

“How can we ask separating parents to collaborate in the interests of their children unless we are also prepared to collaborate?”

Australia’s story of collaboration between professionals in family law – how children and families benefit^{1 2}

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Since 2006 Australia has introduced sweeping changes to the way that parenting disputes are handled following separation and divorce. The key changes include:

- Changes to the law
- Changes to the courts
- Changes to the ways parenting disputes are managed outside of the court - in community-based settings, such as with mediation and the provision of information and advice.

These changes reinforce the responsibilities of parents to focus on the needs of their children as their first priority when they separate, and are changing attitudes to the way divorce is managed, with a focus on preserving and strengthening family relationships instead of adversarial legal processes.

¹ This presentation has been greatly enriched by the contributions particularly of Dr Rae Kaspiew, with other very valuable input from Professor Lawrie Moloney, Ms Ruth Weston PSM and Ms Carlie Sporton.

² The views expressed are those of the presenters and may not reflect those of the Australian Government or the Australian Institute of Family Studies.

Community-based support services, such as “Family Relationship Centres”, assist parents to resolve their disagreements and educate them about the developmental needs of children in the critical transition to new family arrangements.

As part of these transformational changes to social and legal policy and practice, we have also achieved change in the ways that the professions collaborate with each other. This process has not been easy, as lawyers and social science professionals (eg social workers and psychologists) usually have different values and professional languages, and these are often a barrier to effective collaboration.

In this presentation we will show how we have attempted to bridge these barriers between the professions, and how we have learnt from each other, developed mutual trust and confidence, and new practice methods which place the needs of vulnerable children at the centre of our work.

What have we learnt so far?

Australia’s family law system was originally re-shaped in 1975. At that time, the system set up to deal with marriage breakdown included the Family Court of Australia, which was formulated uniquely as a ‘helping court’ with its own counselling division, in recognition of the importance of addressing the emotional dimensions of disputes arising from marriage breakdown. Since then, the family law system has witnessed further development. For example, substantive and procedural distinctions between the way that de facto and married couples are dealt with have disappeared. In addition, most matters are now dealt with by the Federal Magistrates Court, with the Family Court of Australia hearing appeals and only the most complex matters. And the family law system encompasses a range of relationship support services that work alongside and sometimes, hand in hand with, courts and legal services, in addition to a government operated administrative mechanism that manages the area of child support.

Arguably, two of the most significant features of the contemporary family law landscape are first, recognition of the need to address complex matters involving family violence and its frequent companions – mental health and substance misuse through better identification and more tailored approaches and second, a strengthening emphasis on the need for collaboration between different parts of the system, and most significantly,

legal and non-legal services.

In order to understand how these two emphases have emerged, it is useful to reflect on the 1995 changes that articulated two of the tenets that have dominated policy and debate in recent family law history: shared parenting and non-court-based approaches to resolving parenting disputes. The *Family Law Reform Act 1995* (Cth) reshaped the provisions relating to post separation parenting to emphasise the ongoing role both parents should have in a child's life post-separation³ and to articulate strengthened legislative support for the role of 'primary dispute resolution' approaches (ie mediation) to resolving disputes⁴.

Stronger emphasis still was placed on these two tenets in the wave of reform that followed the 1995 changes. In 2006, the Australian government introduced further legislative amendments with even stronger messages about shared parenting and non-court based approaches to parenting matters⁵. In relation to shared parenting, a presumption in favour of equal shared parental responsibility⁶ was introduced, and in relation to dispute resolution, it became mandatory to attend family dispute resolution (the name given to mediation-type processes in the new Act) prior to filing a court application, with some exceptions⁷.

Significantly, the 2006 reforms went well beyond legislative change. This raft of changes saw a major expansion of the service system, intended to support the government's aim to reformulate parenting disagreements arising from relationship breakdown as 'relationship' issues rather than legal problems (Kaspiew et al., 2009). As part of this expansion, 65 Family Relationship Centres were established. These were intended to be a highly visible entry point that operated as a doorway to other services and helped families to access these services, as well as providing counselling and family dispute resolution services (Kaspiew et al., 2009). Lawyers were precluded from seeing clients at FRCs and this position reflected the direction advocated in the report by the House of Representatives Standing Committee of Family and Community Affairs (2003) that established the blueprint for the 2006 reforms. Wishing to keep children's needs at the centre of parenting disputes, this Committee had recommended a "non adversarial source of assistance to *replace* (emphasis added) lawyers and courts" (House of Representatives 2003 p. 89).

