Section 8: Recommendations

This section sets out the Review's recommendations. Some of them call for changes to the governing legislation, some for regulation, some for general government oversight of the activities studied by the review, and some for public support of the interests of vulnerable people in our society. These changes are described in turn. They are listed in this order for thematic convenience but not to indicate a ranking of their importance.

I do not repeat here the detailed analysis that occupies the other sections of the Report. I will confine the text to a brief indication of the considerations that have been raised to the Review and of the factors that have led me to my conclusion.

The recommendations themselves are consecutively numbered through the different sections, from 1 to 46. A simple listing of the recommendations without commentary appears in the Executive Summary.

General

The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters. However, that use should be subject to the safeguards recommended below.

1. **Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.**

2. **The *Arbitration Act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.**

Legislative

Following are proposed changes to the *Arbitration Act* and the *Family Law Act* to make them better suited for family and inheritance arbitrations.

The issue of consent will be addressed in several parts: the identity and capacity of the person who consented to arbitrate; the timing of the agreement to arbitrate; the reality of the consent to the arbitral process; and the reality of the consent to the choice of a different law.

3. **Section 51 of the *Family Law Act* should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV**

of the Act. Therefore these agreements would be required to be in writing, signed by the parties and witnessed.

4. **When Part IV of the *Family Law Act* applies, a mediation agreement or arbitration agreement should be able to be set aside on the same grounds as other domestic contracts.**

5. **Part IV of the *Family Law Act* should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before the arbitration occurs.**

6. **The reconfirmation in writing should not be required for an arbitration conducted:**

    (a) under a separation agreement;
    (b) as a consequence of an award made in an arbitration that was itself agreed to contemporaneously; or
    (c) as a consequence of a judgment of a court.

7. **Section 55 (2) of the *Family Law Act* should be amended to require prior court approval of a domestic contract entered into by a minor in Ontario.**

8. **Section 33 (4) of Part III of the *Family Law Act*, permitting the Court to set aside a domestic contract or paternity agreement for provision of support, should be amended to permit a court to set aside an arbitral award on the same grounds (unconscionability, person owed support is receiving social assistance, or the support is in arrears).**

9. **The *Arbitration Act* should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if:**

    (a) the award does not reflect the best interests of any children affected by it;
    (b) a party to it did not have or waive independent legal advice;
    (c) the parties do not have a copy of the arbitration agreement, and a written decision including reasons; or
    (d) applicable, a party did not receive a statement of principles of faith-based arbitration.

    The parties should not be able to waive this provision.

10. **The *Arbitration Act* or the *Family Law Act* should be amended to provide regulation-making powers for family law and inheritance arbitrations and to require the use of regulated forms and procedures.**

11. **The *Child and Family Services Act* s. 72 (5) should be amended to explicitly include mediators and arbitrators in the class of professionals who have an enforceable duty to report a child in need of protection.**

Regulatory

Some legal requirements are more suited to regulation than to legislation.

It is important that the parties have a full understanding of their circumstances and the implications of choosing arbitration.

12. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitration agreements of family law and inheritance cases must be in writing and must set out:**
    - **a detailed list of issues that are submitted to arbitration;**
    - **whether the arbitration is binding or advisory;**
    - **the form of law, if not Ontario law, which will be used to decide the dispute, and in the case of religious law, which form of the religious law;**
    - **if the arbitration is under religious law, an acknowledgement that the party has received and reviewed the statement of principles of faith-based arbitration prior to signing the agreement;**
    - **explicit details of any waiver of any rights or remedies under the *Arbitration Act*;**
    - **an explicit statement that judicial remedies under s. 46 and the right to fair and equal treatment under s. 19 of the *Arbitration Act* cannot be waived;**
    - **an explicit statement recognizing that judicial oversight of children's issues cannot be waived and that s. 33 (4) of the *Family Law Act* continues to apply; and**
    - **an explicit statement that s. 56 of the *Family Law Act* applies to the agreement and cannot be waived and therefore a party can apply to set the agreement aside for additional reasons including if it is not in the best interests of any children affected by the agreement, there was not full and frank financial disclosure, or a party did not understand the nature or consequences of the agreement.**

13. **Regulations in the *Arbitration Act* or the *Family Law Act* should require arbitration agreements in family law and inheritance cases to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.**

14. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to be**

members of voluntary professional organizations, or fall into an excluded class defined by the regulation, in order to have their decisions enforced by Ontario courts.

