

Australian Law Reform Commission – Review of the Family Law System

Response by ADRAC

to Issues Paper 48 (IP 48) March 2018

ADRAC welcomes the opportunity to participate in the review of the current family law system. This submission seeks to explore and present ideas raised by ADRAC for a better and holistic system for the management of family dispute. The submission has been prepared in a multi-disciplinary approach by ADRAC for the assistance of the Commission, and in response to a selection of the questions from Issues Paper 48. ADRAC would be pleased to elaborate on any aspect of its submission, at the request of the Commission.

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Introduction

The fundamental questions

When considering a major reformation to a socio-legal system it is important to address two fundamental questions.

Firstly, what is the mischief we are seeking to resolve? To avoid becoming lost in the complexity of the exercise or side-tracked by the arguments and counterarguments of sectional interests, it is important to keep a focus on what is broken—there are widespread if not unanimous views of dedicated expert persons working in every sector of the family field as well as those who have passed through it, that the current system requires reform. Secondly, what can be learnt from the numerous examples of other law reform exercises that have attempted to address the same issues of cost, adversarialism and delay? It is certain we have been here before in one form or another and have had many successes and failures that must be heeded.

The cost of ongoing failure or partial and temporary solutions is too high for those suffering the failings of the current family system. While there are many who are genuinely interested in reform, others will willingly or unwittingly collude with a solution that protects their own interests and that of the sector they represent. It will require significant courage and self-sacrifice by many within the system to bring about the permanent paradigm shift that is desperately needed. We must not window dress, we must not take the easy path of incremental improvement. The Issues Paper calls for suggestions to resolve many separate problems, which might invite piecemeal solutions. It is important that the reform process doesn't deteriorate into a competition for resources between powerful sectional interests. If that happens we will end up with a new camel with new shortcomings rather than a solution tailored to suit the unique problems of separating families. This is a once in a generation opportunity to improve the outcomes for thousands of Australians.

Context for end users

Before exploring reform of our family law system, it is important to understand the context facing the end users of our family law services. Separating families are experiencing a time of extreme stress and distress when they come into contact with the family law system. They are often in a volatile and vulnerable state due to the emotional impact of the breakdown of their intimate relationship. They are faced with imminent multiple losses on the financial, emotional and personal level and they are often in shock and turmoil and, as a consequence, they struggle to make rational decisions on a day to day basis, let alone make informed decisions about their future. Most importantly, many worry desperately for their children and the possibility of losing contact and connection with them. This vulnerable state is amplified by the all too frequent concurrent presence of multiple risk factors including family violence, mental health issues, and substance

abuse which we know is more prevalent in the separating population and even more common in those who are in conflict—the very population that is in need of assistance. It is in this condition that the separating parties seek help from the family law system.

It is also important to understand that when families seek help they are likely to be needing assistance across time. Family separation is rarely a single incident. Many separating families, particularly those with the responsibility to raise children, have enduring conflict. The very idea that a ‘resolution’ can be provided that somehow deals with the issues once and for all is naive and, in some instances, dangerous. Family dynamics change, and separating families encounter repeating and often unpredictable changes in their lives that require constant adjustment and renegotiation. Any system designed to assist these families must be low cost, responsive and nimble.

The Mischief

So, first to the mischief question. In the current system separating families who are in disagreement and outright conflict about how to resolve parenting and property disputes (who therefore cannot reach solutions by themselves) encounter a dispute resolution system that can be outrageously expensive (at a time when they are facing crippling financial loss), that is bewilderingly complex, that is staggeringly slow even in parenting matters (for those requiring adjudication), that is potentially unsafe for those extracting themselves from violent relationships, and insensitive and unresponsive to pre-existing risk factors (family violence, child abuse, mental health issues and substance abuse). But perhaps most problematic is that in this vulnerable state they inexplicably encounter a system that is adversarial at its core, which invites them to compete with their ex-partner to minimise their multiple losses, which in turn can and often does exacerbate the pre-existing distress and conflict. In sum, for many the family law system is expensive, unsafe, slow, complex, harmful, undermining and inflammatory.

Clearly a simplistic and piecemeal solution will not resolve these shortcomings of the present family law system. Increasing the number of judges will address the unacceptable delays in adjudicated outcomes but will do nothing to resolve the safety, cost, complexity and inflammatory nature of the adversarial processes. Similarly increasing resources to Family Dispute Resolution (**FDR**) services will not in itself take pressure off the court system because separating families will still be drawn into the vortex of adversarial processes.

Lessons from other law reform areas

Turning next to the lessons learnt in other law reform processes. Examples include the different systems of managing dispute in the workers’ compensation fields, the motor vehicle accident fields, medical negligence and negligently caused injury actions against local government councils. What can be learned does not arise from any suggested analogy between injury and family law. Rather, there are lessons to be learned from attempts to change court-centric systems with high cost and delay, into those with administrative decision-making functions.

Most injury systems in Australia were dispute systems handled within the adversarial court systems. Over time the systems were burdened with unacceptable rising insurance, payout and other costs, court delays and various forms of misbehaviour. In addition, it was said that the existing systems discouraged rehabilitation and movement forward of those affected. All of the compensation/damages systems became subject to increased legislative regulation. Essentially the courts were being asked to manage systems or schemes for which they were poorly adapted. All involved large numbers of lawyers and other professional experts with strong stakeholder interests in the existing system. The parliamentary reform goals were to reduce insurance costs by cutting payouts, cutting costs, reducing court delays and simplifying the systems. Over a period of almost 30 years there occurred extensive tinkering with the system, but it was ultimately found that there was little point in reducing compensation payouts and adding ADR to a litigation field if the primary mechanism remained adversarial litigation. A solution was found: moving decision-making from courts to administrative processes with rights of judicial review. Professionals remained involved, but outside the usual adversarial systems.

In the early stages of reform, ADR was annexed to the court systems but struggled to deal with the case load; litigation continued to be the dominant and very expensive driver/centre of the various systems. That painful history should not be repeated in family dispute reform. Most of the injury reforms failed until the systems were removed from a first-instance court-centric approach. Lawyer roles were adjusted and adapted to new work requirements. Dispute resolution in the forms of mediation, conciliation and some arbitration, was introduced as part of an administrative tribunal system. Only then did successful reform occur. Quicker, cheaper and less adversarial processes were found to make decisions while still continuing to utilize the expertise of professionals with knowledge and experience in the problems being addressed by the new methods.

[Legitimate interests and the culture of adversarialism](#)

There is a dissonance managing separation and family relationships in an adversarial system. Adversarialism focuses on competing positions rather than interests, pitting families against each other, with lawyers often acting as gladiators. Lawyers acting as representatives, advocating for their clients were often blamed for this adversarialism. Many lawyers provided expertise and had a legitimate financial and vocational interest in the system. Those interests clashed with wider systemic and social needs. The lawyers (and also other auxiliary litigation-dependant occupations) were ultimately utilized in new and more effective ways. The reforms contained pain but were not generally catastrophic for legal work in the fields. In hindsight, they were necessary and have proven effective. Legal and other professional roles have been reformed to ones related principally to ADR, negotiation, legal advice and information with some appearances in tribunals and some work in judicial review.

In the family law system, legal practitioners are a major gateway into the family dispute system, in part because at the time of separation people are feeling adversarial. The current gateways endorse this as do the broader public perception and expectations. We can talk about reducing adversarialism and using more ADR but the lessons from other law reform processes suggest this will not work unless the economic and vocational

roles of the lawyer and other occupations dependent on the current system are addressed in a way that aligns their conduct and interests with the underlying goals and principles of a new and different family dispute system. Lawyers are obliged to look after their client at that early antagonistic stage of separation. They will not look after the long term family as a whole because they act in the interests of one member of the family. If they act for one parent, they will systemically tend to address children's issues in so far as they align with the interests of that parent for whom they act; that's why children on some occasions receive their own independent children's lawyer.

The 'family', which in real life has to act in a common interest, doesn't get a look in as to representation. In reality, the dispute model should fit the inanimate common state of 'family' which must work cohesively for all members.

No statement of policy or principle in family law legislation, however clear or strict, can overcome underlying systemic professional obligations. All those obligations are built on the adversarial system which pitches one client against another or, in this case, one family member against others. No-one appears for 'the family' on which the child is dependent. The interests of a family where there are children are greater than the interests of any constituent member, including the child.

The tinkering in the various personal injury systems in the early stages of reform started by addressing the consequences of systems about which there was complaint, and ended over two decades later by addressing causes—including, how professionals in the system obtained a living from the system. What we learned from that process was that no change can occur unless it addresses the basic participant roles of all stakeholders including those who currently make a living from an existing regulated field. Public perceptions and expectations must also be addressed to support any new approach.

Possible reforms

ADRAC proposes that no change in this court-centric system can occur unless courts are taken from the functional or operational *centre* of the system. While ever they remain at the centre, adversarialism will remain the dominant mode of family dispute resolution. A court is needed as part of the system: however, ADRAC recommends that the Family Court, as a specialist first instance court, be abolished. Subject to the High Court's jurisdiction under s 75(v) of the Constitution, access to a court would be to the family division of the Federal Circuit Court and would be limited to review of administrative decisions on questions of law, contempt, and the like. We suggest that first-resort family dispute be largely removed from the Federal Circuit Court in favour of other systems of dispute management conducted adjunctive of administrative systems of decision making. The Family Court, were it to be retained, could act as an appellate court. An alternative is to create a multi-member appellate division within the Federal Circuit Court.

All matters including parenting issues would be dealt with by non-adversarial systems that might still involve lawyers in specific roles. ADRAC suggests that a means to these ends might lie in a three-level system. The first level would be a family support system with offices spread throughout the community and supporting online access to information. It would triage, counsel and provide appropriate ADR services such as

facilitation (where no clear dispute has emerged but there is a need for advice or assistance) and mediation. This service would not make decisions. It would be a port of call for information, counselling and facilitative dispute resolution services. It could operate privately and commercially direct by government or both, in regulated, authorized parallel schemes.

ADRAC considers that the use of rebuttable presumptions in property and parenting issues (as informed by social science) would assist parties to understand the framework within which they are likely to have decisions made. The content of the presumptions is probably outside ADRAC's realm and no doubt the Commission has expert views on those topics. The fact of presumptions however is likely to reduce the scope and intensity of dispute.

The second tier would be submission of dispute to administrative decision makers sitting alone or as a group possibly as a tribunal depending on the matter and using informal techniques. Decisions could be made on the papers or where sought or needed, by representation in a hearing. In this way those with the need to present their narrative would have that opportunity. Ideally, such decision makers would use an inquisitorial method that asked questions through an officer assisting the tribunal, to avoid disputants from being active adversaries against one another. The decision maker may deal with the matter over time, using case managers, and would have the power to suggest or direct useful forms of ADR.

