



Resolution
Institute

Property (Relationships) Act Review

Submission from Resolution Institute

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Prepared by:

The New Zealand Committee, Resolution Institute
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About Resolution Institute

Resolution Institute is a vibrant community of mediators, arbitrators, adjudicators, restorative justice practitioners and other DR professionals. Created as a result of the integrations of LEADR with LEADR NZ in 2013 and with IAMA in 2014, we are a not-for-profit organisation with more than 4,000 members in Australia, New Zealand and the Asia Pacific region.

Resolution Institute has been training mediators in Australia and New Zealand for well over 20 years and has a well-recognised accreditation scheme for mediators. Resolution Institute mediation qualifications are also internationally recognised with Resolution Institute a Recognised Mediator Accreditation Body for accreditation under the National Mediator Accreditation System (NMAS) in Australia, and is also a Qualifying Assessment Programme for International Mediation Institute Accreditation.

In New Zealand, Resolution Institute is an Approved Dispute Resolution Body under the FDR Regulations 2013 and as such has responsibility for training and accreditation of Family Dispute Resolution Providers. Resolution Institute is also contracted by the Ministry of Justice for training and accreditation of restorative justice facilitators.

Our offices are in Wellington (New Zealand) and Sydney (Australia).

Why is Resolution Institute making a submission

Resolution Institute promotes the use of a range of high quality alternative dispute resolution approaches. When approaches are fit for purpose, alternative dispute resolution can be quicker, more cost effective, reduce or repair harm to relationships, and result in more enduring resolution.

A number of Resolution Institute mediators work in family dispute resolution, both as FDR mediators and as family lawyers. Resolution Institute has approximately 80 accredited Family Dispute Resolution Providers from around New Zealand. Resolution Institute notes that FDR often involves highly complex situations and is a highly skilled area of practice. Members report that there is an overlap between care of children and relationship property settlement, in that property issues often come up when considering issues of care of children.

Submissions

Resolution Institute's response focuses on the questions in the Law Commission's Issues Paper 41 under *Part H – Resolving property matters in and out of court*.

The term dispute resolution (DR) is used to refer to the range of 'out of court' dispute resolution approaches, such as mediation and arbitration, throughout this submission.

As a general comment we support the principle of the PRA that matter "should be resolved as inexpensively, simply, and speedily as is consistent with justice." We particularly support the advantages of out of court resolution listed at LC PRA Paper 23.8. We stro

We endorse the use of DR to:

- Support a more child centred approach to PRA matters (re LC PRA Paper, Part I)
- Respond to cultural needs generally including those of Maori and Pasifika (re LC PRA Paper 23.15-21, 26).

We advocate for greater promotion of the use of DR for resolving property matters, and for legislation and systems that support this.

H1: Is the current range of publicly available information about the PRA and options for resolving property matters sufficient? If not, where are the current gaps?

A range of publicly available information on the PRA exists as set out in the LC PRA Paper, however, our members report that the public do not find this information easy to access or understand. Improving the information available, particularly from MOJ sources, given that research shows this is often where the public look, (re LC Paper 24.5(a)) would assist people to understand their legal entitlements (re LC PRA Paper 23.14 (a)).

There is a gap in the provision of information particularly for those looking to resolve their PRA issues without the need for lawyers. This is of particular significance as most people with PRA issues fall into this category (re LC PRA Paper 23.31-23.35). Often the issues between the parties are not complex. This group and others would benefit from clear guidelines for likely outcomes and a user-friendly mechanism to identify the different pathways for resolution and likely costs, advantages and disadvantages and time associated with each route. This would assist the need for appropriate support (re LC PRA Paper 23.14(c)).

There is a gap in the provision of information regarding the options for resolving property matters out of court including information about the benefits of these methods and the effects of prolonged conflict on children (re LC PRA Paper 24.3). Improving this would increase the likelihood of these matters being resolved in a just and efficient manner. Improving the information available, particularly from MOJ sources (re LC PRA Paper 24.5(a)) would assist the public to understand the range of options available including the relative time, cost and other implications of each option. This information needs to be given in a timely manner (re LC Paper 23.14(d)) and at a level that enables parties to make a properly informed decision as to the most appropriate pathway forward for them. (ref FDR Centre submission). A further gap exists in the provision of information on the ways in which these out of court processes can meet cultural needs (re LC PRA Paper 23.21).