15. **Regulations under the *Arbitration Act* should define the concept of a fair and equal process in the context of family law or inheritance arbitrations.**

16. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitrators who apply religious law in family law and inheritance arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law.**

17. **Regulations in the *Arbitration Act* or the *Family Law Act* should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients.**

The law of contracts and Part IV of the *Family Law Act* offer the option to set aside an agreement where there has not been true consent because the person was pressured or coerced into entering into an agreement. More subtle community pressure may not qualify as coercion for this purpose, whereas threats of violence from a partner or family member almost certainly would.

18. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to screen the parties separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement, using a standardized screening process.**

19. **Regulations under the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to certify that they have screened the parties separately for domestic violence, that they have reviewed the certificates of Independent Legal Advice or the waiver of Independent Legal Advice, and are satisfied that each party is entering into the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.**

At present arbitrators are not required to keep any record of their decision, though they are to issue their decisions with reasons in writing, unless the parties state otherwise. This makes it difficult for a potential party to know whether a particular arbitrator has a prejudice or style of proceeding. It also hampers any investigation of the practice of arbitrating family law matters in the interests of public policy. This review certainly faced that challenge. To alleviate these problems, arbitrators should have to keep records and make them accessible. These recommendations are dealt with below; here is the regulatory sanction.

20. **Regulations under the *Arbitration Act* or the *Family Law Act* should state that if the records required by Recommendations 37, 38 and 39 are not maintained, a party can apply to have an arbitral award set aside.**

Independent Legal Advice

Almost all participants agreed that there was a need for Independent Legal Advice for those participating in a family or inheritance arbitration.

The challenge for the Review is to strike a balance between the clear need for additional information about the law and the arbitration process, and the fear that a requirement for Independent Legal Advice will make what is currently a useful and swift alternative to the court process more legalistic and time-consuming.

21. **The certificate of Independent Legal Advice in family law and inheritance cases should state that the party has received advice about the Ontario and Canadian law applicable to his or her fact situation, the law of arbitration, and the remedies available to both parties under Ontario family and arbitration law.**

22. **Arbitration services which conduct family law and inheritance arbitrations should distribute the statement of principles of faith-based arbitrations required under Recommendations 16 and 17 to potential clients, in advance of the clients seeing a lawyer.**

23. **If religious law is chosen under the arbitration agreement in a family law or inheritance case, the Independent Legal Advice certificate should explicitly state that the lawyer reviewed the statement of principles of faith-based arbitration and the lawyer is satisfied that the person has sufficient information to understand the nature and consequences of choosing the religious law.**

24. **Waivers of Independent Legal Advice in family law and inheritance cases should state that the party has waived the right to receive advice about Canadian and Ontario family law and Ontario arbitration law, and if religious law is chosen should state that the party has received and reviewed the statement of principles of faith-based arbitration required by Recommendations 16 and 17.**

Public Legal Education

Although commentators frequently cautioned the Review that pamphlets and other written information are not enough, all emphasized the need for useful, accessible information so vulnerable women, in particular, are aware of their legal options to resolve disputes.

25. The Government of Ontario should develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.

26. The initiatives in Recommendation 25 should be linguistically and culturally designed to suit the diverse needs of different communities, as well as any communications challenges faced by members of the community (e.g. blindness, deafness, etc.).

27. Any public education campaign that is developed should include, but not limit itself to, information on the following topics:

- **General rights and obligations under the law;**
- **Family law issues;**
- **Alternative forms of dispute resolution;**
- ***Arbitration Act;***
- **Immigration law issues; and**
- **Community supports.**

28. Public legal information programs funded by the government of Ontario should include an overview of the options for resolving a family law dispute, including the arbitration process.

29. Public legal information programs in family law funded by the government of Ontario should be available to all community members who wish to attend, whether or not they have a matter before the court.

30. Family Law Information Centres should provide information that has been developed by and for specific ethno-cultural communities and in community languages about their rights and responsibilities under Ontario and Canadian law.

Training and Education for Professionals

Parties to arbitrations and mediations may not be aware of the professional competence (or its absence) of arbitrators or mediators they select to deal with their matters. There is no mechanism of quality control to ensure that the intent of the *Arbitration Act* in dealing expeditiously and fairly with family law matters is not being subverted and that serious inequities in the treatment of women and men under arbitrated decisions has not occurred over time.

The reality of regulation of professional services is that some combination of state, community and market regulation probably works best. The Review was very concerned that simply withdrawing all statutory support and limitation (i.e. by prohibiting arbitration in family law matters altogether), would limit people's options for resolving their disputes and might push the practice of religious arbitrations outside the legal system altogether, thus limiting the court's ability to intervene to correct problems.

