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Submission to the ALRC Enquiry into the Family Law System

The authors support the submissions
of AACP and VACP

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Parameters and basis of this submission

The submission is about the potential role for interdisciplinary collaborative practice (ICP) in family law, and addresses specific questions as framed by the Commission.

The authors of this submission are members of the International Academy of Collaborative Professionals (IACP) Victorian Association of Collaborative Professionals (VACP) and the Australian Association of Collaborative Professionals (AACP). The latter two organisations have made submissions to the Commission, which are supported by the authors. For that reason, this submission is limited in scope. It aims to provide the Commission with a description of the MELCA model of interdisciplinary collaborative practice which began in Melbourne in 2009 and has developed as an efficient, process driven, 5-Step model of practice. We address specific questions through the lens of ICP.

Importantly this submission provides data analysing 60 collaborative cases, and we believe is the only such Australian data available to the Commission.

MELCA

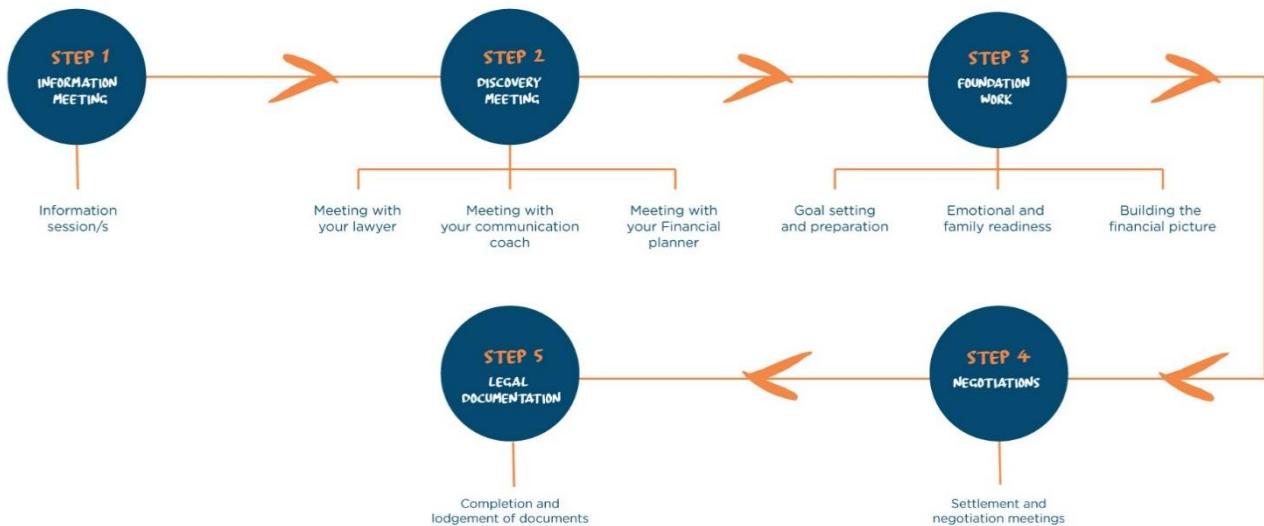
The authors are Tricia Peters MBA, MPAcc, CFP, Collaborative Practitioner, Mediator, Author, and Marguerite Picard LIB, B. Juris, Accredited Family Law Specialist, Arbitrator, Collaborative Practitioner, Mediator, Author, the Directors of Australian Collaborative Alliance Pty Ltd, trading as MELCA, a for-profit organisation. The organisation was founded by the directors in 2009, together with our colleague Dr Tina Sinclair, psychologist.

The functions of MELCA are:

1. Conducting ICP cases and mediation
2. Training collaborative practitioners
3. Running an ICP practice group
4. Research
5. Mentoring of ICP practitioners
6. Advocacy for ICP at state, national and international level
7. Participation in collaborative practice membership bodies, internationally, nationally and at state level.

The MELCA model

The model is a 5-Step process. Its unique features are its fixed pricing, case management, comprehensive interdisciplinary intake for couples, child inclusive work, clearly defined foundation work conducted by lawyers, psychologists and financial advisors, and an average of two negotiation meetings. The model is depicted in the diagram below.



An explainer video about the model in action can be found at

<https://www.youtube.com/watch?v=zRLnuKkoBbY>

Copies of 'Breaking Up Without Breaking Down' will be mailed to the ALRC

Influence and Achievement

The MELCA founders are the authors of "Breaking up Without Breaking Down" 2017, Sinclair, Peters, Picard, the creators of an ICP process explainer video (link), and have presented and taught the model in Victoria, South Australia, Western Australia, Tasmania, the United Kingdom, Canada, Germany, Austria, the United States.

