
Family dispute resolution: The importance of clear protocols for cooperation between family relationship service providers and family lawyers

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Under the Australian family law framework mandating mediation since 2006, the role of the family lawyer dealing with a parenting matter is two-fold. The first responsibility the lawyer has to the client is to give legal advice about the presenting issues in dispute. The second equally important role of the family lawyer is to assist the client in devising the best way to resolve those issues. Not all family lawyers have assumed, or understand, this changed role, and there is a lot of confusion among family lawyers, family relationship service providers, clients and mediation participants about what should be the first step in the process of family dispute resolution. This article argues that the success or otherwise of the mediation process can be attributed to both the timing of the mediation in the parents' separation and, significantly, to the legal advice provided to the parents.

It has been six years since the introduction of compulsory family dispute resolution in children's matters in the Australian family law system. This is an adequate amount of time to allow reflection on the progress of that change.¹ Some of the evaluations to date have explored questions which include: Are more parents accessing relationship services? Do fewer parties file at court? Are more matters settling out of court? Has the court backlog eased? Has the time for a final hearing diminished? Are family lawyers out of a job? Which matters should be exempt from mandatory mediation?² The questions go on.

This article looks primarily at the following associated questions: How has the role of family lawyers changed, if at all, since 2006, and has the introduction of mandatory family dispute resolution successfully launched a cultural shift that focuses on out-of-court facilitation of the resolution of family law disputes? In other words, if the role of family lawyers has changed, then does the new role of family lawyers facilitate an out-of-court resolution of family law disputes and, if not, why not? This article argues that the mandatory mediation laws have changed the role of family lawyers, and as such the new role of the family lawyer dealing with a parenting matter is two-fold. The first responsibility the lawyer has to the client is to give legal advice about the presenting issues in dispute. The second equally important role of the family lawyer is to assist the client in devising the best way to resolve these issues. That means the family lawyer must undertake a screening and assessment of the client and the issues to ascertain the best way forward for that individual, and the children involved.

Ascertaining the best way forward requires the family lawyer to explore the family dispute resolution options available with the client. An exploration of the family dispute resolution options available to the client involves explaining the process of these options, including mediation with a family dispute resolution practitioner if appropriate (ie, if it does not fall into an exemption category

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¹ In 2006 the Howard Government enacted amendments to the *Family Law Act 1975* (Cth), introducing mandatory mediation and a presumption of equal shared parental responsibility ("2006 amendments"). This article explores the introduction of mandatory mediation and whether or not tangible improvements have been made for participants and parties in the system, seeking a resolution of their family law disputes.

² Many of these questions were explored in great detail and answered in Kaspiew R, Gray M, Weston R, Moloney L, Hand K, Qu L and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, December 2009), <http://www.aifs.gov.au/institute/pubs/file> viewed 9 August 2012.



under the *Family Law Act 1975* (Cth)), child-inclusive mediation, round-table conferences, collaborative law, negotiation and any other option that would come before making a court application. Attending an initial consultation with a family lawyer with a view to seeking this advice should be the first step to resolution for the separating parent.

Not all family lawyers have assumed, or understand, this changed role, and as a result there is a lot of confusion among family lawyers, clients and mediation participants about what should be the first step in the process of family dispute resolution. The success or otherwise of the mediation process can be attributed to both the timing of the mediation in the parents' separation and, significantly, to the legal advice provided to the parents. If the correct legal advice is given at first instance – ie, advice about the most appropriate family dispute resolution mechanisms for the particular circumstances of the matter – then the issues in dispute have a far greater chance of being resolved out of court than if the wrong pathway is taken from the beginning. In relation to mediation specifically, if the separated parents come to the mediation having received the correct legal advice first, and armed with reasonable proposals to put on the table, the mediator's job of facilitating a dialogue to achieve a resolution is greatly assisted, and the chance for a successful mediation is greatly increased.

Although a simple concept, this new role of the family lawyer is not uniform. Indeed, confusion about where family lawyers sit in the process of the family dispute resolution framework can often jeopardise the resolution of disputes. That is, without a clearly defined collaborative process in the family dispute resolution framework, where family lawyers guide their clients through the steps, families are forced to move from one part of the system to another in a disjointed manner, and are required to start again when one process fails.

This misunderstanding of the new role of the family lawyer, combined with the fragmented and disconnected process that is currently the family law system, not only jeopardises the success of family dispute resolution options but reinforces the stereotype of family lawyers as litigious and disinclined to work collaboratively.

