LITERATURE REVIEW: CULTURAL CONSIDERATIONS IN ALTERNATIVE DISPUTE RESOLUTION

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THIS LITERATURE REVIEW WAS COMMISSIONED BY THE MIGRATION COUNCIL OF AUSTRALIA IN CO-OPERATION WITH THE JUDICIAL COUNCIL OF CULTURAL DIVERSITY. IT WAS INTENDED TO INFORM THE DEVELOPMENT OF A GUIDANCE NOTE FOR JUDICIAL OFFICERS WITH A SPECIFIC FOCUS ON CULTURAL CONSIDERATIONS THAT MIGHT ARISE AS PART OF THE FAMILY DISPUTE RESOLUTION PROCESS. A BROAD OVERVIEW IS PROVIDED CONSIDERING THE WORK UNDERTAKEN BY FAMILY DISPUTE RESOLUTION PRACTITIONERS AND THE INTERSECTION OF WESTERN STYLE FACILITATED DISPUTE RESOLUTION PRACTICES WITH CULTURALLY AND LINGUISTICALLY DIVERSE COMMUNITIES.

I INTRODUCTION

This literature review was conducted to assist in informing the development of a guidance note to judicial officers, tribunal members and mediators on cultural concerns and approaches to alternative dispute resolution (ADR) within the context of family dispute resolution (FDR). It is intended as an overview of literature with respect to cultural considerations in FDR rather than a comprehensive analysis of a specific area of focus. Part II considers the work of Family

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Dispute Resolution Practitioners (FDRPs) and their attitudes towards culture. A proposal for amending pre-mediation practices is also presented. Part III explores the intersection of culture with the Western style of facilitated mediation and considers challenges that mediators can face when managing a mediation for a culturally and linguistically diverse community (CALD). Part IV considers cultural views on money and intergenerational succession in the context of East Asian countries which provides some further assistance in understanding approaches a person from an East Asian culture may take toward FDR.

II FDRPs

A *Accreditation and Obligations of FDR Professionals*

The *Family Law (Family Dispute Resolution Practitioners) Regulations (2008)* (Cth) (*FDR Regulations*) provide the accreditation process, criteria and obligations for a FDRP. Prior to providing family dispute resolution services the FDRP must take certain steps such as an assessment of the parties and a consideration as to whether FDR is appropriate in the circumstances.[1] They should consider whether the ability of either party to negotiate freely 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.[2]

If providing FDR services, the FDRP is obliged to ensure that the FDR process is suited to the needs of the parties involved. The *FDR Regulations* provide by way of example that this can be done by "ensuring the suitability of the family dispute resolution venue, the layout of the family dispute resolution room and the times at which family dispute resolution is held".[3] These appear to be general examples and not a strict guideline that would limit the consideration of the FDRP, however, limitation to the venue, layout of the venue and the time that an FDR may occur as examples could possibly cause an FDRP to interpret the example in a limited sense.

While there is no specific mention in the *FDR Regulations* of a requirement to make a consideration of cultural identity or the cultural appropriateness of proceeding with FDR, a consideration of the cultural appropriateness of the FDR model could be made and accounted for by the FDRP. The *FDR Regulations* require that FDRPs hold certain qualifications or

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1 *Family Law (Family Dispute Resolution Practitioners) Regulations (2008)* (Cth) s 25.

2 Ibid s 25(2)(a)-(f).

3 Ibid s 29(a).

accreditation such as a Vocational Graduate Diploma of Family Dispute Resolution or an equivalent postgraduate award, or accreditation under the National Mediator Approval Standards (NMAS).[4] Considerations of culture in the context of separating families and the development of culturally appropriate strategies for FDR form part of the coursework for qualification that an FDRP must obtain.[5]

The NMAS[6] provides guidance in Pt III for mediators on the method in which mediation may be conducted. Notably, the guidelines provide that when conducting a preliminary conference or intake, mediators should:

> [Assess] whether mediation is suitable and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or introducing safeguards where violence is an issue).[7]

The NMAS are a voluntary scheme initially introduced in 2008 to support and promote high standards by mediators and enhance the quality of mediation services in Australia. A mediator who is accredited under the NMAS by a Recognised Mediation Accreditation Body may be assessed under the *FDR Regulations* as eligible for accreditation as a FDRP, provided that they have undertaken the prescribed further education.[8]

B *FDR Professionals and Attitudes to Culture*

There is some evidence that mediators influence the content and outcome of the disputes they mediate.[9] Their attitudes towards their own culture and that of the people they work with are important given their position and potentially strong influence over the matter. In 2011 Susan Armstrong published her research into attitudes towards culture in family dispute resolution professionals ("FDR Professionals") which involved 219 FDR Professionals participating in an online survey and a semi-structured interview process.[10] Armstrong found that most of the FDR Professionals participating in the research felt that they were culturally responsive and confident about understanding and responding to culture in an FDR, but notes that this was inconsistent with earlier research "where family relationship service professionals, especially those in [Family Relationship Centres], expressed a lack of confidence about engaging with

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4 *Family Law (Family Dispute Resolution Practitioners) Regulations (2008)* (Cth) s 5.

5 See generally, for example: Relationships Victoria, *Graduate Diploma of Family Dispute Resolution CHC81115*, <http://www.relationshipsvictoria.com.au/training/training/course/5/6>; The College of Law, *Family Dispute Resolution Practice (FDRP)* (2018) <https://www.collaw.edu.au/learn-with-us/our-programs/postgraduate-applied-law-programs/family-dispute-resolution-practice>.

6 Mediator Standards Board, *National Mediation Accreditation Standards* (1 July 2015) <https://msb.org.au/themes/msb/assets/documents/national-mediator-accrediation-system.pdf >.

7 Mediator Standards Board, n 6 Pt III cl 3.2(a).

8 *Family Law (Family Dispute Resolution Practitioners) Regulations (2008)* (Cth) s 5(3).

9 Rachel Field, 'Mediation Ethics in Australia: A Case for Rethinking the Foundational Paradigm' (2012) 19 *James Cook University Law Review* 41.

10 Susan Armstrong, 'Encouraging Conversations About Culture: Supporting Culturally Responsive Family Dispute Resolution' (2011) 17 *Journal of Family Studies* 233

Culturally and Linguistically Diverse (CALD) clients compared with other types of clients".[11] She considered that participants in her research had self-selected for the study and deduced from this that they may "demonstrate a high degree of commitment to cultural responsiveness".[12]

The participants did not feel that either their organisation or FDR services were adequately equipped and resourced to engage with CALD communities.[13] Engaging members of CALD communities with FDR services is an important priority, but the method and structure of engagement should be carefully considered prior to implementation. Armstrong notes that community engagement requires high levels of organisational commitment, and that engagement should not make excessive demands of service providers or communities, nor create unrealisable expectations.[14] Even if engagement with CALD community members is successful there is still a chance that uptake of services may be slow, however this should not present an impediment to the services being provided. Armstrong records that the participants reported that only a third of FDR providers had adopted parenting programs to enable the participation of CALD participants.[15] Wherever parents do choose to utilise the FDR service it is essential they are able to derive the full benefit from the service and that the program is responsive to their needs. Armstrong considers "programs and resources should be adapted to ensure that participation is optimised".[16]

The findings of this research suggested that authentic conversations were a key consideration in assisting FDRPs to be culturally responsive in their engagement with CALD participants.[17] The research participants strongly endorsed cultural awareness training, however Armstrong notes that this type of training is "widely recognised as necessary but insufficient in developing culturally sensitive and competent practitioners."[18] Research participants complained that existing forms of cultural awareness training were too shallow or superficial and were not tailored to specific practice.[19] The research participants identified that their preferred methods of training or learning would be "structured, service-specific, collective conversations about culture" which Armstrong considers are learning methods that have the capacity to facilitate deeper understanding and engagement.[20]

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[11] Armstrong, n 10, 243.

