
Family Law Council

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15 November 2005

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

**National Alternative Dispute Resolution Advisory Council and Family Law Council
joint advice on the requirement for immunity for family counsellors and family
dispute resolution practitioners under the *Family Law Act 1975***

On 13 September 2005 you requested that the National Alternative Dispute Resolution Advisory Council and the Family Law Council (the Councils) jointly review and provide advice on the requirement for immunity for family counsellors and family dispute resolution practitioners under the *Family Law Act 1975* (the Family Law Act). The full terms of reference are provided in appendix A. In particular, you sought advice on:

1. whether it is appropriate to confer the same immunity that applies to a judge, when performing the functions of a judge, on family dispute resolution practitioners when conducting facilitative dispute resolution (as provided in the Family Law Amendment (Shared Parental Responsibility) Bill 2005)
2. whether it would be appropriate to extend that immunity to family dispute resolution practitioners when conducting advisory dispute resolution, and
3. whether it would be appropriate to extend that immunity to family counsellors when conducting family counselling in accordance with the Act.

In summary, our responses to the questions are:

1. It is not appropriate to confer this immunity for facilitative dispute resolution.
2. It is not appropriate to confer this immunity for advisory dispute resolution.
3. It is not appropriate to confer this immunity for family counselling.

Accordingly, we recommend that the immunity provisions be removed from the Family Law Amendment (Shared Parental Responsibility) Bill 2005. We also recommend that the distinction between ‘facilitative dispute resolution’ and ‘advisory dispute resolution’ be removed from the Bill since the only rationale for the distinction is in relation to the proposed immunity for facilitative dispute resolution practitioners.

Reasons

(i) The justification for granting immunity to mediators

The Councils consider that any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. There is now almost no profession which is granted the privilege of immunity from the ordinary laws of the land concerning civil liability. When the High Court ruled that the current immunity of barristers at common law should be retained, there was considerable disquiet in the Australian community. It follows that even if there is immunity under the present legislation for mediators, its continuance should be a matter of careful consideration and scrutiny. It requires compelling justification.

The position around the country on the immunity of mediators is a varied one. There is no general statute at state or federal level that confers immunity on all mediators working within the jurisdiction.¹ However, under some specific statutes, mediators have an absolute immunity in relation to work done in relation to mediation associated with that legislation. For example, s.19M of the Family Law Act and s.53C of the *Federal Court of Australia Act 1976* both confer on mediators and arbitrators the same protection and immunity as a judge in performing judicial functions. However, in contrast to the position under the Family Law Act, the Federal Court of Australia Act provision only applies to court-ordered mediation. Certain other mediators have a qualified immunity. For example, in legislation establishing the community justice centres in New South Wales² and their equivalent in Queensland³, mediators in the centres are provided with immunity for anything done or omitted to be done in good faith in execution of their duties.

¹ For discussion of the position see Robyn Carroll, “Mediator Immunity in Australia” (2001) 23 *Sydney Law Review* 185.

² *Community Justice Centres Act 1983* (NSW), s.27(1).

³ *Dispute Resolution Centres Act 1990* (Qld), s.35(1)(c).

Perhaps the strongest justification for having an immunity is in relation to court-ordered mediation. Here the mediation is part of a continuum of case management strategies by which it is aimed to resolve litigation between parties and for that reason may be seen to be an extension of the judicial role - attracting the same immunity as for other aspects of the court process.

Whatever the validity of that justification in relation to court-ordered or court-annexed mediation, it is very difficult to justify the immunity of mediators under the Family Law Act now when most mediation is community-based and may not be part of a court's case management process. Indeed under the Family Law Amendment (Shared Parental Responsibility) Bill 2005, there are provisions which will require people to engage in a dispute resolution process before being allowed to file in court. Furthermore the Family Relationship Centres will offer free mediation to people who seek it in relation to their parenting arrangements after separation and there is no necessary connection with any court application. Given the current development of community-based mediation in parenting disputes outside of the court system, the Councils consider that there is no justification for maintaining an immunity which has its origins in mediation as an extension of the case management and dispute resolution work of the courts.

