

Australian Law Reform Commission Review of the Family Law System

ADRAC Response to Discussion Paper 86

A version of this paper without the text of proposals and questions was submitted to the ALRC on 13 November 2018.

Please direct any queries in relation to this response Jeremy Gormly SC, Chair, ADRAC at office@adrac.org.au.

Introduction

The Australian Dispute Resolution Advisory Council (**ADRAC**)¹ 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;

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

- 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.

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 *The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:*

- *the benefits of seeking information, advice and support when contemplating or experiencing separation;*
- *the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children's safety and best interests;*
- *the existence and location of the proposed Families Hubs (Proposals 4-1 to 4-4) as a place where people experiencing separation can access advice and support services;*
- *the availability of the proposed family law system information package (Proposals 2-5 to 2-8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and*
- *the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.*

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

Proposal 2-2 *The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.*

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

Proposal 2-3 *The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.*

ADRAC supports this proposal.

Proposal 2–4 The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from:

- *universal services that work with children and families, such as schools, childcare facilities and health services; and*
- *first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies.*

ADRAC supports this proposal.

Proposal 2–5 *The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:*

- *advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and*
- *review the information package on a regular basis to ensure that it remains up-to-date.*

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 *The family law system information package should be tailored to take into account jurisdictional differences and should include information about:*

- *the legal framework for resolving parenting and property matters;*
- *the range of legal and support services available to help separating families and their children and how to access these services; and*
- *the different forums and processes for resolving disputes.*

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 The family law system information package should be accessible in a range of languages and formats, including:

- *electronically via a central website;*
- *as printed material available at key entry points to the family law system and universal services; and*
- *through interactive means, including a national telephone helpline and a national web-chat service.*

ADRAC supports strategies to enable access and participation.

Proposal 2–8 *The family law system information package should be:*

- *developed with reference to existing government and non-government information resources and services;*
- *developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and*
- *user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.*

ADRAC supports strategies that encourage consultation, inclusion and cooperation.

3. Simpler and Clearer Legislation

Proposal 3–1 *The Family Law Act 1975 (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:*

- *simplifying provisions to the greatest extent possible;*
- *restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;*
- *redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;*
- *user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;*
- *removing or rationalising overlapping or duplicative provisions as far as possible;*
- *removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;*
- *removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and*
- *considering what provisions should be contained in subordinate legislation rather than the Act.*

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 Family law court forms should be comprehensively reviewed to improve usability, including through:

- only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);
- using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;
- using real-time help functions, such as a live-chat functionality, and links to audio-visual help;
- providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;
- ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;
- providing a paper form for use by individuals without access to technology; and
- providing a single set of forms for all courts exercising jurisdiction under the Family Law Act 1975 (Cth).

ADRAC supports these proposals.

Proposal 3-3 The principle (currently set out in s 60CA of the Family Law Act 1975 (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

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 *The objects and principles underlying pt VII of the Family Law Act 1975 (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:*

- *arrangements for children should be designed to advance the child’s safety and best interests;*
- *arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;*
- *children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;*
- *decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and*
- *decisions about the care of an Aboriginal or Torres Strait Islander child should support the child’s right to maintain and develop the child’s cultural identity, including the right to:*
 - (a) maintain a connection with family, community, culture and country; and*
 - (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of that culture.*

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 *The guidance in the Family Law Act 1975 (Cth) for determining the arrangements that best promote the child’s safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:*

- *any relevant views expressed by the child;*
- *whether particular arrangements are safe for the child and the child’s carers,*
- *including safety from family violence or abuse;*
- *the developmental, psychological and emotional needs of the child;*
- *the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;*
- *the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and*
- *anything else that is relevant to the particular circumstances of the child.*

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 *The Family Law Act 1975 (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child’s connection to their family, community, culture and country must be considered.*

ADRAC supports this proposal.

Proposal 3–7 *The decision making framework for parenting arrangements in pt VII of the Family Law Act 1975 (Cth) should be further clarified by:*

- *replacing the term ‘parental responsibility’ with a more easily understood term, such as ‘decision making responsibility’; and*
- *making it clear that in determining what arrangements best promote the child’s safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.*

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 *How should confusion about what matters require consultation between parents be resolved?*

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 The Family Law Act 1975 (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

- *there has been a change of circumstances that, in the opinion of the court, is significant; and*
- *it is safe and in the best interests of the child for the order to be reconsidered.*

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 *The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.*

ADRAC supports this proposal.