[12] Armstrong, n 10, 243.

[13] Armstrong, n 10, 244.

[14] Armstrong, n 10, 244.

[15] Armstrong, n 10, 244.

[16] Armstrong, n 10, 244.

[17] Armstrong, n 10, 245.

[18] Armstrong, n 10, 245.

[19] Armstrong, n 10, 245.

[20] Armstrong, n 10, 245.

It is critical that in developing cultural competence that it is understood that"cultural competence does not mean having an [encyclopaedic] knowledge of myriad cultural groups'.[21] It would not be feasible or practical to require FDRPs to attain and maintain such a level of knowledge. It would be recommended, however, that FDRPs are familiar with culture and the way that cultural attitudes can shape people's experiences and interactions with the world around them. This includes the mediator presenting with awareness about their own culture and how that may shape their approach to a cross-cultural mediation. Michelle LeBaron and Zena Zumeta say that mediators should be aware of their own cultural "starting points and currencies" – starting points being places where it feels "natural" to begin and currencies being things that are valued.[22]

In order to highlight the importance of the mediator recognising their own cultural starting points, LeBaron and Zumeta share an example of a cross-cultural mediation:-

> [E]arly in a family mediation session about parenting plans postdivorce [sic] for a Chinese immigrant family, one party suggested that their child be sent to live with his grandmother in Hong Kong. The mediator, listening from an individual-ist starting point, listed this suggestion as an option, and continued talking with the parents about their lifestyles, daily schedules, child care arrangements, and relationships with the child. Only later in the session did it become clear to the mediator that the collectivist starting point of the family led to the view that parenting could be done as well, by the child's grand-parent as by the parents, or better. The mediator's values about preserving the nuclear family and frequent contact with both parents were different from the parents' values of facilitating care giving by an available family member while both parents worked full-time. If this mediator had been aware of cultural starting points — hers and the parents' — she might have recognized that they led to different understandings of the family's and children's needs and helped effect a less circuitous resolution.[23]

A culturally competent mediator would take culture into account by first noticing how their own cultural norms and values shape their views and their interactions and consider how their own culture may limit their ability to interpret the experiences, norms and values of people who are different.[24] Mieke Brandon and Beth Dababneh say that a culturally competent FDRP is a practitioner who is not only aware of but also has an appreciation for culture – this practitioner would be able to use their cultural knowledge "to provide a culturally responsive service".[25] It is not suggested that a FDRP should have a full knowledge of each and every possible culture but they should be equipped with the skills to identify their knowledge and limitations and plan their engagement with CALD and other diverse clients.

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[21] Michelle LeBaron and Zena Zumeta, 'Windows on Diversity: Lawyers, Culture, and Mediation Practice' (2003) 20(4) *Conflict Resolution Quarterly* 463, 465.

[22] LeBaron and Zumeta, n 21, 465.

[23] LeBaron and Zumeta, n 21, 465.

[24] LeBaron and Zumeta, n 21, 466.

[25] Mieke Brandon and Beth Dababneh, 'Children's Rights to Culture in Australia: How FDR Mediation Can Support These Rights' (2016) 6 *Family Law Review* 77, 85.

C *Analysis of Culture and Parties' Expectations Prior to Mediation*

This literature review considers culture broadly and often in the context of nationality based or religious based cultural groups. It is important for FDRPs to keep in mind that a person may belong to several cultural groups and several subcultural groups and it is important to consider their culture not just in the broad sense but also by reference to details that may be disclosed or become apparent throughout a pre-mediation intake interview. For example, there would be different considerations and lived experiences for a person who identifies as part of the LGBTIQ community who comes from a deeply religious family to a person who identifies as heterosexual who also comes from a deeply religious family. Subcultural considerations should form part of a thorough pre-FDR analysis and FDRPs should be encouraged to give consideration not only to heritage and CALD status but also to any disability or otherwise that may impact on a person's presentation and engagement with the process.

Rebekah Doley wrote that mental health concerns had the potential to impact on disputants in FDR and considered this issue with respect to disputants with Autism Spectrum Disorder (ASD) who are involved in the FDR process.[26] She identified that many symptoms of ASD had the capability to cause difficulty for a person attempting to engage in FDR. Symptoms which might negatively impact on a person's FDR participation include impairment in social communications and interactions, restricted patterns of behaviour, interests or activities, and difficulties with executive functioning, language, and non-verbal communication.[27] Doley says:

> The mediator will also need to bring exceptional skills in managing the process and directing the parties through the relevant steps of the model. Dealing with power issues, unrealistic expectations, one party dominating and controlling the process, and losing impartiality are issues that can arise in exceptional circumstances for mediators generally, but which are highly likely to be present in mediations with AS individuals.[28]

FDRPs may be assisted by implementing further pre-mediation steps that allow them to identify individual preferences for the manner in which the FDR would be conducted. A challenge that many FDRPs may face in the identification of individual preferences arises in the manner that intake questionnaires and forms are designed and administered. A person may not meet the FDRP until initial intake paperwork has been completed and as a result the FDRP may not have information that could be critical to the success of FDR available to them prior to the commencement of the mediation process.

The Family Law Detection of Overall Risk Screen ("DOORS") is a confidential screening process developed for use by family law professionals at the point of entry into the family law system which was released in Australia in 2013.[29] DOORS comprises a three-part framework

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[26] Rebekah M Doley, 'Working in ADR with Disputants on the Autism Spectrum' (2016) 27 *Australasian Dispute Resolution Journal* 150.

[27] Doley, n 26, 151.

[28] Doley, n 26, 156.

