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Dear Director

This submission will address Question 21, namely: 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?

In the task of answering this question this submission will take the following format: a summary of the main points of the submission will be presented first, followed by, a brief history of family dispute resolution (FDR) in Australian family law, then, arguments for and against lawyer assisted FDR will be explored. Finally, arguments advocating the increased government funding for lawyer assisted FDR will be presented.

## I MAIN POINTS

May it please the committee that we submit the following main points:

- i. FDR is now a compulsory requirement for potential litigants in Family Court proceedings.<sup>1,2</sup>
- ii. FDR is more likely to succeed when all professionals involved such as lawyers, mediators, family consultants and psychologists.
- iii. The primary benefits of lawyer assisted FDR include safeguarding the financial, emotional and reputational resources of the parties by avoiding litigation through a subjective approach that focuses on party self-determination and empowerment.<sup>3</sup>
- iv. Lawyers assisted FDR allows for their clients to have an active voice in mediation, while also having their rights protected.<sup>4</sup>
- v. A lack of judicial scrutiny may impose barriers to achieving successful mediation outcomes.<sup>5</sup>
- vi. This advocacy for a minimum pro bono target would be useful if the hours were utilised in the Australian family law system as a substitute for government funding.<sup>6</sup>
- vii. Given that there are complex issues intertwined within the family relationship breakdown, it as be advocated that allied health professionals such as phycologists and family therapists are better placed professionally to support a relationship and family breakdown.<sup>7</sup>

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<sup>1</sup> *Family Law Rules 2004* (Cth) r 1.05, sch 1(1)(a).

<sup>2</sup> *Family Law Act 1975* (Cth) s 4.

<sup>3</sup> Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation From Mediators at Victoria's Civil and Administrative Tribunal' (2014), 40 (3), *Monash University Law Review* 761.

<sup>4</sup> Tania Sourdin, *Alternative Dispute Resolution* (Thompson Reuters, 4<sup>th</sup> ed, 2012) ch 1.

<sup>5</sup> Richard Chisholm, 'Less Adversarial Proceedings in Children's Cases' (2007)(77) *Family Matters* 28.

<sup>6</sup> David Hillard, 'Towards a voluntary minimum pro bono target [Based on a paper presented at the National Pro Bono Conference (2nd: 2003: Sydney).]' (2004).

<sup>7</sup> Patricia Riley et al, 'Beyond law and ethics: An interdisciplinary course in family law and family therapy' (1997) 23(4) *Journal of marital and family therapy* 461.

## II A BRIEF HISTORY OF FDR IN AUSTRALIAN FAMILY LAW

The current innovations in Australian family law, known as the less adversarial trial, began with the *Apollo Programme* in the Sydney and Parramatta registries of the Family Court of Australia; and the *Responsive Model* in Melbourne. Parkinson notes that these reforms were aimed at reducing the adversarial nature of children's cases.<sup>8</sup>

## III FAMILY DISPUTE RESOLUTION

The primary benefits of family dispute resolution (FDR) include safeguarding the financial, emotional and reputational resources of the parties by avoiding litigation through a non-adversarial, subjective dispute settlement that focuses on party self-determination and empowerment.<sup>9</sup>

FDR is now a compulsory requirement for potential litigants in Family Court proceedings.<sup>10 11</sup> This requirement is assessed 'when an initiating application under s 601 of the *Family Law Act (1975) (Cth)*'. However, the applicant can apply to the court for an exemption. In cases where family violence is apparent the *Family Law Act 1975 (Cth)* provides for additional safeguards for the provision of FDR. This ensures that in these cases the parties must reassure the Court that 'they have received information from a family counsellor or FDR practitioner about the services and options available' to the parties in their circumstance.

The Federal Magistrates Court had not adopted the Family Courts procedures in adopting compulsory FDR. Chisolm strongly argues for its incorporation based upon its capabilities to do so.<sup>12</sup>

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<sup>8</sup> Patrick Parkinson, *Australian family law in context : commentary and materials* (2014). 8.200 and 8.205].

