by focusing on a single act of violence suspended in time. Rather it requires looking at the relationship as a whole and considering the levels of trust, care and mutual responsibility that exist within it.¹⁴⁹

By investigating the broader relational context of the relationship, FDRPs become more attuned to the possibility of non-disclosure of family violence and the reasons for it, as well as understanding when a co-parenting relationship between the parties facilitated by FDR might be sustainable despite family violence.¹⁵⁰ This will also assist FDRPs to place adjustments and safety measures into the process to mitigate the risk of family violence disrupting the parties' ability to negotiate.¹⁵¹

B Safety of Parties & Risks That Children May Suffer Abuse

FDRPs must be aware of the safety of the parties engaging in FDR. The 'safety' of a party may refer to a broad range of concerns, such as physical safety, emotional safety or psychological safety, and stress levels.¹⁵² The Attorney-General's fact sheet outlines three risk domains which FDRPs should consider in making their assessment of safety: domestic and family violence and violence towards others; child abuse or abduction; and self-harm.¹⁵³ It recommends that FDRPs ask parties during intake

¹⁴⁶ Kochanski (n 35) 166.

¹⁴⁷ Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (n 135) 191.

¹⁴⁸ Sarah Dobinson, 'Relational Autonomy and Family Dispute Resolution: How a Feminist Approach Can Improve Service Delivery in the Context of Family Violence' (2016) *University of New South Wales Law Journal Student Series* 4: 1–24, 17.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* 18.

¹⁵¹ *Ibid.*

¹⁵² Donna Cooper and Mieke Brandon, 'Navigating the Complexities of the Family Law Dispute Resolution System in Parenting Cases' (2009) 23(1) *Australian Journal of Family Law* 30, 34.

¹⁵³ Commonwealth Attorney-General's Department (n 94).

questions whether they are concerned for their own safety, their children's safety, or the safety of anybody else.¹⁵⁴ However, these questions risk moving beyond the considerations offered to FDRPs by the legislative scheme. In the vast majority of instances, where a party's safety or their children's safety is at risk, this will necessarily affect a party's ability to negotiate. For example, fear of putting a child into a harmful environment may stop a responsible parent from putting forward suggestions for shared time in good faith. But it is not true to say that because a party feels unsafe for themselves or their children that they *necessarily* will lack an ability to negotiate; nor that because there is a risk that a child may suffer abuse that the parties will lack a capacity to negotiate. In other words, the wording of the *2008 Regulations* narrows how FDRPs can consider questions of party and child safety as to how such considerations affect their ability to negotiate.

For example, what of circumstances where parents are unconcerned about the risk to their child, regardless of the facts, or where a party believes that they can negotiate freely, despite their own safety concerns? For example, consider a situation where there is a state-based child protection investigation ongoing. During intake, the other parent discloses this, but informs the practitioner that they see the investigation as the government being 'overbearing'; that they do not believe the child is in any danger; and that they are prepared to discuss having the child stay with the other parent. An FDRP may assess that the issue of child abuse present in the family impacts on the negotiating capacity of the parent, despite what they might say. However, the existence of child abuse may not have any perceivable impacts on a party's ability to negotiate. Where this occurs, under a narrow interpretation of the legislative scheme, where parties are presenting as confident of their ability to negotiate freely, FDRPs lack the discretion to issue a certificate saying that FDR is not appropriate, regardless of any objective considerations of safety for children who may be at risk of abuse. As such, FDRPs are arguably obligated to conduct the session (or delay offering a session until the investigation is complete), and simply to advise parties to consider what is best for the children.

To take another example, consider a situation where a party states that they believe that if an FDR session is conducted, there is a chance that they will be attacked after the session, and that they may be followed home. Nevertheless, when asked whether they believe that this will affect their ability to engage in the FDR session, they advise that they shall not let their fear stop them from negotiating with the other party. Or, one party makes statements which are concerning to the practitioner, such as veiled threats, and the other party is unaware of these statements. Here again, the question of safety is distinct from the question of a party's ability to negotiate freely. The current Regulations, interpreted narrowly, do not allow the practitioner to consider the broader questions of safety outside of its impact on the negotiation dynamic of the FDR session itself. It would be beneficial if the *2008 Regulations* separated these considerations.

