



VICTORIAN ASSOCIATION OF COLLABORATIVE PROFESSIONALS

Submission to the ALRC Review of the Family Law System: Response to Discussion Paper dated 2 October 2018

Submitted by:
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AUSTRALIAN LAW REFORM COMMISSION – REVIEW OF THE FAMILY LAW SYSTEM
SUBMISSION BY VICTORIAN ASSOCIATION OF COLLABORATIVE PROFESSIONALS
(VACP)

1. Introduction

Thank you for the opportunity to make this submission in relation to the discussion paper of 2 October 2018.

The ALRC will recall that VACP made a submission in response to the Issues Paper of March 2018. Our submission is number 91 on the ALRC website.

VACP is the peak body for family law collaborative professionals in Victoria. Its members are family lawyers, psychologists, financial planners and accountants. It is affiliated with the Law Institute of Victoria and the Australian Association of Collaborative Professionals (AACP) and the International Academy of Collaborative Professionals (IACP). The patron of AACP is the Honourable Diana Bryant AO.

The focus of this paper will be Part 5 of the discussion paper relating to Dispute Resolution, with a brief reference to Part 6 and Part 12.

2. Executive Summary

- (a) VACP strongly supports proposal 5-3 of the Discussion Paper in relation to mandating family dispute resolution (FDR) in property and financial matters before Court proceedings can be commenced, with limited exceptions. (We also proposed this in our submission number 91).
- (b) However we say this should go further. In addition to the government-funded sole option of FDR, the legislation should offer accredited alternative dispute resolution (ADR) options as another way of satisfying the mandatory requirement to attempt to settle cases without court.

In addition to FDR, these alternative dispute resolution options should be specifically authorised under the Family Law Act:

- (i) **Mediation** with mediators accredited by the National Mediation Accreditation System (NMAS), overseen by the Mediator Standards Board (MSB).
- (ii) **Interdisciplinary collaborative practice** (see our submission number 91 for more detail, and other submissions numbered 140, 144, 155, 160, 170 and 201 which advocate collaborative practice), involving professionals accredited by the AACP.

(ICP involves a psychologist and a financial planner as neutrals in the process. As needed, an independent child consultant is brought in for child inclusive practice to help to negotiate parenting matters and again, as needed, experts as to valuation and the like are employed jointly by the parties. All the professionals including the lawyers are trained in interest based negotiation which in many ways is the antithesis of adversarial and traditional or positional negotiations. All substantive negotiations take place with the clients and the team together, working together to reach a mutually acceptable outcome)

- (iii) **Arbitration** with practitioners accredited by Australian Institute of Family Law Arbitrators and Mediators (AIFLAM). It keeps a list of qualified arbitrators pursuant to regulation 67B of the Family Law Regulations.
- (c) We respectfully disagree with the apparent assumption in the Discussion Paper that *all* matters, with limited exceptions, should be managed within a government funded FRC and FDR system with no specific recognition of any other alternate dispute resolution system. The problems with this we say include:
- (i) Many people want to choose their own lawyer/practitioner to help them through this very tough stage of life (separation).
 - (ii) Many people can afford to pay for a private alternative to FDR.
 - (iii) FRCs have scarce lawyer resources, and they lack the resources or mandate to provide legal advice.
 - (iv) A single system of FDR for all purposes would be impossibly expensive for government to maintain.
 - (v) Mandating more alternatives to FDR will certainly reduce the number of cases going into court - with substantial cost savings to government.
 - (vi) Indeed, by broadening the mandated ADR options available and reducing the exemptions from FDR/ADR, we say that court filings should further shrink, by even 50% or more, with enormous cost savings to government, and huge financial and emotional savings for clients.
 - (vii) Private ADR providers can usually respond to client needs with much more agility and flexibility than can large FRCs, consequently reducing the escalation of conflict which is inherent in unwanted delay.
 - (viii) Genuinely urgent matters can even be urgently attended to in ADR, and avoid the escalation of court.
 - (ix) Since clients with more complex financial cases cannot go into FDR, they are forced into the largely uncontrolled private lawyer market, and large numbers of those lawyers are not trained in or sympathetic to interest based negotiations. Consequently the problems of adversarialism cause real harm to those clients and their families. And yet their emotional, relationship and family needs are just as important and unsuited to court as are those with less wealth and complexity who go into FDR.
 - (x) We respectfully suggest that many of the lawyers just referred to traditionally resist change in how things are done in practice. Accordingly, without clear mandating of other pathways such as the ADR options above, experience shows that they will continue to too quickly encourage clients to “get their section 60I certificate” and go to court – as they do from time to time now.

