Legally Assisted Family Dispute Resolution

A STUDY BY
GREATER SYDNEY
FAMILY LAW PATHWAYS NETWORK
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by Marilyn Scott
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Funded by the Australian Government, the Greater Sydney Family Law Pathways Network is a coordinated network of service providers operating within the broader Family Law system in the Greater Sydney region. The aim of the Network is to foster dialogue and collaboration between organisations with a view to helping separated families access services. By encouraging collaborative referrals and enhancing the understanding of available services, the Network represents an essential component of the Government’s commitment to an accessible Justice System that meets the needs of Australian families.

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INTRODUCTION

This study into Legally Assisted Family Dispute Resolution (LA FDR) was commissioned by the Greater Sydney Family Law Pathways Network and conducted in 2011. The aim of the study was to gauge views of lawyers, particularly Family lawyers, in relation to interdisciplinary practice.
ABOUT THE STUDY

The study was conducted online throughout the second half of 2011 (from 8 September until 24 October) and involved both quantitative and qualitative research of 127 New South Wales lawyers.
The study had five objectives, including:

1. To benchmark the use of FDR and other dispute resolution services amongst New South Wales solicitors;

2. To capture and analyse the individual differences between lawyers in their case management approaches, including their use of various dispute resolution processes;

3. To identify the lawyers' knowledge of, and/or experience with the emerging range of dispute resolution processes, including LA FDR and other collaborative approaches;

4. To seek commentary from the lawyers about their perceived needs for both skills and professional development in relation to these emerging processes;

5. To explore lawyers' views about client and lawyer input into the choice of dispute resolution or other processes.

The study results were intended to be a researched basis for informing new initiatives of the Greater Sydney Family Law Pathways Network (GSFLPN).
BACKGROUND

In the Family Law jurisdiction court-connected dispute resolution services were commenced in the early 1990s whilst extensive mediation services were also developed in the community and private sectors. Throughout this decade there were incremental changes to dispute resolution processes and service offerings, both within the courts and in the community. However, it was not until the early to middle years of the last decade that there was a perceptibly stronger emphasis on providing dispute resolution services for family matters.

In 2004 the Family Court commenced the Children’s Cases Program, whilst the Family Law Council launched Best Practice Guidelines for Lawyers Doing Family Law Work. In 2005 the first Collaborative Lawyers were trained in Australia and in 2006 the Family Court introduced the less adversarial trial (LAT) in children’s cases. In the same year the Federal Government established a network of community-based Family Relationship Centres (FRCs) throughout Australia, thereby building a national network across the pre-existing community of family dispute resolution and family service providers. In 2007 a further development of the system came with the mandatory requirement for dispute resolution processes to be tried by divorcing parents with children, prior to seeking a legal outcome for their dispute, if such efforts were not successful.
Interestingly, many of the earlier processes offered in Family Law matters were lawyer-exclusive, with mediations often being conducted by mediators from social and behavioural science backgrounds. However, with the introduction of the mandatory pre-filing requirement for children's matters a new professional player arrived on the scene: the Family Dispute Resolution Practitioner (FDRP), with around sixty per cent of these practitioners in New South Wales identifying as being legally trained. This figure suggests that there are a significant number of legal practitioners who were already cross-trained and/or practising as mediators at the time this scheme was commenced. It also suggests that the decades of dispute resolution practice in family law work had impacted on these legal practitioners so that the introduction of Legally Assisted Family Dispute Resolution in June 2009 could be accepted by many practitioners as a natural progression of family law professional development. The Attorney-General announced a change in policy in relation to FRCs which enabled client’s lawyers to be present during family dispute resolution and to allow legal professionals to provide a range of legal assistance to FRC clients. Protocols for the provision of Legal Assistance in Family Relationship Centres was also released by the Attorney-General’s Department. This new process adaptation has the potential to answer criticisms that have grown in relation to the somewhat artificial division of the socio-legal dimensions of Family Law matters when Legal Assistance was not available during the Family Dispute Resolution process.

It is the balancing of the socio-legal dimensions of Family Law matters which appears to be the current area for professional and service development. This study provides the opportunity to take a snapshot view of how Family lawyers are adapting to these changes to interdisciplinary practice and to identify the challenges that they may be experiencing in developing professional competence, confidence and expertise in what may be very new skill sets.
METHODOLOGY

A survey instrument of twenty two questions was developed based on the five stated objectives of the study. The development of the survey questions had several stages. There was the preliminary conceptualisation followed by clarification of the project objectives and question redrafting which was submitted for further clarification and refinement in consultation with the project committee.
This process of planning, drafting, redrafting, consultation and later piloting took several months. There was a mix of both quantitative and qualitative questions to allow for data to be collected for statistical analysis and to gather views and commentary of the participants to provide depth and richness to the findings.

The survey questionnaire was piloted in a manual format, and from the feedback of the pilot participants about the time for completion and user friendliness of the question structure, an online version was created which significantly reduced the time for completion and finessed the presentation of some questions that were designed for “tick the box” in the electronic format.

A covering letter accompanied the Survey with an invitation for registered legal practitioners to participate in the online survey.
There were budgetary considerations in relation to the selection of the participants as the actual identity of all registered legal practitioners who worked in the Family Law area was not readily ascertainable and the cost of contacting all firms and solo practitioners individually in New South Wales was prohibitive. The use of an online survey with a general invitation for participation was the least expensive option for contacting the potential group of participants. To some extent this self-selection approach meant that the participants were a random sample of practitioners across years of practice, area of practice and location.
The survey was advertised through the Family Law Section and generally through the New South Wales Law Society’s newsletter. Participation was encouraged with an offer of restaurant tickets to be won by a randomly selected participant. The participants were directed to another site for entry into this prize lottery so that anonymity of participants in the online survey was preserved.

Even with the prize inducement, the participation rate was disappointing and the deadline for completion was extended to allow for more participation. With this extension there was a further surge of participant numbers, however, the final number, including those responses collected in the survey pilot, was only 127. In the New South Wales Law Society 2011 Profile of Solicitors in NSW it is reported that there are 24,543 registered legal practitioners holding current practising certificates in New South Wales (p.i). Of the 41% respondents to the 2011-2012 Practising Certificate Questionnaire (p.27) 15.2% (approximately 1,472 solicitors) reported that they spent 25% or more of their time, that is their dominant area of practice, in Family Law.

The New South Wales Law Society’s online directory of solicitors (at 29 May 2012) lists 250 Accredited Family Law Specialists. With only 118 of the 127 responses to this survey identifying as practising in Family Law as a significant part of their practice such a low response rate will require a generally cautious interpretation of the findings. However, with 41 of the respondents to the Survey identifying as Family Law Accredited Specialists this represents a more meaningful percentage of 16.4% for this specialist sub-group which may afford some stronger interpretation of data results.
Questions 1, 2 and 3 asked the respondents to indicate number of years in practice, practice area and general region in which practice was located.
In Question 1 the options for number of years in practice were 0-4, 5-9, 10-19, 20-29 and 30+. The response totals were 25, 27, 28, 31, and 16 respectively.

In Question 2 the options for practice area were: Family Lawyer (Accredited Specialist) (41), Family Lawyer (not accredited) (54), General Practitioner (Family Law matters) (23) with a total response rate of 118. There was also General Practitioner (infrequent Family Law matters) (5) and Practice is exclusive of Family Law matters with 4 respondents.

In Question 3, there were 5 choices: Central Business District (CBD) (Sydney, North Sydney, Parramatta) (30); Sydney suburban (40); Large metropolitan city (Newcastle, Wollongong, Gosford) (20); Large regional city (Nowra, Wagga Wagga, Coffs Harbour, Dubbo, Albury, Lismore, Port Macquarie, Tweed Heads) (28); and finally Rural town (9).

**Accredited Specialists in Family Law**

Of the 118 respondents who regularly practised Family Law, 41 identified as Accredited Family Law Specialists. The majority of these respondents had more than 20 years’ legal experience, with none having less than 5 years’ experience in legal practice. 23 respondents practised in either the CBD (13 respondents) or suburban Sydney (10 respondents). The remainder were distributed evenly between the large metropolitan and regional cities. None practised in rural towns.

Amongst these accredited specialists, 67.5% had Mediation training, and 55% had Collaborative Law training. None had training in Counselling, although 6 had undertaken studies in Social and Behavioural Sciences. Only 2 Accredited Family Law Specialists responded as having no Dispute Resolution training.

Tables 10 to 12 in the Annexure allow comparison of practitioner training between Accredited Family Law Specialists, non-accredited Family Law Specialists, and General Practitioners regularly undertaking Family Law Matters.
Respondents by Location

Of the 118 respondents regularly practising in Family Law, the majority (66 respondents) were from Sydney’s suburbs (38 respondents) or the CBD (28 respondents). More than half of these (34 respondents) identified as Family Law specialists who were not accredited. Of the remainder, 23 had Specialist Accreditation, and 9 were General Practitioners regularly undertaking Family Law matters. The majority had less than 19 years’ experience (40 respondents; 13 with 0-4 years, 15 with 5-9 years, 12 with 10-19 years). Only 4 respondents had been practising for more than 30 years. Just under half of the Sydney practitioners had Mediation training (44.8%) and/or Collaborative Law training (41.4%). Interest based negotiation (34.5%) and Legal Aid Conferencing (32.8%) also featured highly.

The next largest demographic, constituting 43 of the 118 respondents regularly practising in Family Law, came from large metropolitan or regional cities. This group were more evenly spread across the range of experience, with 7 (16.3%) respondents having practised for less than 5 years, 9 (20.9%) respondents having 5-9 years’ experience, 12 (27.9%) respondents with 10-19 years’ experience, 6 (14%) respondents with 20-29 years’ experience and 9 (20.9%) respondents with more than 30 years’ experience.

The majority were divided almost evenly between Accredited Specialists (41.9%) and non-accredited practitioners in Family Law (46.5%), with a small sample of general practitioners undertaking Family Law matters (11.6%).

More than half of the practitioners (65.8%) from this population had mediation training, with interest-based negotiation (44.7%) and Legal Aid conferencing (42.1%). In contrast, the uptake of Collaborative Law training (28.9%) was much lower than in the Sydney based group who reported 41.4%.

Only 9 of the 118 respondents regularly practising in Family Law came from rural towns. Of these, 3 had less than 5 years’ experience. There were 2 each in the 10-19 and 20-29 year groups, and 1 representative each from the 5-9 year and 30+ groups. All were general practitioners regularly undertaking Family Law practice. None identified as Family Law Specialists, whether accredited or not.
Dispute resolution training was markedly reduced amongst this group compared to the other demographics, although 2 or 3 of the younger practitioner group (0-9 years’ experience) had pursued some training in this area. The most common professional process training for this demographic was in Communication Skills, with 62.5% of respondents participating.

**Tables 13 to 15** in the Annexure provide a breakdown of practitioner training by geographical location.

Of the 38 out of 118 respondents who had been practising for less than 10 years, the great majority (86.8%) were not accredited Family Law specialists, with the remainder (13.2%) being Accredited Specialists in Family Law.

More than half (65.7%) of this group were based in Sydney. Of these respondents, 26 were in the middle group with 10-19 years’ experience; 42.3% were non-accredited Family Law specialists; 30.8% were general practitioners; and 26.9% were Accredited Specialists. Most worked in suburban Sydney (34.6%) and large regional cities (30.8%).

Finally, 44 of 118 respondents identified as having practised for more than 20 years. Of these, 65.9% were Accredited Specialists and 59% practised in Sydney, these respondents being evenly divided between the CBD and the suburbs.