¹⁵⁴ Ibid.

Nor does the current wording of the *2008 Regulations* allow the FDRP to consider the safety of third parties, such as themselves or an identified third party who may be at risk (for example, a party's new partner). This is because the *2008 Regulations* say that FDRPs may consider 'the likely safety of the parties'.¹⁵⁵ This is a clear reference to the parties in the proceedings, not *all possible affected parties*.

These scenarios are all problematic. It is appropriate for FDRPs to consider the broad safety of parties in offering FDR sessions, as well as and especially the risks to the children, independent of whether the parties themselves identify that such considerations are likely to affect their ability to negotiate. It is also appropriate for FDRPs to consider how third parties may be affected by an FDR session going ahead, as well as other public policy concerns relating to safety, such as child abduction or fraudulent or criminal behaviour.¹⁵⁶ As such, the current criteria for determining whether FDR is not appropriate is overly narrow as it relates to safety. FDRPs may simply choose not to offer an FDR session. However, they may not issue an Inappropriate Certificate. This has the effect of leaving parties who require legal intervention unable to access the court system, which may have the effect of leaving children without safe, judicially considered arrangements.

C *Emotional, Psychological and Physical Health of the Parties*

Emotional, psychological and physical health might refer to a broad range of issues.¹⁵⁷ On the one hand, reg 25(2)(e) might list factors which consider a party's capacity to mediate. Capacity, for example, is considered quite closely in guardianship and medical law. Capacity in that framework relates closely to autonomy: it is the inherent freedom that a party has to make and accept responsibility for important decisions.¹⁵⁸ In common law, the criterion of capacity is the ability to comprehend and retain information; the ability to use and weigh the information as part of a decision-making process; and the ability to communicate a decision.¹⁵⁹ Factors which may affect a party's capacity include intellectual disabilities or being drug-affected. It is important to note that generally, legal jurisdictions which consider capacity presume that a party has capacity, and place the burden on the decision maker to prove otherwise.¹⁶⁰ Given the desires of the government to encourage participation in FDR and the concepts of self-determination that underpin the legislative scheme, this onus should also exist in making assessments to offer FDR.

¹⁵⁵ *2008 Regulations* (n 1) reg 25(2)(b).

¹⁵⁶ See Boulle and Alexander (n 39) 30.

¹⁵⁷ *2008 Regulations* (n 1) reg 25(2)(e).

¹⁵⁸ See Victorian Law Reform Commission, *Guardianship: Final Report* (Report No 24, April 2012) 99.

¹⁵⁹ *Re JS* [2014] NSWSC 302, [18]. This test is derived from *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, 553–4 (Butler-Sloss LJ).

¹⁶⁰ *PBU v Mental Health Tribunal* (2018) 56 VR 141, 185–6 [143]–[147] (Bell J).

It is also vitally important to recognise that simply having a mental illness, or a history of being drug-affected, does not necessarily affect a party's capacity to make decisions. In *PBU v Mental Health Tribunal*, for example, it was found that a person who had schizophrenia did not lack the capacity to make decisions for themselves, as the existence of the medical condition did not affect their capacity to understand, use or weigh the information given.¹⁶¹ As such, it is incumbent upon FDRPs to not just consider whether either party has a history of mental health illnesses, or if such illnesses exist at the time of intake. Rather, the FDRP should be satisfied that such an illness is actually inhibiting a party's capacity to understand, process, and convey information.