Proposal 3-10 *The provisions for property division in the Family Law Act 1975 (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.*

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 *The provisions for property division in the Family Law Act 1975 (Cth) should be amended to provide that courts must:*

- *in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and*
- *in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.*

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 *The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.*

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 *The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.*

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 *If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full.*

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 *The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.*

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

Proposal 3-16 *The Family Law Act 1975 (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.*

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

Proposal 3–17 *The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:*

- *a tool to look up the legal name and contact details of superannuation funds;*
- *a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;*
- *tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and*
- *allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.*

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

Question 3–2 *Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?*

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 *Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the Family Law Act 1975 (Cth):*

- *amendments to increase certainty about when financial agreements are binding;*
- *amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;*
- *replacing existing provisions about financial agreements with an ability to make court-approved agreements; or*
- *removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?*

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

Proposal 3-18 *The considerations that are applicable to spousal maintenance (presently located in s 75 of the Family Law Act 1975 (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').*

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 *The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.*

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 *What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:*

- *greater use of registrars to consider urgent applications for interim spousal maintenance;*
- *administrative assessment of spousal maintenance; or*
- *another option?*

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 *The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:*

- *identify the person’s safety, support and advice needs and those of their children;*
- *assist clients to develop plans to address their safety, support and advice needs and those of their children;*
- *connect clients with relevant services; and*
- *coordinate the client’s engagement with multiple services.*

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 *The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.*

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 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

- *specialist family violence services;*
- *legal assistance services (such as community legal centres);*
- *family dispute resolution services;*
- *therapeutic services (such as family counselling and specialised services for children);*
- *financial counselling services;*
- *housing assistance services;*
- *health services (such as mental health services and alcohol and other drug services);*
- *gambling help services;*
- *children’s contact services; and*
- *parenting support programs or parenting education services (including a program for fathers).*

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 *Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.*

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 *The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:*

- *an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;*
- *a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and*
- *an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.*

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 *The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.*

ADRAC supports this proposal.

Proposal 4-7 *The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.*

ADRAC supports this proposal.

Proposal 4–8 The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.

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** The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) should be relocated to the Family Law Act 1975 (Cth).*

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** The new legislative provision proposed in Proposal 5-1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.*

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

Proposal 5-3 *The Family Law Act 1975 (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters.*

There should be a limited range of exceptions to this requirement, including:

- *urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;*
- *the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);*
- *where there is an imbalance of power, including as a result of family violence;*
- *where there are reasonable grounds to believe non-disclosure may be occurring;*
- *where one party has attempted to delay or frustrate the resolution of the matter; and*
- *where there are allegations of fraud.*

ADRAC applauds this proposal.

Proposal 5-4 *The Family Law Act 1975 (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.*

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 *The Family Law Act 1975 (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:*

- *the matter was assessed as not suitable for family dispute resolution;*
- *the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;*
- *the parties had commenced family dispute resolution and the process had been terminated; or*
- *the matter had commenced and concluded with partial resolution of the issues in dispute.*

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 *Should the requirement in the Family Law Act 1975 (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?*

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 *The Family Law Act 1975 (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:*

- *earnings, including those paid or assigned to another party;*
- *vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;*
- *income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;*
- *superannuation interests; and*
- *liabilities and contingent liabilities.*

ADRAC supports this proposal.

Proposal 5-7 *The provisions in the Family Law Act 1975 (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:*

- *impose a consequence, including punishment for contempt of court;*
- *take the party's non-disclosure into account when determining how costs are to be apportioned;*
- *stay or dismiss all or part of the party's case; or*
- *take the party's non-disclosure into account when determining how the financial pool is to be divided.*

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 *Should the provisions in the Family Law Act 1975 (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?*

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 *The Family Law Act 1975 (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:*

- *they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and*
- *if the matter proceeds to court and a party fails to observe this duty, courts have the power to:*
 - (a) impose a consequence, including punishment for contempt of court;*
 - (b) take the party's non-disclosure into account when determining how costs are to be apportioned;*
 - (c) stay or dismiss all or part of the party's case; and*
 - (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.*

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 Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

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 *The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:*

- *examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;*
- *the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and*
- *amendments to existing funding agreements and practice agreements to support this work.*

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

Proposal 5–10 *The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.*

These Guidelines should include:

- *guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;*
- *effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;*
- *the respective roles and responsibilities of the professionals involved;*
- *the application of child-inclusive practice;*
- *the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;*
- *the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;*
- *the application of approaches to support effective participation for LGBTIQ families;*
- *the application of approaches that support effective participation for families where parents or children have disability;*
- *practices relating to referral to other services, including health services, specialist family violence services and men’s behaviour change programs;*
- *practices relating to referrals from and to the family courts; and*
- *information sharing and collaboration with other services involved with the family.*