MELCA has conducted several hundred collaborative cases, mostly ICP, and has produced the following research and analysis of the model using 60 recent cases.

Analysis of collaborative cases conducted by MELCA

Introduction

MELCA is working with RMIT School of Global, Urban and Social Studies in a joint research project to analyse the outcomes of collaborative practice and compare these with other family law dispute resolution processes. While this project is only in conception stage, the data that will be used in the initial phase of the research has been collected by MELCA. MELCA has collected data on 60 collaborative cases, nearly 100% of which were full team interdisciplinary cases. The information provided here is the initial analysis undertaken by MELCA which will be further verified and manipulated in the joint research. The couples in the sample are diverse across ages, length of marriage, number and ages of children, income and wealth and level of conflict. The analysis shows that the average cost per case is \$30,000, this is the all up cost to the couple (not for each person) for all professionals. The cases were ranked on a scale of 1-5 in terms of the level of conflict between the couple, 60% of the cases were ranked as low-level of conflict (scale 1-2), 12% moderate (scale 3) and 28% as moderately high to high conflict (scale 4-5). Anecdotally, none of the cases would have been able to resolve their settlement without assistance. Importantly, the owners of MELCA observation is that the collaborative process is a more positive experience for clients, one that at the very minimum does not increase their conflict and which sets them up to be the best separated family they can be. The collaborative process was successful in 95% of the completed cases and the average number of collaborative meetings to reach resolution was 2. Further analysis and detail from the data is provided below.

Success of collaborative cases

Of the 60 cases, 87% reached agreement on all aspects of their matter, 8% are still in process and are expected to finalise all agreements within the next 3 months. 5% of cases did not reach agreement on all matters and went on to other dispute resolution processes or did not continue with a settlement. MELCA knows of only 1 couple who went on to a court process to settle the remaining issues. An overview of the cases is provided in the table 1 below.

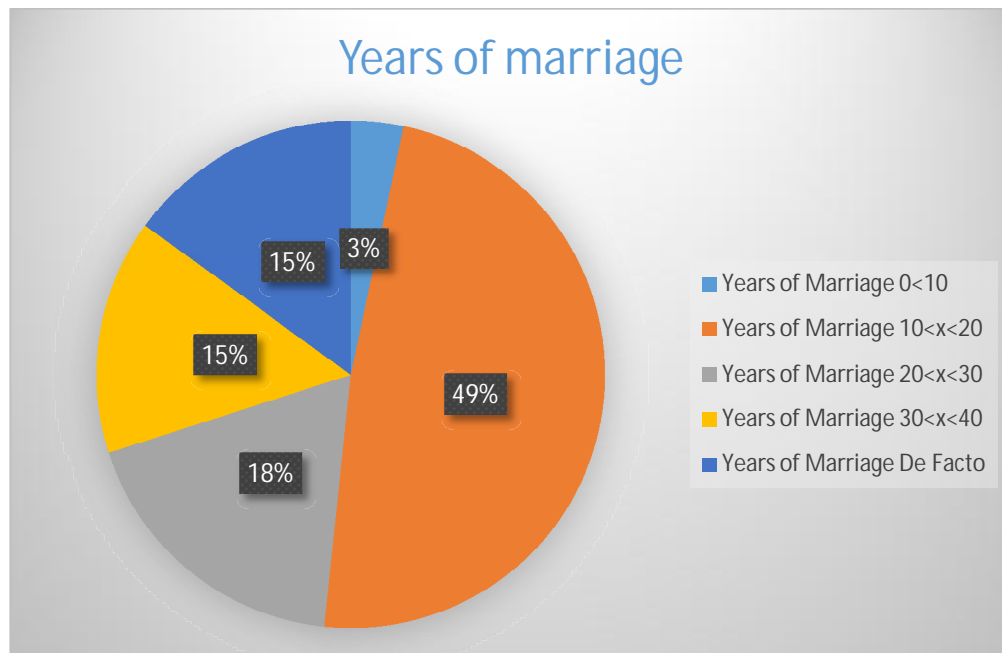
Table 1: Overview of collaborative cases

Total no of cases started	60	%
Completed cases	52	87%
Unsuccessful cases	3	5%
In Progress cases	5	8%

Length of marriage

The length of marriage of the couples in the sample range from 6 years to 35 years. Graph 1 shows the breakdown of the years. Nearly half (49%) of the couples had marriages of between 10-20 years and only 3% of marriages had been for less than 10 years. 33% of couples were in long relationships of over 20 years. The other 15% of couples were de facto couples and data on the length of their relationship has not been identified. The length of marriage for the participating couples is shown in Graph 1 below.