- (xi) Lawyers will overall make less money! We say this is good for the community. It will also force traditional lawyers to be more creative and people focused in their family law practices.
- (d) VACP is concerned that the current family dispute resolution (FDR) system is struggling to keep up with the current demand and there are long delays getting into FRCs for FDR.

In our experience the current delays for the first intake interview in FRCs in Victoria are between 3-8 weeks. After that, if the clients are thought to be suitable for FDR, it is commonly about 3 weeks more for the first joint session of FDR. As a result a good number of clients go to court, who should not have to, and plead urgency under s. 60I(9) to avoid the 6-11 week delay before there is a chance of obtaining a s.60I certificate.

The predominant FDR model of one practitioner and two clients is far from ideal in many cases where the degree of power imbalance (or other factors) really require further professionals involved in the process to maximise the chances of success of the process, not to mention maximising the support given to the clients so that they feel that they have genuinely made independent decisions and reached settlements with which they are comfortable.

Accordingly, for these and other reasons too many cases avoid FDR and go to court. But the Discussion Paper effectively wants to move more cases into FDR in parenting – through, for example, more legally assisted FDR and tighter controls on exemptions to FDR.

- (e) Further, many more will go into FDR as a result of mandating FDR before property or financial matters may go to court.

We respectfully submit that the FRC and FDR structure alone, relying largely on government funding and mostly large somewhat inflexible organisational community-based centres, simply cannot sufficiently cover the full gamut of family law needs. Just because a case is too complex for FDR, the parties should not be consigned to the uncontrolled vagaries of the lawyer market (outside the ADR options referred to in (b) above) to settle their cases to avoid court.

Why should they not also be mandated into ADR before court can be attempted, with specific legislative definition given to the types of people and alternative processes that can be used to facilitate their non-court resolution?

- (f) Accordingly, we recommend that the legislation should more specifically recognise interdisciplinary collaborative practice and other ADR settlement options which go beyond the narrowly defined FDR practice.
- (g) Generally, the grounds for exempting parties from FDR or accredited ADR should be as narrow as possible. The grounds for exemption under section 60I(9) should be narrowed.
- (h) The grounds for ceasing or not commencing FDR under regulation 25 should not be expanded.
- (i) The Family Law Act should specify that if a party has made a genuine attempt to resolve their matters by FDR, “accredited” mediation, ICP or

arbitration (as above) then they need not file a section 60I certificate when lodging an application.

- (j) In all parenting and property and financial matters the applicant should be required to file a genuine steps statement (as proposed by the ALRC in relation to property and financial cases) and that should detail efforts in “traditional” FDR or in the other allowable dispute resolution processes.
- (k) Part 6 of the Discussion Paper is aptly called “Reshaping the Adjudication Landscape”. We agree with the suggestion to triage cases with a team-based approach (proposal 6-2) at the commencement of the process including ongoing case management. We recommend that the triage process go further. In addition to directing the path through the litigation process we say the triage team should consider sending the matter either to an ADR process (for the first time) or in some cases sending it back into an ADR process (including a different process to that which was unsuccessfully attempted previously). This is consistent with section 60I(10) under which the Court must consider referring a matter to family dispute resolution if an exemption under section 60I(9) has been relied upon to avoid filing a certificate.
- (l) In relation to part 12 of the discussion paper we note the recommendation for the establishment of a “Family Law Commission”. This is for the purpose of overseeing the family law system, managing the accreditation of professionals, issuing guidelines to professionals among other things (proposal 12-1). Since the commission will have a high level of family law specialisation and expertise it would be beautifully qualified to oversee on a continuing basis the performance of not just FDRPs but also mediators, collaborators and arbitrators and their respective accrediting bodies. We see this independent oversight of all those professionals as a very valuable way of ensuring confidence in the family law system and more particularly the ADR system.

