

# Australian Law Reform Commission Review of the Family Law System

## ADRAC Response to Discussion Paper 86

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13 November 2018

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## Introduction

The Australian Dispute Resolution Advisory Council (**ADRAC**)<sup>1</sup> would like to commend the Australian Law Reform Commission's (**ALRC**) Review of the Family Law System and is supportive of the Discussion Paper released on 2 October 2018.

ADRAC applauds ALRC proposals aiming for a resolution culture and recommends ALRC go further in actively promoting a range of accredited forms of dispute resolution processes for resolving family law disputes that are supported from the point of entry into the system and tailored to suit the needs of each family.

ADRAC supports reforms focussing on access to justice through the early provision of information and triage, the simplification of legislation, the development of a tiered system commencing in the local community and progressing to the court system as a last resort, and strengthening of the Certificate regime. ADRAC supports measures focusing on professional accreditation, raising professional standards, and training at every stage in the system.

ADRAC supports the need for a consistent approach to Family Dispute Resolution (**FDR**) at all stages of the family law system, with clear information and common understandings about the different types of FDR processes, the options for support and the methods of triage. This would result in services and supports tailored to the specific circumstances and needs of clients, and actively promotes self-determination wherever possible.

ADRAC proposes that the family law system prioritise the need to promote self-determination at all stages of the family law system by:

- Removing the focus on the court and the adversarial system as the centrepiece;
- Introducing a comprehensive triage system at all stages and not only at the tertiary stage;
- Actively promoting and channelling disputes to the appropriate FDR processes at each tier of the proposed system;
- Applying a rebuttable presumption that all families should be directed towards FDR until and unless assessed as inappropriate by a specially trained and supported triage system.

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<sup>1</sup> While Andrew Bickerdike is a member of ADRAC, he was not involved in the preparation of this Response to the Discussion Paper.

ADRAC acknowledges the need for specialised expertise and skills for all service providers at each tier and the need to ensure that key roles are properly funded to ensure they are not filled by under skilled professionals. FDR should always be carried out by trained, qualified and experienced professionals who remain registered and accredited as Family Dispute Resolution Practitioners (**FDRP**). The roles of Case Manager and Navigator are of key significance requiring high levels of knowledge and skills around multiple areas. This would enable the accurate assessment of the needs of each family at an early stage, and avoid the potential of over servicing of clients (particularly of children), through re-assessments and re-traumatisation from one tier to the next, whilst recognising that needs and interests change over time

ADRAC recognises that there are specialist services, individuals and communities that carry the requisite expertise, skills and knowledge, as well as the imprimatur, and so are better placed to respond meaningfully to specific areas in the Discussion Paper. ADRAC directs its comments to those areas under its charter.

## 2. Education, Awareness and Information

ADRAC supports the provision of relevant, accessible, appropriate, safe, helpful, and contextually relevant information to all who are impacted by family disputes, including children and young persons.

ADRAC supports a national systems approach based on an integrated raft of services that work together seamlessly with a foundation in consultation, co-operation, access and relevance across contexts.

ADRAC recommends that the relevant information provided to each family include the National Principles for the Resolution of Disputes developed by the National Alternative Dispute Resolution Advisory Council (**NADRAC**) in March 2011 (**the NADRAC National Dispute Resolution Principles**) as follows:

- People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.

- Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
- People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
- People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
- Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
- Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

#### *Proposal 2-1*

ADRAC supports this proposal but recommends that service delivery be extended to agencies as well as private practitioners.

#### *Proposal 2-2*

ADRAC supports these initiatives to consult with service users to ensure services are relevant and culturally appropriate and therefore accessible.

#### *Proposal 2-3*

ADRAC supports this proposal.

#### *Proposal 2-4*

ADRAC supports this proposal.

### *Proposal 2-5*

ADRAC supports this initiative and recommends that this information package should contain an emphasis on FDR as the primary initial focus to promote knowledge, understanding and use of FDR mechanisms, principles and values. ADRAC encourages the consideration of participants of this working group to include private professionals in addition to organisations.

### *Proposal 2-6*

ADRAC supports this proposal and recommends that each information package include the NADRAC National Dispute Resolution Principles:

- People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
- Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
- People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
- People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
- Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
- Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

### *Proposal 2-7*

ADRAC supports strategies to enable access and participation.

#### *Proposal 2-8*

ADRAC supports strategies that encourage consultation, inclusion and cooperation.