For these reasons also, there is no justification for extending immunity to counsellors.

(ii) Capacity to limit liability contractually

Mediators, like other professionals, may limit their civil liability by contract. It is therefore possible for them to negotiate for immunity, or to include it in standard conditions for providing the service. The validity of such exculpatory clauses depends on the nature of the liability that is sought to be excluded and the applicable law in the jurisdiction where the contract is made.

(iii) Limitations on admissibility of evidence

Even if immunity is not limited by contract, it will not be easy to bring a negligence action against a dispute resolution practitioner. Evidence of anything said or done in a dispute resolution session will remain inadmissible in court, subject to the exception provided in what is currently s.19N of the Family Law Act. We consider this is necessary to maintain the confidentiality of the process. It will have a collateral effect of making it quite difficult to adduce the evidence necessary to justify a negligence action against a dispute resolution practitioner. Furthermore, since in mediation, agreements are made by the participants, and the mediator has a facilitative rather than advisory role, it is likely to be difficult to establish that loss has been caused as a consequence of the mediator's conduct. For these reasons, even if mediators do not have immunity, it is unlikely that lawsuits will be commonplace.

(iv) Impact on the mediation profession

Our consultations indicate that immunity from liability for negligence is not an issue which is of great importance to practitioners in the field. There is no reason to suppose either that the continuation of the immunity will significantly increase the likelihood of new entrants to the field or that its removal will significantly deter new entrants from continuing to practice. Nor is there any evidence that insurance issues ought to be significant in relation to the removal of immunity of mediators. The reality is that most organisations which offer mediation offer a range of other services as well. Those services include counselling. Other such services do not attract immunity from civil liability. It follows that these organisations need to have insurance covering the liability of the majority of their professional staff. It seems curious that some should have immunity and some should not depending on the nature of the intervention that they are engaged in, when assisting families.

(v) Exception for mediation conducted within courts

We consider however that it is important for dispute resolution which is conducted by employees of the Family Court of Australia or the Federal Magistrates Court to continue to attract immunity. This is because such dispute resolution is one of the continuum of interventions which are involved in the work of the court and which therefore should be seen as part of the totality of the court process. In any event it is anticipated that, over time, the Family Court mediation staff will practice as family and child specialists giving non-confidential advice to the parties to help them resolve their disputes and that they will have a reportable role in the process of case management. We note from our terms of reference that you do not intend to change the position that family and child specialists under the Family Law Act should have immunity, and we agree with that position. For the avoidance of doubt, we think it is important to retain the continuing immunity of employees of the courts involved in family dispute resolution whether or not they fall within the definition of being family and child specialists for the purposes of s11D of the Family Law Act.

The distinction between facilitative and advisory dispute resolution

A further reason for the advice of the two Councils that the immunity of mediators should be removed from the Family Law Act, is that we do not consider that the distinction between facilitative dispute resolution and advisory dispute resolution is a tenable one in terms of the kind of mediation that is practised in relation to disputes about children. Proposed subsection 10H(2) provides the following definitions:

- (2) Family dispute resolution may be either:
 - (a) ***advisory dispute resolution***—in which the family dispute resolution practitioner conducts family dispute resolution by, among other things, providing advice on one or more of the following:
 - (i) the subject matter of the dispute;

- (ii) possible outcomes of the dispute;
 - (iii) the application of the law;
 - (iv) an area of professional expertise besides the law (for example, psychology); or
- (b) ***facilitative dispute resolution***—in which the family dispute resolution practitioner conducts family dispute resolution without providing advice on any of the following:
- (i) the subject matter of the dispute;
 - (ii) possible outcomes of the dispute;
 - (iii) the application of the law;
 - (iv) an area of professional expertise besides the law (for example, psychology).