**Tables 16 to 18** in the Annexure compare practitioner training filtered by length of practice.

**Family Dispute Resolution Practitioners (FDRPs)**

From the same group of 118 respondents, 16 identified as Family Dispute Resolution Practitioners (FDRPs). The overwhelming majority of FDRPs were experienced legal practitioners, with 12 out of 16 respondents having practised law for more than 20 years, whilst 11 of the 16 also held Family Law Specialist Accreditation. None were situated in rural towns, with 6 practising in Sydney’s suburbia and the remainder split between the CBD (3 respondents), and the large metropolitan (3 respondents) and regional cities (4 respondents). All except 1 respondent also had Mediation training. Further, just over half of the respondents had training in Legal Aid Conferencing and just under half had advanced negotiation training in a range of negotiation models.
FINDINGS AND COMMENTARY PURSUANT TO THE FIVE SURVEY OBJECTIVES.
1. The use of FDR and other dispute resolution services amongst New South Wales solicitors

Question 4
Practice process profile

From a list of 10 processes the participants were asked to select:

a. The process/es your clients are more likely to require at the commencement of a matter; and

b. The process/es your clients are more likely to participate in as the matter progresses.

The ten processes listed were:
i. FDR (with FRC FDRP);
ii. Mediation (with CJC mediator);
iii. Conference (Legal Aid);
iv. Legally assisted FDR in FRC;
v. Lawyer/lawyer negotiation;
vii. Collaborative Law/Practice
viii. Mediation (with private mediator or private FDRP);
ix. Arbitration;
x. Litigation.

The participants could select more than one process to be favoured at either the commencement of proceedings or later when proceedings had matured. This provision for choice was to accommodate the individual requirements of clients (as one process does not fit all matters) and the range of processes the practitioner’s client base utilised.
a) The process/es your clients are more likely to require at the commencement of a matter

Given the mandatory requirement for clients with children’s matters to participate in a dispute resolution process as a pre-requisite to filing, FDR (with FRC FDRP) was predictably the most selected choice with 72.4% (92). The process with the second highest frequency of selection was Lawyer/lawyer negotiation with 66.1% (84), and Legal Aid Conference was third with 47.2% (60).

Interestingly, after this group of robustly selected processes there was a cluster of results for the dispute resolution processes which appear to be less commonly selected, starting with Mediation (with private mediator or private FDRP) 25.1% (32); then Legally Assisted FDR in FRC with 29; followed by Collaborative Law/Practice with 20.

The responses, which are a little more difficult to understand in relation to processes that may be required at the commencement of a matter, include the selection of Settlement Conference and Litigation by 17.3% (22) and 16.5% (21) respectively. One explanation would be that urgent matters which required immediate curial attention were an important component of these practice profiles.

Without drawing too finely on the results for this sub-question, the mandatory requirement for pre-filing FDR has a significant impact on process choice at the commencement of matters, and given the wide disparity in results between the choice of an FRC FDRP and a private FDRP / mediator the questions arises as to whether the fee structure at the FRC is the determinative attractor or whether there is some other limiting factor, such as either a lack of knowledge about private FDRP services by legal practitioners or their clients or a lack of availability of local FDRP services.
b) The process/es your clients are more likely to participate in as the matter progresses

Litigation 97 (76.3%), Settlement Conferences 72 (56.6%) and Lawyer/lawyer negotiation 85 (66%) were the major response cluster for process selection in a maturing matter.

Of note was Mediation (with private mediator or private FDRP) at 59 (46.4%), FDR (with FRC FDRP) at 28 (22.0%) and Mediation (with CJC mediator) at 23 (18.1%). There may be several explanations for the late use of FDR / Mediation in a matter: the readiness of the clients to be able to participate in a dispute resolution process; the ripeness of the dispute; the need to have full gathering of information so that an informed decision can be made; an acceptance that a dispute resolution process has to be undertaken before filing can take place; or cynically, compliance with participation in a mandatory dispute resolution process to ‘tick the box’ as other negotiation endeavours had not been tried or were not successful. The use of Legal Aid Conference at 45 (35.4%) may also indicate either an institutional requirement of Legal Aid Services or a pre-trial approach to dispute resolution.

Legally assisted FDR in FRC at 34 (26.7%) appears to be slightly stronger in the maturing matter than the 29 (22.8%) indicated for the commencement of the matter. Understanding the timing of the selection of this process in the life of a matter may be informative for the purpose of future initiatives for this practice.

As Collaborative Law/Practice is premised on the lawyers not proceeding to trial with the clients it would be expected that a there would be consistency between the results for commencing the matter and progressing the matter. The results are fairly close but not consistent with 20 (15.7%) commencing and 23 (18.1%) as the matter progresses. Although the Survey has a small response rate this point probably requires micro analysis to see if an explanation is discoverable.

Curiously, even though arbitrations are not a frequently used process in Family Law matters there was 1 respondent for commencement of process and 16 (12.5%) for progressing matters.
2. The individual differences between lawyers in their case management approaches

Settlement

Question 6
In your experience, when do your clients reach settlement?

The participants were asked to identify, from their experience, the stage at which clients were most likely to reach settlement. Nine stages were identified, and the respondents were asked to classify each on a scale from Almost Always to Never.

Limiting the responses to the 118 respondents who regularly practised Family Law, the following results emerged. Very few respondents ticked the “almost always” box, and of those who did the most popular stage for settlement (chosen by 16.1% or 19 respondents) was during negotiations on the court house steps, on the eve of the trial or the first day.

The majority of respondents answered in the “often” to “sometimes” range, suggesting that clients most “often” reach settlement during traditional lawyer/lawyer negotiations, with the lawyer acting as an advocate, but prior to the commencement of either a facilitated dispute resolution process or formal court process (50%), or during a facilitated dispute resolution process after court proceedings have commenced (49.2%), or, once again, during negotiations on the ‘courthouse steps’ on the eve or first day of trial (39.8%).

Clients may “sometimes” reach settlement:
- during some other facilitated dispute resolution process, such as mediation or FDRP prior to filing (46.6%); or
- prior to any legal/dispute resolution processes commencing, where the clients seek formalisation of draft Consent Orders they have worked out themselves (44.1%); or
- during traditional lawyer/lawyer negotiations after court proceedings have been filed but prior to any court ordered conciliation conference (43.2%); or
- after a facilitated dispute resolution process prior to filing (42.4%); or
- at a settlement negotiation/conference during an adjournment after a trial has not been reached (38.1%).

The only process identified by a large proportion of respondents as “never” experiencing a settlement was during a collaborative law or collaborative practice process (38.1%).

**Table 1** in the Annexure provides the responses to this question of settlement for all 118 respondents regularly practising in Family Law.

When the results are broken down into Accredited Family Law Specialists, non-accredited Family Law Specialists and General Practitioners undertaking Family Law matters, it can be seen that in the experience of Accredited Family Law Specialists (of whom there were 41 respondents), settlement most “often” occurs due to traditional lawyer to lawyer negotiations either prior to the commencement of proceedings (27 respondents), due to facilitated dispute resolution after commencement of proceedings (22 respondents) or on the courthouse steps (18 respondents), while settlement “sometimes” occurs during (25 respondents) or after (22 respondents) facilitated dispute resolution processes prior to filing.

The Accredited Specialists also reported settlement “sometimes” occurs when clients seek formalisation of draft Consent Orders (21 respondents), at settlement conferences during an adjournment (19 respondents), or due to lawyer negotiation after commencement of proceedings (18 respondents).

Amongst this group, 5 respondents felt that collaborative law processes “almost always” led to settlement, with 12 respondents saying that they “sometimes” led to settlement and 11 respondents saying that such processes “never” led to settlement.

The Accredited Specialists had the least disparate response to collaborative law, suggesting they had, as a group, the highest level of familiarity with it. The experience of this group implies that their clients are most likely to reach settlement during the preliminary stages, prior to any formal processes being instituted.
Table 2 in the Annexure contains the settlement responses of the Accredited Family Law Specialists.

In the experience of the 54 non-accredited Family Law Specialists who responded, settlement was most likely on the eve of trial, during negotiations on the court house steps (10 respondents chose “almost always”; 23 respondents chose “often” and 14 respondents chose “sometimes”). Settlement also “often” occurred during facilitated dispute resolution after commencement of proceedings (29 respondents), during (18 respondents) or after (23 respondents) facilitated dispute resolution prior to filing or due to traditional lawyer to lawyer negotiations prior to either dispute resolution or formal court proceedings (22 respondents).

With regard to clients seeking formalisation of Consent Orders, 21 respondents found this “sometimes” led to settlement, and another 21 respondents suggested this “rarely” occurred. The majority of non-accredited Family Law Specialists said that collaborative law processes “never” (25 respondents) or “rarely” (15 respondents) led to settlement in their experience.

There were 10 respondents who suggested it “sometimes” led to settlement, 3 respondents felt it “often” did, and only 1 respondent said collaborative law processes were “almost always” successful.

Table 3 in the Annexure contains the settlement responses of the non-accredited Family Law Specialists.

Of the 23 General Practitioners undertaking Family Law matters who responded, settlement is most likely to occur during negotiations on the courthouse steps (5 respondents choosing “almost always” and 6 respondents choosing “often”), or during traditional lawyer to lawyer negotiations prior to any facilitated dispute resolution or formal court process (10 respondents choosing “often”).

Within this group, the response most commonly chosen was “sometimes”, and the respondents were almost evenly divided amongst a number of stages, with just over half of the respondents suggesting that settlement “sometimes” occurred during facilitated dispute resolution processes prior to filing, as a result of lawyer negotiation after filing but prior to court-ordered conferencing or during facilitated dispute resolution after the commencement of proceedings (12 respondents chose “sometimes” for each of these stages).
Just under half of the respondents felt settlement “sometimes” occurred when clients sought formalisation of consent orders (10 respondents; although 10 respondents also chose “rarely” for this stage), during collaborative law processes (10 respondents; although also noting that 2 respondents chose “rarely” and 9 respondents chose “never” for this process), or after facilitated dispute resolution but prior to filing (9 respondents).

Other than collaborative law processes, the least likely process for settlement was at a conference during an adjournment (8 respondents chose “rarely”, 3 respondents chose “never”).

Table 4 in the Annexure contains the settlement responses of the General Practitioners regularly undertaking Family Law matters.

Satisfaction with settlement outcome

Question 7

How do you gauge your satisfaction with a settlement outcome?

The respondents were asked to rate how they gauged their satisfaction with a settlement outcome, rating 8 criteria as either “highly important”, “important” or “not important”. Out of the 118 respondents who specialised or regularly engaged in Family Law practice, the most “highly important” criteria were that the processes used were suitable to the matter with minimal harm to the client and any children involved (75 respondents), the practicality of the outcome with regard to maximising the likelihood of compliance (71 respondents) and that the settlement reached was within the likely range of court orders (70 respondents).

Amongst the issues of importance, the suitability of the processes for all parties was the highest rated (82 respondents) followed by whether the outcome was consistent with the client’s values (71 respondents, although this issue also received the highest “not important” rating, chosen as such by 16 respondents).
Other issues felt to be important were that the processes used were suitable for the client (65 respondents) and that the outcome was consistent with the client’s expectations (60 respondents).

Table 5 in the Annexure contains the satisfaction responses of all 118 respondents regularly practising in Family Law.