A number of commentators discuss emotional readiness to mediate.¹⁶² I have argued elsewhere that parties can present with deep and complex emotional needs, and that this may impact on their performance in an FDR session.¹⁶³ Parties may present to mediation at different stages of the grief cycle;¹⁶⁴ they may be highly attached to a particular emotional state;¹⁶⁵ or the effects of the separation may still be 'raw'.¹⁶⁶ However, while these factors may affect a party's ability to come to an agreement, FDRPs should think carefully about whether or not such factors affect their power to negotiate. In most of these situations, parties are still able to advocate for their own interests. Research from Anne Barlow et al in the United Kingdom context has found that an asymmetry between parties in readiness to engage in FDR is normal.¹⁶⁷ They suggest that in scenarios where parties are not emotionally prepared to mediate, they should be given a thorough explanation of the procedures and an understanding of the practical decisions to be discussed; that sometimes parties should be limited to discussing temporary arrangements; and that parties should be supported by other therapeutic interventions before and during the FDR process.¹⁶⁸ As such, FDRPs should tailor their processes where parties are in highly emotional states, but it would be rare that these emotional states are enough to warrant the issuance of an Inappropriate Certificate, or for the FDRP not to offer an FDR session at all.

¹⁶¹ Ibid 213 [233].

¹⁶² See Fisher and Brandon (n 39) 261; Andrew J Bickerdike and Lyn Littlefield, 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' (2001) 18(2) *Mediation Quarterly* 181, 182; Anne Barlow et al, *Creating Paths to Family Justice: Briefing Paper and Report on Key Findings* (Report, University of Exeter, July 2017) 6.

¹⁶³ Joshua Taylor, 'It's Time to Abolish the Genuine Effort and Non-Genuine Effort Certificates in Family Dispute Resolution' (2019) 33(1) *Australian Journal of Family Law* 29, 42.

¹⁶⁴ Robert E Emery, *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* (Guilford Press, 1st ed, 1994) 52.

¹⁶⁵ Bickerdike and Littlefield (n 162).

¹⁶⁶ Barlow et al (n 162) 6.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid 6–7.

D *Other Factors That the FDRP Deems Relevant (the 'Catch-All Provision')*

The catch-all provision is perhaps the most confusing provision to interpret. FDRPs have expressed confusion with their scope of authority to issue Inappropriate Certificates on a broad range of issues. This section will consider in detail four complex decision-making factors from the literature that FDRPs appear to give weight to in practice: administrative concerns; prospects of settlement, which include considerations of parties' history of entrenched conflict, the likelihood that parties are negotiating in bad faith, and the willingness or motivation of the parties to engage in FDR; the best interests of the children; and where parties do not seem to have the capacity to resolve the matter in another way.

1 *Administrative Concerns*

FDRPs have raised a number of administrative concerns which they claim to have impacted their capacity to offer FDR, and in doing so perhaps led to the issuing of improper Inappropriate Certificates. These include the inability of parties to pay costs;¹⁶⁹ lack of capacity to offer an appropriate FDR forum;¹⁷⁰ and pragmatic concerns such as waiting times, unavailability of a party for a time, or inability to agree on session times.¹⁷¹

Many of these factors appear to have little connection to the criterion of free negotiation and are instead commercial decisions. Where an appropriate forum cannot be offered in a reasonable timeframe, parties should be referred to another organisation. Where parties cannot agree on a session time, an organisation is well within its rights to refuse to offer a service. It may also be appropriate to offer a certificate stating that a party refused or failed to attend, if they offer a reasonable choice of times and advise that failure to attend may result in a certificate being issued.¹⁷² However, as these concerns are not related to a party's capacity to negotiate, Inappropriate Certificates should not be issued.

2 *Prospects of Settlement*

A number of recommendations in the literature may be considered as broadly suggesting that FDR is not appropriate where there is some likely barrier which would make settlement unlikely. Kochanski suggests that FDRPs should consider whether parties are truly motivated to settle, or if they are just there to get a certificate.¹⁷³ Linda Fisher and Mieke Brandon suggest that an FDRP should assess whether parties have 'the necessary skills and motivation', and list the following

¹⁶⁹ Centacare Australia, Submission No 125 to Australian Law Reform Commission, *Family Law for the Future: an Inquiry into the Family Law System* (May 2018) 3.