While the distinction between facilitative dispute resolution and advisory dispute resolution may well be an entirely valid one for other forms of dispute, it is both necessary and appropriate at times that mediators in parenting disputes advise parties about what is likely to be of benefit for children and what is likely to be harmful to them. It may well be appropriate to counsel parents that the arrangement that they are contemplating for organising the parenting of their child may not be one which would give the child the stability and security that he or she needs. There are other ways in which a mediator with experience of parenting disputes or with a background in psychology or social work may be able to assist parties to understand better the needs of children and the interests of their children when negotiating a parenting arrangement. Giving advice of this kind is not a matter of taking sides, and nor does it compromise the independence of the mediators. It is an aspect of their facilitative role in helping the parents to work out what is likely to be in the best interests of the children.

The Councils consider that enshrining a distinction between facilitative and advisory dispute resolution in legislation will do much more harm than it will do good. By drawing such a sharp distinction between the two forms of intervention, there is a risk that it will constrain best practice in family dispute resolution in a way that is not justified. The only reason why that distinction is made in the Bill is so that the continuing immunity of mediators should remain while other professionals engaged in a more advisory role would not have immunity. If, as we consider is the right course of action, mediators cease to have immunity under the Family Law Act, there will be no need for the distinction between facilitative and advisory dispute resolution. It will be necessary only to define family dispute resolution without further subdivision. We consider this would be a much better legal framework for dispute resolution than maintaining that distinction when it does not have a secure foundation in current family work. However, it is possible that such a distinction will be valuable by way of guidance in setting out practitioner standards.

Conclusion

In conclusion, we would like to emphasise the support that both Councils have for the Government's plans to ensure proper standards of accreditation and professional training for those involved in dispute resolution work. Both Councils would like to assist the Government in framing the rules and regulations which would give effect to this accreditation process and we look forward to working with the Government in this regard.

Yours sincerely



Justice Murray Kellam AO
Chair of the National Alternative Dispute
Resolution Advisory Council (NADRAC)

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Yours sincerely



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TERMS OF REFERENCE

I am writing to request the Family Law Council, jointly with the National Alternative Dispute Resolution Advisory Council (NADRAC), to review, and provide advice on, the requirement for immunity for family counsellors and family dispute resolution practitioners under the *Family Law Act 1975* (the Act).

In particular I would appreciate advice on:

1. whether it is appropriate to confer the same immunity that applies to a judge, when performing the functions of a judge, on family dispute resolution practitioners when conducting facilitative dispute resolution (as provided in the Family Law Amendment (Shared Parental Responsibility) Bill 2005)
2. whether it would be appropriate to extend that immunity to family dispute resolution practitioners when conducting advisory dispute resolution, and
3. whether it would be appropriate to extend that immunity to family counsellors when conducting family counselling in accordance with the Act.

In advising on these matters, the following issues should be considered:

- any statutory immunities provided to other community-based and private dispute resolution practitioners, counsellors or other professionals
- the ability of family dispute resolution practitioners and family counsellors, and the organisations which employ them, to contractually limit their liabilities when providing services to clients
- the appropriate balance between the public interest in offering the statutory immunity as an inducement for family dispute resolution practitioners and family counsellors to comply with the regulatory scheme in the Act and the public interest in protecting users of their services from negligent practice
- the potentially detrimental impact on the costs of dispute resolution practitioners and organisations, including insurance costs, if the current immunity offered to family and child mediators under section 19M of the Act were to be withdrawn and how that may impact on the Government's Family Relationship Services Program
- relevant professional benefits (eg subsidised insurance) afforded to, or which could be afforded to, family dispute resolution practitioners and family counsellors by relevant professional associations (eg the Australian Psychological Society)
- relevant professional benefits afforded to other professions by relevant professional associations, and
- if the Councils are of the view that the immunity should be retained or extended, whether it would be desirable to incorporate any provisions in the family law legislation to protect users of their services.