Built into this second tier would be a system of administrative decision-makers, with annexed conciliation services to which disputants would be referred prior to a determination. Determination would be preceded by informal hearings preferably conducted not adversarially by use of officers assisting who would take oral accounts in front of the decision-maker not unlike what occurs in an inquiry process that uses counsel assisting. In this way parties would be less openly in contest with one another and more drawn into a system that responds to the inquiry of another person. Support for this approach can be taken from the example of the Administrative and Civil Tribunal (ACAT) in the ACT.

Conciliators operating prior to hearing can be more robust and advisory than mediators or FDRP's at first instance. They can for example give indications as to the likely decision of a decision-maker. ADRAC's research suggests that conciliation is an effective DR tool when associated with the potential for a future hearing or decision.

ADRAC sees system navigators, case managers, family counsellors, legal advisors, inquisitorial systems, tribunals and ADR including conciliation and mediation, as the primary working tools of ordinary daily family dispute. All of that can be achieved with a lesser amount of adversarialism than is currently present.

ADRAC sees the final tier as the Federal Circuit Court (as the specialist family court) hearing a limited range of matters, principally (if not exclusively) by way of review of prior administrative decisions. Hearings of this type could also be conducted with a lower level of both formality and adversarialism. Costs could be controlled. Cases could be turned over speedily. As in any system, much would turn on the training, capability and resources available to the decision-makers and the court to undertake their work.

Naturally, applications for review to the court should involve usual costs sanctions for failure to accept reasonable offers but should also be capable of application of the *Federal Proceedings (Costs) Act 1981*.

In line with the wider ADRAC submission that the family is not a good area for adversarialism, ADRAC recommends that every effort be made to reduce adversarial conduct in hearings. That should be true whether in tribunals that operate adversarially or in any courts that review administrative decisions. Methods such as increased informality, reduction in formality of issues and insistence on courtesy in cross-examination would all help. In addition, however pre-planning discussions in court in the presence of the parties could occur. In those discussions, a judge if prompted by the legislation, might emphasise the need for cooperation and courtesy. The judge might also be prompted to ask parties to consider the future and whether they consider that they are likely to return to Court. They might be asked to consider in advance how variations could be handled without returning to court and how that would or should be recorded. The Court might also suggest periodic review of arrangements by return to court, to ensure compliance or to discourage non-compliance.

ADRAC acknowledges that issues of major public interest can arise in the family field best suited to judicial determination. Examples in the past have been change of gender in children, end of life and some conception issues. Such matters could be commenced in the High Court and remitted to another court or, with appropriate legislative pathways, by way of direct referral of a question of law to the Federal Court.

Finally, it must be recognised that despite the many criticisms of the Australian family law system and despite its obvious problems there are many highly skilled, ethical and dedicated professionals—lawyers, judges, FDRP’s, counsellors—who are working to deliver the best outcome they can for those needing assistance. The above condemnations of the current system must not be interpreted as a criticism of those who work within it. On the contrary, most are working hard to overcome the many ill effects of a system they find themselves caught in.

Please note that where we refer to ‘family’ we are including all types of families that reflect the complexity present in our multi-cultural modern Australia.

Objects and principles

Question 1. What should be the role and objectives of the modern family law system?

The needs of families that are separating will not be met by the current family law system, but by the development of a new system that is bold and innovative. This system needs to reflect the complex needs of modern families and not the stakeholders who seek to be involved with them. A new approach is required with the focus on the family, and ways of empowering and supporting the family to make necessary decisions by agreement wherever possible.

The roles and objectives of such a system would be to assist families to make the decisions arising from their separation in a safe, timely, cost-effective, and appropriate way that ensures dignity, privacy, and is least harmful.

All families would have access to this system in a timely and cost efficient manner, with a clearly identified entry point, and experienced and qualified practitioners to assess the needs of each family. The approach would be based on the strengths of the family and how these can be promoted into the future. This system would be accessed easily, with the availability of a wide range of services to enable a pathway to be tailored to reflect the unique needs of each family and their requirements at various stages of their separation.

The objectives for this system would be:

1. To acknowledge the unique needs of each family;
2. To prioritise the need for safety at all times;
3. To protect children and those who are vulnerable, such as those at risk;
4. To promote a holistic and multi-disciplinary approach to meet the complex needs of each family;
5. To ensure the early availability of relevant information to assist the family to understand the impacts of separation and conflict;
6. To protect and enhance ongoing relationships;
7. To deal with all aspects of family issues including parenting and financial aspects;
8. To provide a range of services to meet the unique needs of each family at different stages in the separation process including counselling, mediation, conciliation, arbitration and family conferencing;

9. To ensure that all services are truly interest-based rather than adversarial in nature;
10. To deal with the differing and sometimes inconsistent needs of the individual parties, each child, others impacted (such as grandparents), and the family overall;
11. To acknowledge the need for families to heal and recover from the affects and effects of separation and breakdown of a relationship;
12. To enable the early identification of capacity issues that will impact on participation in the system (such as family violence, substance abuse, and mental health issues), and provide for appropriate supports to reflect these;
13. To do no further harm to the family.

Question 2. What Principles should guide any redevelopment of the Family Law system?

1. The first source of decisions affecting a family, should be the family itself aided if in dispute, as needed, by a family support system rather than by a family law system.
2. Family Legislation would include a Relationship Separation Charter that contained principles to guide separating couples including:
 - a. Acceptance of the decision of each party to cease cohabitation.
 - b. Acceptance of the right of each party to end a relationship.
 - c. Obligations to accord one another and each child an ongoing just and fair outcome of the separation.
 - d. Acceptance of the obligation to accord children of the family primacy of consideration after separation and to speak with and behave toward family members in accordance with that primacy.
 - e. Acceptance of the continuity of family and its obligations as the primary source of child nurture for as long as the children are dependent.
 - f. Recognition of the interdependence of all family members in the nurture of children after separation.
 - g. Acceptance that the legal rights of a child obtain their value when expressed through the consistent and loving nurture of parents of the family after separation.
 - h. Acceptance of the obligation of separating parents to cooperate and continue to promote the nurture of the children of the family.
 - i. The right of children to be offered the opportunity to be heard and to express views about the family independent of their separating parents.
 - j. Recognition that unresolved dispute between parents is harmful to children and carries an obligation to seek resolution.

- k. Recognition of the rights of each parent to nurture children of the family after separation.
 - l. Acceptance of the obligation of courtesy to the other partner after separation.
3. As family dispute may require ongoing contact and cooperation in the reconfiguration of relationships and the nurture of children, any new family dispute system would adopt approaches that are constructive, that emphasise the need for cooperation and justice for all family members, and consider safety and adapt future needs and requirements.
 4. To reduce separation dispute, there should exist (subject to other agreement), a prima facie regime for equal sharing of property in accordance with clear and defined rebuttable presumptions.
 5. Families need the establishment of authorised Family Support Service units (either public, private or both).
 6. The Family Support Service would undertake tasks such as:
 - a. Providing society, families and their members including online, with information about the Family Support system, system navigation services, joint counselling and family dispute resolution services.
 - b. Receive and act upon family dispute about with whom a child should live, relocation of children, time sought with a child and/or the making of important decisions regarding the child.
 - c. Triage family dispute, whether of property or parenting, and require engagement of appropriate dispute resolution processes whether provided publicly or by approved external providers.
 - d. Where parents dispute parenting matters, they shall be required to attend assessment for suitability of current circumstances for family dispute resolution, and if agreed, family counselling at cost, the purpose of which would include establishing the interests of each child and achieving agreement.
 - e. Consider and require as needed, without cost, compulsory consultation after family counselling about options and obligations and thereafter require parties in continuing parenting conflict to attend conciliation or other FDR, or such other dispute resolution process deemed likely to assist.
 - f. Where a commencement with facilitative processes does not produce an agreement that a navigator considers to be in the interests of the child, the parenting dispute shall be elevated to more directive and interventionist methods such as to inquisitorial arbitration.
 - g. The Federal Circuit Court shall sit in camera with an appropriately qualified family specialist acting to assist the inquirer as a questioner and to make such decisions as are necessary in the best interests of each child. Appeals from the inquirer shall be by way of judicial review.

7. There is a legitimate social or community interest in children and their wellbeing and accordingly, where there is dispute between separating parents about living arrangements, relocation of the children or with whom the children will ordinarily live, parents must promptly notify and engage with a family assistance navigator for assessment for suitability.
8. Where a family includes children, the family is reconfigured, not ended, by the separation of adult partners. The family should have legislative recognition and families would continue to be the principle source of cooperative nurture of its children as agreed between the parents, supported where needed by dispute resolution or other processes.
9. Parents would have the guidance of a legislative statement of nurture of children in the event of parental separation. That statement would emphasize the obligation of cooperation to continue to take such action as is necessary to act in their children's best interests, achieve agreement, seek dispute resolution, and to consider the importance for children of continuing all important relationships including those with both parents, extended family, and others.
10. Dispute resolution of parenting issues should include the views of children that they would like their parents to consider consulted independently of the parents and expressed in such form as the family counsellor/mediator thinks appropriate having regard to the age, stage of development, education and other factors relevant to the children.
11. FDR Practitioners and indeed all persons working in the family field need thorough standard-managed training.
12. Separating couples should, in the interests of their children, be encouraged to provide to one another and to the Family Support Service a signed family undertaking of cooperation, courtesy, seeking of dispute management, notification of parenting dispute, receipt of information and knowledge of the requirements of family legislation.
13. Access to the court should be available only on the following questions:
 - a. By leave on questions of law of public importance;
 - b. By leave on family matters of wide public interest;
 - c. Extra-jurisdictional issues; and
 - d. Judicial review of administrative decisions.
14. Family support is a valuable and helpful but complex service which requires quick response capability, high levels of skilled workers, clear and intensive training and resources to maintain necessary services.

Access and engagement

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

This question is somewhat circular because the answer must assume the type of family law system requiring navigation. If the current adversarial based system continues, or some form of adapted version that has an adversarial process as its foundation, then those who use it will need significant levels of assistance.

Separating families are experiencing a time of extreme stress and distress when they come into contact with the family law system. They are often in a volatile and vulnerable state due to the emotional impact of the breakdown of their intimate relationship. This vulnerable state is amplified by the all too frequent concurrent presence of multiple risk factors including family violence, mental health issues, and substance abuse. In this state, families encounter a complex family law system with multiple entry points and pathways and will often also engage with parallel state based systems (such as child protection, mental health services and family violence support services) that do not coordinate or integrate with the family law system. This creates significant opportunities for both the exacerbation of the pre-existing dispute and significantly increased risks as vulnerable clients fall through the inevitable gaps between services. Even if reforms resulting from this process lead to improved coordination between services and within the family law system, the task of navigating through the process will remain challenging—particularly for those clients experiencing family violence or other risk factors. Most will be caught up in the system for an extended period and will encounter many opportunities for negative and dangerous outcomes as a result.

