



Submission in response to Discussion Paper 86

Australian Law Reform Commission

Review of the Family Law System

Prepared by Dr Maree Livermore

Family law and family violence solicitor

Marrickville Legal Centre

Response to ALRC Discussion Paper 86

Marrickville Legal Centre

Education, Awareness and Information

Proposal 2–1 to 2-8 National education and awareness campaign

Marrickville Legal Centre (MLC) supports the provision of comprehensive family law system information.

We recognise, however, that the family law system has approached the task of improving understanding at several previous reform junctures. There have been attempts to effect parenting behaviour change by legislating for values of ‘cooperative parenting’, rules requiring family dispute resolution (FDR) practitioners and others to disseminate information about this, and a number of attempts to reform the court websites. We are not confident that these awareness-raising, attitude-changing projects have been effective. Further there is, currently, a large amount of family law information available on the web. Some of it inaccurate, some of it is partisan to political perspective, and some of it is very good. The court-provided internet-based materials are not optimised but much of it does a good job of explaining a very complex law and system.

It is our impression that many people don't want to engage with family law issues until they need to know about them. For many Australians not currently involved in separation or family disputing, even talk about family law is distasteful, threatening and anxiety-inducing. They don't like to think about it. They *resist* being informed about it. It is difficult to raise public awareness and understanding about issues that have such an effect.

Moreover, MLC is concerned about possible over-reliance on information-dissemination as a potential ‘cheap and cheerful’ policy panacea. Held in view of the balance of the proposals in DP86 currently, the information package take an appropriate place. If a balanced packaged of proposed reforms does not go forward, however, and yet the information package remains, this may not continue to be the case.

MLC, along with other community legal centres, leverage multiple referral relationships with police, domestic violence services, mental health services, refuges and another specialist providers. We are soon to formalise our first Health Justice Partnership with a local community mental health service. We appreciate the conceptualisation around health-harming legal need. What we have discovered, in fact, as a function of the exercise of these relationships, is a vast void of unmet legal need.

The problem is not in the networking and referrals. We have plenty of those, we know how to do them and we could make more. From them, however, we reach many more potential clients than we can possibly service. The real problem is in funded capacity to service the need. Pointing to issues of communication, networking, information provision and referral arrangements as a new pathway towards access to justice seems a little like policy deflection.

It is telling, also, that the policy direction here is for development of ‘an information package’. Although it is recognised that the package should not be ‘one-size-fits-all’ approach, the complexity of doing it in the multiple forms necessary does not appear to be recognised. Quite apart from the various language and cultural differences, and different types of disability, there are problems of digital literacy to address.

To answer the need, we believe there needs to be a policy about *community legal education* about family law, not simply an information policy. If there is genuine intention to educate the Australian public, in all its diversity, about family law, there should be strategic engagement of contemporary collaborative pedagogies appropriate for the range of demographic groups. This would involve e-learning technologies, the use of social media (and YouTube in particular), mobile device apps, and face-to-face teaching, involving role play and ‘collaborative problem solving’.

Many people do not learn readily through the availability of literature. Or even from literature that it compulsorily thrust upon them. Unless the education awareness policy invokes these more sophisticated educative techniques, we consider that the considerable funding that would be involved in preparing a new information package might be better spent on other policy initiatives.

3. Simpler and Clearer Legislation

Proposal 3–1 Simpler legislation

MLC enthusiastically supports the detail of Proposal 3.1. Family law drafting should reflect the capacity of its principal users, the people of Australia. Our family law should be understandable and usable by the people, not ‘done to’ them. ‘Simply and codify where possible’ should be the principal aim. If it is not possible to reduce the current state of the law to ‘black letter’ -- for example in the application of caselaw and by drawing specific fact examples – we suggest consideration of the development of a ‘Family Law Practice Guide’ that is regularly updated. See below, for example, the rationale for the How to Practice guide supporting the UK's *Mental Capacity Act 2005*.

*The Act covers a wide range of decisions and circumstances, but legislation alone is not the whole story. We have always recognised that the Act needs to be supported by practical guidance, and the Code of Practice is a key part of this. It explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners. ... A number of people will be under a formal duty to have regard to the Code: professionals and paid carers for example, or people acting as attorneys or as deputies appointed by the Court of Protection. But for many people, the most important relationships will be with the wide range of less formal carers, the close family and friends ... The Code is also here to provide help and guidance for them. It will be crucial to the Code's success that all those relying upon it have a document that is clear and that they can understand. The Code of Practice will be important in shaping the way the **Mental Capacity Act 2005** is put into practice. ¹*

Proposal 3.2. Forms

MLC strongly supports the revision of family law court forms.

¹ UK Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* Issued by the Lord Chancellor on 23 April 2007, Foreword

Notwithstanding larger policy issues, the fact that many people completing family law forms do not speak English needs to be observed and provided for. MLC assists clients every week who have poor or no English literacy to complete family law forms using onsite and telephone interpreters. The resourcing, accountability and evidentiary issues are problematic. We note that, at 3.28, the Law Council of Australia has specifically observed that the on-line interface should be available in languages other than English.

We reiterate our support for continuing availability of paper forms. Many people are unable to use, or have no access to more sophisticated digital and communications technology for on-line form completion. On the other hand, almost every client has a mobile phone. Focus on the development of mobile applications optimising form completion would be very useful.

We note, too, that not just forms but family law processes also should be redesigned. The procedures for completing an acceptable package of consent order documentation, for example, is outstandingly complex and technical.

There is a tremendous range of user-centred design expertise now available for professional assessment and re-design of such processes. The various law and justice systems in Australia have been slow to engage with these learnings. We consider that the family law system could choose to lead the way, realising enormous benefits in better systemic and individual outcomes.

Proposal 3.3 to 3.6 Simplifying decision-making about parenting arrangements

MLC enthusiastically endorses these proposals. We specifically endorse the list of six factors in the proposed reconfiguration of section 60CC.

In relation to paragraph 3.37, we consider that child psychological safety should be specifically mentioned. It is our experience that parties are unsure about whether protection from psychological harm is an acceptable consideration.

We refer to the suggestion at 3.42 that the amendment of the paramountcy principle to include considerations of safety will send a strong message to families. Respectfully, we do not agree that this will generally apply. The amendment of the paramountcy principle as described may assist decision-makers and service providers. It is our experience that families involved in family law disputing are usually not open to consider that their actions are harmful to their children, even when it is apparent that this is so.

In relation to the problems of comprehension of the notion of parental responsibility, we note that this problem did not exist in earlier years of the *Family Law Act* when there were defined concepts of guardianship, day-to-day parental responsibility and responsibility for ‘specific issues’. We are not suggesting a return to this but do support a more simple and explicit definition.

Proposal 3.8 Applying for new orders about children

We support the amendment of the Act to provide that parties can apply for new orders about parenting arrangements with leave. We support the codification of the principle in *Rice v Asplund*, as varied in *Marsden v Winch*.