We now proceed to discuss particular aspects of part 5, part 6 and part 12 of the discussion paper below.

3. Part 5 – Dispute Resolution & Interdisciplinary Collaborative Practice

General Overview

- (a) As the Discussion Paper says, after mandating FDR in parenting matters, court filings in those matters dropped by 25%. We say there is substantial scope for those filings to drop further if exemptions from FDR are narrowed and other ADR processes are also mandated.

It follows, we suggest, that if property and financial cases must go through an FDR/ADR process (with few exceptions) prior to litigating, there will be a further substantial reduction in court filings. This is ideal since, we say, litigation should be a genuine last resort. We are concerned that the Discussion Paper proposal still makes it too easy for people to get into the court system, when more legislative push, so to speak, could ensure many more cases settle in ADR and stay out of court. Of course, the resulting reduction in filings would significantly impact on the overall cost of maintaining the court system.

- (b) The FDR system we say does not adequately handle the more complex of family law cases where there are significant power imbalances, significant ill-will, significant mental health issues or significant non-disclosure.

Normalising ADR and genuinely making it difficult to go to court will we say normalise good practices like full disclosure.

- (c) By definition FRCs and FDR deal with cases which are “less complex” because they do not have the funding and structures to handle the full range of cases. We note in passing that “complex cases” in Family Law have never been principally about complexity of facts or legal questions. They have always been principally about complex personalities.

This was the experience when the Federal Magistrates’ Court as it was then called was first set up in 2000 with a monetary limit for its property jurisdiction. It was quickly realised that this was arbitrary and unhelpful, e.g. if a house was worth a dollar more or less than the monetary jurisdiction it made no difference to the level of complexity in a case. The monetary limit to jurisdiction was quickly removed from the legislation. In practice the two family law courts then altered their approach so that the cases which were expected to run for more than 4 days of final hearing were decided to be the complex cases which needed to be referred to the Family Court.

Often in property cases the pool may be worth many millions of dollars but it is not difficult for the negotiating clients and their lawyers to identify the pool and to value the assets. Yes - it may be necessary to get an accountant to value a business (or two) but once the valuation is obtained the parties then work with that valuation to come up with a settlement. But the thrust of the Discussion Paper is that clients which have just these types of valuation questions will not fit within an FDR and FRC regime and are unlimited in their ability to go to court.

- (d) Accordingly, we urge the ALRC not to simply overlook the need for ADR in cases outside the competence of FRCs. We recommend other ADR processes be specifically recognised in the Family Law Act, as a practical alternative to FDR processes, so that the whole gamut of cases be encouraged into ADR (including FDR) rather than encouraged into court.

A system where exemptions to FDR are sought and exploited and are too easy to obtain (such as complexity) simply consigns separating people outside the straight forward into a court system unless they can negotiate in a traditional way.

- (e) Traditional negotiation processes, often using lawyers in a rough and ready adversarial based way, get results in many cases. However they can be so much improved upon, to the benefit of clients, their children and the whole of society. Instead of the separation resolution process itself leaving a negative feeling it can be used to improve people’s self-understanding and future lives.