ADRAC recommends that those entering the family law system have access to a service or practitioner who will act as a coordinator/navigator/case manager throughout their engagement with the family law system. For those with few risk factors, this may be a very temporary and light engagement. For those with multiple risk factors and high levels of conflict, the engagement will be more intensive and enduring. It is likely the navigating agent or service will need expertise in relevant legal and clinical (social science) issues, but predominantly the latter.

Question 10. What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

As referred to in ADRAC's introduction to its submission, the costs of engaging with the family law system are in large part driven by the adversarial nature of the current system which prolongs engagement, exacerbates conflict and consumes the limited resources of separating families. Dislocating the family separation decision-making process from the adversarial system is the only viable solution.

Less viable but incremental improvements would be to increase the use of ADR services early on in the dispute process (compulsory property FDR, introduction or enhancement

of conciliation and arbitration processes), introduce a fixed schedule of fees for professionals, increase the funding of legal aid and community legal centres and introduce a more prescriptive regime for deciding property outcomes.

Question 12. What other changes are needed to support people who do not have legal representation to resolve their family law problems?

The court based adversarial system is predicated on the concept of procedural justice. When one or both parties in court proceedings do not have legal representation it is difficult to achieve procedural justice. Furthermore, in these instances, enormous pressure is put on court resources and processes to try and provide procedural justice.

Unrepresented parties must have timely and appropriate access to relevant information regarding process options, social science considerations, and principles or presumptions applied in the issues they bring.

The best option for separating parents who cannot afford legal representation would be for them to participate in a process that requires minimal legal input and no representation. An inquisitorial process such as that being trialed in Parent Management Hearings may be proved effective for parenting disputes and for property matters. A combination of a more prescriptive regime for deciding property outcomes and the introduction of an administrative decision-making process (such as the Swedish model discussed elsewhere in this submission) will allow non-represented litigants to achieve more just outcomes.

Lack of legal representation is less problematic in ADR processes. Clients who utilise ADR usually benefit from legal advice, and these processes do not preclude or in any way degrade the participants' legal rights. However, the ADR process does not require extensive legal involvement, thereby limiting the financial burden on separating families. Any enhancement of ADR services will therefore assist those unable or unwilling to engage legal representation.

Legal principles

Question 14. What changes to the provisions of Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

Part VII of the *Family Law Act 1975* (Cth) (**FLA**) relates to children and seeks to provide a comprehensive system to cover all aspects relevant to children.

It is clearly stated that the paramount consideration must always be in the best interests of the child (ss 60CA and 65AA). This notion is quoted often but there is no clear expression of what this means, how it might apply in a general sense, and how families can use this to assist them to deal with their separation and come to agreements. There is also a common misconception amongst judges, lawyers, service providers and parents that this is something to be determined and then applied as if it will continue until the child is self-determining. In reality, this is an understanding that alters constantly to reflect the changing circumstances of the parents, others involved and the growth and development of the child. This is particularly the case with young children.

Objects

The objects of Part VII of the FLA are to ensure that the best interests of the child are met (s 60B(1)), which is said to occur if the child has a meaningful involvement with both of their parents, they are protected from physical or psychological harm, they receive adequate and proper parenting, and their parents fulfill their duties and meet their responsibilities (s 60B(1) (a)–(d)).

These objects involve an investigation of the role that the child's **parents** have in their lives, and encourage a stereotypical analysis of what parental duties and responsibilities are in general, and how they apply to the child in a particular case. They presuppose that the child is being cared for by 'parents', (although this is not defined in the FLA) and facilitate an analysis that would compare them to common notions and find one or other lacking in this comparison. This introduces the competition and comparison of the adversarial system.

This approach does not reflect the needs of children, the importance of significant relationships, nor the complexity that exists in modern families. It assumes that the child exists in a narrow or nuclear family setting and that each family must be measured against acceptable standards.

A better approach would be to regard the child in their unique family context and focus on the strengths that exist within that family to meet the particular needs of that child. Rather than measuring the capacity of the parents at a point in time, the ongoing relationships within the family can be seen as support structures that will change over time and can be assisted to best support the child into the future.

ADRAC recommends that clear objects be developed that reflect the needs of the child in modern, dynamic families such as:

1. That the child should at all times be the focus of any parenting arrangements after separation;
2. That the individual needs, age and stage of development of each child should be regarded as paramount;
3. That each child should be able to continue a relationship with all other significant people in their lives;
4. That each child should be protected from any harm including any impact of conflict between their parents or other significant people in their lives;
5. That where appropriate the child should be given an opportunity to have a voice in arrangements that affect them; and,
6. That where requested or considered appropriate a child should be able to have a representative appointed to assist them.

Principles

The principles underlying the objects in the FLA involve the child's right to know and be cared for by both parents, to spend time and communicate on a regular basis with both parents and other significant people, to have their parents jointly share parenting duties and responsibility and to agree about future parenting arrangements (s 60B(2)).

Again these principles are very **parent** focused and do not reflect the broader family context for most separating parents, the strengths available for children in a time of fundamental change, or the complexity of modern families. ADRAC proposes that clear and child focused principles be developed to reflect the needs of modern families as identified by social science.

Factors

There are factors to assist the court to determine what is in the best interests of the child (s 60CC) which comprise two primary considerations and fourteen additional considerations.

These are complicated and confusing for parties seeking some guidance in how to go about dealing with the consequences of a separation, as well as for lawyers trying to give clear and easily understandable advice. The case law illustrates the vast differences in approach to the application of this framework and the exercise of judicial discretion in this area.

This approach assumes that a judge will be well equipped to determine what is in the best interests of a child, and that the legislation gives sufficient structure for this to occur in a way that will promote the best interests of the child. Experience has shown that families do not benefit from the application of the adversarial process and that it is

generally the children who are compromised. This system seeks to have each parent set against the other, referring to the factors to show the other parent as lacking and inadequate in comparison.

ADRAC proposes that a list of appropriate principles be developed to guide families and service providers and empower families to make their own decisions following a separation wherever possible. These could include the following:

1. Each child should be able to have an ongoing relationship with all important people in their lives;
2. Arrangements should reflect a child's age and stage of development and the needs at that age for meaningful relationships;
3. Children should have regular and frequent time with all significant people in their lives;
4. As far as possible, each child should be free to be a child and not exposed to adult issues;
5. Communication should not take place between carers through a child;
6. Any changes in a child's life should be managed and appropriate for that age and stage of development of the child;
7. Child arrangements should include an ability for review to reflect changes in needs and circumstances;
8. Everyone significantly involved with a child should have access to relevant information about that child; and,
9. Each child should feel that all of their important relationships are supported and encouraged by all significant people who care for them.

FDR

An attempt has been made in s 60I to direct all persons with a parenting dispute to make a genuine effort to resolve the dispute at FDR, prior to approaching a court (s 60I). A court must not hear a parenting matter unless a Certificate is filed indicating that attempts to attend FDR have been made, or the matter comes within one of the exceptions in the Act. *The Family Law Rules 2004* (Cth) (**FLR**) provide that there may be serious consequences, including costs penalties, for non-compliance with these requirements, but is rarely if ever seen in practice (Schedule 1, Part 2 1(3)).

These provisions should require all those families that could benefit from FDR to attempt a non-litigious method of managing their situation rather than entering the

adversarial process of the court, with the negative and destructive consequences that flow from this.

Experience shows that it is often very difficult to encourage both parties to attend FDR, and that lawyers are very proficient at finding and promoting an exception to this requirement. Having got to court, the judges do not seriously explore the attempts at FDR to determine whether there are further opportunities for a non-litigious pathway, and do not impose the consequences anticipated by the legislation.

ADRAC would recommend that family disputes should not be able to have access to the courts unless they have exhausted other options, and that this change in priorities should be supported by the court system on every occasion that a matter comes before it.

Legislative pathway

The legislation in Part VII is complicated and difficult to understand.

It involves the application of a presumption of parental responsibility based on biological parentage (s 61DA) that can be rebutted by family violence, child abuse, or if not in the best interests of the child. Parental responsibility is described as “all the duties, powers, responsibilities and authority, which by law, parents have in relation to children” (s 61B). This is a very difficult concept to explain, both in relation to what it means and as to how it can work in the context of a relationship breakdown. The existence of the presumption presupposes an ability of parents to be able to communicate with each other, consult, and make a genuine effort to come to a joint decision. Coming from the adversarial context, this is often an unrealistic expectation.

There are significant ramifications flowing from application of the presumption of parental responsibility. If this is shared, then the court must consider equal time, and if not reasonably practical and in the best interests of the child, then substantial and significant time, and if not reasonably practical and in the best interests of the child, then what other arrangement would be in the best interests of the child. This description illustrates how cumbersome this pathway is, and how difficult it is to work with for families, particularly in the adversarial context (s 65DAA).

The whole idea of a ‘family law system’ with a ‘parenting legislative pathway’ presupposes that this is a journey for families that will have an end point, that if they persevere and get to the end of the legal system, they will have an answer that will enable them to move on. This is based on the assumption that there is a solution to the dispute and when the judge is able to determine the matter, they can provide this answer and the family will live happily ever after.

Often families do not want or need a decision imposed on them, but require knowledge and support to work within their own individual setting to consider the consequences of the separation, and make their own decisions. Conflict intervention can give them the skills and strategies, with assistance, to make their own situation better. This is a different type of intervention not found in the adversarial or court process. There is a wide range of non-litigious options available including counselling, negotiation, FDR,

conciliation, restorative practice, family group conferencing and arbitration. ADRAC recommends that the primary focus for the resolution of family disputes be on these non-litigious options for dispute resolution with the supports of other services such as parenting education, counselling, FDR, restorative practice, family group conferencing and arbitration. A type of case management must be developed to guide families down this pathway, provide appropriate supports, ensure that they engage as required, and are accountable for their participation.

Children's wishes

The first of the additional factors in s 60CC provides for the court to consider “any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views”.

The requirement for the court to consider any views expressed by a child when deciding on parenting orders is repeated in s 60CD where provision is made for these views to be expressed in a Family Report, through an Independent Children’s Lawyer, or by any other means. The children are not required to express views (s 60CE), but if they do, the court must consider them.

