

# Resolution of Disputes in Family Law

## SHOULD COURTS BE CONFINED TO LITIGATION?

*The Attorney-General has recently announced his intention to consider making far-reaching changes to the delivery of primary dispute resolution services. As a contribution to informed debate, MARGARET HARRISON explains the services the Family Court is currently providing and the possible implications of reducing or removing these services.*

The Family Court of Australia is now over 20 years old. Despite the brickbats thrown at it during its lifetime, it is recognised both nationally and internationally as a provider of high quality dispute resolution services for separated families. It is also still one of the few specialist family courts to be found anywhere, and one of an even smaller number which has integrated both conciliation and mediation services into its structure<sup>1</sup>. Given that the characteristics of the Family Court were formulated in the early 1970s, when there were virtually no models anywhere of integrated court services, this was something of an act of faith at the time.

Because of its multidisciplinary approach and its philosophy that litigation is seen as a step of last resort, the term 'Family Court' in the Australian context obviously encompasses far more than the provision of judicial services. It is frequently noted that only 5 per cent of applications in the Court proceed to judgement. This statistic leaves unanswered a number of questions as to why couples settle, and, of course, makes no assumption that settlement is necessarily accompanied by satisfaction with the outcome, nor by compliance with its terms. It also tends to minimise the impact and complexity of the disputes which are determined by judges. However, within this environment the Court's counsellors, registrars and mediators resolve a large proportion of issues involving both financial and children's

matters and do so within the framework of legislation which allows for voluntary and compulsory interventions.

Research findings which show the value of early intervention strategies (Kelly 1989) are reflected in settlement statistics, and early voluntary counselling is encouraged via the Court's Case Management Guidelines, as well as the Family Law Act itself.

During the financial year 1995–96, 59 per cent of all counselling clients attended sessions voluntarily, a further 47 per cent were ordered to attend, and the remaining 4 per cent were seen before trial for a family assessment. The figures show that 74 per cent of clients who attend counselling *before* they file a child-related application settle at least one issue at that stage, contrasted with 59 per cent of those who settle *after* their first Court appearance (Family Court of Australia 1992).

Court mediation settlement figures are similar to those of voluntary counselling (usually conducted before documents are filed), and Court mediation is a purely voluntary service. The Family Law Act does not allow the holding of pre-filing conciliation conferences where financial disputes are in issue<sup>2</sup>, and full resolution occurs in approximately 43 per cent of these matters. This lower figure is probably due to the tendency for disputation to increase and settlement opportunities to decline as people move down the litigation pathway (McDonald 1986).

Significant amendments to the Family

Law Act which came into operation in mid-1996 emphasise the importance of primary dispute resolution<sup>3</sup> and introduce definitions of family and child counsellors and mediators and the organisations for which they work. In so doing the provision of services external to the Court has been encouraged, particularly in relation to mediation, where previously only Court annexed mediation was recognised by the legislation.

Organisations such as Relationships Australia and Centacare provide a number of valuable primary dispute resolution services which complement those offered by the Court. Liaison between the organisations in the different states, cities and rural areas prevents duplication or overlap, and allows the Court to concentrate on the management of cases involving separated couples rather than on the delivery of marriage and relationship counselling.

This focus means that the Court's clients are encouraged to plan for the future and for the arrangements which need to be made for their children, rather than to dwell on the nature of their past relationship. High levels of conflict are common, as is the fact that the couples have multiple issues in dispute, and a number will have earlier availed themselves of the services provided by the non-government agencies prior to separating and coming to the Court. Many families have experienced episodes of violence prior to and/or accompanying

the separation. Conciliation counselling is brief and is directed at crisis intervention and problem solving.

### **A New Direction for Primary Dispute Resolution?**

The Attorney-General has recently announced his intention to consider making far-reaching changes to the delivery of primary dispute resolution services<sup>4</sup>. In his address to the National Press Club (Family Law: Future Directions, 15 October 1997), the Attorney-General identified as an issue the 'contradiction between encouraging people to resolve their family law problems outside the courts, while at the same time keeping a major source of counselling, including voluntary counselling, within the Family Court'.

He went on to say: 'I think that most people would prefer to deal with the whole process of separation and associated agreements over children and property *outside of the court environment*. The community's attitude to the adversarial approach of litigation in the Court is changing . . . These changed community expectations should be taken into account in planning the appropriate balance between Court and community services' (emphasis added).

Other concerns identified by the Attorney-General at the National Press Club included the possibility of the approved agencies and the Court providing overlapping services. This prompted him to suggest, at the time of announcing the commencement of a consultation phase, that what he described as 'all or most government funded non-judicial services in family law' be managed by an agency in his Department, which would ultimately be the central agency for their planning, contracting and management<sup>5</sup>.

