

**Mandatory Mediation in Australian Family Law**

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## **Introduction**

Australia is a modern society that enjoys freedoms that are fundamental to our health, wealth and happiness.

<sup>1</sup>“The right to marry – in a sense decisively different from the ‘right’ to cohabit – and the right to divorce are profoundly important to the liberty of individuals and the welfare of families. In a just and well-ordered society, those rights are fundamental for men and women who *want* to marry and for those men and women who, perhaps finding their lives together intolerable, want to have the right, through divorce, to salvage an opportunity for a new life”

The Australian Federal Government is changing the way divorcing couples with children will settle their disputes. Amongst these changes is compulsory dispute resolution/Mandatory Mediation.

This paper will examine what these changes are and why they are seen by our Federal Government as necessary, evaluate the meaning of Mandatory Mediation and in particular what it means in Family Law.

Will there be resistance or acceptance to mandatory mediation by service providers and divorcing couples with children?

What other changes in the delivery family mediation have accompanied Mandated Mediation?

What are the anticipated effects that mandated mediation and these changes will have on outcomes?

Is the Government making positive changes for divorcing couples and their children?

## **Hypothesis**

Most divorcing couples with children, being able to avoid the stress and expense of lengthy court proceedings, will accept compulsory family dispute resolution. In time divorcing couples with children will expect compulsory family dispute resolution rather than court as a normal part of the process.

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<sup>1</sup> Marriage, Divorce and Family Justice Page 2

## Background

**Litigation** has been the traditional battlefield for divorcing couples. Our culture of argument – ‘I am right, which means you must be wrong’, is very strongly entrenched in all areas of our lives.

<sup>2</sup> “ ‘You be the judge.’ ‘He thinks he is the judge and jury.’ ‘The jury is still out on that one.’ We sometimes talk as if the world were one big courtroom, our lives a series of trials. We look to courts to reveal the truth, and often they do. But our legal system isn’t designed to uncover truth – at least not directly. It’s about winning, even if it means colouring, distorting, or hiding facts in order to win. The.... legal system is a prime example of trying to solve problems by pitting two sides at each other and letting them slug it out in public. It reflects and reinforces our assumption that truth emerges when two polarised, warring extremes are set against each other.....driven not by a search for truth but by a search for the best defence.” Surely such acrimonious behaviour is highly detrimental to personal relationships, savage tactics are certainly not appropriate for assisting families in crisis.

<sup>3</sup>“Since the opening of the Family Court of Australia in late 1975, applications for “principal relief” (divorce) have been solely on the grounds of separation for a year or more. The hope attached to this single and seemingly simple criterion was that separation and divorce would become a more civilized process than the procedures that had existed under the essentially fault-oriented legislation that preceded it. It quickly became apparent, however, that a general tendency to also de-link fault from decisions about the “ancillary matters” of money and children brought unexpected challenges. Criticism of the new legislation came from a number of quarters. The “best interests of the child” criterion underpinning decision making in parenting disputes was thought by many to be too vague. In addition, a considerable number of feminist scholars and commentators were unhappy with the principles that informed property distribution, spousal support and child support after separation. Some were especially concerned that the concept of “no fault” divorce had become confused with a notion that past behaviour should have little or no impact on the outcome of parenting disputes. Alongside such concerns was a growing realisation, informed by social science research, of the extent to which family-related violence and child abuse had been hitherto underestimated in Australian society.”

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<sup>2</sup> The Argument Culture, Deborah Tannen page 138

<sup>3</sup> Our Children Come First by Lawrie Moloney Relationships Family Quarterly  
I S S U E 1 2 0 0 6

<sup>4</sup> “1.1 For many years the Australian community has been extremely concerned about contact and residency issues following marriage and relationship breakdown and their experiences with the Family Court and the Child Support Agency. These have been critical issues brought to the daily agenda of members of parliament by their constituents. Several major parliamentary inquiries and a number of other inquiries have looked into these matters, but the problems persist. Different solutions are obviously needed.”

### **Extensive and wide ranging changes are needed**

<sup>5</sup>“no one legislative change or pronouncement can alter the concerns, dealing with the matter is a national responsibility, and implied that it is important to the greatest extent possible, children have the benefit of regular and meaningful contact with both their parents.”

The <sup>6</sup> Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation. ... recommended (recommendation 9) '... that the Family Law Act 1975 be amended to **require separating parents to undertake mediation or other forms of dispute resolution** before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.'

As a direct consequence of the report to the enquiry, <sup>7</sup>“reforms to the family law system are the most significant in 30 years and are aimed at helping families deal co-operatively and practically with relationship difficulties and separations.”

<sup>8</sup>“Because of the far-reaching nature of its proposed package, the government decided to consult the community about the reforms. On 10 November 2004, it released a discussion paper, *A new family law system: implementation of reforms*. Over 400 written submissions were received in response to the paper and officers of the Attorney-General’s Department and the Department of Family and Community Service held face to face meetings with over 300 agencies, service providers and interest groups. These consultations greatly assisted the government as it shaped this final response to *Every picture tells*

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<sup>4</sup> INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION, 1 Introduction, Origin of the inquiry

<sup>5</sup> Howard J MP, *House of Representatives Debates*, 24/6/03, pp 17277-17278.