[29] Jennifer McIntosh, Jamie Lee and Claire Ralfs, 'The Family Law DOORS: Research and Practice Updates' (2016) 98 *Family Matters* 34.

that is designed to support family law professionals with the identification, evaluation and response to risks that may arise in a family separation.[30] There is an initial screening interview which can be completed using software such as the DOORS online application or by pen and paper that explores culture and religious background, conflict management style, and safety among other topics related to the separation and relationship between the parties.[31] Once this is completed a summary of risk factors and suggestions for follow-up discussions and response is generated for the practitioner who can tailor their response and seek further resources for follow up.[32] DOORS has been implemented within all family law services operated by Relationships Australia South Australia and by some other relationships services and law firms in Australia in addition to pilot trials that have been conducted internationally.[33]

DOORS has faced challenges such as slow uptake of the program by service providers due to concerns about the length and complexity of the screening questionnaire – if a full screening is conducted a client would need to answer 109 questions in a yes or no format.[34] It is noted that the questionnaire is customisable and a practitioner may choose to conduct a full screening or only screen for certain risk factors, depending on the needs to the case.[35] The accessibility of DOORS and other pre-mediation screening methods for Indigenous or CALD clients and people with limited literacy is a further concern. It is suggested that practitioners or interpreters may assist by reading the questions to clients if necessary with anecdotal evidence suggesting that interpreters often considered it easier to work from a written document than a face to face interview.[36] These challenges are unlikely to be unique to the DOORS model; screening tools that rely on a client to respond to questionnaires will likely encounter this feedback to varying degrees depending on the complexity and scope of the inquiry. The implementation of any pre-mediation screening model and the practical challenges associated will ultimately be for the provider of the service and its practitioners to address and overcome.

Dorcas Quek Anderson and Diana Knight considered the challenges that mediators face among the rapid growth of culturally diverse disputants in both Australia and Singapore.[37] They concluded that a pre-mediation intake form with targeted questions would assist mediators in navigating "cultural complexity" while retaining flexibility that assists the mediator in tailoring their understanding of the parties and the mediation process on a case by case basis.[38] They acknowledged that the pre-mediation stage already comprises of intake questionnaires which

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30 McIntosh, Lee and Ralfs, n 29, 35.

31 Jennifer McIntosh, *The Family Law DOORS: A New Whole-of-family Approach to Risk Screening* (11 September 2013) Australian Institute of Family Studies <https://aifs.gov.au/cfca/2013/09/11/the-family-law-doors-a-new-whole-of-family-approach-to-risk-screening>.

32 McIntosh, n 31.

33 McIntosh, Lee and Ralfs, n 29, 35.

34 McIntosh, Lee and Ralfs, n 29, 37.

35 McIntosh, n 31.

36 McIntosh, Lee and Ralfs, n 29, 38.

37 Dorcas Quek Anderson and Diana Knight, 'Managing the Inter-cultural Dimensions of a Mediation Effectively – A Proposed Pre-mediation Intake Instrument' (2017) 28(2) *Australasian Dispute Resolution Journal* 89.

38 Quek Anderson and Knight, n 37.

are designed to elicit information about the dispute, give an understanding of the parties' backgrounds, expectations, and any details that might make a FDR untenable such as domestic violence.[39] This proposed model would assist with identification of subcultural issues that may not be immediately apparent to the FDRP.

Quek Anderson and Knight proposed a pre-intake questionnaire that would be administered by way of a face to face interview which would take up to one hour and would contain a variety of questions which would allow the participant to clearly express their preferences prior to mediation.[40] Examples of potential questions include:

- Describe how you have tried to communicate your concerns to the person whom you now have a conflict with;
- When I have a dispute with someone:
    - I tend to "say things as they are" rather than talking around the point Strongly Disagree / Disagree / Agree / Strongly Agree
    - I am comfortable with *the other person* fully expressing his or her disagreement with me. Strongly Disagree / Disagree / Agree / Strongly Agree.[41]

These questions will assist FDRPs to align their communication style with that of the parties. The FDRP can use the information gained in this questionnaire to adjust their questions and communication style to that of the parties to avoid or minimise the occurrence of clashes noting that the mediator will need to actively manage the conversation and reframe statements to help the parties reach a mutual understanding.[42]

Quek Anderson and Knight highlighted "saving face" as a concern for many parties, though the extent and the form that an attempt to save face takes can vary. A FDRP might be assisted by asking questions that elicit information from parties with respect to their views about saving face and the perceptions of others such as:

- In trying to resolve this dispute with the other person, how the other party perceives me is important. Strongly Disagree / Disagree / Agree / Strongly Agree
    - [follow up question] In what way? How would you prefer the other party to perceive you?[43]

This type of questioning attempts to identify concerns that a person may have about their own self-image in the eyes of the other party and the mediator and allows the FDRP to tailor their interaction with the party – for example, a person with high concern for face is likely to "crave for the mediator's regard', so the mediator can use an active demonstration of understanding

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[39] Quek Anderson and Knight, n 37, 92.

[40] Quek Anderson and Knight, n 37, 92.

[41] Quek Anderson and Knight, n 37, 94.

[42] Quek Anderson and Knight, n 37, 94.

[43] Quek Anderson and Knight, n 37, 96.

of that party's perspective to assuage any concerns that person may have that the mediator has a poor impression of them.[44]

Quek Anderson and Knight further identify that the impressions parties have of power and authority in respect of those involved (such as the other party, the mediator, and /or broader cultural group) may impact on the mediation process. This was the experience of Judith Herrmann and Claire Holland, who wrote about their experiences as mediators adapting the Australian approach to mediation to different settings overseas with a specific focus on their personal experiences designing and adapting mediation programs in refugee camps in the Central African Republic and on the Thailand-Myanmar (formerly Burma) border.[45] A specific challenge Holland encountered during her experience in the refugee camps on the Thailand-Myanmar border was that in some cases the participants did not feel comfortable with some aspects of the mediation process such as negotiation of outcomes or engaging in a direct conversation.[46] Observing this reluctance Herrmann and Holland concluded that a requirement to engage in direct negotiations in the mediation could cause people to feel pressured and stressed and could have the effect that such a requirement would dissuade people from reporting issues or using the conflict resolution system that was in place.[47]

Quek Anderson and Knight suggest intake questions that would ascertain each of the parties' expectation of the level of authority their mediator will have such as:

- It is important for my mediator to have the following attributes:
    - Older in age than me
    - Same gender as me
    - Higher social position and qualifications than me

    Strongly Disagree / Disagree / Agree / Strongly Agree;[48]

This question helps the mediator to understand whether they will be a suitable person to mediate the dispute, and will help them to identify addressable concerns and resolve them, for example if experience is important to the parties, the mediator can reassure the parties of their experience and qualifications.[49] In considering power, a mediator should also be aware of the level of guidance the parties expect – a party with a low preference for guidance from the mediator may respond poorly to suggestions made. A question could be asked to elicit an understanding of the parties' expectations such as:

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[44] Quek Anderson and Knight, n 37, 96.

[45] Judith Hermann and Claire Holland, 'Co-creating Mediation Models: Adapting Mediation Practices when Working Across Cultures' (2017) 28(1) *Australasian Dispute Resolution Journal* 43.

[46] Hermann and Holland, n 45, 47.

[47] Hermann and Hollands, n 45, 47.

[48] Quek Anderson and Knight, n 37, 96.

[49] Quek Anderson and Knight, n 37, 96.

