


AUSTRALIAN LAW REFORM COMMISSION – REVIEW OF THE FAMILY LAW SYSTEM DISCUSSION PAPER 86 OCTOBER 2018

We make the following comments in relation to the ALRC Discussion Paper, referring to our submission and to the referencing of such in the Discussion Paper.

We support and endorse the submission by VACP (Victorian Association of Collaborative Professionals), in response to the Discussion Paper.

The overriding emphasis of this response is to reassert:

- the benefit of formally including Interdisciplinary Collaborative Practice (ICP) as an approved Dispute Resolution method in relation to both children’s matters and financial/property matters;
- The need for family separation to be seen as an emotional crisis with legal and financial consequences for families, rather than being “owned” by the legal system;
- The harm caused to families by the conflict created and escalated by the adversarial system, both as to the approach to negotiation taken by lawyers in the system, as well as in actual litigation;

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Interdisciplinary Collaborative Practice (ICP)

MELCA submits that Interdisciplinary Collaborative Practice (ICP) and the MELCA model are uniquely able to assist families and ought be formally approved forms of DR under the legislation. MELCA specifically supports the VACP submission and the Discussion Paper in relation to the expansion of pre-action DR to financial matters.

ICP is able to deliver Dispute Resolution (DR) in a unique way, providing flexible process design. Inclusion of collaborative practitioners as DR providers is important because:

1. ICP enables families and couples to be screened in, meaning that the process has the flexibility to build in whatever support a family needs, rather than screening them out to processes that cannot provide the same level of integrated interdisciplinary support.
2. ICP allows for a one-stop approach for families.
3. Attention is drawn to the interdisciplinary intake in the MELCA model, described in our submission. That intake is unique both in Australia and internationally, informs the process design required for a family, and is well placed to assess what is required for DR to succeed, or in the words of the Discussion Paper, “in relation to the suitability for” DR (5.20), including any imbalance in “relevant financial arrangements” (5.2).
4. MELCA and other ICP practitioners have a track record in having successfully collaborated complex cases involving violence, dependency, mental health issues, and financial complexity. It is our submission that no other form of DR or adjudication can assist such families to successful, deep resolution, and that none of the proposals in the Discussion Paper is parallel.
5. The integration of social scientists/psychologists, child specialists and financial professionals in ICP is uniquely helpful to families. In ICP these professionals are part of a team supporting a family rather than being appointed by lawyers or “used” in cases, being the traditional practice of family lawyers. Their involvement is supportive to the family members and to the legal process.
6. The involvement of social scientists working with the whole family reduces conflict, and children’s exposure to conflict.
7. The participation by neutral Financial Planners in ICP teams has, in the MELCA experience, been able to manage the disclosure obligation issues raised in the Discussion Paper at 5.4. The collection of financial data in an adversarial process sets up a battle ground, and is performed in an environment of mistrust. When conducted by a neutral professional, conflict is not created or escalated. Anecdotally, our experience is that fears of hidden assets or income are often dealt with by the neutral

financial planner who can objectively assess the financial history of the couple, and seek information to allay fears in a way that is non-confrontational, but rather, “picture building”. Where doubt remains, processes short of whole-matter litigation should be available.

