

Australian Law Reform Commission

Review of the Family Law System

Discussion Paper 86

Submission

by Dr Maree Livermore

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Submission in response to ALRC Discussion Paper 86

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Introduction

There is an outstanding array of ideas for initiatives, interventions, programs, lists and services in IP48 and DP86. But these are currently not accountable or assessable against a specific overall structure or dynamic, or referable to identified policy objectives. They are currently, simply, *separate parts*--of a reformed family law system that has no cohesion or rationale as a whole.

It is understood that the likely current focus of the Review is to 'get ideas on the table'. I consider, however, that part of the menu of ideas under discussion should be the character and shape of the overall system. It is the entire institution of ordering for family law issues that is under question and for discussion here. That institution could look very different (or not) from its current condition.

I submit that the approach to family law system reform commenced in the ALRC review process would benefit from:

1. the definition of a policy objective(s), against which the value and relevance of specific service or structural ideas might be calibrated;
2. the adoption of a theoretical framework to guide design towards achievement of the objective; and
3. attendance to the development of a cohesive, workable family law system.

A new policy vision of the institution of the family law system as a whole, formed at this level of the discussion, would be a valuable contribution to the subsequent, more nuts-and-bolts processes. When it comes time to decide which of the 'parts' are affordable, and how all the parts can be made to work together efficiently, there might be basis in principle for decision-making. Especially in the context of cross-sectoral partnering as DP86 proposes, the dangers of fragmentation pose a significant threat.

Further again down the track, after implementation, a new vision for the system as a whole would facilitate the design of cross-system communications and processes. It would provide a basis for understanding of the operative programmatic and dials might be usefully tweaked to influence the specific behaviour within it. It would also provide a basis for evaluation.

My purpose in this very limited submission is to recommend a particular approach for an *objective* for system design, a *theoretical framework* and the bones of what might constitute a workable *holistic system* arising from the theoretical base.

Thank you for the opportunity to make this submission. I am sorry that such large ideas have received such short treatment. I would be pleased to elaborate or discuss further if this would assist.

Maree Livermore

Background to ‘responsive regulation’

I suggest that the derivation of a cohesive reformed family law system could be usefully considered from a 'responsive regulation' perspective. The responsive regulation framework is an approach to the design of regulatory interventions intended to influence behaviour in relation to identified public goods, originally proposed by Ayres and Braithwaite in 1992.¹ Its advantages, for present purposes, include:

- its capacity to harness and organise an escalating range of interventions;
- it assumes a preference for *self-regulation* by subjects, with the overriding principle being that regulatory arrangements should only be interventionist as necessary to achieve the policy goals;

The responsive regulation approach has been recently updated by work adapting it for public health policy goals² and to better serve policy goals that are less about obtaining compliance with rules and more about aspirational regulation, that is, to influence behaviour to serve social objectives.³

Operative definition of regulation

The broad definition of regulation by contemporary regulatory theorists is that it is about the ‘control, order or influence the behaviour of others’, about social ordering.⁴ The Australian family law system, with the *Family Law Act* at its heart, is plainly a system of regulation, with number of explicit policy objectives within it designed to control, order and influence the behaviour of people, not only in dispute in relation to their post-separation arrangements, but to promote broader 'pro-family' and parenting ideals.

Objectives

The most fundamental of these are set out explicitly as Objects in various Parts of the Act in itself. But clearly, as the Terms of Reference for the ALRC review⁵ reflect there are additional policy objectives in play, including, for example:

- "to ensure that the contemporary needs of families and individuals who need to have resort to the family law system are met”,
- to encourage “resolution of family disputes”,
- to relieve “the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction”, and

¹ Ayres, A. and Braithwaite, J. *Responsive Regulation: Transcending the deregulation debate* (OUP) 1992

² Reeve, B. Sydney Law School, *Legal Studies Research Paper No. 15/35*, Public Health and Responsive Regulation: A Theoretical Framework for Public Health Governance - The Food Pyramid Meets the Regulatory Pyramid: Responsive Regulation of Food Advertising to Children. May 2015

³ Ibid and Kolieb J. When to punish, when to persuade and when to reward: strengthening responsive regulation with the regulatory diamond. 2015 *MonashULawRw 6*

⁴ Parker, C., Scott, C., Lacey, N., & Braithwaite, J. (2004). *Regulating law*. Oxford, UK: Oxford University Press at 1,

⁵ Brandis QC. G. *Terms of Reference* in ALRC, Review of the Family Law System, DP 86, October 2018.