³ Eg FLA s60B.

⁴ Eg FLA s14 and 14A.

⁵ Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

⁶ FLA s61DAA.

⁷ FLA s60I.

At the time the 2006 reforms were introduced, the empirical evidence base for the family law system was underdeveloped and somewhat patchy. In recognition of the significant social change sought to be achieved by the reforms and of the need for better evidence to inform future policy development, the Australian government commissioned the Australian Institute of Family Studies to evaluate the impact of the 2006 reforms. This Evaluation was based on multiple studies examining the operation of the legal and service systems and large-scale quantitative surveys of parents (Kaspiew et al 2009). It has produced an evidence base of a scale unprecedented in Australia or elsewhere that, together with other pieces of research and analysis (Chisholm 2009, Family Law Council 2009, Australian Law Reform Commission 2010) has informed the most recent set of changes in Australia.

Turning to the Australian family law landscape in 2012, in June this year the latest set of substantive changes to the Family Law Act came into effect. These changes, enshrined in the *Family Law Legislation Amendment (Family Violence and Other Matters) Act 2011*, are designed to strengthen the family law system's response to family violence and child safety concerns⁸. They respond to some significant findings of the Evaluation of the 2006 family law reforms and associated research about the prevalence of a history of family violence prior to separation, ongoing concerns about child safety after separation and patterns in parenting arrangements. The Longitudinal Survey of Separated Parents (LSSF) Wave 1, the centerpiece of the Evaluation research program, demonstrated that a history of family violence (ie physical hurt and/or emotionally abusive behavior) was more common than not among separated parents. 65% of mothers and 53% of fathers reported either physical hurt before separation (26% of mothers and 17% of fathers) or emotional abuse before or during separation (39% of mothers and 36% of fathers). In LSSF W2 (in which parents were re-interviewed some 28 months after separation), 4% of parents reported experiencing physical hurt at the hands of the former partner in the previous 12 months, with 53% reporting emotional abuse in the same time frame.

In relation to concerns about their own or their children's safety as a result of ongoing contact with the other parent, 21% of mothers and 16.5% of fathers reported holding such concerns. By LSSF W2, a similar proportion of the sample reported holding safety concerns, with a core group of 10% holding the concerns through both LSSF waves. For

⁸ Family Law Legislation Amendment (Family Violence and Other Matters) Act 2011, Explanatory Memorandum, p 1.

9.5% of parents, concerns held in Wave 1 had dissipated by Wave 2 while newly arising concerns were reported by 7% of parents in Wave 2.

The Evaluation findings demonstrated that among parents who reported a history of family violence, or who held ongoing safety concerns, shared care parenting arrangements were no less common than among parents without such a history and no such concerns. This pattern is not consistent with the intent of 2006 reforms, which made matters where there were concerns about family violence and child safety exceptions to both the presumption of equal shared parental responsibility and the requirement to attend family dispute resolution prior to lodging a court application. The Evaluation findings demonstrated that family dispute resolution was more likely to be used by parents reporting a history of family violence than those who did not (Kaspiew et al., 5.1). They also showed that parents who reported a history of family violence and/or child safety concerns were taking longer than parents without these concerns to sort out their parenting arrangements and were using multiple services (Kaspiew et al., 232). These and other Evaluation findings supported the need for a clearer legislative response to family violence in the context of post-separation parenting arrangements. They also pointed to the need for more effective systemic responses so that families affected by violence and/or safety concerns have speedy access to services equipped to deal with their more complex needs. Some Evaluation findings suggested that aspects of the family law system, particularly Family Relationship Centres and legal services operated in parallel rather than concert (Kaspiew et al 362). Other analyses conducted in the same period (Chisholm 2009, ALRC 2010, FLC 2010) also highlighted a range of obstacles to efficient responses in these areas, including the lack of a common understanding of family violence across the family law system, gaps and overlaps between the federal family law system and the state and territory –based child protections systems and barriers to information being shared between services and organisations in different parts of the system.

