

Resolution Institute

Australian Law Reform Commission Review of the Family Law System – *Response* to the *Issues Paper*

7 May 2018

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# Preamble

Resolution Institute is pleased to submit this *Response to the Australian Law Reform Commission (ALRC) Review of the Family Law System Issues Paper (Issues Paper).* We note that this important review is the first major review of the *Family Law Act 1975 (Cth),* since its 1976 commencement.

We note that the ALRC is seeking written submissions to the *Issues Paper* by 7 May 2018 as part of the ongoing preparation of a *Discussion Paper*, planned for release in September 2018, and the *Final Report* due to the Commonwealth Attorney-General by 31 March 2019.

The terms of reference to the ALRC identify many aspects of particular interest to Resolution Institute, including:

* the desirability of encouraging the appropriate resolution of family disputes at the earliest opportunity and in the least costly and harmful manner;
* the benefits of the engagement of appropriately skilled professionals in the family law system, and what those appropriate skills are;
* family law services, including dispute resolution services and what services should be;
* whether the adversarial court system offers the best way to support the safety of families and resolve matters (and what appropriate and viable alternatives exist); and
* enhanced understanding, accessibility and engagement in resolving family disputes, with finality.

The term ‘Family Law System’ is defined broadly in the *Issues Paper* to include all relevant state and Commonwealth legislation, and all family law and post separation services, including family relationships services as well as legal aid, community legal sector and private legal services.

Resolution Institute is pleased to participate in the Review and supports all reforms to simplify and enhance access, remove formalised and expensive adversarial processes and address cultural factors and other impediments to resolution of disputes.

# About Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals in Australasia. Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (“ACNC”) as a not-for-profit organisation. Resolution Institute has a membership base of over 3,000 DR professionals, across a diverse range of industry sectors, including family, building and construction, finance, commercial, community, technology, mining, local government, insurance, and environmental.

Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality DR services.

Resolution Institute provides a nomination service for parties in dispute, when:

* parties need a contractually agreed, independent and unbiased service to appoint a dispute resolver
* a government, industry or agency scheme requires an independent and unbiased third party to appoint an appropriately qualified dispute resolver; and
* less commonly, an individual requests a dispute resolver

# About this *Response*

At the end of March 2018, 337 of Resolution Institute members identified as accredited Family Dispute Resolution Practitioners. As the Attorney General’s Department is responsible for accrediting FDRPs, Resolution Institute is reliant on our members to report their FDRP accreditation to us. We are reasonably confident that more of our members hold FDRP accreditation and have not yet reported it to us. We have approximately 300 members who are accredited as arbitrators with Resolution Institute. Many of these arbitrators practise in areas other than family law. Resolution Institute considers that family law arbitration is a potential development and business growth area for our members

To prepare this Response, Resolution Institute conducted a consultation process with its members to inform the preparation of this *Response*. This included a survey which posed open-ended questions, based on the questions in the *Issues Paper*, encouraging expansive answers. We achieved a reasonable level of member engagement in the survey (approx. 14% of members listed as working in family law) , especially given that the survey asked for a substantial commitment of time and thought, taking often more than an hour for members to complete. Resolution Institute received approximately 1450 answers to survey questions, totalling more than 160 pages in a Word document. Resolution Institute also encouraged its members to make their own submissions individually in response to the ALRC *Issues Paper*.

Resolution Institute has attempted to synthesise and summarise responses from individual survey respondents noting common themes, as well as identify any significant diversity of opinion in relation to specific issues.

Resolution Institute has included most of the suggestions that members made. Resolution Institute has not attempted to evaluate or prioritise suggestions made by survey respondents (all of whom are Resolution Institute members). We have included as many suggestions and comments as possible so that the ALRC has access to the range of comments made by survey respondents, the majority of whom are practising in the area of family law and/or dispute resolution. Resolution Institute recognises that any suggestions that survey respondents have made would be subject to considerations of financial viability, cost-effectiveness, risk assessment, likelihood of achieving the intended goals and the potential for unintended consequences.

Resolution Institute has omitted responses to several of the questions posed in the Issues Paper, in instances where responses to those questions are outside our field of expertise or experience. The Resolution Institute *Response* follows.

# Objectives and principles

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

Resolution Institute supports that the main role and objectives of the modern Australian family law system is to enable children and all family members to have ongoing, safe and positive relationships with other family members through arrangements reached in fair, quick, equitable, inexpensive and non-threatening processes. Most of our members advocated that processes within the family law system should be non-adversarial. Resolution Institute supports the introduction and usage of non-adversarial systems wherever suitable and possible.

**Survey respondents** (all of whom are Resolution institute members) identified the main roles and objectives of the family law system as:

*Recognise the needs and best interests of the children*

* educate the community about children's needs as a priority
* listen to and engage with children using appropriate and respectful means
* protect children from unnecessary trauma and conflict when their parents/guardians separate
* protect children from psychological and physical harm and to make parents responsible for their actions
* protect children from ongoing harm post separation
* keep the best interests of the children at the fore whilst not forgetting the emotions of the parties and other family members involved

#### *Encourage the use of alternatives to the court system*

* prioritise and work collaboratively with non-adversarial family dispute resolution (FDR) processes to meet objectives
* mediate rather than litigate to resolve matters quickly
* encourage those in dispute to attend interdisciplinary collaborative DR processes before going to court
* assess disputes early to decide which type of DR is most suitable

#### *Support fair and equitable outcomes in the context of wider society and cultural values*

* promote equality, safety and community growth through the family law system. This system is an integral part of not only the protection of vulnerable people such as children and those with a disability
* develop and implement easy to follow guidelines and legislation on cohabitation and separation of intimate relationship that is culturally acceptable to the wider Australian societal values and belief systems
* maximise and promote family harmony whatever the structure of the family

#### *Implement a strong legal framework with finality*

* resolve family disputes justly, expeditiously, and at reasonable cost within a strong legal framework
* assist families to come to resolution when all other avenues have failed, or are not appropriate
* ensure that the court, when matters progress to it, provides an end to conflict by making a decision that all parties have to abide by
* engage and empower those in conflict to make informed choices (often with the assistance of their chosen legal representative)

#### *Ensure processes are timely and cost effective*

* resolve matters speedily upon filing in the court using all means available including mediation, arbitration and hearing by a Judge if all other means fail
* keep the costs down by avoiding litigation and making processes more collaborative
* close loopholes and disallow tactics that some legal professionals use to increase conflict

#### *Manage conflict effectively*

* ensure that family breakdown doesn't cause more problems than staying together
* advance the safety and well-being of family members by ensuring processes are non-inflammatory and don't escalate conflict
* encourage families to resolve their disputes and repair relationships, not to make circumstances worse
* provide additional support to separated parents to navigate the family law system in the most direct and supportive manner possible so as to achieve the best outcome for the family such as maintaining dignity and privacy
* be mindful of all types of domestic violence and resource conflict management with suitably qualified professionals

#### *Manage property settlements effectively*

* provide clear and accessible guidelines for the settlement of property post separation Education, access and empowerment
* encourage conflict competency (through the provision of education regarding conflict triggers and conflict management coaching[[1]](#footnote-1)).
* To allow all members of society regardless of their socio-economic status to have the help they need to cooperatively resolve post separation parenting and property matters

## Question 2 What principles should guide any redevelopment of the family law system?

It makes sense that the principles that should guide any redevelopment of the family law system are synonymous with the main roles and objectives of the modern Australian family law system as discussed in question 1 above. All factors identified above should be applied in response to this question.

**Survey respondents** identified the main roles universally agreed that the guiding principles for redevelopment of the family law system should provide for a range of alternative ways for the family to make cooperative arrangements for the future, not just through adversarial processes. One respondent noted that the current adversarial approach encourages a very negative attitude from parents. The adversarial system also fosters the desire to win rather than negotiate and discourages compromise in the best interests of their children.

Another survey respondent stated that it is essential to start the separation process with a presumption of cooperation; that is, people visit a mediator first, rather than visiting a legal adviser first. The respondent observed that the early involvement of legal advisers encourages those in dispute to become competitive and oppositional. The respondent further noted that the fundamental principle is **cooperate then negotiate** and stated *“It is an oxymoron to use adversarial principles to guide the restoration of family harmony”[[2]](#footnote-2)* . In practice the widespread adoption of this approach would render courts a ‘last resort’ detour only used in extreme situations, rather than being the hub of family dispute resolution.

**Survey respondents** identified other guiding principles as:

* Community approach
  + More collaboration between services, particularly the child protection system, police, schools, family support services
  + More training for doctors, therapists, school counselors, teachers, police, lawyers in domestic violence pre and post separation
  + educate families how to communicate, to have self-reflection and how to move forward
* Fairness, safety and justice
* Protect rights and needs of children
  + Access to parenting programs to educate parents on how to protect children from conflict
* Ensure protection from family violence
* Enforce ethical professional practices
* Ensure equality between people
* Increase cultural awareness
* Increase financial accessibility

# Access and engagement

## Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved

Of those who responded to this question, a minority commented that there is enough information available already. One respondent noted that there is plenty of information available and the focus should be on improving training involved for the professionals involved.

