

Review of the Family Law System

Submission by Relationships Australia Victoria (RAV)



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RAV Response

Question 1

What should be the role and objectives of the modern family law system?

The role of the modern family law system should be to integrate a multifaceted approach to assist families resolve disputes as a result of relationship difficulty, separation, and divorce. At its core, the system needs to effectively uphold the rights and interests of children and to optimise effective responses to family violence (FV).

The objectives of the system are:

1. to assist families to restructure their relationships and finances
2. to assist couples and caregivers to repair their relationships with each other and their children
3. to reduce the emotional, psychological, economic and social costs of separation and divorce
4. wherever possible, to facilitate and support self-determination.

A multifaceted approach recognises that the modern family law system is comprised of:

- Services that provide advice, information, counselling, therapeutic support, and education
- Specialist services that provide support to victims of family violence and services that assist FV perpetrators change their behaviours
- Providers of legal and related services, including legal advice, assistance, advocacy, dispute resolution, and representation
- Courts.

Question 2

What principles should guide any redevelopment of the family law system?

In addressing this question, RAV considers the principles that should guide the redevelopment of the family law system *as a whole* as well the principles to be applied by the courts in the exercise of their jurisdiction under Section 43 of the *Family Law Act*.

Principles that should guide the redevelopment of the family law system as a whole

The family law system should operate within a clearly defined *Access to Justice Framework*. The framework should recognise that just as health is not found primarily in hospitals or knowledge in educational institutions, so justice is not primarily to be found in the courts. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged¹. In the field of family law, the truism that courts are not the primary means by which people resolve their civil disputes, and never have been, should be converted into a guiding objective and organising principle. The limitations of the traditional understanding that 'access to

¹ M Galanter, 'Justice in many Rooms' in M Cappelletti (ed.), Sijthoff, A den Rijn, *Access to Justice and the Welfare State*, 1981, pp 161–2. (Cited in *A Strategic Framework for Access to Justice in Civil Law System*, Report by the Access to Justice Taskforce, 2009, Commonwealth Attorney General's Department.

justice' is synonymous with access to court are particularly pronounced in the family law field, where the unhappiness of families sits at the heart of disputes.

A rights informed approach and the upholding of procedural fairness must remain as critical elements of the family law system: however, the system should recognise the primary importance of "Everyday Justice" (Counselling, Education, Advice, Information, Coaching) and "Informal Justice" (Alternative Dispute Resolution and legally assisted Interest Based negotiation)². Decisions made through the formal justice of the courts will continue to influence the quality of justice in the other spheres. However, courts should be regarded as the least fitting option for resolving family disputes except in the most complex and hard cases. The emphasis should be on enhancing people's capacity to understand their position and where possible, resolve matters themselves. The system should provide a range of informal mechanisms to resolve disputes best suited to the family law field, especially in addressing the needs and interests of children.

In this regard, a family law access to justice framework should be supported by an empirical base. Families entering the family law system experience a multiplicity of legal and psycho-social issues, ranging from the simple to the highly complex. They come from a diverse range of socio-economic, linguistic, and cultural backgrounds, including LGBTIQ+ cultures, and a broad spectrum of educational achievement. The family law system needs to provide services to Aboriginal and Torres Strait Islander communities that take into account kinship and extended family structures, delivered in flexible ways that better match the needs of those communities. Maintaining an empirical base will enable governments to understand the nature and number of disputes and develop options for resolving those disputes. Ensuring that 'Everyday Justice' and 'Informal Justice' services are tailored to meet the needs of all people will enhance justice outcomes and reduce pressure on the courts. An empirical base will allow the family law system to adapt over time, help identify gaps in the system, and monitor costs and effectiveness.

With these arguments in mind, we propose the following principles should guide the redevelopment of the family law system as a whole:

- An Access to Justice Framework that emphasises Everyday Justice Services and Informal Justice processes as the primary means for resolving family disputes.
- The importance of an empirical base to enable governments and policy makers to understand the nature and number of disputes and to develop options for resolving those disputes informed by accurate demographic data.
- The importance of services being evidence-based and outcome-focused.
- The importance of enhancing people's capacity to understand their position and where possible, to resolve matters themselves.
- The importance of educating professionals, parents and care-givers of the adverse effects on children of exposure to sustained family conflict.
- The importance of high quality information and advice that is accessible to all people regardless of socio-economic, linguistic, cultural, and educational background.
- The importance of giving couples and care-givers the opportunity to repair and improve their relationship to each other and their children.
- The desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner.
- The paramount importance of addressing the needs of the children of families experiencing relationship difficulty or during and after parental separation.

² Commonwealth Attorney General's Department, *A Strategic Framework for Access to Justice in Civil Law System*, Report by the Access to Justice Taskforce, 2009, p5.

- The importance of children having a say in the decisions that affect them commensurate with their age, maturity, and situation.
- The need to redress imbalances of power within all dispute resolution processes.
- The need to screen for, assess, and respond to family violence, regardless of where families and individuals enter the family law system.
- The importance of the family law system being seen as secular and inclusive.
- The importance of recognising that families and individuals are diverse in structure, beliefs, and values, with an equal right to access justice within the family law system.

Principles to be applied by the courts in the exercise of their jurisdiction under Section 43 of the Family Law Act

- a) The importance of recognising that families are diverse in structure, beliefs, and values, with an equal right to access justice within the family law system.
- b) The importance of giving couples and caregivers the opportunity to repair and improve their relationship to each other and their children.
- c) The desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner.
- d) The need to protect the rights of children and to promote their welfare.
- e) The importance of children having a say in the decisions that affect them commensurate with their age, maturity, and situation.
- f) The need to ensure protection from family violence.

Question 3

In what ways could access to information about family law and family law related services, including family violence services, be improved?

RAV believes that there is great scope for developing curated multi-media resources, YouTube videos, interactive graphics, gaming and virtual technology to:

- assist families to better understand the family law system
- educate and empower families including children about what to expect and how to minimise harm.

Question 4

How might people with family law related needs be assisted to navigate the family law system?

Please refer to RAV's response at Question 31 which incorporates our response to Question 4.

We also consider that the access mechanisms outlined in our response to Question 3 could assist people to navigate information sources related to the family law system.

Question 17

What changes could be made to the provisions in the Family Law Act (FLA) governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

As pointed out in paragraphs 145-148 of the Issues Paper, the current law incorporates a high degree of judicial discretion, albeit that the court is directed to consider certain factors, as set out in s 79 (which include 75(2) factors). The intention is to enable a “just and equitable” outcome with the enormous variety of financial histories and circumstances that exist for separating couples. But such discretionary decision-making comes at a high price, as follows:

- uncertainty for each person about the way the law will be applied in their situation.
- legitimate differences of view between lawyers for the parties about likely court outcomes, resulting in sometimes significant differences in the legal advice provided, in particular where a client’s instructions are factually incomplete or inaccurate.
- high costs of the Court process (court filing fees, and legal costs of \$350-400 per hour or more) and delay in resolution because of lengthy Court lists.

These are matters which affect all separating couples, but have most impact on those parties with a low asset pool (and income) at a time when financial resources are stretched as a couple needs to establish two separate homes. RAV sees many clients in this situation.

RAV has over thirty years’ experience in conducting family mediation (now family dispute resolution (FDR)) in both parenting and property matters. While many property cases resolve in FDR (or shortly afterwards with the assistance of lawyers), others fail to resolve at that point and legal proceedings are commenced by one of the parties. Of course many of these resolve at some point in the process, but often ‘at the door of the court’, when an experienced barrister provides more authoritative advice about the likely outcome. By that point, much of the damage has been done—in terms of cost, delay, deterioration in relationships, and impacts on children— which are only compounded by the pressure and anxiety of the atmosphere in which ‘consent’ orders are ‘agreed’. While FDR and lawyer-assisted FDR are of great assistance, they might be even more effective if there was legislative prescription for particular outcomes and more limited circumstances in which discretion might be exercised. While a more prescriptive regime was considered (and rejected) several years ago by the Government, we submit that this should be reconsidered in view of:

- the impetus given to unnecessarily adversarial conduct (on the part of some lawyers and clients) by a highly discretionary scheme.
- the continual blow-out in Court waiting lists over time in spite of the system’s best efforts (it was originally intended that the Federal Magistrates Court (now the Federal Circuit Court) would provide a pathway to final hearing within six months).
- the unavailability of legal aid in property matters (at least in Victoria). Therefore, for most people, access to justice by way of a Court decision is not a reality, given high cost-of-living pressures and legal costs.

In our submission, if the parties’ expectations are clear from the start of the marriage/de facto relationship about what will happen in the event of separation, then a more prescriptive process will be acceptable to the community. Of course, the difficulty is in the detail, but a number of models exist internationally for consideration (e.g. New Zealand and Canada, as referred to in paragraph 149 of the Issues Paper). One common feature is the idea of “relationship property” or a “community of property”, which establishes certainty around the property that is to be divided and the property that remains with each individual. Another feature is the legal presumption of equal sharing of the property that is to be divided. With short marriages/relationships in particular, such changes would greatly assist resolution.

Consistent with this approach and deserving of consideration is the Swedish model where property is classified as either personal or marital. If the parties are in disagreement, an application can be made to Court for the appointment of a marital property administrator who can decide whether property is personal or marital and how items should be valued and divided. Generally, there is an equal division of marital property. An appeal can be made to the Court, which can adjust the equal division to achieve a fairer outcome, following a consideration of specific factors.

RAV would broadly support these ideas while retaining discretion for adjustment in particular situations which could be more circumscribed than at present. There will always be a need to adjust for particular imbalances in future need, in particular, we would submit, to take account of a considerable difference in earning capacity and where periodic child support is non-existent or inadequate, situations that are common for women. It is important that family law settlements do not reinforce financial gender inequity in relation to pay, asset accrual and superannuation.

Changes to the principles of property division in the FLA along the lines of the above-mentioned ideas would assist the resolution of property disputes in FDR. If attendance at FDR became mandatory in property division (subject to assessment for appropriateness)—as it is in parenting matters—this would also contribute to an earlier resolution of many of these disputes, with particular benefit for those separating couples who have assets of modest value.