Whilst such statements and suggested changes may put the cart before the horse, the implications of what the Attorney-General is considering have important ramifications for both Family Court counselling and mediation, and for the services provided now or in the future by approved community agencies. The statements also include several assumptions, which will doubtless be challenged during the consultation process which is now underway.

One purpose of this article is to explain what services the Family Court is now providing, as any understanding of what outcomes would result if these services were reduced or removed is an important aspect of an informed debate.

The agenda for change has been confused by the fact that only weeks before the Attorney-General's press club speech the Parliamentary Standing Committee on Legal and Constitutional Affairs announced that it had received terms of reference from him to allow it to inquire into aspects of family services under the chairmanship of Kevin Andrews MP. Although this committee appears to be focusing on the prevention of relationship breakdown, its terms of reference and accompanying material specifically referred to the roles played by community based and government agencies such as the Family Court in a wider context.

The Attorney-General's assumption that counselling within Court premises encourages parents to see litigation as the preferred solution to their difficulties flies in the face of both statistical evidence and client satisfaction surveys. It suggests that clients are unable to understand the nature of conciliation and mediation, and ignores the fact that many choose to come to the Court because they recognise its expertise, welcome its imprimatur, and/or are referred by either solicitors or other agencies.

It also promotes a re-definition of the role of the Court's core functions, from its current statutory mandate which directs it to resolve disputes by a variety of means, to one which would focus on the provision of litigation only. Whether such a model would see the discontinuance of the conciliation services provided by Court registrars where financial matters are in dispute is unclear, as these are non-judicial within the meaning apparently given to this term by the Attorney-General.

### **The Roles and Functions of Family Court Counselling**

Conciliation counselling is only one, albeit a major, means of resolving disputes involving children. As mentioned, clients can attend this service voluntarily, either before or after filing an application with the Court, or may be ordered to do so should the conciliation process not result in a settlement.

Such counselling is restricted to children's matters and is different in quality and quantity from long-term therapy and the longer-term interventions that normally accompany marriage and relationship counselling outside the Court. On average, Family Court conciliation counselling families attend 1.8 sessions of one to two hours duration each. However, 23 per

cent of families attend for three or more sessions and some may choose to return to it on a later occasion.

Conciliation counselling does more than help separating families reach agreements about the parenting arrangements for their children, and it is more than simply an 'alternative to litigation'. Conciliation counselling involves reducing conflict, and helping parents (and possibly others) reach practical parenting arrangements and adjust to their changed parenting situation – the separation itself and working through the hurt, anger and other emotions experienced when they separate.

All Court counsellors have tertiary qualifications in either psychology or social work and at least five years postgraduate experience and, since 1993, appointees also have at least two years experience in working directly with children and their families. Some have had experience in the Court's mediation service and draw on those skills and exposure from working with registrars in mediation, joint conferences and pre-hearing conferences when conducting conciliation counselling.

All relevant members of the family are included in the conciliation counselling process if possible and, unless there are allegations of violence or other special circumstances, the parents are seen together, which emphasises their continuing role as parents.

Where appropriate, counsellors may also involve the children in these interviews. They help the children present their views and perceptions so that these can be taken into consideration by the parents when making their decision. While it is important that children be given the opportunity to be consulted, counsellors must be satisfied that it is safe for them to do so without fear of reprisal from a disappointed parent. It is also vital that the parents can focus on the children's needs, not merely their own, as otherwise children's involvement would be counter-productive and probably harmful.

Conciliation counselling conferences are confidential and what is said and the issues raised cannot be used as evidence should the dispute ultimately be the subject of litigation. Counsellors take an oath of confidentiality which can be departed from where an allegation of child abuse arises during counselling. In such situations Court personnel are required to report to state welfare authorities. Other serious allegations or conduct which arise in a counselling session and which may compromise the safety of a party, a child or

another person are also exceptions to the confidentiality of counselling.

Referrals from the Court or orders by Judges, Judicial Registrars and Registrars to attend counselling may occur at various stages of the proceedings once an application has been filed. A parenting order cannot be made unless the parties have attended a conference with a family and child counsellor to discuss the matter to which the proceedings relate. Exceptions include orders made by consent, those which are interim in nature, or urgent, where attendance would be impracticable, or there are special circumstances such as family violence.

Conciliation counselling has the same purposes and functions whether it takes place voluntarily or as a result of a Court order, or whether or not proceedings have been filed. Where possible, families are provided with the same counsellor on each occasion, although where conciliation counselling is followed by family assessment a different counsellor must be allocated to protect the nature of the confidentiality and the inadmissibility of anything said during the earlier counselling.