In practice, the views of children are regarded by the court in the context of the child’s age, stage of development and maturity. However, the legislation does not provide any guidance around how this exercise is to be undertaken. The focus on the wishes of the child can lead to parents, consciously or unconsciously, seeking particular views from the children. These might be supportive of them or reinforce their view of the other parent or the opponent in their dispute. They might begin by suspecting or wanting certain reactions from their children and over time come to see and expect them.

ADRAC recommends that there be clear guidelines as to when and how children’s wishes can be relevant. This could include:

1. That each child should be informed that parenting decisions are made by the carers involved in their care;
2. That a child can be given an opportunity to put their views and these may be taken into account;
3. That the weight to be given to a child’s view will vary depending on their age and stage of maturity—it is unlikely that a young child’s views will be given any weight, whereas the views of a teenager are likely to be given significance;
4. That it is not uncommon for a child to give differing views to each carer;
5. That an opportunity can be given to a child to provide their views to an independent person.

The position of many children living with separated parents can be very complex and difficult for them. As Independent Children's Lawyer, experience shows very clearly how parents can each have a very different view of the separation and be in very different stages of the separation process, and the place of their children within this world view. Many children love both parents and want to be free to spend meaningful time with each but are made to feel that they cannot be loyal to both and must choose between them. Children can end up trying to please both parents in very different ways, which does not leave them any space to meet their own needs. They can be placed in such a difficult situation by one or both parents that they may feel a need to align with one parent, often the primary parent, in order to take themselves out of a situation where they are subject to ongoing psychological pressure.

There is little guidance in the legislation about the need to protect children from the impact of their parents' parenting dispute. The legislative amendments in 2006 included s 60CC(C) which required the court to consider the capacity of the parents to facilitate and encourage a close relationship between the child the other parent when determining what was in the best interests of a child. This was an important factor in protecting the child from conflict and becoming involved in the parenting dispute. This section was removed in 2011 as a result of pressure from the family violence lobby, and with it the obligation of the court to directly address this important consideration when looking at best interests.

Schedule 1 Part 2 of the FLR states that the parties to a parenting dispute must have regard to the continuing relationship between a parent and child, and the importance to a child of co-operation between their parents. This legislation also requires consideration of the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute. Such provisions are crucial to protect children, but in practice they do not make a significant impact on most disputes that reach the court system.

Despite this guidance in the legislation, the focus is not on the protection of children emotionally and psychologically, but on the parents' rights in relation to their child. A cultural shift needs to take place away from approaching these situations on the basis of rights and entitlements, and onto the needs of children as informed by social science and as reflected in their broad circumstances.

ADRAC proposes that this cultural shift cannot take place through the court system. It depends on education about the children's experience and the impact on them of the breakdown of their family relationships. It requires an understanding of the impacts of separation on children, and the particular needs of children at their stage of development and in their context. Therapy can be a pre-requisite for making the necessary changes in behavior and for protecting children from negative consequences. ADRAC recommends that an assessment should take place to consider the needs of the family and that the family be directed to which of a wide range of non-court based services would best suit their needs at that time. These could include counselling, FDR, conciliation, family conferencing, restorative practice, or arbitration.

There will inevitably be a small proportion of families who cannot benefit from dispute resolution services. These should be directed to an administrative tribunal, and where

this is not appropriate, to a court determination. Progressing through all these steps (education, therapy, attempted ADR and administrative determination) would give a family the best opportunity for the cultural shift needed to protect children, take them out of the conflict, and allow them to be able to achieve what they need to and to be able to live their life as a child.

Conclusion

The best outcome for children would be produced by preventing families from being able to access the adversarial system, unless as a last resort. ADRAC proposes that all possible attempts must be made to assess the individual needs of each family, respond to these, and provide a range of non-litigious options to suit the family's needs at various stages of their separation. Where these options have been exhausted the family be referred for a judicial determination, which could be provided by arbitration, or a court setting, but should feature a non-adversarial approach such as inquisitorial procedures. ADRAC recommends that a nuanced ADR system be developed that allows for empowerment and direct participation (FDR, and family conferencing models) and focuses on children's needs, interests, ages, stages and temperament of individual children within their social systems and extended families. This would increase the likelihood of better outcomes and enable larger conversations with those invested in children.

ADRAC proposes that appropriate objects and principles be developed that reflect the complexity of modern families, and the needs for children within the broader family context. These must be based on current social science and be clear and easy to understand by participants in the process as well as professionals providing services or assessment. They must protect children from being impacted and affected by the conflict between their parents.

Question 16. What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

The legislation in Part VII of the FLA seeks to apply to all children. The approach of the legislation is from the perspective of biological parents and legal rights in many instances are based on this premise.

However, there are situations where a couple will separate and this can have the consequence of separating a child from others who have become very important in their lives, such as a psychological but non-biological parent, or a step-sibling who has shared a significant part of the child's life. The parents decide to separate and no longer want to have anything to do with the other, and the consequence for the child is that they can be cut off from those who have featured significantly in their life up to that point. This prevents some children in the same family setting from being treated consistently and sets them up as being excluded or isolated from their siblings or significant supports. This is often not in their best interests.

Examples where this approach can be seen as detrimental to a child and their ability to have their needs met would include:

- The close and loving relationship between children and siblings of separated step-parents or previous or subsequent relationships;
- The rights of step parents or other extended family members who have been closely involved with the care and support of a child but are no longer part of their household following separation;
- The rights of potential parents involved in surrogacy or IVF procedures where there is uncertainty of their rights following the birth of a child including same sex relationships;
- The rights of grandparents to make important decisions for their grandchildren where the parents are unable to attend to the care of their children;
- The rights of extended family members or other significant people associated with the care of a child with special needs but who do not have parental responsibility.

ADRAC recommends that the legislation provide for consistency for all children regardless of their family structure by removing the focus from the relationship of the child and their biological parent, to the child and any person who has been significantly involved with the child over an extended period of time. Whether the issue is exercise of parental responsibility, or the right to have an ongoing relationship with a child, children should not be prejudiced where they have significant relationships with those who are not biological parents.

[Question 17. What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?](#)

The provisions relating to Property Division are contained in Part VIII of the FLA for those who have been parties to a marriage, and Part VIIIAB for those from a de facto relationship. The sections specifically relating to alteration of property interests are found in s 79 and s 90SM respectively. These sections are essentially mirror images of each other, so although comments will be directed to s 79, they will relate to both.

The legislation in this area is complicated and on the face of it does not provide clear guidance as to how the court is to exercise their powers in this area. The reported case law regarding the application of the legislation is vast and inconsistent. This results in a great variety of interpretation, uncertainty and range of advice as to rights and entitlements in this area. It is difficult to provide a precise estimate of what the likely outcome will be for them of any judicial determination of property settlement. Lawyers are seen as the 'experts' and it is their role to provide advice as a foundation for negotiation and possible settlement. The disparity in this advice sets parties up with disparate expectations and paves the way for them into the adversarial system to

achieve what they are led to believe is a fair outcome. ADRAAC is of the view that engaging in the adversarial process is detrimental to families and particularly to children.

Pre-action procedures

Each prospective party to a case must comply with stated pre-action procedures before starting a case in the Family Court (FLR r 1.05).

In financial cases this involves:

- participating in dispute resolution such as negotiation, conciliation, arbitration and counselling;
- exchanging by correspondence a notice of intention to issue an application and exploring options for settlement; and,
- complying with the duty of disclosure.

All parties are expected to do this unless there are good reasons for not doing so, such as exceptional cases involving child abuse, family violence, urgency, or where this would prejudice a party (Schedule 1 1(1)–(4)).

The purpose is to encourage early and full disclosure, to avoid the need for litigation, to assist with a timely and efficient resolution, to promote efficient case management and focus on essential issues should the matter have to proceed to court (Schedule 1 1(5)).

The parties are directed to regard the need to protect and safeguard the interests of children, the ongoing relationships particularly those involving children, and the potential damage to a child of conflict between their parents. The parties are encouraged to consider the best way to identify issues, explore options, to seek resolution as early as possible, consider the consequences of inflammatory exchanges, litigation, and the impact on all affected. The need to be proportionate, pragmatic and reasonable is highlighted (Schedule 1 (6)). The parties are requested to be sensible and responsible in their approach (Schedule 1 1(8)).

Direction is provided in the rules as to how this is to take place.

A person considering filing an application is to make enquiries of available dispute resolution services, provide a copy of the Pre-action Procedures Brochure to the other party, and invite them to engage with an identified person or organisation for dispute resolution (Schedule 1 3(1)). Each must co-operate and make a genuine effort to resolve the dispute by participating in dispute resolution (Schedule 1 3(2)), If this does not happen, the party intending to issue proceedings must provide written notification of this intention including the issues in dispute, the orders to be sought, a genuine offer to resolve the issues and a time frame for response (Schedule 1 3(5)).

The Rules provide that the Court must apply the Rules and actively manage each case to encourage the use of dispute resolution rather than court, and to ensure that the parties and their lawyers comply with the Rules (FLR r 1.06 (a) and (f)).

In practice, this requirement is not taken seriously by the Court. Except in exceptional circumstances, no information is sought regarding compliance with the pre-action procedures, and it is generally accepted that it is very unlikely that a court would adjourn a matter for compliance, if informed that this has not occurred. Instead, the approach is generally to acknowledge that costs have been incurred to get the matter to court and allow the litigation process to continue.

The *Federal Circuit Court Rules 2001* (Cth) do not contain a similar provision; however they do state that where the Rules are insufficient, the Court may apply the FLR as necessary (*Federal Circuit Court Rules 2001* (Cth) r 1.05(2)).

In relation to parenting matters, the pre-action procedures have a general level of compliance, as a Certificate confirming attempts at dispute resolution/FDR must be lodged in most cases to commence court proceedings. There is no such requirement in relation to financial matters, and experience shows that there is rarely a serious attempt made to comply with these pre-action procedures.

ADRAC proposes that parties be encouraged to follow the steps envisaged by this legislation, so that they would become aware of all relevant information, issues to be discussed, factors to be taken into account, and directed to appropriate dispute resolution processes to provide resolution of their disputes. This would provide for a timely and efficient resolution of financial disputes and minimise the potential for a detrimental impact on children, more vulnerable parties and others affected by the disputes.

Despite the sentiments expressed in the legislation, disputes about financial matters are not being directed to dispute resolution services, and court is seen as the beginning of any pathway towards resolution. A cultural shift is required to change this so that court is rather seen as the last resort for resolution if all else fails.