RAV would also support the following matters raised in paragraph 152:

- simplification of the superannuation provisions, as far as is legally possible
- greater use of Court Orders for the split or transfer of unsecured debt and liabilities and more explicit reference to this in the legislation

We do see cases in FDR where the asset pool is small or minimal, but parties are in conflict about 'joint' unsecured debts which may be in the name of one party. If there were a presumption of equal sharing of the liabilities incurred during the marriage/de facto relationship, this would assist early resolution. While this is often a position parties reach in FDR, more explicit legislative reference would be useful.

- codification of the decision in *Kennon & Kennon*, or clearer guidance about how family violence will be taken into account in property division.

RAV supports this initiative as a practical way of acknowledging the impact of family violence. FDR practitioners at our services deal with a very wide range of family violence which is present, in one form or another, in a majority of cases. So it would be important to be specific about the nature and extent of the violence that may be taken into account—it will need to be such as to impact on the contributions made, or the future needs, parenting capacity or earning capacity of a party. But in these circumstances, RAV would support a discretionary adjustment in favour of a victim.

While, in some cases, arguments about this will result in the need to commence legal proceedings and therefore delay resolution, these cases will represent the severe end of the FV spectrum, and not the majority.

Question 22

How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Low cost property dispute resolution is available in many community organisations. RAV has been delivering this service for thirty years, to around 1000 families per year. The fees for the service are means tested and are as low as \$10 per hour. Clients usually pay for their own legal advice, but in many cases—particularly where the property pool is small—the legal advice is limited to one or two consultations and clients share the costs of writing up consent orders. Some clients are able to access free or low cost legal advice, for example from community legal centres or lawyers who offer fee relief to low income families.

RAV agrees with the recommendation of the Productivity Commission that the requirement in s 60I of the *Family Law Act* to attempt FDR prior to lodging an application for children's orders be extended to financial matters. Property FDR services would be more broadly accessed if property matters were subject to the same requirements to attempt FDR that apply to children's matters. This would of course then capture all property matters—not just those with a small property pool. Many separating couples are unaware of the benefits of property mediation and find themselves unwittingly drawn into a costly legal process driven by the emotional dynamics that accompany separation.

While RAV also supports the referral or ordering of cases into property FDR by the courts, we would not necessarily regard this as an early intervention. Clients may well have expended significant funds by this stage and the ensuing processes are likely to have exacerbated the conflict and, if there are children of the relationship, harmed the parenting alliance.

Question 24

Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Legally-assisted FDR is a proven model for providing effective and safe dispute resolution for families affected by family violence. This model requires significant resourcing and it would be important to identify which clients would benefit from such an approach. If a Family Safety Navigator Model (refer to our response at Question 31) was adopted, FV affected clients could be appropriately assessed for, and supported in, a legally assisted FDR process.

Care must be taken in deciding what types of presentation suit what form of FDR. Some family violence affected clients are not appropriate for any FDR process due to the nature of the family violence (controlling and abusive violence). Others will benefit from an adapted form of FDR that takes into account safety and capacity of clients – perhaps a process that includes support from a third party in mediation and/or a shuttle mediation process. Some FV affected clients will be able to undertake FDR just with the ongoing support of a Family Safety Navigator (or some other similar type support role). Legally assisted FDR suits a particular type of presenting need, not just the presence of family violence.

Question 26

In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

RAV would recommend the increased utilisation of family dispute resolution in parenting and property matters and conciliation processes also in both parenting and property matters. This could be achieved by further supporting existing models of practice, extending existing models of practice to accommodate additional clients and developing new models of practice.

There are a number of models of ADR that can be considered in relation to family disputes.

Parenting FDR: Traditional models of FDR are primarily facilitative in nature, with the Family Dispute Resolution Practitioner (FDRP) maintaining a neutral role throughout the process. However, FDRPs are also tasked to ensure the best interests of children are central in the discussions, that shared parenting is considered and FV -affected clients are provided with a safe process. These requirements sometimes oblige an FDRP to manage the process in a manner that might not be considered purely impartial. Significantly, under the Act they are described as “advisers”—not neutral or impartial as is the case in many other ADR contexts. In this role, they have a duty to encourage a person to act on the basis that the child’s best interests are best met by the child having a meaningful relationship with both parents, and by the child being protected from the harm of being exposed to abuse, neglect or family violence, and in applying these considerations, by giving greater weight to protection from harm.

It is likely that FDRPs operate with some degree of variation across the private and community sectors—particularly in regard to the degree of neutrality that is exercised. Some will be less neutral when exercising their role to ensure children’s best interests are considered. Others will more readily push the boundaries of neutrality when working with clients who are FV affected. Anecdotal evidence suggests that there is variance between community organisations in the number and percentage of presenting FDR clients that are provided with inappropriate 60I certificates. This may indicate variance in the criteria used to judge whether family violence clients can be safely included in FDR.

The usage of FDR in parenting matters could be enhanced if services were supported by a case navigator or similar role that may extend the range of FV affected clients that could appropriately participate in FDR. Alternatively, the expansion of lawyer-assisted services would allow for additional clients to be provided with safe and effective FDR (see additional comments in RAV’s response to Question 24).

Property FDR: As discussed in this submission at Question 22, many community organisations currently provide property FDR (including all Relationships Australia organisations nationally), and have been doing so for a number of decades. However, the level of property FDR remains at much lower levels than FDR related to parenting matters. The usage of property FDR would increase significantly if the s60I obligations were extended to property matters. This would have multiple benefits including the:

- freeing up of court resources to deal with complex parenting matters.
- reduction in costs to separating families who would otherwise have become entangled in the adversarial system.
- ability of parents with concurrent parenting matters to have all their separation issues dealt with in FDR. This would be cost effective, convenient and perhaps most importantly, protective of the parenting relationship.
- early intervention of dispute resolution before matters escalated into the adversarial processes.

The introduction of compulsory property FDR would require:

- additional formal training requirements for FDRPs not experienced in property mediation
- accreditation standards
- resources to allow the community sector to provide subsidised property FDR (assuming that the government would wish to provide low cost property FDR to the community).

The model of practice would also need to be defined. Currently, RAV recommends and encourages clients attending property FDR to seek legal advice or assistance prior to or during the FDR process and it is frequently the case that agreements reached in FDR are finalised and drafted as consent orders by lawyers. This 'parallel' process has been effective for many years and clients report high levels of satisfaction with the process and outcomes. Cases dealt with in RAV property FDR range from relatively simple, small property matters to larger multi-million-dollar property pools which include complex trust structures, self-managed superfunds, businesses and other various asset and debt classes. RAV property mediators are all registered FDRPs and have received additional specialist training in the relevant legal framework and principles, financial skills, and the micro-skills required to conduct property mediation.

Based on decades of experience in successfully conducting property mediation, RAV does not believe that property FDRPs must be legally qualified. They would, however, need to acquire legal knowledge and financial skills through specialist training. Property FDR should be undertaken by highly skilled practitioners who are FDR accredited, have expertise in family violence assessment and are knowledgeable about the impact of family violence, including in particular the dynamics of financial abuse and control. Legally qualified mediators would similarly need to be trained in FDR skills (FV, cultural competency, child development etc.) and ideally would be required to be accredited FDRPs.

Lawyer Assisted FDR: RAV has extensive experience providing lawyer assisted dispute resolution. Current services include lawyer assisted FDR in parenting and property matters, court ordered lawyer assisted property conciliation (discussed below), and lawyer assisted culturally-sensitive FDR for family violence affected families in the Vietnamese community.

Our experience is that these services and models of practice are highly effective, particularly for cases with unique challenges. Examples include those affected by family violence and assisted by the presence of a legal support person (although as argued in response to Question 24, the presence of family violence doesn't always call for a lawyer-assisted model), in cases where there are particular cultural needs and the legal assistance is culturally appropriate, and in cases where one party feels the need to have legal expertise during negotiations. In this latter example, lawyer-assisted FDR might be more important in a single session model (like court ordered property conciliation). In most property mediation FDR models there are multiple sessions that allow clients to seek legal advice between sessions and before making final decisions. However, this doesn't preclude the development of a range of legally assisted mediation models to meet the diverse needs and preferences of clients in the future.

Conciliation: Conciliation is commonly regarded as a process in which the practitioner plays a more active role, which may include advising clients: "The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to

reach an agreement”³. Commonly a conciliator will act as a facilitative mediator in the first instance and shift into an advisory role if the clients are struggling to reach agreement.

Property Conciliation: RAV is currently contracted to provide a legally assisted property conciliation service to clients ordered by the Federal Circuit Court (on average 380 cases per year). The service has been operating in various forms for many years and has a long history of providing effective and safe outcomes for clients. Settlement occurs in 74% of cases and clients report high levels of satisfaction with the process and outcome(s). It needs to be remembered these cases are already in the court system before they are ordered to attend property conciliation and would therefore be regarded as already engaged in the adversarial legal system, with the service offering an opportunity to curtail unnecessary prolonging of cases.

Funded from the Federal Circuit Courts Primary Dispute Resolution budget, the model was developed to assist the court achieve key deliverables, namely to:

- provide access to justice for every Australian regardless of geographic location or personal circumstance and do so in a timely, efficient and courteous manner.
- provide the Australian community with a simple and accessible alternative to litigation for the resolution of less complex disputes within its jurisdiction - in which, where practical, parties are encouraged to resolve their disputes through dispute resolution and negotiation methods.

With the aim of reducing the number of cases unnecessarily proceeding to pre-trial conciliation conferences, there is an expectation that parties and lawyers will negotiate in good faith and not resort to grandstanding and positional bargaining. Timeframes are designed to ensure that when parties are ordered to attend property conciliation, the process is completed and outcomes are reported back to the referring Judge before the next court event.

Standard Orders require parties to prepare and exchange:

- a list of assets and liabilities
- a statement of alleged contributions
- a statement of future needs
- valuations
- proposal as to fair division of assets.

