Response to the Victorian Law Reform Commission’s Information Paper ‘Review of Victoria’s Child Protection Legislative Arrangements’ specifically on the use of alternative dispute resolution processes to assist in child protection matters.

1 April 2010

Background

In late 2009, the Victorian Ombudsman undertook an investigation into the Department of Human Services (DHS) Child Protection Program. The report¹ made a total of 42 recommendations, all of which have been accepted by DHS. One of the recommendations from the Report was that the Victorian Attorney-General provide a reference to the Victorian Law Reform Commission (VLRC) to examine alternative models for child protection legislative arrangements that would reduce the degree of disputation and encourage a focus on the best interests of children. The Attorney General so directed the VLRC.

In February 2010, the VLRC developed a brief Information Paper to facilitate ‘consideration of models that take a more administrative case management approach to child protection issues’. As part of its review, the VLRC has been directed to consider the arrangements that exist in other Australian jurisdictions (including the Family Court of Australia) and in other countries, particularly England and Scotland. The Commission is also required to have regard to (in summary):

- The underlying aim of the system to protect children in Victoria from abuse and neglect, and the best interests principles in the Children, Youth and Families Act 2005
- The processes for applying for and reviewing orders of the Children’s Court
- previous reviews of Victoria’s child protection system
- The Attorney-General’s Justice Statements (in 2004 and 2008), particularly on Appropriate Dispute Resolution and measures to reduce the adversarial nature of the justice system

In its Information Paper ‘Review of Victoria’s Child Protection Legislative Arrangements’ released in February 2010², the VLRC has identified four areas where reform may be possible:

1. New processes that may assist the resolution of child protection matters by agreement rather than by adjudication
2. New grounds upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children’s Court when deciding whether to provide this authorisation
3. The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services
4. Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members

The VLRC invited submissions in response to these four options. FRSA initially prepared this response to assist our members in Victoria that may be developing submissions. Given the tight timeframes we have since decided to submit this directly to VLRC as indication of our interest in assisting to build connections between child protection service systems and the family law system. Many of our members work across both systems and would have substantial expertise to offer the next stage legislative and policy development.

¹ Available from www.ombudsman.vic.gov.au
² Available from www.lawreform.vic.gov.au
Family Law Reforms

FRSA believes that major Family Law Reforms enacted in 2006 are relevant to the VLRC exploration of alternative mechanisms for the resolution of children’s matters in the Victorian child protection system.

Family Law in Australia changed considerably when the Federal Parliament passed the Family Law Reform (Shared Parental Responsibility) Act 2006. The aim of this reform was to bring about “generational change in family law” and a “cultural shift” in the management of parental separation, “away from litigation and towards co-operative parenting”3. The changes were shaped by the recognition that although the focus must always be on the best interests of the child, many of the disputes over children following separation are driven by relationship problems rather than legal ones. These disputes are often better suited to non-adversarial, community-based interventions that focus on how unresolved relationship issues impact on children and assist in reaching parenting agreements that meet the needs of children.

The policy objectives of the 2006 changes to the family law system were to:

1. Help to build strong healthy relationships and prevent separation;
2. encourage greater involvement by both parents in their children’s lives after separation, and also protect children from violence and abuse;
3. Help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
4. Establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.

The changes to the family law system included changes to both the legislation and the family relationship services system. The legislative changes encapsulated in the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (SPR Act 2006) amended the Family Law Act 1975 (Cth) (FLA 1975) and comprised four main elements:

- Require parents to attend family dispute resolution (FDR) before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse (SPR Act 2006 s60(I));
- Place increased emphasis on the need for both parents to be involved in their children’s lives after separation, through a range of provisions, including the introduction of a presumption in favour of equal shared parental responsibility (SPR Act 2006 s61DA; see also s60B(1)(a), s60CC(2)(a));
- Place greater emphasis on the need to protect children from exposure to family violence and child abuse (SPR Act 2006 s60B(1)(b), s60CC(2)(b)); and
- Introduce legislative support for less adversarial court processes in children’s matters (SPR Act 2006 Division 12A of Part VII).

Central to these reforms was recognition that decision-making regarding children is not a single or one off event that occurs at a point in time but rather an ongoing process that needs to be responsive to changing circumstances of both children and parents. Ideally, both parents remain involved in decision-making, develop a cooperative relationship after separation and demonstrate commitment to putting the interests of the child first as they negotiate changes over the long term. Where this is not possible or does not occur naturally, a range of services are available to assist separated parents and their children as they navigate separation, repartnering and child development stages. The ‘Family Law System’ which encompasses legal services (legal aid commissions, community legal centres, family lawyers), family relationship services (see below), private practitioners, government agencies and the Family Courts4 provides a diverse range of resources.