8. Legislating for the inclusion of neutral forensic accountants and the power to subpoena without issuing wholesale proceedings would address situations of genuine lack of disclosure in DR processes.
9. Families belonging to the “sandwich class” cannot access legal aid and often prefer private delivery of holistic services, of which ICP is submitted to be Australia’s best example.
10. Many families do not want to risk the financial costs and escalation of conflict that are often identified as of concern in engaging separate, private, family lawyers. These families require formal legal processes, but with support for their emotional needs, and their need for assistance with financial settlement that is in proportion to their assets. These are hallmarks of ICP, noting the sophisticated DR training of the lawyers and other practitioners who work in this setting.
11. ICP allows for positive pre-emptive work and interventions. The concept of pre-emption and preventing development and escalation of conflict is embraced by ICP/ MELCA model, and is particularly relevant in relation to parenting, relationship issues and financial disclosure. It is currently difficult for families to engage in formal legal processes without having their needs elevated to “dispute”. Examples of positive pre-emption in ICP include:
 - i. parents who need assistance with Parenting Plans and care for children with complex needs, often find themselves drafted into a dispute resolution framework due to the lack of availability and knowledge of positive, consensus-building alternatives. In ICP they can work jointly with child specialist psychologists in a collaborative setting, which does not presume there is a dispute, but rather a need for support and education;
 - ii. relationship conflict plays out in family law matters, both in relation to parenting plans and financial settlements. In ICP, couples can access help from a psychologist/ counsellor to manage conflict and to work on resolving the end of their relationship, as a foundational and integrated part of their collaborative negotiations;
 - iii. a number of responses included in the Discussion Paper refer to the cost, delay and conflict generated in lawyer-led financial discovery. Financial professionals are typically engaged jointly in ICP as neutral professionals. The efficiency in

time and cost, and the lack of conflict surrounding financial disclosure when navigated by financial professionals is a noteworthy feature of MELCA cases and the experience of ICP professionals broadly;

- iv. either i, ii or iii above can be the start point for a family, or can be delivered as stand-alone services, and may be the only service a family needs to proceed with little further formal support.

We again comment, and support the many similar comments in the Discussion Paper, that an adversarial approach to family separation is not appropriate. However, the manner in which families are referred to DR and the quality and variety of DR options is crucial to real reform of the system.

The current FRC and FDR options for families are not adequate for all needs, and, anecdotally, are utilised by families due to lack of other legislated and well-known alternatives. For example, MELCA has assisted a number of families who failed to reach agreement in FDR, and often due to the financial complexity of their cases. As an example, a couple with an asset pool valued in excess of \$200,000,000 had engaged with an FDR provider for an amicable resolution, being their only knowledge of such a DR alternative, before working with MELCA which was able to resolve the matter using a team approach.

The inappropriate uptake of government funded services places a burden on public funding that can be partly shifted to private service delivery by ICP providers.

Spousal Maintenance

1. MELCA comments that the conventional approach to capitalisation of spousal maintenance is a product of convenience and the lack of financial capacity of the person needing support to engage in legal argument for their needs. The scarcity of ongoing spousal maintenance orders identified at 3.162 of the discussion paper supports this conclusion.
2. Section 81 (finality) has been used, inappropriately it is suggested, to argue for the limitation of ongoing spousal maintenance payments.
3. Conventions have developed about capitalisation of spousal maintenance. There is, anecdotally, confusion by lawyers as to how to interpret the various s.75(2) factors into negotiations about spousal maintenance.
4. Capitalisation of spousal maintenance may not be sufficient, and may not reflect a reasonable future standard of living for the party in need. It is calculated on the window in time during which separation occurs. It does not take into account the future earnings and ability of the endowed party to pay ongoing support. It ignores the adequacy of a percentage provision for capitalisation of maintenance, which depends

entirely on the value of the asset pool at separation, and which does not weigh or measure future needs.

5. ICP allows a financial planner to reality-test capitalised maintenance, evaluate any need for ongoing payments in addition, and to do projections for the financial future of each household. This information is often educative and gives an informed basis for negotiation. If any legislated reform to spousal maintenance is to be formula-based, inclusion of neutral financial planners in any process is a better alternative to a formula, recognising that formulas will provide a default.
6. In litigation, it would be appropriate for financial planners to assist the courts in exercising their discretion as to required levels of ongoing spousal maintenance.
7. The inclusion of a role for psychologists in assessing “capacity to earn” (3.167) in any process is submitted as more likely than not to identify underlying capacity or lack of capacity, which may include the effects of coercion and control and other forms of family violence. The experience of MELCA cases supports this role in ICP, but there is no reason for it not to extend into any other process where capacity is in issue, but without the need for litigation or expensive written psychiatric reports in most cases.