The intent of this requirement is to ensure that preparatory work that might not otherwise be completed until a later phase of the court process is completed now, narrowing issues in dispute and optimising chances of a resolution. Affidavits are not required.

Private Lawyer Assisted Property Conciliation: RAV has recently initiated a private lawyer assisted conciliation service which offers the service model to separating couples prior to initiating court proceedings. This service is proving popular and effective.

Parenting Conciliation: Whilst not commonly practiced within the Australian family law system, RAV believes there is scope for introducing a parenting conciliation service. For parents who cannot reach an agreement in mediation, there may be an opportunity to engage an expert parenting conciliator who can

³ See NADRAC Glossary of Terms, at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>.

provide advice about how they might resolve their disagreements in the best interests of their children, and, who might also suggest outcomes and actively encourage clients to reach a parenting agreement. The conciliator would not make a determination or compel clients to reach agreement, but may press them to reach an outcome by making the parents aware of the impact of the ongoing conflict on their children and the likely process and outcomes that would ensue if they failed to reach agreement. To some degree this can and does happen within the court prior to a formal hearing, but it could be argued that there is a role for such an intervention earlier in the dispute process. The alternative for these parents is to initiate court proceedings with the accompanying problems of delay, high cost and possible inflammation of their dispute. The pilot Parent Management Hearings may offer an alternative arbitration-like step in the future, but there is also a role for an intermediate conciliation step much like that offered in property matters.

The parenting conciliator would need to have deep content knowledge of the subject matter including in areas such as family violence, child development, trauma, adult adjustment, and mental health. The conciliator would also need to be knowledgeable about the legal processes and outcomes of parenting disputes. The Parenting Coordinator role developed in the U.S., which we discuss in relation to Question 29, offers a conciliation model that provides relevant learnings and could be adapted to the Australian context.

Question 27

Is there scope to increase the use of arbitration in family disputes? How could this be done?

RAV would recommend consideration of the Swedish model of property settlement. Although this model is embedded in a family law system that is significantly different to the current Australian model—including the concept of community/marital property and a presumption of 50/50 split of marital property—the resolution process itself is of interest. Couples are encouraged to resolve matters themselves or via ADR. If they cannot agree on a property settlement they can apply to the district court for the appointment of a ‘marital property administrator’, who decides what should be included in the division of marital property and how that should be divided. If one party disagrees with this decision they can appeal to the district court that may, for example, overrule a 50/50 split if it is considered unfair. This is a model of arbitration that might be adapted to the Australian context.

RAV is also supportive of the current Parent Management Hearings Pilot. RAV believes that the proposed panel, staffed by members with expertise in family law and co-occurring complex issues, is a constructive and viable option for less adversarial resolution of disputes relating to children. In particular, the alignment with the existing principles and Best Interests of Children contained in the Family Law Act 1975, and the safety provisions detailed in the Bill, could provide vulnerable parents and children with determinations to support safety and wellbeing.

Question 29

Introductory response to Questions 29, 34 and 37

In considering how the needs, wishes and interests of children are better addressed in the family law system, in our view, it is important to take a systemic approach. Whilst the Issues Paper does not specifically ask questions about parenting education and early intervention programs, the role these programs can play in ameliorating the impact of parental separation on children should be held in mind. Improving children's participation in court processes and family dispute resolution, and the broader question of introducing problem-solving decision making should be addressed as part of an integrated approach to improve outcomes for children in the family law system. RAV supports the need for the family law community to work collaboratively to integrate research-supported models for resolving family disputes that focus on the welfare of children. "The goal of the family law system should be to give the parties the tools to restructure their lives. Central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and enable the family to manage its own affairs"⁴. We believe that this is in line with increasing recognition of adverse effects of the traditional legal process ("juridogenic harm") in domestic relations matters⁵.

The effects of separation and divorce on children have been studied extensively since divorce rates began rising in the last century. While children are resilient and can endure fundamental changes in family structure due to divorce and even death, and most children adapt normally, parental separation can have a detrimental impact. Many forces contribute to the risk faced by children. These include loss of contact with a parent, stress of adjusting to changing living situations, lack of psychological resources, parents' psychological health and parenting ability, and economic decline. However, whilst all of these play a role, exposure to high levels of conflict between parents and caregivers has consistently been identified as the most significant predictor of poor outcomes for children. As a group, these children are likely to have significant adjustment, academic, and relationship problems, and exhibit indications of psychological maladjustment, lower academic achievement, social difficulty, and poor self-esteem, with higher levels of anxiety and depression. The literature indicates that not all parental conflict is harmful. Parental conflict which children are not privy to ("encapsulated conflict") does not affect well-being.

Reducing children's exposure to conflict therefore remains a critical goal of the family law system, and should be regarded as a priority outcome at every stage of a family's engagement with it, whether trying to repair relationships or when engaged in informal or formal legal processes.

At all stages parenting programs and education can play a role in ameliorating the impacts of separation on children. Parenting programs following parental separation have been shown to be effective in treating and preventing a wide variety of child adjustment difficulties. These interventions have essentially focused on psycho-education and skills-based programs for parents following separation, with program content based on demonstrating the links between separation, parental behaviour and child adjustment. Prevention and early intervention parenting programs for ameliorating the impact of separation on children have been supported throughout the literature: outcomes include the reporting by parents of increased parental cooperation, restoration of parental alliance, improved children's well-being, and a belief that early

⁴ S.H. Ramsey, 'High-conflict custody cases: reforming the system for children', Wingspread Conference Report and Action Plan, *Family Court Review* (U.S.), vol. 39, no. 2, 2001, p. 147.

⁵ S.Ergun, *Evaluating Parenting Coordination: Does it Really Work*, Institute for Court Management, ICM Fellows Program, 2016.

attendance at separated parenting programs will prevent or reduce enduring parental conflict. In addition, research comparing collaborative forums for dispute resolution with litigation following separation, found that parents who mediated their dispute had significantly lower conflict with each other, and that both parents were significantly more involved in their children's lives⁶. The integration of informal dispute resolution with psycho-education and coaching programs focused on improving conflict management skills and capacity should continue to be strengthened.

To effectively address the exposure of children to conflict in different forums of the family law system, the nature of conflict needs to be assessed. For example, labelling the parental relationship as 'high conflict' can be problematic and misleading, because it implies that both parents are equally driving the conflict, when it can be that one parent is unilaterally creating and maintaining it, especially in the context of a history of family violence. At the most persistent and recalcitrant end of the spectrum, high conflict is likely to be personality driven. Eddy asserts that high-conflict legal disputes are driven more by personality than by legal or financial issues. He describes individuals with "high conflict personalities" as having exaggerated emotions and repeatedly engaging in inappropriate behaviour. They typically deny responsibility for their problems, place blame on others, persist long after others let go, and make minor problems into major disputes. In his view, courts attract individuals with personality disorders, or traits of personality disorders, because the court process resembles their thought structure. The commonalities of high conflict personalities and the adversarial nature of the court process make adversarial court proceedings, particularly domestic relations matters, the ideal environment to play out the drama.⁷ These observations strengthen the argument for assertive forms of conflict assessment, which include the voice of the child, and further exploration of problem solving approaches.

In general, we would argue that better including children's voices and improving their participation in the family law system will help in assessing their true situation. Where there is a lack of a good quality relationship between parents, the views of a child should be an essential part of determining parental caring capacity and a child's capacity to thrive in a conflictual situation. This in turn will assist in matching interventions and decisions to achieve the best outcomes for children, especially in reducing their exposure to damaging levels of conflict.

Question 29

Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

RAV believes that there is scope for problem solving decision-making processes to be developed within the family law system, especially in dealing with families where there is entrenched conflict in cases involving children. In particular, we believe that the Parenting Coordinator role developed in the USA, provides a model that should be considered for the Australian context.

The last fifteen years have shown parenting coordination to be a complex and distinctive process that integrates the fields of law, mental health, and conflict resolution, and which is practiced by attorneys, psychologists, and social workers. It is at once an intervention, a dispute resolution process, and an innovative form of case management. In contrast to the court process, which culminates in a one-time ruling,

⁶ J. McIntosh and E. Tan, *Family Court Review*, vol. 55, no. 3, 2017, July, pp. 329-344.

⁷ B. Eddy, *High Conflict People in Legal Disputes*, Scottsdale, AZ: High Conflict Institute Press, 2012.

it is ongoing until terminated. Services are provided informally without making a record, in a non-adversarial but court-sanctioned environment on an as-needed basis.⁸

In 2012, the American Psychological Association *Guidelines for the Practice of Parenting Coordination* for psychologists who practice parenting coordination provided the following definition:

“Parenting coordination is a non-adversarial dispute resolution process that is court ordered or agreed on by divorced and separated parents who have an ongoing pattern of high conflict and/or litigation about their children. The underlying principle of the parenting coordination intervention is a continuous focus on children’s best interests by the PC in working with high-conflict parents and in decision-making. Parenting coordination is designed to help parents implement and comply with court orders or parenting plans, to make timely decisions in a manner consistent with children’s developmental and psychological needs, to reduce the amount of damaging conflict between caretaking adults to which children are exposed, and to diminish the pattern of unnecessary re-litigation about child-related issues”⁹.

To comprehend fully the nature of the dispute presented, the first task of a parenting coordinator is to gather information from the parents and, if appropriate, collateral sources. The coordinator then works to educate and facilitate the communication of the parents to help them reach a solution. If the parents reach impasse, a parenting coordinator will proceed to make an arbitral decision that is as binding as one issued by a court of law. This progression may occur over the course of time or within a single session, depending on the nature of the dispute. Decisions remain in effect unless set aside a court through a formal review proceeding. There is no judicial involvement unless an appeal is filed. The intervention is thus gradual, with the parenting coordinator taking greater control, only if necessary.¹⁰

A multidisciplinary role, the five major functions of parenting coordination are:

- 1) Education
- 2) Conflict management
- 3) Assessment
- 4) Coordination/case management
- 5) Decision-making.