### **3. Simpler and Clearer Legislation**

#### *Proposal 3-1*

ADRAC supports the simplification of the family law legislation by redrafting provisions to be as accessible and readable as possible. ADRAC further supports the intention to restrict the *Family Law Act 1975* (Cth) (the **Act**) to essential provisions and to provide a structure that meets the needs of those seeking guidance from the legislation. This would empower those navigating the family law system and particularly those seeking to engage in FDR processes to easily acquire clear information about their legal obligations and responsibilities, rights and entitlements and assist them in the timely, cost-effective and efficient resolution of their disputes, and promote the aim of self-determination wherever possible.

#### *Proposal 3-2*

ADRAC supports these proposals.

#### *Proposal 3-3*

ADRAC supports these proposed amendments as they will make the legislation easier for professionals to discuss with clients and easier for their clients to understand and use to inform their decision-making. This provision facilitates a child-focussed approach consistent with social science and ensures that professionals and clients prioritise the needs of children.

#### *Proposal 3-4*

ADRAC supports these proposed amendments as they will make the legislation easier for professionals to discuss with clients and easier for their clients to understand and use to inform their decision-making. These provisions are consistent with relevant social science research and, by being stated clearly and concisely early on in the legislation, can assist from the outset in the identification of relevant issues and the general principles to be applied. Having these in the legislation promotes consistency and ensures that, no matter which process is engaged in, the outcomes will be based on the same principles and are most likely to benefit children.

### *Proposal 3-5*

ADRAC supports these proposals. The notion of “best interests” has been seen as fundamental to guiding parenting disputes. However, this has become so complex that it is difficult for professionals and clients to understand and apply to a particular situation. This proposal would provide a clear and simple explanation that can more easily be discussed by professionals and understood by clients. This will promote a child-focussed approach and assist in managing the reasonable and appropriate expectations of professionals and clients working within the system, including in FDR.

### *Proposal 3-6*

ADRAC supports this proposal.

### *Proposal 3-7*

ADRAC supports amendments that will make the legislation easier for professionals to discuss with clients and easier for their clients understand and use to inform their decision-making. This is a complex concept and any assistance in developing a common understanding of what this would mean for any particular family focusing on each individual child, and how it might work in practice, would be of great benefit to separating families.

Clarification of this concept would assist to develop a resolution, foster self-determination wherever possible, and promote the acquisition and development of skills required for a separated family to implement this into the future.

“Parental responsibility” requires the exercise of various aspects of parenting. The relevant social science principles reinforce the importance of children being supported by parents in ways that go beyond mere decision-making. ADRAC is concerned that this simplification goes too far in reducing appropriate expectations of parents in fulfilling their role regarding their children, and would propose that consideration be given to amending the legislation to refer to “parental responsibility and decision-making”.

### *Question 3-1*

ADRAC supports the need to avoid confusion regarding consultation and the importance of self-determination for separating families wherever possible.

Many families achieve this goal without resort to intervention by professionals. This ability would be supported by the community awareness and access to information as envisaged by the Families Hubs to be established in local communities. Such information should include reference to the NADRAC National Dispute Resolution Principles:

- People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
- Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
- People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
- People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
- Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
- Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

Those families who cannot resolve their disputes themselves should be able to access proper triage services as soon as possible to be directed to the supports necessary and the appropriate FDR method to suit the needs of that family. In this setting each family can be facilitated to be able to develop the necessary communication skills to understand what is required for consultation between them.

This will enable parents to



- Build their capacity for joint decision making in a facilitated process
- Be assisted to communicate effectively as parents
- Clarify what matters require consultation and those that do not and what decisions are expected to be made jointly
- Develop guidelines tailored to meet the particular needs of each family
- Have productive ongoing parental contact
- Assist particularly in situations of ongoing and enduring conflict
- Clarify how they will exchange important information about their children going forward.

This would significantly assist parents to engage in FDR, retain power over their own decision making, and keep out of the court system. The clear provision of information (based on legal rights and entitlements and relevant social science) would facilitate reasonable and appropriate expectations for separated parents, maximise the opportunities for respectful and amicable agreements, and benefit the best interests of the children.

#### *Proposal 3-8*

ADRAC recommends a requirement in these situations that the parties participate in FDR, regardless of whether this has taken place within the last 12 months, or if the orders have been made within the previous 12 months. Consideration would also need to be given to the impact of any Parenting Plan made by the parties following a final parenting order that may have impacted on the orders.

#### *Proposal 3-9*

ADRAC supports this proposal.