¹⁷⁰ *Ibid* 13.

¹⁷¹ CatholicCare Victoria & Tasmania (n 88) 79.

¹⁷² *2008 Regulations* (n 1) reg 26.

¹⁷³ Kochanski (n 35) 165–6.

factors which will affect the prospects of success as ‘indicators on which a decision can be made about the suitability of the parties and the dispute for mediation’:

- a clear statement by one party that he or she will not participate in dispute resolution, and wants their day in court;
- bad faith bargaining, or a clear likelihood of this;
- a matter which is primarily a dispute of fact;
- parties who have major, non-negotiable values differences;
- lack of commitment by one or more of the parties to resolve the dispute;
- likelihood that the costs of the dispute outweigh the benefits.¹⁷⁴

Gay Clarke and Iyla Davies suggest that FDR is not appropriate where parties are not trying to resolve the dispute genuinely and are seeking to gain a tactical advantage, and where ‘the parties are so conflict ridden they are incapable of considering the dispute between them apart from their own feelings ie., the “all or nothing” dispute’.¹⁷⁵ Laurence Boulle and Nadja Alexander have suggested that mediation should not be offered where ‘past experience suggests they will not respond to mediation’.¹⁷⁶ They further claim that mediation should not be offered where

it will make the situation worse, or where the parties are likely to use mediation for ulterior purposes, for example to indulge in destructive conflict or to fish for information.¹⁷⁷

These suggestions have the same underlying rationale: where there are reasons to suggest that FDR will not be successful, it ought not to be offered. There is some merit to this view. There are cost and time considerations in mandating FDR when it is likely to be ultimately unsuccessful. Tania Sourdin notes that by forcing parties to go through a mediation session where the issue is likely to go unresolved, parties are having to wait longer to seek a judicial determination. The waiting period could have the effect of making the situation worse,¹⁷⁸ and was a concern raised by parents in the Smyth et al study.¹⁷⁹ FDR is undoubtedly a stressful and emotionally draining process in which to participate; doing so unnecessarily should, of course, be avoided.

¹⁷⁴ Fisher and Brandon (n 39) 252–3.

¹⁷⁵ Clarke and Davies (n 8) 93.

¹⁷⁶ Boulle and Alexander (n 39) 33.

¹⁷⁷ Ibid.

¹⁷⁸ Tania Sourdin, ‘Making People Mediate, Mandatory Mediations in Court-Connected Programmes’ in David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 1st ed, 2005) 147, 148.

¹⁷⁹ Smyth et al (n 40) 84–5.

Providers also exist in a context of limited resources. It might be argued that provision of those services should instead be offered to those most likely to use the process genuinely and benefit from it.

However, there are a number of reasons to suggest that such determinations should not be made by the FDRP. First, there are many other benefits that FDR can offer outside of just making agreements. FDR can be an empowering and useful process, even if the parties are unwilling to move. Mayer argues that not all parties are necessarily seeking agreement as the primary goal of mediation; parties may instead be simply seeking a forum by which to better communicate their concerns.¹⁸⁰ Robert Emery argues that there is a benefit to parties being able to reach their underlying emotions in an FDR session, and that this moves them towards agreement in the future.¹⁸¹ FDR also gives the mediator the opportunity to test the parties' positions and bring the child into the conversation where they may otherwise have been missing. In this way, FDR is an educative experience for the parties. Further, FDR is an opportunity to model and encourage positive communication between parties; there is significant value in parties simply having a conversation with each other, especially where the conflict is high.¹⁸² As such, FDRPs who limit parties' participation in the process because agreement is unlikely are also removing them from other potential benefits. Secondly, FDRPs may be wrong in their initial impressions, and FDR may unexpectedly produce meaningful outcomes. The way parties present in intake sessions may not reflect how they will act in an FDR session. Statements about wanting to go to court may be masking a deeper sense of hurt or frustration.¹⁸³ FDRPs should be giving parties the benefit of the doubt when considering the prospect of resolution in offering FDR.