The majority of respondents thought that the information available currently is disconnected, complicated (not plain English) and somewhat ad hoc. Some suggestions about the ways in which access to information about family law and family law related services could be improved are:

* Improve collaboration between services - streamline services and information across all family support services, including doctors, police, schools, lawyers, child protection, courts based on where parents and children reside
* Establish shopfronts in shopping centres and other readily accessible locations
* Set up internet programs for remote and rural communities can
* Set up adequately staffed telephone lines to provide access to information for CALD and physically incapacitated members of the community
* Ensure that all families attend FDR processes first (FDR professionals and FRC staff are trained to screen for DV, provide information about family law services and make appropriate referrals.
* Ensure family law websites include the full range of services available and are user friendly
* Provide training for people who may not be familiar with Australian societal norms about Australian customs and societal values
* Increase promotion and government support for assistance and free services for information, along with state-subsidised mediation
* Implement the use of case workers such as a Neighbourhood Justice Officer or a Family Safety Practitioner that manages a family in accessing services and making sure parents complete or continue ongoing engagement in services
* Provide early access to relationship counselling and education services
* Provide an online assessment for rating conflict and communication between parents and from the results be referred to services that may assist them
* Establish an information portal agency or organisation to diagnose and refer parties in dispute to the most appropriate next step considering individual needs and circumstances.
* Provide a well-advertised improved online register of accredited FDRPs (This could be an improved version of the current register on the Attorney-General’s Department website or an alternative register with improved functionality)
* Provide a directory of all available services with a description of each service and their appropriateness to types of dispute, including a list by area of the practitioners who offer those services, and the cost
* Include family law services in the training curriculum of relevant professionals, such as social work, law, social sciences, psychology, medicine
* Require legal firms to provide pro bono advice sessions
* Increase funding for community organisations, women's groups and legal services such as women's legal centres, legal aid commissions, indigenous legal centres
* Increase use of social and mass media
* Provide a family law help line
* Provide simple fact sheets with process flow charts
* Promote private services, not just government services
* Introduce a travelling road show (face to face information session) for those in dispute addressing parental responsibility, child trauma and effect of family violence and exposure to abuse on the development of a child's brain and emotional health
* Provide more information about the chief factors a court will look at in considering property and care of children issues
* Provide behavioural change programs for domestic violence offenders

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

Most Resolution institute members who responded to this question thought that training and education of those professionals who work within the family law system was the key. Many noted that all assistance provided needs to take account of safety, cultural and language needs, be understandable and child focused, and available at a local level.

**Survey respondents** also suggested the following:

* Revise the Legal Aid system with the aim of achieving universal access to legal advice through the provision of more funding
* Train court officers to use plain language
* Provide more access to family counsellors
* Make training mandatory for all professionals in trauma and domestic violence
* Implement a multi-disciplinary approach to create a better working relationship between legal practitioners, mediators, FDRPs and counsellors
* Provide online dynamic case studies which model individual circumstances and suggest alternative paths forward
* Consider introducing Family Court Registered Dispute Resolvers ("FCRDR") (acting more like arbitrators, not mediators) as a precursor to engaging lawyers (similar to adjudicators in the building industry)
* Introduce case managers for couples to help the family access the services they need such as legal, child support, police, mental health services, indigenous health services, medical, drug and alcohol, domestic violent support, sexual health advice, family therapist, counselling etc. (Family Law is just one aspect of the total experience for separating families)

## Questions 5 to 9 How can the accessibility of the family law system be improved for people with a range of diverse needs? Consider Aboriginal and Torres Strait islander people, culturally and linguistically diverse communities, people with disability, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people and people living in rural, regional and remote areas of Australia.

There was some dissenting opinion expressed by survey respondents about special provisions for particular groups. Some survey respondents stressed that all people have the same basic rights and that preferential treatment of some may be perceived to undermine the rights of others. One respondent noted that everyone should be treated equally. Another noted that the needs of any client should be addressed on an individual basis.

Another noted that it is important not to overcomplicate a relationship breakdown and the needs of any children should be carefully addressed and considered.

One respondent commented that there are already many facilitative processes which provide an avenue for diverse needs to be met. This respondent noted that currently time constraints and limitations restrict the way that those using facilitative processes exercise their creativity when interfacing with diverse families. This suggests that there may be more scope for autonomy in engagement with families. The respondent gave two examples of cases where a different form of engagement may add value: it may be appropriate for a practitioner using facilitative processes to spend a weekend in country Australia or visiting mosques upon invitation to understand respectfully the diverse needs of some people. Resolution Institute recognises the need for clear practice and financial parameters and notes that this respondent’s comments points to the need to provide scope for professional judgement

The majority of respondents who answered this question agreed that this issue can be complicated and ever evolving, and that people with particular needs require the understanding and assistance of specially trained officers to guide them through processes and refer them to suitable service providers. It was commented that the most sensible approach is to consult with the groups mentioned and ascertain their needs.

Resolution Institute considers that an appropriate principle is that all should be treated equally, with fairness and with due flexibility to make allowances for the weakness or vulnerability of individuals. Practitioners could be aided in this by sensitive training to alert them to the particular issues which different groups of people face.

**Survey respondents** also suggested the following to improve accessibility for the above groups are:

* Dedicated funding which will improve engagement and outreach into these communities, in particular ATSI, CALD and LGBTIQ
* Enhanced technology to improve access
* Legislative provisions for well trained, linguistically and culturally diverse information providers and advisers to meet access needs
* An easy to access guide to professional practitioners who are trained in working with diversity
* More people from these groups employed and trained within the family court system as liaison officers, therapists, mediators, lawyers and other professionals (incorporating diverse beliefs and value systems into family law outcomes)
* Greater use and incorporation of culturally aware practices, cultural healing, trauma recovery approaches, community education about family law rights, responsibilities, services, engagement and collaboration with culturally diverse groups in the development, delivery and evaluation of services and outcomes
* Support of (case) workers working alongside these families from start to finish when they engage in family services
* Improvement of the recognition of non-biological parents and family members as often being as important as biological parents
* More cost effective and access to supervised contact centres for culturally diverse families and rural remote families
* Subject to cost, court based legally trained duty advocates
* For remote areas of Australia, the option of mediation for geographically separated parties
* Provision of integrated services of mediators, psychologists, 'life coaches' and so on to overcome inter-generational issues
* Introduction of specialist family law magistrates nationally (as in Western Australia), who tour to the regions on circuits
* Introduction of volunteer duty solicitors at the courts
* Access to government subsidised and culturally appropriate ADR services in the first instance

## 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?

One survey respondent noted that engaging the legal system to impose a decision, opinion or assessment onto a family is the most disempowering process available to the parties and should be used as the absolute last resort. The respondent stated *“It will always be expensive and so it should be. It is never cheap to engage experts ... If families require a judge to make decisions regarding the most private aspects of their lives then the community should be concerned to ensure that the best expert evidence is being heard and the lay evidence is being properly tested by expert legal counsel. Such a process should not be cheapened. Rather more resources should be given to the courts to avoid the currently ridiculous time constraints that judges have.”*

Resolution Institute supports that adversarial court based approaches should be reserved for the matters that cannot be otherwise resolved. Resolution Institute encourages the use of facilitative DR processes wherever possible and appropriate. If facilitative processes are not possible and appropriate, the use of a determinative process such as arbitration provides parties with the potential to work with the arbitrator to create a more customised process suitable to the parties’ needs than is possible within the court system.

Another member said that *“...the ‘Child Inclusive practice’ process as set out by Dr Jennifer McIntosh, needs to replace the ‘family consultant’ model of the court. The family consultant model escalates conflict and further places children at risk, further entrenching family conflict. Most professionals agree, that the ‘family report’, is damaging and children suffer long term ramifications of this. There is no requirement for families to be given a report in black and white which will essentially make a powerful judgement about a parent, parents or child/children. The Child Inclusive model, conducted by experienced child consultants, strengthens families, and highlights children’s needs to the parents. It is future focussed, child inclusive and supports children in their struggle. Family Dispute Resolution with Child Inclusive practice, offers potential for parents to psychologically shift away from conflict and refocus on the immediate needs of children.”*

Resolution Institute members provided a number of suggested changes to the family law system to reduce the cost to clients of resolving family disputes. A common theme was earlier intervention. It was argued that by diverting resources (such as Federal government funding) to early interventions when relationship problems arise, and encouraging the use of FDR and family counselling, it is more likely issues can be resolved more efficiently. Another common theme was better use of existing resources such as proper time to digest and discuss reports.

**Survey respondents** suggested a range of methods to reduce the cost to clients of resolving family disputes:

*Encourage early intervention*

* Better access to mediation of reasonable duration and more education about the availability and value of mediation
* Better access to reports is needed. If reports are available there should be sufficient time to read and digest those reports, which have taken considerable time and cost to provide
* Enforced attendance at FDR services and family counselling first. These can provide information and refer to appropriate cost effective services in need.
* Development of a comprehensive data base of family support services, legal service and private report providers
* Introduction of compulsory parenting courses and programs based on individual family needs. Parenting coordinators/ case workers/ Family Safety Practitioners to manage families from through the process
* More emphasis on mediation and arbitration – outsource and publically fund after means test
* Where there are minimal risk factors, families need to be diverted away from the Family Court. Family lawyers should encourage their clients to engage in collaboration to resolve both property and parenting
* Medicare funding/eligibility for private mediators and child consultants
* Improved funding and expansion of Family Relationship Centres - take-up of family dispute resolution would be improved by an equivalent of Medicare funding
* An equivalent of the ‘Better Access to Mental Health’ approach might serve a purpose - ie, eligible parties able to access a limited amount of public funding for a defined level of family dispute services provided by registered FDRPs. This would allow parties to choose their service provider from FRCs, affordable private providers who could ‘bulk bill’ eligible clients or charge a gap for provision of higher levels of service, and completely privately funded dispute resolution services.
* Family Relationship Centres could prioritise low income families to reduce waiting times and urgent access to services

#### *Improved court process*

* Increase Commonwealth funding for outsourced private report writers
* Employ more contracted professionals to provide reports in a more timely manner
* Provide more Judges
* Provide additional Registrars to funnel cases to more appropriate services, such as family Dispute Resolution. Have a triage system so property matters for lesser amounts can be fast tracked and even go to FDRPs
* Make it mandatory for parties to go to FDR prior to court for property matters
* Use arbitration with extensive real enforcement powers
* Introduce the potential for suitably trained FDRPs to be able to act also as arbitrators and provide reports to court if required or requested
* Introduce more education on how the court makes decisions (Many people have a belief that a judge will be on their side)
* Provide Legal Aid in parenting matters where a litigant falls just outside the means test and cannot afford private representation. There are an increasing number of people in this bracket who need representation.
* Remove children's matters from adversarial litigation
* Introduce a panel of three system to courts: a lawyer, social worker, and quasi-medical to conduct and facilitate a collaborative process
* Introduce rules to require both parties to document their respective stances and own financial resources within a short period, and identify any issue with the other party's stance and then attend an early conference with a tribunal (not a registrar) that has power to make final orders and is willing to make them in the event of default.
* Require the statement of financial resources to be comprehensive and the party's best assessment of value without the need for professional valuation. It should probably include reference to any significant assets disposed of within the immediately preceding "x" years.
* Adequately recourse compliance monitoring and increase access to supervised contact centres. This would help to overcome a significant high cost of non-compliance with family court orders. There is often an imbalance of power by one party with significantly more financial resources than the other party in funding ongoing court applications, appeals. Added to this is often abuse of process by DV perpetrators making false allegations.