CLEAR PROCEDURES FOR REFERRALS BETWEEN FAMILY RELATIONSHIP SERVICE PROVIDERS AND FAMILY LAWYERS

By devising clear protocols for the cooperation between family relationship service providers and family lawyers,³ the new role of the family lawyer as the launching pad for the resolution of the issues in dispute could be used to the benefit of all separating parents – both those whose matters are suitable for mediation and those whose matters are not. Family lawyers are just as important as ever in the dispute resolution process.

The new family law framework is multidisciplinary and, now more than ever before, it is the family lawyer's role to draw on this framework to advise the client, not only about their rights and those of their children, but also about the family dispute resolution options available given the particular facts of the matter. Similarly, the family lawyer's role is to make appropriate referrals to implement support structures for the separating parents going through the system. Court options are very much the last resort – the onus is on the family lawyer to spell this out for clients, and devise a way forward that would suit the presenting issues and parties involved.

Knowing how family lawyers and family dispute resolution practitioners fit together in the family law framework is important. This article argues that it is the family lawyer's role to refer the client to a family dispute resolution provider at the right time in the separation. That may be after an hour of preliminary legal advice, or after some negotiations between one client's lawyer and the other parent or the other parent's lawyer. What is imperative, though, is that every party to mediation comes to the table with some legal advice from a family lawyer. Family lawyers must be the starting point for all separating parents. This allows the lawyer mediator to remain the mediator, and not risk putting on their lawyer hat when they are alerted to an unequal negotiating platform due to one party having obtained legal advice and the other not having had such benefit. Equally, it avoids a situation where

³ The recommendation for the development of protocols for cooperation between family relationship service professionals and lawyers acting as advocates for individual parents was put forward in Kaspiew et al, n 2.

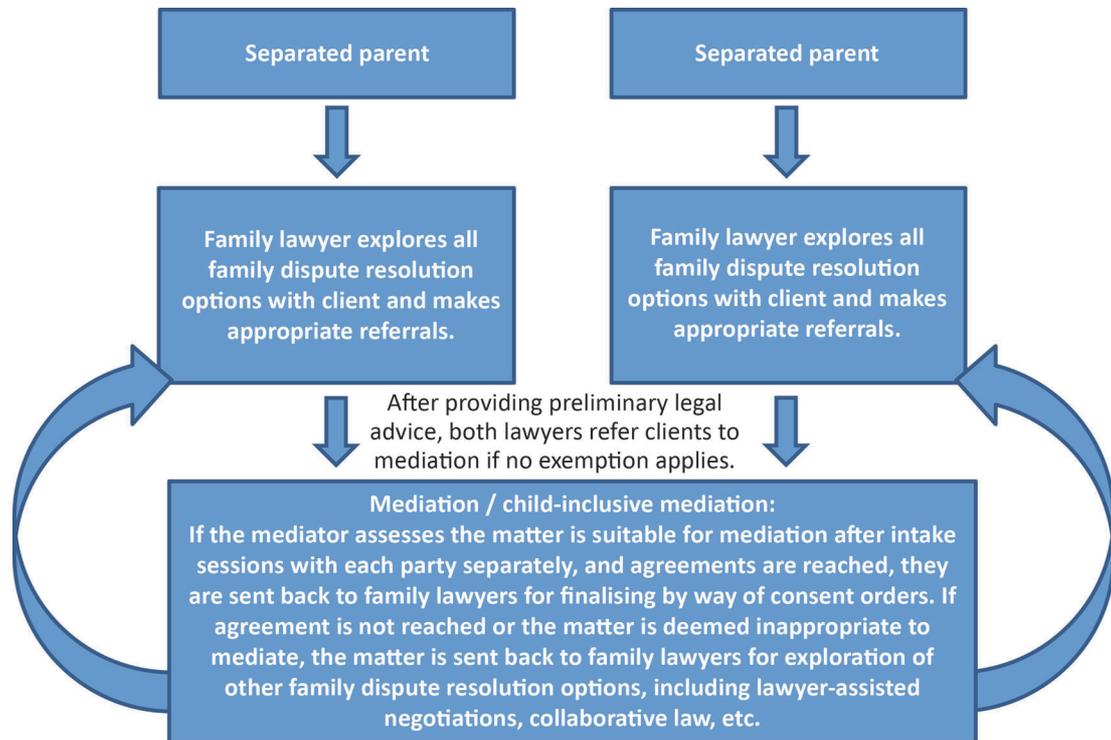


the non-lawyer mediator is unable to detect when one party has benefitted from legal advice and the other party has not, because the background of the non-lawyer mediator is not in law but in social work or psychology.