#### *Proposal 3-10*

ADRAC supports these proposed amendments as they will make the legislation easier for professionals to discuss with clients and easier for their clients to understand and use to inform their decision making.

#### *Proposal 3-11*

ADRAC supports this proposal, which has the potential to empower those affected by family violence to make the most appropriate decisions and are supported by the family law system to ensure their future needs are met.

#### *Proposal 3-12*

ADRAC supports this proposal as property and financial matters have serious implications for the future economic wellbeing of those families who have experienced separation. Informed intervention and a responsive legal framework ought to be grounded on a factual basis and supported by evidence.

#### *Proposal 3-13*

ADRAC would support this proposal. The balance of power between parties to a separation (particularly between vulnerable members of the community) is an area requiring specialist knowledge and cultural understanding.

#### *Proposal 3-14*

ADRAC would support this proposal. Legal intervention in the break-down of relationships has the potential to adversely affect vulnerable members of the community with limited capacity of future earning, such as single parents or persons with a disability.

#### *Proposal 3-15*

ADRAC supports these initiatives, which may empower separating couples to make the most appropriate decisions relating to their superannuation.

#### *Proposal 3-16*

ADRAC supports these initiatives, which may empower separating couples to make the most appropriate decisions relating to their superannuation.

#### *Proposal 3-17*

ADRAC supports these initiatives, which may empower separating couples to make the most appropriate decisions relating to their superannuation.

### *Question 3-2*

ADRAC supports amendments to the legislation that promote the ability of families to be self-determining and agree upon the arrangements that best suit their needs at the time of separation. These needs must take into account any hardship that results from the separation and the importance of assisting separated families to deal with this difficult time, particularly for more vulnerable parties and for children.

ADRAC recommends consideration be given to streamlining regulations on access to superannuation when permitted as a result of separation or divorce, so as to minimise costs involved in obtaining court orders for a superannuation split where there is a small asset pool. Currently the costs and requirements associated with this are excessive and out of proportion when compared to the size of the asset pool or level of debt. This causes significant hardship particularly for vulnerable clients such as those suffering from family violence, facing homelessness, or not in gainful employment.

### *Question 3-3*

ADRAC would support amendments that increase certainty for clients when dealing with financial agreements.

### *Proposal 3-18*

ADRAC would support any amendments that provide greater certainty for those seeking to use FDR to deal with issues of spousal maintenance.

### *Proposal 3-19*

ADRAC would support any amendments that provide greater certainty for those seeking to use FDR to deal with issues of spousal maintenance, particularly in the context of family violence.

### *Question 3-4*

ADRAC would recommend a clear provision stating that FDR is a recommended, timely and cost-efficient process for dealing with these issues.

## 4. Getting Advice and Support

### *Proposal 4-1*

ADRAC commends the Families Hubs as a visible entry point for services. These should be clear in providing dispute resolution services as their primary focus, as well as providing legal and support services.

### *Proposal 4-2*

ADRAC supports the use and development of appropriate digital technology in the Families Hubs for the accurate and comprehensive assessment of client needs. Those using this technology and undertaking the initial triage process should be trained in the use of these and other tools for the best assessment of requirement supports for each individual family and the development of a tailored pathway for each family to the most appropriate form of FDR.

### *Proposal 4-3*

ADRAC recommends that the Families Hubs undertake a thorough assessment of each families' particular needs and that FDR processes be supported appropriately within the proposed Families Hubs. Initial approach to the Families Hubs should result in specialised triage for the best assessment of requirement supports for each individual family and the development of a tailored pathway for each family to the most appropriate form of FDR.

Further, ADRAC recommends that dispute resolution organisations and, where appropriate, private practitioners could also play a role in the service delivery options in Families Hubs.

### *Proposal 4-4*

ADRAC supports this proposal and recommends that dispute resolution organisations and, where appropriate, private practitioners should also play a central role influencing the design and service delivery options of the Families Hubs.

### *Proposal 4-5*

ADRAC recommends that appropriate training be compulsory for intake officers/case managers/triage workers to ensure appropriate screening and risk assessment is undertaken and that there is clear role differentiation between professionals.

*Proposal 4–6*

ADRAC supports this proposal.

*Proposal 4–7*

ADRAC supports this proposal.

*Proposal 4–8*

ADRAC supports this proposal.

## **5. Dispute Resolution**

ADRAC substantially agrees with the approach and proposals suggested by the ALRC, but makes the following three comments which derive from experience in the introduction of ADR procedures into areas of dispute with a legal framework.