H2: If more information should be publicly available, who should be responsible for providing information, and in what form should this information be available (written/online/telephone)?

Who: Resolution Institute agrees with the comprehensive list of 'who' set out in the FDR Centre Submission. For ease of reference it is copied below in italics:

The FDR Centre submits:

- (a) information should be readily accessible online with printed materials also available from key locations;*
- (b) the following entities are best positioned to, and therefore should be primarily responsible for providing access to information:*
 - (i) Ministry of Justice;*
 - (ii) New Zealand Law Society;*
 - (iii) Family Court;*
 - (iv) lawyers;*
 - (v) accountants and financial advisers;*
 - (vi) dispute resolution services providers;*
 - (vii) Citizens Advice Bureau;*
 - (viii) Community Law Centres; and*

(ix) *Parenting Through Separation programme providers.*

What: A comprehensive list of ‘what’ is set out in the FDR Centre Submission. We concur with the FDR Centre’s submission and make the following comments:

To aid the ‘just and efficient’ resolution of these matters (re LC PRA Paper 23.14), information needs to be made available across all avenues including print, online, voice and social media. Ideally these sources of information would be backed up by Ministry of Justice/Family Court staff in situations when people need to speak to someone face to face.

Resolution Institute further submits that other approaches such as an automated phone service, an interactive avatar or online videos could serve a really useful function and assist access to justice by delivering information in a readily accessible way. An example of online videos that explain mediation are the NSW Department of Primary Industries farm debt mediation videos: <https://www.raa.nsw.gov.au/fdm/nsw-farm-debt-mediation-videos>

H3: Do you think there is a problem with access to affordable dispute resolution services for property matters in New Zealand?

Resolution Institute adopts the submissions made by the FDR Centre on this question. For ease of reference the FDR Centre submission is set out below in italics.

The FDR Centre submits:

- (a) *the question of affordability is really a function of the cost of the dispute resolution process (including the cost of taking legal advice and obtaining representation) of the value of the subject relationship property;*
- (b) *parties currently have access to affordable private dispute resolution services for relationship property disputes where the value of the relationship property is over \$50,000.00; and*
- (c) *where the value of relationship property is less than \$50,000.00, the cost of private dispute resolution services, together with the necessary legal advice in terms of section 21F of the PRA, may be cost prohibitive for many parties.*

It is of note that (in 2011) less than 10% of PRA cases in the Family Court involved property valued at less than \$100,000.00.¹ Rising property values and inflation in the intervening period would suggest that percentage figure might be considerably less in 2018.

Regardless, it is clear that a significant proportion of PRA cases involve property of substantial value. The countervailing position may be that those cases involving relationship property of relatively modest value simply never come before the courts because the time and cost involved makes it prohibitive for those parties concerned to engage in that process. In our view, that is an issue that is worthy of further consideration in the context of the review of the PRA.

H4: Do you think that FDR (Option 1) or another designated dispute resolution service (Option 2) should be available for resolving PRA matters?

Resolution Institute adopts the submissions made by the FDR Centre that an extension of the existing FDR service or a similar service should be available and funded or partially funded for disputes involving lower levels of relationship property. For ease of reference the FDR Centre submission is set out below in italics.

¹ Issues Paper, paragraph 23.26(b).

The FDR Centre submits:

- (a) An extension of the existing FDR service, or a similarly funded, speedy, and easily accessible dispute resolution process, should be available for resolving disputes concerning relationship property valued at less than \$100,000.00;
- (b) disputes involving relationship property valued at more than \$100,000.00 are capable of being (and currently are being) resolved by existing private dispute resolution services which provide parties with flexible, and time and cost-effective alternatives to the courts; and
- (c) there is no need for any other designated dispute resolution service to be made available or launched as a mandated service and to do so would undermine the autonomy of parties to opt for a process which best meets the needs of their individual circumstances.

The driver for the answer to this question is one of reasonable affordability ie, proportionality. The State has an important role in supporting people who cannot reasonably afford access to justice. The question that arises therefore, is: what is the threshold level below which private dispute resolution service providers are unable to offer an effective service such that the state should intervene to facilitate access to justice in respect of relationship property disputes? After all, the State is concerned to ensure that courts and State funded dispute resolution services are appropriately and proportionately used in accordance with the requirements of justice such that incurring cost unnecessarily, forgoing opportunities of consensual, self-determined dispute resolution and, to the broader community, consuming resources needlessly and unnecessarily is mitigated.