We say that ICP is a genuine and substantial contributor in what must be the overall goal, of promoting more human friendly approaches to resolution of differences without exacerbating the unhappiness of separation. This is the ideal for all. ICP enables people with all sorts of complexities to enter into ADR, such as matters involving: power imbalance, family violence issues, significant psychiatric/relationship issues which can be greatly assisted by therapy in parallel to or perhaps prior to FDR, legal assistance to even up the

playing field between the parties and simply give emotional support, truly complex factual and/or financial cases, and cultural assistance for cultural minorities who may otherwise struggle with the process.

- (f) We now adapt some words from our earlier paper (submission number 91, commencing at page 10).

The first consequence of an adversarial approach in family separation, whether through traditional negotiation or litigation, is to polarise the issues, and thereby the couple. It also deepens any pre-existing polarisation and encourages a binary analysis as opposed to the potential of creative problem solving.

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

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

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

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

- (g) We believe there is a strong case for neutral social scientists to intake couples before litigation or at an early stage, to bring to each client and the lawyers, some education and understanding of the personalities, the dynamic and the conflict style of a couple to encourage the narrowing of the dispute, identification of settlement opportunities, or an early decision by the lawyers and the court to fast-track couples who are intractable. Further, they have a vital potential role in assisting parties to come to terms with separation and to

imagine and start to plan their future lives. Their strong presence in collaboration has been mentioned but their role potentially in all separations should be considered.

- (h) We also believe that there is a role for the collection of financial data by neutral financial advisors or accountants, as a requirement in any family law process. This work is an area of inefficiency when conducted by lawyers, and in a climate of suspicion generates mistrust, duplication and expense. Again, there is no reason in principle why they should not have a role in most family law financial negotiations.
- (i) To reiterate, we are concerned that the proposals by the ALRC consign many to traditional processes where there are sophisticated ADR processes available outside the FRCs into which people who do not fit within FRC competencies should be encouraged.

Accordingly, we say that ICP in particular has enormous potential to contribute to societal good by minimising if not completely removing adversarialism and antagonism that often comes even with negotiated family law resolution. For the good of society this needs to be enshrined in the Family Law Act as a settlement option accordingly.

- (j) One of the major problems with allowing people into the litigation system too easily is escalation. If there was any chance of civility between the couple, “crossing swords” in court is often fatal to that, at least in the short term during the legal process, and possibly forever. Relationships get worse as parties file evidence about relative contributions, good and bad, during the relationship, about relative parenting skills, good and bad, and so on.

It is worse than that because it is a common experience of the litigation process for parties to become angry upon receiving court documents (not surprising) but then to be positively incensed at finding the first error in the document (supposedly) which is so commonly described to lawyers along the lines of, “look at all those lies!”. The adversarialism, the black and white, right and wrong thinking is so destructive to relationship and destructive to the best interests of the children, whether the case is a parenting case or simply a property and financial case in which the couple have children (of any age) about whom they are not actually arguing.

As the case progresses in the adversarial system, the issues over which the parties do not agree escalate, as do conflict and even hatred between the couple. The adversarial lawyers suddenly need to chase “every rabbit down every burrow” because the couple who may have been more able to agree on some issues at the start now cannot agree on anything. So the cases become 4 or 5 or 10 day trials, at enormous cost to parties and the taxpayer.

- (k) Again, we say that the sophisticated approaches already existing in ICP can nip these problematic situations in the bud. Even for couples who find themselves nearly exhausted, either emotionally or exhausted of funds, or both during a litigation process, there is no reason why they could not be referred out from a litigation process into ICP (or other alternative like mediation). ICP in particular with its near universal involvement of psychologists and financial planners is especially suited to handling the emotional messiness of cases which have gone off the rails, including in the litigation system.

Our experience is that the neutral psychologists and financial planners involved often have a powerful impact and credibility with clients, who may not always hear what the other party or their lawyer says, but they do hear the neutrals.