Graph 1: Years of Relationships



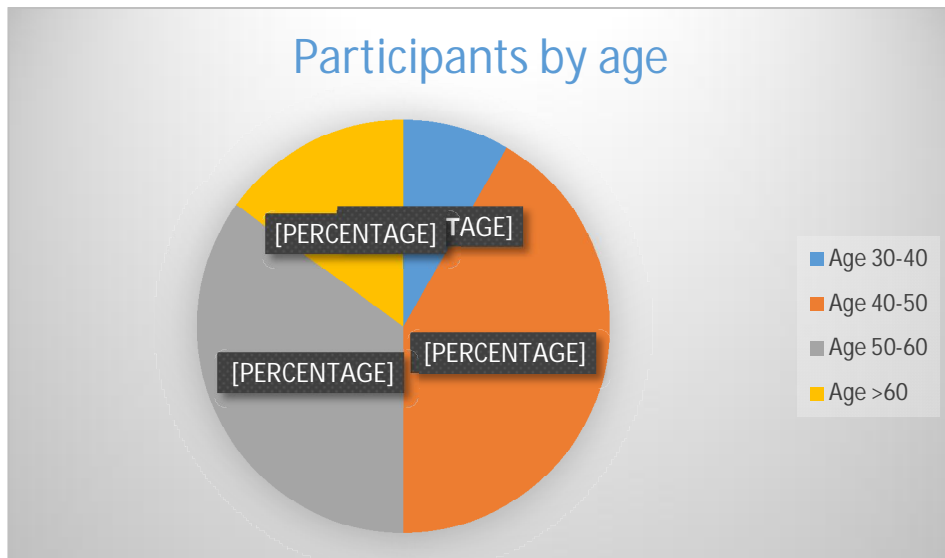
Age of participants

The ages of the individuals involved in the 60 cases ranged from 31-74. 42% of people were aged between 40-50 and 35% between 50-60. Ages 30-40 and 60-75 represent 8% and 15% respectively. Details of the age ranges are provided below in Table 2 and Graph 2.

Table 2: Age of the collaborative case participants

Age bracket	30-40	40-50	50-60	>60
No of participants	11	51	45	13

Graph 2: Age of collaborative case participants



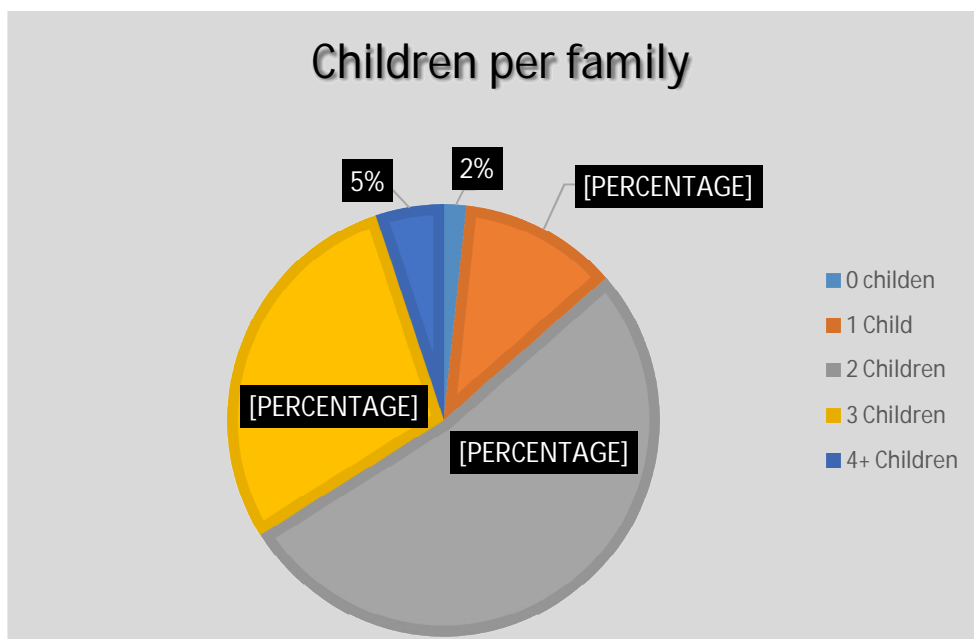
Family composition

Of the couples in the sample, all but one had children, 40 couples had children under age 18. 52% of the couples had 2 children, 34% had 3 or more children. Table 3 and Graph 3 below shows the breakdown of the number of children of the couples in the sample.