Ideally, a parenting coordinator will possess expertise in conflict resolution theory and techniques, including:

- mediation
- child development and psychology
- adjustment to divorce
- family dynamics and family systems theory
- domestic relations law
- the dynamics of domestic violence and associated safety and intervention considerations
- parenting education and techniques.

⁸ S. Ergun, *Evaluating Parenting Coordination: Does it Really Work*, Institute for Court Management ICM Fellows Program, 2016.

⁹ American Psychological Association, ‘Guidelines for the Practice of Parenting Coordination’, *American Psychologist*, vol. 67, no. 1, 2012, p.64

¹⁰ Ergun, op. cit.

Evaluation of the model in Ohio indicated that Parenting Coordination was very effective in reducing litigation in the American context. Whilst not universally successful, “the results are sufficiently encouraging. The strong desire for an alternative to the court process warrants establishing an affordable pilot parenting coordination program within the Court. By addressing participants’ concerns and removing perceived barriers to success, the Court can also better support the private provider model”¹¹.

In our view, there is sufficient evidence to consider introducing a pilot program in the Australian family law context. We believe that consideration should be given to both mandatory and voluntary Parenting Coordination models. The model has been developed to reduce conflict and re-litigation by assisting parents to implement and comply with court orders. However, some conflicted parents may voluntarily seek the assistance of a parenting coordinator in implementing a parenting plan following Family Dispute Resolution (FDR) or even in assisting in developing a parenting plan. We see great potential benefits in this for children, especially if recommendations by a parenting coordinator were available to courts in the event of subsequent litigation.

In forming this view, we note that in the US Parenting Coordination models vary from state to state, and that whilst guidelines exist there appear to be no established requirements for training and accreditation. If the model was to be trialled in Australia there should be clear professional, ethical and procedural guidelines and training requirements commensurate with the multidisciplinary nature of the role, to ensure uniform standards of practice, program integrity, and meaningful evaluation.

¹¹ Ibid.

Question 31

Combined response to Questions 31 and 4

Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Question 4 How might people with family law related needs be assisted to navigate the family law system?

Introduction

Research by the Australian Institute of Family Studies¹² has shown that family relationship services support significant numbers of families who are affected by family violence and have multiple and complex needs. In order to safely and effectively respond to these needs, family relationship services commonly work collaboratively across jurisdictions with other services, such as specialist FV services, legal assistance services, mental health, and drug and alcohol services.

In RAV's experience, FV-affected families who present for FDR and who also have multiple and complex needs require more support than the current FDR model can provide. In addition, there is a gap in services provided for families moving between FDR and Court. In the absence of continuous, linked services and support, women and children affected by FV are at significant risk when they attempt to navigate from FDR to the Court, or post-FDR arrangements. This risk is compounded by the cross-jurisdictional issues that can create barriers to women and children obtaining legal protection from FV.

In particular, complex and protracted negotiations around ongoing co/parenting relationships place women and children at risk. RAV holds the view these ongoing co-parenting or parallel parenting ties result in a set of complex dynamics that require models of service that can cut across jurisdictions and state and national funding priorities.

RAV believes that co-ordinated case management to provide access to therapeutic programs and legal processes simultaneously, will build transparency, capacity and better outcomes for families and children. Comprehensive services to enable families to resolve their disputes safely are required to reduce the heightened risk to safety faced by women and children in particular during the navigation through the FDR environment and in transition to and after Court.

RAV recommends that FDR services be supplemented by a whole-of-family response that is provided by a practitioner who is focused on effectively assessing and responding to presenting FV issues and/or other complex needs. RAV has developed and is piloting one such model at two of our Family Relationship Centres (FRCs) (Melbourne and Sunshine), aimed at ensuring family safety and the wellbeing of children affected by FV throughout their interactions with the family law system.

RAV's Family Safety Model (FSM) supports FDR services at participating FRCs. The FSM provides support to families at what is often a high risk and difficult time for families with complex needs. During separation,

¹² R. Kaspiew, R. Carson, M. Coulson, J. Dunstan and S. Moore, *Responding to family violence: A survey of family law practices and experiences (Evaluation of the 2012 Family Violence Amendments)*, Melbourne: Australian Institute of Family Studies, 2015.

conditions can often deteriorate for families—with significant impacts on children. The FSM offers continuity of care, and extends our capabilities to support families through to court processes as required. The model uses a whole-of-family approach and prioritises safety and child wellbeing.

The FSM was recently commended in the Family Law Council's *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* report to the Attorney-General (2016).

The Family Safety Model

RAV has designed the FSM with three intentions, to:

1. support FV-affected families who receive an FDR service which results in an agreement. These families require support during and after the FDR process.
2. support FV-affected families who receive an FDR service which does not result in an agreement/outcome. These families also need support:
 - a. during and after the FDR process to ensure their safety and wellbeing. These clients often need support during the implementation and ongoing maintenance of parenting outcomes.
 - b. in the transition between FDR and Court - noting that there are often significant delays before an adjudicated outcome.
 - c. Post-FDR if the clients for whatever reason chose not to proceed to court.
3. support families who are affected by high levels of FV and/or coercive control, who are screened out of FDR because it is not appropriate for their circumstances. These families also need support in the transition between FDR and Court or during whatever alternative process they undertake.

Figure 1 below represents the alternative pathways for families affected by FV who present to an FRC.

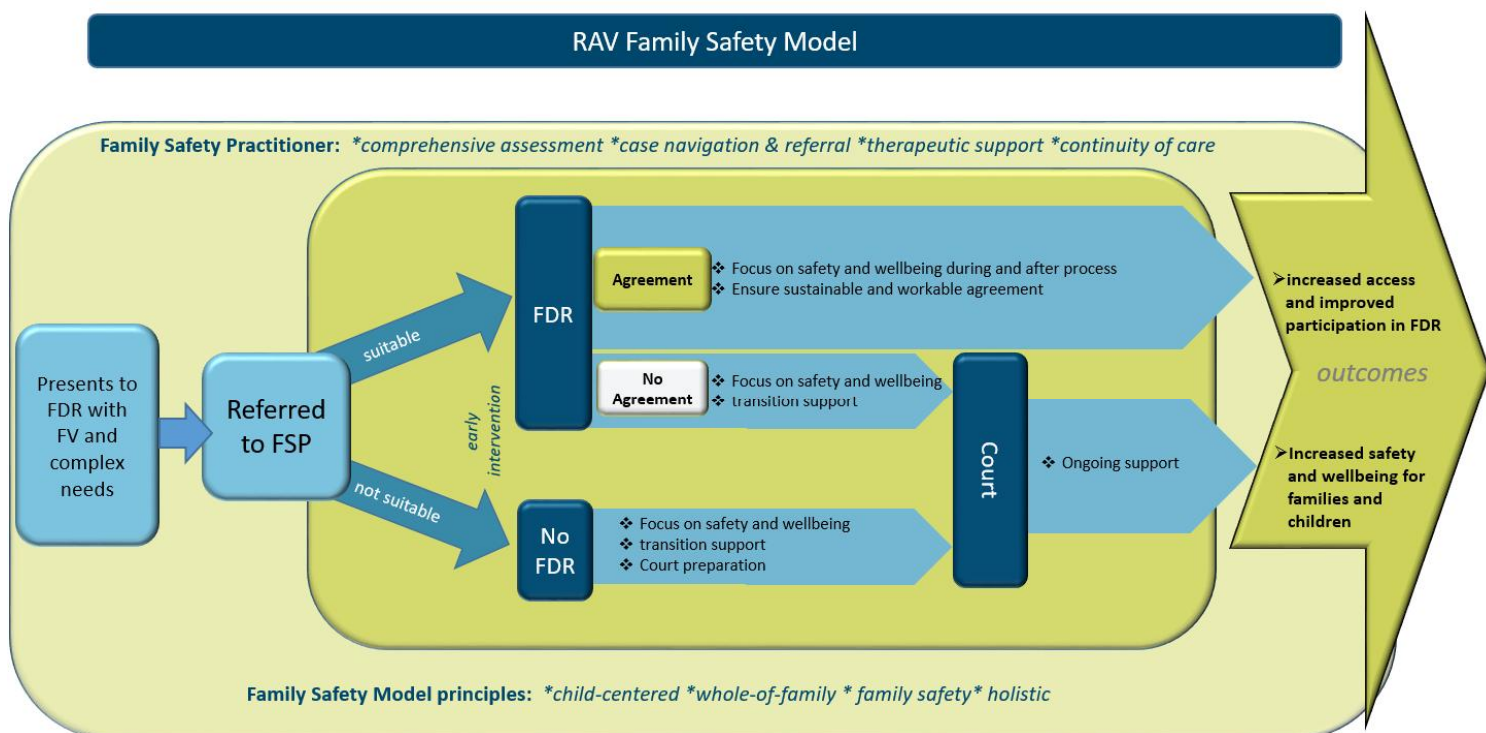


Figure 1: Pathways for families presenting to FDR with FV and complex needs

What needs does the FSM address?

The Family Safety Model caters specifically for families who want to undertake FDR, but who may have multiple FV risk factors that are compounded by complex needs. FDR services typically assess for FV and complex needs in relation to a client's willingness, capacity and safety to participate in mediation. These families would usually be screened out of FDR as part of a standard assessment process, or would be assessed as 'borderline' in terms of the appropriateness of participating in FDR as a result of serious concerns about their safety and capacity to mediate.

These families, if not for an enhanced FDR assessment and response process, would be required to navigate an adversarial family law system, or reach a resolution about parenting or property disputes independently, in an unsafe environment. In addition, families with complex needs face lengthy court processes often up to twelve months with an increased risk to safety and wellbeing, in particular, for women and children during this time¹³.