- I expect the mediator to give his or her views on the best way to resolve the dispute. Strongly Disagree / Disagree / Agree / Strongly Agree.[50]

This question allows a FDRP to identify the level of guidance the parties are likely to require, if any guidance is required at all, which will enable them to adjust their method to the needs of the parties.[51]

Hermann and Holland identified challenges that may arise where there is a power imbalance between the parties – left unchecked the more powerful party may "dominate the process', but if power is addressed with too much attentiveness to the less powerful party this may cause the other party to feel that there is a bias or a preference that undermines the fairness of the process.[52] If the intervention by the FDRP went too far the attempts to balance the power could disempower a party by delegitimising them, or if power imbalance is addressed "too directly" the outcomes could be "unrealistic" and "the parties are likely to return to their "old roles" once they leave the mediation room.'[53]

It would be risky for a mediator to make a sweeping assumption that all parties of a certain cultural background will respond positively to their approach; a mediator should be aware of the parties' expectations and preferences and have the skill to tailor their professional approach to suit the needs of the parties. Quek Anderson and Knight conclude by acknowledging that this proposed intake interview is not a comprehensive solution, but should ideally form part of a preliminary exploration into tools that assist mediators to identify and navigate culture in disputes.[54]

This type of comprehensive face-to-face assessment may face criticism and slow uptake from service providers as a result of similar concerns raised in response to the DOORS model. The practical reality may be that some service providers simply do not have the staff or time available to conduct face to face interviews of up to an hour with each party to the dispute.

D *Incorporation of Children's Rights to Culture into FDR*

The *Family Law Act 1975* (Cth) ('the Act') and the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), among other things, require mediators to:

- Ensure that the best interest of the child is the paramount consideration;[55]
- Give advice to parents as to what the law says about shared parenting;[56]
- Satisfy themselves that the parties are able to negotiate freely as part of an assessment of the suitability of the parties for FDR;[57]

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[50] Quek Anderson and Knight, n 37, 97.

[51] Quek Anderson and Knight, n 37, 97.

[52] Herrmann and Holland, n 45, 47.

[53] Hermann and Holland, n 45, 47.

[54] Quek Anderson and Knight, n 37, 97.

[55] *Family Law Act 1975* (Cth) s 60D.

[56] *Family Law Act 1975* (Cth) s 63C(2) – with respect to creating a parenting plan.

[57] *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25.

- Decider whether the parties have made a genuine attempt to resolve the matter by FDR.[58]

Legal reform to Family Law legislation occurred in 2006,[59] and 2011.[60] These reforms identified and incorporated the rights of the child to culture into Pt VII of the Act. Children have the right to enjoy their culture which includes that children have the right to enjoy their culture with people who share their culture.[61] The Act provides that parents must attend FDR prior to litigation to make a genuine attempt to resolve their dispute and cultivate a co-operative co-parenting relationship.[62] There is an exception contained within s 60I(9) of the Act that the parties may not be required to participate in FDR if the court is satisfied that there is a risk or there has been family violence or abuse of the child.

Brandon and Dababneh reported on the outcomes of research by way of qualitative interviews with 30 FDRPs, with the results indicating that the majority of FDRPs have "a rudimentary understanding of the legislative rights of children to their culture'.[63] They found that while FDRPs were generally "sensitive to a child's culture" and understood the challenges that people from a diverse cultural background were presented with in attempting to maintain their children's connection to their culture within the Australian cultural context, FDRPs were not taking culture into account in decisions about what would be in the child's best interests.[64] This is not to say that FDRPs are not able to recognise the complexity of culture within FDR – Brandon and Dababneh found that FDRPs were able to self-reflect on their own cultural preferences and understand how their own culture shapes their approach to conflict resolution.[65] Brandon and Dababneh's research showed

> [A] number of FDRPs believed they had to "recalibrate" their obligations to the principles of neutrality and parental self-determination and hence were reluctant to facilitate discussions about culture in FDR. It is the authors' opinion that discussion about culture must be seen as gentle inquiring, through authentic and sensitive dialogue with the parents, to find out what is important for each child to know and enjoy, based on their interests in their culture.[66]

They said that people view the world through the lens of their culture and FDRPs should explore this this – it was key to the role of the FDRP that they ask questions about each of the

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

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

60 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

61 *Family Law Act 1975* (Cth) s 60B(2)(e).

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

63 Brandon and Dababneh, n 25.

64 Brandon and Dababneh, n 25, 82.

65 Brandon and Dababneh, n 25, 82.

66 Brandon and Dababneh, n 25, 85.

parties' cultural background and explore how the parties view their role in supporting the right of a child to culture.[67]

E *Co-mediation as a Conflict Resolution Tool*

Co-mediation is a model that involves two or more mediators working together as a team to assist the parties to the conflict towards resolution. Lan Yuan Lim considers that a skilled mediator would be able to navigate complexity provided that they are mindful of the sensitivities of the matter and does not consider that co-mediation is always necessary even in cross-cultural mediation.[68] In some circumstances the parties may prefer to utilise a co-mediation model where a mediator from the same cultural background would be able to lead the other mediator on cultural issues that arise as part of the FDR process.[69] The presence of a mediator with the same cultural background as one or both of the parties could maintain balance and reduce or remove perceptions that a party might hold about the fairness of the process.[70] Co-mediators from different backgrounds can bring different perspectives to a dispute, assist a party or the other mediator with understanding and respecting cultural or religious needs, raise unique ideas about methods for resolution and encourage co-operative problem solving.

Lim set out to identify the challenges that arise in co-mediation by conducting a focus group with mediators and seeking that they share their experiences. Lim found that the most common problems encountered by mediators in a co-mediation, irrespective of age or gender differences, were "personality differences; differences in skills and experience; differences in approach and style; varied philosophy and goals in mediation; and not understanding the issues in dispute correctly.'[71] Participants in the focus group shared some examples where the mediators became drawn into the dispute they were mediating and appeared to take a position. Lim considers that for good practice, co-mediators should not only have a good rapport, they should also have an action plan in place that guides their behaviour and interactions with each other and the parties during the mediation.[72] Culture is complex and sometimes difficult for a person to understand or engage with if they do not share the culture and the mediator must find the right balance during FDR so that all parties perceive the process as fair, impartial and relevant.

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[67] Brandon and Dababneh, n 25, 86.

[68] Lan Yuan Lim, 'Challenges in Co-mediation: A Practice Issue' (2014) 25 *Australasian Dispute Resolution Journal* 39.

[69] Kelvin Lau, 'Mediation in a Cross-cultural Setting: What a Mediator Should Know' (2014) 25 *Australasian Dispute Resolution Journal* 221, 230.

[70] Lau, n 69, 230.

[71] Lim, n 68, 42.

[72] Lim, n68, 43-44.

III INTERSECTION OF CULTURE WITH WESTERN DISPUTE RESOLUTION MODELS

A *Tokenism or Inclusiveness?*

While most, if not all, mediators approach cross-cultural mediation with the best intentions, attempting to introduce the Western FDR model to other cultures has the potential to introduce tokenistic behaviours to the process which can undermine the genuine intentions of the mediator. Grant Morris and Katie Alexander considered whether the statutory inclusion of references to culture in the proposed Te Ture Whenua Māori Bill 2016 (NZ)[73] would translate into effective practice for mediators or result in inefficiency through use of tokenistic behaviours and rituals.[74] An example of this is the practice of reciting a karakia before commencing mediation, a process Morris and Alexander considered and said "[a]t worst, it could be seen as a token gesture to Māori culture before the "real" mediation commences".[75] Where a party to a mediation gains the impression that their culture is being treated as a mere token to be acknowledged but not incorporated and respected there is a possibility that they may not feel engaged with the process and may feel negative feelings towards the FDR or the FDRP.