1. Assisted dispute resolution should be encouraged at every possible point in the family law system leaving curial determination as a necessary or final resort.
2. The court system is necessarily adversarial and should never be the centrepiece where there may be ongoing relationships after judgment. This is a fundamental need where children are concerned and is desirable in all forms of family dispute. ADRAC urges a greater use of FDR than is presently proposed and in particular, facilitation, conciliation, mediation, restorative processes, family group conferencing and short-form arbitration (such as Philadelphia Arbitration as used in the NSW District Courts in the 1990s).
3. The need to protect vulnerable parties and deal appropriately with discrepancies in knowledge and resources requires recognition of these factors as soon as possible and referral to the appropriate supports to suit the needs of each particular family member. This triage and assessment can only properly reflect the complex dynamics of family disputes where it is undertaken by an experienced and specifically trained professional. This assessment must be ongoing and the use of lawyer-assisted FDR should not be undervalued but promoted actively in this context.

ADRAC applauds the strong position taken by the ALRC in responding to the problems of non-disclosure. ADRAC would add that disclosure is an obligation that should be imposed on all parties and their legal representatives in the same way as is required in all courts. This is essential to the

provision of quality FDR and long-lasting agreements that will keep matters out of the court system.

ADRAC would also support a consistent approach to the triage and referral of all appropriate family disputes to FDR, including parenting and financial matters. This would promote self-determination of all issues arising from a separation, with appropriate disclosure and legal and other supports where required. A review of the certificate process is recommended to ensure timely and efficient transition for a family throughout the family law system where necessary.

#### *Proposal 5-1*

ADRAC supports guidance for suitability for FDR to be contained in the Act where it will be more accessible and be afforded more weight in decision making.

ADRAC promotes access to justice as a primary focus of the family law system at all times. If a separated family seeks self-determination by FDR then this should be respected and facilitated wherever possible. An assessment as to unsuitability should be regarded as applying to the FDRP making that assessment only and at that stage and not be binding on other FDR providers who might make a different assessment based on the type of service that they offer. However, concerns around potential systems abuse need to be factored into clinical decision-making. It should be stressed that FDR is a flexible process that can be adapted to suit the needs of most situations and can have a significant benefit for families even if an agreement is not reached on all outstanding matters.

#### *Proposal 5-2*

ADRAC supports this amendment to further refine the suitability for FDR to respond to the complexities and nuances of modern families.

#### *Proposal 5-3*

ADRAC applauds this proposal.

#### *Proposal 5-4*

ADRAC supports this proposal as directing families to FDR to explore thoroughly the opportunity to make their own decisions regarding financial matters and supporting the principle that litigation should be regarded as a last resort.

ADRAC applauds the proposal to enhance the use of pre-action procedures and to adopt and adapt the processes set out in the *Civil Dispute Resolution Act 2011* (Cth). That Act, which emanated from NADRAC's report "Resolve to Resolve" (2009), was met with considerable opposition at the time of its passage but has proven to have none of the predicted problems forecast for it. It is equally applicable in the family law field.

#### *Proposal 5-5*

ADRAC supports the need for consistency in the management of all disputes arising from a separation in FDR.

ADRAC would propose that the categories currently listed on the certificate be expanded to consider the following:

- an indication that FDR has not been appropriate as there has not been full and frank disclosure by one party;
- an indication that the FDRP considers that there may be benefit for a family in further opportunities for FDR.

Any review of the certificate regime would also need to be accompanied by a corresponding review of the approach of the triage stage and/or the court at the third tier to the filing of a certificate. This could ensure that a certificate is more than a filing requirement and that the information included in the certificate has some benefit for the family law system.

#### *Question 5-1*

ADRAC would recommend that these limitation periods be removed from the legislation. A more flexible approach is required as they are not always appropriate and can impose artificial constraints on a families' ability to determine the most appropriate circumstances and timing to finalise financial matters. While guidelines for timeframes can be useful, they can in some situations be inconsistent with the need for any family law system to be client focused and respect self-determination. Experience shows, for example, that some participants may, for psychological, financial or family reasons, prefer to agree and to decide to share their joint assets at a later date.

#### *Proposal 5-6*

ADRAC supports this proposal.

### *Proposal 5-7*

ADRAC supports this proposal as supportive of the need to provide complete and timely disclosure, and discouraging the use of non-disclosure as a tactic in the resolution process.

### *Question 5-2*

Yes. However, ADRAC also supports the view that the obligations of disclosure should be extended to obligations of inquiry and frankness by legal practitioners who represent a non-disclosing party at any stage in the family law system including FDR.