How does it work? Program theory

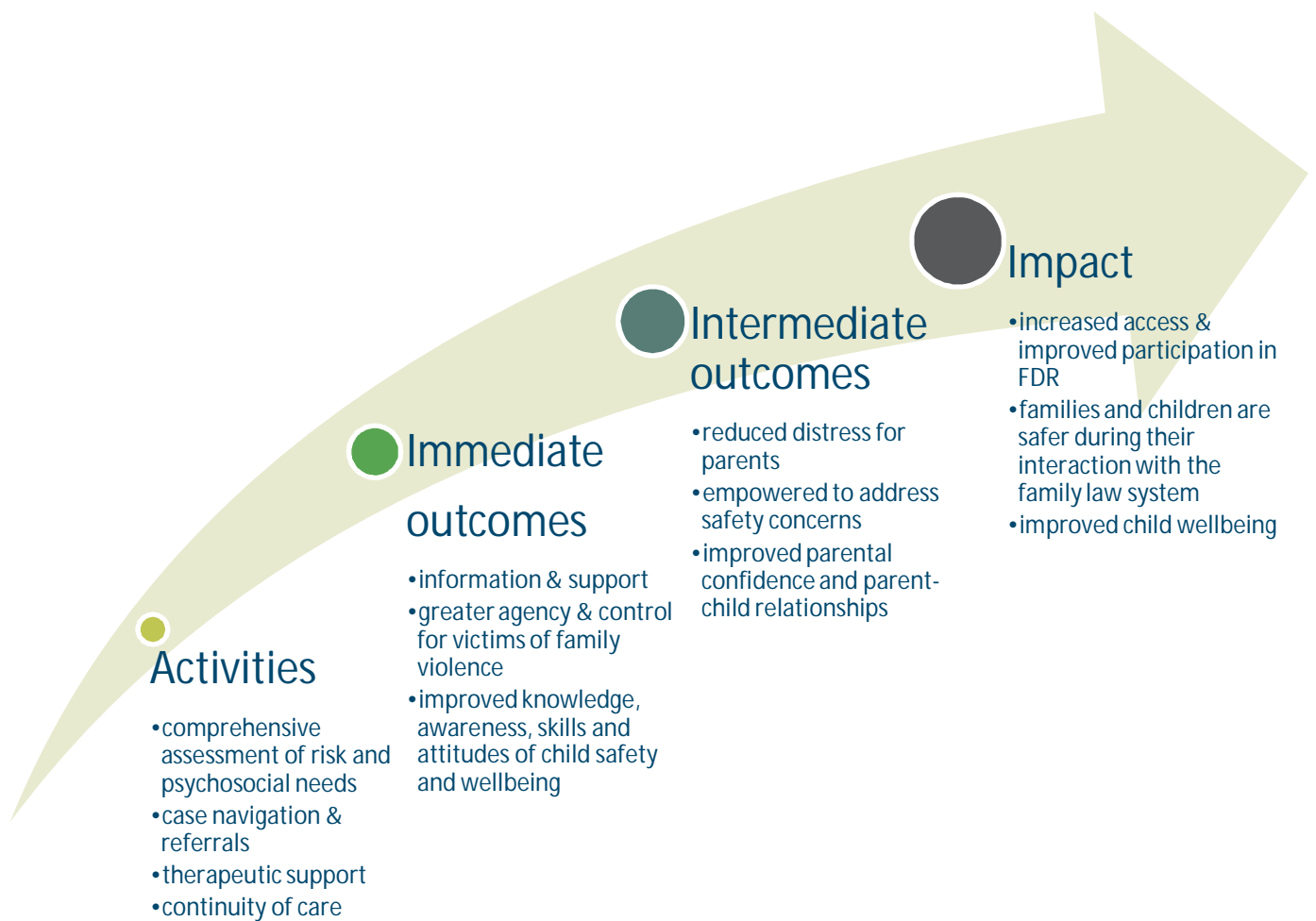
The FSM allows families to participate to a greater extent in FDR, reduce risk and achieve better outcomes. The key targeted outcomes of the FSM are to:

- improve the safety and wellbeing of families, regardless of their pathway in the family law system.
- improve the likelihood that parenting agreements are workable, sustainable and durable (these agreements can be achieved through FDR, with a lawyer, or on their own).

These outcomes are achieved through assigning a skilled Family Safety Practitioner (FSP), or Navigator, who offers case navigation and appropriate referrals, comprehensive assessments of risk and psychosocial needs, continuity-of-care, and therapeutic support in times of need.

Figure 2 demonstrates the program theory for the Family Safety Model.

¹³ Family Court of Australia, 'Report on Court Performance', *Annual Report 2016-17*, pp. 36-37 located at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2016-17/2016-17-annual-report-part3>, (accessed 3 May 2018)



Key principles of the FSM: child-centered * whole of family * family safety * holistic

Figure 2: Program Theory—Family Safety Model

Child-centered: RAV considers child developmental needs, and has a strong understanding of safety and risk. Having a child-centered approach means that we have the same standard of expectation from both parents during this time. By giving parents a voice and listening to their concerns, we are able to guide them to appropriate resources and provide a child-centered lens to their current situation¹⁴.

Whole-of-family & holistic: Integrated case management service models provide an advanced response to FV and enable services to be co-ordinated seamlessly for clients. They provide key elements such as risk and needs assessment, joint planning of interventions, the delivery of services by a range of independent agencies or practitioners but within an overall client plan, case tracking and formal case closure processes. Whole-of-family approaches can support a more integrated and coordinated FV service that works with the victims of FV, addressing the needs of children and young people, as well as engaging perpetrators. In doing this, the safety and wellbeing of families and children is prioritised. Adopting an inter-agency approach

¹⁴ David Mandel and Associates LLC, *The Safe and Together Model*, Canton, CT (USA), 2014, located at http://endingviolence.com/wp-content/uploads/2013/01/st_model.pdf

enables a continuum of services to be provided to the family over an extended period, increasing the overall responsiveness of the wider service system to meet the family's needs.

The Family Safety Practitioner (Navigator)

The FSM is best conceptualised as the delivery of telephone-based consultations. Clients contacting the FRC, identified to be at risk of FV and other complex needs are referred to a highly skilled FSP (Navigator) who maintains contact with the family as needed throughout their involvement in the family law system.

The FSM ensures that all clients identified as FV-affected during FDR screening or throughout the course of service delivery, are offered a comprehensive assessment addressing safety, risk and the psychosocial needs of all family members including children. It is holistic, incorporating a range of psychological, relational and structural domains that inform a collaborative case plan. The knowledge obtained from this assessment is revised and re-shaped throughout the period of support, in collaboration with family members, including former partners. The amount of support that clients are offered and choose to use throughout and after FDR varies according to their needs and current circumstances.

In particular, the ability for an FSP (Navigator) to remain in contact past the point where FDR and/or interaction with the Court has finished provides families with an integrated and continuous support through a period that is well documented to be a high risk time for them.

The FSM's foundational principle is that it is safer to track and coordinate the work for all family members that are affected by FV – either together or separately, but always systemically. The second guiding principle is the importance of actively supporting families in the transition from FDR services (early intervention) to the Court (tertiary/interventionist response), to prevent women and children 'falling through the gaps' and facing increased risk to their safety and wellbeing during the separation process.

RAV's practice experience involves whole families, whether together or separated, presenting for service. Within our practice, clients may attend a service on their own or with family members, and may be living together or separated. However, in any scenario, services are provided using a whole-of-family approach which recognises the needs and wellbeing of all family members. Over many years, RAV has developed robust ways to assess and work safely with these 'whole families' who present with high risk FV presentations. This is particularly pertinent in our work with complex family law matters, where FV is *not* the exception¹⁵.

The Family Safety Navigation model is a trial of an approach that transforms the way dispute resolution and other family law processes intersect with state-based FV responses, including the Courts, for women and children. RAV has been delivering whole-of-family responses through our Family and Relationship Services in several other programs, including Men's Behaviour Change. Demonstratively, the FSP at our Kew Centre takes referrals from our family counselling program. There have been several high risk cases where women attending counselling have disclosed FV and the FSP has provided support at the point where the woman has chosen to end the relationship, known to be a particularly dangerous period. The FSP has supported the development of safety plans, referrals to specialist services and provided information to assist women navigate the Family Law System and access state-based services, including the police. Where perpetrators have been engaged with our services, we have sought to maintain that engagement using the whole-of-family approach.

¹⁵ A. Bickderdike and H. Cleak, 'One way or many ways. Screening for family violence in family mediation', *Family Matters*, 98, 2016, pp.16-25.

Skills and expertise of a family safety practitioner

RAV strongly recommends that the skills required of a FSP (Navigator) are drawn from the social science fields (social work, counselling, family therapy, psychology). FSPs (Navigators) need expertise and experience in assessing for and working with families affected by FV—including working with and engaging perpetrators, victims and affected children. In addition, FSPs (Navigators) need a detailed understanding of FDR processes and the wider family law system in order to tailor interventions to support the clients in the family law processes they are involved in. These interventions will vary significantly according to the FV profile of the case and the family law services. The FSP (Navigator) also needs strong engagement skills as many clients will require a repeated, patient and assertive approach to encourage initial and ongoing engagement.

Evaluation

The FSM program is being evaluated for the duration of the pilots at both the Melbourne and Sunshine FRCs using a mixed-method approach. The evaluation design includes a combination of the following:

- Output data
- Quantitative survey conducted at regular intervals using validated measures
- Qualitative interviews with clients, Senior Family Dispute Resolution Practitioners, Family Safety Practitioners, and Centre Managers.

The Melbourne FRC trial has been evaluated since January 2017, and the Sunshine pilot commenced in February 2018.

Service Delivery Data

The following data was collected from January 2017-March 2018 at the Melbourne FRC.

- Total number of cases = 138
- Cases closed = 73

Needs addressed: In general, the main needs addressed are FV, child wellbeing and therapeutic support. Clients received support and assistance most often in the following areas: IVO process & procedure, FV (specifically for multicultural & LGBTIQ+ clients), men's referral services, court, police and child protection, and child development. The most common referrals included FV services, family therapy, and counselling. In most instances, multiple compounding needs were addressed in addition to FV including mental health, and alcohol and other drug use (refer **Table 1**, below).