Often, when parties come to the mediation table claiming they have not yet sought advice from family lawyers, it becomes clear during the mediation that in fact one party has, leaving the other vulnerable to having the wool pulled over their eyes. This may occur when one party expresses a desire to share parenting time, without having ever before shared the “parenting time” and having no capacity to do so, eg due to work commitments. The lawyer mediator will know that such an agreement can affect the distribution of the property and also the amount of child support required to be paid, but the lawyer in the lawyer mediator is not meant to provide advice on the substantive issues in the mediation. A non-lawyer mediator, on the other hand, does not necessarily know the implications of such a proposal, or that positions can be couched in a party’s expressed interests. That is why it is important that all parties to mediation obtain legal advice prior to the mediation.⁴

In practice this devolves to a question of timing. Below is a diagram proposing an order to the collaborative approach between family lawyers and family dispute resolution providers, which has worked very well for many mediation participants since 2007.⁵

FIGURE 1 Ideal framework for multidisciplinary family dispute resolution



⁴ This argument is supported by Linda Kochanski in “Family Dispute Resolution: The Importance of an Intake” (2011) 1 Fam L Rev 164 at 166. She says: “To reach a successful outcome in mediation, parties must be fully informed; the FDRP should ensure that the parties have had legal, financial and any other relevant advice before proceeding to FDR. Many parties will have their legal representative present at the mediation, but some parties may seek advice and attend mediation by themselves due to economic constraints. In the intake the FDRP should refer parties to the relevant professionals and encourage them to seek advice on various aspects of their dispute and to bring back a range of options for discussion. That referral may take the form of the FDRP actually making an appointment for a party with a relevant professional.”

⁵ The mediation participants referred to here are separating parents who have sought the mediation services of the author from 2007 to date.



THE FAMILY LAW CLIENT AND FAMILY MEDIATION PARTICIPANT

Having argued that the timing of the mediation in the dispute resolution framework is significant to its success, it is relevant to discuss the parties to whom this timing is important. Although a generalisation, parties often fall into one of three categories:

1. Those who are not interested in mediation, and for whom obtaining a s 60I certificate is simply a hurdle to jump before applying to court.⁶
2. Those who would never consider anything other than engaging in a child-focused and out-of-court dialogue about the future parenting arrangements, albeit facilitated.
3. Those who engage in mediation as it is a mandatory part of the process, but are unsure of the order in which to proceed, and invariably end up in either category one or two.

Whether parties fall into the first or second category will often be determined by the nature of the legal advice received or the lack thereof. This reinforces the argument that family lawyers should be the first step in the pathway to resolution, and the need for careful reflection by lawyers about the order and timing of the explored dispute resolution options and referrals.

Sadly, there are many parents in the first “not interested” category, and this answers the question posed earlier in this article about whether or not the introduction of mandatory family dispute resolution has successfully launched a cultural shift that focuses on out-of-court facilitation of the resolution of family law disputes. It has not. Much more work is required in the community to achieve a cultural shift where parties instinctively enter into a dialogue in moments of life-changing disputes, such as peer mediation starting from preschool or kindergarten; however, this is a topic for another article, and it is also a long-term project. The next best thing to achieving a complete cultural change is devising a functional and consistent approach to family dispute resolution, and ensuring there is a collaborative approach between family lawyers and family dispute resolution practitioners.

Unfortunately, few parents fall into the second category, where self-determination is the obvious option. More often than not, parents who start in category three must be convinced by the family dispute resolution practitioner that mediation is the preferable option to filing a court application, if the matter is suitable for mediation, and even then there is no guarantee that those parties will reach agreements on each point in issue.

Again, this supports the argument that lawyers are as important as ever in the family law framework and must work hand-in-hand with family dispute resolution practitioners to devise the best way to achieve a resolution for the family law client and mediation participant. If not all the issues are able to be resolved through mediation, they can be referred back to the family lawyers for negotiations and an exploration of other family dispute resolution options available, as Figure 1 illustrates.

MOVING FORWARD

While the 2006 introduction of mandatory mediation has not made as significant an impact as perhaps intended, the role of the family lawyer has been altered, and it has been strengthened. It has been enhanced by the emphasis placed on a multidisciplinary system, which includes family dispute resolution practitioners, and by the reinforcement of many options for family dispute resolution prior to litigation. Scope to enhance the family lawyer’s role and status has been created via the opportunity to explore collaborative approaches with family dispute resolution providers to resolving disputes.

