Submission to the Family Law Council regarding information sharing between community based Family Dispute Resolution and Family Counselling providers and the Family Law Courts

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Introduction

This submission is prepared for the Family Law Council Discussion Paper in response to the Terms of Reference regarding families with complex needs and the intersection of information sharing within the family law and child protection systems. In particular, we will address Terms of Reference 3, where we will provide the view of Relationships Australia SA on proposals to enhance collaboration and information sharing within the family law system, namely between the family courts and family relationship services. Our remarks are based on over 60 years of services for families including relationship counselling, relationships education and most recently, community based family law services, in which to complement and add value to an equivalent submission recently provided to the Family Law Council by Relationships Australia national office.

Relationships Australia SA has been providing family law related services including Family Dispute Resolution (referred to in this submission as " FDR") , Children's Contact Services (referred to in this submission as "CCS"), Family Relationship Centres (referred to in this submission as "FRC") and Post Separation/ family counselling for well over a decade. We rely on collaborations with the legal system, as well as other affiliated community services to enable coordinated service provision. Consequently, we have well established partnerships with federal and State based courts, child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services in the community. It is from this experience that we recognise the important contribution multi-agency collaborations and an interdisciplinary approach makes for families whose parenting disputes are made more complex by issues including (but not limited to) psychological problems, family violence, substance abuse, child neglect and mental health issues.

We also believe that effective collaboration is not exclusively about the formal provision of individual's details, but rather involves a shared understanding about typical family dynamics, such as what constitutes family violence and child abuse and its effects on the individuals involved, as well as participation in coordinated processes across agencies and professions.

Accordingly, we have long held the position that any information (excluding that which falls into the statutory exceptions) which is obtained during FDR and family counselling ought to remain

outside the domain of the Court.[1] We hold this position for several reasons, which will be discussed in detail below.

Ultimately, we are of the view that indiscriminate information sharing between FDR and family counselling undermines both the parliamentary intention of the 2006 amendments to the *Family Law Act (1975)* (referred to in this submission as "the Act") and the public good. We say the exchange of information obtained during the course of parties' interactions with community based FDR and family counselling ought to protect the underlying principle of community service provision and alternative dispute resolution and any proposals within the Act to allow further or additional information exchange between community family law service providers and the Court should be of a limited nature, if at all.

Background Issues- Principle of Mediation

In our view, the issue posed by the Terms of Reference 3 highlights the perceived inconsistency of two very important public policy issues for the community based family law sector, that is:

1. on the one hand, the absolute ability to ensure all communications during the course of FDR and family counselling at community based family law services remain confidential (subject to the exceptions in the Act) , to allow families to discuss their issues in a free and trustworthy environment without risk of those matters being used a later time in Court; and
2. on the other hand, to ensure that all relevant material is provided to the Court so that families are protected and a fully informed decision can be made.

It is a question of how to balance these two outcomes when considering whether information sharing between community based family law services and the family law courts should be expanded. Therefore, for us it is also a question of how we can work together with families and the legal profession to enable proper and complete evidence gathering without undermining the core purpose of FDR and family counselling services as they were intended under the Act.

In 2006, the Act was amended to require or facilitate parties using alternative dispute resolution methods to resolve issues relating to children and property following separation. The intention of the Act was clear: - parties are expected to use, as defined in Section 10F of the Act, family dispute resolution as:

> *"a process (other than a judicial process) a) in which a 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"*

Similarly, Section 10B of the Act defined the process of family counselling to be one which helps people who are affected (or likely to be affected) by separation or divorce with personal and interpersonal issues and/or issues relating to children.

As part of the 2006 amendments, key protections were implemented within Sections 10D, 10E, 10H, 10K and 10J of the Act to emphasise the requirement of confidentially and/or inadmissibility of discussions held during FDR or family counselling, except for in certain circumstances. The Act also clearly sets out those circumstances where the rules of confidentially and/or admissibility do not apply, to ensure that families, particularly children, who are, or suspected to

[1] In this submission, unless otherwise indicated, we refer to "Court" as the Family Law Courts, including the Federal Circuit Court.

be, at risk[2] can be safeguarded. Clearly, the parliamentary intention of the 2006 amendments was to uphold the principle of ensuring that "separating and divorcing parents have access to quality family counselling and dispute resolution services so that they can attempt to resolve their disputes outside of court," [3] whilst the same time, ensuring that the parties are safely able to discuss their issues in dispute following separation without fear that this information would be used (or misused) at a later time. In other words, the Act explicitly allows parties the security of confidentiality but also the protections afforded by the exceptions.