Table 1: Common needs addressed	Percentage
Family violence	88%
Child wellbeing	65%
Therapeutic services	34%
Mediation	30%
IVO information	18%
Legal advice	10%
Mental health	12%
Drugs & alcohol	11%

Table 1: Common needs addressed

Level of engagement: Most cases were completed within the first month, with only a small percentage (4%) engaging for 6-9 months, and none for than nine months (Refer **Table 2**). The reason for closure was most often client directed (refer **Table 5** below). The majority of cases require low levels of engagement, usually an initial assessment and referral (refer **Table 3**). Half of these require additional follow up. At the time of closure, just over half of all cases required three follow-up calls or less. None required more than ten follow up calls (refer **Table 4**).

Table 2: Length of engagement	Percentage
Less than 1 month	48%
1 - 2 months	10%
2 - 4 months	27%
4 - 6 months	11%
6 - 9 months	4%
9+ months	0%

Table 2: Length of engagement

Table 3: Action Outcome	frequency
Assessment & referral	82
Follow up	47
Information provided (by e/mail)	33
One off consultation	23

Table 3: Action Outcome

Table 4: Level of engagement	Percentage
One off (one contact only)	38%
moderate (no more than 3 follow up calls)	53%
intermediate (4 - 9 follow up calls)	8%
intensive (10 follow up calls or more)	0%

Table 4: Level of engagement

Table 5: Reason for case completion	Percentage
No further support required (client decision)	56%
No further support required (FSP decision)	11%
Unable to contact	17%
Client chose not to engage	17%

Table 5: Reason for case completion

Client background: The majority of clients engaging with the FSP (Navigator) are female and Party 1 (P1) in the FDR process. However, the FSP (Navigator) also frequently engages males and perpetrators (21% of clients were male) (refer **Table 6**). In 14% of cases, both parties were engaged with the FSP (Navigator). 40% of clients had an IVO in place either during or prior to their engagement with the FSP (Navigator) (refer **Table 7**).

Close to 40% of clients are engaged in the FDR process: the remainder are assessed as being inappropriate or unwilling to participate (**Table 8**). Of these, 9% were specifically assessed as inappropriate due to FV. Of the 89% of clients who were issued with an FDR certificate under Section 60I of the Family Law Act, 50% of these genuinely participated in FDR. The remaining clients were unsuccessful for various reasons (**Table 9**).

Table 6: Gender	Percentage
Female	79%
Male	21%

Table 6: Gender

Table 7: IVO in place	percentage
Yes	46%
No	51%
Partial	0%
Court Order	0%
Yes - expired	3%

Table 7: IVO in place

Table 8: Participation in FDR	percentage
Yes - (including shuttle FDR)	47%
No - assessed as inappropriate for FDR	26%
No - parties declined/withdrew	24%
Transferred to another FDR Service	3%

Table 8: Participation in FDR

Table 9: Assessment of FDR certificate 60I	percentage
Genuine effort to resolve the dispute	50%
Assessed as inappropriate for FDR by practitioner	33%
Assessed as not appropriate to continue by practitioner	2%
Failure of one or both parties to make a genuine effort	16%

Table 9: Assessment of FDR Certificate – 60I

Client Evaluation

A quantitative survey is collected at Assessment, and then after three months, six months and nine months or closure. The objective of this survey is to provide data of a significant sample. The evaluation will continue for the duration of the pilot, and we anticipate a large number of completed evaluations by December 2018. In addition, there will be specific measures implemented for perpetrators and male clients that better reflects their specific circumstances, and intended outcomes.

At this stage, for the purpose of our present response, we provide a case analysis of seven samples, five of which have multiple time points. We expect that this sample size will grow to over 100 clients by December 2018. The initial results are provided below. In this analysis, all survey respondents were female, 4 out of 7 were Party 2 (P2), two were P1. The results from the survey are summarised as follows in specific outcome categories:

Safety

- When asked to rate **how safe they felt** (1 *safe*-10 *unsafe*), and **how safe their children felt** over the past week, in general feelings of safety increased over time (ranging from 1-6 for clients, and 1-8 for children).
- The overall **CRAF (Common Risk Assessment Framework) client risk rating** for each of these clients, as assessed by the FSP (Navigator), ranged from low-medium. For two out of five clients risk reduced over time, whereas the risk rating for the others did not change. The CRAF is a common tool used across Victoria to help practitioners identify and respond to FV risk factors.

Parenting

- Given that FV can affect the relationship between victims and their children, clients were asked to rate their **relationship with their children** in the last month (1 *poor*-10 *best possible*). In general,

clients indicated their relationship improved over time (3 out of 5) with none decreasing, with a reported range of 6-10.

- Clients were asked to rate **confidence in themselves as a parent** over the last month (1 *least confident*-10 *most confident*). In two out of five cases, confidence increased and no cases experienced a decrease in confidence.

Wellbeing

- When asked how clients were **coping with life** at the moment (1 *not at all*-10 *completely*) the responses ranged from 5–8.
- The FSP (Navigator) was asked to rate their clients' ability to cope with **problems and everyday stresses**. In general, this was good with 2 out of 5 improving whilst the remainder did not change.
- The FSP (Navigator) was asked to rate the clients' **level of depression, anxiety and overall emotional state**. This ranged from good to marginal, with one client improving over time and no change for the remainder.
- The FSP (Navigator) was asked to indicate the extent of the **child's emotional difficulties** in the last month (1 *not at all a problem*-10 *very much a problem*). For four out of five, this factor decreased: in the remaining case, this factor increased. Responses ranged from 2-7.
- The FSP (Navigator) was asked to indicate the extent of the **child's behavioural difficulties** in the last month (1 *not at all a problem*-10 *very much a problem*). In general, this did not change, with one reducing, and one increasing. Responses ranged from 1-5.

Parenting agreement

- Generally, clients are contacted by the FSP (Navigator) before FDR commences. By 3-6 months they **all had some form of parenting arrangement or agreement**. These range from verbal, court order, partial, or written. Written is the most common form of agreement, although this changed over time for some clients. The majority said the agreement 'just happened', particularly in terms of verbal agreements. These transitioned at times through lawyers or court orders.
- Three out of seven cases felt they had to **make compromises** to their own or their child's safety in order to reach an agreement. Each of these had reached agreement either through a lawyer or court order (i.e. not FDR).

Client interviews

Four clients from the FSM were interviewed. As part of the evaluation design, RAV will be interviewing more clients by December 2018. The clients had varying levels of involvement with the FSP (Navigator) but had all reached a level of stability with their situation. Three clients interviewed were female and one was male. Three out of four were identified as P2.

Key themes

Cases are complex and often involve a necessity to specifically address multiple compounding needs in addition to FV, such as alcohol and other drug use, mental health issues, and complex living arrangements. All interviewees were very satisfied with the service they received and felt that it had supported them during a difficult process. Not all clients required referrals, but all wanted to better understand the process and the impact on their children and wanted advice about what to do in specific situations.

- **Feeling supported and validated:** All clients felt the most beneficial aspect of the program was getting support when it was needed, feeling like someone cared about their wellbeing, and that their concerns, in particular for their children, were validated and addressed. Specifically, the male interviewee noted that more males should access the service, as "we are not good at talking about stuff" but the FSP (Navigator) allowed him to share his emotions and engage in equal conversation which was comforting for him.
- **Access and resources:** Clients indicated that as a result of the program they "know where to go" if they need help. This is significant feedback because they found the system hard to navigate for

different reasons. Three out of four specifically mentioned that they had gained strategies for responding to situations, particularly as parents. Clients are not often engaged with other services, and can find it hard to access appropriate services as they are not tailored towards FV-affected partners who are separating, despite this being a well-documented time of high risk and distress. In particular, one interviewee mentioned that she found it difficult to find help as she is a working mother, who is not entitled to certain benefits. The FSP (Navigator) assisted her to find an appropriate FV service that also offered after hours' appointments.

- **Child wellbeing:** All participants felt that their children had benefited as a result of their engagement with the FSP (Navigator). Specifically, they mentioned feeling less stressed, being more in control, having greater confidence and capacity to parent, and having developed improved skills and awareness of how to deal with situations. In particular, the male client noted that rather than being angry at the situation it helped him frame it from the perspective of his ability to respond in the best interest of the children.
- **Timely and appropriate:** All clients indicated the importance of being supported when it was needed, and that the FSP (Navigator) made contact with them at key points such as upcoming access, an FDR session, or IVO expiration. They felt the level of contact was very appropriate, and knew that they could get in touch as needed. In general, the FSP (Navigator) was in contact every couple of weeks or months "depending on what was going on".
- **Skills and qualities of the FSP (Navigator):** It was felt that the FSP (Navigator) was very skilled and knowledgeable in relevant areas such as FV, child development, and relevant resources. They felt that the FSP (Navigator) was able to give sound and relevant advice, and validate their concerns. It was important to all clients that the FSP (Navigator) seemed concerned for their wellbeing, and was easy to speak to. The FSP (Navigator) was also the only constant for many, as some clients have had three FDRPs throughout their FDR process. In particular, one client noted that they felt the FDRP was unable to understand the impact of FV on her mental health, or adequately address her safety concerns for her children due to the need to be impartial.

In summary, the success of the Family Safety Model has relied on the skills and qualifications of the FSP (Navigator). The biggest impact for clients was feeling supported at critical times, which they felt improved their overall wellbeing. The FSP (Navigator) tracks when key events are coming up, makes contact as agreed with the client, and is also skilled in key practice areas such as FV, child development, and social work. Continuity-of-care was also very important: in particular, the ability for an FSP (Navigator) to remain involved past the point where service for FDR and/or Court interaction has finished provides families and children with an integrated and continuous support.

Participants noted that it is difficult for FDR practitioners to adequately address their FV needs due to the requirement of neutrality for an FDRP. FV affected families require understanding and support to feel validated and empowered to take the appropriate actions. In this way the FSM is an early intervention model, preventing FV and negative impacts on children. As evidenced by FDRP testimonies (see below) there were also documented benefits from liaising with the FDRPs about specific cases, but also improving awareness of FV in general.

Family Dispute Resolution Practitioner and Family Safety Practitioner (Navigator) Responses

The following description was provided by an FSP (Navigator) describing some of the challenges for family members, and the benefits of the model for both victims of FV, perpetrators and their children.