Table 3: No of children in the participant families

No of children per family	1	2	3	4+
Number of families	7	31	17	3

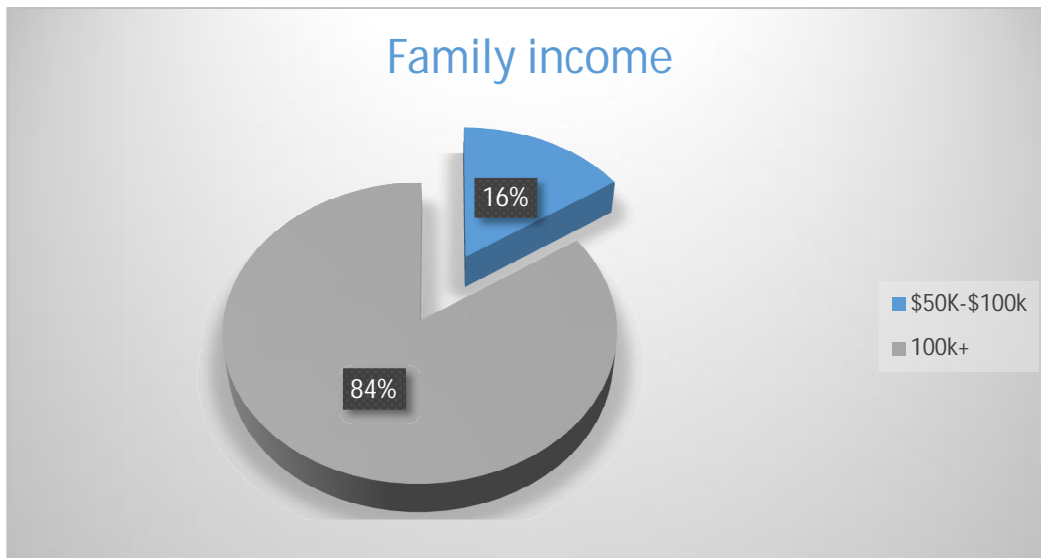
Graph 3: No of children in the participant families



Family income and wealth

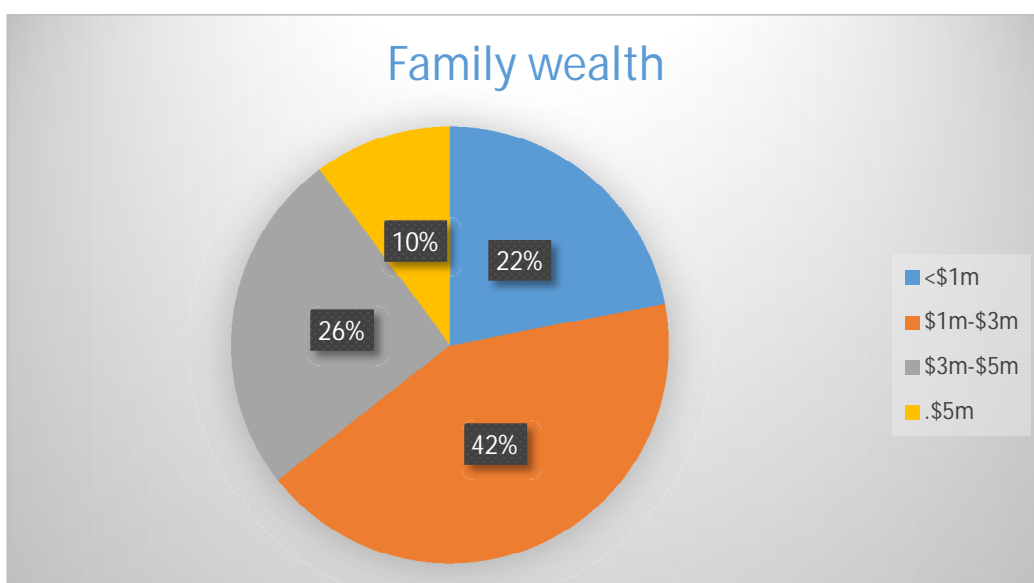
As might be expected for people who need to seek help to reach a financial settlement, the family income of 84% of the sample couples was greater than \$100,000. 16% of the families had income between \$50,000 and \$100,000. This is shown in Graph 3 below.

Graph 3: Family income



In terms of overall net family wealth, the range of net wealth (all assets, including superannuation minus all debts) was \$0.5m->\$10m. 68% of the participant families had wealth between \$1m-\$5m. 22% of the families had more modest wealth of less than \$1m. 22% of the families had more modest wealth of less than \$1m. 22% of the families had more modest wealth of less than \$1m.