The 2006 amendments supported parliaments early intervention strategy in family related disputes by ensuring information obtained during the FDR and family counselling process (except for the exclusions) remained confidential. On a practical level, the process has had the further advantage of enabling all families' access to a non-adversarial, inexpensive and community based service, regardless of background. By consequence, this has also allowed those families in the community who previously may have 'fallen through cracks' of the adversarial legal system the opportunity to access a meaningful way to resolve their disputes regarding family issues following separation. In our view, this has been an invaluable resource made available to the community.

In addition, not only has the process as set up under the 2006 amendments for FDR and family counselling enabled community based family law services to operate successfully as family related problem solving organisations, but it has also allowed community based family law services to evolve into an ' information hub' in respect to the dynamics of family relationships. Over time, we have seen the confidential nature of community based family law services also become opportunities for families to gain greater information about their options; to connect in with other service providers in accordance with need and enable the freedom to disclose information which otherwise they may not have done so. The process allows families to focus on other factors in their family relationships, rather than focussing solely upon 'rights' and entitlements under the Act. For instance, we encourage families who use FDR to beforehand attend a Child Focussed Information Session, which is a 3 hour information seminar to help parents move towards building healthy relationships with each other and their children following separation. The session covers many topics typically asked by parents following separation, including what is FDR and why it is relevant to the family law system; how their children may be feeling following separation and how to work towards building a stable foundation for parenting following separation. Accordingly, from our perspective, we consider that one of the fundamental aspects of the FDR and family counselling process is to educate families about better ways of conflict resolution; to assist families gain insight into their behaviour and work on re-focussing expectations:- a service which greatly assists the community on broader social and economic scale.

Exchange of Information- Section 60I Certificates

We well recognise that there is an argument for better information sharing between community based family law services and the Court, especially when risk becomes apparent during FDR, with the purpose of ensuring that any such issues are effectively managed between the two systems. However, in general we do not support further information sharing because we are of

[2] In this submission, we use the term 'risk' to broadly to define acts or events which affects the safety of individuals, especially children, who may experience or be exposed to such acts or events such as (but not limited to) family violence, emotional, sexual or psychological abuse, suicide, mental health issues, substance abuse or neglect.

[3] See FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL- Explanatory Memorandum: http://www5.austlii.edu.au/au/legis/cth/bill_em/flaprb2006510/memo_0.html

the view that there are sufficient mechanisms in place to capture and identify risk without the need to increase information sharing with the Court, particularly through the provision of Section 60I Certificates. We say to do so would undermine the validity and effectiveness of the services provided at community based level and create a situation of making community based family relationship professionals as ' evidence gatherers' for the Court.

Presently, the way the Act overtly allows for information gathered during FDR to be provided to the Court is through Section 10J, via the issuing of Section 60I Certificates. Under Section 10J of the Act, any communications during the course of FDR are inadmissible, save and except for circumstances of child abuse and for the purposes of issuing Section 60I Certificates.[4] In accessing suitability for family dispute resolution, Regulation 25 of the Family Law (Family Dispute Resolution Practitioners) Regulation 2008 provides:

1. Before providing family dispute resolution under the Act, the family dispute resolution practitioner to whom a dispute is referred must be satisfied that:

    (a) an assessment has been conducted of the parties to the dispute; and
    (b) family dispute resolution is appropriate.

2. In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

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

3. If, after considering the matters set out in subregulation (2), the family dispute resolution practitioner is satisfied that family dispute resolution is appropriate then, subject to regulations 28 and 30, the family dispute resolution practitioner may provide family dispute resolution.
4. If, after considering the matters set out in subregulation (2), the family dispute resolution practitioner is not satisfied that family dispute resolution is appropriate, the family dispute resolution practitioner must not provide family dispute resolution.