#### *Ensure professional conduct*

* Increase disclosure of the range of costs that could be associated with a legal battle
* Introduce flat fee or capped legal costs. Family lawyers could have a cap on what they charge clients to encourage resolution rather than protracted conflict. Collaborative practice may assist
* Provide more information about Family Court time frames and delays
* Require lawyers to update their ethics training at least every two years. Special emphasis should be placed on ethics training for those trained elsewhere than Australia to ensure alignment with ethical standards of legal practice in Australia
* Introduce a National Family Law Code of Conduct for lawyers instead of state based codes

## Question 11 What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Members who responded to this question disagreed about legal representation in family court proceedings, mainly because they disagreed with the adversarial system of DR and thought it was much better to keep families out of court in the first place. Some argued that they have not observed many difficulties for self-represented litigants to access the court; most difficulties arise with document preparation and procedural issues. They argued that it is not the responsibility of court officers to assist and that making the whole system less adversarial would assist more. It was noted that support by way of family consultation with a professional would be more of an advantage to the family, along with early mediation opportunities.

In contrast, one survey respondent argued that, instead of looking at ways to support self-represented litigants, it would be preferable to provide all litigants with access to legal representation and more access to legal aid.

#### Survey respondents suggested ways in which assistance could be provided at court:

* Appoint well-informed duty officers to assist
* Appoint dedicated case workers
* Provide straight forward training sessions conducted by court officer or multidisciplinary panels at the Family Court
* Provide simple language brochures /self-representation pack
* Create a panel of low cost legal advisers available
* Provide para-legals to assist
* Develop a scheme for law students to volunteer as part of their training
* Allow more support people
* Make accredited volunteers available
* Simplify the legislative framework and drafting it in plain English including court forms, access to forms, making family court website user friendly and how to lodge documents properly
* Provide instructional media (podcasts, video, youtube). These would be like WA's handbook for in-person litigants, in that they would explain the essentials of the process and how it should be approached
* Increase training for judges and registrars to more effectively manage recalcitrant litigants and enforce rules and orders
* Refer to conflict coaching and/or Restorative Conferencing first, then to a facilitated (mediated) conference if necessary with appropriately qualified FDRPs. In this case, the member suggested that the FDRP in that forum be able to make recommendations to the court or to act as arbitrators. Resolution Institute notes that there is significant debate about the potential of hybrid facilitative-determinative processes. There would need to be appropriate safeguards and process detail before such a hybrid process could be considered. The member suggesting this hybrid considered that it is critical that the practitioners are qualified FDRPs as it is FDRPs who have understandings about child development.

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

Most survey respondents reiterated the suggestions they made addressing question 11. Another common theme in responses was support for the expanded use of government funded mediation.

**Survey respondents** suggested the following ideas to support people who do not have legal representation:

* Change the role of the judge to be more inquisitorial and lessen reliance on formal court procedure, establishing the needs in the situation, and making a determination on this basis
* Normalise resolving family separation issues without becoming adversarial
* Develop a new phrase other than family 'law' to set a new context for resolution
* Address mental health issues as appropriate
* Recognise time needed for self-represented represented parties to 'hear' and consider
* Allow voluntary organisations to support people who do not have legal representation and fund them to do so (also consider expanding into mediation support)
* Reduce reliance on documentation to make it easier for self-represented litigants to navigate. The heavy reliance on procedural documentation, even in electronic form, needs to be simplified and reduced to not only assist litigants in person but to help communication between the parties
* Increase funding to FRCs so that they can provide more than 2 hours mediation per case

## Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

One survey respondent noted that resources could be directed more appropriately to the revision of the adversarial system rather than the redesign of physical buildings.

Most respondents agreed that safety and security are the most important concerns. Some stated that most urban court buildings and facilities are sound however identified that many rural facilities are not suitable.

**Survey respondents’** suggestions include:

* Separate entrances for parties: entrances scheduled to occur at different times and through different locations
* Clear and large designations above doors
* Court officers to direct movement
* Shuttle mediation facilities
* Introduction of synchronous (video) conferences
* More space and provision for segregation in waiting areas
* Wider use of video evidence especially in cases of alleged acute domestic violence and sexual abuse of children
* Access to child minding and activities for children
* Development of child friendly spaces so that children would not be in court rooms at all. Any environment which seeks to resolve children’s matters should reflect a child friendly, family focused presentation. Outdated clinical environments add to conflict.
* Special allocation of rooms for the victims of domestic violence and their children staffed by trained professionals
* Increased number of safety rooms
* Better access for people with disabilities
* More security including security staffing and cameras
* More secure outdoor spaces
* Local Councils could be encouraged or even financially supported to have facilities for family separation processes making them less intimidating and formal

# Legal principles in relation to parenting and property

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

Members who responded to the question held a variety of views about the current approach of Part VII which recognises equal responsibility of each parent and encourages significant time (not necessarily 50/50) with each parent. Resolution Institute notes that many survey respondents consider that the 2006 amendments introduced a 50/50 outcome as the required outcome, with limited scope to vary from this. Some respondents refer to a 50/50 rule. In the context of a perceived 50/50 shared parenting outcome/rule, most respondents felt that the 2006 amendments were not positive and the law should be revised to reinstate the pre-2006 position.

#### Survey respondents made the following varied comments about the 2006 amendments:

* The presumption of equal shared parental responsibility has been misunderstood and as such has been taken advantage of by both lawyers and clients to the detriment of children.
* Remove the presumption of equal shared parental responsibility and the association of equal shared time. Listen to the voices of children and take into consideration more of their wishes and presenting needs when making decisions
* The rule is of limited application - it can only be considered where the parents have a good parenting relationship, can communicate well, and can focus clearly on the interests and developmental needs of the children
* Repeal the provisions about equal time and simplify cases to be determined on the basis of the best interests and practicality test – reinstate pre-2006 position
* Children are not property and should be able to have their views and needs made of primary importance, balanced with safety - Shared care should only be available after full safety assessments
* The underlying principles are sound, but the legislation has been through too many amendments so it is now confusing - a redraft should be attempted
* The difficulty is always going to be the adversarial nature of court - earlier education on attachment theory, on theories around gender and power, and on taking a 'lifetime view' of the raising of children may be of assistance.
* Re-write that 50/50 is not a 'right' but starting point (equal shared care goal to be aspired to and is often done over time but where is separation acrimonious, this is very difficult)
* Equal shared care or regular shared care should not be so easily given to parents that continue to engage in ongoing conflict that harms children. There is no monitoring or the extensive psychological harm done by parents in their ongoing conflict*.* This is creating trauma and mental health problems for the next generation of children that grow up and repeat their parents appalling behaviour and parental conflict hence the cycle continues… None of these complex needs and safety concerns are in the best interests of children as the focus has been too heavily on shared care and the ongoing relationship of both parents with their children to the detriment of children's wellbeing… Sadly sometimes parents are too often motivated for equal shared care so they don’t have to pay for child support, so they can revenge against the other parent, so they can continue tormenting and doing DV against the other parent through the children.

**Survey respondents** made the following additional comments about Part VII of the Family Law Act:

* Provide [compulsory]parenting courses that emphasise meeting the developmental needs of children, and the necessity for the parents to be able to parent without conflict - this should include communication skills training.
* Conduct an independent assessment of the characters of both parents and special training for ‘aliens’ who have never experienced the law supporting children/s rights
* More monitoring of care arrangements over time - Develop a list for families addressing the requirements for children's development and needs - including, education, safety, stages of development needs. The should be an option to review and revisit during significant developmental stages
* Develop more clear definitions of abuse and violence and their impact on children
* Make changes to the 60i certificate process to greater involve FDRPs (who has spent at least five hours with the parents)
* Involve child focused mediators to work with the issues regarding the children's needs
* Redirect frivolous cases for second mediation - protracted conflict is disastrous for children. Some sort of tight limitation on time between separation and mandatory achievement of parenting agreement as a condition of dissolution of marriage i.e. a condition of granting dissolution (where children are involved) is that a parenting agreement is filed in all cases
* Introduce a second mandatory tier between FDR and family court litigation such as compulsory collaborative law practice with the ability to report to the court should it too not be successful in resolving parental disputes.
* Enable mediators and lawyers the capacity to refer clients to family services based on their presenting needs. ie mental health, drug use, DV etc.
* Require parenting plans to be submitted in court applications, making parents justify why they shouldn't honour them to prove whether they made a genuine effort in mediation.
* Increase capacity for the child protections system (DOCS/FACS) to address psychological harm by parents.
* Factor children's voices into more into decisions
* School education programs should be nationwide on acceptable parenting behaviour, respectful communication and behaviour in relationships, education in unacceptable behaviour in DV for both parents and children. Parent alienation, parental coaching and bullying against the other parent through the children, all aspects of psychological harm by parents, false allegations, mental health, drug use, DV control, coercion and power imbalance by DV perpetrators post separation through FDR and family court process are all not adequately addressed.

## Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

**Survey respondents** agreed that the safety of children was a paramount concern. One commented that the current system is not adequately addressing the safety concerns of children. Most reiterated that a presumption of 50/50 care is inappropriate.

A minority of survey respondents thought that the definition of family violence was adequate and noted that the law doesn't need to be changed, support systems need to be better.

Many focussed on violence and its effects on society and thought that it was futile to amend definitions and procedures without addressing the core causes of violence and how and why it is used in families and the wider community. One respondent noted that family violence is intergenerational and affects the whole family system, leading to a loss of contact and communication with the wider family system, causing rifts that take generations to heal.