Proposal 3.10 Property Division

MLC supports a more prescriptive or formulaic approach to the property settlement process. We are interested in the ADRAC proposal for a presumption-based approach to property division, but also in proposals that suggest a simple formula.

We do not see it as beyond the capacities of our talented lawmakers and judiciary to codify a set of principles or presumptions about property division to guide people attempting to help themselves through the process (as well as the FDR practitioners who also need more direction). To not provide this vital guidelight seems to us to reflect an excess of purist lawyerism. The majority of outcomes in property settlements land closely within a range, despite the vagaries of effect of the vast field of discretion, and confounding variables like initial and post-separation contributions, windfall, and short marriages. It should be possible to describe the method behind this, to assist people to be able to make a reasonable estimate of their own position under the law.

As things stand, people remain enormously disadvantaged in their capacity to privately order and settle even small estates in the opacity of four-step process. Even a rough estimation of ‘what this is worth to me’ is mostly not attainable from sources of free legal advice or others (who are attending appropriately to professional boundaries and their professional indemnity insurance obligations). There is a level almost of desperation evinced by our clients to discover what they can about the likely “percentages”. Unless they can afford to pay for advice and a long process of instruction, there is likely no one who will give them any reasonable idea at all until they commence litigation.

We agree that the address to section 75 factors should be rationalised.

We strongly support a form of codification of *Kennon*.

It is acknowledged that is probably beyond the capacity of many parties privately, or in FDR, to factor a range of the more complex elements of family law property (including considerations of domestic violence, superannuation, post and initial contributions, capital gain, inheritances and so forth). Nonetheless, their property negotiations proceed forthwith, and not within a framework that could be considered as ‘within the shadow of the law’. The principles relating to these matters should be explained, either in the law itself or perhaps in a practice guide. People need clearer guiding light about these matters that are so germane to their and their children’s futures. It is, in a sense, a denial of natural justice that the law on these fundamentals should be so opaque, and especially if we seek by through other policy to encourage early, private settlement.

As is suggested at 3.100, the case law covering the field of the discretion and the application of law in property matters is vast and arguably inconsistent. It is arguable that there is benefit in corraling case law development in any case.

If it is necessary to undertake research to formulate a set of simple principles and assumptions, and we do not accept that it is, the research should be commissioned immediately and tasked with an early delivery time. There is a massive data set readily available in the existing case law.

We note also the complexity of the process and formulation of property settlement by consent orders. Some investment in expert address to the crafting of workable, plain-English property

order precedents, along with effective human-centred user-experience design, would reap benefits for the system and for ordinary clients of the system.

MLC views reforms in the regime of property settlement within Australian family law as being amongst the most important and beneficial that might be achieved in this reform project.

Proposal 3-13 to 3-14 Debt

MLC supports codification of principles for treatment of debt as outlined by Caxton Legal Centre (reported at 3.128) with additional provision for financial abuse situations.

MLC has no confidence in the likelihood of effective voluntary industry action by the financial sector.

Proposal 3-15-3-17 Superannuation

It is our experience that women can be unenthusiastic about their rightful claims in regard to their partner's superannuation entitlement. In any case, we agree that superannuation splitting is currently altogether too difficult a process. We agree that readier access may be useful to assist a party experiencing hardship as a result of separation

Question 3-3 Binding financial agreements

MLC supports the removal of capacity for binding pre-nuptial agreements (BFA) from the family law system and for amendments for broadening the scope for setting an agreement aside.

We concur with Women's Legal Services Australia, as reported at 3.154, that BFA's are used against CALD women with little or no English or capacity to access their rights under Australian law.

Proposal 3-18 to 3-19

Question 3-4 Spousal maintenance

MLC agrees that spousal maintenance is not well-understood nor are entitlements to it nearly as frequently availed of as they should be. The matter is particularly important, as 3.165 identifies, for CALD women. We very strongly support the proposed measures for a dedicated spousal maintenance section of the Act, and on the naming of the effect of domestic violence as an impact on victim's capacity to support themselves.

We support any devolution of decision-making that facilitates and expedites urgent applications for spouse maintenance. The period directly after separation is a time of great hardship for many women and children.

By way particularly of demonstrating support and recognition of the needs of CALD women in the context of a multicultural Australia, we also support administrative assessment of longer-term spousal maintenance applications. The process of extraction of spousal maintenance from a party who is unwilling to pay it requires the longitudinal attention and investigatory and regulatory heft that an organisation such as the Child Support Agency is able to provide but that the court system is not. Arguably also, the expense of such administration would be offset by the appropriate

redistribution of support obligations that a functioning spousal maintenance (extraction!) system would provide.

We support also:

- codifying case law considerations
- merging married and de facto provisions
- introducing capacity to earn as a relevant criterion
- including family violence as a consideration
- streaming maintenance into a specific list, and particularly,
- acknowledging the particular issue of individuals on temporary or partner visas without any means of support.

4. Getting Advice and Support

Proposal 4-1 to 4-4

A single, integrated family law system

We agree with Caxton Legal Centre (at 4.9) that the overall system response needed is one that is “holistic and multidisciplinary—one that addresses both legal and psychosocial issues”. We like this vision particularly because it reflects the essence of our interest and concern in relation to the Hub idea. We consider that the approach to legal and psychosocial issues in the family law system must be truly ‘joined-up’-- not just as between service supports, but between coordinated service supports and the balance of the legal machinery. Our conceptualisation of the Family Hub ideal is larger than DP86 describes. Our specific vision is for integration of Family Hubs, FDR and court process in a single, holistic system.

We strongly support Proposals 4-1 to 4-4 and the concept of Family Hubs as a ‘one-stop shop’ with services available onsite, but also as a ‘first-stop shop’ – that is, as the first point of entry to the family law system as a whole.

Likely continuing pressure on courts without integration

It is MLC’s experience that clients routinely under-estimate and reduce the priority of satisfying their non-legal support needs at the time of separation. This may be because the legal needs are harder and more expensive to satisfy and yet are so crucial for ‘success’ in the current system.

If the authoritative legal function of the courts is conceptually ‘apart’ for the non-legal supports provided at the Family Hubs, respectfully, we do not agree that people will attend Family Hubs as conceptualised in DP86 – or, at least, that they will not attend and access the services provided there, in numbers that would result in the prevention, earlier resolution or non-escalation of disputes that would in turn amount to significant release of pressure on the family court system. Notwithstanding that the Hubs may offer useful support services, we expect that the adversarial priorities currently prevalent in post-separation disputing will mean that people would likely voluntarily access these services only marginally more than they currently do.

We understand that this Review is aiming for more fundamental and substantial institutional effect, that is “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 at the earliest opportunity and in the least costly and harmful manner”, to relieve “the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction” and to address the “jurisdictional intersection of the federal family law system and the state and territory child protection systems”.² Shuffling existing non-court-based services into a central location will not be sufficient for the shift in client behaviour required to achieve these objectives.