In other words, in FDR, when considering issuing Section 60I Certificates, Family Dispute Resolution Practitioners (referred to in this submission as 'FDRP's') must fully consider the factors outlined in the regulations. Where FDR is considered as inappropriate or it became inappropriate, this can (and perhaps should) in itself act as sufficient notification to the Court that there are risk factors at play. Accordingly, we say that the provision of a Section 60I Certificate issued pursuant to sub section b) or e) of the Act in circumstances where we as the service provider have refused to provide FDR can in itself be an adequate prompt to the Court that risk is present. Thereafter, it is a matter for the Court to ensure that they explore and test those issues through its own processes.

[4] Richard Chisholm, 'Confidentiality and Information Sharing in Dispute Resolution: Aspects of Current Law, Policies and Options', FRSA Conference Paper, November 2011.

We are concerned that obligating community based FDR and family counselling services to obtain information which could be provided to the Court at a later time will create the situation where community based family law services will become unwilling participants in an otherwise legal process. The idea that the Court could have ready access to some or all of the information provided at community based family law services, such as notes, assessments and other personal material means FDRPs and family counsellors are in effect collecting evidence for the Court.

In our long experience in dealing with thousands of families who participate in FDR and family counselling, much of the attraction to do so is based on confidentiality. We are of the view that by supplying information to the Court, over and above that of which is provided through a Section 60I Certificate will be detrimental to this purpose. Our strong view is that many families who use community based family law services, including children, will be increasingly hesitant to provide relevant disclosures and/or other important personal information during FDR and family counselling, making it difficult to direct families into the assistance they need and thereby undermining one of the key roles of the service. Put simply, it places the community based family law service providers in a position of distrust, when actually the process was created for the primary purpose to assist families resolve or discuss their issues in a safe and protected environment.

In particular, we are concerned that the willingness of families in disadvantaged groups to provide information about serious safety concerns, such as family or domestic violence (particularly as perpetrators) or other major lifestyle issues, such as drug, alcohol and other addictions or mental health problems will be adversely impacted if community based family law services are required to provide more information to the Court. From our observations, FDR and family counselling can act as a neutral, non-judgemental space where these issues can be canvassed in relative safety,[5] which then can then allow practitioners to link families into the interventions and/or services they need. Based on our experience in the sector, families in disadvantaged groups are less likely to furnish information regarding risk factors once a matter proceeds to Court. This can be for many reasons, including legal strategy; lack of understanding of the process; language and/or cultural barriers or simply because they do not wish to divulge such issues before the Court. For instance, in our experience, indigenous women have traditionally been reluctant to provide information about risk because it may be culturally inappropriate to do so and/or they have an innate distrust of the legal system. The community based family law system can be a safe and genuine alternative to the adversarial legal system for these groups. In addition, many community based family law services offering FDR and counselling have other specialised internal supports and programs available, such Cultural Liaison Officers for CALD clients or Aboriginal Liaison Officers for Aboriginal clients to assist families deal with or appropriately enable disclosures about their complex needs. We are concerned that if FDR and family counselling services are required to provide further information to the Court which should be considered as confidential (other than what is already provided through a Section 60I Certificate), this could act as another barrier for those vulnerable or marginalised groups in disclosing relevant information on a wider scale.

We are also concerned that there would be considerable resources and time required to implement a system of expanded information sharing to the Courts from community based FDR and family counselling services. These are both issues that the FDR and family counselling sector can ill- afford. For instance, it may include time consuming activities such as FDRPs and/or family counsellors having to attend Court to give evidence. These types of obligations

[5] Save and except where there are statutory obligations

may have the consequence of drawing resources away from the sector, causing underservicing to clients who could be diverted from the Court system where appropriate. It could also have the unintended ramifications of cost in terms of instructing legal counsel and other experts, which we say would have significant impact upon already limited community based funding. In addition, we are also concerned that the requirement of providing additional information obtained by an FDRP or family counsellor places those professionals in the capacity of an ' expert' under rules of evidence, which is neither possible nor desirable in the circumstances.