- to address the “jurisdictional intersection of the federal family law system and the state and territory child protection systems”¹.

For the purposes of this submission, the assumed objective of the Commonwealth is summarised as:

to resolve family disputes at the earliest opportunity and in the least costly and harmful manner while ensuring that the contemporary needs of families and individuals are met

I note that other stakeholders in the system—the community services sector for example—may have alternative objectives for the sector, for example, 'access to justice'. Individual litigants may have self-interested objectives.

Background to the responsive regulation approach

Contemporary regulatory theorists in the academy embrace a sociological perspective, arguing for less distinction between the regulatory activity of markets, the state, of other influential organisations and individuals, and as between notions of ‘private’ and ‘public’ regulation.⁶ The ‘new regulationists’ pluralist vision of regulatory governance encompasses not only a range of public and private actors attempting to influence outcomes, but a range of regulatory processes and strategies, exercised by them upon each other.⁷

In the family law context, this range of actors include the courts, the private legal profession, family dispute resolution (FDR) providers, the broader community sector, and of course the family law 'client'. Each of these stakeholders has their own set *agenda, values, drivers and objectives*. Each has their own *regulatory strategies* to try to influence the other players within the system such that they can realise the outcomes that they want. Each has their own set of *capacities* to leverage influence, and to prosecute an agenda. The challenge of the state in framing a regulatory instrument like the *Family Law Act* is to influence the balance of actors interacting upon each other -- that is, the family law system as a whole -- to deliver the outcomes that *it* wants, while acknowledging and working with the objectives, strategies and capacities of the relevant players.

'Responsive regulation' is one of the ‘new regulationist’ approaches that attempts to mediate this multiplayer, multimodal, multi-objective regulatory landscape. It organises regulatory approaches not on an either-or basis ('carrot and stick' or 'command and control') but as calibrated and escalated in response to the behaviour of the regulated subject.

The simple idea of the regulatory pyramid is at the heart of the concept. The pyramidal approach has self-regulation, with interventions such education and awareness-raising at its base, and with non-discretionary, and possibly punitive, command- and-control interventions at its peak. At the base levels of the pyramid, there is an assumption that the subject is a virtuous actor (that is, that subjects would comply with the requirements of a law if they understood the behaviour required and had capacity to comply). At the mid-levels it is assumed that the subject is a rational actor (that is, able to be persuaded or deterred). At the apex, it is assumed that the subject is irrational or

⁶ Scott, C. (2004). Regulation in the age of governance: The rise of the post-regulatory state. *The politics of regulation: Institutions and regulatory reforms for the age of governance* (pp. 145–174). Cheltenham, UK: Edward Elgar.

⁷ Burris, S., Wagenaar, A. C., Swanson, J., Ibrahim, J. K., Wood, J., & Mello, M. M. (2010). Making the case for laws that improve health: A framework for public health law research. *Milbank Quarterly*, 88(2), 169-210.

without capacity to comply. The presence of the "benign big guns"⁸ in the upper parts of the pyramid is pivotal to the effective operation of the escalating model at its lower levels.

Responsive regulation theory suggests that states should begin with regulation that is least intrusive on the individual, but reserve options to introduce more stringent controls where 'softer' measures fail. There is great appeal in the notion that persuasion will mostly always work, meaning that regulators can focus on the more collaborative and cheaper interventions *by harnessing the urge to self-regulate* to get the outcomes they want.

In the context of the state's objective in the family law system, where the goal is to resolve family disputes at the earliest opportunity and in the least costly and harmful manner while ensuring that the contemporary needs of families and individuals are met, this would equate with the provision of education, information and awareness-raising about the law and the system and its principles, to encourage early and private settlement. If this self-regulation is effective, and responsive regulation theory holds that it should be in the majority of cases, there is no need for further intervention. If it is not, the theory suggests that states move from pure self-regulation to 'enforced self-regulation'. In the family law context, this would equate with the mandated FDR regime in the event that people are unable to settle their disputes privately. Further up the pyramid again, if enforced self-regulation is not necessary and where parties are arguably more irrational or otherwise unable to exhibit behaviour that is consonant with the policy objective (to settle early), more 'command and control'-oriented interventions, such as occur at court, are necessary.