ADRAC recommends that parties would be directed towards a 'navigator' who could assist to assess the unique needs of families, support them in the steps for necessary preparation, and direct them towards the most appropriate method of dispute resolution to suit their needs at that time. This would provide essential support for the family to be empowered to be able to identify and resolve their own issues and come to a mutually acceptable agreement without the detrimental consequences of participating in the court process. This would have a similar result to the experience of families attending FDR in relation to parenting disputes. It would save the substantial costs associated with court proceedings, leaving more of the assets for the benefit of the children and families, provide a timelier outcome, alleviate the stress associated with court proceedings, promote the protection of children and minimise any harm to the family.

Legislative framework

Section 79 of the FLA sets out the powers of the court to alter property interests and the factors to be taken into account.

Section 79(2) provides a threshold requirement that the court shall not make an order under this section unless it is satisfied that it is just and equitable to do so. This section has recently been the subject of considerable case law including in the High Court. The meaning of ‘just and equitable’ in this context is technical and complex, and could not be described as clear and comprehensive for family lawyers let alone others trying to understand their rights and entitlements under this section.

Section 79(4) sets out what the court should take into account when considering what order to make. There are 7 subsections and a reference to s 75(2) and 17 factors contained in that section. The case law in this area is vast, with a great variation of outcomes even on strikingly similar factual scenarios.

Section 79 is discretionary in nature with the Court being able to “make such order as it considers appropriate”. The considerations to be taken into account by the court include:

- direct or indirect financial contributions;
- direct or indirect non-financial contributions;
- contributions to the welfare of the family;
- likely impact on earning capacity;
- any parenting order;
- any child support liability;
- any of the factors set out in s 75(2) (broadly described as ‘needs factors’) that would be relevant.

There are no principles or objectives, or legislative presumptions provided in the legislation as guidance on how to apply these considerations. This is found in the large body of case law that varies considerably even in relation to similar factual circumstances.

Access to all relevant information, and information about rights and entitlements, are crucial to being able to develop reasonable expectations from any dispute resolution or Court process. The legislation regarding property division seeks to facilitate access to this information, but non-compliance with the spirit of pre-action procedures, the lack of enforcement of these by the Court system, and the lack of clarity and transparency about legislative rights and entitlements, makes this very difficult for separating couples. They must rely on advice from lawyers and other service providers that is often inaccurate and incomplete, and that tends to direct them towards the Court system.

ADRAC recommends that financial matters be treated the same as parenting matters and that the primary focus for the resolution of all family disputes be on non-litigious options for dispute resolution with the supports of other services such as education, counselling, FDR, restorative practice, family group conferencing, and arbitration. A type of case management must be developed to guide families down this pathway, provide appropriate supports, ensure that they engage as required, and are accountable for their participation.

For that small proportion of families who cannot benefit from dispute resolution services, these should be directed to a user friendly administrative tribunal, and where this is not appropriate for a court determination. Progressing through all these steps (education, therapy, attempted ADR and administrative determination) would give a family the best opportunity for the cultural shift needed to protect children, take them out of the conflict, and allow the family to make the essential decisions to allow them to move forward.

ADRAC proposes that there must be legislation including rebuttable presumptions to provide clear guidance as to the approach of the court and likely outcomes including:

- the sole ownership of property owned by either party prior to the relationship;
- that all debts or liabilities incurred during the relationship will be their joint responsibility and discharged from the parties' assets prior to distribution;
- that there will be an equal sharing of assets acquired, improved or maintained by the parties during their relationship;
- that both parties will be required to jointly resource the expenses of the children and meet any special needs of any child; and,
- that the parties to a relationship can determine the distribution of their property by way of a Binding Financial Agreement.

Resolution and adjudication processes

Question 21. Should Courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

The concept of 'diverting' parties from courts to other DR assumes courts are the primary DR process. Ideally, courts would not be at the decision-making centre of the reformed family support system with matters instead diverted to ADR. Courts including the Family Court should be, and usually are, enabled to send parties to DR at any time. However, as a court, they do this from an adversarial starting point. It would be preferable for a non-judicial approach to family decision-making to be taken. The ADRAC suggestion is of a three tier model as described in the introduction to this submission. The first stage would not involve either court or administrative tribunal decision-making. It would involve access to an information triage and ADR service as a first stage. The second stage would involve a non-adversarial, administrative decision-making process supported by conciliation. Only in the third stage would there be a court which would be limited to reviewing administrative decisions.

An appropriate DR procedure can be used in any dispute at any stage of the dispute. The earlier a dispute is referred to DR, the more likely it is to be considering interests rather than legal rights. Conversely, the closer the ADR process is to a court determination, the more likely it is to be considering a rights-based resolution. The ADRAC proposals for reform of the family system envisage processes that make litigation and the adversarial processes available in a limited type of matter or as a last resort. If a matter is to reach a court, it will already have been through some form or forms of DR, although the fact that the matter has moved on to litigation should not preclude a judge from referring parties to DR.

Courts need not have any reluctance in requiring parties to attend conciliation, mediation, arbitration or other suitable DR processes. Courts are often invested by Civil Procedure Acts with powers to refer parties to a DR process. See, for example, s 26 of the *Civil Procedure Act 2005* (NSW). Parties cannot be required or forced to settle, but they can be required to attend a DR process. From that point, the DR process should be able to manage any reluctance to settle. If a party truly wishes to have judicial review of earlier administrative decisions, that wish should not be blocked. Nevertheless, the adversarial nature of court proceedings is a poor system for ongoing family decision-making (if children are involved) and should be systemically discouraged.

ADRAC points to Conciliation as one process in particular that is likely to be of benefit in the family field. On one view of parts of current FDR processes, conciliation is already being used. However, its potential is not being reached, because its methods are adapted to the non-directive, non-advisory process of mediation.

Conciliation is a dispute resolution process conducted in the shadow of a determinative process and in accordance with particular considerations that bind the parties and the conciliator through applicable legislation. Parliament has directed its attention to

various areas of dispute in the community and prescribes policies and approaches to those areas and to the ways in which its disputes are managed and resolved. Conciliation is a process that has been used by all parliaments to prescribe the way in which dispute resolution must occur in that field. In doing so, it is not allowing the parties to come to any resolution they choose as in mediation. Rather, conciliators working under legislation are required to encourage parties to resolve a dispute within the confines of the policy of the legislation they are employed to propound. Conciliation in Human Rights, equal opportunity, industrial and the other legislative fields that ADRAC has identified all use conciliators that will urge disputants to a resolution that is consistent with the legislation or at least that is not inconsistent.

The resulting distinction between mediation and conciliation is quite marked. In mediation, it is regarded as inappropriate and even unethical to urge a particular type of outcome on the parties. Parties to a mediation are free to resolve in any way they wish, and the opinion of the mediator should not intrude. Conciliators operate quite differently. They will encourage parties to resolve as a mediator might do, but they are free and indeed active in urging parties to resolutions of particular types that are consistent with the policy in the legislation. They will advise on likely outcomes and will even discourage resolution agreed between the parties that is inconsistent with the applicable legislation.

In Australia, conciliation is provided for in s 51(xxxv) of the Constitution, and has been an effective tool to the present time in the Australian industrial environment.

Conciliation is used as a precursor to determination, whether by administrative or judicial means. It uses trained officers of the court or decision-maker to bring the parties together before a determination. Conciliators are usually employed or contracted by the institution that uses them. In that way, the Court or decision-maker is able to train them to conciliate within the context of the policy and terms of the applicable legislation. Benefits of both mediation and conciliation are that they allow parties to state their own narrative in their own terms in a way that satisfies the need for procedural justice or fairness, but without the costs and the evidentiary and other issues of curial hearing.

The more directive and robust approach of conciliation is of real benefit to parties. It is an approach authorised by the existence of policy stated in the legislation. It allows conciliators to inform parties of particular considerations that will apply to their dispute. Conciliators can advise parties of the ways and the approaches that will be used by decision-makers in determining their dispute. This form of direction and advice assists parties who may otherwise be lost in the choice that is available to disputants in mediation. It must not pre-empt or bypass the active participation by the parties in the process.

Conciliation operates in the current family law system; however, it is underutilised and only occurs in the court context. Conciliation is well suited to family dispute. On one view, it is already being used, but in confusing ways. Current legislation does not distinguish between mediation and conciliation. In practice, there is some resolution brought about by the experience of the DR practitioners but there is room for the conciliation process used in practice to be identified and supported as conciliation rather than mediation.

Question 22. How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property claims?

Small property matters have been a problem in the existing system because of the cost of disputing/litigating them in an adversarial environment. Small property matters are often suitable for the close attention of small claims arbitration, mediation or conciliation. Quick, immediate decision-making conducted orally without lawyers has worked reasonably well in the small civil claims field, but family dispute has a benefit in the property field, in that wider property claims could be conducted in ways that aim at and urge the avoidance of continuous small dispute.

ADRAC also recommends the Swedish model of property settlement. It uses presumptions including the concept of community/marital property and of a 50/50 split of marital property. The resolution process 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 it 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. ADRAC has recommended a system similar to this in the introduction to this submission.

In general, ADRAC urges the use of presumptions in property disputes. Presumptions assist parties by giving guidance as to what is reasonable and helps them to move a step closer to the understanding of what a reasonable outcome might be. Presumptions may also be of assistance in parenting matters, but these would need to be very carefully crafted to take into account appropriate social science considerations to ensure that they are appropriate for children of all ages and stages of development.

Question 24. Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

In short, definitely, yes. Earlier thinking about family violence and abuse was that both were matters for the criminal justice system only, and that DR processes had no role to play. Time and experience have led to other views, the development of a range of protective measures and a case by case approach. The range of behaviours and circumstances of abuse or violence are now understood to be very broad. The circumstances in which abuse is reported, is likely to be reported, or is the subject of effective sanction if reported, is low. The degree to which families will not act by criminal report has become clearer.

Naturally, safety is a foremost consideration; in any DR process where violence or abuse is complained of, direct exposure of parties to one another may have to be avoided or managed. Nevertheless, there seems to be a greater benefit in mediating or conciliating matters where there has been violence or abuse than in having it unattended or unaddressed in any way. There is some evidence that real benefits can accrue to all

parties by controlled discussion with a third party intervention present, a carefully designed safety plan and ongoing monitoring for suitability.

In the criminal field in some places, there are active systems for the use of meetings, mediation and victim contact where perpetrator and victim are brought together in controlled circumstances. Those systems provide some examples of both method and benefit.

Restorative Engagement must be noted as an important feature of relevant DR processes in this context.

Question 26. In what ways could non-adjudicative dispute 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?

The best way for non-adjudicative DR processes to be developed is to make these processes, rather than litigation, the first and default method for resolution of family dispute. ADRAAC has suggested in introduction to its submission, a three tier system of family dispute management. The first is one of information triage, case management and ADR. After that, there would be a second tier which would involve an administrative decision-maker (perhaps sitting as a tribunal or dealing with disputes on the papers without a hearing). In the third tier, there would be access to the Federal Circuit Court acting as a court of administrative review. Access to a court would therefore be a last resort.