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4 The term ‘Family Courts’ collectively refers to the Family Court of Australia, Federal Magistrates Court and Family Court of WA.
responses and must work effectively with related service systems including law enforcement, child protection, mental health and drug and alcohol services etc.

Family Law Reform Evaluation

The Family Law Reforms of 2006 have been comprehensively evaluated by the Australian Institute of Family Studies (AIFS). This evaluation involved consultation with over 10,000 separated parents as well as practitioners in community based family and relationship services, family lawyers and other professionals. AIFS found evidence that the policy objectives have been achieved and that there has been a ‘cultural shift’ towards less adversarial dispute resolution, improvements in cooperative shared parental responsibility and stable post-separation parenting arrangements.

The evaluation also confirms that a proportion of families are not suitable for dispute resolution and that timely access to legal services and courts can be important in these cases. Further, that more can be done to better integrate the service system and improve responses to families affected by violence, abuse and increasingly complex issues.

FRSA anticipates that further development of the family law system will see more coordination of different approaches where some issues are resolved through negotiation and others through court orders, where mediators, lawyers and child consultants work more closely together and where court orders may become more complex - conditional on supports being available, parents demonstrating competence and ongoing review of children’s safety and wellbeing.

Potential Learnings for Victorian Child Protection

FRSA believes that there are some key concepts in the Commonwealth Family Law Reforms that can inform changes to the Victorian Child Protection system, specifically:

1. Many parents can be supported to make decisions in the best interest of the child through the use of Family Dispute Resolution and particularly the use of Child Inclusive Dispute Resolution which also enables children to participate in decision-making; this includes parents who may at a point in time be in conflict over care arrangements or be struggling to provide adequate care themselves but do want to continue to have some responsibility and role in decision making.

2. Shared parental responsibility can take many forms and is an important basis for maintaining meaningful relationships between parents and children over the long-term; including relationships with parents who do not or cannot have residential care of children but wish to remain involved. Clearly there are some circumstances where this would not be appropriate, but when it is safe and appropriate, there can be considerable health and wellbeing benefits for children.

3. Service systems need to adapt to the increasing complexity and diversity of families, streamlining decision-making while maintaining a range of community based supports.

Each of these suggestions is expanded in more detail below.

Family Dispute Resolution

The family law system has always encouraged parties to try to settle out of court and reforms to the Family Law Act 1975 were enacted in 2006 which require parents to “make a genuine effort to resolve that dispute by family dispute resolution” before filing a matter with a Family Court for resolution. There are important exceptions that apply to families affected by abuse or violence and/or where a matter requires urgent resolution.

In practice, this means that the majority of separated families in dispute over parenting arrangements attend family dispute resolution. Through the Government funded Family Dispute Resolution services (including but not limited to the network of 65 Family Relationship Centres)

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6 Family Law Act 1975 S 60I(1).
families undertake screening and assessment to determine whether FDR is suitable. The screening and assessment processes have been supported by government investment in both practical tools and practitioner training. If the practitioner determines that dispute resolution is not appropriate or unsuccessful a certificate will be issued enabling the parties to file the matter with the Family Court if they choose to do so. This approach works to encourage families in dispute to access services early in the separation which can help avoid disputes becoming entrenched and alert parents to the potential impact on children if they are exposed to high or prolonged parental conflict.

Child Focus

While mediation is at the heart of Family Dispute Resolution these terms are not interchangeable. Mediation is about assisting two parties to reach an agreement; Family Dispute Resolution is about assisting parents to reach agreement that is based on the best interests of the child or children at the centre of their dispute. The principle of ‘best interest of the child’ is central to the legislation and to practice. Family Dispute Resolution practitioners work with parents to identify options for sharing parental responsibility while keeping children’s needs at the forefront of their considerations. Parents who attend an FDR or FRC service will often participate in counselling and education sessions to identify and explore the needs of their children and the importance of the relationship that they and their ex-partner have with each child. Relationships with extended family (eg grandparents) as well as stability of schooling, friendship networks and broader social activities may also be considered. As articulated by Dr Jenn McIntosh the goals of child-focused dispute resolution are to:

- Create an environment that supports disputing parents in actively considering the unique needs of each of their children;
- Facilitate a parenting agreement that preserves significant relationships and supports children’s psychological adjustment to the separation, including recovery from parental acrimony and protection from further conflict;
- Support parents to leave the dispute resolution forum on higher rather than diminished ground with respect to their post-separation parenting; and
- Ensure that the ongoing mediation/litigation process and the agreements or decisions reached reflect the basic psycho-developmental needs of each child, to the extent that they can be known without the involvement of the children.