It is important is that the application of the regulatory regime is *responsive* to the behaviour of the subject, whilst the subject is at the same time receiving influence towards compliance, but only so much as is necessary, to realise the system objective.

It is also important that the system functions holistically, that escalation proceeds efficiently, without overlap, duplication or too many options. Subjects need to understand clearly what is at stake, and that more *is* at stake, if they don't choose to self-regulate towards the policy goal at a lower, more self-determining level of the pyramid. There must be cost involved in proceeding up through the levels, at the very least in personal autonomy. If this is not the case, subject behaviour within the system would become speculative ('if I don't succeed here, maybe I will in the next process'). It is also important, as a function of the responsive nature of the system, that de-escalation within the pyramid is possible.

In the Marrickville Legal Centre's submission ("the Marrickville submission") I have contributed ideas towards an integrated Family Hub/family court system model that is premised on these principles of responsive regulation. The response regulation pyramid representing the various levels of intervention is represented in Figure 1.

⁸ Braithwaite, J. *Regulatory Capitalism: How it works, Ideas for making it work better* (Edward Elgar, 2008) at 19.

A family law system in the responsive regulation framework

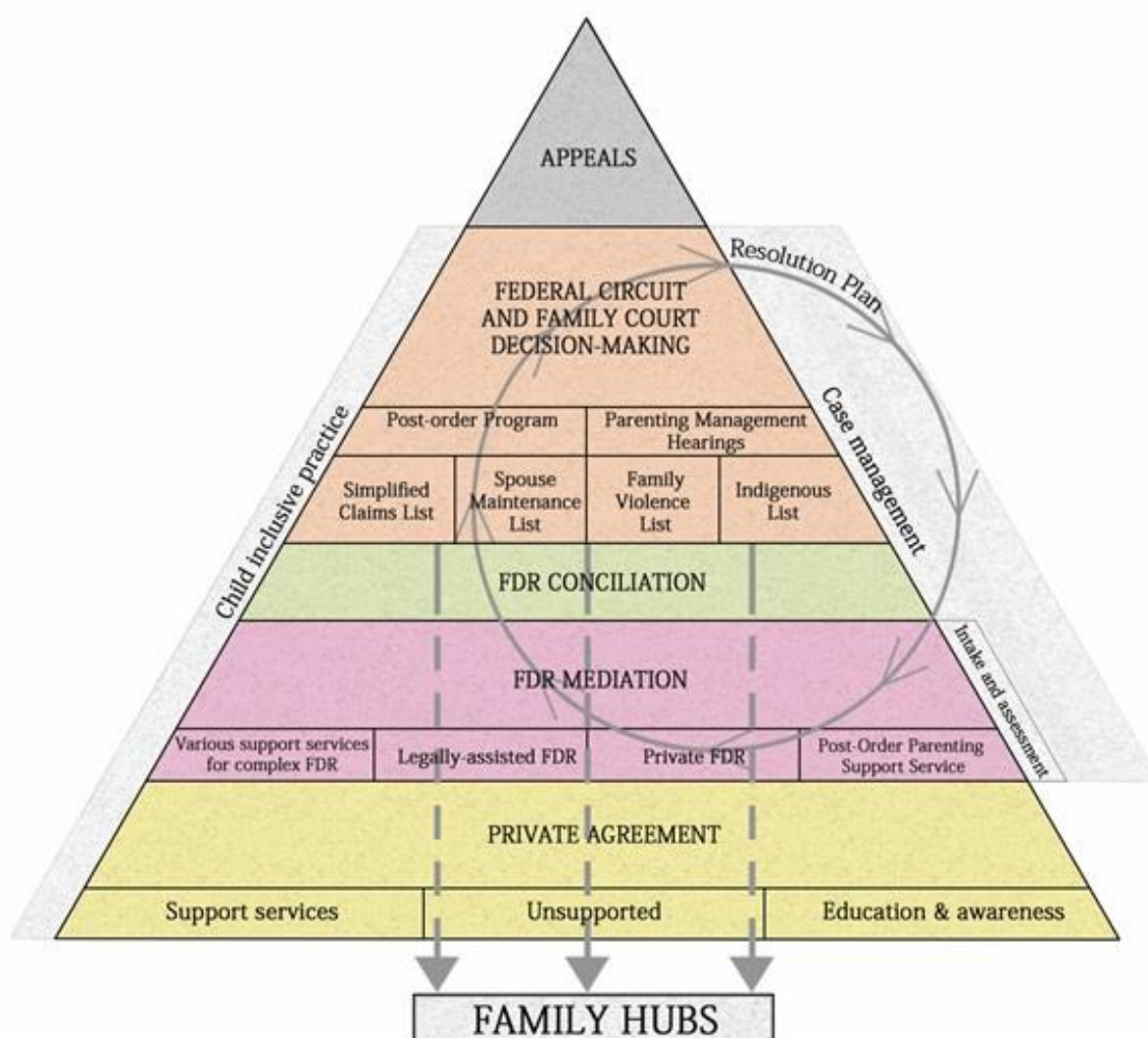


Figure 1: An integrated model of Family Hub and family court functionality.

Possible operational details and positive outcomes of an integrated Family Hub/family court system model are briefly outlined in the Marrickville submission. In the present submission, I only wish to highlight its features with reference to the responsive regulation theoretical framework. In very brief summary, these include:

- The reference objective for the system overall is: *to resolve family disputes at the earliest opportunity and in the least costly and harmful manner while ensuring that the contemporary needs of families and individuals are met.*
- The interventions at the base yellow level are the minimum sufficient to promote self-regulated behaviour that is consonant with the reference objective: at this level, privately-arranged agreement in relation to parenting and property arrangements. This might occur

without any reference to the family law system ('unsupported'). It might also occur after the client accesses support services (for example, an appointment at a community legal centre) or education, information or awareness-raising tools (for example, attending a Divorce Class).