In our view, the objectives will not be achieved unless support and dispute resolution services are seen to be truly integrated with the balance of the decision-making system, and indeed, that entry to the system is possible, for the most part, only through the Hubs, whether or not clients voluntarily choose to avail themselves of the services available there.

We note that the absolute necessity of the integration of the law and non-law parts of the system was recognised in the Law Commission of Ontario’s formulation of the multidisciplinary, multifunction centres, as DP 86 notes, to provide “integrated entry points to Ontario’s family justice system” (at 4.18). The Commission recognised, as we do, that access to the authority of the court, in the hierarchy of needs of people with family law problems, may constitute a precondition for engagement for many people:

the court has an important role to play in the context of other forms of dispute resolution as the mechanism of final resort; many people might not willingly resolve their matters outside the court if the option ...of present[ing] their case to a court were not available.³

The Law Commission cited the importance of the operation of the Legal Aid Ontario’s Family Law Service Centre close to the Ontario Court of Justice and next door to the South Asian Legal Clinic of Ontario:

working independently but adding to the synergy of LAO’s one-stop resource for clients seeking information, support and legal services in the hub for all family law court matters in the Greater Toronto region.⁴

Thus, the Law Commission recognised the need not only for defragmented and joined-up support services, but a defragmented and joined-up family law system as a whole:

It is important therefore that these “entry points” be seen as gateways to the appropriate remedy and not a barrier when the most appropriate remedy is the intervention of the court. These entry points therefore need to be seen and understood as being integrated with the family justice system and not operating outside it. They should be seen as part of a larger family-related system.⁵

Use by care and protection?

By way of a possible adjunct advantage, we note that a truly rationalised, multidisciplinary Family Hub model is a potential source of linkage with the care and protection system. Many of the proposed services of the Family Hub would be utilisable in a more responsive care and protection system. Information management issues would need to be addressed and there would be

²Brandis QC. G. Terms of Reference in ALRC, Review of the Family Law System, DP 86, October 2018.

³ Law Commission of Ontario, Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity, Final Report (2013), pg 86

⁴ Ibid, pp 86.

⁵ Ibid, pp 87.

significant cultural differences between the two systems to overcome. Much would be gained, however, towards the stated goal of “improving jurisdictional intersection” between them, including systemic streamlining in intake, case management and service provision, cross-cultural benefits and potential cost-sharing and savings.

FRCs as a separate entity

MLC is not convinced on the retention of FRCs as a functioning entity-type separate from the Family Hubs. The Hub concept is a direct development from the FRC concept. The FRC’s intake and assessment systems and expertise, program design and management, and overall learnings over the years of their establishment to date is crucial to the development of successful Family Hubs. The public would be permanently confused by their coexistence, unless the FRCs were re-named and entirely re-branded.⁶ There would be funding and role diffusion, and functional overlap. The organisational layering would generate inefficiency. There is no real difference in the types of non-legal, non-FDR support currently being provided by FRCs and as proposed by Family Hubs. It makes more sense to leverage the considerable organisational systems, learning and people assets of FRCs towards the success of the new concept, to facilitate FRCs cultural and organisational development towards the more sophisticated Hub conceptualisation.

Need for a more directive level of family dispute resolution

Marrickville Legal Centre believes deeply in the extraordinary potential of coordinated community-based services working closely with government, through the Family Hub model, to deliver a better family law system. Maximising the opportunity, motivation and resources that people have to resolve their differences *privately* is without doubt the key to better outcomes -- for the people and the children, as well as the system. But this will not happen by ignoring the fact that the family law system is literally full of people who are in dispute, who are finding it difficult to stop disputing, and whose overweening concern is to continue to stand up for battle, notwithstanding how ragged or unprepared they may feel. In our view, providing a comprehensive happy-land of support services, divested from the authority of the balance of the system, will not be enough to distract them from this quest.

We refer to the text of a recent conversation with our staff solicitor Maree Livermore and our client, “Jarrod”, who has been involved as a self-represented litigant in parenting proceedings, in and out of the court, since 2010: ⁷

ML: You were saying before that it would be good if there was some sort of ‘wise person’ to help you guys settle things? What sort of person would that be?

J: Well, firstly, a peer. One of the things that bothers me is that the judge is, you know, like a ‘king’. And there are these unwritten rules about what you’re supposed to do and say, and stand, and sit. There’s just all this extra pressure. You know, we just don’t need this! We need someone who understands what the law is, who does have a solid foundation, and then mediating in a sense, letting people talk, but, also, who can come to a final decision on the basis of those conversations.

⁶ For all of the finer-points of the policy decision-making in the day, as described at paragraph ??, there was certainly much public discussion at the time of the origin of FRCs about FRCs being ‘one-stop shops’.

⁷ Edited transcript of conversation between Jarrod (name changed) and Maree Livermore, 12 November 2018.

ML: *[Speaks about system of justice, courts making final decisions] ...But what if you could have gone to a different sort of practitioner, who was maybe able to suggest solutions? Who was able to say to one or both of you: "Hey you're really barking up the wrong tree there. If you keep going in that direction, it's not going to work, and you won't succeed if it goes to court. You need to understand that the law is this and that, and that this is the arrangement that would work the best in accordance with the law, and that this is what I recommend that you should agree." If there was someone like that to turn to, would that have been useful?*

J: *Most definitely. An example, when we were in mediation...my ex didn't want to move to 50-50. So she's giving her reasons and these included: that one time she came over and there were three pizza boxes in the loungeroom; another one was she was concerned about was whether I could brush the kids' hair for school; and another one was one time she used the bathroom and there was some mould. So the mediator couldn't... the mediator was mediating! So, he couldn't say: "Hang on, those are not valid reasons to not have equal access, it's just not enough".*

ML: *So if I am understanding you correctly, you want there to be something between mediation and court-ordered results. Something more informal but more authoritative than we have now.*

J: *Absolutely. And also something more affordable.*

ML: *So when you say it should be a peer, what do you mean?*

J: *I just mean... just that, so I don't have to be intimidated by the person...yeah, things like that are really stressful. It just isn't helpful to have to worry about whether you have said 'your Honour enough'. Like, am I supposed to say it every sentence or just once and will I get in trouble if I don't?...*

ML: *So the current proposal is for Family Hubs... [describes DP86 Hub concept]. So if, say, you're describing another layer of practitioner between the mediator and the courts, should this person sit at court or at the Family Hub?*

J: *At the Hub. In a room. The problem with court, especially if you're inexperienced, is that the whole thing is completely daunting. I think it should be taken out of that context and put into a normal context – just a room with chairs and a table, so that it's easier, then, to deal with the real issues.*

The transcript reveals two experiences that we believe are common: 1. that family law litigants experience the authority of the legal system as stressful and unhelpful; and 2. that high-conflict couples may experience family dispute resolution, as it is currently largely provided, as providing inadequate authority and direction to enable them to come to resolution.