<sup>9</sup> Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation From Mediators at Victoria's Civil and Administrative Tribunal' (2014), 40 (3), *Monash University Law Review* 761.

<sup>10</sup> *Family Law Rules 2004 (Cth)* r 1.05, sch 1(1)(a).

<sup>11</sup> *Family Law Act 1975 (Cth)* s 4.

<sup>12</sup> Richard Chisolm, 'Less Adversarial Proceedings in Children's Cases' (2007)(77) *Family Matters* 28.

### III ARGUMENTS FOR LAWYER ASSISTED FDR

This submission asserts that lawyer assisted FDR can attain successful results for clients by facilitating the identification of the parties' interests and positions,<sup>13</sup> greater problem solving,<sup>14</sup> enhancing the full disclosure of information and early settlement of disputes, crystalizing the major issues of the dispute<sup>15</sup> and providing advice about the likely outcomes and costs of the proceedings.

Such benefits are illustrated by Kaspiew et al who argue that lawyer assisted FDR can actively support the best interests of the parties' children.<sup>16</sup> This is achieved by the provision of advice before and during the mediation process about the purposes of the *Family Law Act* and the potential disadvantages of litigation.<sup>17</sup> Further, lawyers can use their experience to recommend appropriate counseling services.<sup>18</sup> The lawyer should not oversimplify the issues in dispute.<sup>19</sup>

Reinforcing this point is Chisholm's and Marfarlane's argument that mediation is more effective and better supports the best interests of children due to its non-adversarial methodology<sup>20</sup> and encouragement of collaborative decision-making<sup>21</sup> which facilitates future focused discussion.<sup>22</sup> The non-adversarial approach can also assist the client to make informed decisions regarding the drafting of settlement offers, parenting plans and consent orders.<sup>23</sup> Riskin suggests that an adversarial approach may reduce party control and limit the effects of mediation.<sup>24</sup> However, for lawyer involvement in mediation to work effectively,

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<sup>13</sup> Law Council of Australia, *Guidelines for Parties in Mediations*, 3.

<sup>14</sup> *Ibid* (guideline 6.1).

<sup>15</sup> Menkel-Meadow Carrie 'The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does not Tell Us' (1985) *Missouri Journal of Dispute Resolution* 31-34.

<sup>16</sup> Rae Kaspiew et al, 'Evaluation of the 2006 family law reforms' (2009).

<sup>17</sup> *Ibid*.

<sup>18</sup> Law Council of Australia, *Guidelines for Parties in Mediations*.

<sup>19</sup> Menkel-Meadow Carrie 'The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does not Tell Us' (1985) *Missouri Journal of Dispute Resolution* 31-34.

<sup>20</sup> Richard Chisholm, 'Less Adversarial' Proceedings in Children's Cases' (2007)(77) *Family Matters* 28 [97].

<sup>21</sup> Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press, 2008) ch 1.

<sup>22</sup> Law Council of Australia, *Guidelines for Parties in Mediations*, 3.

<sup>23</sup> *Ibid*.

<sup>24</sup> Riskin Leonard 'Toward New Standards for the Neutral Lawyer in Mediation' (1984) 26 *Arizona Law Review*

both parties must be represented.<sup>25</sup>

In addition to safeguarding the best interests of children, Grillo argues that lawyer assisted ADR has the potential to mitigate issues resulting from significant power imbalances.<sup>26</sup>

The Australian Government commissioned Kaspiew et al to provide statistical analysis of FDR outcomes, the table below illustrates the modalities of contact for families who experience violence:<sup>27</sup>

| Reported Outcome   | Percent of respondents |
|--|------------------------|
| Had experienced physical violence and contacted a service provider or used counselling, mediation or FDR                       | 65                     |
| Reported having experienced emotional abuse alone and contacted a service provider or used counselling, mediation or FDR       | 60                     |
| Did not report experiencing violence or emotional abuse and contacted a service provider or used counselling, mediation or FDR | 33                     |

Accordingly, a lawyer's ability to mitigate a domestic violence perpetrator's ability to exercise and extend their control through the outcomes of the mediation and interactions with the victim is of fundamental importance.<sup>28</sup>

First, this can be achieved by the lawyer influencing the mediation model most appropriate for their client.<sup>29</sup> Field highlights that specific strategies are required to protect the interest and safety of victims of domestic violence who find themselves within the mediation context

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<sup>25</sup> Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation From Mediators at Victoria's Civil and Administrative Tribunal' (2014), 40 (3), *Monash University Law Review* 761.