To summarise, we say that to require community based FDR and family counselling services to increase information sharing with the Courts is fraught for several reasons, as follows:

- The FDR and family counselling process needs to remain trustworthy;
- Parties would be less prepared to be forthcoming about risk factors during family counselling or family dispute resolution
- It will reduce the capacity and resources for practitioners to provide clients with services;
- It adversely impacts upon the community by undermining the integrity of the alternate dispute resolution process;
- It goes against the express intention of the legislation;
- It means that practitioners would need to make a forensic assessment that risk is evident;
- It may place the victim of violence at greater risk, as it may trigger an adverse reaction;
- It may place the issuing FDRP at risk of violence and/or threats and/or complaints;
- It may mean that the Court would require practitioners to provide evidence to the Court about the existence of risk;
- It will be time consuming and expensive;

It is important to note however that we are not unwilling to work collaboratively with the Court system on a broader basis. On the contrary, we believe strong collaborative relationships such as through the Family Law Pathways Network provide important opportunities to develop common understandings and joined responses between community based family law services and the Court. We are prepared of course to share ideas and concepts with the Court in which to enrich the system and improve its efficiency, ultimately to enable separated or separating families a better experience through a difficult time. For instance, initiatives such as the Memorandum of Understanding with the Pathways Network 'Kiosk' at the Family Law Courts has demonstrated that shared understandings about services currently available, waiting lists and processes involved in accessing the different community based services is of real benefit to the quality and nature of orders made by the Court and we are very prepared to be involved in this collaborative approach. However, again, we do not think it appropriate to exchange information about individuals or families about risk factors because there are already satisfactory processes in place in which to enable the Court to do so. Accordingly, it is our view that there is a marked distinction between community based FDR and family counselling services being prepared to 'collaborate' with the family court system to enable families' better outcomes and that of 'information gathering' in a legal framework to assist the Court in their quite separate authority as decision maker.

Other Means of Information Gathering

It is our view that further exchange of information from community based family law services to the Court is superfluous because once a matter is before the Court, the Court has existing case management practices operating to be able to identify and detect risk, in addition to or outside Section 60I Certificates during Court proceedings. These processes and procedures include:

1. The Affidavit material provided by both parties;
2. The filing of a ' Notice of Risk' in respect to each party subject of the proceedings;
3. A mandatory Section 11F Child Dispute Conference following the first hearing;
4. Family Assessment Reports;
5. The appointment of an Independent Children's Lawyer.[6]

These processes and procedures have been put in place in which to 'catch' risk, either on a stand alone basis or in combination, so that the Court can make a fully informed determination in respect to a matter based on evidence. Of course, we recognise that these procedures are not always fool proof and such imperfections will mean there will be ways to try to exploit the system, for example, a perpetrator of family violence may deny consistently doing so in his Affidavit material or attempt to deceive a Family Consultant about the issue.

In our experience, admissions of unsafe behaviour are more likely to occur at the FDR and /or family counselling stage through a thorough risk screening process. We have used a risk screening tool for some time to obtain such admissions and based on our experience, it has been successful in identifying risk in the first instance and then enabling our service to direct families according to their needs. However, in the event that a matter proceeds to the legal system, rather than the Court obtain this type of information from community based family law services which is considered confidential, we say a better option would be to provide the Court, particularly Family Consultants, with greater resources to apply a similar universal risk screening tool for all parties, or at the very least those who are identified as having risk via a Section 60I Certificate, following the filing of Court proceedings. This will assist the Court in better identifying families at risk, as well as the nature of that risk, whilst simultaneously ensuring that this information is not static. In those cases where this screening does alert the Court to new risk, or additional risk, it may also have the further benefit of assisting the Court in streamlining the matter through the Court process, such as to the Magellan list or, in cases of family violence for instance, assist the victim in accessing services to navigate the Court system.

We are also wary of over- sharing of communications from FDR or family counselling especially where such information may be disclosed by children. In our view, it would be undesirable to have the communications provided by children in a so called safe environment to be made available to the Court in a indiscriminate way, given it is possible that these communications could place children at greater risk once the matter is at Court of becoming further traumatised or become encased in polarised parental agendas.

In respect to children, it is also fundamental to note that first and foremost, FDRPs and family counsellors are classified as mandatory reporters. If risk was identified of the nature under the legislative requirements, a report would be made[7]. In addition to this, Section 10D(4) and Section 10H(4) of the Act allows family counsellors and FDRPs respectively to alert all other authorities to risk factors identified during the FDR and/or family counselling process. In our experience, best practice principles ensure that the community based family law sector have policies and procedures in place in relation to such risk where it is identified, including reporting

[6] Presumably, those parties who do not use the FDR process and go directly to Court will not meet the threshold for enabling proceedings, unless the first two of the abovementioned is provided and the matter thereby comes under the exceptions, which may indicate that some or all of the parties may be at risk.