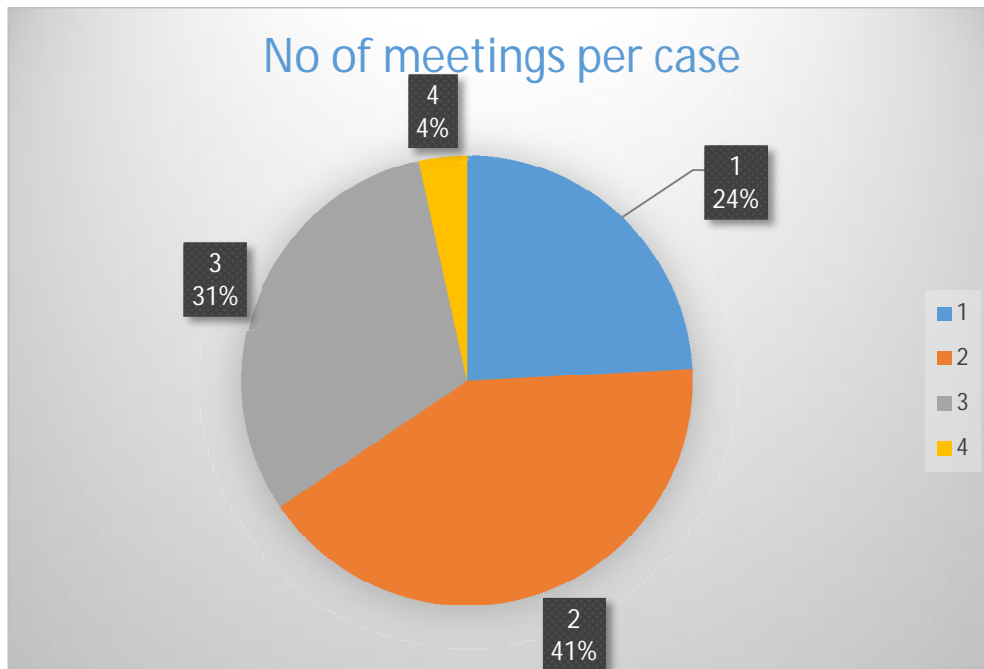
Graph 5: Family wealth



No of collaborative meetings

The number of collaborative meetings needed to reach resolution ranged from 1-4, with the average number of meetings being 2. MELCA has refined its processes and system over the years to prepare clients for their negotiations, emotionally, financially and legally. The process has reduced the number of collaborative meetings in recent times to 2 meetings in most cases, which has enabled MELCA to keep the costs to the clients down. Graph 6 below shows the details of the number of meetings.