#### Survey respondents’ comments on definition and provisions regarding family violence include:

* More words and changing definitions will not assist what will inevitably always be difficult decisions for parties to make regarding the weighing of safety against the rights of children to have meaningful relationships with their parents.
* More assessment and judgement will not help. It is important to engage the offenders more effectively, increasing personal connectivity and assisting people to develop and maintain compassionate relationships
* Whatever changes are made to the *Family Law Act*, it should reflect the seriousness of the impacts of the violence and the breakdown that ensues. Enforcement of breaching of FVO needs to be consistently applied and rigorously promoted to change the current culture of nonchalance around FVO breaches.
* Family violence has become a weapon in itself. Family respect is interaction based on individual and family interests. Family violence is interaction based on power in circumstances other than emergencies. Interests include recognition, acknowledgement, connection, certainty and many others. Power struggles; interests meld and that's where cooperation originates

**Survey respondents’** comments on the safety of children include:

* Amend the definition of best interests of children to include the term psychological harm. Psychological abuse needs to be addressed, not just within the family court system but across society generally - education of parents, professionals, children and the follow up in addressing this type of detrimental harm needs to be a focal point. DV is not just physical harm but coercive and controlling behaviour towards children post separation. All forms of violence and abuse should be considered negative for children
* Witnessing a parent be abused is severe trauma for a child, and as complex as it may be, children must be acknowledged as equally victims of abuse/violence; not just the adult victim
* Prioritise interim orders based on DV concerns - Make DV allegations a priority and engage case workers to assess risk and ongoing safety concerns.

**Survey respondents** suggested the following changes to the definition of violence:

* Include abuse of process as part of the definition of violence - the misuse of process is not recognised as a form of abuse and should be addressed
* Suggested definition of family violence:

*1. Unreasonably withholding support for, or preventing, a child being given educational opportunities,*

*2. Unreasonably disrupting a child's study or sports activities, and*

*3. Forcing, actively or in a passive manner, a child to comply with one's unreasonable requests or to do hard work that is not conducive to the child's physical or mental development*

**Survey respondents** also commented:

* Urgent revision of strangulation laws required
* Trackers/anklets should also be used

## 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?

Most members who replied to this question agreed that all children should be protected and empowered, regardless of their family structure.

*“A child is a future citizen and the child's development and protection is important for the country.”*

**Survey respondents**’ comments are:

* Use a psychologist to assist children to sit independently and write what they want, then consult and prepare a report
* Recognise and incorporate guardians and caregivers of children other than their biological parents within their family structure - it takes a community not just a mother and father to raise healthy well adjust children
* Adapt to the changing family structures, while maintaining the principles of safety, wellbeing and connection for children
* Assess case by case as family structure will affect the way a dispute should be handled

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

Most Resolution Institute members who responded to this question thought that the provisions of the *Family Law Act* governing property division should be simplified (mostly by introducing guidelines and simple to follow less adversarial processes). One thought that no amendment was necessary as the *Family Law Act* allows judges to have a wide discretion and “*if we are unhappy with the way judges exercise that discretion then this is a matter for additional and different training for our judges.”*

**Survey respondents** suggested changes to definitions and process as follows:

* Include private sector accountants and financial planners to assist with transparency and disclosure
* Simplify the language of the relevant provisions so that individuals can understand them (this could mean that particularly where the assets pool is small, parties would need less legal input and therefore would incur lower costs)
* Develop a workable estimate table of what a split may look like
* Provide education on how non-financial contribution is considered
* Require parties to make genuine/reasonable attempts to resolve via negotiation and/or mediation in property disputes before being able to file an application for court orders
* Consider a mandated starting point of equal division of property to be varied after considering any factors which would suggest it should be otherwise (having regard only to significant contributions before and during the relationship and future needs) - the discretionary element is retained but it should lead to better forecasting of outcomes
* Consider treating smaller and larger property disputes with different process – careful consideration would need to be given to how small and large are defined
* Include treatment of wastage of marital assets such as gambling
* Include definitions and details about how to deal with gifts, redundancy payments, inheritances, Personal Injury and TAC/Workcover payments etc - defining how these are to be viewed will reduce matters coming before the court
* Simplify superannuation splitting
* Introduce guidelines to ensure all parties make reasonable/genuine attempt to resolve property dispute via direct negotiation and/or mediation before being allowed to file in court
* Encourage the use of arbitration and provide guidelines for when it would be appropriate for parties to utilise it rather than proceed to court
* Develop plain language directions about listing all assets and liabilities; principles suggesting what can be taken into account (eg recent windfalls) and not taken into account (eg affairs).
* Introduce compulsory mediation in property matters to reduce the back log at court and give people a voice in determining the outcome of their dispute
* Problems and disputes often arise due to the delay between separation and final property settlements –many people report that it is unfair that assets purchased and paid for by one party post separation but prior to a property settlement are included in the relationship assets
* Consider more consistency for across legislative provisions for married and unmarried couples (acknowledging there are Constitutional/jurisdictional impediments)

## Question 18 What changes could be made to the provisions in the Family Law Act governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

## **Survey respondents** made the following comments:

* Clarify when spousal maintenance should reasonably end – should it discontinue once the children reach school age? An alternative is to incorporate an adjustment in the property determination (if there is one) – this provides certainty and finality
* Consider how to address denials or access to children and if it is suitable to sanction with termination of spousal maintenance payments. One member reported that one of the major grievances by fathers is, although they pay maintenance regularly the other parent can deny that parent access to the children for a various reasons. Unless the reason is proven to be for the children’s safety by way of court order as such, the parent refusing access to the other parent for the sake of convenience, their financial assistance could be terminated until the other parent is allowed access.
* Allow spousal maintenance to be garnered through the taxation system
* Consider compulsory mediation prior to going to court
* Improve enforceability, monitoring and review of spousal maintenance after orders are made

## Question 19 What changes could be made to the provisions in the Family Law Act governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

**Survey respondents** were evenly split on whether binding financial agreements (BFAs) should be abolished or strengthened.

#### Survey respondents in favour of strengthening BFAs commented:

* Consider strengthening so after dissolution of marriage, there can be no more disputes
* Make mandatory in order to prevent an equal split result after two years of cohabitation

#### Survey respondents not in favour of BFAs commented:

* Abolish as the amount of case law flowing from BFAs and the continuing difficulty concerning preparation and efficacy warrant them virtually useless
* There is a high rate of unenforceability

**Survey respondents** suggested the following changes:

* Instill a premise that the Courts should try to give effect to the party’s agreement
* Introduce a presumption in favour of validity of legal advice on both sides
* Redraft in plain English and simplify the setting aside provisions, to make it clear that as long as the pre-conditions are satisfied, ie independent legal advice, the prima facie position is that BFAs are binding and can be aside in only limited exception circumstances eg unconscionable conduct , duress, DV etc.

# Resolution and adjudication processes

## Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

Resolution Institute supports the use of non-adversarial mechanisms of DR in family disputes.

Many survey respondents responding to this question highlighted the importance of removing the court as the gatekeeper of family dispute resolution and to reserve the court for criminal and civil wrongs in family systems.

**Survey respondents** made the following comments:

#### *Provide more early intervention*

* Offer more family conferencing /therapeutic support to arrive at agreed outcomes at the very first stages of family disputes
* Implement early intervention for counselling, mediation and alternative processes. Parties need to be reminded and encouraged that they have capacity to resolve issues themselves, and that they will be supported to do so.
* Introduce automatic interim arrangements / orders for parenting disputes made automatically/ without the need to litigate to provide children stability

#### *Increase access to mediation*

* More access to mediation, multiple times if necessary, where appropriate. With long period of children's dependence on parental support, parents may need to communicate in future years. They cannot go back to judge all the time so access to a mediator will have long term cultural change.

#### *Increase the use of FDRPs*

* Allocate a FDRP per case subsidised by the government
* Allow FDRPs to have a more adjudicative role especially if they have a legal background. Resolution Institute notes that this would require specialized training as well as careful process design. For a practitioner to move from a role of being an impartial FDRP facilitating parental decision making to a being an adjudicator needs to be carefully considered in the broader context of discussions about hybrid processes.
* Allow FDRPs to have a role in resolving property disputes as well

#### *Reconsider the role of Registrars*

* Widen Registrars’ powers to include duty lists, first return dates, directions hearings, consent adjournments, consent orders, subpoena objections, some interlocutory matters to permit Judges to hear and determine matters rather than performing many procedural matters in Court.
* Empower registrars to do triage and funnel work to other areas, such as FDRPs and mediation

#### *Expand the powers for judges*

* Give judges the ability to case manage like Supreme Court judges do in family provision claims and stop unnecessary delays and prolongation of proceedings
* Allow judges to make mandatory referrals to mediation or arbitration in suitable cases
* Consider cost consequences for delay or over lengthy documentation
* Consider limits on the number of directions and other preliminary hearings
* Enable judges to address and penalise lawyers who misuse process to delay matters
* Jurisdictions outside of WA would do well to implement a system that has specialist family law magistrates, based in the capital, and touring the regions on circuits. The process of appointment of judges who deal with family law disputes must take into account the expertise of the nominees

#### *Increase the numbers of arbitrators available to provide family law arbitrations*

* Relax the criteria for appointment of arbitrators in financial disputes to expand the pool for the appointment of experienced and competent arbitrators to provide competition and reduce costs. Consider panel arrangements
* Consider other family law disputes suitable for arbitration

## Question 21 How can (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?

Resolution Institute supports expanded use of other DR processes and services to facilitate earlier resolution of disputes. Survey respondents agreed with the expanded use all modes of DR, especially mediation and arbitration, earlier in the family law system DR process, along with referral to counselling services.

One respondent suggested that this question should read: “how can communities provide greater opportunities for participants to use dispute resolution processes for early resolution?”, to convey the view that better funded and supported dispute resolution processes and services are desirable for, and benefit, the wider community, not just court systems.