FSP testimony

“The Family Safety Model is designed to help families who have experienced family violence and are separating using the Family Dispute Resolution and/or Family Law Courts to assist in property and children matters.

These families have already experienced trauma and have complex needs. Many Family Violence (FV) services are geared towards crisis intervention and a quick response where there is a history of FV, rather than a long term or early intervention response. Often, this leaves women who may be at risk during a time of separation without an appropriate service to turn to.

All members of the family are left to navigate the separation where a power imbalance can still be present, allowing a perpetrator to continue to commit FV. For affected family members, predominantly women and children, this is a vulnerable time with all sorts of new stress and new routines. Instead of being free from a violent relationship they can find themselves in unfamiliar territory with the risk of becoming victims to legal process, legal jargon, stress of one income, threats of losing the house, paying bills and trying to parent children who are at times forced to see the perpetrator often in new and unfamiliar circumstances (i.e. newly supervised).

The Family Safety Model is designed with a whole-of-family approach to assist families entering RAV for FDR. This model has had such a positive impact on the families who have been assisted – both the affected family members (AFM) and perpetrators! Perpetrators of FV, though it is not an excuse for their behaviours, at times of separation can also become highly stressed causing their violent behaviour to increase, having further negative impacts on the AFM.

So far, some of the main benefits of this work have been for families to understand the processes around separation better. For women who have been cut off from the world and isolated navigating complex issues [in the Family Law System] can become overwhelming and [without support] she may succumb to the other party’s demands in mediation. The better her understanding of the process, her options and the consequence, the more empowered she is to make better decisions.

This model gives her someone to talk to, someone who can make suggestions and give advice. Money is often tight and she doesn’t know what to say to her children. This model enables her to link into services, gives her questions to ask of legal services and tips on how to save money. It gives her an idea of what to expect of the legal process and attending court and the support her family will need while going through it. Rather than giving up when she is overwhelmed, she is empowered to consider the best outcome for her children, not just now but into the future.

During this time, children may be forced to attend supervised contact, and spend hours speaking to a Family Report writer. They may not understand why they are unable to see Dad, and after separation begin to display symptoms of trauma an act out. Women are often blamed for ‘turning the children against their father’ or influencing the Family Report, but there is no advice for her about how to talk to the children and appropriately explain what is going on. This model gives her someone to talk to and give advice about how to talk to the children, someone who can help her understand the child’s perspective, what they may be going through, and what they may need, enabling her to become attuned with her children.

As said before, this is a whole-of-family approach and support is also extended to the perpetrator. He can also be linked into services including Men's Referral Service, providing advice on financial support and counselling, and more depending on needs. Perpetrators may be struggling to adjust to a new balance of power, be very blaming of her and feel entitled – this model gives him someone to talk to, in a safe environment and to consider his own actions. He is asked to look at the situation from a different another perspective, in particular to consider the impact on the children. Often, this can help him understand the impact of his actions on both his children and their mother, and give him strategies of how he might approach the situation different, and ensure the safety of the children.”

In addition to clients, Family Dispute Resolution Practitioners (FDRPs) have also benefitted from the model. In particular, having access to the model at their FRC, and collaborating with an FSP (Navigator) has assisted them to respond to and support FV and complex needs better. The following sections provides two practitioner testimonies: regarding the implementation of the FSM.

Senior FDRP Testimony

“I have been a FDRP for over 10 years and a Senior FDRP for over seven years. In my role, and in seeking to support other staff I supervise I have been heavily reliant on the Family Violence (FV) services to work in collaboration with us to work through safety concerns for clients.

Sometimes it is unknown whether clients will follow through with suggested referrals, as the high volume of clients we see, doesn't always allow monitoring in this way. I am also trained in Family Therapy, and am mindful of systemic factors.

In the last 12 months I have been the Senior FDRP at Melbourne, and the Family Safety Model has been a wonderful resource that has ensured clients have been called when they have safety concerns. The opportunity has been there for both those who have been victims of FV, and those who have subject to Family Violence Orders. There have been numerous positive outcomes and the seamless process of referral and follow up has been invaluable.

One example is where the couple where separated under the same roof. There was much tension and the children were caught in the middle. Using my Family Therapy training I was able to start to bring some order through helping the “parental sub-system” to become more functional. The Family Safety Practitioner worked very effectively in supporting this. Then we were also able to engage our Property Service so that the couple could be in separate houses in a timely way.”

FDRP testimony

“[The FSP] is able to speak to the parents in a way that is more personal than the FDR process allows and also for a longer time individually. She has spoken to both parents and her conversations contributed to the parents being more willing and able to make agreements yesterday. I have had a catch up with [the FSP] today and it's apparent that these parents are benefitting from this collaboration (FSP& FDR) and hence the children are as well.

For the perpetrator of the FV, [the FSP's] input has been significant. He was therefore a lot easier to work with as, although he still minimises the FV, at least he is modifying his behavior and is aware of the consequences if he does breach. He also said that he doesn't want his children to feel forced to see him which was a change from the 'entitled' views he usually holds.

I spoke to [the victim] today to check in on how she felt about the FDR agreements and she thanked me and said that she thinks they are both making better decisions now and she is pleased with the outcome and

aware of the supports/options she has if anything goes wrong. She feels that she is protected by the IVO and also this process of FDR which has provided a way for them to resolve issues.”

Summary

In an environment of increasing case complexity, the FSM is able to effectively assist people progressing through FDR, and is also of great assistance to those transitioning through the Family Law System. The current trial of the FSM at our Melbourne and Sunshine FRCs demonstrate an opportunity to enhance the existing FDR model, to proactively prioritise the safety of partners, children, former partners and family members of clients presenting for FDR. RAV's FSM provides a continuous, case navigation service that improves the likelihood that agreements made in FDR are sustained, and supports women and children to transition to the Courts safely. We contend that this is the most effective and safest option for women and children affected by FV who are separating.

Question 34

Please see Introductory response located at Question 29.

How can children's experiences of participation in court processes be improved?

Where a good quality relationship between parents is lacking, the views of a child should be an essential part of determining parental caring capacity and a child's capacity to thrive in a conflictual situation.

We believe that there are currently significant limitations in children's participation in the Family Law system:

1. With a statutory presumption of equal shared parental responsibility, the need for a thorough assessment of the child is often limited to a single interview and fails to factor in background influences, especially unrealistic parental demands for shared care arrangements.
2. Interviews with children are limited and often depend on significant parental cooperation with the interviewee.
3. In Child Protection investigations, staff must interview children but no such pre-requisite exists in the family law system, making good outcomes for children less likely. For example, shared care is more likely to work better when a child is able to contribute to the development of realistic agreements.
4. The adversarial nature of the legal process is more focussed on delivering outcomes for parents rather than benefits to the child or protection from future conflict for the child.
5. Child interviews may not cover all the issues and psycho-social domains relevant to the child.
6. Family consultants see children in a court environment which, for many children, can be unfamiliar and overwhelmingly uncomfortable.
7. Views of children may at times be unrealistic, but there is limited time to undertake detailed exploration of the reasons a child holds those views.
8. The system can be dismissive of a child participating in the court process simply because of their age and perceived lack of maturity. A child's capacity and competence to express their views should be the default position.
9. Independent Children's Lawyers (ICLs) are limited in the time they can spend with children and in there is no requirement that they must meet with children to hear their views.
10. The lack of appropriate funding for ICLs also contributes to children's voices not being heard or included in court proceedings.
11. Lengthy delays in the court hearings can see major changes in a child's life and circumstances. Delays are further prolonged by the length of time taken to release court judgments which can be six months or more after a trial ends. Delays can add to post-separation conflict and contribute to further negative impacts on children.
12. Children are not consulted about their views of the court outcome.
13. Many cases do not include the views of children who are sufficiently mature to be able to form a submission in their best interests; often due to time constraints or parental conflict.
14. Legal process takes too long – a child's wishes and feelings may be affected and altered by ongoing parental conflict associated with unresolved disputes before the courts.

RAV recognises that addressing these limitations is by no means straightforward. However, we believe that there needs to be more emphasis on children's empowerment in the Australian Family Law system in cases of divorce and separation, especially where parental relationships are conflicted, in contrast to the traditional approach, which has emphasised children's welfare and interests.

Children overseas are increasingly being treated as active participants in the processes and decisions that affect them. These developments provide us with tested models and processes that have sought to strike the right balance between protection and empowerment, including established systems, assessment tools, and

processes that seek to ensure, for instance, that wishes and feelings expressed by children are those that authentically belong to the child, rather than to their parent, sibling or other.

The importance of the child's right to be heard and for their wishes and feelings to be acknowledged is now accepted as an integral part of the family law system in the UK, where children are supported through the Children and Family Court Advisory and Support Service (CAFCASS), which represents children in family court (and child protection) cases. In our view, there is much that can be adopted and adapted from the UK experience. Even if the creation of an equivalent body to CAFCASS is out of scope, (although we suggest consideration should be given to that proposition) many of the resources and approaches could provide important learnings within Australia: these include the wishes and feelings assessment, the factors that determine whether a Judge or Magistrate will speak directly with a child, and the welfare checklist which the court must take into account when reaching its decisions can be learnt from.

In the UK, courts seek to strike a balance between the expressed wishes and feelings of children and other relevant considerations. each and every one of the following factors must be considered:

- a) The ascertainable wishes and feelings of the child concerned, considered in the light of his/her age and understanding
- b) His/her physical, emotional and educational needs
- c) The likely effect on him/her of any change in his circumstances
- d) His/her age, sex, background and any characteristics which the Court considers relevant
- e) Any harm which he/she has suffered or which he/she is at risk of suffering
- f) How capable each parent (or other relevant person) is of meeting his/her needs.

In the German family law system, there is a long history of judges directly interviewing children in family law proceedings. Indeed, in matters dealing with custody or access rights judges are obligated to personally hear the child if the feelings, ties, or will of the child are significant for the decision. The findings of a study published in the Family Court Review challenged the view that children are placed under too much stress when involved in judicial interviews and, furthermore, that quite young children can be effectively and safely interviewed by judges¹⁶. In our view the German model should be further considered for adoption here. In particular, an understanding of the interaction between the judge's level of experience and professional development and the children's experience of being interviewed would be of value.