Graph 6: No of collaborative meetings per case

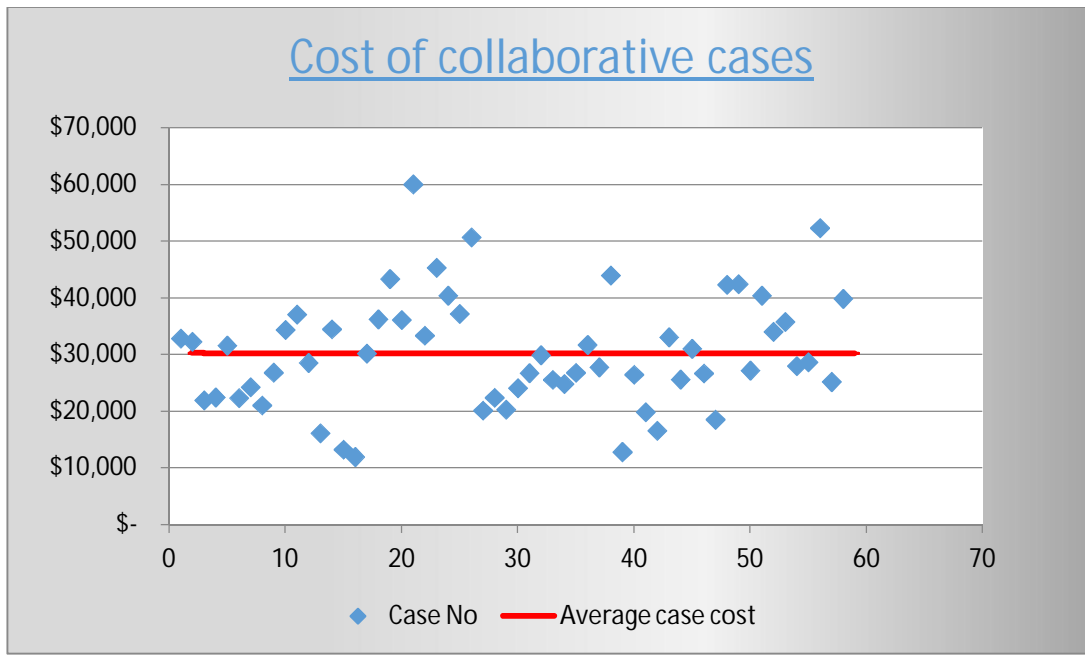


Cost of collaborative cases

There is a perception amongst legal practitioners and others that collaboration is a high cost alternative because of the number of professionals involved in the cases. This has not been the experience at MELCA where the process and system have been designed to have the most appropriate professional doing the work they are skilled to do at the right time in the process. The key aspects to keeping the cost down is to work with the clients to understand each other's perspective, to identify the drivers of conflict and assist the clients with their communication. While this work is done by all members of the team, the primary professional responsible for this work is the psychologist. The work of the financial planner also helps keep the costs down. By collecting financial information from a neutral and mutual place, the necessary financial data can be gathered by one person without the level of conflict that can arise when collected separately by opposing legal representatives. The other key to keeping costs down comes from the way the team works together to solve the issues based on the stated interests of the clients. The cost for each case has varied from \$10,000 to \$60,000 per couple, with the average cost being \$30,000. This includes the costs of all the professionals who worked on the case. In some cases, where a child expert was used, those costs were in addition to the cost of the collaboration. At this stage we have been unable to separate out those cases where the child expert costs were included in the costs in the data set and

where those costs were in addition. Graphs 7 shows the cost of the individual cases and the average cost per case.

Graph 7: Cost of collaborative cases



ALRC SUBMISSIONS PAPER - QUESTIONS

Submissions made by MELCA to the Questions put by the Commission as relevant to Interdisciplinary Collaborative Practice.

Objectives and principles

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

To provide safety, and to consider processes that see family separation as primarily an emotional crisis, with legal and financial consequences, rather than as fundamentally a legal problem to be solved by an adversarial process. The objective should be to offer families non-adversarial processes which are designed to do no further harm to families or the individuals within the family.

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

- *The guiding principles need to include self-determination, consensus building, preservations of a family although living in more than one household, cost effectiveness, future-focused agreements, and inclusion of the appropriate professionals to address the needs of any one family.*
- *Of these principles, we see the most significant as being the development of consensus building approaches and the movement away from adversarial systems for families. In this regard, we particularly adopt this following extract from the submission of the Victorian Association of Collaborative Professionals (VACP).*

FROM VACP SUBMISSION

ICP and Conflict

Litigation does not resolve interpersonal conflict. It escalates it. There is a deep debate, analysis and learning in the ADR community about the nature and resolution of conflict. It is the belief of the writers that adversarial approaches, whether or not formally within the court system, lack capacity to manage or resolve conflict. They ignore root causes and focus on presenting issues and behaviours. They miss the opportunity to educate couples about their own conflict and thereby miss the opportunity for learnings to be taken into subsequent (dysfunctional) relationships.

Resolving conflict as opposed to legal settlement approaches can be a cost effective early intervention. Conflict is known to create and extend the life of adversarial negotiations and litigation. The work of Bill Eddie and the High Conflict Institute has observed that in 80% of the few matters that reach final hearing (in the USA) one or both members of the couple is a high conflict personality potentially.

For this group and for others within the litigation system, it is a safe assumption that the presenting issues are underpinned by relational conflict, and it warrants examination as to how conflict management at an early stage might alter the conduct of these disputes. The early intervention opportunities of ICP have that capacity.

Resolution as distinct from “settlement”.

The definition of resolution can extend beyond merely ending a dispute to a deeper experience for individuals and couples.

Adversarial powers and approaches provide a safety net and are a foundation-stone. Adjudicators thereby end legal processes; they do not end interpersonal conflict or disputes. The opposite is true by definition. Adversarial approaches to problem-solving have unique characteristics which make them unsuitable for assisting most families to transition successfully into two households

The first consequence of an adversarial approach in family separation is to polarise the issues, and thereby the couple, or it deepens polarisation and encourages a binary analysis as opposed to the potential of creative problem solving.

It is the observation and experience of the writers that irreversible damage is done to a couple relationship once an adversarial approach is embarked upon. If that approach culminates in judicial decision-making that damage is even greater. This is not to ignore that the relationship of separating couples is already damaged, which in fact makes them more vulnerable to escalation that occurs within an adversarial process, it being a continuation of the couple dynamic. It is not a helpful intervention in many cases, and that kind of intervention is not what is required. ICP can provide intervention by engagement of the right team member at the right time.

The power of early Intervention

Early and pre-emptive consensus building approaches seek to acknowledge and arrest or minimise relational damage, which is impossible to achieve once a divisive debate is established. Fundamentally, a data-driven argument, judicially-determined, can rarely get to the heart of conflict. The skills of both social scientists and financial experts are often directed to expert testimony in the adversarial system. It is the submission of the writers that families stand to benefit from working mutually and constructively with these disciplines at an early stage, and that consideration be given to compulsory engagement with these professions to pre-empt disputes, narrow issues and de-escalate existing disputes.