<sup>6</sup> NADRAC

<http://www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/Page/RWP3892D3CAA804C3BCA256E8B008375EF?OpenDocument>

<sup>7</sup> Australian Government –A new Family Law System. Putting the focus on kids. Fact sheet 1.

<sup>8</sup> <http://www.aph.gov.au/house/committee/fca/childcustody/govtresponse.pdf> downloaded 06/05/07

*a story* - the report on the inquiry into child custody arrangements in the event of family separation, released 29 June 2003

<sup>9</sup> "...changes to the law that require parents to attend family dispute resolution before taking a parenting matter to court will be phased in. It is expected that this requirement will apply to all new parenting cases from 1 July 2007, and to all parenting cases from 1 July 2008."

### **Mandatory Mediation**

<sup>10</sup>"It is often said that the concept of 'mandatory mediation' is a contradiction in terms - the essence of the mediation process is its voluntary or consensual nature. However, the rules of the Federal Court and the Supreme Court of each state and territory in Australia have been amended in recent years to give the courts the power to order parties to participate in a mediation against their will."

So what does mandatory really mean? The Macquarie Dictionary defines Mandatory as <sup>11</sup> "2. obligatory. 3. Law permitting no option."

'Voluntary' on the other hand is defined as <sup>12</sup> "1. done, made, brought about, etc by free will or choice. 2. Acting of one's own free will."

Professor Laurence Boulle defines mediation as <sup>13</sup> "a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision making and to assist the parties to reach an outcome to which each of them can ascent." He does however state that there are difficulties in this statement for many reasons. <sup>14</sup> "One is the flexibility and open interpretation of terms such as 'voluntary' and 'neutrality' which are often used in the definition of mediation, but which can never provide certainty and clear boundaries."

<sup>15</sup> "In reality, entry into mediation is sometimes voluntary, but in other cases it is affected by differing degrees of pressure or duress.....One of the main pragmatic concerns is that if persons are forced into mediation against their will and better judgement, it could result in their participating in a perfunctory fashion. Such participation would reduce the prospects of a settlement being reached and the mediation could constitute an expensive exercise in futility." With this in mind then surely it also suggests that parties may also make agreements without real commitment, simply to "get it over with," these agreements would quickly be broken once the party has had time to reconsider his own real best interests.

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<sup>9</sup> Australian Government –A new Family Law System. Putting the focus on kids. Fact sheet 2

<sup>10</sup> Jenny Campbell and Thomasin Opie of Allens Arthur Robinson, [www.findlaw.com.au](http://www.findlaw.com.au)

<sup>11</sup> Macquarie Dictionary, p 482

<sup>12</sup> Macquarie Dictionary,

<sup>13</sup> Mediation Principles Processes and Practices, Laurence Boulle p3

<sup>14</sup> Mediation Principles Processes and Practices, Laurence Boulle p3

<sup>15</sup> Mediation Principles Processes and Practices, Laurence Boulle p17

If <sup>16</sup> “voluntarism is an essential component of mediation” indeed may it be seen as a pseudo court process when <sup>17</sup> “voluntary’ is contrasted with ‘mandatory’ or ‘coercive’, as these terms apply, for example in the litigation process where parties are compelled to attend, to participate and to comply with the outcome, on pain of sanctions if they do not do so. The emphasis on the term ‘voluntary’ in mediation is justified in terms of the ‘alternative’ character of mediation.”

The entry into mediation must essentially be voluntary, as is sticking with the process<sup>18</sup> “once the parties have entered mediation, voluntarism requires them to be able to withdraw from the process at any stage before settlement.”

Furthermore <sup>19</sup>Mediation is not genuinely voluntary where a party enters into it under threat of litigation from the other side, or because of their inability to afford litigation or other dispute resolution options.”

## **SO WHAT?**

Arguments about voluntarism aside, what does mediation really mean for families?

The very essence of mediation is that it is **NEEDS based**. Do families NEED to go to court? Traditionally Family Lawyers have encouraged the adversarial nature of litigation, and have instructed their clients not to talk to each other. Relationships between divorcing parents naturally deteriorate as they can become more polarised in their positions, spending so much time, effort and horrendous expense on litigation, that they grow more embittered and their issues further entrenched. In the process, co-parenting needs of their children have been brushed aside and made impossible to provide. The longer this battle is allowed to rage, the worse the situation gets. How can these couples be expected to co-operate, co-parent, listen to each others needs, be heard and understood? <sup>20</sup>“For people who find themselves locked in battle, staying out of court brings crucial emotional benefits. And it is a fraction of the costs of going to court. ...each parent will save approximately \$50,000 by staying with mediation.”

Surely **what couples need before its too late**, is to be able to recognise what real issues need to be addressed, and through mediation, negotiate and resolve them respectfully, and therefore retain any threads of their relationship that remain so they can effectively co-parent their children and move on with their lives without destroying each other.

