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The New Family Dispute Resolution System: Reform Under the Family Law Amendment (Shared Parental Responsibility) Act 2006

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The New Family Dispute Resolution System: Reform Under the Family Law Amendment (Shared Parental Responsibility) Act 2006

Abstract

This article explores the changes to Australia's family law system brought about by the recent enactment of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). It outlines the new family law system as proposed by the Act, and discusses the Australian Government's reasoning behind the changes. This article then examines the new family mediation process through the use of Family Relationship Centres, addressing both the advantages and disadvantages of the introduction of compulsory mediation prior to pursuing litigation. This article aims to highlight that while the new family system has certain benefits, some problems may still exist with its implementation in the current post-separation environment.

Keywords

family, law, dispute resolution, 2006, australia, mediation, child, children, family mediation centre, implementation, litigation

Cover Page Footnote

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**THE NEW FAMILY DISPUTE RESOLUTION SYSTEM:
REFORM UNDER THE FAMILY LAW AMENDMENT (SHARED
PARENTAL RESPONSIBILITY) ACT 2006**

SERENA NICHOLLS

Introduction

[i] The Australian Government is currently undertaking dramatic changes to the practice of family law. As such, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) has been enacted, which marks a milestone in Australia's family law system. One of the most striking revolutions of the Act is the increased emphasis on using mediation to resolve family law disputes. This article will begin by giving an overview of the new family law system as proposed by the Act, and discuss why the Australian Government believed that our family law system needed reform. The family mediation process, particularly through the use of Family Relationship Centres will also be discussed. This article will then address the advantages for introducing compulsory mediation before filing an application relating to children issues. Lastly, it will discuss the potential problems expected with the introduction of the new family mediation process. This article aims to highlight that while the new family system has some attractions some problems may still exist with its implementation in the current post-separation environment.

Reform Under The Family Law Amendment (Shared Parental Responsibility) Act 2006

An Overview of the New Family Law System

[1] A media release on the 10th May 2006 from Attorney-General Phillip Ruddock called the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) the ‘most significant family law change’ in 30 years.¹ This statement is supported by the wide-ranging proposals in the Act, which were inspired by the report by the House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story*² and the Federal Government’s discussion paper *A New Approach to the Family Law System: Implementation of Reforms*.³ The following briefly reviews some of the main changes implemented throughout the Act.

Rebuttable presumption of equal shared parenting

[2] The *Family Law Reform Act 1995* (Cth) encouraged the idea that both parents should have an active and constructive role in the upbringing of their children’s lives post-separation.⁴ As such, this sentiment was embedded in “rights” language within the *Family Law Act 1975* (Cth), particularly sections 60B and 61C. However, this attempt to encourage shared parental responsibility may not have been particularly effective.⁵ Therefore, the Government has solidified the pressure towards shared parenting by explicitly introducing a rebuttable presumption of equal shared parenting in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).⁶ This presumption aims to ensure parents ‘share the key

¹ Attorney-General’s Department, ‘Parliament Passes Historic Family Law Changes’ (Media Release, 10 May 2006).

² House of Representatives Standing Committee on Family and Community Affairs, Federal Parliament, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003).

³ Australian Government, Federal Parliament, *A New Approach to the Family Law System: Implementation of Reforms* (2004).

⁴ Richard Chisholm, ‘Post-separation Parenting: Public Debates, Reports and Policies’ (Paper presented at the Families Matter 9th Australian Institute of Family Studies Conference, 29 February 2005).

⁵ House of Representatives Standing Committee on Family and Community Affairs, above n 2, [2.10].

⁶ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s60B.

decisions in a child's life regardless of how much time the child spends with each parent'.⁷ The premise behind the introduction of a rebuttable presumption of shared parenting is supported by the research suggesting that joint parental involvement is advantageous for the upbringing and overall well-being of children, at least in those families where repetitive high conflict is absent.⁸ Obviously, to fulfil this presumption parents must be able to communicate and consult each other when making decisions that will impact their children's lives.⁹ It can also be rebutted when the court believes that there is violence, abuse or that imposing joint parental responsibility would not be in the best interests of the child.¹⁰

Compulsory family dispute resolution

[3] The Australian Government's overall strategy is to promote mediation for separating parents, rather than using the court process and ultimately litigation.¹¹ In accordance with this strategy, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) makes attendance at family dispute resolution (FDR) compulsory before a parenting issue can be taken to court from the 1st July 2007.¹² Section 60I(1) of the Act states that:

The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this part make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

⁷ Australian Government, above n 3, 10.