It cannot be ignored that the lawyers who are engaged in litigated cases labour under the handicap of a single view of the conflict. They only ever meet one party to the dispute, and often have no objective view of the validity of that single perspective until there is no longer an opportunity to adjust for it.

The system is not built for lawyers to expect or need to do anything different. A lawyer’s lack of knowledge and objectivity about the history and nature of their client’s marital relationships, the relational dynamic and the personality or behaviour of the other party can have advantages in litigation. It allows for strong, partial advocacy for a client. It also has disadvantages in litigation. It can lead to a course of preparation and argument that increases costs and does not enhance outcomes. There can be unwarranted evidence-gathering and argument based on mistrust and suspicion, for example.

The writers believe there is a strong case for neutral social scientists to intake couples before litigation or at an early stage, to bring to each client and the lawyers, some education and understanding of the personalities, the dynamic and the conflict style of a couple to encourage the narrowing of the dispute, identification of settlement opportunities, or an early decision by the lawyers and the court to fast-track couples who are intractable.

We also believe that there is a role for the collection of financial data by neutral financial advisors or accountants, as a requirement in any family law process. This work is an area of inefficiency when conducted by lawyers, and in a climate of suspicion generates mistrust, duplication and expense.

ICP offers this opportunity.

Access and engagement

Question 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

Using ICP practitioners to reduce conflict by the provision of:

- couples counselling (with the usual exceptions for safety and mental health) for people to gain insight into their conflict style and relational dynamic, and to process the end of their relationship;*
- parent education prior to commencement of ADR or any other process, (including negotiation by correspondence between lawyers);*
- the appointment of neutral financial advisors to help couples understand budgets and children's needs to remove the emphasis from the formula to needs and financial capacity, and to collect financial information as to assets and liabilities;*
- assistance to find common ground and develop problem solving approaches; (building the future project not tearing down the possibilities)*
- the mandating of ICP in relation to Part VII and Part VIII matters, as a pre-action procedure;*
- training lawyers in ICP to move them to interest-based thinking and away from adversarial thinking.*

Legal principles in relation to parenting and property

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

- The authors take the view that opting into the legal system and the prescriptions of the Family Law Act and cases is, and should be, only one option for a separating person or couple.*
- Stronger requirements for the training of lawyers in interest-based negotiation, human behaviour and understanding of the value and range of pre-emptive opportunities and ADR options available for families.*
- Processes for assessing the advice given by lawyers to their clients about non-court based dispute resolution alternatives, and enforcement of those obligations.*
- The early engagement of families with child psychologists to educate parents about their children's needs arising from the separation, to meet children and bring their voice to the parents, to assist parents to separate out their negative feelings toward each other from the best interests of children, to act as an ongoing resource for the family.*
- Significant thought should be given to post-parenting Plan or Parenting Orders "Parent Co-Ordination" to avoid Parenting Plans breaking down and to avoid matters returning to the Court.*
- ICP provides an opportunity for these changes to become a reality.*

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

- *Despite the judicial debate about avoiding decisions based on “comparable cases” that is what lawyers use to advise their clients as to outcome. Consideration could be given to using Artificial Intelligence to determine a range, providing uniformity of advice and the reduction of hopeless, overly-optimistic or misguided cases entering the system. This might address “core” cases and exempt cases where issues of contributions or needs contain special complexity.*
- *The authors raise an issue about the use of the word “fairness” in this question. Our approach is that separating couples ought have greater input into what is considered “fair”. In an adversarial decision making, the law will favour one party over the other in relation to each issue, the aim of which is not “fairness” but assertion of the law. Looked at from the perspective of the couple, it is often the case that the consequences of applying the law is not fairness for one or both.*
- *ICP allows couples to explore settlement options that feel fair to them, but which do not start and finish with what the law says. ICP has the capacity to balance power, education and information differentials so discussions about “fairness” are meaningful.*

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

- *The utilisation of ICP and neutral Financial Advisors would give real information about financial needs, and reduce the number of cases where spousal maintenance is “capitalised” using a percentage of the asset pool as the measure, without regard to how that measures against actual needs.*
- *This is a gender and power issue, both of which can be addressed by ICP, and cannot be addressed adequately in any other process. Legal costs mean that issue of spousal maintenance cannot be litigated in most cases, and power imbalances added to cost, mean that spousal maintenance is often not able to be addressed and is “lost”. The disparity in wealth, five years after separation, is partly explained by inadequate spousal maintenance to women.*
- *Spousal maintenance cases regularly fail to acknowledge the value of earning potential to an income-earner who has received the non-financial support of a spouse partner during long relationships and relationships that have produced children.*
- *The realistic and future focus of ICP practitioners meaningfully addresses these issues and has the potential to bring about cultural change and reduction of the burden on the public purse of means tested pensions and benefits.*

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

- *Specifically in relation to pre-nuptial (Section 90B and Section 90UB) agreements, an ICP approach can deal with the difficult conversations about the reasons for the agreement, power and gender, by working with a psychologist or counsellor as a preliminary stage. The*

authors have considerable experience of this approach, which may result in more balanced agreements or abandonment of the concept.