### *Proposal 5-8*

ADRAC supports a consistent approach to the obligations of advisors in both parenting and financial matters.

Full disclosure is essential to all attempts to resolve issues in dispute, including in the FDR process. Only if there is confidence that this has been provided can any agreements reached be long lasting and likely to prevent dissatisfaction and matters proceeding through the family law system to the third tier.

ADRAC submits that obligations involving the provision of advice and information, and production of relevant documents, must extend to obligations of proper inquiry and frankness. It should be emphasised that these obligations are continuous, and apply throughout the FDR process, including to lawyers engaged in legally assisted FDR, as well as lawyers advising clients about FDR.

### *Question 5-3*

ADRAC supports the proposal to align processes and approaches in both parenting and financial matters. This would provide clarity and consistency in dealing with all issues arising from separation. This would promote separating families to seek an holistic approach to their issues, with the likely result of minimising conflict and the need to remain in the family law system any longer than is necessary.

This proposal would require service providers to be qualified and experienced to deal with both parenting and financial matters, and for referrers to be appropriately trained for this purpose. At present this is not always the case.



There is great value in reviewing:

- the certificate regime and
- the process for demonstrating the mandatory attempt at FDR prior to lodging a court application has been satisfied.

ADRAC would propose that the categories currently listed on the certificate be expanded to consider the following:

- an indication that FDR has not been appropriate as there has not been full and frank disclosure by one or more parties;
- an indication that the FDRP considers that there may be benefit for a family in further opportunities for FDR.

Any review of the certificate regime would also need to be accompanied by a corresponding review of the approach of the triage stage and/or the court at the third tier to the filing of a certificate. This could ensure that a certificate is more than a filing requirement and that the information included in the certificate has some benefit for the family law system.

#### *Proposal 5-9*

ADRAC supports family law services being inclusive and encompassing so they are culturally appropriate, relevant, safe and helpful.

#### *Proposal 5-10*

ADRAC supports family law services being inclusive and encompassing so they are culturally appropriate, relevant, safe and helpful.

ADRAC recommends that support be given to train FDRPs and lawyers supporting vulnerable parties in FDR, as to their specific needs and how best to support them in FDR. This training should promote clear and consistent expectations across all service providers.

ADRAC also supports the inclusion of the NADRAC National Dispute Resolution Principles as part of the effective practice guidelines:

- People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
- Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
- People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
- People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
- Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
- Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

#### *Proposal 5-11*

ADRAC supports this proposal.

## **6. Reshaping the Adjudication Landscape**

ADRAC reaffirms its view that the adjudication landscape requires substantial reform to shift decision-making from courts, in support of a less adversarial system with the emphasis on self-determination through well-supported FDR at each tier.

#### *Proposal 6-1*

ADRAC supports the use of specialised triage processes recommending their use throughout all the proposed tiers of the family law system.

ADRAC agrees that a triage process should be established but it should be utilised at an earlier stage on an administrative basis before matters are referred to a Court.

Allowing a triage system to be part of Court process may entrench the misconception that family dispute system is adversarial, or unnecessarily litigious. Courts should not be involved in the day-to-day response to administrative needs of a family support system. Rather, they should be a last resort and dedicated to their specific curial task. ADRAC suggests that the Families Hubs should be site for the initial triaging service.

### *Proposal 6–2*

ADRAC proposes that the triage system can be informed by Registrars and Family Consultants, but that this service is undertaken by a specialised professional engaged and trained for this purpose.

ADRAC proposes that the triage system be informed by the NADRAC National Dispute Resolution Principles

- People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
- Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
- People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
- People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
- Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.

- Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

#### *Proposal 6-3*

ADRAC supports the implementation of specialised pathways to provide additional supports and processes for those who are more vulnerable and needing to engage in the family law system. At all tiers (including the third tier) FDR can be promoted with appropriate supports as an option for vulnerable clients.

#### *Proposal 6-4*

ADRAC would support this proposal where there is an assessment that FDR is not appropriate. This would enable the minimisation of legal costs and promote the timely resolution of these disputes. It would also provide a simplified and more streamlined process where appropriate.

#### *Proposal 6-5*

ADRAC would support these considerations as appropriate where all attempts to promote FDR have been unsuccessful.

#### *Proposal 6-6*

ADRAC would support the development of case management guidelines for a simplified process for these matters where attempts to promote FDR have been unsuccessful.