Although the Attorney-General's proposal implies that primary dispute resolution processes and litigation necessarily occur sequentially, in fact they run on parallel lines. Close integration occurs between the two paths and there may be frequent crossing from one to the other, depending on developments in the management of the case.

At the completion of all court ordered conciliation counselling a memorandum is completed and put on the Court file to indicate the outcome and to guide the future management of the matter.

### Family Reports

Once cases have exhausted the conciliation process a Judge or registrar may order the preparation of a family report. This provides the judge with additional information about the children before an order is made, and allows any wishes of the children to be conveyed in a sensitive manner. The contents of a report are not confidential and will be disclosed to the Court. These contents usually include material obtained by the counsellor from the various family members in a number of combinations and settings, including home and school. The report generally concludes with a discussion of the various possible outcomes for the family and the likely effects of these outcomes on the child. Counsellors may be examined on

the contents of their reports in court, as may other expert witnesses.

Many cases settle after the parties have seen the counsellor's assessment in the report. Matters requiring reports are often extremely complex, involve risk for the children and high conflict, and thus need extremely careful preparation. These factors are reflected in the fact that the average report involves five to eight times more counsellor hours than does a conciliation conference.

The preparation and use of reports illustrates the extent to which judges who rely on the reports, registrars who assess the need for them, and counsellors who prepare them, work together from their different but complementary professional backgrounds to promote the best interests of children.

The Family Law Act, Rules and the Family Court Case Management Guidelines provide an integrated client-focused approach to the resolution of disputes. In addition, a number of other services are provided by Court conciliators and mediators, including community education and liaison, and information sessions advise people of the range of options and pathways they may take.

### Conclusion

The Attorney-General's enthusiasm for changing the structures by which primary dispute resolution services are delivered by both the Family Court and non-government agencies provides an important opportunity for debate and consultation.

However, his obvious preference for devolution of the counselling and mediation work currently undertaken by Court staff to outside agencies needs to be seriously considered and questioned. Avoidance of possible duplication and overlap should not be the catalyst for the jettisoning of the integrated services which have enabled the Family Court to give complex family disputes the multidisciplinary attention they require.

The concept of judicial core services being the sole *raison d'être* of the Court's existence, and non-judicial services being ancillary and severable, leads to an elevation of litigation over primary dispute resolution which would contradict the impetus of the Family Law Act, and particularly its most recent amendments. Ironically, it also runs contrary to developments in other courts, both here and overseas.

This discussion is not intended to detract from the work of non-government agencies, nor minimise their importance

or effectiveness. The Family Court has worked in a complementary way with these organisations and recognises their value in providing reconciliation and marriage relationship counselling. This has reduced the pressure on the Court to provide such services when its workload in meeting the needs of separated families reached impossible dimensions. However, if its primary dispute resolution services were dismantled, the Court would lose one of its most respected and valued features.

### References

- Family Court of Australia (1992), *Submission to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act*,  
 Kelly, J. (1989), 'Mediated and adversarial divorce: respondents' perception of their process and outcome', *Divorce Mediation Quarterly*, no. 24.  
 McDonald, P. (Ed) (1986), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies, Prentice Hall, Sydney.

### Notes

- <sup>1</sup> Singapore, Fiji, Hong Kong and several of the American states are currently examining models which would see the establishment of Family Courts similar to ours.
- <sup>2</sup> These are conducted by legally qualified registrars and are a compulsory precursor to the making of an order where financial matters are in dispute.
- <sup>3</sup> This term was inserted into the amended Act in recognition of the centrality of conciliation and mediation. The widely used phrase 'alternative dispute resolution' was seen to imply incorrectly that these methods were secondary in importance to litigation.
- <sup>4</sup> The Attorney-General has responsibility for the funding and approval of organisations which provide primary dispute resolution services to the community. The Family Court is administratively independent of the Attorney-General's Department, but lies within its portfolio and is funded from the Administration of Justice Program.
- <sup>5</sup> Since this article was written, the Attorney-General has reiterated his views about the future of the Family Court's counselling service. In a speech to the Victorian Court Network conference on 12 March 1997, Mr Williams indicated that his Department's forthcoming discussion paper would canvass the management of 'all non-judicial family law services' by a centralised Departmental agency. The Chief Justice of the Family Court of Australia, The Hon Alastair Nicholson, subsequently stressed the importance of the Court having the coordination and control of services for its clients and their children, and predicted that a new bureaucracy along the lines suggested would create an unwieldy structure.

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