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 These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

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 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

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 The triage process should involve a team-based approach combining the expertise of the court’s registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

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 Specialist court pathways should include:

- *a simplified small property claims process;*
- *a specialist family violence list; and*
- *the Indigenous List.*

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 *The Family Law Act 1975 (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:*

- *the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;*
- *the proceedings to be conducted without legal technicality; and*
- *the simplified court procedure to be applied by the court on its own motion or on application by a party.*

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 *In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:*

- *the relative financial circumstances of the parties;*
- *the parties' relative levels of knowledge of their financial circumstances;*
- *whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;*
- *the size and complexity of the asset pool; and*
- *whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.*

The court should give weight to each of these factors as it sees fit.

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

Proposal 6–6 *The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for:*

- *case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;*
- *conducting a conciliation conference once the asset pool has been identified; and*
- *establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).*

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 *The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:*

- *a lead judge with oversight of the list;*
- *a registrar with responsibility for triaging matters into the list and ongoing case management;*
- *family consultants to prepare short and long reports on families whose matters are heard in the list; and*
- *a cap on the number of matters listed in each daily hearing list. All of the professionals in these roles should have specialist family violence knowledge and experience.*

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

Question 6–1 *What criteria should be used to establish eligibility for the family violence list?*

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

Question 6–2 *What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?*

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** The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.*

ADRAc supports this proposal.

***Question 6–3** What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?*

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** What other ways of developing a less adversarial decision making process for children's matters should be considered?*

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 *The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:*

- *education about child development and conflict management;*
- *dispute resolution; and*
- *decision making in relation to implementation of parenting orders.*

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 *The Australian Government should work with relevant stakeholders, including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.*

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

Proposal 6–11 *The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.*

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 Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.

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 The proposed Families Hubs (Proposals 4-1 to 4-4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.

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 The Family Law Act 1975 (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

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 The Family Law Act 1975 (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.

See ADRAC response to Proposal 7-3.

Proposal 7-5 The Attorney-General's Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child-inclusive family dispute resolution is not appropriate.

ADRAC 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 There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.

ADRAC 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 Children should not be required to express any views in family law proceedings or family dispute resolution.

ADRAC 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 *Children involved in family law proceedings should be supported by a ‘children’s advocate’: a social science professional with training and expertise in child development and working with children. The role of the children’s advocate should be to:*

- *explain to the child their options for making their views heard;*
- *support the child to understand their options and express their views;*
- *ensure that the child’s views are communicated to the decision maker; and*
- *keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.*

ADRAC 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 *Where a child is not able to be supported to express a view, the children’s advocate should:*

- *support the child’s participation to the greatest extent possible; and*
- *advocate for the child’s interests based on an assessment of what would best promote the child’s safety and developmental needs.*

See response to Proposal 7-8

Proposal 7-10 *The Family Law Act 1975 (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a ‘separate legal representative’) in appropriate circumstances, whose role is to:*

- *gather evidence that is relevant to an assessment of a child’s safety and best interests; and*
- *assist in managing litigation, including acting as an ‘honest broker’ in litigation.*

ADRAC 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 *In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?*

ADRAC 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 *How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?*

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 *What approach should be taken to forensic issues relating to the role of the children's advocate, including:*

- *admissibility of communications between the children's advocate and a child; and*
- *whether the children's advocate may become a witness in a matter?*

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 *Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:*

- *a report prepared by the children's advocate;*
- *meeting with a decision maker, supported by a children's advocate; or*
- *directly appearing, supported by a children's advocate.*

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 *Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.*

ADRAC supports this proposal.

Proposal 7–13 *There should be a Children and Young People’s Advisory Board for the family law system. The Advisory Board should provide advice about children’s experiences of the family law system to inform policy and practice development in the system.*

ADRAC supports this proposal.

8. Reducing Harm

Proposal 8–1 *The definition of family violence in the Family Law Act 1975 (Cth) should be amended to:*

- *clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8– 3)) including emotional and psychological abuse and technology facilitated abuse; and*
- *include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.*

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

Question 8–1 *What are the strengths and limitations of the present format of the family violence definition?*

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 *Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?*

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 *The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the Family Law Act 1975 (Cth) in relation to the experiences of:*

- *Aboriginal and Torres Strait Islander people;*
- *people from culturally and linguistically diverse backgrounds; and*
- *LGBTIQ people.*

ADRAC supports this proposal.