Kelvin Lau considered that the "mainstream model" of mediation, being the facilitative style where parties engage in open and frank discussions with a neutral and impartial mediator, is culture-specific and focusses entirely on Western values and culture.[76] He highlights that the "mainstream model" restricts involvement in the mediation to the individual parties involved which is at odds with the preferred approach of people who come from a collectivist culture who may involve others in dispute resolution processes and says that:-

> Failure to consider the cultural differences and the needs of these communities often result in low uptake of mediation services because mediation is often seen as a Western tool which is unfair and does not help them resolve their differences.[77]

Morris and Alexander said that the individualist approach is "exacerbated by the fact that many mediators are legally trained" and that the adversarial and rights based practice of law in New Zealand does not translate to effective cross-cultural mediation in relation to people who are from a collectivist culture.[78] LeBaron and Zumeta consider that it is important to consider the assumptions of legal culture when exploring cultural competence due to the "pervasive influence of lawyers and the law in mediation".[79]

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[73] The Bill was withdrawn on 20 December 2017.

[74] Grant Morris and Katie Alexander, 'Inclusiveness or Tokenism? Culture and Mediation in New Zealand's Dispute Resolution Statutory Regimes' (2017) 28(2) *Australasian Dispute Resolution Journal* 170.

[75] Morris and Alexander, n 74, 177.

[76] Lau, n 69, 223.

[77] Lau, n 69, 223.

[78] Morris and Alexander, n 74, 173.

[79] LeBaron and Zumeta, n 21, 467.

B *Access to FDR Services for Indigenous Australians*

There is an identifiable gap in the availability of culturally appropriate FDR services for Indigenous people. A report arising from a project between the Federal Court of Australia and the Australian Institute of Aboriginal and Torres Strait Islander Studies demonstrated a number of issues that may arise for Indigenous people who are accessing FDR services, including a lack of Indigenous FDRPs, lack of culturally responsive services, and inflexible arrangements.[80] The report identifies some "critical factors for effective practice" which can aid FDRPs in developing an appropriate FDR process that is responsive to the cultural needs of Indigenous clients. This includes the development of practices that:

- Recognise that cultural issues are inseparable from other issues affecting Indigenous peoples' lives, including historical and contemporary issues.
- Ensure that local services include staff members from each relevant cultural group in the community to enable greater local ownership of the service.
- Manage conflicts in negotiation with parties in ways that are congruent with the parties' cultural values, priorities and governance structures – including kinship protocols, respect for Elders and traditional owners, use of ceremony and approaches to gender.[81]

Stephen Ralph considered the report and noted that while many Family Relationship Centres (FRCs) providing mediation and FDR services to Indigenous clients employed Indigenous Advisors, these advisors worked within a context of a liaison and consultation role and there was a lack of Indigenous practitioners in the delivery of the FDR services.[82] Ralph considered the reported experience of a FDRP and said:

> [M]any Aboriginal people do not want to be referred to mainstream services and be seen by non-Indigenous practitioners. This, of course, is not a reflection upon the skills and capacity of non-Indigenous FDR practitioners, but simply an acknowledgement, as noted in the report, that for Aboriginal people, understanding of local conditions, language and culture, as well as a sense of "connectedness" and local authority are essential to effective practice with Indigenous families.[83]

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[80] Federal Court of Australia Indigenous Dispute Resolution and Conflict Management Case Study Project, *Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia- Report to the National Alternative Dispute Resolution Advisory Council*, (Federal Court of Australia, 2009) xv [6].

[81] Federal Court of Australia Indigenous Dispute Resolution and Conflict Management Case Study Project, n 80, xix.

[82] Stephen Ralph, *Family Dispute Resolution Services for Aboriginal and Torres Strait Islander Families: Closing the Gap?* (September 2010) Australian Family Relationships Clearinghouse <https://aifs.gov.au/cfca/publications/family-relationships-quarterly-no-17/family-dispute-resolution-services-aboriginal-and>.

[83] Ralph, n 82.

A finding of the report was that "skilled practitioners who know local conditions, language and culture are irreplaceable and in short supply".[84] Ralph considered that the strict education and practical requirements of accreditation for FDRPs may be responsible for the lacuna of accredited Indigenous FDRPs; citing a case study from the report indicating training and education opportunities for aspiring FDRPs were generally limited and difficult to access, while courses with a specific focus on working with Indigenous people were near non-existent.[85]

The introduction of an alternative model of dispute resolution in the form of a "Care Circle" was analysed by Sarah Ciftci and Dierdre Howard-Wagner.[86] The Care Circle program was established pursuant to ADR provisions in the *Children and Young Persons (Care & Protection) Act 1998* (NSW) and operated with the purpose of reducing the existing barriers between Indigenous people and their access to the court system and to empower and facilitate the participation of Indigenous people in child protection related decision-making.[87] The success or otherwise of each Care Circle appeared to depend on the magistrate who presided over the process – one Indigenous interviewee said that "it depends on the magistrate on whether it works or not."[88] A non-Indigenous interviewee shared some discomfort with the operation of the Care Circle, saying

> I was a bit concerned that the Elders were being treated as almost some sort of tribunal where they were being co-opted into agreeing with the magistrate's view and almost giving it an imprint of being a, I suppose making a decision more palatable because Aboriginal Elders were involved.[89]

Ciftci and Howard-Wagner observed the conduct of a Care Circle matter and commented that the magistrate retained a high degree of control over the matter including directing who would speak, when they would speak and for how long – which was counter-intuitive to established cultural practice for Indigenous communities.[90] While the Indigenous interviewees all preferred the alternative format of a Care Circle to traditional structures, Care Circles were considered to retain elements of power imbalance and inherent "whiteness" of the legal culture which can lead to intercultural conflict.[91]

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[84] Federal Court of Australia Indigenous Dispute Resolution and Conflict Management Case Study Project, n 80, 116.

[85] Ralph, n 82.

[86] Sarah Ciftci and Dierdre Howard-Wagner 'Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Pilot Program in Nowra' (2012) 16(2) *Australian Indigenous Law Review* 81.

[87] Ciftci and Howard-Wagner, n 86.

[88] Ciftci and Howard-Wagner, n 86, 92.

[89] Ciftci and Howard-Wagner, n 86, 92.

[90] Ciftci and Howard-Wagner, n 86, 92.

[91] Ciftci and Howard-Wagner, n 86, 95.