**Survey respondents’** suggestions include:

* Implement an objective gatekeeper to advise/provide legal opinion on whether a matter is likely to be successful/gain desired outcome pre-litigation
* Mandate engagement of parents to courses, therapies, rehab, family support services, parenting programs based on their presenting needs
* Mandate child inclusive mediation as part of the dispute resolution process
* Provide in the legislation that before hearings can commence, the court must first consider referring parties to an extended range of alternative dispute resolution processes including for eg, arbitration, conciliation, collaborative law practice, and early neutral evaluation.
* Make orders and do not allow a matter to progress unless the court is satisfied that best ‘genuine efforts’ have been made by the parties to resolve the dispute in the form of a certificate issued by a DR practitioner (and sanction with costs consequences if not a genuine attempt)
* Define the concept of 'genuine effort'
* Make it compulsory for both parties to attend mediation - current system is that one party can refuse and section 60i certificate is issued
* Mediate multiple times if necessary
* Implement stronger case management
* Extend funding to private practice areas to speed up the process
* Establish panel of FDRP's, Conflict Management Coaches and Restorative Practice conveners to be referred to the same way that Independent Children’s Lawyers are appointed
* Consider technical loopholes - some families are being allowed to lodge parenting applications without a section 60i certificate when they lodge property applications at the same time. This loophole needs to close.

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

Resolution Institute members who responded to this question all agreed that an effective low cost option for resolving small property matters would be extremely beneficial. Many members thought that low cost and potentially binding mediation was a viable option.

**Survey respondents’** suggestions and comments include:

* Extend funding of Legal Aid Commissions, and where relevant Family Relationships Centres to provide legally assisted mediation of these matters
* Introduce mandatory mediation, and if there is no resolution, have the mediator ask for a report in writing from both parties to be forwarded to the court
* Empower Registrars to determine disputes where the property pool is less than an agreed amount
* Introduce a dedicated short hearing list for small value and simple matters
* Provide a list of approved valuers who could be accessed and used to resolve all valuation issues before the parties then attend mediation
* Train FDRP's in small property matters
* Consider arbitration on the papers
* Consider a mediation-arbitration hybrid approach where the parties agree to be bound
* Enable private arbitrators to be retained in smaller property cases by providing Legal Aid
* Amend the legislation to abandon the contribution approach in small matters
* Consider excluding legal advisers from small matters

## Question 23 How can parties who have experienced family violence or abuse be better supported at court?

Resolution Institute acknowledges the importance of parties who have experienced family violence or abuse receiving support so that they feel safe, secure, and able to participate freely in DR processes.

One survey respondent commented that an evidence based adversarial system does not work in extreme cases of violence, where a victim may not provide evidence as a result of extreme fear of the perpetrator. The respondent was aware of circumstances where a perpetrator or a barrister has been able to cross examine a victim in court, resulting in further abuse and traumatisation. The respondent further commented that the court process itself can be traumatic. Cases involving family violence need a trauma informed approach that may not be able to be offered in a court process. The respondent suggested that consideration should be given to streaming these cases either internally or externally to processes that involve professionals trained to screen for domestic violence and trained in trauma informed care. A dispute resolution process that involves appropriately trained professionals and the use of shuttle communication is a way to support parties where family violence is an issue.

**Survey respondents** suggested that parties could be better supported at court (and through other aspects of the family DR process) as follows:

* Assess the level of emotional fitness of the parties prior to the attendance at court
* Assign a suitable person at court to accompany the vulnerable party and satisfy him/herself as to security in transit to and from court
* Seek the services of external agencies (such as the Salvation Army) to provide support
* Increase availability of other DR services
* Provide more safe and separate rooms, and separate entrances if necessary
* Provide more private waiting areas
* Separate hearing times for each party
* Restrict cross examination of victims in the court room by allowing clients to present their response and evidence in an informal process through dispute resolution
* Provide trauma informed training for all judicial officers
* Engage specialist DV case workers to provide evidence and support to victims in the court process
* Assist clients that are assessed as not suitable for mediation because of mental health, drug use, anxiety, domestic violence or lack of capacity to mediate/negotiate, by providing access to suitable therapy, counselling and parenting programs
* Increase use of appearance via video
* Expand shuttle court processes and communication
* Consider referral to medical services, voluntary bodies and, where necessary, police,
* Provide a calming atmosphere in a very formal strict environment
* Increase funding for family violence support workers

## Question 24 (How) should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Resolution Institute members responding to this question all agreed that legally assisted family DR processes should play a greater role in the resolution of disputes involving family violence or abuse, provided there is appropriate training and accreditation to deal with family violence and child protection.

**Survey respondents**’ suggestions included:

* Ensure family lawyers involved are trained in FDR, domestic violence and trauma informed care
* Make court orders for cases with family violence to FDR processes designed to support clients where family violence is an issue
* Study and extend the Legal Aid NSW assisted DR process that endeavours to enable the resolution of disputes of families in these situations. This process, which makes use of shuttle mediation, conducting mediation by telephone, and a lawyer being present to advise and assist each party, can enable safe agreements to be made. This LAC process could be extended to other organisations and service providers
* Consider that some matters will never resolve where there has been family violence or abuse (requires complete and unconditional acceptance of responsibility for violence and abuse which may provide a foundation for a resolution)
* Be mindful that legal advisers are more inclined to pursue an outcome for resolution rather than identify what caused the parents to be in conflict
* Consider the use of technology so that clients and professionals can participate regardless of distance and remoteness
* Increase training for family lawyers in addition to the legal rights of parties. Family lawyers should also receive training in emotional intelligence and self-awareness to enable them to engage in conflict resolution processes with compassion. In this way they might be less fearful of dealing with complex issues like family violence and abuse and be more effective in dispute resolution processes which are designed to keep the participants safe
* Consider providing appropriate training for non-legally trained private registered FDRPs in legally assisted processes as an advanced certificate
* Consider regulation, such as caps on client legal fees.
* Encourage greater collaboration between Family Law specialists and FDRPs
* Encourage greater awareness and use of restorative justice processes
* Fund Family Relationships Centres to specialise

## Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

**Survey respondents** made the following suggestions:

* Apply financial penalties/costs orders
* Include the misuse of power in the definition of family violence in the *Family Law Act* including the examples listed in research conducted by the Australian Institute of Family Studies ie. instigating and re-instigating legal proceedings in multiple courts, prolonging court proceedings by seeking constant adjournments, challenging interim orders and procedural determinations with the intent of exhausting legal funding, approaching multiple legal practitioners to limit the other party’s access to legal advice especially in remote rural areas, making cross applications for personal protection orders, using family court processes to gain evidence relevant to criminal matters, self-represented clients cross examining the other party over sensitive DV allegations, using subpoenas to gather sensitive information about a parties personal therapeutic counselling records, making multiple notifications to child protection authorities, welfare checks by police, challenging and appealing child support decisions, deliberately not engaging or delaying the dispute resolution process, non-disclosure of income and assets in property matters.
* Other penalties: limit contact with children and mandatory attendance to parenting programs to address poor parenting behaviour through the misuse of power
* Expand the power of the family court to dismiss applications without merit
* Change pre-filing FDR requirements so that all cases are screened for domestic violence by FDRPs who are fully trained in domestic violence cases – if DV is identified, the matter is then streamed into an appropriately designed and professionally delivered dispute resolution process
* Push frivolous cases to the bottom of the list. They waste public money, distress children and block cases that need a judge's expertise to determine.
* Restrict access to court intervention, not allowing for the initiating of further applications to the court (unless under severe circumstances which is to be defined)

## Question 26 In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

Some survey respondents took the opportunity in their responses to this question to express their views that the family law system needs a complete overhaul. One respondent estimated that around 80% of disputes should be able to mediated and managed through alternative dispute resolution processes.

Another respondent asked why this question pre-supposes that the economic imperatives of cheaper and faster should subjugate the fair and dignified resolution of family conflict. The respondent noted that there are so many ways that dispute resolution can be tailor made for each family situation noting that tailor made solutions are not cheap and not fast and they usually stick.

**Survey respondents** made the following comments

* Expand the use of Family Resolution Centres (FRC’s) – there should be more legally assisted mediations for both property and parenting matters in FRC's. Too many matters are assessed as unsuitable because of parents’ incapacity to reflect on their own parental conflict and behaviour, because of their presenting needs ie DV, drugs, mental health, parental alienation, helicopter parents, anxiety, self harm, abuse of process and power.
* Enable FRC's to provide initial family law advice based on parents’ matter so that they are well informed before participating in dispute resolution Introduce more after hours services,
* Increase use of technology
* Increase online parenting programs
* Increase mandatory attendance to engage in family support services based on their presenting needs.
* Consider collaborative law practice for all property and parenting matters should family dispute resolution be unsuccessful. Parenting plans must be submitted if parents reached an agreement in mediation then decide to initiate family court proceedings. This would indicate whether a genuine effort was made and highlight where and why the parenting plan has not been able to be followed .ie DV, presenting needs of parents, identifying ongoing parental conflict.
* Ensure all legal practitioners and courts make the Attorney-General's list of registered FDR practitioners available to all family law clients (update the website and enhance usability)
* Give greater referral power to the DFRP to be able to refer participants for other services before continuing with FDR or court.
* Refer the book *Fathers After Divorce* by Michael Green[[3]](#footnote-3), a former barrister. He suggests

a family commission assisted by various qualified practitioners and the parents attend unrepresented.

* Allow FDRPs to adjudicate if they have a family law practice background
* Divert funds from courts to provide a 'Medicare' approach to dispute resolution by FDRPs.
* Increase promotion of available services.
* Increase funding of community legal services to provide more services
* Utilise volunteers more
* Use appropriate court officers to direct separating parents to use particular dispute resolution services
* Prioritise cases - if a case has been waiting to be heard for more than six months, send it back to mediation
* Mandate inclusion of Conflict Management Coaching as a pre- cursor to mediation
* Mandate attendance to *Keeping Kids in Mind* type program or similar detailed program
* Train FDRP's and mediators in restorative practice and use those principles in FDR and mediation

## Question 27 (To what extent) is there scope to increase the use of arbitration in family disputes? How could this be done?