⁸ Eva Ryrstedt, 'Joint Decisions – A Prerequisite or a Drawback in Joint Parental Responsibility' (2003) 17 *Australian Journal of Family Law* 1.

⁹ Australian Government, above n 3, 11.

¹⁰ Family Law Section of the Law Council of Australia, 'Shared Responsibility: Lawyers, the Court and the Community – Understanding the New Family Law Parenting System', national seminar series on the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, presented in June 2006, 70-72.

¹¹ Nola Webb and Lawrie Moloney, 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9(1) *Journal of Family Studies* 23.

¹² Australian Government, above n 3, 12.

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[4] Crucial to compulsory FDR is that the parties must make a genuine effort throughout the process to resolve the dispute. If the parties have made a genuine effort in the mediation but the dispute has not been resolved, they will then be issued a certificate of compliance, enabling them to proceed further along the court process route.¹³ The Act has identified exceptions to compulsory FDR, including situations of child abuse, spousal abuse, incapacity to participate, and that the application is a matter of urgency.¹⁴ Compulsory FDR is to be rolled out in three phases, with it coming into full effect on the 1st July 2008.¹⁵ The main premise behind this reform is to provide an environment where separated and separating parents can resolve disputes in the best interests of the child.¹⁶ It is essential to note that already over 90% of filed children's disputes settle.¹⁷ Therefore, this reform seems to be aimed at settling some of these cases earlier and some of the residual 10% cases before a court hearing. A key question to ask is whether this reform is driven primarily by the goal of saving expenditure in court processes, or improving the quality of settlements.

Less adversarial process in the court

[5] The Australian Government has advocated for a reduction in the adversarial nature of family law and the court process in general.¹⁸ Notwithstanding this crusade, the adversarial nature of family law continues to set a small minority of parents as rivals to resolve a parenting

¹³ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s60(I)(8).

¹⁴ *Ibid* s60(I)(9).

¹⁵ Family Law Section of the Law Council of Australia, above n 10, 36.

¹⁶ Webb and Moloney, above n 11, 23.

¹⁷ Family Law Council, '*Patterns of Parenting after Separation*' (1992) A report to the Minister for Justice and Consumer Affairs, Part 6.

¹⁸ Chisholm, above n 4, 37.

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dispute and ultimately determine a winner and a loser.¹⁹ To overcome this the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) introduced five principles allegedly to make family law less adversarial, including considering the needs of the child, active management of the proceedings, protection against family violence, promoting cooperative parenting and reducing delay and formality.²⁰ The premise behind the attempted divergence of the Family Court from adversarial processes has been supported by the High Court, particularly in *U and U* (2002) where Gaudron J stated that “where, as in the present case, the paramount consideration is the child’s best interests, it is not always appropriate that the issues be explored and the evidence revealed strictly in accordance with the adversarial procedures that apply in party-party litigation”.²¹ This less adversarial process will also impact the application of rules of evidence in family disputes, with many rules being selectively applied.²²

The implementation of Family Relationship Centres

[6] To change the face of family law, the Australian Government is investing significant funds over the next few years to provide services to families. Of particular importance is the establishment of a network of 65 community-based Family Relationship Centres (FRCs).²³ The introduction of FRCs was proposed by the Government as an alternative to creating an alternate decision making body or tribunal, which was originally recommended by the committee (ironically, there are already three court systems for managing child custody disputes: State

¹⁹ Lawrie Moloney and Jennifer McIntosh, ‘Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions’ (2004) 10 *Journal of Family Studies* 71, 74.

²⁰ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Division 12A, s69ZN.

²¹ *U and U* (2002) 191 ALR 289, 296.

²² Family Law Section of the Law Council of Australia, above n 10, 132.

²³ Bruce Smyth, ‘Family Relationship Centres in Australia: Reflections Based on Research and Practice’ (2005) 69 *Family Matters* 64.