There have been program development responses to these issues, in addition to the recent legislative changes. These responses require inter-disciplinary collaboration on a scale and in a manner that is new to the system in its current form. The first of these collaborative efforts involves publicly funded legal services (Community Legal Centres and Legal Aid Commissions) partnering with Family Relationship Centres to provide legal information, support and advice to FRC clients. This program brought together the new, non-legal players in the family law system and the established networks of publicly-

funded legal service providers in a significant attempt to provide holistic, publicly subsidised services to separated parents in a way that meant both their relationship and legal issues could be addressed at the same time. The program reflected a reversal of the original policy that precluded lawyers from being involved with clients at the centres (AGD 2007). Findings in three main areas, apart from family violence and child safety concerns, from the Australian Institute of Families Studies' Evaluation of the 2006 family law reforms, supported the necessity for such an initiative. First, service system and legal system professionals indicated a significant confusion, and the existence of widespread misconceptions, about the meaning of the legislative changes introduced in 2006 (the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Kaspiew et al Chapter 9). Second, the identification of families for whom family dispute resolution was not the most appropriate pathway was emerging as problematic, with FDR being applied in unsuitable cases for a range of reasons (Kaspiew et al Chapter 5). Third, there was evidence of the need to build understanding and awareness between the legal and non-legal parts of the family system to provide a more integrated response to families (Kaspiew et al 2009, p253, 362).

An Evaluation of this program that was also conducted by the Australian Institute of Family Studies highlighted significant levels of enthusiasm for the program among legal professionals and FRC professionals (Moloney et al 2011). While the aims and justifications for the program were almost universally endorsed by participants in the evaluation studies, it was also clear that the nature of the collaboration required was challenging in some respects. In some partnerships, there were barriers related to trust and professional respect to overcome, in a context in which legal and relationship support services had previously, to some extent, been operating in parallel if not in outright competition. The partners also had to work to understand and address cultural differences that affected the extent to which their practices fitted together. An obvious example of this arose in partnerships where the concept of a conflict of interest, which precludes lawyers from acting against a party whom they have previously represented or advised, was slow to be understood, leading to difficulties in referrals. The findings of this evaluation underline the point that many post separation matters involve both legal and relationship issues: clients need access to both types of help and advice to find the way forward.

A second example of the increasingly specialised and collaborative nature of service system responses is a pilot of a family dispute resolution process where there has been

family violence. Women's Legal Centre Brisbane developed the model for the process and it is being piloted in five locations around Australia. In each of these locations, partnerships involving publicly funded legal services, family dispute resolution providers, child consultants and separate services who provide support to family violence victims and work with perpetrators have been formed. Risk assessment and safety planning are key foci in the process, which also involves an approach where case management decisions are made collaboratively by the different professionals involved in the cases. The program is aimed at providing a safe dispute resolution option for families where there has been family violence (some level of acknowledgement from the perpetrator is required) who do not wish to go to court. This Pilot is due to run until April 2013 and it is also being evaluated by the Australian Institute of Family Studies.

A case example of a new collaboration: Lawyers working alongside social workers in the Family Relationship Centres

One of the most exciting aspects of the changes in Australia is the range of new collaborations which have developed, initiated by practitioners themselves or part of government-funded projects.

In December 2009 the Australian Government funded the "Building Better Partnerships Program", providing a legal partner service for each of the 65 Family Relationship Centres (FRCs) in Australia. Each centre was funded for about two and a half lawyer days a week. Legal Aid NSW was funded to partner with three Family Relationship Centres. Legal Aid NSW was funded to provide a coordination role for that first 12 months and in NSW.

Apart from this new project Legal Aid NSW has had a legally assisted mediation or "conferencing" program for the last 12 years. This has been the case for Legal Aid Commissions Australia-wide. The Legal Aid NSW model was not and is not based on any therapeutic process but rather a pre-litigation process where parties were required to participate in conferencing prior to Legal Aid funding matters in a litigation pathway. Hence we have had significant experience in legally assisted mediation. This process has always sat outside any therapeutic services or case managed process.

Our conferencing program has always had very good results in terms of rates of agreements or “settlement” outcomes.