We suggest that \$50,000.00 is an appropriate threshold level, below which parties are unlikely to have the personal resources to meet the costs of any court or private dispute resolution service. Furthermore, taking into account the attendant legal advice required to be obtained, the cost of resolving the dispute is likely to represent a significant proportion of the value of the relationship property at issue.

In our experience, and consistent with the Ministry of Justice's 2011 Review of the Family Court, the majority of relationship property disputes (that FDR Centre administers) involve substantial assets, and highly complex factual and legal issues, which make these disputes unsuitable for an FDR-type process.

It is a matter of striking a balance between providing legal protection to those who require it, and ensuring parties retain the ability to adopt the dispute resolution service of their choice to the extent possible.

We propose one practical approach might be to extend the existing FDR service to provide for the resolution of relationship property disputes involving property valued at under \$100,000.00, on the basis that:

- the State funds the service where the dispute concerns relationship property valued at under \$50,000.00, including providing access to legal aid to ensure parties are properly apprised of their legal rights and obligations when engaging in that process; and
- the parties self-fund the service at a reasonable and appropriate set fee where the dispute concerns relationship property valued at between \$50,000.00 and \$100,000.00.

This would enable a relationship property dispute of relatively modest value to be dealt with in an inexpensive and speedy way, where the asset holdings of the parties making up the relationship property are unlikely to be held in complex structures, requiring high level disclosure and extensive evidence.

For disputes over \$100,000.00, there are already effective private dispute resolution services available to parties to relationship property disputes, in respect of which the costs are proportionate to the value of the relationship property involved. In these cases, market-forces operate to ensure the parties have access to efficient and effective services at a price point which is reasonable and proportionate to the value and complexity of the specific dispute.

Existing services – suitability and effectiveness

To meet the diverse needs of parties to relationship property disputes, the FDR Centre currently offers:

- Family Law Mediation;
- Family Law Arbitration; and
- Family Law Arb-Med.

These services are delivered by appropriately qualified and experienced dispute resolution practitioners, all of whom are experienced family lawyers or retired judges. We do not consider that relationship property disputes are amenable to being dealt with by persons without relevant legal training, expertise, and experience.²

Resolution Institute submits that it is the demonstration of sufficient understanding of the legal and other issues that is needed by the DR professional rather than a law degree. The issue of qualifications could be managed by panels of approved providers and or suppliers with minimum standards set by the Ministry of Justice.

It is important to recognise that one size does not fit all when it comes to family law dispute resolution processes. Three factors differentiate family law disputes from commercial disputes, namely:³

- *they typically involve intense emotions;*
- *parties almost certainly continue to relate to one another long after the dispute has been resolved; and*
- *parties need help rebuilding their relationships.*

Given the centrality of the relationship to the dispute, many relationship property disputes are successfully resolved by mediation.

Mediation has the potential to fundamentally improve society and how we view conflict. The process enables and empowers parties to work collaboratively and negotiate and resolve their dispute promptly, cost effectively, and confidentially rather than having a decision imposed upon them by a judge or arbitrator.

Mediation also enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.

However, in some cases mediation (or a mediation/FDR type process) may not be appropriate. For instance, where there are complex legal issues; or where a significant power imbalance exists because of information asymmetries; parties have different levels of confidence, education, emotional control, or financial support; or where one party has a history of being violent or intimidating towards the other party, including physical, emotional, financial, or economic abuse.⁴

Resolution Institute submits that adequate pre-mediation screening processes should be required to ensure that matters not appropriate for mediation are screened out.

In such cases, arbitration or an arb-med process may be more appropriate to ensure that there is structure to the information gathering and exchange process, and that a just, final, and binding decision is made.

As noted in the Issues Paper, arbitration may be perceived as being a more expensive option as compared to court as parties are required to pay the arbitrator's fee. However, in our experience arbitration can be significantly cheaper than court proceedings, as the process can be controlled with a final and binding award delivered within as short a time period as 45 working days.⁵ This leads to considerable cost (and time) savings for the parties and ensures that assets are not unduly tied up pending resolution of the relationship property dispute.