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Magistrates, Federal Magistrates and the Family Court).²⁴ This main premise behind the introduction of FRCs is to steer parents away from litigation into a more family-friendly environment and early intervention programs.²⁵ A media release on the 4th April 2006 from Attorney-General Phillip Ruddock described FRCs in the following way:

The Centres, supported by a telephone Advice Line and website, will help families to strengthen their relationships and, where families separate, help parents put aside their own differences and reach agreement on issues concerning their children without going to the courts.²⁶

[7] FRCs may be viewed as the linchpin to the new FDR process, as they will attempt to assist separated parents to make a genuine effort in resolving their children's disputes before commencing litigation.²⁷ It is envisaged that FRCs will be recognised as single entry points into the process of mediation and other processes resolving family disputes.²⁸

Why Was There a Need for Family Law Reform?

[8] Australian family law has always been heavily shaped by the social, political and economic culture within which it exists. The introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) is marked by a major normative and ideological shift in the Australian Government's approach to post-separation parenting and family dispute

²⁴ Catherine Caruna, 'Shared Parenting and Family Law Reform: the Next Instalment' (2004) 69 *Family Matters* 62.

²⁵ Ibid 63.

²⁶ Attorney-General's Department, 'Family Relationship Centres and Services One Step Closer to Reality' (Media Release, 4 April 2006).

²⁷ Philip Ruddock, 'Official Launch – Sutherland Family Relationship Centre' (Speech delivered at the Sutherland Family Relationship Centre Official Launch, Caringbah, 19 July 2006).

²⁸ Smyth, above n 23, 64.

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resolution.²⁹ The Government felt pressure to appease the many vocal fathers' groups who have consistently lobbied for changes to the family law system.³⁰ Additionally, the changes were driven by the research suggesting that the healthy development of a child, post-separation, rests largely on the quality of the parent-child relationship and the extent of parental cooperation.³¹ And importantly, the Government is looking for methods of spending less money on court systems, and social welfare for separating parents. Additionally, many of these amendments have allegedly been based on the ideas tested in the Family Court's new Children's Cases Program, which has been used relatively effectively in New South Wales.³² This program was recently introduced in Queensland, with the aim of reducing the adversarial nature of family conflicts once they enter the legal system.

[9] A consistent criticism of family law for the past decade has been the inadequate funding, lack of administrative support and ultimately the gigantic workload experienced by the Family Court.³³ The litigation pathway can also be both financially and emotionally costly to the parties in dispute.³⁴ For this reason also, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) is designed to divert parents from the litigation path and bring about a culture change in how family disputes are handled.³⁵ Similarly, there have been many commentators arguing that the adversarial system is not an appropriate forum for making parental decisions in

²⁹ Helen Rhoades, 'The Rise and Rise of Shared Parenting Laws: A Critical Reflection' (2002) 19 *Canadian Journal of Family Law* 75.

³⁰ Becky Batagol, 'A Presumption of Joint Custody: Research vs Ideology in the Battle over our Children' (2003) 28(5) *Alternative Law Journal* 230.

³¹ Bruce Smyth, 'Parent-child Contact in Australia: Exploring Five Different Post-separation Patterns of Parenting' (2005) 19 *International Journal of Law, Policy and the Family* 1, 129.

³² Danny Sandor, 'A Fresh Approach to Children's Hearings' (2004) 5 *Law Society Journal* 54.

³³ Rodney Burr, '30 Years Old: The Family Court and CCH's Family Law Service' (2006) 28(2) *Law Society of South Australia Bulletin* 8.

³⁴ Tom Fisher and Julia Pullen, 'Children and the Shadow of the Law: A Resource for Primary Dispute Resolution Professionals' (2003) 9 *Journal of Family Studies* 81, 95.

³⁵ Attorney General's Department, 'Public Campaign to Promote New Family Law System' (Media release, 4 June 2006).

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the best interests of the child.³⁶ The use of compulsory FDR is intended to combat this problem and diffuse intra-parental conflict post-separation.³⁷ A steadfast criticism of family law has also been that it is confusing, intimidating and doesn't address the heightened emotions that accompany parenting disputes.³⁸ These amendments and the introduction of FRCs are intended to reduce confusion, act as a single entry point and provide a level of support for separated or separating parents.³⁹ Overall, it was a culmination of these factors that led the Australian Government to re-evaluate the *Family Law Act 1975* (Cth) and ultimately introduce the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Time will tell whether these changes are effective on various measures of "success". Ironically, all the same ideological and financial rhetoric behind the 2006 reforms were all present when the *Family Law Act* was enacted in 1975, and amended multiple times since.