What is conciliation?

We suggest that the missing link in the range of interventions and supports coalesces in the notion of conciliation. Conciliation, as defined by the Resolution Institute, is:

a process in which parties to a dispute with the assistance of a neutral third party ('the Conciliator') identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role in regard to the content of the dispute or the outcome of its resolution, but not a determinative role. The Conciliator may advise on or determine the

*process of conciliation whereby resolution is attempted, and may make suggestions or give advice on terms of settlement.*⁸

Conciliation differs from mediation in the level of control of content and process held by the practitioner, and most particularly, *in their scope for being directive.*

*Conciliators could be regarded as belonging to the outcome and settlement end of the spectrum as ‘dealmakers’ in contrast to mediators at the other end, remaining client-centred regarding their self determination to settle and are considered ‘orchestrators’.*⁹

Conciliation models in other jurisdictions

Without the benefit of the opportunity or resources for extensive research, we note that there are models of conciliation in other jurisdictions that usefully inform thinking about what this revitalised level of FDR might look like.

There is wide variety in the potential types of practice that conciliation might involve.

*Conciliation, for example, can be used to refer to a range of processes used to resolve complaints and disputes including informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute, and also combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.*¹⁰

Conciliation is a practice well-known in other Australian jurisdictions, including in practice and procedure around unfair dismissals, human rights, administrative appeals, Workcover, residential tenancies, and planning and development. In many, if not all of these jurisdictions, the conciliation process mandated by legislation.

A slightly different, newer model of conciliation in common use in the US, UK and in Europe and currently gaining favour in Australia apparently,¹¹ is Early Neutral Evaluation (ENE). This ENE model presents an opportunity for dispute resolution and decision-making by the parties that is non-binding at the point of settlement, informal, with no fixed evidentiary or procedural rules other than as agreed between the parties in the ENE agreement and confidential. As in conciliation, the ENE structures a third-party’s objective input. The ‘Neutral’s’ role is to identify the main issues in dispute, discuss the strengths and weaknesses of the parties’ arguments, and to assist the parties to explore options for settlement. There is greater emphasis, however, on assessment of the merits of the respective claims, and provision of opinion on the likely outcome of the case in court. The model is currently applied in the jurisdiction of the AAT.

⁸ NADRAC, 2000, Alternative Dispute Resolution Definitions and viewed at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Appendix%20A.pdf> on 22 November 2018.

⁹ Meike and Brandon, 2008 *A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution* Vol 8 No 1 (QUTLJJ)

¹⁰ Ibid, at 195

¹¹ Ashurst, Blog post 29 September 2017 Accessed at <https://www.ashurst.com/en/news-and-insights/legal-updates/early-neutral-evaluation/> on 22 November, 2018.

History of conciliation in the family law system

‘Conciliation Conferences’ conducted in the family law system have been conducted for many years, and have contributed strongly through those years to the incidence of early settlement in litigious matters. In even earlier times, however, there was also ‘Conciliation Counselling’ available for parenting disputes.

The movement towards mediation, and away from conciliation model originated with the theoretical valorising of the principle of ‘voluntariness’ thought to empower the best possible outcomes. From an article by experienced court counsellors, Clarke and Davies, published in 1991 on the eve of the introduction of the new voluntary model of ‘mediation’:

5. USE OF CONCILIATION IN THE FAMILY COURT Conciliation is arguably the ADR process that is most available in the Family Court system. It has been practised in that court by Counsellors and Deputy Registrars since the court commenced operation in 1976. It is used in two distinct ways: (i) Order 24 Conferences in property and financial matters; and (ii) Conciliation Counselling in disputes involving children. The main distinctions between these two conciliation processes and mediation are that entry into the Family Court conciliation processes is not voluntary, but compulsory (and true mediation must be a voluntary process), and further, in conciliation, the third party makes concrete recommendations, as opposed to suggestions, concerning solutions. Conciliation is, therefore, less concerned with the empowerment of parties to reach their own conclusions. It is suggested that Jenny David's definition of conciliation is appropriate: "Entry into this process may be voluntary for the initiating party but is never voluntary for the responding party and may not be voluntary for the initiating party. The conciliator controls the process, and the conciliator and the parties control the outcome".

This should be contrasted with the elements of mediation already illustrated. Even Nicholson J., the Chief Justice of the Family Court of Australia, acknowledges this distinction between mediation and conciliation, and makes it clear that the former process will only be offered for the first time in mid-1991 as a court annexed programme. His Honour said that although it will have a number of the features of conciliation counselling, it will not be just a variation of what the court has been offering for the past 15 years. ' The proposed 1991 pilot projects to be situated at Melbourne, Dandenong and Parramatta NSW, will be based on a true mediation model, that is, entry into the process will be on a voluntary basis with no element of compulsion or imposition of agreement.¹²

From the point of the conduct of those pilots through to early years of the new millennium, the practice in mediation grew. Yet still, at the time the practice of mediation was formalised as ‘family dispute resolution’ in the early 2000s, the practice of both mediation and conciliation was considered as belonging on a spectrum, with best practice application to specific clients and circumstances, on a horses-for-courses basis.¹³ The definition of ‘family dispute resolution’ (at FLA s10F) has been, and still is, wide enough to encompass both modes of practice.

The vision for voluntarism was not realised however. With the advent of compulsory FDR in July 2007, voluntariness as a marker of FDR mediation in the family law system fell by the wayside. The existing model of FDR in parenting matters now differs from conciliation only in the

¹² Clarke, Gay R ; Davies, Iyla T -*ADR - Argument for and against use of the mediation process particularly in family and neighbourhood disputes*" [1991] QUTLawJl 6; (1991) 7 Queensland University of Technology Law Journal 81 at 3.

¹³ Brandon and Stodulka, *A Comparative Analysis Of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes* Vol 8 No 1 (2008): QUT Law & Justice Journal

requirement that the mediating FDRP cannot make suggestions or give direction on possible terms of settlement.

The incidence of the conduct of the conciliation mode by FDRPs outside the court system is now very low, and restricted to provision by relatively highly paid private lawyer/FDRPs specifically sought for this relatively rare type of service provision. Why did this shift towards the eradication of conciliation in FRCs, and in the larger system of FDR provision, occur? We think it likely that it arose from workforce capacity issues and associated insurance-related concerns in the charitable organisations and FRCs largely providing FDR. These organisations have traditionally not employed legally-qualified FDRPs.

A more flexible FDR practice for the future.