Resolution Institute supports that where parties are so conflicted that other non-adversarial /facilitative DR processes may not be useful in the resolution of their dispute, arbitration may be an appropriate way to have these disputes determined, in certain circumstances. Arbitrators need appropriate accreditation, an extensive understanding of the legislation, and the communication skills necessary for the role. Whether or not the arbitrator’s determination should be open to appeal needs further consideration.

One respondent did not support the use of arbitration and stated that if anyone is going to impose a decision onto the most private aspects of citizens’ lives (their family relationships) the judiciary, bound by strict rules of evidence, should be the only body to impose such a decision.

**Survey respondents’** other comments included:

* Make arbitration compulsory where the Judge determines it is appropriate especially for Part VIII and Part VIIIAB matters
* Pass guidelines/rules that help identify what cases are suitable for arbitration and allow judges power to make a referral
* Train more arbitrators in family dispute specific issues. Experienced mediators could be considered. Introduce family specific arbitration training and accreditation
* Refer small property matters where full financial disclosure has been achieved to arbitration to free up the family court system for more complex and serious matters
* Recognise that the scope for arbitration is substantial in property/ financial disputes. There may be constitutional constraints on the arbitration of custody etc disputes.
* Choose arbitrators by reference to the amount in dispute to ensure that costs can be limited in small disputes. Fees can be negotiated. Arbitration can be flexible in procedures and are usually quicker than court lists, especially in smaller matters.
* Consider a system where the arbitrator’s determination is ratified by a judge, thereby reducing use of judges’ time
* Consider referral to arbitration if three genuine attempts at mediations fail
* Give or do additional training of FDRP's to act in this capacity

## Question 28 Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

Resolution Institute is currently working in partnership with a provider to develop an online DR tool. Resolution Institute supports the use of online DR in cases where it is suitable for the nature of the dispute and for the particular parties involved.

**Survey respondents** were evenly split on whether online dispute resolution processes play a role in family law matters.

Those who opposed the use of online DR were concerned about its use in family law matters as they consider that these matters can only be settled properly by the parties interacting face-to-face in the presence of an independent dispute resolver. Some respondents expressed the view that face to face meetings are crucial to gauge character and encourage empathy and respectful behaviour. Other respondents expressed concerned because of the potential for deception, abuse, delay and corruption. Some even suggested that online DR is also potentially dangerous where abuse or violence is involved. Another respondent considers that it is very difficult to assess risk and the potential for adverse outcomes in online forums.

One survey respondent noted that online DR may be difficult in such a personal dispute context, yet it may be possible for purely property disputes and non-acrimonious dissolution.

Those who supported the use of online DR stated it is a matter of choice for the parties. It is about awareness of the potential benefits of online and helping to identify cases that are most suitable for use of online DR systems.

**Survey respondents** made the following comments and suggestions:

* Online has the potential to accelerate dispute management if used properly and effectively and thereby reduce time and costs
* Provide funding for a uniform/compatible on-line service to be used by service providers, who can then work in collaboration with each other
* Given Australia's vast spaces and remote communities, online dispute processes can play a useful role in family dispute resolution
* Cost-savings will be enormous
* For online DR to be effective, there would be a need to ensure clients have the capacity to read, write and utilise technology effectively
* Consider the assistance of neighbourhood justice officer/ Family Safety Practitioners/ Case workers through family support services and FRCs. They would all improve access to clients especially using technology both after hours and remotely
* It is essential to have a safe location, identity security, a safety plan and a support person for each of the participants
* Have visuals so you can see who is in the room and safeguard confidentiality
* Have a backup in case technology fails
* Can be used for some and not all of the process eg for information gathering, agreeing issues in dispute, agreeing issues of commonality
* For simpler cases, parties could access a template agreement in some sort of ‘dropbox’ facility and mutually edit it until they reach agreement - a government template would reassure participants that they can work out a fair deal between themselves.

## Question 29 Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Resolution Institute received many comments from survey respondents that this was a very difficult question and consensus that the answer very much depends on the circumstances.

One respondent commented that problem solving decision making for these families may not be appropriate. These families may need to be involved in other processes that have more safeguards for the children.

**Survey respondents** generally agreed that early assessment of risk and referral to appropriate professionals is the key:

* Complex needs is a social, not a legal, problem. If complex needs cases are stalling in the system, it indicates a deficiency in support services. Support services need to be in place before those cases appear before the court. If the families are not adequately supported before going to court, the court can't make a decision that is durable
* Include holistic assessment of each family system, to establish what the strengths, weaknesses and challenges to each family might be, and how they could best be supported
* Family consultants could be used for early assessment
* Well trained judges should sit informally with children and hear the story from where they stand and evaluate what is needed
* Take away from the court and any adversarial setting and more by psychologists and experts in such family dynamics
* Use the experience and expertise of the FDRP who has conducted the mediation. FDRPs with a psychology or social science background are appropriate
* More use of psychologists who are especially trained in this area - this could be a specialisation at university level (post-grad) for psychologists
* Parties might be required to undergo a psychological examination before entering into the process
* Restorative conferencing with whole array of service providers and development of program to address needs could work well
* Parents must be made to engage in family support services based on their presenting needs ie drug addiction, mental health, trauma, DV, anxiety, depression etc as they will not engage in services of their own accord. This is particularly so when parents are not able to reflect on their own contribution to parental conflict
* More liaison between child protection, family support services, counselling, mediators and lawyers would be beneficial. Privacy and confidentiality should be overridden when there are risks to children. Mandatory reporting should actually be followed up by case workers/ parenting coordinators in relation to safety and risks concerns for children. The proposed Parenting Management Hearing Panel would be a good start with professionals trained in family law, mediation and trauma informed DV

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

Resolution institute members who responded to this question supported that there was scope for family inclusive decision-making processes to be incorporated into family law.

Some survey respondents noted that family-inclusive decision-making processes should only be incorporated in appropriate cases. A respondent noted that in some cases, the family members are actually the source of the problem, so trying to involve them in the dispute is inviting ongoing dysfunction. Another respondent noted that if the question relates to extended family, many of whom bear historical or religious beliefs, they may interfere with due process. The process must only involve input from the parties - spouses, partners, parents and their children (of any age).

**Survey respondents** provided other comments as follows:

* Child inclusive processes in alternative dispute resolution have proved very effective in enabling parents to focus on the needs of their children in making parenting arrangements. To incorporate it into the family law system would require specific training of suitably qualified professionals, and federal government funding because of the expense of this addition to current processes. Family inclusive processes could be considered where the parents are amenable to it, and also where it is apparent that ongoing conflict exists to the extent that the parents are not able to focus on the needs of the children
* Judges could be trained and be required to assess for themselves the children's wishes by interviewing them
* Family led decision making should be prioritised with ATSI families, CALD and other disadvantaged family groups. This requires the inclusion of significant family members/carers that should be part of the decision making process
* Consider adaption of the restorative Justice model
* Consider especially in relation to elder abuse
* This approach is culturally appropriate in many circumstances with our legal system
* Older children could be involved sometimes
* Carefully consider the involvement new partners who often have a big impact
* Often not suitable if there has been DV or abuse

# Children’s experiences and perspectives

## Question 34 How can children’s experiences of participation in court processes be improved?

In addressing issues raised in response to other questions, some Resolution Institute members who responded to the survey have previously commented that they do not think court is a suitable place for children at all. Many have noted that court processes can be traumatic for children and cause long term damage.

**Survey respondents** suggested that children’s experiences of participation in court processes might be improved as follows:

* Provide informal and relaxed environments
* Do not expose children to adversarial and distressing procedures such as cross examination
* Implement child inclusive FDR processes that use a child protective model where the child specialist becomes the voice of the child
* Utilise Independent Children's lawyers (ICL’s) to improve a child's experience by meeting and explaining process to them. Currently, many ICLs rely on documents and do not make any attempt to get to know the child or provide information on what is happening. This can distress the child.
* Extend the opportunity that families with a legal aid grant have to discuss the findings of a Family Report at mediation. Make this available to all families, perhaps involving the Family Consultant as an advocate for the children.
* Make a hearing date soon after children have been interviewed at Court, to ensure that children’s voices are acted upon swiftly
* Use more contracted professionals to be able to talk to children directly, at an earlier stage in the process
* Use more audio recording in interviews - when children are interviewed by police, mediators, therapists, psychologists, child protection and so on these interviews should be audio recorded so children do not have to continually recount their traumatic experiences
* Provide ongoing therapy and support if children have been exposed to serious risk and or ongoing parental conflict. Children should be educated and counselled on what is acceptable parental behaviour and what is not in relation to their own personal experience and how they can feel empowered to develop and implement their own safety plans when at risk
* Provide more education in schools, act on referrals made by school counsellors
* Provide ongoing therapy
* Conduct more child inclusive mediations
* Advise children of the option to attend court if they are old enough. Voluntariness is key.
* Improve children's experiences of participation in court processes by removing the court as the hub
* Increase use of support workers
* Facilitate child participation through representation in written, video, or other format provided through a 3rd party or independent service
* Provide more access to children's mediators to provide more effective 'voice' to children
* Recognise that child inclusive mediation is considered best practice and is effective in helping focus parents on their children and away from their own grievances

## Question 35 What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Resolution Institute supports that any information imparted to children about the outcome of court processes that affects them should be done sensitively and in an age-appropriate manner.

**Survey respondents** made suggestions which include the following:

* Have specially trained officers, such as family counsellors, speak to children in language appropriate to them
* Ensure parents have the skills and knowledge to support the children through outcomes and decisions – empower parents to work together and promote positive dialogue for the children
* Provide therapy as required
* Increase the number of independent children’s lawyers, social workers, counsellors, child consultants, children's mediators or psychologists to liaise with the children they are representing/assisting
* Use the above professionals to communicate with children (who could record their responses in case of any future actions) – provide follow up as necessary
* Hear preliminary processes in chambers (where decisions are made about whether the children should be allowed to have their voices heard, who should be present for such conversations, whether they should be confidential or taped and fed back to the parties)
* Use the FDRP who conducted the mediation if both parents agree
* Use special court staff or accredited volunteers

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

Resolution Institute supports that it is not appropriate or suitable to ask children to express their views in formal and threatening adversarial processes unless absolutely necessary.