C *Culturally and Linguistically Diverse Communities and Access to Services*

In 2006, FRCs were established by the Australian Government as part of reforms to the family law system and are intended to form an entry point or "gateway" to the broader family law and family support system.[92] The FRCs provide information for families, assistance with accessing services and assist separating families through a dispute resolution process which may be a joint or individual process. The primary function of the service is to assist separating parents to reach parenting agreements in joint sessions.[93]

Lola Akin Ojelabi et al conducted an evaluation of the FRC at Broadmeadows and considered access to services by people from a CALD background.[94] Their research focussed on the cultural appropriateness of the FRC and the barriers that CALD community members, specifically those who were members of the Lebanese, Turkish and Iraqi communities, may encounter when accessing the service.[95] They conducted the research via a review of five forms and questionnaires that are filled in by FRC workers, mediators or clients.[96] While this method of data collection lacked control over the collection and classification of data, Akin Ojelabi et al considered and accounted for this limitation and found that there were still statistically significant results to report.[97] CALD clients were more likely than non-CALD (people born in Australia, New Zealand, United States or United Kingdom) clients to be issued with a s 60I certificate (that the matter was not appropriate for mediation), and clients who were born overseas were more likely to reach agreement in matters if they had lived in Australia for 15 years or more than those who had lived in Australia for 15 years or less.[98] Akin Ojelabi et al did not explore the barriers, whether experienced or perceived by FDRPs that may account for the higher rate of provision of s 60I certificates to CALD clients but consider this could "include various factors related to cultural differences between the service delivery model and client expectations.'[99] It is also a possibility that some FDRPs may lack confidence in their ability to meet the needs of CALD clients.[100]

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[92] Australian Government Attorney-General's Department, *Operational Framework for Family Relationship Centres* (Revised September 2017) <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/Operational-Framework-for-Family-Relationship-Centres.pdf> 4.

[93] Australian Government Attorney-General's Department, n 92, 7.

[94] Lola Akin Ojelabi et al, 'A Cultural Assessment of Family Dispute Resolution: Findings about Cultural Appropriateness from the Evaluation of a Family Relationship Centre' (2012) 18(1) *Journal of Family Studies* 76.

[95] Lola Akin Ojelabi et al, 'A Cultural Assessment of Family Dispute Resolution: Findings about Access, Retention and Outcomes from the Evaluation of a Family Relationship Centre' (2011) 17(3) *Journal of Family Studies* 220.

[96] Akin Ojelabi et al, n 95, 221.

[97] Akin Ojelabi et al, n 95, 225.

[98] Akin Ojelabi et al, n 95, 229.

[99] Akin Ojelabi et al, n 95, 229.

[100] Akin Ojelabi et al, n 95, 229.

Howard Irving, Michael Benjamin and Jose San-Pedro wrote about the dynamics of Latino families and the challenges that FDRPs may experience when conducting mediations with people of Latino heritage.[101] The internal family dynamics of many Latino family groups are complex and tend towards collectivism, that is, the interests of the collective will take precedence over those of the individual.[102] In Latino families, the development of rapport extends beyond development of trust - in this context developing rapport involves "moving from the status of outsider to that of insider, with whom private family matters may be freely discussed.'[103] An important consideration for mediators is that Latino families may be "slow to warm to a non-Latino mediator" and that a FDRP should practice and encourage patience when working with Latino families.[104]

Due to the broad range of cultural and sub-cultural groups within Australia is it difficult to identify a "one-stop" type approach that FDRPs could employ in FDR. It is suggested that FDRPs are given a level flexibility and support in how they conduct FDR with respect to cultural considerations so that they may tailor their approach to FDR to suit the circumstances of each matter.

D *Culture as an Excuse in Family Disputes*

Lola Akin Ojelabi explored the "demonisation" of culture in the context of the negative use of the concept – for example where culture is exploited or used as a justification for abuse.[105] She says that while FDRPs may not be able to end all social injustices it is critical that they are able to recognise a situation where culture is being used to justify abuse of a party.[106] A person may try to explain their own or their partner's behaviour by reference to their culture – a person who hits their domestic partner or is excessively financially controlling for example, may excuse their behaviour as common or normal in their culture if challenged on the topic. Hayley Gleeson and Julia Baird conducted an investigation into domestic violence within Muslim marriages and the difficulty that Muslim women encounter if their husband refuses to agree to a religious divorce.[107] A woman named Maryam spoke to ABC News and reported that her husband was controlling of every aspect of her life – he would monitor her kilometres driven in her car and question her extensively about her travel if he felt there was not a match between the kilometres the odometer showed and her account of where she had been, she could not spend money without his permission, he tried to stop her from working and he would yell at

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[101] Howard Irving, Michael Benjamin and Jose San-Pedro, 'Family Mediation and Cultural Diversity: Mediating with Latino Families' (1999) 16(4) *Mediation Quarterly* 325.

[102] Irving, Benjamin and San-Pedro, n 101, 327.

[103] Irving, Benjamin and San-Pedro, n 101, 332.

[104] Irving, Benjamin and San-Pedro, n 101, 332.

[105] Lola Akin Ojelabi, 'Dispute Resolution and the Demonisation of Culture' (2014) 25 *Australasian Dispute Resolution Journal* 30.

[106] Akin Ojelabi, n 105.

[107] Hayley Gleeson and Julia Baird, 'I'm not his Property: Abused Muslim Women Denied Right to Divorce' *ABC News* (online), 18 April 2018 <http://www.abc.net.au/news/2018-04-18/abused-muslim-women-denied-right-to-divorce/9632772>.

her and complain to her family about her – Maryam recalled that when she spoke about her husband's behaviour to the Imams their response was "but he doesn't hit you".[108] Gleeson and Baird identify that:

> A consistent theme in public pronouncements by imams both [in Australia] and overseas is that men have the authority to control the movements and actions of their wives, and that women must obey and respect their husbands without qualification.
>
> If a husband does not want his wife to work, for example, he can, according to some imams, forbid her to.[109]

When a view like this is used to justify controlling and abusive behaviour in the context of culture, FDRPs may be faced with a difficult circumstance where an attempt to address abuses that are justified by a demonisation of culture may be viewed as racist and the FDRP may feel further restrained by the requirement to remain neutral and impartial.[110] It is important that the FDRP has the confidence to proceed with the FDR and has the skills and support needed to navigate difficult topics and manage difficult clients.

Akin Ojelabi says that FDRPs should be cautious in their assessment of cultural considerations in mediation and ensure that they avoid "Type I and Type II errors'– a Type I error would be where culture is ignored or disregarded altogether in the process; a Type II error is where culture is overvalued to the extent that issues such as domestic violence and denial of basic rights are not addressed.[111] FDRPs should not easily accept an explanation that seeks to minimise responsibility for negative behaviours and instead attribute the behaviours to culture. A FDRP should conduct an inquiry in the form of a cultural analysis to identify why and how the practice developed and any transformations the practice has undergone, noting that a person who benefits from that narrative may be resistant to any change as changes will affect their ability to dominate and control the other partner.[112]

E *Faith-based Alternative Dispute Resolution*

This section will consider the role, if any, that Faith-based Alternative Dispute Resolution (FBADR) could play within FDR. It is recognised that there is a broad and diverse representation of religions beyond the Abrahamic religions in Australian communities, however this Part will focus on Islamic Law (Sharia) and Jewish Law (Halacha). The terms "religious marriage" and "religious divorce" are used in the following however the form that marriage and divorce take under both Sharia and Halacha could be likened to a contractual arrangement with community obligations as opposed to a purely religious arrangement.