We submit that the family law system does not need to look beyond the menu of its current and previous alternative dispute resolution practices for directions that answer the challenges and objectives of the system in these and future times. As noted, the existing definition of family dispute resolution at s. 10F provides scope for the full range of practices from counselling, to mediation and to conciliation, as provided from a court base or by an external organisation. Existing accreditation rule and protocols for FDR practitioners are amenable to adjustment and accretion. The legal profession has demonstrated that it is ready and open for shifts in its practice towards participation in alternative dispute resolution methods.¹⁴

The family law system in its earliest years tried mandatory conciliation counselling for parenting matters with no mediation. In the early 2000s, it tried conciliation conferencing in court for property matters and at first voluntary but then soon compulsory mediation/conciliation in the private sphere for parenting. In more recent years, the practice of conciliation in FDR has fallen away in the private sphere. It is our view that it is time now to bring it back: *to provide the missing link of an authoritative, directive influence towards settlement*, though provided in the private sphere, and prior to the commencement of litigation.

A vision for a joined-up family law system integrating courts, FDR and family support services.

We outline at Figure 1. a possible model for the operation of the Family Hubs, and their relation to the court, in a fully integrated family law system. The proposal builds at its core from the conceptualisation of the Hubs as outlined in DP86, being local, multi-functional centres of support, providing a comprehensive suite of services to assist parties to resolve their issues without recourse to litigation. It enlarges from that vision with additional structural elements that integrate Hub and court processes more comprehensively, and which encourage and facilitate circularity rather than linearity of process towards resolution (which, in our view, supports and reflects the frequent experience of separating couples of an unfolding of understanding and changing circumstance over the first post-separation years).

The model is derived from the ‘responsive regulation’ approach¹⁵, which structures policy to influence subject behaviour to encourage self-regulation at the first level of engagement with a

¹⁴ Ryan, E. Article in the Lawyer’s Weekly, 28 August 2017 ‘Light bulb moment’ sees mediation specialists fill the gap.’ Accessed at <https://www.lawyersweekly.com.au/sme-law/21755-light-bulb-moment-sees-mediation-specialist-fill-the-gap> on 22 November 2018.

¹⁵ Ayres, J. and Braithwaite, J. *Responsive Regulation: Transcending the deregulation debate* (OUP) 1992

system, but then provides increasingly interventionist options, until the necessity for command-and-control, for relatively few subjects, is established at the top of the pyramid. For more detail on theory, we refer to the submission of Dr M. Livermore in response to DP86..

Our proposed model purposely integrates, and makes seamless, the operation of the Hubs and the courts within a regulatory pyramid that is focussed on the specific objective ‘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’.

It incorporates more structure and direction, if not discipline and authority, into the Hub concept--a reflection of the ‘wise person’ sought by our client Jarrad--while retaining access to all the existing proposed voluntary processes and supports, and encouragement for private resolution. This expanded notion of Family Hubs incorporates opportunities for FDR across the full spectrum of its forms, from counselling through to mediation and conciliation, with compulsoriness applying for both property and parenting matters.

Thus, in this system model, the Hubs and the court take on more of the character of each other, and become more useful to each other as a consequence. There is the one problem at core--the problem of humans disputing about money and children. It makes no sense to attempt to address the dynamics of that one problem in two diverse, disparate and unmeshed sub-systems.

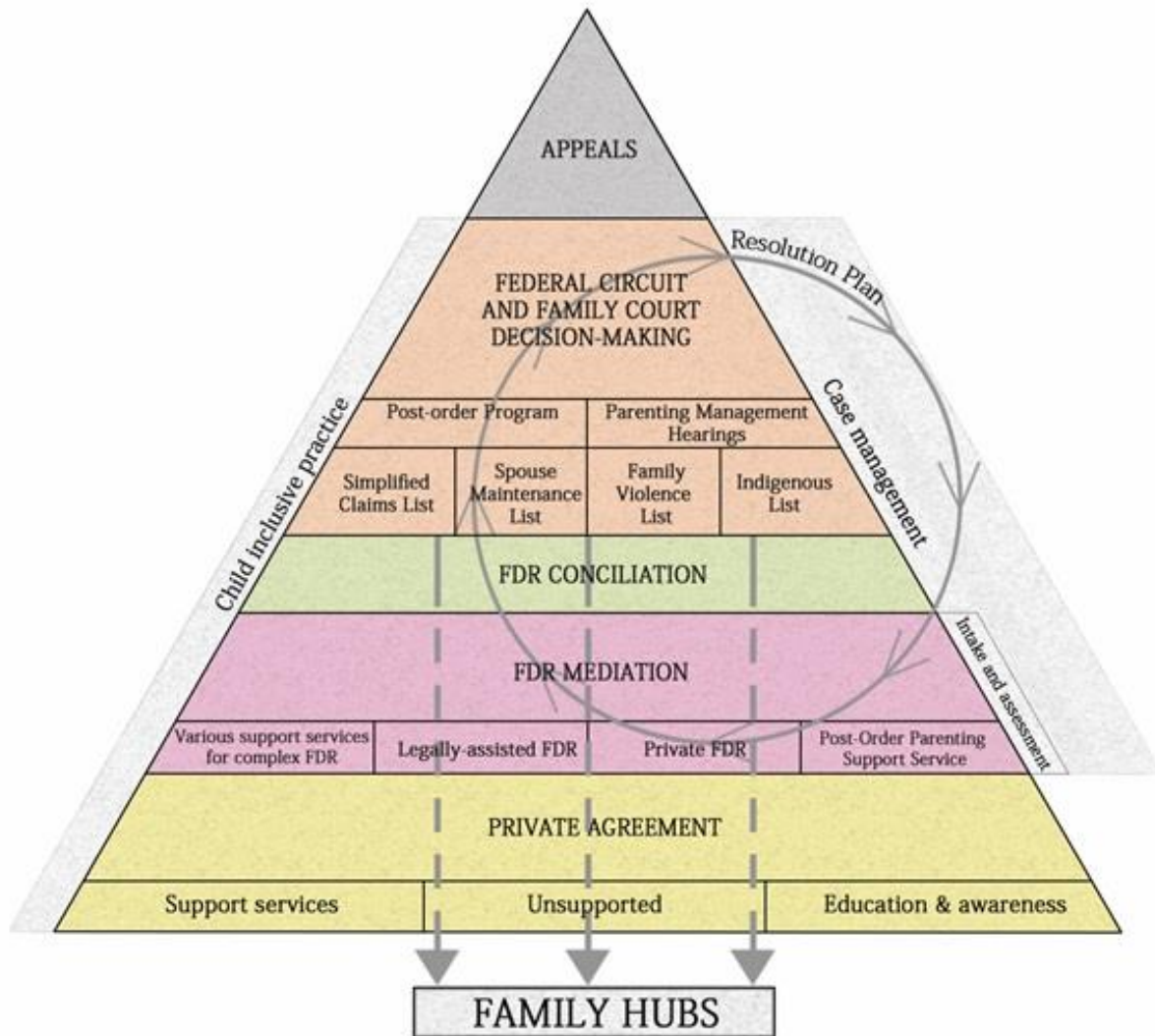


Figure 1: An integrated model of Family Hub and family court functionality.