What Are the Alleged Advantages of the New Family Law System?

Compulsory pre-filing FDR

[10] Before the introduction of the new family law system, Tom Altobelli asserted that '*too many cases are allowed to enter a litigated pathway without some form of dispute resolution intervention*'.⁴⁰ Altobelli's argument is supported by research which indicates that when parties enter into a mediation process they will reach either partial or full agreement in between 70-92%

³⁶ Tom Altobelli, 'Reflections on Primary Dispute Resolution' (2001) 13 *Bond Law Review* 391, 392.

³⁷ Juliet Behrens, 'Resolving Disputes and Making Decisions in the Family Law system: Ongoing Challenges' (2004) 16(3) *Legaldate* 8, 9.

³⁸ Rosemary Hunter, 'Through the Looking Glass: Clients Perceptions' and Experiences of Family Law Litigation' (2002) 16 *Australian Journal of Family Law* 1, 8.

³⁹ Anna Byas, 'Family Law: Old Shadows and New Directions' (Paper presented at the 8th *Australian Institute of Family Studies Conference*, 5 February 2003).

⁴⁰ Altobelli, 'Reflections on Primary Dispute Resolution' above n 36, 400.

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of cases.⁴¹ In *Every Picture Tells a Story* the Committee appeared to agree with Altobelli, asserting that FDR would be effective when used as an intervention to prevent family disputes proceeding to litigation⁴² (again it should be emphasised that when parties enter a litigation process, over 90% of custody disputes reach full agreement). Early intervention is also supported by the literature arguing that parents who attend mediation immediately post-separation are more likely to report increased parental cooperation than parents who attended FDR following their divorce decree.⁴³ This is based on the proposition that it is critical to reach a resolution before conflict surrounding the separation becomes entrenched.⁴⁴ In fact, Brown found that the likelihood of parents reaching a resolution reduces once the application is filed and the parties are given the opportunity to take up entrenched positions.⁴⁵ Therefore, by allowing a considerable time to pass post-separation, parents may find themselves in a situation where they will be unable to get on with their lives because unresolved issues remain outstanding.⁴⁶ Of course, all this research can be questioned as parents who cooperatively select mediation early already exhibit cooperativeness.

[11] By entering into FDR before filing an application, families may be able to avoid the tendency of litigation to escalate conflict in some families. It is well known that the litigation pathway can be a breeding ground for animosity, anger, frustration and ultimately distrust. This high level of conflict can largely be attributed to the win/lose character of the adversarial

⁴¹ Altobelli, 'Reflections on Primary Dispute Resolution' above n 36, 401.

⁴² House of Representatives Standing Committee on Family and Community Affairs, above n 2, [3.55].

⁴³ Jennifer McIntosh and Helena Deacon-Wood, 'Group Interventions for Separated Parents in Entrenched Conflict: An Exploration of Evidence-Based Frameworks' (2003) 9(2) *Journal of Family Studies* 187, 194.

⁴⁴ Smyth, above n 23, 64.

⁴⁵ *Diversity in Primary Dispute Resolution Services: What are the Choices for Clients?* (1998) in Webb and Moloney, above n 11, 28.

⁴⁶ Bill Westbrook, 'Arbitration in Family Law: A New Alternative' (2001) 15(2) *Australian Family Lawyer* 9, 12.

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system.⁴⁷ Presently, approximately 5% of separating couples will always require a judge, for a variety of complex though predictable reasons.⁴⁸ This view is further supported by Family Law Council, who found that the damage to parenting relationships is not due to the conflict per se but by the fact that parents are fighting without resolution.⁴⁹ This heightened level of conflict has also been known to cloud parents' perceptions when determining what is in the best interests of the child.⁵⁰ In reality, the more intense the parental conflict post-separation, the more likely the parenting arrangement will adversely impact the child.⁵¹ This is because parents in the adversarial system experience a relationship involving a high level of conflict and a low level of cooperation.⁵² Furthermore, research conducted by Ellis and Stuckless supported the theory that shared parenting is significantly higher for parents who participated in mediation.⁵³ In accordance with this theory, mediation may be a more appropriate method for resolving parenting disputes, as the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) requires a level of cooperation between parents to facilitate a shared parenting arrangement.