“<sup>21</sup>**Something to think about** One in four children from separated families suffers from poor mental health. That’s a lot more than ‘normal’. Separation

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<sup>16</sup> Compulsion is Not the Answer Ingleby, 27 Australian Law News 17,18

<sup>17</sup> Resolving Public Policy Conflicts through Mediation: the Water Roundtable” Adler, R 69, 78

<sup>18</sup> Mediation, Principles Process Practice, L Boule p15

<sup>19</sup> Court Sponsored Mediation: The Case Against Mandatory Participation Ingleby, R 56,

<sup>20</sup> Sydney Morning Herald “Family feud meets the negotiator, Catharine Munro 1208/06 P58

<sup>21</sup> Because it’s for the Kids, Building a secure parenting base after separation, page 5

doesn't cause this. Long, bitter, unresolved conflict does. Children's energy gets drained by high or frequent conflict between parents, when mums and dads can't 'be there' for them, because their minds are full of tension and anger. Babies and young children are especially vulnerable to both family conflict and being looked after by overwhelmed parents." <sup>22</sup> "What **children need** after their parents separate is exactly what they needed before: a secure emotional base....with parents they trust and feel comforted by."

### **Early Intervention is the key – before going to see a lawyer**

To encourage early intervention for families experiencing family breakdown and relationship difficulties, the Government is opening up access to **a single entry point** to the family law system, the new Family Relationship Centres – 65 of which are being opened up across Australia.

It is hoped that with easier access to early interventions, many families will be able to address their issues and restore a normal level of harmony to their relationships, enabling more families to remain intact. For those unable to keep their families together, help is available to enable them to effectively cooperatively parent their children, thus avoiding much of the damage to children that has been allowed to happen in the past.

We read from the Australian Attorney General's literature that Family Relationship Centres offer 3 to 5 hours free assessment and other services, then provide or refer families to needed services such as individual counselling, relationship counselling and skills, family relationship education, mediation and other dispute resolution services, parenting programs, parent help, anger management, specialist services for men, and legal services.

<sup>23</sup>"The main focus of the changes is that children come first. When working out shared parental responsibilities following a family breakdown, the new laws make it clear that it's all about putting the needs and the best interests of the children first."

<sup>24</sup>**Cooperative Parenting or Parallel Parenting?** Research on families of divorce suggests that there are three styles of parenting for families after divorce: cooperative, conflicted or disengaged. Cooperative parenting is the style used by families in which conflict is low and parents can effectively communicate about their child. ...children of divorce fare best when their parents can be cooperative with their parenting. Conflicted parenting is the worst for children, who are often in the middle of the conflicts.... Disengagement is one of the possible styles of parenting after divorce. If you disengage, it's like you have developed a 'demilitarized zone' around your children and have little or no contact with the other parent. When you

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<sup>22</sup> Because it's for the Kids, Building a secure parenting base after separation, page 4

<sup>23</sup> A new family law system FACT SHEET ONE

<sup>24</sup> <http://www.parentingafterdivorce.com/articles/parenting.html>, article written by Philip M. Stahl, Ph.D P1

disengage, you will avoid contact with the other parent so that conflict cannot develop. You must do this first to reduce the conflict and before you can move on to the next style of parenting...parallel parenting...both learn to parent your child effectively, doing the best job you can do during the time you are with your child. You will continue to disengage from the other parent so that conflicts are avoided. If you determine that you cannot cooperatively parent because your level of conflict is moderate or high, disengagement and parallel parenting is the necessary style of parenting.”

### **What is family dispute resolution?**

<sup>25</sup> “a process (other than a judicial process): (a) in which family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other: and (b) in which the practitioner is independent of all the parties involved in the process.”

### **Mediation or Family Dispute Resolution – What’s the difference?**

A Family Dispute Resolution Practitioner provides mediation or family conferencing services etc within the confines defined in the Family Law Act (including issuing certificates under section 60I of the Act).

Other mediators providing family mediation outside these confines are still known as mediators.

### **Compliance Certificates**

<sup>26</sup>From 1 July 2007 if a person wants to apply to the court for a parenting order (and they have not previously applied) they will need a certificate from a **registered** family dispute resolution provider which confirms that an attempt at family dispute resolution was made.”

### **Exceptions**

Parents do not need to attend Family Dispute Resolution if they are able to agree on their issues without external assistance ie there is no dispute to resolve.

<sup>27</sup> “If a matter is assessed as inappropriate, the practitioner may provide a certificate to this effect. The client may also be referred directly to court if they meet one of the exceptions under the Act.