We suggest the following principles as a basis for discussion about the possible operation of Family Hubs within an integrated model of the family law system operations:

1. Family Hubs provide, coordinate and disseminate:
 - a. Education, information and awareness-raising services about family law and processes.
 - b. Family and individual support services, including community-based legal services.
 - c. Intake and assessment services.
 - d. Case management services.
 - e. Child inclusive practice services.
 - f. FDR mediation.
 - g. FDR conciliation.

2. Each Family Hub would coordinate the provision of a locally appropriate menu of support services providing for specific client and family complexities, with onsite or at least high-quality digital availability of a core set of these services (in all Hub locations).

3. Family Hubs would provide discrete and expert intake and assessment services for all new cases in the family law system. A needs and capacity assessment process would take place at intake. A capacity-to-pay assessment would also be conducted at intake. Subject to means, parties would be liable to pay, at the maximum on a cost recovery basis, for client or family support services accessed through Family Hubs.
4. Entry to the family law system would be through Family Hubs for all disputants and would-be litigants, at least initially. The intake assessment would provide the foundation for a resolution plan to be agreed with all of the parties. Settlement of a resolution plan would be a pre-condition for access to the balance of the system.
5. ‘Resolution plans’ define the issues between the parties, the specific needs or considerations of the family or client, the family or client support services the parties agree to access, and the next-authorised ‘decision opportunity’ in the dispute resolution pathway, individual party financial contributions, and expected outcomes and timeframes.
6. Subsequent needs and capacity assessments, requested by the parties or authorised at other milestones in the resolution pathway, may result in amendments to the resolution plan. Plans might be otherwise amended by agreement between the parties, or by an authorised delegate. Plans would be liable to continual adjustment, cycling, if necessary, from court-based to Hub processes, or between Hub processes, until resolution is reached or the parties exit the system.
7. Each resolution plan would have an allocated Case Manager tasked with oversight of the reasonable progress of each plan. For parties that fail to comply with their resolution plans, including time-frames for milestone achievement, plans may lapse.
8. Resolution plans, in their first stage, might involve the provision of education, information and awareness raising about the system and the law. At the next level, and depending on needs, they may prescribe the provision of specific client or family support and/or legal advisory services, in order to promote private settlement. At the next level, they might prescribe FDR mediation. If FDR mediation fails, they would prescribe FDR conciliation. If FDR conciliation fails, the plan may record authority for commencement of litigation.¹⁶ At various decision-points in the course of litigation, parties’ resolution plans might be amended by the court to require access to additional support or advisory services, or to attend further FDR mediation or conciliation.
9. It would be possible for achievement of all or some milestones within a resolution plan by access to accredited private or community-based FDR, legal and family support providers outside the Hub. The Hub would retain intake and case management of all plans.

¹⁶ Existing legislative, workforce and process arrangements around the issue and function of section 60I certificates provide precedent for the workability of this significant nexus between the community and justice sectors.

10. FDR practice in the Hubs would be amenable and flexible to adaptation in the presence of family violence or for other conditions of client complexity (including Aboriginality, physical or mental illness, CALD, intellectual or physical disability, and substance abuse). Expertise would be available to support Hub clients experiencing these complexities in undertaking Hub FDR processes.
11. The effect of family and client complexities (including if there is a history or risk of family violence) on resolution parties' suitability for FDR processes would be assessed at intake.
12. Child-inclusive practice would be activated and mandated from intake through to resolution.

Resolution plans

The 'resolution plan' concept is analogous the 'treatment plan' in the mental health sector. In that field, the treatment plan is a 'live' document, prescribing actions towards recovery involving the coordination of the provision of in-patient, out-patient and community-based health services and supports. Its maintenance is the responsibility of the chief mental health officer.¹⁷ Orders for compulsory treatment and detention under mental health legislation is predicated upon its carriage. We suggest that a corollary in the family law sphere would have valuable therapeutic effect. The porousness and flexibility of a resolution plan is amenable to the iterative, circular process that true problem-solving requires. Family law solutions and problems suggest themselves and develop over time. Circularity through processes and approaches over time is key. Discernment is key.

FDR Conciliation

Our model suggests that conciliation might be conducted as a next-level process, within the Family Hubs, or by an externally accredited practitioner, by a FDR conciliator (FDRCP), in the event of the failure of a matter to settle in an earlier FDR mediation process. We suggest that FDRCPs would require legal qualification for their accreditation and, of course, must be entirely independent of the parties. We envisage also that FDR conciliation might be legally-assisted with the agreement of the parties.

The role of the FDRCPs would be to, with the parties, define or re-define the issues, explore settlement options (which may include the suggestion of new settlement options by the FDRCP) and with the parties, either jointly or separately as agreed, explore the legal merits or otherwise of the parties' respective positions. This latter function would be undertaken with express disclaimers in relation to any opinion on the range of outcomes that might be expressed by the FDRCP, with contractual exclusion of professional liability to the limits allowable by law.

As in the operation of conciliation and Early Neutral Evaluation in other jurisdictions, the views of the FDRCP or the outcome of FDR conciliation would not bind the parties. Upon the conclusion of the process, whatever the outcome, parties would receive certification to enable commencement of litigation. On the other hand, and continuing the policy pressure to encourage private resolution, Hub legal support resources would be available at this point to facilitate the

¹⁷ See, for example, s 19A *Mental Health Act 1986* (Vic)

creation of parenting plans or consent orders to formalise any settlement that might have been reached in conciliation.

It is not suggested that, at least in the short term, the FDR conciliation process would make redundant the more authoritative process for conciliation conferencing in the courts. It is possible however that in the longer term the FDR conciliation capacity and process in the Hubs might develop sufficient professional rigour and capacity to recommend the workability of this.

Conclusion

We submit that this proposed model for an integrated Hub and court system supporting the resolution of post-separation disputing may have a number of outcomes and advantages as follows:

- As policy structure, it shifts pressure, emphasis and cost for the resolution of post-separation disputing out of the realms of the law and the courts, and down to human-centred processes and professionals with genuine expertise and capacity to facilitate private settlement.
- It enlarges understanding and experience of the ‘shadow of the law’ – such that recourse to formal structures of law becomes less necessary.
- It facilitates the pre-litigation provision of tailored legal information to would-be self-represented litigants who would otherwise not seek nor obtain legal advice.
- It possesses structural policy integrity with capacity to encompass and rationalise the many fragments of specific service and complexity reforms suggested in DP86.
- It may encourage public confidence and ownership of the concept of family law as being for and by the people, not lawyers and judges.
- It leverages the legal profession’s current orientation towards increasing expertise and participation in FDR practice.
- Functionality for reference of matters from court to Hub, and vice versa as the development or revelation of conditions between the parties suggests, may be useful and appropriate. In specific matters, the functional relationship between the two service centres may be circular, iterative, or parallel.
- Greater numbers of pre-litigation resolutions are likely to result.
- Case management of the resolution plan, and a dedicated, professionalised intake and assessment service should realise significant efficiencies across the entire system. The eligibility and appropriateness of services, supports and interventions will be assessed by the one instrumentality, notwithstanding that the client might cross many organisational interfaces. The fragmentation, siloing and ‘falling through the cracks’ that is a problem in other sectors where joined-up sector partnerships are sought to be leveraged, can thus be avoided.
- Increased access to justice for the people: affordable, appropriate, available, tailored, effective

Proposal 4-5 to 4-8 Expansion of the Family Advocacy and Support Service (FASS)

MLC regards the proposed functionality outlined for the expanded FASS (intake and assessment, case management, additional specialist legal and support services for clients affected by family violence) as extremely important to include in the reformed system. We submit however that the

integrated model of Family Hubs and court, if taken up, would perform or coordinate the performance these functions for clients of the system affected by family violence more efficaciously than the proposals in DP86, which appear to envisage a service for victims, a service for perpetrators, and an external case management service for ‘where a client has complex needs’. It is MLCs experience that a large proportion of family law litigants have complex needs and that the case management is vital, central function of the reformed system, if desired outcomes are to be attained.