The majority of the 41 Accredited Specialists in Family Law agreed on the importance of the suitability of the process for all parties (32 respondents, or 78% of this group marked this as “important”, with another 7 respondents choosing “highly important”).

Comparison with likely court orders ranked very highly (25 respondents chose “highly important” and 15 respondents chose “important”), as did minimisation of harm (23 respondents chose “highly important” and 17 respondents chose “important”), followed by consistency with the client’s expectations (20 respondents chose “highly important”, with another 20 respondents marking this as “important”) and the ease of compliance (20 respondents chose “highly important”, with another 19 respondents marking this as “important”).

Other “important” criteria for gauging satisfaction amongst this group were suitability of the process for the client (21 respondents chose “important” and 19 chose “highly important”), and the proportionality of the costs of the proceedings with the issues in dispute (23 respondents chose “important” and 17 chose “highly important”).

Consistency of the outcome with the client’s values received the most equivocal response. Although 28 respondents chose “important” and 9 respondents chose “highly important”, this criterion also received the highest “not important” rating, chosen as such by 4 respondents.

Table 6 in the Annexure contains the satisfaction responses of the Accredited Family Law Specialists.

Consistency with client’s values also received the highest “not important” rating amongst the 54 non-accredited Family Law specialists (11 respondents chose “not important, 13 chose “highly important and 30 chose “important”).
The outstanding result from this group was that 39 respondents, or 72.2%, chose the likelihood of compliance as the most “highly important” indicator of their satisfaction (with another 13 respondents marking this as “important”).

The spread over the remaining criteria was relatively evenly divided, with just over half of respondents choosing the fact that settlement was within the expected range of court orders (36 respondents), the minimisation of harm (34 respondents) and the proportionality of costs (30 respondents) as “highly important”, and a similar number choosing suitability of the process for all parties (35 respondents), suitability of the process for the client (31 respondents) and consistency with client’s expectations (29 respondents) as “important”.

**Table 7** in the Annexure contains the satisfaction responses of the non-accredited Family Law Specialists.

Interestingly, amongst the 23 General Practitioners regularly undertaking Family Law matters, the suitability of the process for all parties received the highest “not important” rating (chosen as such by 4 respondents). However, this criterion also received the highest “important” rating, and was chosen as “highly important” by another four respondents.

Overall, the most highly important gauge of satisfaction for this group was that the process used was suitable for the matter and resulted in minimal harm. This criterion was ranked “highly important” by 18 respondents (78.3%) and “important” by the remaining 5 respondents. Other “highly important” indicators of satisfaction were the likelihood of compliance (12 respondents), consistency with client’s expectations (11 respondents, another 11 respondents marking this as “important”) and proportionality of costs (11 respondents, with 10 respondents giving this criterion a rating of “important”).

Amongst the “important” indicators for this group, 13 respondents respectively chose consistency with client’s values and suitability of the process for the client, and 12 respondents found it “important” that settlement was within the likely range of Court Orders.

**Table 8** in the Annexure contains the satisfaction responses of the General Practitioners regularly undertaking Family Law matters.
3. The lawyers’ knowledge of the emerging range of dispute resolution processes

d) The lawyers’ experience with the emerging range of dispute resolution processes, especially Collaborative Law was explored with the next three questions.

Question 18
Are you trained as a Collaborative Lawyer?

Nearly thirty per cent of the participants (37/127) confirmed that they were trained as Collaborative Lawyers.

Question 19
If you have answered yes to Question 18, how many Collaborative Law cases have you participated in?

Only 35/127 respondents answered this qualifying question, even though 37 had previously indicated that they were trained as Collaborative Lawyers. Whilst 14 of the respondents indicated that they had not participated in any Collaborative Law matters since training, five had participated in one case and a further five had participated in two cases.

Hundreds of Collaborative Lawyers have been trained in Australia since 2005 so, without knowing how recently they were trained, there appears to be slow participation uptake for this process for these respondents.

There was a further cluster of respondents who appear to be further along in participation in Collaborative Law with four having participated in three matters; two in four; two in five and one in six. There were three standout responses with two indicating participation in fifteen matters and one in thirty.
Table 19 in the Annexure graphically represents the responses to this question.

A further analysis of participation in practice bands showed 24 Family Lawyers (Accredited Specialists) had been trained as Collaborative Lawyers. This group accounted for nearly three quarters of the Collaborative Lawyer cohort with 6 indicating that they had not participated in a Collaborative Law matter. Three respondents had participated in four, six, fifteen and thirty matters respectively; two had had three matters; three had had one and five matters respectively and four had had two matters.

These results seem to indicate that this group are finding clients and matters that are suitable and are able to have a pair of clients who both choose Collaborative Lawyers. This is an encouraging sign that the cohorts of trained Collaborative Lawyers are becoming sufficient in some locations so that this process can be offered. It may also indicate that confidence in process competence is gathering momentum amongst the practitioners and that there is sufficient support in the practice groups for professional development for these practitioners. An analysis by location has not been conducted as this is a very small sample.

Question 20
How confidently could you explain the roles of the following professionals?

The professional roles that were offered for selection included those which are associated with pre-filing mandatory dispute resolution; cases involving complex children and financial issues; and Collaborative Law or Collaborative Practice processes.

Table 20 in the Annexure clearly demonstrates the demarcations between the more emerged FDR process and the emerging Collaborative Law process.

The full participant group of 127 was used for this question which would explain why six of the respondents are not confident about explaining the professional role of the FDRP. This result is of interest in that it may indicate
that knowledge about FDR and FDRPs is jurisdictionally specific. The Family Consultant, and Counsellor (Social/Behavioural Scientist) was also well known to 93.7% and 91.3% of the cohort, respectively. Again the inclusion of the non or infrequent Family Lawyers in these results could explain this lack of confidence in role explanation.

The second group of professional roles that were confidently explicable were the Financial Counsellor (81.1%) and the Financial Specialist (77.2%). Whilst these are strong figures, they are not as strong as those for the Family Consultants. The emphasis on the socio-legal aspects of Family Law with the development of dispute resolution processes and services which have focused on the levels of conflict and emotional levels in the family matters may account for this difference. The development of FDRP practice and the FDR process has tended to privilege children’s issues over financial issues as the dominant paradigm is the ‘best interests of the child’ and provision for the welfare and wellbeing of the child. However, given such recognition by this survey of the role of the Financial Counsellors and Financial Specialists in Family Law matters an FDR model that incorporated this professional expertise may be as useful in LA FDR property matters as the counsellor and child specialist is in the current model.

The professional roles that were least understood were Coach (life) (44.1%) and Coach (Communication) (40.2%). These two professional roles, especially the latter, are more closely identified with Collaborative Law / Collaborative Practice. One of the major criticisms about mediation over the years has been the power imbalance that may occur between the parties, especially if one or both of the parties cannot adequately participate due to severe communication issues.

It is the role of the Coach (Communication) which is most likely to forge the socio-legal professional bridge between the lawyers, social/behavioural scientists and clients in the emerging range of dispute resolution processes. From these results it appears that there is limited knowledge amongst lawyers about how far some of the processes have evolved in the past twenty years in North America and in the past seven years in Australia.
b) The lawyers’ experience with the emerging range of dispute resolution processes, especially LA FDR was explored with the next three questions.

Question 8
How many times have you been approached by an FRC to participate in legally assisted FDR?

Question 9
Have you accepted an invitation to participate in a legally assisted FDR?

Question 10
If you answered yes to Question 9, how many legally assisted FDRs have you undertaken?

In Question 8, respondents were asked how many times they had been approached by an FRC to participate in legally assisted FDR, and in Question 9, respondents were asked if they had accepted such an invitation. In Question 10, respondents who had accepted an invitation to participate in FDR were asked how many legally assisted FDRs they had undertaken.

Amongst the 118 Family Law practitioners, the response total to Question 8 was 510 approaches, or an average of 4.25 requests per respondent. More than half of the respondents (59.8%) had not accepted an invitation to participate in legally assisted FDR. Those that had accepted such an invitation had participated in an average of 18.75 FDRs.

The 41 Accredited Family Law Specialists had been approached on average 3.73 times to participate in legally assisted FDR. In this group, 65% had not accepted such an invitation. The 35% who did accept went on to participate in an average of 18.75 FDRs. This is the same average as for the Family Law practitioner group as a whole.
The fifty four non-accredited Family Law Specialists were approached on average 3.67 times to participate in legally assisted FDR. Amongst this group, 63% did not accept the invitation. The 37% who did accept had engaged in an average of 19.62 FDRs.

For the twenty three General Practitioners regularly undertaking Family Law matters, invitations to participate in legally assisted FDR were at a much higher rate, with an average of 6.52 approaches per respondent. The acceptance of such invitations was also considerably higher. This was the only group in which the “yes” group was larger than the “no” group, with 56.6% of respondents accepting the invitation. However, the average number of FDRs participated in was lower, with an average of 13.69 legally assisted FDRs per respondent.

Analysis of individual responses shows that there was skewing in these results by three respondents who reported they had undertaken a hundred matters each. There were another four frequent participants who reported that two had undertaken sixty and sixty nine matters respectively, with another two reporting participation in 50 matters each. These seven respondents were the most frequent participants.

**Question 11**

**If you have declined to participate in a legally assisted FDR, can you please briefly state your reasons?**

There was a mixed response to this question as some respondents answered in sequence with the preceding questions, whilst other used it as a place for commentary. As both sources of information are useful for the purposes of this survey both approaches to the question are included.

Firstly, of the forty three respondents nine reported that the question was not applicable; one reported that they ‘do not do Legal Aid matters” and another that they do not do that much family law work; two reported that they would participate in the process if invited; whilst another fourteen reported that they had never been invited.
From these latter responses two may provide some useful information in relation to the process of invitation by FRCs or in relation to identifying Family Lawyers who would be amenable to receiving an invitation:

- Have never been given the opportunity yet am a trained FDRP and a specialist Family Lawyer;
- Never been approached by FRC. My experience in FDR is limited to private mediation at the request of the client and in legal aid conferences upon a referral from Legal Aid or at the request of the client or upon my advice to the client to engage in LAC.

The remainder of the responses addressed the question as it was intended, to provide reasons for declining an invitation.

Significantly, Domestic Violence was cited by five respondents as being their reason for refusal whilst the remainder of the respondents each identified other reasons as follows:

Client suitability:
- Non balanced relationship;
- Power imbalance between the parties;
- Inappropriate;
- Not suitable for client;
- Parties too far apart in their proposals;
- Clients wishes to not participate.

Complexity of case:
- Complex issues and decided not suitable for Conference.
Issues from professional legal perspective:

• Where the Solicitor on the other side has given clear indication that he/she is not genuinely interested in early resolution;
• I would prefer to have a greater degree of control over the negotiation processes than the FDR process would permit;
• Only if client cannot afford to have me there and is not legally aided, on occasion the client has participated without legal assistance even though other party had legal assistance;
• We are the CLC partnered with the FRC to provide this service. We have declined to assist in matters where the parties have already engaged their own lawyers;
• Conflict of interest.

Service provider issues:

• Never declined they have never followed through;
• Supporting documents not yet available;
• Inappropriate FD practitioner.

Matter settled:

• Matter settled prior to conference.

There are some interesting insights here that appear to raise issues around intake assessment and suitability for an FDR when the process is a mandatory requirement, especially in relation to Domestic Violence and power / balance issues. The regulatory exceptions to FDR may be influencing these results simply because the exceptions are there in a rights-frame, which will influence the lawyers’ behaviour and advice, and may deter many practitioners and clients from obtaining professional assistance to overcome these barriers.