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<sup>25</sup> The term “family dispute resolution’ as defined in s 10F of the Act

<sup>26</sup> [www.ag.gov.au/fdrproviders](http://www.ag.gov.au/fdrproviders) downloaded 28/04/07

<sup>27</sup> [www.ag.gov.au/providers](http://www.ag.gov.au/providers) downloaded 01/05/07

Subregulation 62(2) requires the family dispute resolution practitioner to be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by:

- a history of violence (if any) among the parties
- the likely safety of the parties
- the equality of bargaining power among the parties
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the parties
- any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

Subregulation 62A(3) provides that a family dispute resolution practitioner may not issue a certificate to a person under subsection 60I(8) of the Act after 12 months has elapsed since the date of the last attendance (or attempted attendance, as per paragraphs 60I(8)(a) and (aa)) of that person at family dispute resolution, conducted by the family dispute resolution practitioner, in relation to the issue or issues that are the subject of the person's intended application to the court.

### **Non compliance or inability**

To ensure that people are properly informed of the potential consequences of not attending family dispute resolution, subregulation 62A(4) provides that a family dispute resolution practitioner must not provide a certificate pursuant to paragraph 60I(8)(a) of the Act unless the party or parties who have failed to attend the process have been contacted at least twice, with at least one of these contacts being made in writing, and have been provided with a reasonable choice of days and times for attendance at family dispute resolution.

In these contacts, the party or parties must be informed that if they do not attend family dispute resolution, a certificate may be provided by the family dispute resolution practitioner under paragraph 60I(8)(a) and that this certificate may be taken into account by a court when determining whether to make an order referring parties to family dispute resolution under section 13C or awarding costs against a party under section 117 of the Act.

In order to issue a certificate retrospectively, up to a period of 12 months, the family dispute resolution practitioner must be registered at the time the certificate is issued.

## **Information provision requirements**

Regulation 63 of the Regulations requires family dispute resolution practitioners to ensure that consumers receive information to enable them to understand the important elements of family dispute resolution. This information must be provided prior to commencing family dispute resolution and must include the following information:

- that it is not the role of the family dispute resolution practitioner to give people legal advice (unless the family dispute resolution practitioner is also a legal practitioner)
- the family dispute resolution practitioner's confidentiality and disclosure obligations under section 10H of the Act (as detailed below)
- the generally inadmissible status of communications made in family dispute resolution (as detailed below)
- the qualifications of the family dispute resolution practitioner to be a family dispute resolution practitioner
- the fees (including any hourly rate) charged by the family dispute resolution practitioner in respect of the family dispute resolution
- that family dispute resolution must be attended, if required under section 60I of the Act, before applying for an order under Part VII of the Act (as explained above)
- that, if a person wants to apply to the court for an order under Part VII of the Act, the family dispute resolution practitioner may provide a certificate under subsection 60I (8) of the Act, including a certificate to the effect that the person:
  - did not attend family dispute resolution due to the refusal, or the failure, of the other party or parties to the proceedings to attend, or
  - attended family dispute resolution with the other party or parties to the proceedings but that the person, the other party, or another of the parties, did not make a genuine effort to resolve the issue or issues
- if a certificate under subsection 60I(8) of the Act is filed, the court may take it into account in considering whether to make an order under section 13C of the Act, referring the parties to family dispute resolution or to award costs against a party under section 117 of the Act
- information about the complaints mechanism that a person who wants to complain about the family dispute resolution services may use.”

## **Registration and Accreditation required for Family Dispute Resolution Providers**

Along with making family dispute resolution mandatory, the Government needs to be seen to ensure that service delivery will be at a level that meets desired outcomes. Therefore a registration system is being put into place to ensure that all Family Dispute Resolution Providers (except for those providing Dispute Resolution Services on behalf of the Court), both on an individual and an organisational level, have met the required standards of training, experience and suitability for inclusion on the Family Dispute Resolution Register.

<sup>28</sup>“A national uniform system of mediator accreditation could have the following objectives: the improvement of mediator knowledge, skills and ethical standards; the promotion of standards and quality in mediation practice; the protection of the needs of consumers of mediation services and the provision of accountability where they are not met; the development of consistency; and a broadening of the credibility and public acceptance of Australian mediation and mediators here and abroad.”

The accreditation system for family dispute resolution practitioners being phased in, is designed to ensure the professional standards of family dispute resolution services are delivered and to recognise the professionalism of the sector and practitioner.

Registration is required from 1<sup>st</sup> July 2007 however, accreditation is not essential before 1<sup>st</sup> July 2009. This transition period will allow time for current practitioners to address all requirements enabling them to meet the criteria for the new accreditation.

From 1 July 2009 Registration AND Accreditation will be required for practicing Family Dispute Resolution Practitioners to issue valid certificates and work in the field.

### **Mandatory Obligations of a Dispute Resolution Provider**

Along with mandatory mediation (Family Dispute Resolution) come mandatory obligations of Providers/practitioners. <sup>29</sup>“Under the changes to the Act, there are a number of new and changed obligations in relation to the provision of family dispute resolution.

These include a requirement for family dispute resolution providers to be included on the Family Dispute Resolution Register in order to issue certificates under section 60I of the Act. Family dispute resolution practitioners are also required to provide information on services that assist reconciliation, parenting plans and information in cases involving family violence or child abuse.