- Pink level design assumes the 'failure' of the goal for self-regulated behaviour leading to private agreement on the issues after receiving yellow level support, signalling the need for escalation and the commencement of more structured interventions. Thus, at the entry to the pink level there is formal intake and assessment, formation of a 'resolution plan' and the introduction of case management. Pink level interventions themselves are more structured in form, with mandatory elements such as the requirement to undertake FDR mediation before proceeding further up the pyramid, but are not directive in content or outcome.
- In the event that clients of the system are not willing or able to meet the objective at the pink level, there is escalation, operatively through the resolution plan, to green level interventions. As discussed in the Marrickville submission, this level is represented by the newly proposed FDR conciliation functionality. It is proposed as 'the missing link' in the chain of graduated interventions. At this level, there is still self-regulatory discretion available to the client – the client is not compelled to abide by the suggestions of the conciliator and may opt to continue forward in the dispute. On the other hand, there is level of benign if non-authoritative direction introduced here into the content of the FDR – as the legally qualified conciliator speaks to the parties about the merits and demerits of their case -- that parties may choose to ignore at their peril (possible future cost). For the many parties in the family law system who would reach this level without having access to legal advice, *this might be the first objective reflection of the facts of their case in relation to the applicable law*. This is a functionality not present in the current system, and which I suggest, if instituted, would lead many additional parties towards pre-litigation settlement.
- It is noted that the pyramid is about interventions, not about enforcement or implementation. Elements such as consent orders and parenting plans are not represented here because they are outcomes-oriented, not interventions designed to support or influence behaviour.
- There is disincentive to need to progress up through the pyramid by virtue of the additional costs involved and the loss of the opportunity for self-determination.

As suggested in the Marrickville submission, I propose that all of the interventions in the green, pink and yellow levels should be performed and coordinated by Family Hubs. I propose further that case management of resolution plans by Family Hubs should continue as clients escalate into the litigious orange level. This is to facilitate the efficient iterative, cycling of parties around the pink, green and orange levels, as ordered by the court, if the de-escalation is seen to be workable and advisable. For example, parties reaching the orange level might be ordered to access specific Hub support services, or to 'try again' in FDR mediation and/or conciliation.