#### *Proposal 6-7*

ADRAC would support the establishment of specialised processes for high risk family violence matters.

#### *Question 6-1*

Any allegation of domestic violence should establish eligibility for the list.

#### *Question 6-2*

In ADRAC's view, early fact finding could have some benefit where there are differences on factual matters that may be crucial to determining the appropriate pathway through the family law system. For instance, early fact finding regarding the level of risk to a child in spending time with a parent may prevent long periods of disruption to their relationship that may have long term and

negative consequences. Early fact finding in relation to allegations of family violence may also determine whether a matter should be referred to a specialist court list or not.

ADRAC recommends that this should occur only in rare circumstances, at the discretion of the Court where a benefit can be established. The experience in other jurisdictions has demonstrated that separation of issues can create discoordination of approach and assessment. Courts at common law and equity have leaned against divided hearings despite their active use in earlier times.

#### *Proposal 6–8*

ADRAC supports this proposal.

#### *Question 6–3*

ADRAC adopts the view that the Parenting Management Hearings panel (**PMH**) process is in an experimental stage and should be able to adapt its processes to meet such demands as it perceives. However much this may appear to be “experimenting” with process, it is a step forward to make the effort to find satisfactory processes to meet definite needs.

#### *Question 6–4*

ADRAC supports the PMH process and suggests, in answer to the question raised, the experimenting of greater engagement, questioning and involvement of the individuals in suggested outcomes. A process of guided conversation (which can be time consuming and frustrating) where options are worked out in conversation not unlike what can occur in mediation may assist. ADRAC’s view is that the PMH process be continued and persisted with, so that effective methods can emerge with experience.

#### *Proposal 6–9*

ADRAC recognises that FDR processes are currently first options pathways for these issues and many families are assisted and supported in this forum; many of these services are in funded programs and many are in private practice. This proposal is in part a duplication of current FDR services.

ADRAC supports this proposal as it promotes and encourages educative and further non-determinative dispute resolution processes.

### *Proposal 6–10*

ADRAC supports this proposal and notes private practitioners need to be included as relevant stakeholders.

### *Proposal 6–11*

ADRAC supports this proposal and requests the overlap between service professionals be considered by the family courts.

## **7. Children in the Family Law System**

### *Proposal 7–1*

ADRAC supports this proposal and the need for information during the FDR process which promotes cooperative decision-making. Such information ought to be made available to children in a range of forms and modalities all of which normalise and affirm a variety of family configurations and roles and which take account of children’s developmental age and current situation. This information should make it clear that in keeping with dispute resolution principles, process and practice:

- Children’s voices will be heard and considered
- Adults are the decision-makers
- Decisions can be made harmoniously
- Everyone will need to contribute to the adjustment

### *Proposal 7–2*

ADRAC supports this recommendation and the need for staff at the proposed Families Hubs to be trained to provide support for FDR processes.

### *Proposal 7–3*

ADRAC supports this recommendation and the need for the Act to encourage all children to be **offered** opportunities to express their views at all stages of a family law procedure. Further, the input of children ought to be sought in a way that is physically, cognitively and emotionally safe, and so that these views can be heard and considered in the decision-making by adults. These opportunities need to be considered carefully to manage risks of over-servicing or systems abuses, with children being seen at every stage and reinforcing the trauma of family separation.

#### *Proposal 7-4*

See ADRAAC response to Proposal 7-3.

#### *Proposal 7-5*

ADRAAC supports this recommendation and the need to work with the family relationship services sector as well as private practitioners to develop best practice guidance on child-inclusive FDR.

#### *Proposal 7-6*

ADRAAC supports this proposal for assessment of **current and ongoing** risk to the child of participating in family law proceedings or FDR and processes put in place to manage any identified risk. Further, this needs to be considered within the context of all services provided to the family over time.

#### *Proposal 7-7*

ADRAAC supports this proposal that children should **be offered** and not be required to express any views in family law proceedings or FDR. In FDR and all services, this requires professionals to have appropriate and ongoing training.

#### *Proposal 7-8*

ADRAAC supports this proposal for a 'children's advocate' to support children through the family law system. The children's advocate should have qualifications and experience in FDR practice. These professionals require training and expertise in child development and working with children, but could be from a social science or FDRP background.

#### *Proposal 7-9*

See response to Proposal 7-8

#### *Proposal 7-10*

ADRAAC supports this proposal **where appropriate** but considers that the children's advocate could also act as separate legal representative with the appropriate relevant training and expertise in child development and working with children.