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<sup>28</sup> Mediator Accreditation in Australia, Report to the 8<sup>th</sup> National Mediation Conference, Hobart, Tasmania 3 – 5 May 2006 p 3

<sup>29</sup> [http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesInformation\\_for\\_family\\_dispute\\_resolution\\_providers#heading7](http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesInformation_for_family_dispute_resolution_providers#heading7) downloaded 01/05/07

Family dispute resolution practitioners are required to meet confidentiality and admissibility requirements and the requirements for providing family dispute resolution under section 10K of the Act (including what constitutes a reasonable attempt to contact the other party).

There are also a number of obligations in relation to meeting ongoing professional development requirements and in order to maintain inclusion on the Family Dispute Resolution Register.”

### ***Provide information on services that assist reconciliation***

<sup>30</sup> “Part IIIA of the Act sets out the obligations of specified individuals to inform people about non-court-based family services and other important matters relating to family relationships.

Section 12G of the Act requires family dispute resolution practitioners who deal with a married person who is considering instituting proceedings for a divorce, or considering going to court in relation to proceedings about their children or their finances under the Family Law Act, to give that person (and, in appropriate cases, that person’s spouse) documents containing information about family counselling and family dispute resolution services available to help with a reconciliation between the parties to a marriage.....This prescribed information does not have to be provided if the family dispute resolution practitioner has reasonable grounds to believe that the person has already been given the relevant documents (for example, the person may have received the documents from a legal practitioner or from a family law court), or if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.”

### **<sup>31</sup> “1.1.6 Removal of immunity for family dispute resolution practitioners**

Old section 19M of the Family Law Act provided a mediator..... with the same protection and immunity as a Judge of the Family Court when the...was performing mediation.....In its report on the exposure draft of the Shared Parenting Act, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the question of immunity for family dispute resolution practitioners should be referred to an appropriate Government advisory body for research and consideration on whether it was appropriate to extend immunity to all family dispute resolution practitioners or remove such immunity.

Pursuant to this recommendation, the Government requested advice from the National Alternative Dispute Resolution Advisory Council and the Family Law

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<sup>30</sup>

<http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP717CAD87EACF245CCA2572AC00002BD1#HEADING4> downloaded 01/05/07

<sup>31</sup> [http://www.legalhelp.com.au/family\\_law.cfm](http://www.legalhelp.com.au/family_law.cfm) referring the Family Law Amendment Act (Shared Parenting Responsibility Act 2006) downloaded 05/07/04

Council on this issue. NADRAC and the Family Law Council advised the Government that it is not appropriate for any family dispute resolution practitioners to have immunity. The Councils considered that there is no justification for maintaining an immunity for community based mediations and that mediators, like other professionals, may be able to limit their liability by contract. They also noted that the limitations on the admissibility into evidence of anything said or done during a dispute resolution process (see new section 10J of the Family Law Act) would not make it easy to bring a negligence action against a dispute resolution practitioner. ...Based on that advice, the new Family Law Act does not provide immunity for family dispute resolution practitioners.”

**Perhaps** removal of immunity for family dispute resolution provides a perception of quality control and represents a “protection” for consumers of mandatory mediation services?

### **What are the amendments that mandate mediation?**

<sup>32</sup>“The Family Law Amendment (Shared Parental Responsibility) which came into effect from 1<sup>st</sup> July 2005 to be rolled out in three phases. These provisions contained in the Family Law Rules 2004 are extended to all courts applying the *Family Law Act*.

The relevant provisions are s60 1 (2)–(4).

### **Phase 1 (from commencement to 30 June 2007)**

- ‘s60 1
- (2) The dispute resolution provisions of the Family Law Rules impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.
  - (3) By force of this subsection, the dispute resolution provisions of the Family Law Rules 2004 also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications are necessary.
  - (4) Subsection (3) applies to an application for a parenting order if the application is made: (a) on or after the commencement of this section: and (b) before 1 July 2007’

The dispute resolution provisions in the Rules are well known to practitioners by now. Extending them to the Federal Magistrates courts, and courts exercising a summary jurisdiction, will lead to a more uniform approach to dispute resolution in family law matters. Whilst the pre-action procedures in the 2004 Family Law Rules are a good framework for dispute resolution before the commencement of proceedings, the inconsistency with which they have been implemented within the profession, and are enforced both within

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<sup>32</sup> Critical Issues in Family Law p 44

individual Registries of the Court, and between the Registries, has perhaps retarded their effectiveness.”

### **Phase 2 (from 1 July 2007 to 1 July 2008)**

<sup>33</sup>“From 1 July 2007, if you want to apply to the court for a parenting order (and you have not previously applied), you will need a certificate from a **registered** family dispute resolution provider which confirms that an attempt at family dispute resolution was made.”