In the third group above the issue of lawyers not being genuinely interested in early resolution is one that has had continuing anecdotal support in relation to both FDR and mediation generally for many years. It is very frustrating when one of the professional participants is not engaged. Whilst significant legislative attention has been given to the parties making a ‘genuine effort’ to resolve their
dispute or settle their matters there is not the same public discussion about the impact a non-engaged legal practitioner may have on delaying, or negatively impacting on, the outcome of dispute resolution process.

Another issue this comment may identify is the lack of education in dispute resolution processes and lack of dispute resolution advocacy skills on the part of those lawyers who have resisted moving away from a narrowly adversarial form of trial advocacy.

The other comment of interest is the resistance one respondent identifies in their reluctance to lose control of the negotiation in the FDR process. The shift from lawyer-focused to client-centred practice is another area where lawyers, especially those with many years of practice to their credit, may find difficult to achieve. Whilst it may not be possible for these practitioners to make the necessary adaptation, it may be more useful in this intermediary period of process development to adapt the FDR process so that these practitioners can be engaged. Thus it may be possible that their clients have the benefit of the legal advice, legal negotiation support and FDR process support.

**Question 13**

**Do you think that greater availability of legally assisted FDR would be useful for your clients?**

There were one hundred and twenty seven responses to this question, with six giving an emphatic ‘no’, one a ‘not sure’ and three ‘no’ responses with further qualification. These qualifications which are self-explanatory included:

- No, sometimes lawyers can delay or upset any prospects of settlement;
- No its just another form of delay in progressing the matter more hoops for distressed clients to deal with; and
- Not if participating lawyers are limited to Legal Centre or Legal Aid (as opposed to private lawyers like me, who currently are not involved in FDR at FRCs).
There was a group of three that were unable to comment; two who replied “probably” or “for some clients”; whilst another debated whether the question was correctly framed offering:

- I don’t think the question should be about availability, but appropriateness. If cases are appropriate for legally assisted FDR then it should be available as an option for those clients.

There was also a small group of five responses that could be loosely described as being “yes, but”. These views included:

- Yes but …, not many people have the means to pay a lawyer to sit and advise them at a conference, especially if the negotiations are unsuccessful;
- Yes – but need to have better options for the other party who is not using the FRC/CLC partnership lawyer;
- If prior to filing;
- depending on how its funded, Legal aid is not available for legally assisted FDR in NSW;
- I like the idea, and I believe it would be helpful (this response may have been from a non-Family Lawyer so it is interesting to see such consideration of the idea).

Overwhelmingly, seventy nine respondents said ‘yes’ or ‘absolutely’, whilst another gave a qualified ‘yes’ and the remaining twenty six gave full endorsement with some very lengthy and informative statements.

Again, these useful pieces of information are being included in the body of the report for ease of access and have been grouped under headings to identify areas of interest and concern. The commentary is presented as typed by the respondent so that meanings are not inferred which were not intended.
The lawyer as client supporter within the process and role in finalising agreement details:

- Yes. I have been useful as a sol at Legal Aid mediations in the following ways:
  - someone who is present, following what is happening & quietly able to request Time Out if client becomes distressed or very angry – can go out with them & talk with them;
  - with an extremely inarticulate indigenous client, I did need to say the Opening Statement for him, as he just could not do that, but I was confident that I had enough instructions from him to present it as he would want it put – I did most of the talking at that mediation for the client, but all the time, quietly referring to my client;
- prompt client to speak up & mention things that have been bugging them, but which they have not mentioned at FDR;
  - obtain Time Out, when needed, to advise client as to what the Family Court’s position would be, approximately, in client’s case, and in relation to any offers that have been made;
  - if exploration and negotiations have significantly occurred or things have really slowed down, the sols often come in then to help nut out all of the many details that go into a resolution = Parenting Plan eg., should hand-over occur at this station or that one?

Issues with present system, including court delays:

- Yes. Court delays and expenses make litigation too expensive and lawyer/lawyer negotiations can get bogged down;
- Very useful. The waiting time at the moment for FDR is months which generally leads to more problems in the relationship between the parties.
Considerations about use of Court Orders:

- Distinction – initial advice clients already in FDR systems – definitely as would give them as option to get advice plus have orders done – inability of many FDR set ups to have orders made is a major drawback in my view. PPs appropriate in some circs but many occasions when Orders preferable.
- Clients who have a grant of aid – not applicable as getting legal assistance as part of that process;
- Yes. There is a need for more Court ordered FDR between commencement of litigation and trial;
- Benefits for clients, including understanding comparative process options between Court and FDR:
  - Yes. I think it is the best of both worlds. Once the clients have started litigation and get a sense for the process and the toll it takes on a person's psyche as well as a possible indication of how the Court may rule and the expense involved, it gives them a chance to resolve their conflict in an educated and experienced manner as well as use a process that is impartial, consistent and empowering; hopefully leading to the parties being able to determine how they will raise their own children without court intervention;
  - Yes, very much so. It would assist in reducing anxiety in relation to costs, much more time efficient than waiting for court process and clients tend to own the process;
  - So many clients are scared of going to Court and afraid of doing mediation by themselves for fear of intimidation etc., so by allowing us to be with them to assist and advice would be extremely useful.
Benefits for clients, including focus on the children, knowing agreement is ‘reasonable’:

- Yes, I think most clients need to know that the agreement is reasonable in all the circumstances and only a lawyer can assist a party to understand that they have achieved a reasonable outcome;
- Yes, clients benefit enormously through the process;
- Yes as the majority of our clientele requires assistance (as a result of disadvantage, family violence etc) to ensure focus remains on children and they are further disadvantaged;
- Yes, because many clients require this assistance to focus them on the issues and explore the points of agreement. It can often end with order by consent which give clients some certainty where there has been a lot of animosity.

Benefits for client of lawyer’s legal skills and knowledge of possible Court outcomes:

- Absolutely. It would be a great service to permit parties to have the benefit of the legal advice and drafting skills of lawyers;
- Yes – they can come to practical resolutions and have the agreement formalised immediately also they can negotiate within realistic expectations;
- Yes absolutely. The solicitor has greater knowledge of expected Court outcomes and can guide the parties towards being realistic;
- Yes. Matters settle more easily and sensibly with lawyers present;
- Yes I think it would assist the clients in reaching a resolution faster;
- Yes if the parties had legal advice and there was a cooperative attitude by experienced lawyers, then there would be a higher resolution rate avoiding costs for clients;
- Yes I do. I think that having the solicitors present encourages clients to enter into a settlement with confidence;
- Yes. It allows clients to obtain appropriate advice prior to and during FDR so that they feel more confident entering into agreements. This is particularly important for relationships in which there has been a significant power imbalance. It also allows for Consent Orders to be drafted as an alternative to Parenting Plans;
A very interesting response was in relation to the disenfranchisement of victims of family violence. Whilst many lawyers steer away from family violence issues, this view indicates that there may be a greater sophistication, or at least a cross-disciplinary approach, emerging in relation to the provision of dispute resolution services to appropriate clients in this group.

- Yes. For example, the ‘disqualification rule’ effectively disenfranchises victims of family violence from using legally assisted FDR. This is paradoxical when the Court process is so slow, based on an adversarial context and may further worsen the relationships between the parties and between the parents and children that are affected.

Finally, there was also a small cluster of qualified responses which focus on qualifications, distinguishing between ‘practical lawyering’ and ‘therapeutic work’, and assessment of the clients in terms of genuineness and how far apart they may be in relation to settlement:

- Yes, if they are suitably qualified;
- In my experience overall the Legally-assisted mediations (LAMS) have been very successful where there are a lot of practical issues which need to be resolved around the children eg time with arrangements, travel overseas etc. However if the FDRPs want to engage the parties in therapeutic type FDR then the lawyers have no role in that. In cases where that type of FDR is required then that should be conducted prior to the LAM;
- To an extent. It depends on how far apart parties are and whether each party is genuinely willing to compromise their position and participate as often both or one party is not. In that case it can be a very costly exercise for a client to pay for representation. Being similar to a client having to pay for a round table conference, clients are often reluctant unless they think they are definitely going to make progress;
- Some, depends on individual situation.
These comments do provide a snapshot of the range of issues that are present in practice. Two approaches seem to be apparent. The first shows a concern for the wellbeing of the client and support for their participation in the FDR process, whilst the other approach is more legalistic in tone and is centred on a lawyer’s traditional roles. There are also comparisons between the Court process and FDR process which goes to the systemic issues which the emerging processes are being designed to address. However, from this very small sample of comments there is a strong sense that Family Law is in a transitional phase with some lawyers still situated more closely to the Court’s shadow than others who appear to be more influenced by sense of social service.

**Question 14**

**Do you think that greater availability of legally assisted FDR in FRCs would be useful for your clients?**

For Question 14 the full cohort of 127 respondents replied so at least nine of the responses would be expected to be in the negative, however, there were two ‘not applicable’ responses, thirteen ‘no’ responses; three ‘not sure’ responses including one curious response which said “I am not sure because the Solicitors impose their own agendas (particularly as to their self-interest in keeping the matter unresolved, as to costs).” It is almost as if that respondent was not a lawyer at all.

There were a further two ‘no’ responses which also provided additional information:

- The first said: “No I think it would be worse the outcomes from FRC are not practical workable and clients are under pressure to agree it delays the efficient progress of family matters.”
- The second wrote: “not the one we have.”
Although there are only two responses they both indicate serious concerns and from the tone would suggest these concerns will colour both their participation in an FDR and that of their client.

Six respondents indicated that the greater availability of legally assisted FDR in FRCs would only be useful to their clients ‘sometimes’. Two of these responses also included qualifications.

One said; “Possibly but clients usually want their own lawyer rather than a community centre lawyer – they should have the option of bringing in their own lawyer to the FDR”. The other was less sure about the service provider and the quality of the FDR practitioner.

There was also a ‘yes/but’ response which is not very clear: “Yes, but the practitioner is obliged to inform the clients about equal time arrangements when often they are cases in which equal time is not appropriate”.

Seventy seven (nearly 61% of respondents) said ‘yes’ and another twenty one who, not only agreed with the proposition that the greater availability of legally assisted FDR in FRCs would be useful for their clients, also gave useful commentary which is presented under thematic headings to provide further information about these respondents and their views on practice.

The first reported response raises issues which are already familiar in relation to the criticisms of any lawyer-exclusive dispute resolution process:

- Yes. Without legal assistance, FDR can be a waste of time: if client agrees to something, then takes those terms to their sol & if sol advises that the terms are not to be recommended for a number of reasons. Then, there can be mayhem between parties because parties think they have a settlement, but is then abandoned by one party. Has any research been done on resolutions reached in FRCs & how much, if at all, these settlements deviate from the determinations made under Family Law Act through sols negotiating & matters determined by Courts? It would be interesting to know this?
The reasons for this lawyer's negative opinion may also be an interesting point to research. Whether it is the negative implications and consequences of the agreement which are the cause for concern or whether the agreement, although acceptable to the clients, does not match the lawyer’s view of what the agreement should be if benchmarked against their experience with curial decisions.

Controlling client expectations was another issue:
- Yes… Clients often present with unrealistic expectations, it is the role of the legal advisor to control those expectations;
- I think that it can be very useful especially where client require Consent orders to be made, or if one party has unrealistic expectations.