#### *Question 7-1*

ADRAAC is concerned that this has the potential of systems abuse, resulting in children being exposed to too many professionals and retraumatising them at differing stages of the process.

Consideration could be given where possible to most (if not all) of these roles being undertaken by the same professional. See the comment to Proposal 7-10.

#### *Question 7-2*

ADRAC would support the need for consistency and clarity of role and responsibility and supports the suggestion of a body to oversee the management and co-ordination of these professionals.

#### *Question 7-3*

ADRAC proposes that clarity and consistency is vital to the role of all professionals participating in the family law system and appropriate principles and guidelines would need to be developed in this regard.

#### *Proposal 7-11*

ADRAC supports the range of options provided and recommends that there also be an opportunity for child-inclusive practice at the early stage of the primary tier, which may involve the intervention of an appropriate social scientist or FDRP in circumstances where a children's advocate may not yet be appointed.

#### *Proposal 7-12*

ADRAC supports this proposal.

#### *Proposal 7-13*

ADRAC supports this proposal.

## **8. Reducing Harm**

#### *Proposal 8-1*

ADRAC supports this proposal to provide clarity and consistency for professionals and clients of the family law system.

#### *Question 8-1*

In FDR the definition of family violence should continue to be considered in terms of the experience of the victim/s. If a participant who is the victim is frightened then, for the purposes of FDR, there is family violence.



### *Question 8-2*

ADRAC considers the issue of fear that results in day-to-day behaviour, thoughts and feelings being contingent upon safety should be referred to in the definition.

### *Proposal 8-2*

ADRAC supports this proposal.

### *Question 8-3*

ADRAC considers that the Act should use simple language with clear meanings that are generally understood by most social, cultural and economic demographics to the extent that it is possible. This would indicate, for example, that the term 'repeated' is preferable to the term 'frequently'.

### *Proposal 8-6*

ADRAC notes that confidentiality makes a significant contribution to the success of FDR, but also a similarly significant role in obstructing the investigation of complaints regarding FDR Practitioners. ADRAC regards it vital that the pathway for aggrieved participants' to make valid complaints is a thorough and transparent one.

### *Proposal 8-7*

ADRAC considers that private FDRPs should be represented in any working group convened for the purpose of improving the experience of separating families.

## **9. Additional Legislative Issues**

### *Proposal 9-1*

ADRAC supports this proposal.

### *Proposal 9-6*

ADRAC supports this proposal.

### *Proposal 9-7*

ADRAC would recommend that specialist professionals and support services should be available to all people with a disability engaging with any aspect of the family law system including FDR.

### *Proposal 9-8*

ADRAC supports this proposal.

## 10. A Skilled and Supported Workforce

ADRAC supports the development of a skilled workforce with appropriate qualifications, training and skills for each role within the family law system. This workforce should be required to maintain ongoing registration and accreditation as relevant to their role, and receive the necessary supervision and continuing professional development to remain cognisant of up-to-date research and developments in this field.

ADRAC notes that in relation to FDR, accreditation in accordance with the National Mediator Accreditation Standards (NMAS) only provides entry level access to the FDR pathway, and FDRP training and registration is also essential to this role. FDRPs should be required to remain actively engaged in this role, and receive ongoing supervision and professional development to continue to be registered as FDRPs.

### *Proposal 10-1*

ADRAC supports the development of a skilled workforce with identified core competencies depending upon the specific professional group and role. ADRAC encourages the inclusion of additional stakeholders being representatives of private practitioners in the development of this workforce capacity plan. ADRAC recommends ongoing continuing training requirements including specific areas and a process of recognising knowledge and expertise so training is targeted, relevant, valuable and ongoing to individual professionals. This should be supported by protocols to assess the effectiveness of the training offered, its translation to practice, and hold training providers and professionals accountable for exchanging and acquiring knowledge, skills and abilities.

### *Proposal 10-2*

ADRAC recommends, in relation to FDR options, that consistent clear information and common understandings be developed as to the different types of FDR processes, and the different professional groups working in the family law system. This would result in similar knowledge, skills and abilities required, and support appropriate training and accreditation processes.

ADRAC supports a consideration of core competencies with consideration given to standardising marking and results across institutions and education facilities to ensure results are equivalent,

universal and consistent. Additionally, ADRAC encourages ongoing requirements for education in the core competencies.

#### *Proposal 10-3*

ADRAC supports this proposal and the further discussion around targeting training in specialist areas to meet the needs of clients. ADRAC encourages the change of terminology from cultural competence to cultural humility to recognise that the development of knowledge, skills and abilities is ongoing.