[12] By allegedly reducing the 10% of matters requiring litigation, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) will, in turn, hopefully decrease the pressure and resources required from the already over-extended Family Court.⁵⁴ Conversely, a

⁴⁷ Webb and Moloney, above n 11, 26.

⁴⁸ Family Law Council, above n 17, Part 3.

⁴⁹ Ibid 26.

⁵⁰ Australian Government, above n 3, 5.

⁵¹ Solangel Maldonado, 'Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent' (2005) 153 *University of Pennsylvania Law Review* 921, 979.

⁵² Patrick Parkinson, 'Child custody Arrangements on Family Separation' (2004) 66 *Family Matters* 64.

⁵³ 'Mediating and negotiating marital conflicts' in Fisher and Pullen, above n 34, 96.

⁵⁴ Tom Altobelli, 'Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?' (1997) 11 *Australian Journal of Family Law* 55, 64.

new group of clients may flood the FRCs, leaving the Family Court as busy as ever with the former group of complicated clients. The help of a mediator to reach a parenting arrangement may also give parents the opportunity to reflect on their parenting responsibilities and the long-term interests of the child.⁵⁵ Research suggests that when there is an emphasis on the needs and interests of the child then parents may cooperate more effectively and in turn be more likely to reach an agreement.⁵⁶ This is largely attributable to the nature of FDR. When conducted with high levels of skill it facilitates a cooperative environment, which in turn preserves amicable interpersonal parenting relationships.⁵⁷ Research also suggests that mediation has a higher level of parental satisfaction with both the process and the outcome, when compared to litigation.⁵⁸ Of course, this comparison is always fallacious as couples have self-selected diplomacy or war. Furthermore, some would argue that making parties attend compulsory FDR doesn't impact either success rates or parental satisfaction, compared to voluntary mediation.⁵⁹ This may be a result of the fact that litigation places an unnecessary burden and stress on separating or separated parents.⁶⁰ Similarly, FDR gives parents a level of control by allowing them to set their own timetable and agenda for determination of the dispute.⁶¹ This is supported by Bordow and Gibson, who found that decisions that were reached mutually between the parties were more likely to be highly rated by the parties.⁶²

⁵⁵ Smyth, above n 23, 67-68.

⁵⁶ Australian Government, above n 3, 5.

⁵⁷ Lucy McGough, 'Protecting Children in Divorce: Lessons from Caroline Norton' (2005) *57 Maine Law Review* 13, 36.

⁵⁸ Fisher and Pullen, above n 34, 96.

⁵⁹ Tom Altobelli, 'A Brave New World: Pre-Action Procedures in Family Law' (2004) *17(2) Australian Family Lawyer* 28, 35-36.

⁶⁰ Daryl Williams, 'Family Law: Past, Present and Future' (2001) *15(2) Australian Family Lawyer* 1, 4.

⁶¹ Westbrook, above n 46.

⁶² S. Bordow and J. Gibson, 'Evaluation of the family court mediation service (Research Report No. 12)' (1994) in Webb and Moloney, above n 11, 28.

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[13] Overall, any step taken by the Australian Government to improve the quality of interpersonal post-parenting relationships, which in turn improves the child's relationship with their parent, could prima facie be viewed positively.

The use of Family Relationship Centres

[14] The Australian Government envisages that most post-separation disputes will eventually be handled by FRCs.⁶³ The FRCs mainly aim to act as a visible single entry point into the system and provide a level of support to parents before the conflict is deeply entrenched.⁶⁴ Although this is the Government's main objective, FRCs will not restrict their assistance to parents who are beginning to surface in the family law system but also extend it to parents who are living with unresolved hostility and angst.⁶⁵ FRCs will be offering assistance to couples contemplating marriage, couples post-separation, divorced parents with fresh disputes and grandparents.⁶⁶ The services that will be available at FRCs are wide-ranging, including mediation, counselling, a telephone advice line, information sessions and website resources.⁶⁷ The wide assistance that will be offered by FRCs signals a shift from encouraging FDR towards a recognition that '*separation issues are not always in the form of a dispute*' and therefore emotional resolution is important to dispute resolution.⁶⁸ This ideal was adequately summed up by Attorney-General Phillip Ruddock when he said '*We want the centres to become an integral part of the Australian community – a*

⁶³ Smyth, above n 23, 64.