An adversarial environment makes it more difficult for parties to see the benefits of non-adjudicative processes. The culture of a reformed family system should be as non-adversarial as possible. Once a process is to be used by parties it will need to be conducted flexibly and in ways that allow the parties to:

1. Have information about the process beforehand;
2. Have some form of pre-mediation or pre-conciliation conference whether by recorded phone link-up, face to face conference, or other online facility;
3. Understand what information or documents they will need to have or expect to be provided at the process for their own benefit;
4. Have available a lawyer, accountant or support person present as needed; and,
5. Have advice about their circumstances, needs and prospects and know that the process will have benefits. They should be made available as soon as the parties are ready to use them.

Upon attendance at a non-adjudicative process, the process will lift up and involve the parties, providing them with needed opportunities to speak, to learn about their

position and to see options as well as solutions. Parties may be interested in hearing about the costs and risks of litigation, advice from a conciliator about likely outcomes and the prospects of finalisation provided by agreement. Much of the success of the various processes turns on the training and capability of the DR practitioner.

The development of new non-adjudicative dispute processes

Different models need to be considered in different settings. Families need to go through an assessment process to determine pathways forward, factoring in questions around capacity, willingness, suitability and the most appropriate service at that point in time.

Restorative practices

A question has been posed to reply to the narrative in family law of families in entrenched, unresolved and enduring conflict who present with:

- Ongoing, destructive and expansive protracted disputes;
- Recidivism in formal court processes and in community service agencies - particularly at Family Dispute Resolution services;
- Experience of high personal costs, including negative impacts to individuals, families, communities, destructively impacting healthy social, emotional, physical and psychological development, and eroding energies of children and adults;
- Damage to families, impacting healthy social, emotional, physical and psychological development, and eroding energies of children and adults;
- A high personal price for this unrelenting acrimony and significant social cost for the community.

These clients present with high levels of negative intimacy, lots of conflict, intense emotions, negligible trust, negative assumptions, and conflictual stories that can span years. The children are often negatively impacted by these narratives, although their voice and presence can be another bone of contention. The damage and grief to these families can be far reaching and long-lasting. These clients need a way of disengaging, particularly from their negative relationship, emotions and behaviour. For some, their interests seem to lie in maintaining and prolonging the battle. They seem stuck in their cycle of separation, hooked into a repeating narrative often wanting acknowledgement and validation from the other who is not interested nor engaged. We already have some strategies and tools we use, and some work some of the time.

Intimate adult relationships are severed in a separation; however, unresolved emotional connections can interfere with parental capacity. Standard dispute resolution processes such as FDR interventions or court processes do not actively enable a letting go of the emotional energy from the end of the partner relationship or the separation, nor do they provide a forum to resolve this.

Our community is increasingly cognisant of the untenable costs of high conflict family law disputes and frightening family violence. New ways need to be established to change these challenging stories that are thoughtful and creative, and focused on addressing these unmet, unaddressed and unresolved needs of entrenched family law disputes. Restorative, facilitative tools and strategies provide such an opportunity, and are additional and different to mediator interventions.

In 2015–2016, the Defence Abuse Response Taskforce (**DART**) developed a powerful program called ‘Restorative Engagement’ which focused on a particular way of engaging with the participants in a particular process- being authentic and present, attuned. This process highlighted providing the opportunity to tell the story, in a way that it can be heard and responded to; looking at how the past informs the present. It drew on narrative processes focusing on eliciting a linear progression of the story, the impact of experiences and developing understanding and personal motivations. The focus was on building capacity to speak and to listen, being heard. DART’s Restorative Engagement program provided actively designed opportunities for healing, to let the past go and move forward, to redraft the narrative into a new story (note this program is now run by the Commonwealth Ombudsman: DEFENCE).

Restorative Engagement (which differs to Restorative Justice), emphasises engagement and the relationships aspect. Restorative Engagement is not always well understood and, just like other ADR processes, can be very different in various contexts. Practitioners need specialist training and services need to be assessed carefully and continuously. Restorative Engagement, like mediation, is not intended as a therapeutic intervention—although it can have therapeutic outcomes. To restore parenting relations, we need to factor in intimate relationships. Normally, FDR Practitioners shy away from this notion as risky and having the potential to open up ‘Pandora’s box’. This is a counselor’s role. However, perhaps these parents need the opportunity to be heard, acknowledged and responded to in a meaningful way.

The restorative philosophy is that interpersonal human relationships are harmed by actions and behaviour. The use of Restorative Engagement processes focuses on the relationships and the importance of resetting or restoring right relations. By giving time, space and opportunity to bring a relationship to an end, it allows a letting go and redirection of energies within a dispute resolution process. It provides the space to hear and be heard. In this context, the focus is on assisting the separated couple to manage conflict, manage power, ensure safe and effective outcomes, enhance relationships, and work in a trauma informed way. Using strategies and interventions from Restorative Justice principles, professionals work with parents, enabling them to disengage from their conflict and build emotional scaffolding around the children, in effect heal, resetting their new relationship; within self, between themselves and others, and within and between family groups.

Restorative Justice is increasingly being considered and applied within more environments. There are already examples of redress and provisions for working within the criminal justice system. For example, there is current legislation, the *Crimes (Restorative Justice) Act 2004* (ACT) where matters of family violence and sexual assault are being provided for within Restorative Justice processes. There are thresholds and guidelines being developed for the application of Restorative Justice for various family

violence offences and intimate partner violence. Notwithstanding this, Restorative Engagement differs to Restorative Justice. However, both provide for key elements of redress including active participation in the outcome, providing choices around participation, Voice—telling their story, validation, vindication and accountability. This ensures that participants (especially victims) are invested in the outcomes.

Restorative Engagement provides a forum, a focus on providing the opportunity to tell the story, in a way that it can be heard and responded to; looking at how the past informs the present and potentially considering questions of personal responsibility. Restorative processes draw on narrative processes focusing on eliciting a linear progression of the story, the impact of experiences and developing understanding and personal motivations. Restorative Engagement transforms conflict into co-operation using a trauma informed lens ensuring physical, psychological and social safety and using opportunities for recovery.

ADRAC proposes that Restorative Engagement processes become part of a raft of ADR services and provide another powerful tool to remedy the entrenched conflict, assisting families who need an alternate intervention, to move past their negative relationship. The intention of the intervention used in this way is to facilitate a disengagement, to hopefully sow seeds of pacific separation and reintegration. This unpicks the need for the conflict to become defining and it works in an individual's interests to let go. Fundamentally this creates a ripple effect of conscious knowing, of conscious uncoupling, where parties are enabled to move beyond their fractured, negative intimate relationship to a common understanding and co-operative parental relationship.

Family conferencing

Family conferencing is another model that offers a particular valuable process for separating families, also enabling a strength based didactic process building on self-determination, empowerment and capacity. This model considers who needs to be involved in the decision-making and allows for different family structures and kinship groups. Its benefits include being flexible and tailored to the unique family within their social systems and environment, considering the wider village invested and involved in raising a child—aunts, uncles, elders and grandparents work as interest groups, stakeholders who are invested in the child, and contribute to the plan for their care. This allows for a multi-party focus, particularly in cultures where a family operates in a wider setting, and allows the empowerment of the wider family to be guided and to make the decisions that affect them.

The family conferencing model allows for and demonstrates the potential intersection between the family law system, family violence system, and child protection services.

ADRAC has suggested in the introduction, a three tier system of family dispute management. The first is one of information triage, case management and ADR. ADRAC proposes the consideration and development of a wider range of non-adjudicative dispute processes to be applied and implemented in family law disputes as the first and default method for resolution of family dispute.

Question 27. Is there scope to increase the use of arbitration in family disputes? How could this be done?

Arbitration has real prospects in the family field for the following reasons:

1. It empowers those families who are unable to reach an amicable decision, and provides flexibility for them to decide who, how and when they will have a decision imposed upon them;
2. It gives scope to those persons who would prefer an outcome decided by a trustworthy third party;
3. It gives scope to those persons who wish to tell their story, hear a former partner tell their story or, in general terms, have a hearing with or without the costs of affidavit preparation;
4. The cost comparisons between an essentially oral short version of hearing and a full blown, adversarial document and affidavit-based contest if presented to the parties, is likely to be persuasive;
5. It preserves privacy in ways that are not available in court hearings; and,
6. It retains the flexibility to choose whether or not participants require the services of an advocate in this process.

The use of arbitration can be achieved in the following ways:

1. By offering non-oral short form arbitration “on the papers” as an option;
2. By prescribing a short form of arbitration in which orality and direct documentary evidence is preserved over an affidavit approach where ever possible;
3. By allowing access to arbitration at any point in a dispute process;
4. By defining closely, the matters to be decided by arbitration but allowing that list of matters to expand by agreement between the arbitrator and the parties;
5. By allowing a flexible approach to issues of narrative but a closely defined approach to the matters to be determined;
6. By offering arbitration to those in a waiting lists for court hearings, because of the benefits of judicial determination without the high cost of preparation and hearing;

7. Courts and tribunals can require parties to attend arbitration and may decide to do so if it is perceived that the matter is short, contains no issue of principle or requires speedy resolution.

Arbitration processes can also be further enhanced (as evidenced in research) to ensure parties are more likely to accept the outcomes. Examples include parties negotiating the process, telling their story orally or by statement or by affidavit. There may be some situations where differing facts cannot be determined by documents and evidence on oath may be required to allow for factual matters to be determined. This information could be agreed to be on the papers, presented orally or the subject of questioning as agreed and suited to each particular situation. Preserving the advantages of mediation and arbitration of parties being able to tell their story and say what they want to may be very important. ADRAC recommends the development and enhancement of arbitration processes in family disputes.

Question 28. Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia?

There are benefits in online dispute resolution. Online approaches and processes are of paramount importance where a wide range of reasons prevent families from attending face-to-face processes.

On the ADRAC model outlined in the introduction, online DR would most likely occur in the first tier, but it could be used any time. At present, the most common form of online DR exists in the use of telephone shuttle communication through a telephone mediator. True online DR can be in the form of live meeting software, with or without video link, using an online mediator or in future, with artificial intelligence. It seems likely that in the future, there will be software with algorithms able to provide intelligent options and communication in a family law dispute. At present online capacity (whether telephone or computer) is most suited for the following situations:

- Small matters;
- Remote parties;
- Matters where parents or other carers have poor relations, but need to communicate—often for matters of child care arrangements such as pick-up, holidays and times to be spent with children; or,
- In the context of family violence or other protective concerns.