The FRCs commenced operation in Australia under a philosophy where they were to assist parents in a non-adversarial framework. It was clear that families were to be given a chance to sort things out without lawyers and the court system being involved. Their processes were therapeutically based with staff working as parent educators and coaches through the separation process. Processes were designed to give parents the time and space that was needed to process arrangements after separation. Individuals are assessed and referred for more specialist services than parents or children may need. Then the family is offered access to mediation or family dispute resolution.

There is a clear contrast between the two systems, and initially there was little collaboration between the Legal Aid system and the Family Relationship Centre's.

The new partnerships program was the opportunity to bring the two systems together. It was our job at Legal Aid to encourage collaboration and find ways that we could work together that would assist clients. Firstly, we had to be able to make a credible case to the non-legal sector that lawyers could actually assist. They were, at this stage, up and running and doing quite well without lawyers.

The starting point we came from was that Legal Aid and the other community sector lawyers had no vested interest in litigious processes. While we were running a litigation practice, much of our work at Legal Aid NSW was advising clients not to pursue litigated processes as litigation was obviously not going to deal with their presenting family problems.

Also, because of guideline or budgetary constraints we could not fund the multitudes of folk coming to us for assistance and we would be refusing them Legal Aid. They would then end up running proceedings and acting for themselves. Often in these matters that became intractable the court would end up appointing lawyers to represent the children (Independent Children's Lawyer – ICL).

Many Legal Aid lawyers had considerable experience as Independent Children's Lawyers. In NSW Legal Aid manages all appointment of ICL's. One of the criteria for the appointment of an ICL in Australia includes parties being self represented and/or there is what is described as "intractable dispute".

We knew that robust legal representation and advice was sometimes the critical factor in determining which pathway a parent will take to deal with their issues with their children. Without that legal assistance parents would find their way down a path of self-destruction for their children and themselves.

In that context many lawyers had a real personal commitment to "Early Intervention" legal services. We could see that legal advice and assistance could work hand in hand with family dispute resolution to promote a child focused sensible outcome for parents. Drawing on our experience of legally assisted mediation in the "conferencing" programs the lawyers could see how well a system could work with the more therapeutically based mediation methods used in the Family Relationship Centre's.

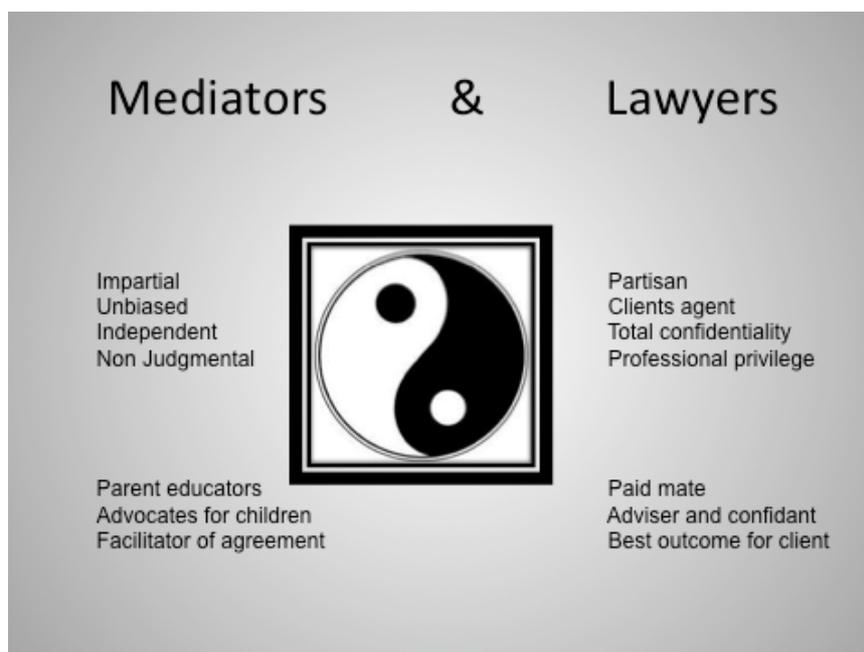
To promote collaboration Legal Aid NSW started the program with a Forum event in March 2009 just after the funding was announced. We brought the FRC sector and the lawyers together for a day. We made them sit in their regional areas and network with each other. This broke up their natural tendency to cluster apart. We sourced produce from the various regions of the state of NSW and made them work together on a regional produce display representing their region. The displays were also used for afternoon tea. It was a fun focused activity which made us all work co-operatively and it promoted connectedness to regional areas.