The court will not hear any new applications that do not meet the requirements. Evidence in the form of a **Certificate issued by Registered Family Dispute Resolution Practitioners will be required** as proof of an attempt at dispute resolution being made. The certificate will indicate 4 things:  
<sup>34</sup>“(1) that the person did not attend family dispute resolution, because of the refusal or failure of the other party to attend; or (2) that the person did not attend because the practitioner considered that it would not be appropriate; or (3) that the person did attend and all attendees made a genuine effort to resolve the issues; or (4) that the person did attend but the or the other party did not make a genuine effort to resolve the issues.” ” <sup>35</sup>Importantly, a certificate will not be required in circumstances where a history or threat of family violence or a child abuse is established,” “ <sup>36</sup>although the court must still consider making an order that a person attend a session where such an exception applies.”

### **Phase 3**

<sup>37</sup>“It is expected that, from 1 July 2008, this requirement will apply to all applications, including those seeking changes to an existing parenting order.”

#### **<sup>38</sup>“FACTS**

- More than one million children in Australia have one parent living elsewhere
- One in four children from separated families see their non-resident parent only once a year or not at all.”

#### **<sup>39</sup> “The Rights of Children**

- All children have a right to know both their parents and to grow up with their love and support,
- All children have a right to be protected from harm,

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<sup>33</sup> [http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesFamily\\_dispute\\_resolution](http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesFamily_dispute_resolution)

<sup>34</sup> *Family Law Act 1975* (Cth), s 601(8)

<sup>35</sup> *Family Law Act 1975* (Cth), s 601(9)

<sup>36</sup> *Family Law Act 1975* (Cth), s 601(10)

<sup>37</sup> [http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesFamily\\_dispute\\_resolution](http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesFamily_dispute_resolution) Downloaded 01/05/07

<sup>38</sup> Australian Government, Attorney Generals Department. A new Family Law System Putting the focus on Kids, Factsheet one 2006

<sup>39</sup> Australian Government, Attorney Generals Department. A new Family Law System Putting the focus on Kids, Factsheet one 2006

- Parenting is a responsibility that should be equally shared, provided this does not put children at risk,
- Parents should be able to work out together what is best for their children rather than fighting in a courtroom”

### **Equal Shared Care Responsibility Act 2006.**

Shared care responsibility does not necessarily imply equal time with both parents. It does mean equal responsibility for decisions affecting the child, such as choice of schools, living arrangements, healthcare etc.

Whether the child spends substantial time, equal time or significant time with parents considers the practical considerations and always in the child’s best interests.

All family members benefit when parenting decisions after separation are made co-operatively.

**The important role of grandparents and other relatives** is being recognised. Their positive influence in the children’s lives can be taken into consideration in the drawing up of a parenting plan, as long as it does not put children at risk.

### **What is a Parenting Plan**

<sup>40</sup> “A parenting plan is an agreement that sets out parenting arrangements for children. A parenting plan covers the day to day responsibilities of each parent, the practical considerations of a child’s daily life, as well as how parents will agree and consult on important, long-term issues, such as which schools children will attend.”

**Terms – Custody and Access, have long disappeared, now Residence and Contact are defunct** no longer found in the New Family Law System, nor are they issues that are mediated. These have been replaced with <sup>41</sup>“the person with whom a child is to live.....’the time a child spends with or communicates with another person.’ “

**Parenting Plans**, although do not create any legal obligations, are recognised by the Family Law Act, and may be taken into consideration at any subsequent parenting proceedings.

<sup>42</sup>“To be recognised by a court it must be in writing, dated and signed by both parties, free from any threat duress or coercion.”

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<sup>40</sup> THE NEW FAMILY LAW SYSTEM, SUMMARY OF THE MAIN CHANGES AND HOW THEY AFFECT FAMILY RELATIONSHIP PRACTITIONERS JULY 2006, Australian Government, Attorney-General’s Department, Civil Justice Division p 6

<sup>41</sup> The New Family Law System- Information for family relationships practitioners p 15

<sup>42</sup> Australian Government, A New Family Law System, Fact Sheet 8

<sup>43</sup> "...a **later parenting plan "trumps" an earlier parenting order**, irrespective of the circumstances leading to the making of both the plan and the order unless threat, duress or coercion can be established. Thus, in theory, a parenting order made after a full hearing with the benefits of child representation and expert reports may be rendered quite nugatory by a later informal parenting plan entered into by the parents without the benefit of any assistance at all."

Although the report seemed to address concerns that parents could make their own parenting plans without any advice, by suggesting there be a 7 day cooling off period to give parents time to seek advice of Family Dispute Resolution Practitioners or legal advice, no such ruling was passed in the Bill. The only "protection" available for an "underpowered" parent, was stipulated in 1(a), which may be argued as a very dubious protection indeed.

With the trend towards less formal parenting plans, the legal fraternity seems concerned that parents may reach agreements <sup>44</sup>"as a result of factors that are quite extraneous and far-removed from considerations of the best interests of their children. Family Law can be sometimes very 'paternal' or 'maternal' in that it insists on there being a checking mechanism to ensure that the legal arrangements that parties enter into are in accordance with social norms. Thus, e.g. all consent orders are at least notionally 'checked' by the Court to ensure that they are in the child's best interests, or just and equitable, depending on the context....Parents will inevitably get it wrong sometimes."