[7] Including Section 10J of the Act

to appropriate authorities, the police, referrals to family violence services or to other supports (such as for mental health or drug/alcohol issues) where it is considered necessary.

Whilst we do not support as a general rule the using of the FDR or family counselling process as a way for the Court to gather evidence, this is not to say that the Court should not have greater access or be provided with more efficient investigative powers to obtain information from other non- privileged sources, such as from Child Protection Agencies, the Police, medical/mental health organisations, drug and alcohol centres and other such services. We would also support the Court obtaining easier and more effective ways to access other forms of evidence, such as from domestic violence services. We are however equally of the view that the Court should consider that process in the context of the complexities surrounding family violence, insofar as many victims do not always report or seek help from services.

With respect, we reiterate that in our view it is not, and nor should it be, the role of the FDR and/or family counselling process, nor the intention of the legislation, to act as part of the evidentiary process for the Court. This is because not only does it undermine the role of the alternative dispute resolution process as it was intended, but it also undermines the principles of natural justice to enable both parties the opportunity to put their case to the Court without prejudice.

Other Alternatives

Whilst we are of the view that there are sufficient supports in place within the Court system to recognise risk, consideration could be given to introducing some alternatives but we stress, as discussed above, if safety concerns were identified, as mandatory reporters, the FDRP or family counsellor would have already done so, or in the case of FDR, a Section 60I Certificate would have been issued, alerting to the Court that there is potential risk.

We understand that there has been some limited support for a referral process of confidential information from community based family law services being provided to the Court, in addition to a Section 60I Certificate, in cases of substantial or high risk. We understand that community based family law services could in some very limited circumstances complete a ‘ tick box’ document which provides a ‘list’ of risk factors to identify the nature of the risk as reported by the parties to the Court. As we understand it, this information would not be made available to the parties.

Whilst we recognise that this type of ‘tick box’ tool could be implemented between the Court and community based family law services, for the reasons we have already outlined, insofar as ‘risk’ would have already been identified via the Section 60I Certificate and/or mandatorily reported in any event, we therefore see the implementation of an additional process at this stage as unnecessary, not to mention administratively difficult, costly and time consuming. Moreover, we are concerned that unless the process was abundantly clear, it may also create the situation of potentially placing the FDR or family counsellor practitioner in the position of providing expert evidence before the Court, as well as arguably denying the parties procedural fairness.

Thus, we would be more inclined to support the use of a universal screening tool across the entire family law sector, including for use once parties reach the stage of Court proceedings, such as the existing Family Law DOORS screening tool,[8] to promote a common language and approach to risk management for the system. The Family Law DOORs screening tool for instance is used in all our post separation services and has assisted us to confidently identify risk

[8] The Family Law DOORS screening tool was developed in conjunction with the Federal Attorney Generals Department and Relationships Australia SA.

and when there is a need for referral to statutory processes, child protection, mental health services and/or other supports. We do not envisage that the information obtained from a universal screening tool would be shared between services but rather undertaken by each as the matter travels through the system. Whilst we note that it is not always ideal for parties to undertake screening on multiple occasions, we consider that the benefits of doing so far outweigh the problems we have previously outlined associated with sharing confidential information between the Court and community based family law services. If a common screening process was used by all across the sector, including by the Court, in our view, this would create a more effective way to obtain accurate and up-to-date information from families at intervals in relation to risk and enable contemporaneous referrals to appropriate services or supports if or when necessary.

Conclusion

Whilst we recognise that the Court desires to be provided with all information about families in order to protect them from risk, in essence, we are of the view that it is not the role of the community based family law services to do so, other than by the means which already exist. Furthermore to involve FDRPs and family counsellors in the legal information gathering process will be adverse to the public good and reduce the effectiveness of community based service provision.

Whist we are prepared to collaborate with the Court to assist families in other ways and we have provided a suggestion for a safe alternative to do so, at this juncture, we submit that there are sufficient safeguards in place within the current Court system in which to detect families at risk. We are adamant that requiring community based family law services to provide the Courts with expanded information obtained during FDR and family counselling effectively places the sector in jeopardy of becoming a forensic body, which is at odds with the overarching principle of alternative dispute resolution and the intention of the legislation itself.