⁶⁴ Australian Government, above n 3, 2.

⁶⁵ Byas, above n 39, 5.

⁶⁶ Australian Government, above n 3, 2-10.

⁶⁷ Attorney General's Department, 'Family Relationship Centres and Services One Step Closer to Reality' (Media release, 4 April 2006).

⁶⁸ Byas, above n 39, 5.

*place people can go when they need help making their relationships stronger or focus on the children when they end’.*⁶⁹

[15] Many commentators argue that family breakdown is not a legal event but a human relationships issue.⁷⁰ This view is supported by the ample research reporting that at early stages of separation parents are often consumed by their own feelings and agendas.⁷¹ It is for this reason that the family law system has consistently been critiqued for managing family breakdown issues under the shadow of the law.⁷² It is proposed that FRCs will counter-act this by providing non-legal services, such as counselling and information sessions.⁷³ By introducing an environment that fosters co-operative parenting and promotes non-legal resolutions, FRCs may deal with family disputes and their associated emotions in an effective and timely manner.⁷⁴ In turn, FRCs will potentially foster a cooperative and amicable parenting relationship, which will reduce the likelihood of future disputes.⁷⁵ Furthermore, a cooperative parenting relationship may also reduce the risk of non-resident parents disengaging from their children due to heightened conflict and emotions.⁷⁶

[16] Overall, FRCs are the linchpin in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). This is especially true in reference to compulsory FDR because

⁶⁹ Attorney General’s Department, ‘Government Outlines Expectations for New Family Relationship Centres’ (Media release, 5 October 2005).

⁷⁰ Lixia Qu, ‘Children’s Living Arrangements after Parental Separation’ (2004) 67 *Family Matters* 4, 7.

⁷¹ Bruce Hawthorne, ‘Australian Men’s Experience of Nonresident Fathering’ (Paper presented at the Families Matter 9th *Australian Institute of Family Studies Conference*, 5 February 2005).

⁷² Fisher and Pullen, above n 34, 81.

⁷³ Attorney General’s Department, Department of Family and Community Services, ‘Operational Framework – Family Relationship Centres’, (2005), 2-3.

⁷⁴ House of Representatives Standing Committee on Family and Community Affairs, above n 2, [3.3].

⁷⁵ Byas, above n 39, 5.

⁷⁶ Hawthorne, above n 71, 5.

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FRCs will be providing mediation services free of charge to the public (maximum of 3 hours).⁷⁷

For this reason FRCs may be the front door to the Family Law System and ultimately be the key role in helping separated or separating parents reach a resolution.⁷⁸

What Problems Can we Expect With the New Family Mediation Process?

[17] The Australian Government's new family dispute resolution process under *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) is commendable but it may fail to produce the unreasonably high results that are expected and propagated. The following section will identify some difficulties that the Government might encounter with the implementation of compulsory pre-filing FDR and the use of FRCs generally.

Compulsory pre-filing FDR

[18] Firstly, the proposal to establish compulsory pre-filing FDR has been described by Attorney-General Phillip Ruddock as '*designed to bring about a generational change in how family conflicts are managed after separation*'.⁷⁹ However, one must ask the question: is forcing parents to enter mediation before filing a parenting application, too premature? It is well documented that parents often struggle with the depth of their feelings and emotions post-separation.⁸⁰ This heightened emotion can be traced back to the theory that parents are grieving for the loss of an in-tact family and the dream that they would get to 'grow old' with their partner.⁸¹ The effect of this ongoing anger and bitterness greatly impacts the level of parental

⁷⁷ Family Law Section of the Law Council of Australia, above n 10, 14.

⁷⁸ Ruddock, above n 27.

⁷⁹ Attorney-General's Department, 'Family Law: A New System, A New culture' (Media release, 12 May 2005).

⁸⁰ Hawthorne, above n 71, 5.

⁸¹ Qu, above n 70, 6.