Even if the FDRP determines that they do not wish to offer an FDR session in the above scenarios, it is unlikely that it is in the scope of their authority to offer an Inappropriate Certificate to the parties. The Commonwealth Government specifically rejected making exceptions to FDR for cases of entrenched conflict and substance abuse, fearing that potentially successful mediations would be excluded.¹⁸⁴ More importantly, these considerations do not fit within the criterion of determining an ability to negotiate. A lack of *willingness* to negotiate does not mean that parties *cannot* negotiate. An unwilling party is not necessarily an incapable party, nor a powerless one. However, FDRPs should also be mindful that a general lack of willingness to engage with another party may be an indicator of undisclosed domestic violence or

¹⁸⁰ Bernard Mayer, 'Facilitative Mediation' in Jay Folberg, Ann L Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques, and Applications* (Guilford Press, 1st ed, 2004) 41.

¹⁸¹ Emery (n 164) 66.

¹⁸² See, eg, Elizabeth Clancy et al, *Family Dispute Resolution Evaluation: An Outcome Measurement Tool Development Project* (Report, Department of Social Services, November 2017).

¹⁸³ Emery (n 164) 27.

¹⁸⁴ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (n 7) 9.

power balance concerns. In deferring to a narrow interpretation of the legislative scheme, a lack of prospects for success — be it because parties are unwilling; are entrenched in conflict; or because they are attending the session in perceived bad faith — is not sufficient to meet the criterion.

3 *Parties Not Acting in the Best Interests of Their Children*

During intake, some parents may appear to not be considering the best interests of their children. There is some justification for believing that this is a requirement in the legislation: under the *FLA*, the best interest of the children is the paramount consideration in parenting orders.¹⁸⁵ Advisers, such as FDRPs, are required under the *FLA* to inform the parties that they should regard the best interest of the child as the paramount consideration, and encourage them to act on the basis that these interests are best met (including having a meaningful relationship with both parents and being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence).¹⁸⁶ Moreover, the *FLA* explicitly encourages parents 'in reaching their agreement, to regard the best interests of the child as the paramount consideration'.¹⁸⁷

However, there is no provision in the legislative scheme that gives FDRPs the right to issue an Inappropriate Certificate if they are satisfied that parents are not acting in the child's best interests, unless it affects a party's ability to negotiate. One reason for this is noted by Bruce Smyth et al, who observe that FDRPs often have differing understandings of what is in the children's best interests.¹⁸⁸ Moreover, most community FDRPs use a facilitative mediation model.¹⁸⁹ The key philosophy of this model is that mediators do not evaluate parties' views, as parties maintain responsibility for content and outcomes and the parties are assumed to be best placed to make decisions regarding their children.¹⁹⁰ Arguably, neither the advisory nor facilitative models of FDR were developed to ensure the full and effective promotion of the rights of the child.¹⁹¹ The current legislative framework does not give FDRPs the authority to deem FDR inappropriate if they are of the view that parents are not sufficiently child-focussed or are acting against their child's best interest.

¹⁸⁵ *FLA* (n 2) s 60CA.

¹⁸⁶ *Ibid* s 60D.

¹⁸⁷ *Ibid* s 63B(e).

¹⁸⁸ Smyth et al (n 40) 4.

¹⁸⁹ Cooper and Field (n 18) 165.

¹⁹⁰ Mayer, 'Facilitative Mediation' (n 180) 29.

¹⁹¹ See Kirsikka Salminen, 'Mediation and the Best Interests of the Child from the Child Law Perspective' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer, 2018) 209, 219.