Protocols and promotion were identified as issues:
- Yes provided the protocol is changed;
- Yes, provided the reasons for doing so were better promoted;
- Lawyers’ role;
- Yes, provided the lawyers are engaged in legal practice as well as providing advice/assistance in FDR.

Provision of services was selected with a range of approaches being expressed:
- Yes, Legal Aid can only manage so many – the FRC also needs to be undertaking legally assisted FDRs as well;
- Very useful. The waiting time at the moment for FDR is months which generally leads to more problems in the relationship between the parties;
- Yes. There needs to be increased funding to reduce waiting lists;
- Yes – could possibly be quicker than Legal Aid Mediations at the moment…;
- Yes…but depends on capacity and scope of work they will do. Good for clients with minimal resources but who don’t qualify for legal aid;
- Yes. It would enable those clients not eligible for Legal Aid, but not of significant means to access low cost FDR and have the benefit of Legal Advice and representation;
- Very useful, but we are limited in availability of lawyers to enable both parties to be represented in the process;
- Yes. The doors should be opened wider to permit and encourage the greater participation of ‘private fee paying’ clients.
Certainty of process outcome:
- Absolutely. The benefit of drafting enforceable Consent Orders and obtaining proper legal advice at the time of the FDR would be invaluable;
- Yes. A lot of mediation doesn’t allow lawyers to be involved and settlements are not clearly explained so drafting Consent Orders is starting all over again.

Client skills and vulnerable groups:
- Yes, FRCs are able to provide clients with skills they need to co-parent in a separated family;
- Yes a very valuable process especially for disadvantaged and vulnerable clients;
- Yes especially in CALD communities.

Client participation:
- Yes – it’s a great informal stepping stone for them to see what they agree on and what needs to be discussed further. Being able to obtain legal advice at the venues would be beneficial for clients.

Country commentary:
- I know of no legally assisted options that are in place in the FRC that operates in our region, is this a Sydney practice?
- We are in a remote area, access to anything always involves great distances for my clients.
Question 15

Is there anything about FDR services in FRCs that could be changed to make the process more amenable to the involvement of lawyers?

There were seventy nine responses with forty eight respondents skipping the question. Of those that responded fifteen were unable to comment due to lack of experience in FDR services.

The most frequent area identified for change in relation to FDR services in FRCs to make the process more amenable to the involvement of lawyers was in relation to negative professional stereotyping and perceived professional cultural tensions. These responses are included here because it will assist in gauging the depth of these issues and alert policy makers to the challenges that may lie ahead in relation to developing and maintaining interdisciplinary, cross disciplinary and multi-disciplinary processes and services. There are also some indicators for considering appropriate training for all professions so that they can have confidence in the competence of their participation in these emerging processes. It is becoming obvious that insular professional education is setting up artificial boundaries that test the good intentions of very competent and dedicated professionals. Providing and developing dispute resolution process in isolation, no matter how well conceived, without involving and engaging all stakeholders flies in the face of respected cultural and organisational change theory and best practice.

The first cluster, of twelve responses, on this topic include:

- Need to sort out somewhat the relationship between lawyers & FDRPs at FRCs. I have been at many gatherings of both groups & I think there would need to be some steps taken to extract from lawyers, greater respect for the non-legal FDRPs & the process and paradigm in which they work. By the same token, the non-legal FDRPs may need to correct misinformation & increase their awareness that not all lawyers are greedy people, making a fortune & constantly trying to rip off their clients;
• There appears to be a tension between FDRs and legal practitioners;
• There seems to be a gap between FRC and lawyers. I think lawyers see FRC as “let’s get in a circle, hold hands and sing some songs and hope we can come to a nice peaceful familial arrangement for the kids”. I think FRC see lawyers as “quick lets go to Court and grab him/her by the jugular”. I think this gap needs to be closed with better awareness of each other’s roles. I think lawyers are almost necessary in most FRD sessions at FRC because a lot of parenting plans the FRC produce are confusing, ambiguous, and completely non-enforceable. This causes many delays whereas lawyers, although not perfect, have much better drafting skills;
• FRCs still need to get over their suspicion of lawyers and stop telling clients we are only in it for the money;
• Staff at FRC need to be willing to welcome lawyers into centre and (not) begrudge their attendance;
• Reduce the hard-edge assumption that involvement of lawyers is counter-productive;
• An attitude that lawyers make things worse and do not assist;
• Not to be frightened that solicitors will cause more problems our role is to act in the best interest of the child;
• Culture shift to permit involvement of lawyers without feeling that they will take over the process or hijack the result;
• Only if you can stop the FRCs being so defensive;
• Anecdotal evidence of anti-lawyer attitude of FDRP’s;
• No; the major obstacle seems to be the combative nature of lawyers, particularly in family law;
• No, because the problem lies in the mindset of the lawyers – the longer they keep the file open the more money they make from the client;
• Mediators can be distrustful of lawyers.

These responses indicate a level of professional tension and disquiet which may be very counterproductive in the provision of dispute resolution services when the recipient clients are already in a conflicted state themselves.
There were also some critical observations in relation to mediators:

- The quality of the mediator is the critical issue;
- Consistency between mediators is an issue;
- We need the FDR service to be proactive in the mediation and offer clients alternatives etc;
- The people who run our local FRC.

The next most identified issue was in relation to the lawyer’s role and their participation in the process. Some of these comments include,

- Each party needs to know they have a lawyer giving them advice;
- Clients getting legal advice before participating;
- Yes, involve the lawyers early;
- Allow lawyers to participate in mediation – I do a lot of legal aid mediation and have never been invited by a FRC to assist anyone;
- Space and clearer understanding for all parties about the role of the lawyers in the process.

The next example discusses a model modification of using a lawyer led ‘reality check’ in relation to what to expect should the matter go to Court:

- I am an FDR practitioner and lawyer. Perhaps one way to improve the process would be for the last stage of the mediation to be a time for the lawyers to de-brief the other participants with a ‘reality check’ if the case has not resolved. eg.”We note the mother isn’t agreeing to allow overnight contact under any circumstances but in my view we will get an interim order for overnight contact in Court, so I don’t think the mother is being realistic about her position” etc. This way, the parties can get a taste of what lies in store for them if they can’t settle. Lawyers should be encouraged to advocate on their client’s behalf (if no agreement is reached) before the FDR session finalises. And if the FDR practitioner agrees with a view, they could perhaps indicate that to the parties present. Reality checks should feature in every mediation session.
The next response also suggests model adaptation to use the lawyer expertise in assisting in the assessment for suitability of a matter for a legally assisted process:

- Allowing the lawyers to flag matters that may be particularly beneficial to being legally assisted, although it is up to the FDRP’s discretion as to what matters progress to the joint mediation stage having the lawyer’s views be given some weight and consideration in determining.

The last response in this group is quite different suggesting late involvement of the lawyer in any process:

- I think we’re best out of the process initially. The more the parties can achieve between themselves generally the better. It is only when the parties are highly adversarial and need tempering that lawyers involvement would be of assistance. Or to provide legal advice such as to assist resolution.

The next area that was identified as being important was in relation to information about the process to the profession:

- I don’t have a lot of experience using the FRCs as my legally assisted FDR is either private or through Legal Aid Conference so I would be interested in information session and/or lawyers hotline;
- Employ a liaison between FRC and FDR lawyers of lawyers interested in engaging in FDR services with FRCs. Alternatively, create a website for enquiries/questions etc regarding FDR processes, particularly through FRCs;
- Better awareness of availability and services;
- Clearer guidelines in how the FDR process might work when lawyers are involved;
- Better availability and acceptance.

Following on from this topic were more suggestions in relation to communication and liaising between the FRCs and the lawyers:

- Greater communication between lawyers and FRC;
- Communication of procedures;
- Contact between FRC and lawyers. Sometimes, our clients tell the FRC that they have a lawyer or want to get legal advice but they say FRC continue to push them to do their mediation;
- If a party has a lawyer, FRC should communicate with the lawyer in writing throughout the process including after intake assessment and after each session so as to ensure the lawyer has input and the party obtains legal advice;
- More certainty about the process, more formality in arranging mediations.

Engagement of lawyers in FDRs in FRCs:
- I can’t say that I have ever been approached to assist with FDR at FRC. It has been a topic of discussion but nothing has occurred yet;
- I am not currently aware of how lawyers are integrated into the FRCs. In the Illawarra region my understanding is that there is no involvement. If FRCs are unable to employ inhouse Lawyers, perhaps a Legal Aid style panel and payment system could be employed for local and interested private practitioners;
- My understanding of FRCs is that participating lawyers are limited to Legal Centre or Legal Aid lawyers. It would assist if clients (if they wish) could have private lawyers attend;
- Involve lawyers already assisting the client if they wish to be so involved;
- Panel of lawyers there to assist just with the mediation.

Importantly, respondents made suggestions in relation to role expectations and the educational issues they perceived were necessary. These suggestions included:
- Education of FRC Staff of the Family Law Act, Court process and likely outcomes of Court.
- FDRPs need more training on the holistic legal processes clients can be involved in – and not operate as if the FRC is suspended from reality;
- Interdisciplinary training and dialogue between lawyers and FDR/FRC personnel about liaising with the lawyers at the intake stage to assist in early identification of issues and tailoring interventions to assist with the specific needs of the family members. In other words, moving away from ‘the one size fits all’ approach;
- In order to produce workable and appropriate outcomes, it would be preferable for the FDRP to be experienced as a legal practitioner in Family Law litigation;
- More focus on outcomes not counselling;
- Needs to be clear that Lawyers expect mediation to be about discussing issues, not a counselling session.
After this series of professional and role comments attention was also given to the process, in particular in relation to timing issues with several different aspects being noted:

- Will need to be time limited to three (3) hours any longer and it is often about pushing parties to agreement;
- There could be a danger in everyone thinking that we have the clients & the lawyers here, so we should go until we drop or have reached a settlement. I have found that clients find the process very tiring. For many after about 2.5 hours, the client is so tired they cannot think straight & therefore, they cannot give instructions properly. I have had one, or perhaps two, agree to a settlement at the end of three hours or more; they go home and sleep on it; and come to my office the next day, saying that they really do not agree with the ‘settlement’ reached. So, it is a mixture of tiredness & people needing to have time away from the process to discover what they really think;
- That mediation should have less waiting times;
- Reduce waiting times;
- Reduction of time required to wait to access services;
- Shorter waiting times. Usually parties intake process can take up to 4 – 6 weeks;
- Time delays and reluctance of FRC to involve lawyers;
- Clearer timeframes for mediation to take place;
- Probably a shorter turn around for each matter, there is a considerable delay in having matters brought to a head in our area and that causes uncertainty and often frustration and then refusal to be involved in the process, that seemingly does not give results;
- Time is of the essence once parties separate. To avoid conflict parties need to negotiate, at least an interim agreement for the kids to avoid problems. After this initial agreement parties need to be able to access FDR again, to update the agreement. Some families need this sooner than others and it should always be provided, especially for children under 5 who’s needs are changing.
There was also commentary in relation to the FDR having a closer connection with the Courts which flies in the face of all the recent research-based changes which have occurred in Family Law practice in recent years.

These comments include the views that:
• FRC should be attached to the legal system and or adopt the legal aid conference model; and
• There needs to be a means of incorporating the FRC into the family court system and legal aid system.

Client’s role:
• In some LAMs, maybe there could be some more active involvement by lawyers? Not really sure how this can work as I think it is very important for the clients to own the outcomes;
• Also by making sure the clients also feel that their views on whether they would prefer legally assisted mediation are heard and explored more thoroughly by the FDRPs.