Inevitably, online capacity will develop and is an area that the family field should be prompting into suitability for its use. It seems likely that the anonymity of online dispute management may appeal to many in younger and future generations as is evidenced in the effectiveness of online dating and introduction sites.

Safeguards in online DR revolve around:

- Identification of participants;
- Privacy and confidentiality;
- Difficulty in assessing remotely ongoing capacity issues as they arise during a session;
- Limitations on communication;
- Online security of communication; and,
- Capacity and training of any practitioner participant.

The risks of errant participant conduct is more manageable than in live mediation or conciliation, especially if a practitioner is involved. Either way there is less risk in terminating a call than in attempting to walk out.

Although face-to-face processes are preferred, they are not always practical. ADRAC supports the need for families in such situations to have access to high quality online and technological processes and facilities that will become suitable into the future.

[Question 30. Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?](#)

Reasonable minds differ on this topic, but the ADRAC opinion is that while there must be a case by case approach to this subject, with children involved, it should always be considered and even encouraged.

Child nurture (being a process by which parents and the family as a whole allow a child to grow and which is beyond care), is the purpose of a functioning family and best occurs in cooperation. The following observations apply to the concept of cooperation in separated families:

- Communication and cooperation are required from parents for ongoing family decisions affecting the children;
- All parties involved in a child inclusive process must understand that giving the child a voice in a process is not the same as requiring the child to make decisions;
- Self-determination by a family rather than external intervention or proxied-decision-making, must be a goal of benefit to all family members;
- The absence of family inclusive decision-making will inevitably mean that such decisions as are made may be the compromise of disgruntled parents unable to agree or by intervention and will exclude the voice of the children.

Family inclusive decision-making can occur if:

- The children are of an age and maturity that they can contribute;
- Parents are aware or are made aware of the need for their post-separation family to function in a way that best nurtures the children;
- It is noted that decision-making affecting the family must promote the interests of children;
- It is noted that the voices of the children need to be heard where possible and where the children wish to have a voice;
- It is noted that at the essence of family inclusive decision-making, is cooperation of all members of the family in the interests of the children;
- It is noted families may need assistance by way of a family counsellor or other third party to support parents to understand how to provide feedback to the child about the decisions they have made following a child inclusive process and to assist in early decision-making processes.

Children's experiences and perspectives

Introduction

What is a child?

A child is a person who is conspicuously growing and developing, forming and being formed into an adult. An adult is a person who is subtly growing and developing, modifying and being modified through the phases of adulthood. The personality of the child is likely to be recognisable in the personality of the adult. Over the 18 years prior to adulthood, the expression of personality changes with each developmental stage.

Children are, by definition, immature. They are cognitively immature, emotionally immature, behaviourally immature and immature in any other aspect considered. Immaturity usually manifests as children being unable to identify cause and effect, known as being 'egocentric'. Children tend to believe themselves to be both more influential and more responsible for what happens in their lives than is realistic. Because of their immaturity, children need to be cared for to maximise their potential for development.

Importantly, due to their singular view of the world, children are significantly at risk of holding themselves responsible for separation in their family especially when upheaval is overt. Family equilibrium enables children to be children.

Children's fears

One way to quickly map the development of children is to consider a child at each six-month interval from 0 to 18 years of age in terms of what frightens them. A developmental sample summary of changes in fear objects is:

- New babies are often frightened of sudden changes and not of strangers.
- Nine-month-old babies are often frightened of strangers and not of thunder.
- One-year-old babies are often frightened of thunder and not of loud mechanical noises.
- Prep-schoolers are often frightened of loud mechanical noises.
- Five-year-olds are often frightened of being separated from parents and not of thunder.
- Six-year-olds are often frightened of monsters and not of strangers.
- Seven-year-olds are often frightened of being home alone and not of people/pets being hurt.

- Eight- to eleven-year-olds are often frightened of people/pets being hurt and not of the fears above.
- In adolescence, fears of belonging and appearance loom large among other fears and not of the fears above.

While it is a generalisation, it is noteworthy that early fears are often behavioural, later childhood fears are often cognitive and adolescent fears are often emotional.

Children spend much of their time being off-kilter because of their rapid development. How do children cope with their fears? Generally, with flight to safety with parents. How do adolescents cope with their fears? Generally, with flight to safety in the peer group and sometimes with fight with adults in authority.

A similar list of rates of change of fears of adults would be calibrated, not in 6 month intervals but in decades or longer, would describe people who have largely integrated their cognitive, emotional, behavioural and other aspects of their sense of self and, together with flight and fight, would describe adaptive coping mechanisms, such as problem-solving.

Because of their maturity and their ability to think of ‘the other’, adults have a responsibility to maximise their care for children’s potential for development and to hold themselves responsible for separation in their family.

What frightens children is included above to draw attention to the dynamic experience of growing up. There is much that can be done to allay children’s fears and there is much useful material about this online including at the [Raising Children](#) website.

Children’s sense of self

Children’s identity develops both in fits and starts, and continuously as they grow and develop. Children need a meaningful relationship with each of their parents and other significant adults as well as with their parents collectively to restore, maintain and develop a sense of themselves. Respect, consideration and appropriate acceptance that is evident to a child between their parents before, during and after separation maintains equilibrium and builds in a child self-respect, self-acceptance and consideration of others. Disrespect and rejection does the opposite.

What are the best interests of a child?

Children need to grow and develop in an environment where they can accomplish their developmental stage-appropriate tasks including, and certainly not limited to, moving along the bumpy continuum from dependence to independence; exploring their world safely; developing a sense of self; connecting with others; expressing themselves.

A child grows and develops, not because of their rights, nor because adults fulfil their obligations. A child thrives because their interests are continuously met. Rights and obligations have their roles: rights provide the focus and scope, and obligations ensure the mechanisms for operationalising interests.

Children grow and develop to their potential when they are part of an identifiable, stable group, usually the family or families; when the families are mostly cooperative and when the dynamics of each family adapts to accommodate the interests of each child through their developmental stages.

While the interests of children remain fairly stable (for example, to connect with their parents), the outcome of an agreement about how this is accomplished should be able to be changed with each developmental stage.

Child development: Perpetual motion in the safety of equilibrium

To acknowledge the dynamic nature of each child and each family, it is in the best interests of each child and of children collectively that agreements that are reached and orders that are made for children are highly and naturally adaptable.

A child thrives when their evolving interests are continuously being met in the context of their rights and due to adults fulfilling their obligations.

Families: Maximising equilibrium

Adults form families to create sufficient equilibrium for them to be themselves. Adults leave families to create sufficient equilibrium to be themselves. In a cost-benefit analysis, upheaval is the cost; equilibrium is the benefit.

The system that the state provides must surely be one which at every turn maximises equilibrium and reduced upheaval.

Question 34. How can children's experiences of participation in court processes be improved?

Children's experiences of participation in court processes cannot be improved sufficiently to the point where the experience is beneficial (or at worst neutral). Children do not belong in court. The purposes of the court; the principles of the court; the processes of the court; the practices of the court are designed for adults, deep into dispute. In a court environment, the guiding principle of interaction and collection of information is adversarialism.

Why are there children's hospitals, primary schools and playgrounds in Australia? Why not treat children in adult hospitals; teach them at technical colleges and universities; stroll with them around lakes? Why does UNICEF have a Charter of children's rights? The response to each question is 'because children experience the world cognitively, emotionally and behaviourally' as children.

Even with the care that is taken, courts 'adultify' (interact with them as if they are adults) and parents 'parentify' (rely on and confide in children as if they are the other parent) children, which is to abuse them.

Children's experiences can be improved by removing the court as the hub; involving children in family dispute resolution processes; and above all understanding how children think and feel.

Children's interests are often referred to in terms of being a goal of the outcome of family negotiations. In fact, the reference is almost always to the best interests of the child. Agreements reached by parents, whether initiated by them, facilitated by another, or determined by another, will at least ostensibly and most often genuinely focus on the best interests of the children. In an adversarial system, however, this can be too little too late when for a long period, children have had their needs denied by theirs' and their parents' direct and/or indirect involvement in an adversarial process.

Whichever taxonomy of children's needs one chooses, those are the descriptors that should apply to children's experiences before separation and following separation and through the process of separation.

In summary, the needs of children and the goals of court, are each a satellite of the other.

Question 36. What mechanisms are best adapted to ensure children's views are heard in court proceedings?

If children's views are to be heard in court, they are most appropriately obtained away from the court, in a child friendly environment, by child specialists preferably known to the child, asking only open questions which are designed to identify what is important to the child. Parents and/or courts then reach outcomes that take account of what is important to the child, rather than providing an outcome that a child has identified.

Question 36 also needs a part B: What mechanisms have potential to ensure that children's views that are heard in court proceedings are translated into adult language, meanings and concepts?

Children's views are expressed in children's language to describe children's thoughts and feelings. The way that children think and experience emotion and use language is according to their developmental stage. It is essential that an expert in child development and in particular children's language and experience of separation, translates what children say into adult language.

"I hate you" is a relatively common adolescent cry, and has many potential translations into "adult-speak" including "I feel oppressed and at a loss because of the power you have over me."

Question 37. How can children be supported to participate in family dispute resolution processes?

This response is to the question rephrased: How can children's voices be heard in family dispute resolution processes?

Please see the response of ADRAC to Question 34 and Question 36, also. There are child inclusive, child focused, child responsive and child sensitive approaches and interventions which, together with support people, enable children's voices to be heard and considered in FDR.

Children can be 'present' in the room and heard in the room in many ways without doing 'adult business'.

In FDR, for example, two of many, many child focused interventions are:

1. An FDR Practitioner and/or a child specialist works with each parent separately and together to identify topics for the child specialist to explore with each of the children and to provide feedback to parents.

Each stage of this process is dependent on skilled professional interventions and the return is well worth the investment.

2. An FDR Practitioner writes the names of children at the top of each whiteboard and into the relevant agenda items.

This is one among many quick interventions that has the potential to shift an adult focused mediation into a child focused one.

[Question 38. Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?](#)

There are enormous risks to children from involving them in decision-making and dispute resolution processes. A comprehensive understanding of developmental psychology should underpin decisions regarding the involvement of children.

ADRAC's responses to Questions 34, 36 and 37 demonstrate that involving children in decision-making and dispute resolution processes can put at risk aspects of every facet of their growth and development. Their identity, their sense of self and other, their relationships, their progression through the stages of development, can all be at risk if children feel the weight of the responsibility of what happens in their family and/or if the main role models that children have, and admire, are people whose form of engagement is to put the other down.

Professional skills and wellbeing

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?