The reason that this changed role of the family lawyer has not made a marked difference in facilitating out-of-court and child-focused family dispute resolution is that some family lawyers and family dispute resolution providers are confused about their roles, and about the importance of the timing of each step in the process and how they fit into the framework together. Two actions are required to rectify this. First, education and training must be provided to all those working in Australian family law to encourage a collaborative approach to advising family law clients and

⁶ This argument is supported by Kochanski, n 4 at 166: “Due to the legislative requirements placed on parties, not everyone who attends FDR comes with the goodwill to settle. Many parties want to attempt the mediation process so that they can be issued with a certificate under the *Family Law Act*, s 60I.”



mediation participants not only about their rights but also about the best pathway to an out-of-court resolution. Second, all separating parents who require the assistance of the family law system must be able to access legal advice with no barriers or impediments (financial or personal).

To achieve this latter recommendation, family law advice must be made more accessible and affordable, eg by equipping each Family Relationship Centre with enough family lawyers as required to service the number of separating parents walking through the doors, and by making the legal professionals the first point of contact. Some efforts have been made to reinstate the importance of family lawyers,⁷ but not enough has been done to allow the users of the family law system to fully benefit from an organised collaborative and multidisciplinary model.

REINSTATING THE IMPORTANCE OF LEGAL PROFESSIONALS IN THE FAMILY LAW SYSTEM

Although the 2006 introduction of mandatory mediation was intended to diminish the role of family lawyers, certain changes were introduced and funded by the Attorney-General in June 2009 that indicated there was in fact value in the support provided by family lawyers. The project was called the Family Relationship Centres Legal Assistance Partnerships Program. It is interesting to discuss these changes and the subsequent reported findings in light of this article's argument that the family law system and its users would benefit from an organised, collaborative and multidisciplinary approach with lawyers being the first point of contact.

The new policy and project enabled legal professionals to provide legal assistance to clients of Family Relationship Centres, and even to allow a client's lawyer to be present during family dispute resolution – formerly an absolute no-no. The stated aim was to enable better partnerships between Family Relationship Centres and lawyers.⁸

There were four stated reasons for introducing the provision of legal assistance to separating parents using Family Relationship Centres. The first was to help clients to better understand their legal obligations and responsibilities, and advise them in resolving their own disputes where possible. The second was to increase the flexibility of Family Relationship Centres in how they were providing services to separating parents. The third was to increase the opportunity for clients to access legal assistance in the Family Relationship Centre premises in a cost-effective, non-adversarial way. The fourth was to ensure client safety as they experience separation and divorce. The last point is ambiguous as it could either refer to physical safety, or safety in terms of making safe decisions based on being well-advised. Either way, these four reasons for introducing lawyers into Family Relationship Centres support the present author's argument that lawyers are vital to the family law system and its users.

The type of legal assistance to be provided varied from legal information sessions for clients or staff on an individual or groups basis, to legal information on different types of dispute resolution processes. Referrals could be made to other legal services, parenting arrangements could be formalised, and assistance could be given with court applications where exceptions to dispute resolution applied, or where certificates had been issued. The timing of the legal assistance could occur at any stage during the client's involvement with the Family Relationship Centre, hence there was no clear protocol about the timing, except the starting point being with the family dispute resolution practitioner. Timing varied depending on the nature of the advice and the range of factors, including complexity of legal issues identified by the family dispute resolution practitioner.

Having the starting point rest with the family dispute resolution practitioner, the order stipulated by these changes was the reverse of this article's proposal to start with the family lawyer. These

⁷ For example, in June 2009 the Attorney-General announced a change in policy to encourage better partnerships between family relationship centres and legal professionals. Community legal centres began recruiting family lawyers to deal specifically with agreements reached in Family Relationship Centres. Information about the policy changes can be found in Australian Government Attorney-General's Department, "Protocols for the Provision of Legal Assistance in Family Relationship Centres", <http://www.ag.gov.au/Families/Familyrelationships/services/Pages/Familyrelationshipcentresresources.aspx> viewed 9 August 2012.

⁸ Information about this initiative can be found in "Protocols for the Provision of Legal Assistance in Family Relationship Centres", cited at n 4.



changes determined that the need for legal assistance should be considered on a case-by-case basis by the family dispute resolution practitioner during the initial screening and assessment conducted with each party separately. Therefore, in addition to the factors that have always been screened during this initial consultation, including violence, client's needs, cultural issues and the appropriateness of participation in family dispute resolution, the need for legal assistance would also be identified. If the need for legal support was determined by the family dispute resolution practitioner, the client would be directly referred for legal advice. Equally, if legal participation in the mediation process was recommended, parameters for the lawyer's participation would be set.