- *In all other Financial Agreement, the ICP approach allows for reality testing, future proofing, looking at what is underneath the iceberg, and genuine “buy-in” from the signatories.*

Resolution and adjudication processes

Question 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

- *Pre-emptive and pre-action opportunities would be more effective than diversion after proceedings are on foot. However, once proceedings are on foot, diversion could be to ICP, mediation, work with neutral Financial Advisors, Psychologists, non-reportable work with child psychologists to address discrete issues or whole cases, with the ability to return to the list with priority.*

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

- *By seeing these cases as being in the domain of Financial Advisors not lawyers.*

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

- *By mandating such processes and the public education of end-users and referrers.*
- *In the observation of the authors, legislative support for, and government funding and promotion of mediation has created cultural change amongst Australian couples. Mediation should be seen as one of the options, but there should be awareness of the substantial difference in mediation models, and the same awareness of the opportunities provided by ICP should be developed.*
- *The interdisciplinary nature of ICP, and significantly the neutrality of the non-lawyer professionals, is unparalleled. ICP negotiation meetings are based on mediation principles, but have the advantage of two neutrals from different disciplines attending, as well as the integration of the lawyer role in the negotiation, not as an adjunct or a “before or after”.*
- *ICP, based on interdisciplinary intakes, is an early intervention or pre-emptive process. The concept of “mediating disputes” is unhelpful language for many couples. People are often ill informed, have made assumptions and are experiencing relational conflict, all of which highlight difference. They may look like they are in dispute. But our experience is that difference does not necessarily mean disputation. Difference can be addressed in ICP by early and neutral provision of information, neutral financial gathering and work to process the end of relationships and to bring insight into the dysfunctional dynamic of the couple.*

Professional skills and wellbeing

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

- *All professionals in the system, (law students too) should undertake education in human behaviour, to understand their own conflict style, emotional triggers and unconscious biases that are likely to increase conflict. That education would also allow client stories to be heard in the context of a relationship that has failed, and to be heard as one perspective only. All practitioners should have training in interest-based negotiation, and recommend it unless inappropriate for reasons of safety or lack of capacity.*

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

- *We need to alter the approach that places responsibility for wellbeing on the practitioners, and acknowledge that the adversarial system is responsible for much of the stress and loss of wellbeing experienced by all professionals involved in the system.*
- *Using ICP and other processes that manage interpersonal conflict, reducing its intensity and thereby the scope and dysfunction of many cases, would go some way to relieving stress on the practitioners. An adversarial system is antithetical to wellbeing when professionals are not only exposed but are active participants in conflict every day.*

Other matters

Screening for ADR

- The issue of screening, or intake, into ICP and ADR generally has been widely discussed in the ADR community. It is the view of the authors that screening out is not necessarily in the best interests of families. Screening in can address the safety, capacity and other needs of families, because of the range of professionals involved in comprehensive interdisciplinary intakes in the MELCA model.
- Our approach is to determine what supports are needed for people to successfully navigate their agreements, and to ensure the involvement of the appropriate professionals or services to support individuals and families.
- It remains a concern when families or individuals are screened out of ADR, as screening out does not guarantee they receive the support needed to address their issues. It effectively screens people into adversarial processes that are expensive, likely to increase conflict and to disadvantage the less empowered party, whether that disempowerment is to do with money, gender or information.

Arbitration

- Much has been said about arbitration as a form of ADR, or as an alternative to trials. It has important features.
- The burden of costs falls on the consumer rather than government, which is an economic advantage to government, but may limit access to justice.
- Arbitration is an adversarial process, and does not address concerns about the inappropriateness of adversarial approaches to family separation.
- Arbitration will occur only after significant compliance with the Act, court Rules and Regulations. It is only at the final stage that Arbitration departs from trial, which is the immediacy of hearing dates.
- It is argued that Arbitration might be a “procedural light” alternative to trials. If that is the case, it raises questions about streamlining court processes, and the necessity for the current burdensome procedures.
- Arbitration retains family separation in the domain of the legal profession and entrenches the concept of family separation as being a legal problem.
- It misses opportunities that ICP can offer in relation to conflict resolution, child inclusion, deep resolution and cost effectiveness.