Apart from registration and accreditation to ensure that Family Dispute Resolution Practitioners have the skills, qualifications, current training and experience required to assist parents with parenting plans, <sup>45</sup> "under the Regulations, before proceeding with family dispute resolution, a family dispute resolution practitioner must be satisfied that an assessment has been made about whether each party's ability to negotiate freely in family dispute resolution is affected by violence or other factors.

**The court system is changing** for those who do require the court process. Rather than the traditional adversarial court system, more of a case management approach will take place, where judges discuss issues directly with the parties, as well as to the lawyers.

Where a parent fails to comply with orders, there will be a wider range of powers available.

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<sup>43</sup> Some Practical Implications of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 page 6

<sup>44</sup> Some Practical Implications of the Family Law Amendment (Shared Parenting Responsibility) Bill 2005 page 9

<sup>45</sup>

[http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesInformation\\_for\\_family\\_dispute\\_resolution\\_providers](http://www.ag.gov.au/www/agd/agd.nsf/Page/FamiliesInformation_for_family_dispute_resolution_providers) 01/05/07 Family Pathways Branch of the Attorney General's Department

Courts will also take into account major failures of parenting responsibilities such as non-payment of child support, and not turning up at contact handover times.

An amendment to the current definition of violence has been made <sup>46</sup> "to include a requirement for the court to assess whether fear or apprehension of violence is reasonable."

**Research was conducted for this paper**, to ascertain what changes, if any, in attitudes, levels of conflict etc have been observed in parties receiving mediation services since the change in rules that mandate mediation. What are the mediators' beliefs about the effect of these changes?

A sample study of 50 mediators who are experienced, qualified, current, and receive supervision were provided with questionnaires and 23 were completed and returned by email post or fax. See attached Questionnaire results – Addendum 1.

Since the new legislation came into effect, from the responses received, it is quite apparent that **the number of mediations has increased**.

Many organisations have **long waiting lists**, despite the ability to refer families to other organisations (are some of them keeping the "work" for their own organisations to the detriment of the families in need?) With many organisations having long waiting lists, will this become an accepted standard, is there a reluctance or inability to provide the early intervention required?

Interestingly **the level of conflict, the number of issues, success rates in reaching agreement and even the willingness to mediate is similar to before**.

**This seems clear evidence of acceptance of the mandated mediation process by the parties.**

The only negative finding, was mediation may make it easier for a party to hide assets. Court however, will always be there for those who do not make open and honest disclosure in mediation.

Other key findings of the research on the effects of mandated mediation were:

- **Better outcomes for children**
- **Fairer outcomes for families**
- **More Robust outcomes**
- **Ability to retain or restore fractured relationships**
- **A more cost effective process**
- **That the government has made a positive difference in this legislation**

**A large majority of respondents indicated that the changes will have a positive affect for families in conflict.**

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<sup>46</sup> Australian Government, A New Family Law System, Fact Sheet 2

## Conclusion

<sup>47</sup>“Clients who reach resolutions throughout the mediation process experience enhanced relationships, increased compliance to parental agreements and emphasis on shared parenting”.

The Government instituted reforms in response to concerns expressed for many years about the Family Law Act 1975 and based on specialist information gathered from over 400 written submissions and face to face meetings with over 300 agencies, service providers and interest groups. Mandated mediation is just one albeit important area of these reforms. Reinforcement of the rights and needs of children and responsibilities of both parents, comes hand in hand with extra services for separating families - parent education, counselling etc.

Results of the research conducted for this paper, provides strong evidence of general acceptance by service providers and parties and success of the new system.

Savings in time, money and stress mean families will be better off because of the reforms. Our children will benefit from the love and care of two parents, and with the extra services available for those who need them suffering members of the family should be able to receive the help they need.

The conclusion of this paper therefore is that mediation *can* successfully be mandated and the Government in ensuring family dispute resolution providers attain and maintain the high competency, and that supporting services are available to back up the processes, has made a hugely positive move in mandating mediation in Family Law. Timing will tell.

**Disclaimer:** Information contained in this paper was collected prior to the seminar in Sydney on 7<sup>th</sup> May 2007, conducted by the Attorney General's office, advising practitioners of the details for registration and accreditation qualifications and other changes. The information contained is subject to future changes and is not intended to replace professional advice of any kind.