- (l) The Discussion Paper promotes Legally Assisted Financial Dispute Resolution (LAFDR) in the FRC context but, in our experience, LAFDR in FRCs is relatively unsophisticated. While the lawyers are “keen to settle” most do not have specific training in interest based negotiations and may still be positional in negotiating.

In ICP there is an emphasis on the professional team working together to get a resolution suitable to all parties. That requires a substantial degree of trust, training and experience with each other which means it is an excellent process for the more complex of family dynamics to be resolved. Indeed, it is a well-established form of LAFDR, firmly based in the holistic interest based needs of the parties, which does not need to be re-invented within FRCs.

Where couples can afford private lawyers for litigation, they can almost certainly afford private lawyers for ICP which is almost inevitably much cheaper than the litigation alternatives. In our submission it would make sense for FRCs to continue to spend most of their focus and time and scarce government-subsidy money in relatively simple processes like the single practitioner two client style of FDR.

We now make comments on the specific proposals in part 5.

4. Proposal 5-2 – Assessment of suitability for FDR

We respectfully do not agree with adding to the matters that a practitioner must consider when determining whether a family dispute resolution is appropriate by adding a consideration of the parties’ respective legal of knowledge of the matters in dispute.

Our whole thesis is to make it relatively difficult for people to get into the litigation system which thereby normalises alternative pathways.

We say that regulation 25 as it stands requires practitioners to consider imbalance of power in determining whether a matter can be dealt with in FDR. We say that this inevitably includes consideration of the relative levels of knowledge of the parties. In our submission adding considerations which enable people to “escape” FDR or ADR simply increases the number of cases which indeed do escape ADR – often for quite insufficient reasons.

Proposal 5-3 – Mandating FDR for property and financial cases

We agree with proposal 5-3 but we would delete the second and third dot points, which say that the complexity of the asset pool and an imbalance of power should be a basis for not requiring pre-filing family dispute resolution in property and financial matters.

We say that our proposal for an alternative pathway such as through ICP or mediation rather than through FDR very comfortably deals with the issues which the second and third dot points raise. If these reasons justified the parties not going into FDR, they should still have the compulsory other pathway of accredited ADR.

Proposals 5-4 and 5-5 – Genuine Steps Statements

We say there should be a genuine steps statement required to be filed with an application in both parenting and also in property and financial matters.

We say that evidence should be required from the applicant as to the genuine steps which had been taken. Without disclosing what offers may or may not have been made, the evidence should include reasons as to why the attempt (if there was one) at family dispute resolution failed.

The respondent would have an opportunity to reply to that evidence and in the triage process at the commencement of the Court process, the registrar should be mandated to decide whether the parties should be sent back into an ADR process, which may be a different one to the unsuccessful one previously tried.

We agree that there should be a provision that if the registrar is unsatisfied with the genuine steps they “must take this into account in determining any costs of the litigation”.

Question 5-1 – The extension of time for commencing property proceedings?

We say that when genuine efforts at negotiation (through whatever process) are in place the time limit should be extended so that the parties may file proceedings within 12 months of the conclusion of a negotiation process (be it from a marriage or a de facto relationship). This avoids proceedings being commenced during genuine negotiations, just because of the threat of the time limit expiring.

Question 5-3 – Aligning the parenting and financial case requirements prior to Court

We say that the processes must be aligned. Similar certificates should be applicable in both parenting and property and financial cases, and similar genuine steps statements should be mandated. In many cases, both parenting and property is involved in any event and the parties need their whole dispute resolved and for them (and us), treating the 2 categories of matter differently makes no sense. The categories of certificates should be simplified and reduced. The multiplicity of certificates simply causes anxiety for clients over matters which are not of much moment to the court.