Delay in resolving relationship property disputes can also have a significant impact on any children to the relationship as well as the adult parties to the dispute. This impact may be financial and/or emotional and cannot be understated.

Resolution Institute notes that while it seems to be outside the scope of this review, consideration should be given to the connections between care of children resolution and property resolution. We

² *If the FDR process were to be extended to cover relationship property disputes, the qualifications, expertise, and experience of persons providing that element of the service would need to be carefully prescribed.*

³ *Failure to Flourish: How Law Undermines Family Relationships* Clare Huntington Oxford University Press 2014 at [84].

⁴ *Ministry of Justice Family Court Proceedings Reform Bill Departmental Report (April 2013) at [180].*

acknowledge there are sound reasons for separating these regimes, however note that often both regimes will have implications for a family and that co-ordination or linkage between regimes is key for the people involved.

H5: Should people with a property dispute under the PRA be required to attempt to resolve the dispute before going to court? If so, what steps should they be required to undertake?

Resolution Institute believes that parties should attempt to resolve disputes before going to court. Resolution Institute members had a range of views on making mediation or other attempts to resolve dispute mandatory before going to court however, noting that there are advantages and disadvantages of this.

We note that there are a range of approaches, including:

1. Compulsory mediation prior to commencing Court Action with some form of 'costs' penalty for lack of attendance or meaningful participation.
2. A screening process where the parties or their representatives need to adequately demonstrate why the matter is not suitable for mediation.
3. A requirement to meet with a mediator for an initial screening session to assess suitability and to provide comprehensive information on out of court approaches. The mediator could, whilst preserving a degree of confidentiality, independently report as to their perspective on the suitability of the matter for mediation having met with the parties.
4. A comprehensive certification process requiring those not willing to attend mediation to set out the exact steps taken to date including gaining information around legal claims and costs, advantages and disadvantages of the differing pathways and any attempt to resolve.
5. Court action may be commenced without formal mediation. Before a settlement conference is scheduled, an attempt at mediation must be made with some form of 'costs' penalty for lack of attendance or meaningful participation.

We believe that at a minimum parties should be strongly encouraged to attempt to resolve disputes before going to court and suggest that option 3 above would provide a way to ensure that informed consideration is given to out of court resolution.

H6: Should there be a duty on lawyers to provide their clients with information about the range of options for resolving property matters under the PRA out of court and the benefits of out of court resolution?

Resolution Institute submits a specific duty on lawyers to provide this information is necessary and ought to assist the just and efficient resolution of matters in this context (re LC PRA Paper 23.14).

H7: Do you think that there should be clear rules of disclosure for parties to follow when resolving property disputes out of court?

Resolution Institute submits that clear rules of disclosure are necessary and ought to assist the just and efficient resolution of matters in this context (re LC PRA Paper 23.14).

H8: Is legal reform needed to better enable parties to use collaborative law to resolve property disputes?

Resolution Institute endorses the use of Collaborative Law practices in this area. Legal reform to strengthen the standing of these practices and clear guidelines ought to assist the just and efficient resolution of matters in this context (re LC PRA Paper 23.14).

H9: Is legal reform needed to promote the use of family law arbitration as an alternative to court in property disputes?

Resolution Institute adopts the submissions made by the FDR Centre on this question. For ease of reference the FDR Centre submission is set out below in italics.

The FDR Centre submits:

- (a) legal reform is needed to better promote the use of Family Law Arbitration as a credible alternative to court in property disputes; and*
- (b) the PRA should expressly provide for the resolution of relationship property disputes by arbitration.*

Resolution Institute concurs with the comments made by the FDR Centre in respect to this submission. The PRA does not currently expressly provide for the use of arbitration. In our view, arbitration and the hybrid arb-med are useful and valid DR processes to offer to the public in PRA context; they add to the 'just and efficient' resolution of matters (re LC PRA Paper 23.14) and hence it is sensible to expressly provide for their use.

Summary

Resolution Institute advocates for strong promotion of a range of options for resolution of property matters. We believe that just and efficient resolution of property matters requires a range of accessible out of court options including mediation and arbitration. This will require:

- better information on the range of options
- funded access to out of court options for lower value property disputes

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