4 *No Other Avenues of Resolution*

Perhaps the most concerning conclusion to come from Smyth et al's study is that many FDRPs are influenced to offer FDR, when they would otherwise consider it not appropriate, if they feel that parties have no other place to go to resolve their dispute¹⁹² — for example, if parties say that they cannot afford or lack the emotional capacity to go to court. The natural inclination is to reassess the decision with a view to providing the parties with an option for resolution. However, this is not acceptable conduct. This article has argued that the *2008 Regulations* call for a narrow interpretation, with FDR being offered wherever possible. However, by facilitating an FDR session when an FDRP would otherwise issue an Inappropriate Certificate, FDRPs risk putting parties in a hostile situation, and having them agree to a settlement inconsistent with their interests. These agreements are often also formalised into parenting plans,¹⁹³ potentially leaving the party in a much worse position, because even though a parenting plan is not legally enforceable, a valid parenting plan may be considered by the courts in making parenting orders or in accusations of breaches of parenting orders.¹⁹⁴ A parent in this circumstance may request an FDR session, and this request may form part of an assessment as to the parent's capacity to negotiate freely. However, according to the Regulations, if the FDRP is of the view that the parent lacks capacity, they *must not* offer FDR, regardless of the alternatives available to the parties. By doing so, they are putting the parties at risk and are breaching their legal obligations.¹⁹⁵

VI CONCLUSION: REFORMING THE REGULATION 25(2) FACTORS

The above analysis draws two clear conclusions. First, FDRPs are often acting outside of their legal authority when they choose to issue Inappropriate Certificates. Second, the *2008 Regulations* as they currently are drafted are unduly narrow and if applied faithfully, limit FDRPs from being able to intervene and issue Inappropriate Certificates in circumstances where they are absolutely warranted. It is quite possible that these conclusions intersect and that FDRPs are choosing to apply best practice

¹⁹² Smyth et al (n 40) xii.

¹⁹³ Agreements in FDR sessions are sometimes, though not always, formalised into parenting plans. An agreement becomes a parenting plan if it is in writing and dated, made between and signed by the parents of the child, and deals with appropriate parenting matters: *FLA* (n 2) ss 63C(1)–(2). A parenting plan is not legally enforceable, however a valid parenting plan may be considered by the courts in making parenting orders or in accusations of breaches of parenting orders: at s 70NBB. Parenting plans may also be submitted to the courts to be made into consent orders. A consent order is a written agreement between parents which is then approved by the court and has the same legal effect as if it were an order of the court: 'If You Agree on Parenting Arrangements', *Family Court of Australia* (Web Page, 3 May 2016) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/if-you-agree-on-arrangements/>>.

¹⁹⁴ *FLA* (n 2) s 70NBB.

¹⁹⁵ *2008 Regulations* (n 1) reg 25(1).

as advocated for in the literature, even when it leads them to act outside of their legal authority. It is clear from the above evidence that FDRPs often misunderstand their obligations under the *2008 Regulations*, especially within the operation of the overarching criterion.

One solution is for the *2008 Regulations* to be reworded to provide greater guidance to FDRPs. It would be useful, as a starting point, for the *2008 Regulations* to separate the criterion of an ability to negotiate freely from questions of safety and risks to children. However, my analysis also raises a broader issue: while commentators largely agree on questions of safety and family violence, there is little discussion of when FDR may be inappropriate, as these concerns apply to the catch-all provision. This article has identified that the *2008 Regulations* do not adequately cover the range of questions FDRPs should be considering in making their decisions, due to the narrowly constructed wording of the overarching criterion. However, in considering how the Regulations should be reworded, the following questions arise: what factors *should* be considered by FDRPs in making their assessments? Should FDRPs be free to make any determination they see fit? Is there a better overarching criterion that should be used? Or, are there other factors which impact on FDR unrelated to a party's ability to negotiate, which warrant the issuance of Inappropriate Certificates? These are questions which still require addressing. It is hoped that this article has made some initial contributions to this broad and important discussion.