31. **The Government of Ontario should work together with professional bodies to develop a standardized screening process for domestic violence for use in family law and inheritance mediations and arbitrations.**

32. **The Ministry of the Attorney General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law and inheritance cases, to develop and deliver continuing education to lawyers about arbitration and Independent Legal Advice, and to examine the insurance and public compensation issues as they impact on the public interest.**

33. **The Government of Ontario should work with voluntary professional associations for mediators and arbitrators to provide training on issues of power imbalance in family law and inheritance cases, use of the prescribed screening process from Recommendation 18, and the process for an arbitrator to certify the material for a family law or inheritance case as required by Recommendation 19.**

34. **The guidelines of voluntary professional associations for training, conduct and competence of mediators and arbitrators should clearly explain their professional duty to report children in need of protection.**

35. **Voluntary professional associations for mediators and arbitrators should require that, in family law and inheritance cases, if mediators practice arbitration during mediation sessions, the agreement to arbitrate must precede the commencement of the mediation, and all the obligations of arbitrators under Recommendations 16, 17, 18 and 19 must be met before the commencement of any arbitration.**

Oversight and Evaluation of Arbitrations

One of the most urgent issues arising out of the Review is the need for some mechanism of oversight. The government lacks of information about the extent to which arbitration is used in family law and inheritance and how this mechanism has impacted vulnerable people. This concern was a major issue raised by virtually everyone responding to the Review.

36. **The Ministry of the Attorney General should work with professional organizations to review existing codes of professional conduct and assess whether they apply when a member of a profession conducts an arbitration or mediation.**

37. **Decisions of arbitrators in family law and inheritance cases should be delivered to the parties in writing and include a copy of the arbitration agreement, and any attachments required by the regulations. Decisions should include written reasons.**

38. **The arbitrator in family law and inheritance cases should maintain copies of the decision for a period of at least 10 years.**

39. **Arbitrators should be required to keep a record of each arbitration in family law and inheritance cases including the names of the parties and their representatives (if any), the arbitration agreement, the certificates or waivers of Independent Legal Advice, any documents filed by the parties, a summary of the facts of the case and the written decision. Copies of these files should be made available to the parties upon request. If an arbitrator does not maintain these files, or make the file available when requested, the arbitral decision may be set aside.**

40. **Arbitrators of family and inheritance matters should be required to report annually to the Ministry of the Attorney General, the following aggregated and non-identifying information:**

    - **Number of arbitrations conducted;**
    - **Number of appeals or motions to set aside and the outcome, if known (e.g. pending, award set aside, court refers back to arbitrator, etc.); and**
    - **Any complaints or disciplinary actions they are aware of that have been taken against them during that year by their professional body or the courts.**

41. **Arbitrators in family law and inheritance cases should be required to provide the Government of Ontario with summaries of each decision, free of identifying information, and the Government should make these summaries available upon request for research, evaluation and consumer**

protection purposes. If in the future arbitrators become a self-regulating profession, the inventory of summaries of decisions should be transferred to the regulatory body for that profession.

42. **Voluntary registration organizations should consider failure to make decisions available and file decisions in accordance with Recommendations 40 and 41 grounds for the deregistration of the arbitrator.**

Community Development

The government cannot, and should not, act in isolation in the delivery of public legal education materials. In order for the material to be accessible, gender sensitive and culturally appropriate, and to ensure that messages are not diluted, government-community partnerships may be an effective way of undertaking public education initiatives around arbitration and related issues. A collaborative approach involving many facets of the community will be the most effective public education strategy.

43. **The Government of Ontario should encourage and fund community organizations who run arbitration services to develop information materials about rights and obligations under religious law.**

44. **The Government of Ontario should encourage and fund community organizations to work with experienced public legal education providers and the legal community to research and develop effective public information materials which explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture.**

Further Policy Development

The review has made a number of recommendations to palliate the most urgent concerns about the use of arbitration in family and inheritance matters. This does not remove the need for longer-term solutions as well.

45. **The Ministry of the Attorney General should set a long term goal of professional self-regulation of mediators and arbitrators who deal with family law and inheritance cases. The Ministry should work with professional organizations including the Law Society of Upper Canada and voluntary mediation and arbitration organizations to develop a consultation process which will lead to guidelines for conduct and competency for these professionals.**

As we have seen, the FLA already treats the setting aside of any settlement which was negotiated in the context of the removal of religious barriers to remarriage in a unique way. Building on this concept, it may be possible for the government to provide a higher level of court oversight to settlements of family and inheritance cases that are negotiated based on religious principles. This is an area where I believe further study and analysis is required.

46. **The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the *Family Law Act* in addition to the several additional grounds set out in these recommendations under which arbitral awards may be challenged.**