**Survey respondents** reiterated some of the points raised in question 35 regarding imparting information to children, and also added:

* Use highly qualified child specialists who become the voice of the child
* Use child inclusive processes
* Have the judges talk to children informally
* Commission a compulsory Family Report and representation by an independent children’s lawyer
* Keep children out of the court room - have their interviews and responses pre-recorded
* Support and encourage children to speak directly to judicial officers, therapists, professionals about their needs, views, experiences
* Allow children to speak to parents indirectly through these professionals about the impact their parents’ individual and collective conflict has had on them so parents have to look at their own behaviour and how it has personally harmed their children
* Be guided by the specialists in this area
* Use child consultants wherever possible
* Use video, written statements, etc provided through an independent third party or service and ensure safety before, during, and after
* Consider judges directly hearing from children in an informal child friendly setting – educate judges to be age-appropriate
* Consider use of therapy dogs
* Consider interviewing children by a court official who gives an outline of the proceedings and asks the children if they wish to express any views and if so in what form - this should not be a perfunctory exercise and the children should be advised that they can reflect on the matter and change their mind.

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

Resolution Institute supports child inclusive practice providing a supportive and effective way for children to have a ‘voice’ in family dispute resolution processes. Using a child inclusive process (pioneered by Dr Jennifer McIntosh) ensures that children’s voices are heard in a way that protects them.

Some additional points raised by members are:

* Mandate Child Inclusive Practice - parents rarely choose to utilise this even when it is promoted by the mediator so this may need some promotion and prompting by the justice system.
* Invite children to participate
* Always use the assistance of FDRPs, social workers, counsellors, child consultants, children's mediators or psychologists
* Use child inclusive, child responsive and child sensitive approaches and interventions which together with restorative justice approaches and support people mean that children's voices can be heard and considered in the FDR
* Consider Child inclusive mediation as a useful tool if the children are deemed at an appropriate age and if children are well supported and with experienced mediators
* Ensure that children are not put in a situation where they are forced to choose between their parents; however children should be given the opportunity to express their views if they wish
* Avoid inflammatory language
* Provide support for children at the time that they are interviewed. The court official or experienced professional should have power to consider whether and what type of support is needed
* Keep involvement to a minimum
* Consider the program currently run by FACS (NSW) called Family Group Conferences (FGC) where children are able to have their voice heard and take part in making a family plan that is about providing them with safety, security and ongoing contact with extended family members

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

Resolution institute agrees that there are risks to children from involving them in decision-making or dispute resolution processes, which is why the Child Inclusive model has been developed. One survey respondent stated that it is usual that children do not wish to make decisions in DR processes, and very much wish to have their views taken into account. There must be a fine balance between the two.

**Survey respondents** identified a range of risks from involving children in decision making or dispute resolution processes

* There can be a risk from parents attempting to influence the child or alienating him or her from the other parent. Such risks are best managed through parent education before the process begins, and through professionals who are well trained and very experienced.
* There is a real risk of the child being empowered to think he is determining the matter - it must be made clear that the child’s views are being sought only to ensure the child has a voice and to give the child that opportunity but does not determine the outcome. The risk lies in properly assessing the child's ability or maturity to express their wishes
* There is always a risk if the children are trained or coached by either parent - this may add additional stress to a child and be more harmful than beneficial for the child
* Parents that lack the capacity to reflect on their own contribution to parental conflict including their presenting needs may place children at further risk. Welfare checks should not be the exclusive domain of child protection and the police. If there was a parenting coordinator/case worker/ Family Safety Practitioner/ Neighbourhood Justice Officers that could regularly assess and check on the safety of children via their school and other therapeutic services then children's views and their safety could be effectively managed. Children are at risk regardless so their views and safety should be incorporated, monitored and managed throughout family court, dispute resolution or child protections processes.
* When a child is involved in any unpleasant incident and for that matter in any pleasant incident, they are highly likely to believe that they caused the incident
* If the parents cannot receive the information well that a child is not happy or not happy to live with them, further anxiety may result
* There are greater risks if children are NOT involved at the earliest stage. Children are not stupid and especially older ones will know what is happening in the family and have a right to be heard, and listened to
* Children are at risk of being held responsible or accountable for decisions or blamed by harmful parents. The information needs to represent children without them having any responsibility for outcomes
* There are risks to children being involved in decision making prematurely, or in ways that given them disempowering contexts including questions around loyalty or abandonment or parental alienation. Parents need to be challenged and provided with ongoing education as a concurrent practice of child inclusive practice
* Children might feel lots of pressure to make decisions and not want to disappoint a parent. There could be repercussions for some children in making decisions

**Survey respondents** suggested the following ways of addressing the risks:

* Appropriate and relevant training should be given to staff utilising these approaches
* Depends on the age of the child but if child has good cognitive skills and shows maturity his views should be obtained with an assessment of the child's reasoning to determine the weight to be attached to the reasoning. This is different from allowing the child to make the decision or determine the resolution which must always remain the responsibility of the parent or other care-giver.
* The parents need assessment prior to involving children to check they have capacity to hear what their children are saying. If the feedback is carefully framed, this can have a powerful impact on parents and help them resolve their dispute.
* A comprehensive understanding of developmental psychology should underpin decisions regarding the involvement of children
* The impression children form from participating in a process should be assessed in terms of whether it would have adverse impact on a child's physical or mental well-being and development
* Only trained specialist psychologists/mediators should interview children
* Children’s involvement in the process should be kept to the bare minimum - involving them leads to the children forming alliances or being alienated from one parent
* Children should never be put in the position of choosing one parent over another – they should never be directly asked which parent they want to live with

# 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?

**Survey respondents** provided an extensive list of areas in which family law system professionals should have competency as follows:

* Compulsory ongoing CLE/CPD, open to review and compliance assessment
* Training in Family Law Legislation
* Training in domestic violence
* Training in trauma informed care
* Training in child protection
* Training in family dynamics and relationships
* Training in Family Dispute Resolution and being a Registered FDRP
* Registration and compliance with all registration requirements
* Personal qualities: Maturity, patience, respect, interest in and empathy with people of all backgrounds, able to assist objectively, possess an understanding of the emotional/psychological as well as commercial/legal aspects of dispute, compassion, resilience, risk management, a willingness to innovate, empathy, kindness, fairness, sense of what is reasonable, unbiased and above influence, respectful and practical, and accept the legitimacy of diverse types of families
* Professional qualities: knowledge of the legal principles underpinning decisions, have as much experience as possible, be objective, find a mentor, be practical and do not be unrealistically ambitious for clients
* Strong communication skills – able to educate, actively listen, prepare well-presented and accessible written documentation
* Both legal and ADR competencies
* Peer to peer information sharing and training
* Retraining and upgrading qualifications yearly and attend/present at annual conferences
* Regular ethics training
* Mediators to meet the national mediator standards and/or to have completed a graduate diploma in dispute resolution
* Specific detailed training in family law mediation for mediators
* Arbitrators and adjudicators to meet all formal requirements
* Ongoing supervision helps ensure that these competencies are maintained
* Regulation by a body, perhaps the Attorney-General's Department, similar to NMAS requirements which is regulated by an industry body called the Mediator Standards Board
* A child focused framework
* Provide more interactive training
* Look for experience, not just knowledge, in the area of Family Law
* Consider changing perpetual registration of FDRPs with regular review and compliance checking

## Question 42 What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

**Survey respondents** suggested a range of competency areas for judicial officers:

* Judges must have considerable experience in the family law jurisdiction
* Training in the responsibilities of their role in regard to family law legislation
* Detailed knowledge of mandatory FDR pre-filing requirements
* Training in recognising some psychological types and traits of personality disorders - if these types could be recognised by judges, not necessarily assessed or judged by them, but at least recognised by them, then traditional assessments of credibility might be influenced towards a more holistic consideration of the complex family issues at play
* Personal qualities: Wisdom, knowledge of human frailty, patience, ability to detect untruthfulness and exaggeration, able to exercise discretion, apply the law, be able to listen carefully at all times, write judgments the parties understand, be fair to all litigants whether self-represented or not, and their lawyers, be timely in making a decision, display compassion, willingness to make hard calls and display wisdom above black letter law skills
* Required to receive annual training in the dynamics of family violence, effects on children, and child protection issues
* More time spent on continuing judicial education
* Annual conferences imposed by government as a condition of ongoing tenure
* Awareness of, for example, the Duluth model and an audit to ensure that none of the abusive aspects of the Duluth model and all of the equality aspects of the Duluth model are developed into judicial competencies
* Attendance at professional supervision (consultation), possibly with a professional who is not in the same area of expertise (i.e. legally trained FDRP consults with a psychologist) in order to extend their expertise. This is also for their personal well-being and functioning.
* Knowledge of the law, patience, but a willingness to require adherence to rules and orders. Have a strong appeal court and have appeals as of right on all final orders and, with leave, on all interlocutory orders. Circulate significant appeal court judgments and provide discussion and/or lectures on any significant developments.
* Provide mediation and arbitration training so judges recognise when to refer out for quicker results
* Conflict Coaching training and refreshers
* Training in DV and child protection
* Review of their decisions by independent qualified superior to rigorous standards

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

Resolution Institutes supports the comments made by a number of members who responded to our survey, that concerns about professional practices that exacerbate conflict should be addressed by reducing the court’s impact as a barrier to harmony. As previously mentioned, it would be preferable for courts to be viewed and maintained more as a last resort for the minority. Expanding the use of FDR and moving away from adversarial processes could reduce rather than exacerbate conflict.

Resolution Institute, along with survey respondents, acknowledge that sometimes professional conduct can exacerbate conflict.