Proposal 5-9 – Supporting the development of FDR

We say that proposals to develop FDR to more often include co-mediators, legal advice, psychologists and financial counsellors is calling for features which are currently available in interdisciplinary collaborative practice. Whilst the majority of FRC clients have relatively low incomes and assets, very difficult cases often involve clients with significant assets in with complex fact scenarios, and including complex parenting issues. Undoubtedly they require sophisticated processes such as ICP provides. The system itself must recognise alternatives to formal FDR as long as the practitioners themselves are properly accredited so that there can be confidence in the quality of those alternatives.

We reiterate that apparently sending most people through an FRC which the Discussion Paper suggests is simply not practical for financial reasons, nor necessary in terms of the means of the couples involved. Hence the other ADR processes should be specifically encouraged in the legislation.

Proposals 5-10 and 5-11 – A framework for Legally Assisted Dispute Resolution (LADR)

We agree with the proposals to develop LADR but say this need not be only or principally within an FRC. We note that in collaborative practice, as mentioned previously, there are very sophisticated processes which include the use of lawyers who are trained to be non-adversarial and to work as a team with social science and financial neutrals.

The guidelines listed in proposal 5-10 are also integral to ICP. Child consultants are commonly used for child-inclusive practice. Screening for risk and other issues is standard practice. Cultural appropriateness can be dealt with by referring to appropriate specialists.

We agree that matters should potentially be referred from the Family Courts into LADR, whether that be amongst private practitioners in an ICP or other ADR model or in an FRC. As we say elsewhere in the paper, the triage process within the court system should enable the courts to be regularly considering the appropriateness of referral out into other ADR processes like LADR.

Proposal 6-1 and 6-2 – Triage, risk assessment and specialist pathways

We recommend that the proposed triage team not just consider the path of the case through the court system, but that it also seriously look at sending cases out of the court system into ADR – and they should continue to consider if this has become appropriate throughout the court process.

We see this as a vital check on the integrity of both the court system and the pre-filing ADR system. The triage team should consider sending matters back to ADR or for the first time into ADR. Reasons for this include that the dynamic between a couple changes over time. The current system means that a section 60I certificate is valid for 12 months for the commencement of legal proceedings. 11.5 months after a perhaps failed FDR process, for example, there is every chance that there will be new considerations to indicate that a new ADR process of one sort or another would be much more likely to be successful than before.

Failure to genuinely enter into ADR at any stage should be highly relevant to costs applications.

Proposal 12-1 – A new oversight body for the family law system

We support the proposal for the creation of a family law commission. We respectfully submit that the Attorney-General's Department which has had significant involvement in processes which may now go to the Family Law Commission (like setting out guidelines for FDRPs). The Family Law Commission by definition must have more expertise and specialist skill in the whole family law field as compared with the more generalist Attorney-General's Department and so the Commission would be an important means of establishing and maintaining confidence in the family law system.

5. Conclusion: It's time for Interdisciplinary Collaborative Practice and *really* consigning the court to history (in most cases)

As referred to on page 20 of our submission number 91, it is time for substantial change to our family law system. We are concerned however that the ALRC does not go far enough. It focuses under the heading of family dispute resolution in part 5 almost entirely on the formal existing processes provided by FDR and FRCs.

However there is little recognition given to the very major developments in private practice provided in ICP and mediation in particular. We say that the privately available ADR options outside the FRC system must be enshrined in the legislation in parallel with the FRCs if the system is not to fail under the weight of cases being referred to FDR.

The exceptions to ADR should be kept to an absolute minimum and the provisions of section 60I(9) and regulation 25 (or equivalent) should also be reduced to the minimum number of provisions and the minimum number of reasons to avoid ADR.

In particular, we say that it is time for interdisciplinary collaborative practice to form a major part of the network of available ADR options, given its unique capacity to attend to the holistic needs of clients, be they in the realms of emotional, psychological, financial, security, and parenting considerations, among others.

ICP prides itself on going beyond the legal needs of clients to provide the opportunity for them to gain assistance in all areas which are important to them, which an ideal model of dispute resolution should encourage. It also often provides a practical and empowered vision for life into the future which the litigation-infused system does not.