In any event, MLC supports the provision of the functionality of the expanded FASS-oriented service as a core service element of the reformed system, provided face-to-face or by high-quality digital consultative means, at all family court locations (including rural, regional and remote).

5. Dispute Resolution

Proposal 5–1 to 5-10

Subject to our earlier suggestions in relation to the operation of FDR within Family Hubs, MLC agrees with proposals to reform the FDR provisions.

MLC regards the re-invigoration of development, and wide availability, of a broad base of FDR models, across the range of techniques from joint counselling to conciliation, and tailored for the addressing the complexities of contemporary Australian family life, as a crucial element of design for an affordable, effective future family law system.

We agree that property and financial disputes should be subject to compulsory FDR. There should be firm limitations for exceptions to the requirement for attempting FDR. Policy and law around exceptions and exemptions should be tightened to minimise the number of applications to the court without attempt at FDR, and to remove incentives (or create disincentives) to ‘game’ the section 60I process (or its replacement as the ‘genuine steps statement’). At least until significant cultural change can occur, and which may occur if the polity gains experience and confidence in a less litigious way, many parties will continue to look for ways to opt out of the FDR process, unless they are given more reason to opt in.

MLC strongly supports research and development towards the development of models of FDR suitable for assisting in resolution of disputes involving clients and couples with conditions of complexity (as described in Proposal 5-9). FDR is currently not accessible to, nor understood well by, lots of people in disadvantaged demographic groups. FDR organisations do not readily accept clients or couples with conditions of complexity.

MLC supports the much greater availability of FDR and legally-aided FDR. There should awareness however that, at least initially, policy promoting legally-assisted FDR could have the effect of relocating some of the existing lawyerly adversarialism from the court system down into the pre-litigation processes. Stronger process and structures with the FDR regime, such as the FDR conciliation level previously suggested, would provide a countering discipline to this possible development.

6. Reshaping the Adjudication Landscape

Proposal 6–1 to 6-3 Triage and specialist pathways

In the integrated Hub and court approach described previously in this submission, a form of triage occurs in the specialist intake and assessment units operating in the Hubs. If a case escalates to court, the court registry will take the principal role in coordinating court-based processes. To the extent that coordination with support services and FDR is required after litigation is commenced, it is suggested that the Hubs' more appropriate expertise should be re-engaged. This is a foundational function of the resolution plan and case management, to enable smooth transition and coordination of community-based and court-based services.

MLC does, in any case, support the principle of triage at court and establishment of the specialist court pathways.

Proposal 6–4 to 6-6 Simplified process for small property pools

MLC strongly supports simplified court procedure for small property claims.

MLC strongly supports a case management role for registrars and the development of a more transparent legislative framework for all property matters.

In designing for such a simplified regime, there should be research into and consideration of the reasons that the Less Adversarial Trial procedure does not have more 'take-up' than it currently does.

Proposal 6–7 Specialist family violence list

MLC strongly supports any measures that provide a safer, faster, tailored pathway for family violence cases. It is noted, however, that there is a problem in regarding the requirement for such tailoring as particular to court-based resolution. Tailoring of process for family violence should be identified and expertly assessed in a community context on intake and then pro-actively case managed through FDR and the entire resolution pathway. Again, we submit that this intake and assessment and case management would most appropriately be coordinated from the Hubs, where the majority of cases would start (and, hopefully, finish), and where there is expertise and process for the provision, and for coordination of provision, of specialist support services.

Per 6.32, we acknowledge the difficulty of the number of cases featuring family violence. The list of considerations as a guide for practice in assessment of 'high risk' looks like a good start.

Proposal 6-8 Co-location of courts

MLC considers that the difficulty of co-location and/or of requiring local/magistrates courts to exercise jurisdiction in family law would be high, whilst clearly desirable.

We see however that it is eminently possible for provision of case management and the coordination of support services, tailored to the requirements of the respective jurisdictions, to be provided by Family Hubs (per the functionality of Hub as proposed earlier in this submission) to those jurisdictions under contract. This might assist the local court system to see more scope and support for engagement in the family law jurisdiction.

Addressing concerns about adversarial process.

It is noted that there are no specific proposals in relation to the very interesting points raised in 6.51 to 6.65.

We submit that the adversarial urge of parties is a major driver for the escalation of disputes towards and sustaining on-going litigation. It is our view that litigation, in its current traditional mode particularly, is an inappropriate mode for decision-making in family law for almost all but the most legally complex cases. Particularly, however, where there is imbalance of power for any reason, or where the coercion and control of women is in play, we consider that the iatrogenic effect on so many people *of their interface with the family law system itself*, is nothing short of a national emergency.

The family law system itself creates seriously damaged victims, including child victims, on a daily basis: in its obfuscatory law and process that is inaccessible for the ordinary people who are its clients and for the most part cannot afford legal representation; in the extraordinary delays; in the inappropriate formality, and in its continued fostering of post-separation adversarial culture in Australian society.

This is notwithstanding the admirable efforts of many individual wise, hard-working and caring judicial officers. There have undoubtedly been funding issues at the base of much of this. We suggest, however, that there has also been a cataclysmic failure of imagination, and policy responsiveness at a systemic level, as the family law needs of contemporary Australian society have crept up and gathered pace, and volume. And yet the response from the system has been little more than ‘business as usual’, along with continual appeasement of the private legal profession, and the continued accretion of impossibly complex law and process, for decades up to the point of this Review. It is arguable that the existing family law system, with the courts as its focus, has entirely forfeited its claim to policy and funding pre-eminence as the societal institution with principal responsibility for the administering the field of ordering for post-separation parenting and financial arrangements. It is time to return family law to the people it is intended to serve, leveraging the now more-professionalised community sector that most effectively – and efficiently—represents and serves their interests.

In designing the reformed family law system, we encourage the Commonwealth to consider all possible policy measures, including the weighting of funding to respective initiatives and as between Hub and court functions, to incentivise early private resolution in the community sphere, and disincentivise escalation to litigation.