Costs, funding and fee scales were also discussed:
• The process needs to be quicker as most clients could not afford to pay for their lawyers to attend multiple sessions which is the norm through FRCs;
• Funding;
• Increased funding for CLCs, legal aid and private solicitors to facilitate greater numbers of lawyer assisted FDR;
• Legal Aid grants for private lawyers to enable them to represent clients in FRCs. Clearer guidelines in how the FDR process might work when lawyers are involved;
• Working out their pay rates at a reasonably attractive rate;
• FDR practitioners to be paid a more appropriate wage to ensure quality of FDRs.

And finally, one respondent suggested that there should be:
• Removal of the A-Gs requirements for Private Practitioners to agree to not represent clients in Court should mediation prove unsuccessful.
In globo, this question produced an informative gathering of information and views which may assist policy makers to better understand and provide for the challenges identified by these practitioners. Whilst dispute resolution processes may be the product of a melding of socio-legal practice and theory, the bringing together of these professionals to function together personally and professionally may require guidance from the health professions, which had similar issues when cross-professional medical teams were first developed.

**Question 12**

*If asked, what recommendations would you make to improve the legally assisted FDR protocols?*

There were 29 /127 respondents to Question 12. Whilst five did not know or could not comment, one did not know they existed. Three could not access the link to the protocols so could not reply and two who claimed to have accessed the protocols commented that the “protocol link seemed to be general and not related to legally assisted FDR” and the other, having read the protocols twice “could not see a reference to legally assisted FDR”.

Thus 11 /29, or nearly 38% of the respondents had no view or could not comment, or had an issue with the applicability of the protocols. Some of these responses may indicate that the users of the information on this link may have some issues that need attention both in accessibility and relevance.

Of the remaining responses several themes were identified: The role of the participating lawyers; managing the client; and the provision of services and process issues. As there are a small number of responses they will be reported in full here for information. Some respondents made several comments which have been reported under appropriate headings.
The role of the participating lawyers:

- It would be advisable to convey to solicitors who are to attend FDR, as to what is expected of them: predominantly say nothing and listen; encourage client beforehand & during FDR to speak up & put what it is that client wants; be aware of when it is appropriate to ask for “Time Out” – variety of situations; how best to advise client about their legal position in the midst of a FDR – are they taking it in; and – as FDR goes on, and on, and on: sol needs to assess whether client is too tired to be able to engage in a settlement of FDR. Sols attending FDR have to understand that it is totally inappropriate to be aggressive, cross-examining or in any way hostile to the other party or the sol for the other party. The sol needs to be familiar with the FDR process;
- More involvement of lawyers and more expectations for lawyers to be involved;
- Ensure the persons providing the legal assistance are suitably trained in mediation;
- Better understanding of procedures;
- Better indication of protection of confidentiality and lawyer-client privilege in process.

Managing Clients:

- Make it mandatory as too many clients initiate proceedings and waste time, money and energy to get to final hearing only to negotiate settlement on the first day of hearing when they could have done this 12 months earlier;
- Ensure FDR participants understand that they are not involved merely to get 60I;
- More use of costs orders for those not actively engaging;
- It is important for both parties to feel they have received advice taking account of their personal position;
- Ensure parties obtain legal advice prior to agreeing as parties often change their mind after mediation which was settled without legal advice.
Provision of services and process issues:
- MORE THAN ONE HOUR FREE;
- Make them more readily available and acceptable for lawyers to attend;
- Allow clients to be able to take solicitor of their choice not just solicitors within the FRC legally assisted pilot program;
- Have lawyers involved. Clients attend and don’t discuss everything they should and then come to me and I have to start negotiating again;
- Less waiting times and more “client friendly” intake assessment processes;
- Always involve a child consultant in mediations regarding parenting matters.
4. Commentary from the lawyers about their perceived needs for skills development and professional development in relation to these emerging dispute resolution processes

Question 16
Besides Court Advocacy, what other professional process training have you done?

The respondents were asked at Question 16, what professional process training they had engaged in, apart from Court Advocacy.

Amongst the 118 Family Law practitioners who responded, approximately half (51%) had participated in mediation training, with communication skills (38.5%), interest-based negotiation (37.5%), Legal Aid conferencing (35.6%), collaborative law training (34.6%) and risk management (33.7%) also proving to be popular additional skills.

This data can be found in Table 9 in the Annexure.

Of the 41 Accredited Family Law Specialists, mediation training was most prolific, at 67.5%, followed by collaborative law training at 55%. Interest-based negotiation and collaborative law practice training had each been undertaken by 42.5% of respondents. Only 25% had undertaking training in communication skills. None had undertaken counselling training, and a mere 15% had studied in social and behavioural sciences.

The training data for Accredited Family Law Specialists can be found in Table 10 in the Annexure.

By comparison, amongst the non-accredited Family Law Specialists, communication skills had the highest uptake, at 47.7%, followed by mediation (43.2%), interest-based negotiation (38.6%) and Legal Aid conferencing (38.6%). While only 25% had collaborative law training, 29.5% had undertaken studies in social and behavioural sciences, and 4.5% had training in counselling.

The training data for non-accredited Family Law Specialists can be found in Table 11 in the Annexure.
This trend was even more marked among the General Practitioners engaged in Family Law matters, with 45% having training in communication skills and 45% having training in risk management, 35% undertaking training in mediation and Legal Aid conferencing respectively, and 30% having studied in the social and behavioural sciences. This group also had the highest level of counselling skills, at 10% of respondents, and the lowest level of collaborative law training, at 15%.

The training data for General Practitioners regularly undertaking Family Law matters can be found in Table 12 in the Annexure.

Question 17
In your view, what further skills might be needed for most lawyers to participate effectively in legally assisted FDR?

There were seventy eight responses to Question 17. Whilst four respondents simply indicated that they were unable to answer the question, the remaining seventy four responses gave many useful suggestions for understanding the areas where Family Lawyers would like to obtain more training, understanding and education. The list in Question 16 appeared to be a check list for some participants, whilst others indicated that they providing suggestions that may have arisen in their practical experience in both mediation and LA FDR.

Firstly, the responses that align with the list in Question 16 indicate that Mediation training was seen by seventeen respondents (22.9%) as being needed for lawyers for effective participation in LA FDR. Another five selected FDRP training. Whilst this may indicate selection on the basis for wanting to be trained in these professional roles, it may also indicate that some lawyers do not actually want to add these professional roles to their qualifications but want to understand more about how the processes function and about their roles as lawyers in both the mediation and FDR processes.

These varying interpretations are derived from eight responses that identified understanding the nature of the FDR process and its non-adversarial approach
as a need, a further two wanted to understand the role of the FDRP, with eight needing to have a better understanding of the lawyer’s role in the FDR process, including preparing the client to participate in the process. One respondent suggested that the lawyer’s understanding of their role in the FDR process should be a pre-requisite for participation.

This insight is, in the researcher’s view, one of the most significant responses to this question as a requirement for competence in professional participation is one of the most important elements that is generally overlooked during the incorporation of dispute resolution processes into legal practice. This view is supported by respondents who commented variously:

- Lose the adversarial mindset;
- The need to move away from a traditional adversarial position and to educate the client accordingly prior to and during the process. It is a different mindset for most lawyers;
- Better understanding the non-adversarial nature of FDR when participating in the actual sessions of FDR;
- Better awareness that the legal issues are not the only issues;
- Mediation or collaborative training so they can shed their adversarial predisposition;
- Collaborative Practice training would be beneficial, as it shifts the mindset from an adversarial one to a problem-solving one;
- Collaborative Law training to break the lawyer’s nexus to position(al) bargaining;
- The lawyers involved must be committed to dispute resolution rather than the litigation path;
- Open-minds and a willingness to settle/resolve;
- Understanding the process, when to not participate and when directed assistance is useful;
- Ability to advise clients without disrupting the process;
- An ability to see when the mediated result is a better option for a client than litigation;
- Skills to realise when a ‘win’ has occurred during mediation – that it is not a ‘win/lose’ dichotomy but a process towards a ‘best fit’ outcome for the parties;
- Some form of mediation training to gain skills away from rigid negotiation techniques.
• All of these comments shed light onto the profound ‘mind set’ changes that dispute resolution processes require for highly trained and experienced adversarial legal practitioners who have been accustomed to working and thinking in a highly regulated and formalised ‘win/lose’ frame and who are new to the client-centred constructs and practices of dispute resolution.

Attention to development in this area of competence for legal practitioners may also have considerable benefits for clients because the confidence that a legal practitioner has in their competent participation in a process will underpin, or at least colour, their process selection advice. Such development may also assist in overcoming some of the ‘professional cultural tensions’ that have been identified in this study.

Negotiations skills were also identified as an area where additional skills were needed.

Whilst eight respondents simply identified ‘negotiation’, others were more specific with two identifying ‘interest-based negotiation” and a further two identifying ‘advanced negotiation in a range of negotiation models’.

Closely aligned to negotiation is Collaborative Law, if viewed as a constructive approach to negotiation where the lawyers balance the best of both interest-based negotiation and adversarial negotiation, which was identified by eight respondents as an area of educational need. Two of these respondents specified Collaborative Practice, which is a term more commonly used when an interdisciplinary approach dominates the process used.

It is noted here that in practice there is a growing tendency for practitioners to distinguish between Collaborative Law and Collaborative Practice. The former is viewed as a process where the’ Lawyer/Client and Lawyer/Client negotiation’ is central to the process with more peripheral input coming from the social/ behavioural science and financial professionals, if and when required. In focus and practice it has a more legal connotation. The latter moves from the legal professional connection with multi-disciplinary assistance into a frame that is conceptualised as interdisciplinary or cross-disciplinary and the practitioners are more experienced in or receptive to a more integrated socio-legal mindset and form of practice. Sometimes the distinction is created by experienced
practitioners as they become more experienced and confident in their own competence in the process and are more at ease in this trans-disciplinary nature of practice.

In relation to micro skills an area of major concern for the respondents was Communication, which was identified by ten respondents simply at a subject area.

Social and Behavioural Sciences was selected by three respondents as another area where further knowledge was needed. There was also a wealth of topic suggestions provided for this and related subject areas. These included:

Conflict:
- Conflict Coaching;
- Conflict resolution skills;
- Conflict resolution strategies;
- Conflict management;
- Understanding mediators’ methods to resolve conflict.

Children’s studies:
- Understanding children’s needs;
- Child development;
- Effects of conflict on children;
- Understanding the effect of arrangements on kids;
- Parenting course – understanding children from a parent’s point of view;
- Child focused practices;
- Child focused negotiations.

Clients’ needs from the perspective of both clients and lawyers:
- Managing client expectations;
- Need for clients to communicate;
- Clients to appreciate the balance needed between costs / outcomes / effect on children;
- Interpersonal relationship skills;
- Anger management;
• Family / Domestic Violence;
• Awareness of Domestic Violence and current research;
• Understanding Family Violence;
• Handling difficult clients.

Psychology studies:
• Personality and negotiation behaviours – conflict;
• Psychological aspects of how mediation works;
• Relationship dynamics;
• Understanding complexities of relationship breakdowns.

The next area related to legal practice. The first issue related to the proper understanding of Family Law Act:
‘Understanding the Family Law Act’ was identified by four respondents as an area of deficiency. This may indicate that this area of practice requires more than casual acquaintance for effective advocacy. For example:
• A proper understanding of the Family Law Act and the role of the practitioners to be more amenable to resolution and less litigious. Many practitioners are still very difficult about this and are more focussed on putting up the fight to impress the client.