Where the family dispute resolution practitioner determined from the initial consultation and the screening and assessment that legal assistance was not necessary, the family dispute resolution practitioner would become responsible for making the final decision on how, or if, the dispute resolution process would take place in the Family Relationship Centre.

In this way, legal professionals would be used to support the mediation process, rather than the reverse, where the family lawyer's work would be supported by the wide range of family dispute resolution options, primarily family dispute resolution, as proposed by the present author. Although conceding the value of legal professionals in the family law system, there was still reluctance in the 2009 changes to make family lawyers more prominent in the dispute resolution framework. The amount of legal support, if any, would be determined by, and on the terms of, the Family Relationship Centres. It is the present author's view that these changes did not improve the family law system or the family dispute resolution model at large and did not clarify confusion for the profession as a whole.

Despite this, emphasis was on a collaborative approach and a partnership between the professional groups, just as this article argues is necessary. The difference between the 2009 policy changes and the proposal of this article is in the order and timing of the collaboration. This article argues that family lawyers should be the first step in the dispute resolution pathway.

It is appropriate now to turn to the evaluation of the 2009 policy changes implemented under the Family Relationship Centres Legal Assistance Partnerships Program.⁹ The main findings of the evaluation indicated that, overall, the 2009 policy changes, which included legal professionals in Family Relationship Centres, were positive and successful. It reported that most partnerships are functioning well, and indicated strong collaboration and enthusiasm for the project. The evaluation report recognised the need to work through issues resulting from the considerable cultural differences experienced by each professional group. Interestingly, it was noted in the key findings that the reluctance to involve lawyers was manifest in some individual statements from Family Relationship Centre staff.

An assessment of the effectiveness of the partnership and services was made. Providing legal services was generally considered by legal and family relationship practitioners and clients as beneficial in moving their cases forward. The types of services offered and the effectiveness of each legal service differed, but two that were rated as core services were individual advice sessions (including advice on family violence concerns) and group information sessions. While the feedback indicated that individual legal advice was nearly unanimously considered beneficial, there were mixed views about the group information sessions, and some partnerships stopped offering this service altogether.

The evaluation found there was significant disparity in opinion and approaches to lawyer-assisted family dispute resolution and that this service was not offered to a great extent. Resource limitations were one of the reasons provided for not offering this service. Another reason was the need to develop an agreed practice model, which is essentially what this article argues is necessary for the family law system at large. Client feedback for the evaluation, although apparently limited, reinforced that lawyer-assisted mediation has considerable potential if well-targeted and supported by clear protocols.

⁹This is found in Moloney L, Kaspiew R, De Maio J, Deblaquiere J, Hand K and Horsfall B, "Evaluation of the Family Relationship Centre Legal Assistance Partnership Program, Final Report" (March 2011), <http://www.ag.gov.au/Documents/Final%20Legal%20Partnerships%20Evaluation%20Report.PDF>, viewed 9 August 2012.



All in all, the evaluation revealed some problems emerging out of the Legal Assistance Partnerships Program, mostly of an evolutionary nature, that are hoped to be resolved through time and informed discussion. Some of the problems identified were resource-based, which meant the program could not be properly supported. However, it was reported that the high levels of enthusiasm and cooperation between family lawyers and family dispute resolution practitioners was remarkable. This reported synergy between law and social sciences is encouraging, given the argument of this article to work collaboratively. It was concluded that many of the challenges would hopefully be met by increasing understanding about roles and increasing agreements about protocols.

CONCLUSION

Despite the initiative to reinstate the importance of family lawyers in the family law framework, and the positive response to, and success of, those initiatives, there still remains confusion at large among service providers in the family law system over the pathway for resolving family law disputes. Until clearer, uniform protocols are introduced about the timing of, and starting point for, the family dispute resolution process, confusion will remain for some family lawyers and family dispute resolution providers. Clarification and education is necessary about their roles, and about the importance of the timing of each step in the process and how they fit into the framework together. The perception of legal professionals also needs to be ameliorated, so those accessing the family law system feel they can trust the advice given.

Once clearer protocols are achieved, those requiring the services of the family law system will be able to fully acknowledge and benefit from an organised collaborative and multidisciplinary model that provides positive change for separating parents.