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cooperation and ultimately their ability to reach resolution.⁸² Former Attorney-General Michael Lavarch appropriately summed-up the post-separation environment by stating that ‘*There are only two rules in Family Law. Rule No. 1 is that everybody is upset by family breakdown. Rule No. 2 is that nothing any Court, lawyer, politician or counsellor can do will alter Rule No. 1*’.⁸³ Based on this argument, compulsory pre-filing mediation may directly contradict the heightened emotion experienced in parental disputes following separation. Emery argued that post-separation cooperation often flies in the face of emotional common sense, as ‘*raw emotions want to scream out: ‘I’ll see you in court’. Why? Because...an invitation to mediation or conciliation goes against the grain of grief*’.⁸⁴ On the other hand, the Australian Government has made it clear that their position on this issue is that mediation needs to be used before filing an application because at that stage emotions may not be deeply entrenched.⁸⁵ This fails to recognise the research suggesting that immediately following separation there is little disagreement about parenting arrangements, with parents merely wanting to formalise and confirm where they stand.⁸⁶ Some research also indicates that relationships between many divorced parents improve in approximately 12 - 18 months post-divorce.⁸⁷ Therefore, compulsory pre-filing FDR may be premature, as parents are experiencing heightened emotions and they are trying to ‘come to terms’ with the loss of their family.

⁸² Annemaree Lanteri, ‘Enforcement of Parenting Orders: The New Regime’ (2001) 15(1) *Australian Family Lawyer* 11.

⁸³ Burr, above n 33, 9.

⁸⁴ Lawrie Moloney, ‘Children in Family Law: Moving Beyond the “Best Interests” Rhetoric’ (2004) 10 *Journal of Family Studies* 160, 164.

⁸⁵ House of Representatives Standing Committee on Family and Community Affairs, above n 2, [3.55].

⁸⁶ Byas, above n 39, 3.

⁸⁷ Kirstie Kurki-Suonio, ‘Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective’ (2000) 14 *International Journal of Law and Policy and the Family* 183, 198.

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[19] Due to the heightened emotions in family law disputes, many parents are adamant about ‘having their day in court’ (whatever this popular phrase means; few want it after having received it) and airing their grievances.⁸⁸ Obviously, introducing compulsory pre-filing FDR is unlikely to convince these parents that they no longer need to fulfil their emotional need for ‘justice’. This is supported by the ample research indicating that FDR is most successful when the parties are committed to the mediation process and their emotions have had a chance to settle.⁸⁹ In turn, forcing parents to unwillingly participate in FDR may produce unsuccessful or unsatisfactory results.⁹⁰ Therefore, the Australian Government might find that access to education and information on parental rights may be a more effective alternative to compulsory FDR.⁹¹

[20] Secondly, the Family Law Courts and mediators might uncover a difficulty in identifying when a parent has made a genuine effort to resolve the dispute, as is required under section 60I(1) of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). The interpretation of the word ‘genuine effort’ has not yet been established but we can assume that it will be defined according to existing jurisprudence.⁹² Some have suggested that the Family Court will adopt the definition used in Section 134 of the *Migration Act* or, alternatively, it could be equated with the ‘good faith’ principle.⁹³ As held in *Western Australia v Taylor*, the elements of good faith can include causing unreasonable delay, failure to make proposals, failure to take

⁸⁸ Byas, above n 39, 3.

⁸⁹ David Greatbatch and Robert Dingwall, ‘The Marginalization of Domestic Violence in Divorce Mediation’ (1999) 13 *International Journal of Law, Policy and the Family* 174.

⁹⁰ John Wade, ‘Four Evaluation Studies of Family Mediation Services in Australia’ (1997) 11 *Australian Journal of Family Law* 343, 345.

⁹¹ Family Law Pathways Advisory Group, Federal Parliament, ‘Out of the Maze: Pathways to the Future for Families Experiencing Separation’ (2001), 51.

⁹² Altobelli, ‘A Brave New World: Pre-Action Procedures in Family Law’ above n 59, 34.