**Survey respondents** provided a range of options relevant in these instances, which include:

* Make provision in the Act that, where professional practice has exacerbated conflict, it can be reported to, for instance, a Law Society, or the CEO of an organisation providing services. These organisations/people would have the power to bring the behaviour to the attention of the professional, with a request that he or she obtain appropriate information on ethical practices.
* Consider introducing an independent complaints authority which deals with complaints promptly - the present system for dealing with lawyers is cumbersome and slow - an independent Judicial Review body concerning complaints about Judges, again acting promptly, and dealing only with practice complaints and not the decision making process.
* Apply the usual standards of professional conduct to all professionals, including the usual sanctions, such as penalties, loss of practising rights, enforced work under supervision and compulsory retaining
* Introduce specialist family law complaints committees including the conduct of court officers
* Implement a restorative justice approach in addressing concerns
* Create a process of assessing the performance of independent children’s lawyers. Some ICLs are proactive, objective and good. Others are inactive, overloaded, biased and unhelpful to the just and timely resolution of disputes. There should be some performance evaluation process for ICLs.
* Develop a shared code of conduct that applies to members of all registration organisations such as the Attorney General’s Department, Law Societies and mediator registration organisations
* Ensure reporting and investigation of cases where litigation is being encouraged for the wrong reasons, or drawn out unnecessarily. Abuse of the delay inherent in the system must be tackled

## Question 44 What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

**Survey respondents** suggested a range of approaches to support the wellbeing of family law system professionals and judicial officers as follows:

* Ongoing professional support
* Regular seminars for all family law system professionals with a focus on collaboration
* Regular conferences with opportunities for counselling and confidential advice
* Provision of regular debriefing and stress management workshops
* Access to subsidised counselling/therapy
* Employment of more judicial officers and Registrars to relieve the present stress of overworked and tired judiciary, and the widening of powers of Registrars. This will flow through to all family law professionals.
* Supervision and a collegiate approach
* Any measures that allow more flexibility in the workplace and more opportunities for sharing, will help well-being - the high workload and the complexity of cases puts family law professionals under constant pressure
* More time out of court
* Smaller dockets
* Better pay, with more part-time work
* National and ongoing conversations about family conflict, DV, how it impacts children and how to protect children from harm so that all the hard work becomes part of our cultural discussion, identity and priority.
* Professional clinical supervision is essential for professional and personal well-being
* More training and guests speakers which will encourage law system professionals to get together, interact and talk with each other face to face
* Provide regular counselling for FRC dispute resolvers. They need to be honoured for the work they do, the risks they manage and the support they provide to families going through tough times
* The courts must be adequately funded and staffed. Judges, magistrates and other court staff must have workloads that are consistent with societal norms. That is, they might reasonably be expected to work hard, but they should have the same access to time off, leave and support services as other employees of the government.
* Stressing importance of self-care and avoidance of burn out - encourage part time roles, ‘down time’ in judges schedule, lunchtimes, ‘off times’
* Outsourcing to arbitration may reduce the pressure
* Offer an Employee Assistance Program to be provided by the Attorney General’s Department, accessible to all professionals involved in the Family Law system.

# Further comments

Resolution Institute members who responded to the survey were keen to share additional comments.

**Survey respondents** offered the following perspectives about the Family Law system

* *“The singularly most important change that could improve the family law system for participants is a change in legislation to ensure that mandatory pre-filing FDR for parenting matters clearly includes property matters as well. This should have happened in the 2006 reforms. Ensuring that this legislation is complied with and implementing penalties for non-compliance.”*
* *“The present Court system is broken and in real danger of collapse. The delays are appalling and with no prospect of improvement. The real consequence is risk of harm to children, psychological and physical, pending the Court being able to determine the issues and put into place something better and in their best interests. The much greater incidence of dysfunctional families affected by drugs, alcohol, chronic abuse and domestic violence, gambling and other problems is increasing exponentially in my view. The number and complexity of parenting cases is ample evidence alone of this problem in society. The Federal Government has failed to address the problem of providing adequate resources. There are no votes in this for politicians. I can only hope some of the changes to which I have referred above are implemented without delay.”*
* *“I am not a family law practitioner. It would be presumptuous of me to comment on such important issues. I do, however, in my role as a mediator on Courts panels in South Australia meet mediators who do work in the 'family' field. I have observed a number of times that the mediators are stressed! I wonder if the practitioners are being adequately debriefed and counselled? Secondly I note that the workload is sometimes onerously heavy. Finally it has often been commented, that the most important attribute that the practitioners have, are mediation skills! They have learnt the effectiveness of not being a pseudo-social worker or psychologist is a different guise.”*
* *“There needs to be more collaboration, coordination and integration between the family court system and other Commonwealth, State and Territory systems, including family support services, family violence, child protection systems, schools, police, private mediators, therapists, and lawyers. This is particularity so with DV, and other parental behaviour that puts children at risk. Parents experiencing separation and/or DV trauma are required to navigate through a myriad of family support and legal services that do not sufficiently share information between agencies requiring clients constantly having to repeat their situation and story to multiple agencies hence why many families give up on accessing services as they find the whole process to be exhausting stressful and confusing. The fact that the family law system, family violence and child protection systems act independently of each other allows children and families to be consistently exposed to ongoing DV, serious ongoing risk, compounding and re-traumatising families and disengagement in services due to the frustration of been refereed to multiple services that have lengthy waiting lists and inadequate powers to address parental conflict and children at risk. All these systems and agencies need to be working together more on cases and clients to address the safety risks and underling parental conflict. Hence why confidentiality and privacy need to be minimised to enable these services and systems to work together and case manage these families both individually and collectively. FRCs are currently under-utilised and Family Safety Practitioners could be employed to refer clients to services and follow up on their compliance with engaging in services and agencies relevant to their situation. I cannot over-state the importance of making it compulsory for parents to attend therapies, engage parenting programs etc based on their presenting needs. This is critical in protecting children from ongoing parental conflict otherwise nothing will fundamentally change or improve within family dynamics which is directly associated with the increase in DV, mental health, drug addiction, self harm and trauma. In addition the multiple and independent jurisdictions in family law child protection and family violence requires a major overhaul whereby federal judicial officers must have dual commission, streamlining and developing a national family and child protection system including a national database, incorporating digital hearing processes to reduce the need for families to attend court physically thereby limiting exposure of victims to perpetrators. Information sharing and collaborative approaches with agencies and relevant authorities working together to prioritise children at risk. Yet again not another review where nothing really much changes or gets implemented. Go back to basics and an expanded bench. Do not try to be all things to everyone”*
* *“My overall comments are that this review seems to assume that the court will remain the centre and the gatekeeper of resolution of family disputes. That is because there is an assumption that dispute resolution comes from the collection of evidence within very narrow parameters and a determination based upon that evidence. Essential reading is ADC ADR Address 2018 - Alternative Dispute Resolution - A Misnomer? Address by Wayne Martin AC. A quote from this highly quotable paper, at page 8: it is important to remember that the issues of fact resolved by a court are only those which the parties choose to present, and that they must be resolved on the basis of the evidence presented by the parties.*
* *In the adversarial system there is no practical capacity for a court to conduct its own investigations to establish the truth, nor is there any obligation upon the court to arrive at some notion of absolute or independent truth. Australian courts are not commissions of enquiry and can only view the facts through a prism of the evidence presented by the parties, which may or may not give a true view. Similarly, courts are generally constrained to adjudicate only upon the legal issues presented by the parties, and have very little capacity to take the law in a direction not proposed by at least one party. The constraints imposed upon a court by the way in which the parties choose to present their case somewhat diminish the normative value of public adjudication. We should remember that the incentive of each party is to win, not to establish the truth or to develop legal principles.*
* *Greater ongoing training and professional supervision should be a requirement for FDRPs. There is plenty of good training available but many practitioners do not attend. Opportunities to attain greater levels of achievement in FDR should be developed, possibly with specialisations.”*
* *“Any reviewer of the family law system would do well to seek the views of the Hon. Justice Stephen Thackray. Having worked in the Magistrates Court of WA, the FCWA and FCA for many years, his Honour is uniquely placed to comment on the various options and systems and their respective merits and shortcomings.”*
* *“I think mental health of litigants is often a major issue in family law matters;”*
* *“It is really rewarding work. Generally, FDRPs in organisations are NOT paid well.”*
* *“I practiced widely at the bar for 28 years, including significant experience in family law. I was then on the Supreme Court for 20 years and self-represented litigants were not uncommon. Some litigants were very difficult to deal with but I do not recall any who could not understand matters stated clearly. On the other hand there were many who chose to not understand. There is no reason to think that family law litigants are more ignorant or incapable of understanding than the community generally. Certainly emotions may run high at times and allowance should be made for these but the basic processes are not difficult to document or understand. My own experience and conversation with other judges has also shown me that if a judge can promise a final hearing date "soon" many cases settle sooner and at much less cost. A tentative and reasoned expression of view from an experienced judge is also commonly calculated to reduce dispute.”*
* *“I have provided almost 600 Child sessions in FDR context. FDV is prevalent in child assessment often when it has not been disclosed by the adults. Child Inclusive practice needs to be mandatory in my view.”*
* *“If the aim is to divert people from the courts so that the courts can deal with very complex cases in a timely manner then compulsory ADR mechanisms have to figure largely in the response. However there is an industry built upon encouraging parents to compete with each other through the court process and there will most likely be opposition to increasing ADR options.”*

# Conclusion

As indicated in the section titled *About this Response* on page 5, we indicated that our Response was primarily a collation of comments and suggestions from those of our members who responded to the survey which Resolution Institute prepared. Resolution Institute considers that these comments may provide valuable insights as they are from Resolution Institute members who work within the family law system, primarily as Family Dispute Resolution Practitioners.

Resolution Institute through its regular contact with our members and through the (relatively small number of) complaints we address from family dispute resolution parties, understand the contexts from which these comments derive. We are also frequently able to clarify and or augment many of the comments and suggestions included in this *Response*.

Resolution Institute would therefore be pleased to discuss the comments and suggestions included in this *Response* to assist the ALRC further.

We look forward to the Discussion Paper expected later in 2018.

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1. Conflict management coaching, sometimes also known as conflict coaching, is a process in which a trained coach supports and helps an individual to address specific conflict situations and to become competent in managing disputes. [↑](#footnote-ref-1)
2. Resolution Institute member, April 2018, anonymous response to survey [↑](#footnote-ref-2)
3. <https://www.amazon.com/Fathers-After-Divorce-Successful-Separated/dp/1876451009> [↑](#footnote-ref-3)