Where appropriate, FDR services may also employ Child Inclusive Practice to give children a voice in the dispute. Once again drawing on the descriptions provided by Dr Jenn McIntosh “child-inclusive dispute resolution is a process of developmental consultation and therapeutic conversation. The primary goal of the child-inclusive model is to re-establish and maintain a secure emotional base for the child post-separation. It requires the involvement of two highly skilled professionals: the mediator, who works with the parents in the resolution of the dispute; and a specially trained child consultant, who meets with and assesses the child and provides the mediator and parents with feedback. It is best if different people undertake the roles, particularly where neutrality is important or conflict/complexity is high. This process involves:

- Consulting with children in a supportive, developmentally appropriate manner about their experiences of the family separation and dispute;
- Ensuring that the style of consultation avoids and removes any burden of decision-making from the children;
- Understanding and formulating children’s core experience within a developmental framework;
- Validating children’s experiences and providing basic information that may assist their present and future coping;
- Forming a strategic therapeutic loop back to the children’s parents by considering with them the essence of their children’s experience in a manner that supports them to hear and reflect upon their children’s needs; and
• Ensuring that the ongoing mediation/litigation process and the agreements or decisions reached reflect at their core the psycho-developmental needs of each child.\textsuperscript{7}

Comprehensive research confirms the benefits of child inclusive practice when properly implemented, particularly in the process of family dispute resolution\textsuperscript{8}.

For any of the above to be plausible, parents need to demonstrate parental reflective capacity or an ability to see the perspective of their children separate from their own relationship and independent of their own emotions. This capacity needs to be assessed or developed before a decision about the appropriateness of FDR can be made.

\textbf{Complex Cases}

Despite exemptions for families affected by violence and abuse, there are a proportion of families that choose to participate in FDR processes rather than invoke the exemption or receive a certificate from an FDR practitioner. This may be because they feel safer or better supported in a community based service or fear a poor outcome from a Court trial. In some cases it just is not appropriate to continue and FDR will not proceed. In other cases, safeguards and additional supports can be wrapped around the family to allow FDR to continue. There are models of shuttle and telephone dispute resolution that do not require both parents to be in the same room, services can also work with one or both parents to address power imbalance or safety concerns, connect parents into family violence or other relevant therapeutic programs and take steps to protect children – including notifying or referring to child welfare services.

\textbf{Practitioner Accreditation and Professional Development}

A family dispute resolution practitioner is an individual that meets the accreditation requirements set out in the \textit{Family Law (Family Dispute Resolution Practitioners) Regulations 2008}. Family dispute resolution practitioners must apply for accreditation to the Australian Government Attorney-General’s Department. There are three pathways for family dispute resolution practitioners to meet the accreditation requirements:

- Completion of the full Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent); or
- An appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units\textsuperscript{9} from the Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent); or
- Included in the Family Dispute Resolution Register before 1 July 2009 and competency in the three specified units (or higher education provider equivalent).

Family Dispute Resolution practitioners employed within FRSA member organisations receive regular support, clinical supervision and professional development. They often have qualifications in social work, psychology, counselling or family law and participate in a variety of professional networks. This is also true for practitioners that work in specialised roles including ‘Child Consultant’.

\textbf{Shared Parental Responsibility and Meaningful Relationships}

Central to the Family Law Reforms enacted in 2006 was the concept of ‘Shared Parental Responsibility’ encouraging parents to reach agreement on care arrangements that support children and young people to maintain meaningful relationships with both parents after separation, where it is safe to do so. While the emphasis is on shared ‘responsibility’ including shared decision making, the legislation also supports consideration being given to children and young people

\textsuperscript{7} AFRC Issues No. 1, 2007, Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors by Dr Jennifer McIntosh, available from \url{http://www.aifs.gov.au/afrc/pubs/issues/issues1.html}

\textsuperscript{8} McIntosh, Wells & Long (2007) pgs 8-25; McIntosh & Long (2006)

\textsuperscript{9} The sixe compulsory units are CHCDFV811A — Respond to domestic and family violence in family work; CHCDISP804A — Create a supportive environment for safety of vulnerable parties, CHCFAM505A — Operate in a family law environment, CHCDISP801A — Facilitate dispute resolution in the family law context, CHCDISP802A — Implement family dispute resolution strategies, and CHCDISP803A — Facilitate family dispute resolution in an impartial manner and adhere to ethical standards.
spending significant or substantial time with both parents, where appropriate, in order to facilitate attachment and connection between children and parents.