What core competencies should be expected of professionals who work in the Family law system?

Families are multidisciplinary, so professionals working with families need to be able to demonstrate core competencies across the breadth of their profession and with the depth on their specialties. People who separate seek assistance from a wide variety of professionals. Professional competencies inform and educate the public and set benchmarks for professional conduct. Professional competencies are meaningful only in the context of professional ethics. Professional ethics are meaningful only when they are responsive to feedback provided by the public. That is, when professional competencies are held accountable to the public they serve and exist in a personal and social system.

ADRAC considers that the core competencies that can reasonably be expected of professionals in the family law system include the core competencies of their profession and their specialty. As there are a constellation of issues that can surface during family separation, ADRAC recommends all professionals working in the family law system to have core competencies in the areas that are directly relevant to separating families (note; please refer Foundation competencies/skills list below). ADRAC further considers that each set of core competencies has a complementary set of demonstrable ethics, in the form of codes of behaviour of all these professions working in the family law system. ADRAC encourages each of the professions that work with people in the family law system to ensure that their professional core competencies include generic competencies such as conflict; cooperation; making a referral; clear communication; cross cultural contexts; diversity; disability; codes of ethics include self-care; professional, clinical supervision; reporting responsibilities.

Many of these professionals E.g. FDR Practitioners, have mechanisms and processes in place for ongoing professional development, regular skill review and assessment feedback, complaints processes, etc. This includes feedback mechanisms for compliments, concerns and complaints from clients, colleagues and others. Not-for-profit organizations receiving funding for providing these FDR services have compliance requirements to ensure these mechanisms are in place and are utilized. ADRAC recommends that these systems are ongoing. It is imperative that complaints processes are accessible, affordable, transparent and timely to ensure clients have the opportunity to raise concerns and have these addressed.

By way of example, a professional who conducts Family Assessments and Reporting can reasonably be expected to consistently demonstrate their professional core competencies while maintaining each of their codes of behavior. The core competencies of their profession, which may be counselling psychology ([Competencies](#) of Australian Counselling Psychologists); the core competencies of their specialties, which may be

infant mental health ([AAIMHI](#) [Australian Association for Infant Mental Health Inc] WA Competency Guidelines) and Report Writing (Australian [Standards](#) of Practice for Family Assessments and Reporting); competencies regarding [families](#) and children, and separation competencies regarding families and children when family violence is a factor (Relevant competencies of relevant units from the Graduate Diploma of Family Dispute [Resolution](#) CHCDFV013).

The review being conducted by the Commission is an opportunity to identify the nature of the work in this field and provide more appropriate training in core competencies to better enable and prepare professionals working in the family field to actively support and assist separating families in the way that many extraordinary professionals who already do. This follows the medical field, which has increasingly complemented their training with education for its practitioners to work holistically with patients. . The family law system needs to see the individual child, parents, families and communities affected by relationship change and family reconfiguration. Working with separating families requires a focus on the relationships aspects—seeing the individual within their world and having knowledge of what is significant in and to their lives. Professionals working within this field, require high levels of competence.

These foundation (and common) competencies need to include the following knowledge and skills:

Micro-skills

- High level communication skills and interpersonal skills.

The brain and stress

- Impact of stress—on adults and children—the impact of stress on the brain and on children’s development.
- Insights from neuroscience and the impact of conflict.

Conflict

- The effects of conflict/the impact on adults and children, and on children’s development.
- An understanding of grief and loss and the impact on adults and children.

Separation and the family

- An understanding of the separation process.
- The impact of separation on adults and children.
- Children’s and adult’s responses to separation.

- Family, couple and extended family dynamics.
- Developing an awareness and understanding of family of origin and its importance.
- Developing an awareness of the wider kinship networks and their importance
- Child development: ages, stages.
- Working with a child focused approach.
- Children’s development stages and their capacity for various parenting arrangements.
- Issues of grief and loss, separation anxiety and trauma for children.

Family violence, power and control and safety

- Understanding the nature and dynamics of Family violence and child sexual abuse and the impact on children.
- Understanding how the family law system can be used to continue and perpetuate abuse.
- Understanding power and control.
- Recognising and responding appropriately to Family Violence—understanding different dimensions and presentations of Family Violence—emotional, verbal, physical, financial, spiritual and how this may present differently in different families and communities.
- The impact of family violence on adults, children and whole family unit and wider system and community.
- Managing family violence screening and risk assessment processes.
- Assessment processes that focus on safety, capacity.
- Identifying risk, including family violence and suicide, understanding suicidality.
- Risk assessments for mental health, substance abuse (drug and alcohol, gambling).
- Supporting safety of vulnerable parties.
- Understanding Suicide and suicide assessment.
- Understanding child abuse.

Other factors

- Understanding substance abuse, mental health issues.

Trauma

- Understanding trauma, the impact of trauma and its different presentations.
- Trauma informed practices – safety, transparency.

Diversity

- Recognising and valuing diversity. This includes an appreciation for:
 - Family diversity – different family units
 - Cultural humility (rather than competency which assumes an end point or capacity to attain mastery)

This relates to (and this is not an exhaustive list)

- Aboriginal and Torres Strait Islander kinship systems and child rearing practices, indigenous, First peoples
- Cultural and Linguistically diverse communities
- LGBTIQ+, questions around sex and gender, and family formation
- Parents and children with disability

This also needs to address:

- Their narrative, history, and trauma stories
- The different presentations of family violence in different communities
- An understanding of the experiences and access to justice barriers

High conflict

- What high conflict looks like and its impact on adults and children.

Professional Self care

- Understanding of what debriefing is and how to do it.
- How to use supervision processes (see below answer).
- How to ensure self-care and make use of Support processes.

Ethics

- Knowledge of ethics and ethical practice in family law and relevant ADR processes.

Intersections between systems

- Knowledge of the Intersection within and between any new systems and processes that are developed as a result of the current enquiry.

What measures are needed to ensure that family law system professionals have and maintain these competencies?

Motivation and incentive

‘ADR is only as good as its practitioners’ (Michael Kirby, ‘Alternative Dispute Resolution-A Hard-Nosed View of Its Strengths and Limitations’ (Paper presented at the Institute of Arbitrators.) The Hon Michael Kirby points out that the success of ADR processes hinges upon the integrity, skills and training of the relevant personnel. Mediator integrity, training and skills are essential to the success of processes, and to the perception of mediation’s potency. ⁱ

There needs to be an initial demonstration or assessment of the foundation knowledge and skills for family law professionals that they have attained these competencies. Furthermore, the maintenance and upkeep of these require regular review, training and updating to ensure skills and knowledge remain developing, accessible, honed and maintains currency.

Often demonstration of competency (as per vocational training programs) is based on a bilateral system—either competent or not yet competent. The demonstration of competency is limited in that it fails to allow for nuances of knowledge and skills, of ability. Capacity amongst practitioners varies. A useful system would need to identify where strengths and weaknesses lie and allow for further development.

FDR Practitioners, are required to have regular ongoing clinical supervision processes, which provides for critical reflective practice (self-reflection and conscious development of skills) and review of work performance, and effectiveness. Introducing a supervision system for all family law professionals will contribute toothier growth and ensure capacity, competency with checks and balances.

ADRAC considers that there is a need for a cohesive education component of universities or other suitable tertiary institutions (possibly at faculty level), that train family practitioners drawing together training and work in family-related fields that are currently spread across numerous disciplines such as psychology, counselling, law and child welfare. This could occur perhaps initially at post-graduate level. Greater dialogue and a more cohesive approach to family work among those who work in the field would improve multi-disciplinary understanding of family issues and improve research potentials.

Question 43. How should concerns about professional practices that exacerbate conflict be addressed?

In the introduction to this submission, ADRAC refers to concerns about the fundamental problem of applying an adversarial system to the family separation context. ADRAC considers that even when professionals are engaging in ethical practice, they may unwittingly exacerbate conflict due to the adversarial environment in which they operate and to which they may feel obliged. Of course, those who act in a cavalier manner without any concern for the impact upon the wider family system, particularly that of the children involved, can do great and permanent harm. ADRAC believes this can be properly managed only when a cooperative, constructive process is the core of the family law system.

In general terms conflict is exacerbated when any aspect of the conflict, that is, the antecedent and/or the behaviour and/or the consequence is described in binary terms; when the outcome is brittle and when there is personal cost.

Just as it affects how people experience their day-to-day circumstances, perception and process affect how people experience conflict and its outcome. There are three lenses through which people experience conflict: power, rights and interests. Conflict experienced in terms of power assumes that an outcome will come from the exercise of authority involving a process, struggling to overpower and struggling to avoid being overpowered. Conflict experienced in terms of entitlement assumes that an outcome will come from claiming of rights, involving a process of impasse, clashing and capitulation. Conflict experienced in terms of interests assumes that resolution will come from an interests focused dialogue, involving melding interests in a process of creating a mutually satisfactory agreement.

Outcomes that are the result of a power struggle and/or a clash of rights are often brittle and often sever relationships. They are brittle because participants leave having won or lost and, significantly, whether they have won or lost, they leave acutely aware of how poorly they did and how well the other participants did. Participants typically feel depleted upon reaching a resolution. In such situations the conflict may lie dormant, though easily provoked. This contrasts to outcomes that are the result of melding of interests, which are robust and sustain relationships. They are strong because participants leave with an agreement and are aware that by their own criteria it is a fair agreement. Participants typically feel enriched upon reaching a resolution, and confident that they can adjust the agreement as circumstances change.

ADRAC recommends the active implementation of complaints processes that are accessible, affordable, transparent and timely to ensure clients have the opportunity to raise concerns and have these addressed. These processes need to assess the nature of the complaint and be directed into the appropriate process. Most professionals are required to have complaints processes in place. Having clear guidelines about these and prioritizing the above will enable clients to have a voice into what they will find helpful. ADRAC recommends having a complaints process that is guided by interests based

principles in a system that parallels the above ADRAc recommendations, i.e. the three tier Family law system and focuses on trying to resolve matters early.

Jeremy Gormly

Chair of ADRAc
On behalf of the ADRAc Council
Tuesday, 15 May 2018

ADRAc COUNCIL Jeremy Gormly SC (Chair), Tom Howe QC (Hon Sec), Dr Andrew Bickerdike (Hon Treasurer), Alysoun Boyle, Adrian D'Amico, Assoc Professor Kathy Douglas, Margaret Halsmith, Susan Hamilton-Green, Debbie Hastings, Dr Sam Luttrell, Craig Pudig.

ADRAc also wishes to thank Jodie Grant of Shifting Sands, who agreed to join the ADRAc working group tasked with preparing this submission and willingly gave of her time and expertise.

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