Question 37

Please see Introductory response located at Question 29.

How can children be supported to participate in family dispute resolution processes?

Child Inclusive Practice

Child Inclusive Practice (CIP) has been shown to an effective intervention, with demonstrated benefits for the parents and children, a reduction in the likelihood of proceeding to trial, and improved capacity and clarity for parents in future management of disputes.

¹⁶ M. Karle and S. Gathmann, 'The State of the Art of Child Hearings in Germany. Results of a National Representative Study in German Courts', *Family Court Review*, vol. 54, no. 2, April 2016, pp 167-185.

However, CIP is insufficiently available through funded FDR programs. Child involvement in FDR processes is limited by time, availability and resources and is not always seen as a priority by many providers. The role of child consultant requires high levels of expertise and experience in dealing with both parents and children in distress, underpinned by a strong foundation in child development and experience working with complex issues for children. A high level of expertise in dealing with complex clinical and family issues and dynamics is also necessary. Given these requirements, appropriate professional standards and provision for ongoing supervision are critical, as is training in the application of child-inclusive practice to family dispute resolution.¹⁷ It therefore needs to be independently resourced.

Expanding the availability of CIP would support more children to participate in FDR, with demonstrated benefits.

Child-Centered Continuum Model

Yasenik and Graham have presented a four level “Child-Centered Continuum Model (CCCM)” of child involvement in Alternative Dispute Resolution (ADR) processes.¹⁸ Making a strong argument for the inclusion of the voice of children in family law processes, the authors propose that children “should be afforded an opportunity to safely participate as stakeholders in the outcomes”¹⁹. Acknowledging that delivering on this aspiration can be “complicated”, they argue that current practices in ADR are falling far short of this objective, in part because of an ongoing debate between the “child’s rights” and the “protectionist” points of view.

The CCCM approach attempts to balance these competing concerns by offering a graduated continuum of child involvement in ADR processes that has, on the one hand, the overriding objective of ensuring the child’s voice is heard, while at the same time moderating the methodology in order to protect the child from becoming inadvertently inserted into the adult conflict. Four levels of child inclusiveness are proposed:

- 1) managed child focus
- 2) child focus
- 3) assisted child participation
- 4) direct child participation.

Those suited to the managed child focussed approach (Level One) are the high and entrenched conflict cases that will often include multiple co-morbid issues such as drug and alcohol addiction, mental health issues, and past trauma and abuse. In such cases the mediator may decide that the risks involved in speaking directly to children outweigh the benefit to the child of being heard. At this level the objectives of the interventions are limited to building the parents’ readiness to hear the voice of their children.

At the other end of the continuum, Level Four (direct participation) occurs when the parents are assessed as being ready to hear the children’s view and the child wishes to participate directly in the mediation process. The mediator may invite the child to attend a mediation session with either one or both parents. The authors cite a New Zealand Direct Participation Model where children who wish to can make a ‘brief uncontested

¹⁷ [No author cited], *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, AFRC Issues No. 1 – July 2007

¹⁸ L.A. Yasenik and J.M. Graham, ‘The Continuum of Including Children in ADR Processes: A Child-Centred Continuum Model’, *Family Court Review*, vol. 54, no. 2, April 2016, pp. 186-202.

¹⁹ Ibid.

statement' early in the mediation process and then exit to leave the parents and mediator to sort through the issue that need to be decided.

In order to assist mediators to decide what level of participation is appropriate for a presenting family, the authors offer a number of assessment tools. A Parent Readiness Scale (PRS) assesses the readiness of parents to receive their child's input in ADR. It measures a number of dimensions including: parent differentiation from child, parent insight, parent sensitivity, and parent ability to place child's needs over own (plus other dimensions). Although not tested or standardised as yet, the authors provide a copy of the PRS tool in the cited article.

A second tool, the Child and Youth Concerns Scale (CYCS), is introduced to the parents by the practitioner and is intended to assess and summarise a child's life experiences and views, and areas of particular concern for a child. It is composed of nine key areas of concern that research has identified as particularly relevant to children experiencing parental separation—including emotional space, understanding of the parent separation, family relationships, peer support and community connections (the CYCS is also provided in the article). The authors provide a good explanation of how both these tools can assist in identifying which participation level is suitable for each presenting family, and how the tools also assist in deciding the best strategies that will assist families when working with them within a particular level.

Overall the authors have provided a comprehensive and structured approach for deciding how and when to safely and effectively ensure the voice of children are heard by parents in family mediation, whilst addressing the valid protectionist concerns. As such, this approach warrants trialling.

Question 41

What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

The Review of the Family Law System is occurring in the context of a growing acknowledgement that the very elements of legitimate democratic adjudicative process are inherently problematic in resolving family disputes in the context of separation and divorce. If fully exercised, due process rights (such as retaining a lawyer, disclosure of opposing evidence, and cross-examination of witnesses) can result in many costs, including expensive legal and expert witness fees, court costs, and excessive time off work that the average parent can ill-afford.²⁰ Rules of evidence meant to assure reliability may exclude important information that might otherwise be available for decision-making. The best interests of children in family law cases are at risk of being defined within the adjudicative process as primarily a legal problem, when in reality, they are intertwined with more complex psychological and social problems. There is unease at the 'juridification' of family relationships and that processes, which have a primary focus on legal questions designed to preserve individual rights:

- result in the system losing sight of human problems in context
- exacerbate conflict
- worsen relationships.

Moreover, courts tend to attract high-conflict personalities because the adversarial process resembles their thought structure. In short, there is increasing evidence that the law is not the best forum for assisting dysfunctional families to function better, and that the current court system not only undermines efficiency, but also civil society and children's rights.

As such, we can view the development of the family law system since 1975 in response to shifts in social norms as inadvertently expanding the influence of law on family relations in unhelpful ways. At the same time, especially since 2006, with the expansion of FDR, the system has been permeated by the social science evidence of the developmental impacts of conflict on children, a deepening awareness of family violence and the forms it takes, and a greater understanding of effects of trauma and mental health problems. There has been greater dialogue between lawyers, psychologists, and social scientists, supported by shared training opportunities and common engagement with research findings.

We would argue that if we are to get the balance right between rights-based and interest-based approaches, between problem-solving and adjudication, and develop a shared commitment across the family law system to reducing the psycho-social costs of separation and divorce, it is important to apply a systemic, multi-disciplinary approach to core competencies, underpinned by core principles, such as the:

1. desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner.
2. need to protect the rights of children and to promote their welfare.
3. importance of children having a say in the decisions that affect them commensurate with their, age maturity, and situation.
4. need to ensure protection from family violence.

²⁰ G. Firestone and J. Weinstein, 'In the best interests of children: A proposal to transform the adversarial system', *Family Court Review*, vol. 42, no. 2, 2004, pp. 203-215.

5. importance of recognising that families are diverse in structure, beliefs, and values, with an equal right to access justice within the family law system.
6. importance of giving couples and caregivers the opportunity to repair and improve their relationship to each other and their children before, during, or after separation.

Whilst there is always the need for specialist roles and the acquisition of deeper knowledge required to perform specialist roles, we believe that, in keeping with the multi-disciplinary competencies of the Graduate Diploma in FDR, there needs to be common core competencies shared across the sector. These include:

1. Relevant legal and policy frameworks, including the rights of children.
2. Understanding, assessing for and responding to family violence.
3. Working with vulnerable clients (those affected by violence, trauma, mental health issues)
4. Child focused approaches, informed by understandings of the psychological and developmental impacts of separation and divorce on children, especially exposure to ongoing conflict.
5. Understanding of the family law system as a whole and the range of services available in a particular locality.
6. Integrative or interest based negotiation theory and practice and conflict management skills.

As a strategy for building more integrative approaches, we believe that inter-disciplinary training opportunities will create greater common discourse and improve collaborative relationships.

Professional accreditation standards should require all professionals working in the family law system to satisfy ongoing professional development relevant to core competencies as well as specialist knowledge and skills relevant to their role.

Question 42

What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

In addition to the core competencies discussed in our response to Question 41, judicial officers will need to have skills commensurate with their evolving function, for example skills in speaking to children or inquisitorial skills. We support the need for judicial officers with specialist background in Family Law, and with requirements to maintain continuing professional learning in core competencies and specialist skills.

Question 43

How should concerns about professional practices that exacerbate conflict be addressed?

All specialist lawyers involved in family law matters should have accredited competency in Integrative or interest based negotiation theory and practice and conflict management skills. They should adhere to professional principles of practice similar to that adopted in collaborative law practice:

- that it is generally in the best interests of parties and their families in typical Family Law matters to avoid litigation.
- ensuring full and honest disclosure.
- adopting a conflict resolution process, which endeavours to avoid Court-imposed resolution, and relies on an atmosphere of honesty, cooperation, integrity and professionalism geared toward the future well-being of the family.
- minimizing, if not eliminating, the negative economic, social and emotional consequences of protracted litigation to the participants and their families.
- taking into account the developmental needs, interests, and rights of children.
- due consideration of the emotional and physical wellbeing of all parties.

Question 44

What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

The benefits of regular supervision, reflective practice, and debriefing opportunities are well established and shown in the human services sector. These mechanisms should be available to lawyers and judicial officers.

Ongoing professional development that strengthens capacity to deal better with recurring challenging aspects of the work also strengthens resilience and wellbeing in the work.

Evidence based mindfulness training and practice has been widely adopted in the US legal field, including for judicial officers, with benefits for wellbeing, resilience and clarity of thought.²¹

²¹ See, for example:

S. Rogers, 'Mindfulness in Law' (2014) in A. Le, C. Ngnoumen and E. Langer (eds.), *The Wiley-Blackwell Handbook of Mindfulness*, Wiley-Blackwell.

J. Jacobowitz, 'The Benefits of Mindfulness for Litigators', *ABA Litigation Journal*, 2013