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[108] Gleeson and Baird, n 107.

[109] Gleeson and Baird, n 107.

[110] Akin Ojelabi, n 105, 37.

[111] Akin Ojelabi, n 105, 37.

[112] Akin Ojelabi, n 105, 31.

Marriage under Sharia is seen to be a contract – it relies upon mutual offer and acceptance, and it is revocable.[113] There is no particular form that the contract takes and the religious ceremonies differ around the world.[114] Ghena Krayem notes many similarities between the Australian *Marriage Act 1961* (Cth) (*Marriage Act*) and Islamic law and says that generally speaking, the requirements under the *Marriage Act* are integrated into the concept of Islamic marriage as practiced in Australia.[115] While most Islamic religious marriages in Australia are registered and comply with Australian law, a marriage must be a religious marriage or it will not count as a marriage "in the eyes of the community".[116]

A religious divorce is considered to be just as important as a valid religious marriage and this is an area where Islamic women may encounter difficulty – if the husband refuses to consent to the religious divorce even though the marriage has ended under Australian family law, the woman is still religiously married and she cannot remarry.[117] Krayem identifies that the "usual motivation" behind such a refusal is to force the wife to relinquish her financial or property rights in the divorce.[118] Jamila Hussain considered the feasibility of establishing a formal system of Islamic family law and mediation in Australia – arguing that while a parallel system did not need to be established there needed to be a formal recognition of agreements arrived at through Islamic mediation and arbitration outside of the usual FDR process.[119]

Observant Jewish people in Australia also find themselves subject to two different systems – the Australian civil system and Halacha. Halacha encompasses all areas of a Jewish person's life including "their personal duties and interpersonal relationships, transactions, commercial dealings, inheritance, tort law, property division, births deaths and marriages".[120] Halacha has a particular emphasis on dispute resolution and within Australia, the *Beth Din* (Jewish court) works with FBADR practitioners comprising rabbis and those with formal ADR qualifications who fill the role of mediators, conciliators and family counsellors.[121]

Navdeep Prawer, Nussen Ainsworth and John Zeleznikow consider that Jewish FBADR has been quite successful in Australia, despite confidentiality of proceedings making it difficult to quantify the number of cases that the *Beth Din* deal with, and say that recourse to the courts for enforcement of an arbitral award is "relatively infrequent" as adherence to rulings is the

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[113] Ghena Krayem, 'Australian Muslim Women: Skilful Legal Negotiators in a Plural Legal World' in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Press, 2013) 70, 80.

[114] Ghena Krayem, *Islamic Family Law in Australia* (Melbourne University Press, 2014) 130.

[115] Krayem, n 113, 81.

[116] Krayem, n 113, 81.

[117] Krayem, n 113, 85.

[118] Krayem, n 113, 85.

[119] Jamila Hussain 'Family Dispute Resolution and Muslim Communities in Australia' in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Press, 2013) 95.

[120] Nadav Prawer, Nessen Ainsworth and John Zeleznikow, 'An Introduction to the Challenges and Possibilities of Faith-based Arbitration in Australia' (2014) *Australasian Dispute Resolution Journal* 91, 93 (footnote omitted).

[121] Prawer, Ainsworth and Zeleznikow, n 120, 93.

norm.[122] However, a number of cases have come before the Family Court of Australia (the Family Court) with respect to the *gett*.[123] A *gett* is the document of divorcement that a husband gives to his wife to effect a religious divorce under Halacha– it is proof of the dissolution of the marriage and gives the effect of the divorce. A civil divorce is no substitute for a *gett* – it does not matter whether the couple have obtained the civil divorce, or for how long a couple is separated, under Halacha the couple is still married. An abusive or manipulative husband may decide to withhold the *gett* or use it to his advantage in negotiating child custody and property during Family Court proceedings.[124] The Family Court does not consider it has the jurisdiction to compel a husband to deliver a *gett*.[125] In *Ferro & Kopel*[126] the wife was seeking that the husband grant her a *gett* and do all things necessary to grant her the *gett*. Berman J said "I do not consider that I have the power to make the order as sought by the wife. To do so would be to interfere in religious matters that do not involve behaviour that is in breach of the general civil or criminal law".[127]

Prawer, Ainsworth and Zeleznikow considered the operation of FBADR models in Australia and some of the challenges that may be faced in implementing FBADR as a form of ADR in Australia.[128] They considered that the benefits of FBADR included that it offered an approach that is "grounded in the common values of the parties', which has the potential to more efficiently resolve the dispute, and that FBADR is capable of understanding the culture of the parties which is important when engaging the parties through their shared communal association.[129] A difficulty for a religious person when navigating secular legal systems can be that their own notion of justice and their faith may be in direct conflict with the legal system – the result of this being that they may feel disenfranchised and disempowered by the process.[130]

Prawer, Ainsworth and Zeleznikow broadly categorised the limitations that FBADR would encounter as "cultural, technical, legal enforcement and resources".[131] They say that these four challenges were "amply illustrated" in the case of *Mond v Berger*[132] (2004) 10 VR 534, where a dispute over congregational organisation and membership rights in a Melbourne synagogue proceeded to a Jewish Court (*Beth Din*) for arbitration. Partway through the arbitration process with the *Beth Din* Mond & Mond withdrew and subsequently challenged the award made by

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[122] Prawer, Ainsworth and Zeleznikow, n 120, 94.

[123] See eg, *Ferro & Kopel* [2016] FamCA 409.

[124] Hayley Gleeson, 'Chained Women: The Jewish Wives Being Held Hostage in Abusive Marriages' *ABC News* (online) 27 February 2018 <http://www.abc.net.au/news/2018-02-27/chained-women-jewish-wives-hostage-in-abusive-marriages/9464038>.

[125] See generally: *Snipper & James and Anor* [2018] FamCA 7; *Idelsohn & Idelsohn* [2017] FamCA 398.

[126] *Ferro & Kopel* [2016] FamCA 409.

[127] *Ferro & Kopel* [2016] FamCA 409.

[128] Prawer, Ainsworth and Zeleznikow, n 120.

[129] Prawer, Ainsworth and Zeleznikow, n 120, 97.

[130] Prawer, Ainsworth and Zeleznikow, n 120, 97.

[131] Prawer, Ainsworth and Zeleznikow, n 120, 98.

[132] *Mond v Berger* (2004) 10 VR 534; [2004] VSC 45.

the arbitrators in the Victorian Supreme Court.[133] Dodds-Streeton J found that the actions of the *Beth Din* amounted to misconduct – a witness had been permitted to depart the country before finishing their testimony and arbitrators had made comments that indicted that had formed their view before the matter was fully heard.[134] Prawer, Ainsworth and Zeleznikow say that the Victorian Supreme Court "appeared to misunderstand some elements" of the process that the *Beth Din* conducted and have concerns that there is limited cross-cultural awareness – from both the Australian Courts and the *Beth Din*.[135]

The "solution" likely does not lay in creating a parallel system of FBADR, though as noted above a formal recognition of an agreement reached through FBADR processes would assist many people who as a result of adherence to their religious practices are living between two systems.