However, there was an entirely different approach to Family Law practice which focused on Court process and possible curial outcomes:
• I have come across many practitioners who do not seem to be aware of the likely outcomes of a Court Application and they so not seem to advise their client of the appropriate settlement proposals. Sometimes they are way outside the scope.

The polarity of these approaches would indicate that legal practice in Family Law is still far from being homogeneous and gives an indication of some of the challenges to be met in first narrowing the distance between these views in practice, and then supporting and developing those practitioners who are already into the client-centre / dispute resolution frame.

One respondent supported a specialist qualification for practice, whilst another saw a need for knowledge of the relevant law. It was not clear if this was a reference to the Family Law Act or a reference to law relating to FDR.
Other topics for professional legal practice included:

- Lawyer education of the client in relation to the Family Law Act;
- Drafting skills;
- An ability to focus on the needs of the children rather than getting a ‘win’ for the client;
- Confidence in using client-centred approach;
- Putting client’s interests first.

Process skills in relation to lawyer’s participation in FDR:

- Advising client without disrupting the process;
- Reality testing;
- Understanding and having the skills to win in mediation not default win/lose approach;
- Learning and training in developing empathy.

Systemic issues were also addressed.

‘Referrals to other professional service providers’:

- Making appropriate referrals;
- Professional networking with other professionals;
- Dealing with professional assumptions.

What FRCs ‘do’ was a linked area of concern for several respondents:

- How FRC works;
- FRC to show lawyers what their clients attend.

This lack of process and service knowledge could well be a barrier to a lawyer’s confidence in supporting a client to attend an FRC.

There was also a suggestion about process development:

- The basic model of mediation needs to be changed slightly to enable the lawyers an opportunity to sum up their client’s case/argument before the session ends.

Generally more training in both ‘ADR’ practice and procedures and conciliation was confirmed.
5. Lawyers’ views about client and lawyer input into the choice of dispute resolution or other processes

Two questions were used to collect data to inform this survey objective.

Question 5
In the choice of process/es, how often in the selection determined by:
Lawyer alone; Client; Both client and lawyer?

All 127 respondents replied to Question 5. These results will be reported from the full survey population, including the three practice strands identified as Family Lawyer (Specialist Accreditation) (FLSA), Family Lawyer (not accredited) (FL), General Practitioner (Family Law matters) (GP).

For both Client and Lawyer selecting process:
- 12 reported this was their total (100%) practice;
- 38 reported this approach was taken in 90% and 80% of cases;
- 36 reported this approach was taken in 70% to 60% of the time;
- 8 take this approach half of the time;
- The remainder of the respondents used this approach less than half the time with 14 (40%); 8 (30%); 5 (20%); 5 (10%) and 1 (0%).

For Client (clear instructions that they want the matter conducted in a particular way) and Lawyer alone the results strongly indicate that these approaches are not as commonly used as the joint Client and Lawyer approach to process selection.

For ‘Client alone’ selection it was reported by 94 respondents that this occurred less than 20% of the time and for Lawyer alone 81 respondents reported this was the case in 20% or less of cases, with 36 reporting that this was never the case.

These figures seem to suggest that process selection by both client and lawyer together is becoming the norm.
Question 21
Do you have views about what makes a matter suitable for legally assisted FDR/CP? If yes, what are they?

Question 21 attracted a lot of comment with eighty three responses, seven of which were non-responses. The remaining seventy six responses were often very lengthy and provided considered views in relation to a number of issues. These responses have been distilled into groupings in an attempt to identify any intake assessment trends that might be discernible amongst the respondents. The list of criteria is certainly extensive and includes most factors that are predictably identified in this area of practice, however, what may need more research to supply explanation is the phenomenon that there are a number of significant factors which are supported both positively and negatively by the respondents.

The suitability criteria have been presented alphabetically for ease of reference. Some criteria have been mention only once in all the answers, whilst others have had multiple selectors. Where there are variations in multiple responses to a criterion, a selection of the degrees of variation has been made to assist in further understanding the range of skills, views and experience this study population has demonstrated.

**Aggression**
- Absence of aggression required.

**All matters**
- All matters are suitable, save for exception categories
- Legally assisted FDR is suitable in nearly all case because the processes can be adapted to deal with ‘contra-indicated’ features such as family violence, drug and alcohol dependence, mental health issues
- Collaborative practice models are also suitable in a wide range of cases, including those with high levels of intractable conflict or other pathology … but arguably will struggle more to contain those clients that are personality disordered or borderline personality disorderd.
**Assistance**
- Need legal assistance to advocate.

**Children**
- Both parties prepared to focus on the child
- No serious risks of harm to the children
- If the only issue in dispute is how much time the children spend with each parent, non-legally assisted FDR is suitable
- If there are issues that go deeper than spend time with (each parent) which gives the matter a further complexity then the parties should be legally assisted to ‘deal’ with that matter appropriately
- One party withholding a child from the other parent for no reason.

**Client**
- Client selects FDR
- All matters are potentially suitable, but require education of clients
- Clients are suitable who are polarised and lacking an understanding of family law and who risk being wholly unsuccessful or being much worse off should the matter end up in Court.

**Commitment**
- Commitment by the parties to the process
- Commitment by the lawyers to the process
- Commitment by both parties to resolving the dispute
- Parties MUST have genuine interest / motivation to settle
- Mutual desire to achieve settlement
- Parties have to want to find a solution to the problem and not use the process for other agendas
- Willingness of clients to sort matter out
- Willingness of the parties to participate rather than to just tick a box.
Communication
- Where parties need to improve communication (It is amazing to see the benefits that face to face mediation has upon parties that have lost the ability to talk to each other.)
- Where the parties are able to communicate or have a working relationship with each other but cannot reach an agreement due to a ‘stumbling block’ which lawyers may be able to help them ‘get over’
- No violence, parties do communicate with each other already, maybe both are just stubborn and need someone to help them pick the major issues to come to some sort of agreement. Wafta/bafta
- Where the parties are, for whatever reason, unable to effectively communicate with each other, but the conflict is not such as to justify the matter not being suitable for non-filing of 60I.

Complexity
- Where complexity of issues requires expert legal advice to reach a workable and enforceable outcome
- If there are issues that go deeper than spend time with (each parent) which gives the matter a further complexity then the parties should be legally assisted to ‘deal’ with that matter appropriately.

Compromise
- Both parties open to compromise and to try to reach a solution out of court
- Both parties prepared to compromise to some degree
- Willingness and capacity to compromise; sees the horizon of settlement even if unsure what lies beyond it.

Confidence
- One party not confident settlement will be reached, is not a bar
- Where client may lack confidence to ‘do it by themselves’ process is suitable.
Conflict
- Low conflict is suitable
- Entrenched conflict is not suitable
- High conflict not suitable for FDR
- Families with entrenched conflict are suitable
- Not suitable if there are AVOs / serious family violence
- Not necessarily unsuitable where ADVO is in place
- Any matter with an AVO.

Consistency
- Client/other party with a history/complaint of reneging on previous agreements as no terms signed at the time of resolution.

Co-operation between clients
- Reasonable co-operation between the parties to have the matter resolved to their satisfaction.

Court Orders
- Matters are suitable when Court Orders are already in place
- Matters where there are compliance issues may be suitable.

Disadvantage/vulnerability
- Where disadvantage / vulnerability can be sufficiently addressed by the presence of legal support
- Vulnerable clients, power imbalance, issues better resolved by clients rather than court
- Any matter where a party is vulnerable because of mental health/disability/language/income is suitable
- Beneficial for some people from CALD communities because it gives them greater access to justice and involvement with the system
- Vulnerable clients are suitable
- Clients with language barriers are suitable
- Aboriginal clients are suitable
• Clients with a disability are suitable
• Clients who are homeless or living in a refuge are suitable
• Clients suffering from substance abuse are suitable
• Matters where one parent is in prison or in a rehabilitation facility are suitable
• Clients where one or both parents are young are suitable.

**Domestic / Family Violence**
• There may have been some family violence in the past.. (but).. it is not current – are suitable
• Disclosure of domestic violence is not suitable
• Parties do not have any concerns as to violence or abuse
• No violence or DV issues or sexual abuse allegations are suitable
• No history of violence and intimidation are suitable
• Matters where family violence is not an issues, nor drug/alcohol issues may be suitable
• Mostly resolvable issues, but I had seemingly unresolvable matters that settled / resolved even with the sad situation of family violence.

**Emotional issues**
• Less emotional issues to overcome as a result of the break up are suitable.

**Empathy**
• The capacity to see another’s point of view is required
• Desire to focus on needs of each party and children is required.

**Equality**
• Both can comfortably negotiate with each other
• Equality of status
• Equality of bargaining power even with lawyer present
• Balance of skills for the clients
• Both parties are on an equal ‘playing field’
• Where topics of discussion can be agreed and both parties can provide instructions without fear.
Expectations of clients
- One party has unrealistic expectations about the outcome may be suitable.

Facilitator’s skills
- Most matters are suitable provided the facilitator is skilled and there is little or no intimidation between parties
- View as to the professional expertise of the proposed FDR practitioner is a selection criterion
- Capable and cost effective FDR practitioner is another requisite criterion.

Finances
- Parties with limited financial means are suitable
- Low income earning parties that are recently separated and need a simple and inexpensive resolution of their parenting and/or property matters are suitable for FDR through FRCs. CP can be suitable for slightly more complex matters involving clients looking towards a sensible solution, being an alternative to costly and emotionally involved litigation.
- Combination of both economic factors and merit is considered.

Flexibility
- Flexibility of clients and willingness to want to resolve a dispute.

Funding
- To reduce waiting lists, pay lawyers to attend and bring all FDR services together.

Goodwill and respect
- Goodwill and respect between the parties is required.

Information
- Exchange of financial statements in property matters before FDR is good practice.

Issues in dispute
- Agreement that number of issues in dispute is limited and/or parties not being far apart regarding their respective positions signal suitability.
**Lawyers**
- Willingness to assist in a collaborative way and not be ‘defensive’
- Reasonability (sic) /skill /experience of the legal practitioner representing the other party
- In cases where the opposing lawyer may be resisting direct negotiations due to inexperience or lack of expertise.

**Legal advice**
- Parties have had legal advice, and are concerned to use a legal framework for their settlement, as an alternative to litigation
- Parties have a relationship with their lawyer prior to the FDR and have had the benefit of some preliminary legal advice.

**Legal Issues**
- Complex issues are suitable
- Complex legal issues, including relocation questions are also suitable.

**Litigation**
- Both parties do not want to litigate is a selection criterion
- Matter not one where one or both of the parties are focussed on winning or getting back at the other party is preferred.

**Mental health issues**
- Not suitable where mental health type issues are at play
- Clients who have a mental illness can be suitable.

**Motivation**
- All parties and lawyers are genuinely motivated to reach a conclusion indicates suitability.

**Parenting issues**
- Sensitive parenting matters are not suitable unless the mediator is highly experienced, the parties and solicitors are cooperative and there are no allegations of abuse.
**Power**
- Not suitable if there is a ‘history’ in the relationship that would indicate that the parties are not on ‘even’ playing field
- Process not to be used to abuse or control one party
- No allegations of abuse or power imbalance required
- No allegations of ‘obvious power-play’ by a party indicates suitability
- Imbalance that can be sufficiently addressed by the presence of legal support is acceptable
- Where there is a power imbalance, or emotion clouds the issues to the extent that any consensus is unlikely, but the parties need the joint resources and disciplines of legally assisted FDR/CP
- Where one party is self-represented, there is a strong chance that, he/she is the party who has been dominant in the relationship & now is not the time to expect the other party to have remarkable skills to handle a domineering person. So, even where one party is self-represented, the other party should be able to have legal representation, IF it is considered that FDR is likely to be useful.