Question 8-3 *Should the requirement for proceedings to have been instituted ‘frequently’ be removed from provisions in the Family Law Act 1975 (Cth) setting out courts powers to address vexatious litigation? Should another term, such as ‘repeated’ be substituted?*

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 *The Family Law Act 1975 (Cth) should provide that courts have the power to exclude evidence of ‘protected confidences’: that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:*

- *Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.*
- *The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).*
- *In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.*
- *In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.*
- *The protected confider may consent to the evidence being admitted.*
- *The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.*
- *The court is obliged to give reasons for its decision.*

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 *The Attorney-General’s Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family & Relationship Services Australia, National Legal Aid, Women’s Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:*

- *principles to consider when a subpoena of sensitive records is in contemplation;*
- *obligations of professionals who are custodians of sensitive records in relation to the provision of those records;*
- *processes for objecting to a subpoena of sensitive records; and*
- *how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.*

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 *The Family Law Act 1975 (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, Equality, Capacity and Disability in Commonwealth Laws:*

- *Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and*
- *Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a ‘supporter’.*

ADRAC supports this proposal.

Proposal 9–6 *The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:*

- *build parenting abilities;*
- *access early intervention parenting supports;*
- *carry out their parenting responsibilities;*
- *access family support services and alternative dispute resolution processes; and*
- *navigate the family law system.*

ADRAC supports this proposal.

Proposal 9–7 *The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.*

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 *The definition of family member in s 4(1AB) of the Family Law Act 1975 (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.*

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** The Australian Government should work with relevant non- government organisations and key professional bodies to develop a workforce capability plan for the family law system.*

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** The workforce capability plan for the family law system should identify:*

- *the different professional groups working in the family law system;*
- *the core competencies that particular professional groups need; and*
- *the training and accreditation needed for different professional groups.*

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 *The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:*

- *an understanding of family violence;*
- *an understanding of child abuse, including child sexual abuse and neglect;*
- *an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;*
- *an ability to identify and respond to risk, including the risk of suicide;*
- *an understanding of the impact on children of exposure to ongoing conflict;*
- *cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;*
- *disability awareness; and*
- *an understanding of the family violence and child protection systems and their intersections with the family law system.*

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 *Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?*

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 *The Family Law Commission proposed in Proposal 12-1 should oversee the implementation of the workforce capability plan through training— including cross-disciplinary training—and accreditation of family law system professionals.*

ADRAC supports this proposal.

Proposal 10-5 *In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.*

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 *What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?*

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 *State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.*

ADRAC supports this proposal.

Proposal 10-7 *The Family Law Act 1975 (Cth) should provide for the accreditation of Children's Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.*

ADRAC supports this proposal.

Question 10-3 *Should people who work at Children's Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?*

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 *All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.*

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 *What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?*

No comment.

Question 10-5 *What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?*

No comment.

Proposal 10-9 *The Australian Government should task the Family Law Commission (Proposal 12-1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.*

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 *The Family Law Commission (Proposal 12-1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.*

ADRAC supports this proposal.

Proposal 10-11 *When requesting the preparation of a report under s 62G of the Family Law Act 1975 (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.*

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 *In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter.*

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 *The Family Law Act 1975 (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:*

- *prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and*
- *make recommendations about how that person's disability may, or may not, affect their parenting.*

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 *The Family Law Act 1975 (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.*

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 *Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?*

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 *The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.*

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 *The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:*

- *why information needs to be shared;*
- *what information should be shared;*
- *circumstances when information should be shared;*
- *mechanisms for information sharing, including technological solutions;*
- *how information that is shared can be used;*
- *who is able to share information;*
- *roles and responsibilities of professionals in the system in relation to information sharing;*
- *interagency education and training;*
- *interagency collaboration; and*
- *monitoring and evaluation of information sharing initiatives.*

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

Question 11-3 *Should records be shared with family relationships services such as family dispute resolution services, Children’s Contact Services, and parenting order program services?*

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 *The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.*

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

Proposal 11-11 *The Family Law Act 1975 (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:*

- *what information should be shared;*
- *why information should be shared;*
- *circumstances when information should be shared;*
- *mechanisms for information sharing;*
- *how information that is shared can be used;*
- *who is able to share information; and*
- *roles and responsibilities of professionals in the system in relation to information sharing.*

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

Question 11–5 *What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:*

- *Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?*
- *What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?*
- *Should client consent be needed to share this information?*
- *Who would have access to the information at the family courts?*
- *Would the other party get access to any information provided by the Families Hubs services to the family courts?*
- *Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?*

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 *The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:*

- *develop Accreditation Rules;*
- *administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;*
- *establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;*
- *establish and administer processes for the suspension or cancellation of accreditation; and*
- *establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.*

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.