IV CULTURAL CONSIDERATIONS & MONEY

A *East Asian Children and Money as a Cultural Tool*

Noboru Takahashi et al considered the way in which relationships such as parent-child and peer relationships develop in different East Asian cultures through the use of money.[136] The research was conducted jointly via three methods: researchers from Japan, Korea, China and Vietnam visited the other three countries to conduct interviews, observations, and a questionnaire survey for children in fifth, eighth and eleventh grade and their parents. They argued that "cultural differences discovered… were not substantial entities that existed beforehand [rather] they appeared when researchers belonging to other cultures compared the other cultures from their own perspective".[137] Essentially, something that appeared natural or "normal" for a person from culture A, appeared to be a significant or unusual deviation from "normal" for a person from culture B.

Takahashi et al surveyed children and their parents in Japan, Korea, China and Vietnam who were asked questions about how they receive money from their parents, and questions about treating or lending money to friends and splitting bills. While each country is geographically close to the other, the attitudes recorded by Takahashi et al were varied. In Japan, the children and their parents surveyed displayed negative attitudes to treating friends, lending or borrowing money and positive attitudes towards bill-splitting while respondents from Korea and Vietnam were more likely to display a positive attitude towards treating friends, lending or borrowing money and a negative attitude towards bill-splitting.[138] Respondents from China were

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[133] *Mond v Berger* (2004) 10 VR 534; [2004] VSC 45 – where Mond & Mond sought to set aside the award on the grounds of misconduct pursuant to *Commercial Arbitration Act 1984* (Vic) s 42.

[134] *Mond v Berger* (2004) 10 VR 534, [355]-[361]; [2004] VSC 45.

[135] Prawer, Ainsworth and Zeleznikow, n 128, 98-99.

[136] Noboru Takahashi et al, 'East Asian Children and Money as a Cultural Tool: Dialectically Understanding Different Cultures' (2016) 58(1) *Japanese Psychological Research* 14.

[137] Takahashi et al, n 136, 16.

[138] Takahashi et al, n 136, 20.

considered to fall in the middle, in that many respondents agreed that treating a friend and splitting a bill with a friend were almost equal, depending on the situation.[139] These views were considered likely to have been determined in part by the parent-child relationship but also by the parent and child's position in society.[140] It was also considered that social modernisation and the increase in the processes of production, distribution and consumption lead to a market economy which can shift social engagement from collectivism towards individualism.[141]

Takahashi et al considered that as market economy expanded, so too did individualism and they track that development through the reported use of children's pocket money. This was not necessarily a fixed trajectory in that as market economy expanded so too did individualism rise and collectivism decline – it was noted that collective inclinations can and do remain even though individualism may become enhanced.[142] FDRP's may be assisted by gaining an understanding of the cultural views that parties have regarding money and be prepared to work with the parties to tailor the mediation to appropriately address any consideration or understanding they should have about the parties and their attitudes towards money.

B *Intergenerational Succession in the Chinese-Australian Family Business*

Jing Ye, Melissa Parris and Dianne Waddell considered and highlighted the influence of cultural dynamics on intergenerational succession for Chinese family business in the Australian context.[143] Ye, Parris and Waddell considered that due to "the strongly family-centred nature of the Chinese culture" family dynamics would influence the process of succession,[144] but considered that there was the potential for conflicts to arise due to possible differentiations between generations in the perception of family and cultural values.[145] They identified four distinctive elements that form and guide belief and practice in Chinese business and relationships:

- The virtue of pervasiveness and persistence are values which encourage people to pursue a longer-term benefit even if suffering a short-term detriment;[146]
- Family is the most prominent social norm in Chinese culture and the next generation is expected to engage with and eventually control the family business which may result in a sense of duty or feelings of obligation;[147]

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[139] Takahashi et al, n 136, 20.

[140] Takahashi et al, n 136, 21.

[141] Takahashi et al, n 136, 24.

[142] Takahashi et al, n 136, 24.

[143] Jing Ye, Melissa Parris and Dianne Waddell, 'The Influence of Cultural Attributes on Intergenerational Succession in the Chinese-Australian Family Business' (Paper presented at Australian and New Zealand Academy of Management Conference, Auckland, New Zealand, 2 – 5 December 2008).

[144] Ye, Parris and Waddell, n 143, 2.

[145] Ye, Parris and Waddell, n 143, 7.

[146] Ye, Parris and Waddell, n 143, 8.

[147] Ye, Parris and Waddell, n 143, 9.

- Chinese culture respects hierarchies and paternalism is a key influence that dominates business – "the established authority tends to be stable and long lasting" and there is a status of a "father-figure, who centralises the power of decision-making';[148] and
- Interpersonal relationships and the strength of business and personal connections guarantee the reliability of business exchanges.[149]

Ye, Parris and Waddell identified that immediate family members and trusted relatives would often succeed ownership and hold senior management positions, noting that this was likely to be based on a view that only those in immediate or extended family should be trusted in order to keep the business in the family.[150] They did not consider the Chinese-Australian family business in the context of a family dispute or a dispute resolution process, however, their paper provides insights into Chinese culture that can be extrapolated and applied when considering culture and family dynamics in disputes.

While Chinese families were noted to have successful economic adaption they were considered to present with difficulty in acculturation in Australia, where there is a stronger cultural emphasis on individualism and egalitarianism and it was noted that where there is successful adaption of Chinese family business in Australia it could be "attributed to the blending of Chinese values and Western practices".[151] A challenge for Chinese families is that as the second generation have greater access to Western education and likely higher proficiency in English, they also have more opportunity to branch out into other businesses and professions which may limit the availability of potential successors for the Chinese family business.[152]

V CONCLUSION

FDRPs are faced with numerous challenges in adapting mediation practices with assessments of cultural consideration. FDR should be an inclusive process, but as highlighted earlier tolerance and understanding of cultural issues should not go so far as to preclude an examination and consideration of ethical issues that arise or to affect the conduct of the mediation.

The literature demonstrates that FDRPs may not feel supported or that their cultural training and awareness is inappropriate. Some methods were identified that may provide a framework for amendment of training programs with respect to culture such as collaborative style learning and having discussions about culture specifically as opposed to a "superficial" approach to training that leaves participants feeling dissatisfied and under prepared to assist CALD and other diverse clients. Further, FDRPs may be assisted by amendments to FDR processes whereby they can explore cultural issues with clients prior to FDR commencing.

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[148] Ye, Parris and Waddell, n 143, 9.

[149] Ye, Parris and Waddell, n 143, 9.

[150] Ye, Parris and Waddell, n 143, 10.

[151] Ye, Parris and Waddell, n 143, 11.

[152] Ye, Parris and Waddell, n 143, 12.

It is difficult to point to a single identifiable feature of FDR that could be changed to ease the challenge for CALD and other diverse clients who are engaging with the FDR system. Culture is a malleable and fluid concept and each individual's experience and understanding of their culture will be different so it is difficult to identify a solution that will fit all participants. There is scope for further research to be conducted in this complex area of family law with a more detailed focus on the issues identified herein.

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