<sup>26</sup> Goodman Ellen, 'Dispute Resolution in Family Law: Is 'Coniliatory Procedure' the Answer?' (1986-1987) 1 *Australian Journal of Family Law* 28.

<sup>27</sup> Rae Kaspiew et al, 'Evaluation of the 2006 family law reforms' (2009) [100].

<sup>28</sup> Field, Rachael 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who Are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal*.

<sup>29</sup> Jean Poitras, Arnaud Stimec and Jean-Francis Roberge, 'The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality' (2010) 26 *Negotiation Journal* 9.

with a decreased sense of self-empowerment and control.<sup>30</sup> Field argues that it is impossible for a victim to confidently assert themselves against a perpetrator and genuinely consent to any agreement reached with a perpetrator of domestic violence. In such circumstances, it may be appropriate for the lawyer to adopt the 'spokesperson model'. This approach is appropriate to overcome problems relating to economic, emotional, physical, psychological, status, language and informational barriers.<sup>31</sup> This representation may facilitate the ability of the party to assert themselves more confidently in the mediation process and to ensure 'genuine efforts' are made to attain a S60I certificate if desired.

Second, Lawyers can play a key role in assessing and determining what processes and which mediators are most suitable for their client after undertaking a personal assessment of their personality and family. This is of particular importance if it can be identified that a mediator may be bias towards a party due to a history of misogyny, violence or indifference to 'difficult' behaviour resulting from the victim's experience of violence.<sup>32</sup>

If no significant power imbalances are apparent, Douglas and Batagol argue that a lawyer should adopt a 'supportive participant approach'.<sup>33</sup> In so doing, the lawyer works with the client in preparation for the mediation and provides collaborative support throughout the process, by negotiating, drafting agreements, and providing flexible and active expert advice relating to a settlement proposal.<sup>34</sup> This approach allows for the client to have an active voice in mediation, while also having their rights protected through 'reality testing' the alternatives to settlement.<sup>35</sup>

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<sup>30</sup> Field, Rachael 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who Are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal*.

<sup>31</sup> Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation From Mediators at Victoria's Civil and Administrative Tribunal' (2014), 40 (3), *Monash University Law Review* 761.

<sup>32</sup> Field, Rachael 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who Are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal*.

<sup>33</sup> Law Council of Australia, *Guidelines for Parties in Mediations*, 3.

<sup>34</sup> *Ibid.*

<sup>35</sup> Tania Sourdin, *Alternative Dispute Resolution* (Thompson Reuters, 4<sup>th</sup> ed, 2012) ch 1.

#### IV STATISTICAL ANALYSIS REPRESENTING POOR OUTCOMES OF FDR

Rae Kaspiew et al use analysis of surveys conducted in the 2009 Evaluation of Family Law Reforms'. Within this report, the survey data indicates that, among parents from the first estimates that were gathered from a large representative survey in 2008, the following tables illustrate the outcomes within the subset who reported that they had completed FDR.<sup>36</sup>

##### Outcomes of families who completed FDR

| Reported Outcome   | Percent of respondents |
|--|------------------------|
| Reached an agreement   | 40                     |
| Did not reach an agreement but issued proceed to court certificate | 20                     |
| Did not reach an agreement and were not issued with a certificate  | 33                     |

##### Outcomes of mothers who reached an arrangement at FDR

| Reported Outcome                             | Percent of respondents |
|--|------------------------|
| Child spent increased time with mothers      | 11                     |
| Child spent increased time with father       | 43                     |
| Outcome was the same as before FDR commenced | 47                     |

<sup>36</sup> Rae Kaspiew et al, 'Evaluation of the 2006 family law reforms' (2009) [97].