We then embarked upon a state-wide training program where we brought the regional FRC partners and regional legal partners together for training in the FRCs. This took the lawyers out of their comfort zone and into the FRC sector "space". We looked at the processes in the FRC's and asked the question – "How could lawyers fit in?"

We dissected the roles of mediators (FDRPs) and lawyers and sat them clearly opposite each other. A significant difference was that the mediators worked on a "family therapy" based perspective that focused totally on the best interests of the children, while the

lawyers worked with each client individually. The lawyer's role focuses on the clients self interest as guided by the law, which puts the children's best interest at centre stage.

We used a yin and yang visual representation.



The mediator (FDRP) is able to appeal to parent's best motivations to avoid further dispute and work together in the best interests of their children.

The lawyer on the other hand speaks to the client from a position of being concerned only for that parties self interest and in a relationship of confidentiality.

Hence we have a situation where the mediator (FDRP) is able to appeal to the clients higher moral values and to challenge them to improve their parental capacity while at the same time the lawyer is able to appeal to their pure self interest – with our child focused legislation bringing both these sides of the coin together.

You can see how the lawyer works within the frame of the clients self interest where they will give advice as follows;

- What they want is unreasonable and they will not be successful in court in that kind of an application
- That perhaps this bit of what they want is reasonable, but the balance of the application is unreasonable.
- What the process is likely to be and what the time frame would be if they pursued that application in a court.
- Whether they would be entitled to Legal Aid, or whether they would have to fund litigation themselves or indeed act for themselves to take the matter further.

Many mediators (FDRP's) took some convincing that the self-interested perspective the lawyers offered was of any use at all. It has taken some time to demonstrate the effectiveness of the dual process. Once the mediators (FRDP's) saw it working however the demand for legal assistance in the FRC processes totally outstripped the funded resource base.

Anecdotally we hear FDRPs comment that parents are able to move more quickly through their processes and make the shifts in their focus that assist them to get on with dispute resolution. Clients tell us they feel more empowered to make decisions and have more knowledge of the alternative legal pathways.

In our unit Early Intervention Unit at Legal Aid we also run court duty programs in our Federal Magistrates Courts and Family Courts. Hence, our staff gain experience in the coal-face of litigation and in the early intervention work in the FRCs. The FRC work also gives our staff a welcome relief from a purely litigation based practice and allows them to have keen ability to give advice about what a court might do with a matter if the parties took it down that pathway.

As part of our coordination role and capitalising on our duty program we also took mediators (FDRP's) and lawyers from Community Legal Centre's into the courts to observe the court duty lists. Many of the Community Legal Centre lawyers were not running litigation practices and did not have the close connection to the courts that we

had the benefit of. Many of the mediators (FDRP's) were working in the shadow of the courts but had never actually been there. We were able to provide some of those opportunities and also to facilitate some more casual encounters with the Judiciary to give a behind the scenes explanation of decisions and court processes.

In NSW we also established a peak level steering committee that brought the major players together in a regular meeting space to support the new program. We also had a state-wide email newsletter for the program, conference events, and cross sector training opportunities.

In Australia we also have the benefit of a collaborative program called the "Family Law Pathways Networks". These networks are interagency committees from all levels of the family law system. Delegates meet monthly bringing the courts, the FRC and community mediation and counseling sectors together with the public and private legal profession. We have worked cooperatively in our program with the Family Law Pathways Networks in each region to promote the legal assistance program and generally to promote collaboration between sector professionals. As time has gone by there has been a shift where many of us see each other as not just stakeholders, but as colleagues and friends within the one system.

The FRC's were set up by government to be the gateway to the Australian family law system. That was the theory. The reality is that there are multiple entry points to the system and parents often need assistance to determine the correct entry point for them. Sometimes the entry point at the beginning of their separation is different to the entry point they need at a later point in time.