Despite the ‘natural’ antipathy of many post-separation parties towards each other, we believe that the culture of adversarialism itself has some capacity for reform, as a new collective volume of experience of the benefits and techniques of early private resolution, filters out through society over time. This is certainly the ripest area for regulatory attention however.

We acknowledge the benefits and achievements of problem-solving courts in other jurisdictions and support the wider roll-out of a refreshed Parenting Management Hearing model. We do have concerns however about the feasibility of the problem-solving approach at the scale demanded by family court litigation load. The investigative, problem-solving judicial official cannot effectively perform a case management role. The approach would only be workable at scale, we submit, if

judges were able to work closely with a robust, reliable, flexible professionalised assessment and case management process and resources, and such that are close to the service supports that might be leveraged in the individual case. We argue this process and resource would be readily available to the courts in the integrated model of court and Hub proposed earlier in this submission. Professor Blagg has suggested that a problem-solving court ‘acts like a hub’ (at 6.64). We submit that for the family court to ‘act like a hub’, it needs only to work closely and seamlessly, as is entirely possible, with fully integrated Family Hub as is proposed in this submission.

Proposal 6-0 to 6-11 Post-order parenting support service

MLC strongly supports the development of a post-order parenting support service. It is our contention however that the service should be located within Family Hub functionality with escalation to the court system only if necessary.

6-12 A safe accessible court environment

We support the suggestions for improving the safety of participants as proposed in DP86.

We suggest further however, that as an explication of practices and principles of therapeutic jurisprudence, and as a recognition of the potential for the anti-therapeutic effects of participating in the court system, that the entire ‘user experience’ of being at the family court be subject to dedicated analysis by human-centred design experts.

As our client Jarrod also said:

I had about a week's notice before court after men I thought were the police banged on my door at night and served me with family court papers. So, I rocked up all by myself at court. I had no idea what to do. I just walked in. And there are no signs telling people what to do! So, for example there's the list, and what court you're in, but you can't even research that in the days before. And the list is off to the side, on a noticeboard thing, with not even a big sign.

By comparison, you go to those centres to get your license and registration and whatnot, and there's a guy standing at the door saying 'what do you want?' and I can say 'I want to renew my license' and then everything rolls from there...And you know, that's just for a license. What's going on at the Family Court!

An MLC staff member has suggested that this might be because the transport registries make money from their clients, so it makes sense to facilitate a smooth client experience. We are quite certain, however, that good human-centred design of the client interface at family courts would pay for itself in improved efficiency in very short order. And this, quite apart, from the obligations of the family court to, at the very least, be not anti-therapeutic.

MLC strongly supports additional facility and accessibility at court for people with disabilities, for family groups and for CALD people.

7. Children in the Family Law System

It is MLC's view that greater participation will give children and young people a sense of control over their lives and empower them—but *only if that participation is not illusory*. Backing the primacy of the best interests principle over the ‘views of a child given due weight according to age and maturity’ risks, in our view, creating an illusion and a damaging one at that. If a child is assessed as having sufficient emotional maturity and intellectual capacity to weigh the pros and cons of the

present and likely and possible future consequences of their choices and actions, why should their express views be discounted further by a best interests test? This is paternalism in excess.

If a child is assessed as competent to consent to major, irreversible gender re-assignment surgery, there isn't a second test to determine whether adults think it is in their long-term best interests. If adults who don't lack mental capacity decide to reject life-saving treatment, these decisions are respected, despite that they might lead to death.

We submit that young people know better about their own lives and relationships than external court people, even 'experts'.

We cannot envisage a workable alternative to the best interests principle, especially as it is so valuable in many respects. As noted here, however, we do not agree that 'there is no tension between children's welfare or best interests (art 3) and their right to participation' (7.18). Accordingly, we strongly support all proposals to increase the participation of children and young people in family law processes, including pre-litigation, and the simple, sole proposition that their *views should be given due weight according to age and maturity*.

Proposal 7-1 and 7-2

Supported.

Proposal 7-3 to 7-5 A right to be heard

MLC enthusiastically supports these ideas and additionally suggests that education, information and awareness-raising materials should promulgate the rights of children to be consulted, and their views respected by parents, in privately ordered post-separation arrangements as well. The Scottish legislation referred to at 7.34 requires that not only authorities, but also parents, should ascertain and consider the views of children in making decisions that affect them.¹⁸

We strongly encourage appropriate policy instrumentation to ensure and encourage child-inclusive practice in all parenting matters, at all stages of a matter. We wish to emphasise the value this investment would reap in terms of earlier and more sustainable resolution.

We favour 'opt out' over 'opt in' but would prefer compulsory CIP.

Proposal 7-6 to 7-7

Supported.

Proposal 7-8 to 7-10 A new model for children's participation

MLC is very pleased to enthusiastically support the proposals in this section. The proposed division of separate representative and children's advocate is an elegant and workable solution.

¹⁸ *Children (Scotland) Act 1995 (Scot)* s. 6 (1): A person shall, in reaching any major decision which involves—

(a) his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or

(b) his exercising a parental right or giving consent by virtue of that section,

have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.

Proposal 7-11 to 7-13

Strongly supported.

We encourage the Commission and the Commonwealth to afford priority to the proposals in this section. Supporting children and young people more effectively in family law processes will make for better family decision-making and fewer matters in the system. It is in keeping with the direction of the balance of the legal field and other developments in contemporary society which acknowledge the participation, knowledge and contribution of young people as nascent citizens.

8. Reducing Harm

Proposal 8-1 to 8-5

MLC strongly supports the proposals in this section.

In addition to the contexts of harm mentioned however, we reiterate that the system must attend to the iatrogenic effects of participation in the system as it currently performs, and with acceptance of the damage caused. Ensuring congruence with principles of therapeutic jurisprudence would lead to a better range of outcomes than continual assertion of the authority of the court. Further, if resources are austere, we suggest that it would be better that the court system did much less, but did what it did very well. With no iatrogenic effect. Because its principal responsibility and objective must be, and at least, ‘first, do no harm’.

Adults involved in family law litigation over several years (sometimes ‘trapped’ there) have a particular and recognisable manner. They are angry, chronically ill and have serious developing mental illness. We don’t see children of litigants very often at MLC, but we are certain that if their parents are like this for years, that parental capacity must be affected with negative impacts on children. The system is responsible for at least part of this damage, and this must stop.

9. Additional Legislative Issues

Proposal 9-1 to 9-7 Litigation representatives

Strongly supported for application in all circumstances where competence is in issue, including in relation to children and young people who have standing to commence proceedings.

10. A Skilled and Supported Workforce

Proposal 10-1 to 10-15

MLC supports all of these proposals.

We would like to see accreditation standards developed for FDR conciliators.

We encourage specific adjustment to accreditation and to funding to increase the legal literacy and availability of FDR mediators in relation to property and financial matters.