The concept of shared parental responsibility is founded on a large body of work into the long-term health and wellbeing of children in separated families which suggests that children and young people benefit in a variety of ways from maintaining meaningful relationships with both of their parents wherever possible. Even when it is not safe for the child or young person to be in the care of one parents alone or overnight, arrangements can be made that support ongoing contact through regular visits, phone calls, email communication and other means of staying in touch. In cases where there is actual or alleged violence or abuse, safety can be protected through the use of Children’s Contact Services where contact is supervised in a safe environment. Contact Services can provide therapeutic intervention to parents and children as well as assessment to inform decision-making where there is some doubt as to the relative benefits of regular contact.

The majority of parents want the best for their children, even when they are not in a position to provide an optimal environment or appropriate care. Yet it can become difficult for parents to remain focused on the child’s best interest when they are in dispute with an ex-partner, broader family network or government or community agency. It can also be difficult for other parties to determine whether behaviours by the parent are genuine attempts to protect a child or serving a more self-interested end particularly if parental competency is in question.

Determining whether a parent has put a child at risk or neglected their care can be very difficult; determining whether an ongoing relationship with that parent is important to the long-term wellbeing of the child is even more difficult. Research by Mudaly & Goddard (2006) with children who have a history of proven parental abuse or neglect resulting in placement into out of home care, suggests that it is important to give children and young people the opportunity to tell their story and to support them if they wish to continue to have relationships with parents and relatives to do so in a way that is safe. This can be important to the child’s sense of identity and healing.

Children caught between two systems

FRSA has previously raised concerns about the disconnection between the two legal systems in place to protect the safety and wellbeing of children in Australia – the State Based Child Protection System and Commonwealth Family Law System. Increasingly family relationship services are concerned about children’s matters proceeding through family law courts when child protection agencies should be involved. These issues have been raised consistently in professional forums including the Family Law Council, Family Law System Reference Group and consultations on the National Framework on Protecting Australia’s children.

The recent Australian Institute of Family Studies Evaluation of the 2006 Family Law changes found that over half of Family Court and Federal Magistrates Court matters involving children contained allegations of family violence. The relationships between Family Court registries and Child Protection Agencies vary significantly across the country and even across regions within State or Territory jurisdictions. The Magellan project for case management of cases in the Family Court that involve allegations of sexual abuse has significantly improved the way that these cases progress and has enjoyed very good support from DHS in Victoria. It is important to hold on to these gains but also to build on them further – perhaps to include other forms of abuse and allegations of harm.

FRSA has urged the Federal Government to address this and forge stronger connectivity between the two systems in the interest of those children at greatest risk of abuse or neglect. This could include:

- Improve information sharing across the two systems;
- Grant Family Court jurisdiction to make child welfare orders and Children’s Court jurisdiction to make parenting orders;
- Increase resources for risk assessment and family support services working with vulnerable families and children before, during and after court proceedings.

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A single court solution

Over the last ten years a single court process for children’s matters has been advocated as the most effective way of dealing with issues of child abuse and parental responsibility and care. A report of the Family Law Council of Australia in 2002 called for a ‘single court’ process for those cases where protection issues intersected with family law issues\(^\text{11}\). This model requires one court to hand appropriate powers to the other, so that the process might be managed expeditiously. In most cases this would require the Australian courts to allow state courts to make judicial determinations on parental responsibility and care.

In other jurisdictions, such as New Zealand, single courts have been constituted to deal with the full range of children’s and family law issues. This allows the court to make determinations on child protection issues prior to making orders for parental responsibility and care.

In the UK, all courts who have applications relating to a family / and or child before them, convene a joint directions hearing at the first instance. At that time the judges are able to collectively determine the process, make relevant interim orders for the wellbeing of the children, and ensure that information is shared across the judicial jurisdictions. The advantage of this and the New Zealand process is that they clearly identify how the child’s wellbeing and best interests are being protected and promoted and expedites the process in other courts to allow final determinations to be made as to where and with whom the child should reside.

Conclusion

Rather than respond to each option identified in the discussion paper FRSA has chosen to focus on areas where we bring relevant expertise. We would be keen to support or facilitate further consideration of the potential use of Family Dispute Resolution in child protection matters and would be happy to provide more detail around any of the content of this submission.

About FRSA

Family Relationship Services Australia (FRSA) is the national peak body for family and relationship services funded by the Federal Government through the ‘Family Relationship Services Program’. This includes post separation services funded by the Attorney-General’s Department:

- Family Dispute Resolution (FDR) services
- Family Relationship Centres (FRCs)
- Family Counselling
- Children’s Contact Services
- Parenting Orders and Cooperative Parenting Programs
- Supporting Children After Separation
- Specialist Family Violence Services
- Men and Family Relationship Services

As well as a suit of Early Intervention Services funded by the Department of Families, Housing, Community Services and Indigenous Affairs. For more information visit [www.frsa.org.au](http://www.frsa.org.au).