#### *Question 10-1*

ADRAC supports additional core competencies to include: basic understandings in the impact of conflict on adults and children, substance abuse and mental health issues, for all members (parents, adults, young people and children) of a multi-generational family including newly formed families post separation.

#### *Proposal 10-4*

ADRAC supports this proposal.

#### *Proposal 10-5*

ADRAC supports proposals that ensure all practitioners in the family law system have the appropriate skills and knowledge to deliver services.

ADRAC supports the current FDR workforce needing to demonstrate the requisite expertise, skills and knowledge to deliver FDR involving financial and property issues. FDRPs from a legal background have the knowledge and skills to provide FDR involving financial and property issues. FDRPs from other primary backgrounds have varying knowledge and skills and experience in financial FDR processes.

ADRAC supports the training requirements for FDRPs to be reconsidered, developed and strengthened so all FDRPs are appropriately trained in property and financial matters.

#### *Question 10-2*

ADRAC proposes that there could be the development of a bridging course as part of the Graduate Diploma of FDR to provide a unit of competency around property and financial matters.

*Proposal 10-6*

ADRAC supports this proposal.

*Proposal 10-7*

ADRAC supports this proposal.

*Question 10-3*

ADRAC recognises that there are specialist services, individuals and communities that demonstrate the requisite expertise, skills and knowledge and are therefore better placed to respond meaningfully to this question.

*Proposal 10-8*

ADRAC supports proposals that ensure all professionals, including judicial officers, in the family law system have the appropriate skills and knowledge to deliver services. Knowledge in this area would support effective and appropriate decision making and manage concerns around safety and risk.

*Question 10-4*

No comment.

*Question 10-5*

No comment.

*Proposal 10-9*

ADRAC supports proposals that ensure all professionals, including report writers, in the family law system have the appropriate skills and knowledge to deliver services. An accreditation system that mirrors the FDRP system would contribute to consistency, effectiveness and public confidence.

*Proposal 10-10*

ADRAC supports this proposal.

*Proposal 10-11*

ADRAC supports initiatives that promote a better understanding of FDR processes among the community to enable informed decision-making via access to clear guidance.

### *Proposal 10–12*

ADRAC would support this proposal. Additional expertise at any relevant stage of the family law system (including FDR), to provide input regarding a child’s needs can be valuable in supporting children and families to reach their potential, managing safety and risk.

### *Proposal 10–13*

ADRAC recognises that there are specialist services, individuals and communities that carry the requisite expertise, skills and knowledge, as well as the imprimatur, and so are better placed to respond meaningfully to specific areas in the Discussion Paper. ADRAC directs its comments to those areas under its charter.

### *Proposal 10–14*

ADRAC recognises that there are specialist services, individuals and communities that carry the requisite expertise, skills and knowledge, as well as the imprimatur, and so are better placed to respond meaningfully to specific areas in the Discussion Paper. ADRAC directs its comments to those areas under its charter.

### *Question 10–6*

ADRAC recognises that there are specialist services, individuals and communities that carry the requisite expertise, skills and knowledge, as well as the imprimatur, and so are better placed to respond meaningfully to specific areas in this Discussion Paper. ADRAC directs its comments to those areas under its charter.

### *Proposal 10–15*

ADRAC would support this proposal and supports the need for wellbeing supports for all professionals working in the family law system.

## **11. Information Sharing**

### *Proposal 11–3*

ADRAC supports this proposal and recommends the inclusion of private practitioners as part of the information sharing framework.

### *Question 11-3*

ADRAC recommends that consideration be given to the practices and protocols already in place for confidentiality under NMAS for dispute resolution and the sharing of information about parties under such existing arrangements.

### *Proposal 11-10*

ADRAC supports this proposal and recommends the inclusion of private practitioners as part of the information sharing framework.

### *Proposal 11-11*

ADRAC supports this proposal and recommends the inclusion of private practitioners as part of the information sharing framework.

### *Question 11-5*

ADRAC recommends, again, that present confidentiality provisions according to NMAS and mediation generally be considered when deciding how and what information is shared by the proposed Families Hubs and with whom such information ought to be shared.

## **12. System Oversight and Reform Evaluation**

### *Proposal 12-2*

Consideration needs to be given to the accreditation already available for mediators under NMAS and FDRP and how the systems will work together and not in competition, in order not to place unnecessary expectations on family law professionals.