**Prior use of FDR**
- If this is the party’s 2nd, 3rd, 4th FDR and no agreement has been reached, then it may be suitable.

**Property matters**
- Small pools of assets are suitable.

**Realistic**
- Realistic approach of clients signal suitability
- Where one party has unrealistic expectation someone that can evaluate how the court would decide the matter is useful.

**Revenge**
- Where revenge or retribution is not the driving force behind a party’s conduct.
**Sexual assault**
- Sexual assault and child sexual assault cannot be seen to ever be suitable.

**Timeframe**
- Availability (of FDR) in timeframe and costing and the assistance of a lawyer being involved with the client throughout the process is a factor in relation to suitability.

**Values**
- Closely aligned values of the parties is suitable.
FINAL COMMENTS FROM RESPONDENTS
Question 22

Any further comments you would like to make with respect to the growth or evolution of practice between lawyers and other professionals who work with families would be very welcome.

To capture the scope of the vast amount of commentary that was given by fifty-two respondents only the topics have been identified here. The full text may need to be dealt with more minutely by the commissioning committee to obtain the benefit of all the views that were expressed.

These topics have been generally apparent in the comments of the respondents throughout the survey and given the consistency of reporting the author recommends that these are the systemic topics that need attention.
RECOMMENDATIONS
1. A need for interdisciplinary functions, education and interaction between the disciplines;

2. A need to address the tensions between the social science professions and the legal profession and to promote a better understanding of each other’s roles;

3. Drafting of valid and enforceable agreements in Family Law matters to be better understood;

4. Inclusion of property matters in the pre-filing regimes of FDR;

5. Closer liaison by FRCs with the legal profession to keep the lawyers up to date on FRC services and processes and to develop and build professional relationships;

6. Further training for practitioners in Collaborative Law;

7. More accurate and appropriate reference of clients to effective counselling support and supporting programs so that beneficial behavioural changes may occur;

8. Distribution of information about the work of Pathways groups and the achievements that have occurred in breaking down barriers between practitioners in the Family Law area;

9. The incorporation of social science research and learning into Family Law practice as a further positive development;

10. Understanding by other professionals of the valuable contribution and positive role of lawyers in Family Law matters;
11. Recognition that the benefits of the developments in this area are not only beneficial to clients but also an enormous benefit for lawyers and other professionals who work with families;

12. The need for an ongoing collaboration and communication between the lawyers and the other professionals to keep both groups abreast of accurate and up-to-date information available to each group;

13. Development of local / regional inter-agency, referral and assistance programs;

14. Development of process and practice consistency between service providers so that there is more role certainty for lawyers;

15. Improved working together of the professions to assist the clients in resolving their matters;

16. Joint / mutual training session, seminars, events and conferences for lawyers, social scientists, counsellors and FDRPs so there are mutual exchanges of views and perspectives;

17. Involvement and availability of more mental health professionals at all steps of the FDR and Court process;

18. Further development of Interdisciplinary Collaborative Practice;

19. An education program amongst Family Lawyers about Collaborative Law to overcome some of the alarming misconceptions that some respondents appear to have formed about the process;

20. Consideration of including the role of the ICL in FDR.
REFERENCES


ANNEXURES

Tables 1 - 4.
Question 6: In your experience, when do your clients reach settlement?

Tables 5 – 8.
Question 7: How do you gauge your satisfaction with a settlement outcome?
Question 16: Besides Court Advocacy, what other professional process training have you done?

Question 19: How many Collaborative Law Cases have you participated in?

Question 20: How confidently could you explain the roles of the following professionals?
Question 6: In your experience, when do your clients reach settlement?

Table 1
All Family Law Practitioners: Settlement

<table>
<thead>
<tr>
<th>Question</th>
<th>Never</th>
<th>Rarely</th>
<th>Sometimes</th>
<th>Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor in any legal/dispute resolution process or commencing clients...</td>
<td></td>
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<tr>
<td>During a traditional lawyer/lawyer negotiation (i.e., lawyer vs. advocate)...</td>
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<tr>
<td>During a collaborative process prior to filing...</td>
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<tr>
<td>After a facilitated dispute resolution negotiations after court proceedings...</td>
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<tr>
<td>During a facilitated dispute resolution court proceedings...</td>
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<tr>
<td>During negotiations on the courthouse steps (e.g., the eve of trial or...</td>
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<tr>
<td>At a settlement negotiations/conference during an adjournment after a...</td>
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</tbody>
</table>
Table 2: Accredited Family Law Specialists: Settlement

Question 6: In your experience, when do your clients reach settlement?
Question 6: In your experience, when do your clients reach settlement?

Table 3: Non-Accredited Family Law Specialists: Settlement

- Never
- Rarely
- Sometimes
- Often
- Almost Always
Question 6: In your experience, when do your clients reach settlement?
Table 5

All Family Practitioners:

<table>
<thead>
<tr>
<th>Question 7: How do you gauge your satisfaction with a settlement outcome?</th>
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</thead>
<tbody>
<tr>
<td>Satisfaction</td>
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<tr>
<td>Not Important</td>
</tr>
<tr>
<td>Important</td>
</tr>
<tr>
<td>Highly Important</td>
</tr>
</tbody>
</table>

Legend:
- Orange bar: Important
- Blue bar: Highly Important
- Pink bar: Not Important
Question 7: How do you gauge your satisfaction with a settlement outcome?
Table 7

Non-accredited Family Law Specialists: Satisfaction

Question 7: How do you gauge your satisfaction with a settlement outcome?
Table 8
General Practitioners
(Family Law) : Satisfaction

---

Question 7: How do you gauge your satisfaction with a settlement outcome?

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Not Important</th>
<th>Important</th>
<th>Highly Important</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sometimes is within likely range of court order</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Outcome consistent with clients' expectations</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Process/ies used were suitable for client</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Process/ies used were suitable for all parties</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Cost of court proceedings were with minimal harm to client</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proportionate issues in dispute and ...</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 9
All Family Law Practitioners: Professional Process Training

<table>
<thead>
<tr>
<th>Professional Process Training</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest Based Negotiation</td>
<td>67.5%</td>
</tr>
<tr>
<td>Mediation Training</td>
<td>55%</td>
</tr>
<tr>
<td>Collaborative Law Training</td>
<td>42.5%</td>
</tr>
<tr>
<td>Collaborative Practice Training</td>
<td>42.5%</td>
</tr>
<tr>
<td>Legal Aid Conference</td>
<td>27.5%</td>
</tr>
<tr>
<td>Facilitation Training</td>
<td>25%</td>
</tr>
<tr>
<td>Arbitration Training</td>
<td>5%</td>
</tr>
<tr>
<td>Conflict Coaching</td>
<td>5%</td>
</tr>
<tr>
<td>Communication Skills</td>
<td>5%</td>
</tr>
<tr>
<td>Risk Management</td>
<td>0%</td>
</tr>
<tr>
<td>Counselling</td>
<td>0%</td>
</tr>
<tr>
<td>Studies in Social and Behavioural Sciences</td>
<td>0%</td>
</tr>
</tbody>
</table>

Question 16: Besides Court Advocacy, what other professional process training have you done?
Question 16: Besides Court Advocacy, what other professional process training have you done?
Table 11: Non-accredited Family Law Specialists: Professional Process Training

Question 16: Besides Court Advocacy, what other professional process training have you done?
Question 16: Besides Court Advocacy, what other professional process training have you done?

Table 12:
General Practitioners (Family Law): Professional Process Training

<table>
<thead>
<tr>
<th>Training</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advance Negotiation</td>
<td>35.0%</td>
</tr>
<tr>
<td>Interest Based Negotiation</td>
<td>15.0%</td>
</tr>
<tr>
<td>Mediation Training</td>
<td>10.0%</td>
</tr>
<tr>
<td>Collaborative Law Training</td>
<td>35.0%</td>
</tr>
<tr>
<td>Legal Aid Representing</td>
<td>0.0%</td>
</tr>
<tr>
<td>Alternative Dispute</td>
<td>5.0%</td>
</tr>
<tr>
<td>Resolution</td>
<td>10.0%</td>
</tr>
<tr>
<td>Mediation</td>
<td>10.0%</td>
</tr>
<tr>
<td>Collaboration</td>
<td>5.0%</td>
</tr>
<tr>
<td>Communication Skills</td>
<td>10.0%</td>
</tr>
<tr>
<td>Risk Management</td>
<td>10.0%</td>
</tr>
<tr>
<td>Stress Management</td>
<td>45.0%</td>
</tr>
<tr>
<td>Counseling</td>
<td>10.0%</td>
</tr>
<tr>
<td>Family Group Resolution</td>
<td>10.0%</td>
</tr>
</tbody>
</table>

Annexures
Table 13
Sydney CBD and Suburbs: Professional Process Training

Question 16: Besides Court Advocacy, what other professional process training have you done?
Table 14
Metropolitan and Regional Cities: Professional Process Training

<table>
<thead>
<tr>
<th>Professional Process Training</th>
<th>0</th>
<th>5</th>
<th>10</th>
<th>15</th>
<th>20</th>
<th>25</th>
<th>30</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advanced Negotiation Training in a Range of Negotiation Models</td>
<td></td>
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<tr>
<td>Interest Based Negotiation</td>
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<tr>
<td>Mediation Training</td>
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<tr>
<td>Collaboration Training</td>
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<tr>
<td>Collaborative Practice Training</td>
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<tr>
<td>Family Dispute Resolution Attorneys Training</td>
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<tr>
<td>Legal Aid Conterring</td>
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<tr>
<td>Facilitation</td>
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<tr>
<td>Conciliation Training</td>
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<tr>
<td>Arbitration</td>
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<tr>
<td>Conflict Coaching</td>
<td></td>
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<tr>
<td>Communication Skills</td>
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<tr>
<td>Risk Management</td>
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<td></td>
</tr>
<tr>
<td>Studies in Social and Behavioural Sciences</td>
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<tr>
<td>Counseling</td>
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</tr>
</tbody>
</table>

Question 16: Besides Court Advocacy, what other professional process training have you done?
Table 15
Rural Towns: Professional Process Training

Question 16: Besides Court Advocacy, what other professional process training have you done?

Legally Assisted Family Dispute Resolution ~ Annexures
Question 16: Besides Court Advocacy, what other professional process training have you done?
Question 16: Besides Court Advocacy, what other professional process training have you done?

Table 17
Practitioners with 10-19 Years Experience: Professional Process Training

- Advanced Negotiation Training
- Interpersonal Negotiation
- Mediation Training
- Collaborative Law Training
- Facilitation
- Conciliation Training
- Arbitration
- Conflict Coaching
- Communication Skills
- Stress Management
- Studies in Social and Behavioural Science
- Counselling
- 95 Legally Assisted Family Dispute Resolution

Annexures
Question 16: Besides Court Advocacy, what other professional process training have you done?
Table 19
Filter = Family Law Practitioners trained as Collaborative Lawyers (35 respondents).
Response total = 111 cases.
Question 20: How confidently could you explain the roles of the following professionals?
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Project Officer

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0400 919 098

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PO Box 285 Caringbah NSW 2229