Outcomes of Fathers who reached an arrangement at FDR

| Reported Outcome                             | Percent of respondents |
|--|------------------------|
| Child spent increased time with father       | 44                     |
| Child spent increased time with mothers      | 15                     |
| Outcome was the same as before FDR commenced | 41                     |

## V ADVOCATING AGAINST THE PROVISION OF GOVERNMENT FUNDING FOR LAWYER ASSISTED FDR

In support of the above analysis are the arguments presented by Chisholm in favour of a trial in front of a Judiciary.<sup>37</sup> When Chisholm advocates for a trial instead of dispute resolution he points towards the custom that the appearance in front of a judicial officer offers a better opportunity to discover the truth and to ascertain what each party has to say. Further, the litigation system 'appeals to liberal democratic notions in that it is for the individuals concerned, not the state, to investigate the matter'.<sup>38</sup>

In support of this appearance Chisholm suggests that 'it is easier for the judge to be impartial if the judge does not conduct an inquiry into the facts.' This is supported by his argument that<sup>39</sup> a judge's role in the adversary system is underpinned by their skills of impartiality, evidence assessment, administering procedural fairness, and their knowledge of the law. These factors ensure that the judicial process is properly administered and the spirit of family law is adhered to with the best interest of the child as the paramount consideration.<sup>40</sup>

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<sup>37</sup> Richard Chisholm, 'Less Adversarial Proceedings in Children's Cases' (2007)(77) *Family Matters* 28 [97].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* [28].

<sup>40</sup> *Ibid.*



*A. The Proposition for Pro bono as a Substitute for Government Funding.*

In 2002, Hillard advocated for an aspirational voluntary pro bono target of 50 hours per year in Australia. This was based on the then American Bar Associations Model Rules of Professional Conduct which prescribed 50 hours annually. In his advocacy, Hillard stressed that;<sup>41</sup> pro bono work did not substitute for legal aid funding, that any target was merely aspirational and was strictly voluntary 'with no sanction or penalty for noncompliance.' This advocacy for a minimum pro bono target would be useful if the hours were utilised in the Australian family law system as a substitute for legal aid.

*B. The use of psychologists and family consultants.*

There is a growing body of literature that purports the proposition that the legal profession is not the avenue to resolve family disputes and related matters, due to the complex issues intertwined within the family relationship breakdown. It submits that allied health professionals such as psychologists and family therapists are better placed professionally to support a relationship and family breakdown.<sup>42</sup>

The interaction between the legal profession and allied health is illustrated by Patricia Riley et al<sup>43</sup> 'the professions of family therapy and law share many clients and areas of overlap. Law-related coursework in family therapy programs is typically limited to legal, ethical, and professional issues.' This illustrates that other social sciences such as psychology are instrumental in providing assistance and support in the process of relationship breakdown.

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<sup>41</sup> David Hillard, 'Towards a voluntary minimum pro bono target [Based on a paper presented at the National Pro Bono Conference (2nd: 2003: Sydney).]' (2004).

<sup>42</sup> Patricia Riley et al, 'Beyond law and ethics: An interdisciplinary course in family law and family therapy' (1997) 23(4) *Journal of marital and family therapy* 461.

<sup>43</sup> *Ibid.*

## VI CONCLUSION

It is this submission's assertion that increased government funding for lawyer assisted FDR is beneficial to enable and encourage lawyers to become more actively involved in the FDR on behalf of their clients.

It is submitted that increased funding supports the primary benefits of FDR including safeguarding the financial, emotional and reputational resources of the parties by avoiding litigation through a subjective approach that focuses on party self-determination and empowerment. Additionally, lawyer assisted FDR allows for their clients to have an active voice in mediation, while also having their rights protected.

The benefits of increased government funding will also include safeguarding the best interests of children during FDR and protecting the safety of victims of domestic violence. This is to ensure that parties can make a decision in their best interests through the equalisation of power imbalances.

The primary benefits of increased government funding for lawyer assisted ADR overcome its potential shortcomings including a lack of judicial oversight.

## VII BIBLIOGRAPHY

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