For instance there are a number of legislative exceptions where mediation (FDR) may be assessed as "not appropriate". Those circumstances include when there is urgency, where there is abuse or family violence, or if is not practicable for parties to use mediation processes.

In these instances lawyers in the FRCs are able to refer clients down another more direct litigation pathway. Sometimes we refer clients to our Legal Aid "conferencing" program and a matter might not been seen as appropriate for mediation in an FRC but

may be seen as appropriate for a Legal Aid conference. There are differences in the Legal Aid conferencing program that allow that program to more easily deal with matters involving family violence or where parties require a process that will focus on court orders as the outcome rather than simply an agreement or parenting plan.

On occasion matters can be resolved by some "minor assistance". This could be in the nature of correspondence, a few phone calls or appropriate advice to tell our own client to sort themselves out. Sometimes we prepare urgent court applications and sometimes we assist clients to come to a conclusion that a legal process and even sometimes a mediation process will not assist with the problems.

Sometimes the advice will be that a client needs to commence down a litigation pathway then at another point it may be useful to try mediation or FDR. Often this is the case where an urgent early determination is made and once a judicial officer has made that decision the rest can be worked out in mediation.

There has been considerable success in Australia with these specific programs in terms of cross sector collaboration. However, it is not universally all that neat and tidy. There is still a deal of cultural difference. In terms of good collaborative or cooperative practice what we are really talking about is a minority of significant (but growing) pockets of collegiate relationships across the professions.

There are also legal ambiguities and sectional interests that continue to work to keep us divided. One of the big issues for us is that confidentiality from the court is built into the legislation establishing our FDR processes and family counseling programs. This means material that is disclosed by parties in mediator (FDR) or family counseling is not available to a court determining that very matter at a later date. Of course many lawyers see this as undermining the courts capacity to access material that is critical to matters concerning the best interests of children. The public policy view however is that confidentiality allows parties to participate frankly and openly in a process which is more likely to lead to agreement. To date our courts have upheld this view of the legislation.

There are also many lawyers who are dismissive of the benefits of FDR processes who continue to promote a litigious attitude in their clients. There are also many FRC and

mediation services that are slow to promote the benefits of cooperative work with lawyers.

There are also minority communities who do not use mediation and family dispute resolution for a variety of cultural and historical reasons. There are also geographic areas in the vastness of Australia that simply do not have access to services.

In Australia we are working slowly yet surely toward a family law system that attempts to meet the specific parent's need for service to the services that are offered to them. This means a complex and difficult system to find your way around as a parent or a litigant. The system however, by its complexity is trying to meet the therapeutic needs of families rather than just being a family law system that makes decisions about disputes.

Learnings from collaborative practice between lawyers, and social science professionals, such as counsellors and mediators

It is apparent that often our laws and social service structures and systems are not always designed with the best interests of children and families. In Australia the Family Law System has been fragmented and difficult for families to navigate.

The steps we have taken to facilitate the working relationships between professionals trying to assist families are designed to enable seamless transition and better outcomes for children and their parents.

Some of the issues which we need to address in this work include:

- Lack of trust between lawyers and social science professionals
- Different professional training and “language”, and sometimes a lack of shared understanding of client needs
- Misunderstanding of professional roles
- Conflicting views of client needs
- Systemic barriers to collaboration
- Client confidentiality

- Lack of time to develop shared practice approaches

There is evidence that effective collaboration also requires that

- Practitioners see each other as offering “different but equally valuable skills and expertise to parents in conflict”
- There is mutual understanding, respect and trust
- We extend “professional courtesies, such as the provision of timely feedback about clients”

(Rhoades et al, 2009, p14)

The program described in this presentation is one example of a government-funded project which is designed to bring professionals together and facilitate collaborative practice. Other examples include Interdisciplinary Collaborative Practice groups which meet regularly to discuss joint cases, and formulate a new way of working together across the professions.

There are strong indications that children and families benefit from professionals working side by side in interdisciplinary practice, but further research needs to be undertaken. Cost is always a critical factor, but we need to be able to assess “cost effectiveness” and the return on this kind of social investment through benefits to the wellbeing of children and their families, and benefits to our community as a whole.

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Video Clip Sources

Legal Aid NSW Best for Kids Family Law information for children and parents

<http://www.bestforkids.org.au/>

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