

Comments on Attorney-General's reference to NADRAC concerning ADR processes

The following comments represent my personal views, from experience in my professional capacity as a family dispute resolution practitioner (FDRP) and Practice Leader and supervisor in a community-based organization that does a lot of family dispute resolution (FDR). The comments are not intended to represent the views of my employer, Relationships Australia (Vic). The comments are confined to areas within my personal knowledge - FDR and the Family Law Act 1975 (FLA).

1. Confidentiality (section 10H FLA)

This section works well as it stands. No amendment needed. The circumstances in which the FDRP has discretion to disclose information are appropriate. Otherwise, the FDRP's general duty of confidentiality to the client(s) should remain.

2. Inadmissibility (section 10J FLA)

This section should also remain in its current form. I would oppose any extension to the information that may be admissible. The only exception is an admission by an adult or disclosure by a child of child abuse or risk of abuse ("abuse" being defined in the FLA), and, even then, the exception doesn't apply if there is sufficient evidence of the admission or disclosure available to the Court from other sources.

To extend admissible information to, say, psychological abuse, may well create problems. While this form of abuse is certainly very damaging to children, the definition of this behaviour is more problematic than an assault constituting a legal offence, and sexual impropriety with power imbalance - the 2 categories of "abuse" covered by the present definition in s. 4 FLA.

While I don't have any statistics, my sense is that the exception is rarely relied upon to admit evidence that has not been disclosed outside FDR.

In his recent "Family Courts Violence Review" dated 27 November 2009, Professor Richard Chisholm recommended that consideration be given to increasing access to relevant external information (including information from FDR services) in cases where allegations of family violence are made. He considers that the Court's ability to conduct risk assessments and its capacity to protect children would be enhanced if it had this information. He pointed to the very real difficulty for Courts when confronted by these allegations, especially at an interim hearing. While this is undoubtedly true, information from FDR services would rarely add anything to the evidence that the parties invariably lead in their affidavit material, or the information that the Court would receive from a Family Consultant or through a Family Report or from a State or Territory child protection authority. FDR practitioners hear allegations of family violence (in its broad sense) all the time, together with denials of that violence. Practitioners' files invariably contain allegations and denials of family violence, or alleged 'minimization' of the allegations, just as in affidavits. Furthermore, the proposed change would have a very significant impact on

clients' willingness to engage properly in FDR, or disclose or acknowledge in FDR certain behaviour which may be able to be dealt with in the FDR process e.g. by means of safety conditions - and, as such, does not assist in the protection of children.

There is the additional difficulty of deciding *how* such information will get before the Court. If this were by way of subpoena, that could create impossible administrative difficulties for FDR services, given that the majority of cases contain family violence allegations of some kind.

It would seem that the real need is the investigation and testing of those allegations – something not within the province of FDR. The practical difficulty faced by judicial officers confronted by a long list of cases containing family violence allegations at interim hearings is acknowledged; this requires additional resources and further thought.

3. Conduct obligations

It becomes very problematic to attempt to describe 'good faith'/'genuine effort' negotiations, and then to impose sanctions for failure to engage in them. In FDR, a person may be quite positional on a certain issue for reasons that are reasonable (from his/her perspective, at least) and it can be dangerous for an FDRP to make negative assumptions about an apparent lack of willingness to negotiate.

While willingness to negotiate might be said to be less important in the new world of 'compulsory FDR' in parenting matters, there is no doubt that willingness to negotiate remains, as it always has been, an essential ingredient of successful mediation. However, it is difficult to conceive how one can meaningfully legislate for willingness.

4. Immunity

My sense is that the loss of immunity has not been an issue, at least for FDRPs in community-based organizations. It is most likely that the larger organizations have professional indemnity insurance and the additional protection provided by s. 10J FLA, rendering inadmissible anything said by or in the company of an FDRP conducting FDR, seems to be effective. However, I do not believe this section has yet been tested in Court, in the context of a negligence or malpractice suit.

It may be that the loss of immunity is more of a concern for private FDRPs, who may struggle to obtain satisfactory professional indemnity insurance.

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19 February 2010