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<sup>47</sup> Lee et al., 1998

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**QUESTIONNAIRE RESULTS**

<b>1. Type of organisation</b>	<b>Gov</b>	<b>Community</b>	<b>Private</b>	<b>Other</b>	<b>Combo</b>	<b>Total</b>	
	2	9	2		10	23	
<b>2. Years Mediating</b>	<b>&lt;2</b>	<b>2 to 5</b>	<b>6 to 10</b>	<b>10+</b>			
	2	5	6	10		23	
<b>3. Quals</b>	<b>Social Sc</b>	<b>Law</b>	<b>Combo</b>				
	10	10	3			23	
<b>4. Training &amp; Supervision</b>	<b>Yes</b>	<b>No</b>	<b>little</b>				
	19	2	2			23	
<b>5. Percentage Family Law</b>	<b>&lt;20%</b>	<b>21 to 40%</b>	<b>41 to 60%</b>	<b>61 to 80%</b>	<b>&gt;80%</b>		
	2	3		2	16	23	
<b>6. Hours a week mediation</b>	<b>&lt;10hrs</b>	<b>11 to 20hrs</b>	<b>21 to 30hrs</b>	<b>31 to 40hrs</b>	<b>40+ hrs</b>		
	11	7	4	1		23	
<b>7. Waiting list</b>	<b>Yes</b>	<b>No</b>	<b>Don't Know</b>				
	12	10	2			23	
<b>8. How many weeks</b>	<b>&gt;1 week</b>	<b>1 to 2 wks</b>	<b>2 to 3 wks</b>	<b>3 to 4 wks</b>	<b>&gt; 4wks</b>	<b>Don't Know</b>	
			2	3	6	2	13
<b>9. Model of mediation</b>	<b>Co</b>	<b>Solo</b>	<b>Facilitative</b>	<b>Authorative</b>	<b>combination</b>		
	6	1	6	2	8	23	
<b>10. Increase in numbers?</b>	<b>Yes</b>	<b>No</b>	<b>Similar</b>	<b>Don't Know</b>			
	17		4	2		23	
<b>-Any difference in Socio Economic levels</b>	<b>Yes</b>	<b>No</b>	<b>Similar</b>	<b>Don't Know</b>			
	1	1	21			23	
<b>-Any difference in Level of Conflict</b>	<b>higher</b>	<b>lower</b>	<b>Similar</b>				
	7		16			23	
<b>-Any difference inNo. of issues</b>	<b>More</b>	<b>Fewer</b>	<b>Similar</b>				
	2		21			23	
<b>- Any difference in Types of issues</b>	<b>More</b>	<b>Fewer</b>	<b>Similar</b>				
		6	17			23	
<b>- Any difference in Willingness to mediate</b>	<b>higher</b>	<b>Lower</b>	<b>Similar</b>				
	2	5	16			23	
<b>11. Success Rate in reaching agreement</b>	<b>higher</b>	<b>Lower</b>	<b>Similar</b>	<b>Don't Know</b>			
	3	1	18	1		23	

12. Longevity of Agreement - measured how	Don't know	not done	Higher	lower	similar	
	16	4	1		2	23
13. On average, how many hours / sessions does each couple receive in mediation?						
- No of hours	1 to 2	3 to 4	>4			
		6	10	6	1	23
- Sessions	1 to 2	3 to 4	>4			
		9	10	4		23
14. Pick a statement you find mostly true	TRUE	FALSE	Would not say			
a) Women are usually more willing to mediate than men		3	2	18		23
15. In families with parenting issues						
a) Women are usually more willing to mediate than men	TRUE	FALSE	Would not say			
		2	6	15		23
16. In families with property and finance issues						
a) Women are usually more willing to mediate than men	TRUE	FALSE	Would not say			
		4	4	15		23
17. Are you employed by an organisation that runs an FRC						
	Yes	No				
		6	17			23
a) What impact do you believe the Family Relationship Centre will have on service levels for families in conflict						
	broader service	Good L/Term	Not Good	other		
		14	4	1	4	23
b) Does the Government's role in changing the laws that send disputing couples to mediation mean better outcomes for children						
	Yes	No	Potentially	Don't Know		
		20	1	2		23
18. Do you believe that mediated outcomes are generally fairer for couples than court orders						
	Yes	No	Some	Not necessarily		
		17	1	2	3	23
19. Do you believe that mediated outcomes are generally better for children than court?						
	Yes	No	Some	Not necessarily		
		20		1	2	23
20. Do you believe that mediated outcomes are more robust than court orders						
	Yes	No	Some	Not necessarily		
		16		2	4	22

<b>21. Do you believe that the mediation process is better at retaining or restoring fractured relationships</b>	<b>Yes</b>	<b>No</b>	<b>Some</b>	<b>Not necessarily</b>	
		19		2	2
					23
<b>22 Do you believe that the court process is better at retaining or restoring fractured relationships</b>	<b>Yes</b>	<b>No</b>	<b>Some</b>	<b>Not necessarily</b>	
			17	1	5
					23
<b>23. As mediation does not have the same requirements of subpoenaed documents etc. do you believe that the parties may feel it is easier to hide assets or other truths that would have been legally required through the court system?</b>	<b>Yes</b>	<b>No</b>	<b>Some</b>	<b>Not necessarily</b>	
		10		10	3
					23
<b>24. Do you believe that mediation is more cost effective than litigation</b>	<b>Yes</b>	<b>No</b>	<b>Some</b>	<b>Not necessarily</b>	
		22		1	
					23
<b>25. do you believe that the Government has made a positive difference in changing the Family Law Act early to tell</b>	<b>Yes</b>	<b>No</b>	<b>Some</b>	<b>Not necessarily</b>	
		15	2	4	2
					23