Workforce Capability - Proposal 10-4

MELCA submits the following suggestions for supporting and training the family law workforce:

1. Conflict Management training;
2. Inclusion of Financial Planners and Financial Counsellors to include their skills as core competencies of the workforce;
3. Inclusion of collaborative practitioners as providers of DR.

Management of unmeritorious proceedings Proposal 8.4

Our submission is that there are many reasons for such proceedings to be issued, and we note:

1. conflict style and behaviour of the lawyers who issue such applications;
2. relational conflict of the parties;
3. power imbalance of the parties, and the use of proceedings as a form of abuse;
4. mental illness and personality disorders;
5. an adversarial system may leave no alternative to interim applications, given the role for which lawyers are engaged, and the limited DR options once proceedings are on foot.

Each of these reasons stems from or reflects conflict, and the lack of management of conflict, or insight into personal behaviour. Conflict management and recognition by professionals of their own selves are amongst the core competencies we would support, and would go some way to addressing the issuing of unmeritorious proceedings.

Costs orders or the threat of same are ineffective, due to the reluctance and time pressure of the courts to adjudicate merit or otherwise of proceedings prior to a final hearing, which happens in a few percentages of cases only.

FDR practitioners and property matters - 10

1. MELCA submits that there is no training of FDR practitioners that is able to properly inform and skill them in relation to property matters, unless the process is supported and assisted by qualified and experienced financial planners.
2. Whilst we do not consider mediation to be a completely neutral zone, it is the case that no mediator can bring sufficient evaluation into the mediation to address the financial knowledge that is required to reality test and make projections as to settlement proposals. Financial professionals do this work every day, and should be enlisted to assist in FDR as they are in ICP.
3. At 10.30 there is discussion as to supporting FDRs with an understanding of property division in family law matters. This has merit in order to avoid lawyers who are subsequently engaged being obliged to “unpick” mediated agreements, so that they can satisfy their professional responsibilities. The ICP/MELCA response to this dilemma is to integrate all professionals on a team, so that siloing of skills and the resulting duplication of time and costs is avoided. We are unaware of any research on this issue, but many lawyers are aware of the significant costs of “fixing” FDR agreements, being a cost that is borne by the parties without government contribution. This hidden cost

points to inefficiencies in the FDR model in cases where there are assets significant enough to warrant post-mediation intervention.

Training in the MELCA model

MELCA is a training organisation, and has experience training and presenting its practice model to audiences in Australia, the UK, USA, Canada and Europe. As recently as October and November 2018, we have presented the model at the international conference of collaborative professionals (IACP Forum) in Seattle, and trained practitioners in several locations in Canada.

Whilst there are many interdisciplinary collaborative practitioners the world over, the interdisciplinary intake at MELCA is a unique way of triaging families, and is done at a fixed fee. It is this aspect of the model that has attracted the most international attention and interest, because of the efficiencies and depth of resolution it sets up. MELCA clients may be triaged to collaboration, mediation, co-operative negotiations between lawyers, or if necessary (but rarely) to litigation.

The process step after intake at MELCA is the foundation work undertaken by the professional team. Our experience is that the relationship work, parenting work, conflict management and financial discovery performed in the Foundation stage, set families up for limited and efficient ongoing negotiations. All necessary legal documents are created as part of the model, without the need for contention in completing Child Support Agreements, Applications for Consent Orders or Schedules of Assets in Financial Agreements.

We bring the MELCA model to the attention of the ALRC because our research (refer to our submission) and experience support its expansion and the desirability of ICP as a defined DR provider in the recommendations of the ALRC on reforms to the family law system.

The MELCA 5-Step Process

MELCA's process is unique. We don't take a one size fits all approach to settlement. Your settlement has to be right for you, your family and your goals for the future.

In order to reach, not just a settlement, but real resolution, we approach your divorce as an emotional issue with financial and legal consequences.

By doing it this way, we are able to first help you deal with how you're feeling and get an informed understanding of your situation before dividing assets and drawing up legal documents. This results in less conflict, a settlement that helps you lead the life you want and better future relationships.