⁹³ Family Law Section of the Law Council of Australia, above n 10, 39.

reasonable steps, failure to make counter-proposals, a refusal to agree on trivial matters and a failure to do what a reasonable person would do.⁹⁴ The approach taken by the family law system to the ‘genuine effort’ requirement will greatly impact the way that parents are forced to participate in the compulsory FDR process.⁹⁵

[21] Thirdly, the ability of compulsory FDR to effectively deal with issues of domestic violence and family abuse is also questionable.⁹⁶ Many argue that in family mediation processes there will often be a power imbalance, with women meeting on unequal terms.⁹⁷ Research clearly suggests that ‘*the only communication and cooperation that exists between a batterer and a victim are the batterer’s communication of his or her needs and the victim’s cooperation in fulfilling those needs*’.⁹⁸ As a result, victims of domestic violence will often stand idly by as their spouses take control over the children or they will agree to unsafe parenting arrangements.⁹⁹ It is the lack of effective communication and cooperation characteristics exhibited in domestic violence relationships that fatally undermine the underlying requirements for effective FDR. It is acknowledged that the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) expressly excludes cases of domestic violence from compulsory FDR.¹⁰⁰ However, this Act cannot ensure that cases of this nature will not drift into compulsory and free family mediation. Research supports the view that many victims of domestic violence minimise the severity of the

⁹⁴ *Western Australia v Taylor* (1996) 134 FLR 211, 224-225.

⁹⁵ Altobelli, ‘A Brave New World: Pre-Action Procedures in Family Law’ above n 59, 34-35.

⁹⁶ Colleen Brown, ‘A New Breed of Mediation: The Labradoodle’ (2004) 31(10) *Brief* 6, 7.

⁹⁷ Rachael Field, ‘Family Law Mediation: Process Imbalances Women Should be Aware of Before they Take Part’ (1998) 14 *Queensland University of Technology Law Journal* 23.

⁹⁸ Lee Khachaturian, ‘Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows’ (1999) 44 *The Wayne Law Review* 1745, 1768.

⁹⁹ Helen Rhoades, Reg Graycar and Margaret Harrison, ‘The First Three Years of the Family Law Reform Act 1995’ (2001) 58 *Family Matters* 80, 83.

¹⁰⁰ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s60I(9).

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violence against them, especially when they are in a professional setting.¹⁰¹ Therefore, victims may be too intimidated or reluctant to assert their rights and make the violence known to the Court, which would ultimately result in unsuitable cases proceeding to compulsory FDR.¹⁰²

[22] Fourthly, there is no doubt that every decision made by parents in mediation will greatly impact upon the future life experiences of the children concerned.¹⁰³ In Moloney's view, '*children are active participants in the process of family breakdown and to disregard their voice when resolving disputes between parents...is to 'commodify' them*'.¹⁰⁴ In the last decade, the Australian family law system has begun to recognise that children's voices should be heard in post-separation parenting decision making processes. As such, children's wishes have been expressed through separate representation, giving oral evidence and engaging the services of a family report.¹⁰⁵ However, children are rarely involved in FDR processes, which may bring the new family dispute resolution system under attack.¹⁰⁶ Even though the Government has emphasised the importance of a child-focused system, compulsory pre-filing FDR may not facilitate this approach. This is attributable to the premature nature of pre-filing FDR and the parties' disclosure rights that are yet to be fulfilled. It is critical, in the FDR process, for parents to have access to independent information relating to the best interests of the child, including family, school and doctors reports.¹⁰⁷ Research supports this proposition, with 93% of

¹⁰¹ Greatbatch and Dingwall, above n 89, 176.

¹⁰² Altobelli, 'Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?' above n 54, 63.

¹⁰³ Amanda Hart, 'The Silent Minority: The Voice of the Child in Family Law' (2003) 28 *Children Australia* 31, 32.

¹⁰⁴ Catherine Caruna, 'The Joint Custody Debate: Where to Now?' (2003) 66 *Family Matters* 64, 65-66.

¹⁰⁵ Catherine Barnett and Claire Wilson, 'Children's 'Wishes' in the Australian Family Court: Are they Wishful Thinking?' (2004) 11(1) *Psychiatry, Psychology and Law* 73, 75.

¹⁰⁶ Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13(3) *Austrian Journal of Family Law* 197.

¹⁰⁷ Barnett and Wilson, above n 105, 76.

conferences utilising a family report reaching an agreement.¹⁰⁸ In light of this research, it is suggested that pre-filing FDR does not facilitate the right of a child to be heard in parenting disputes.

[23] The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) will also be a challenging time for lawyers in the profession. Attorney-General Phillip Ruddock has made it quite clear that the Australian Government is making amendments to the family law system to change the culture of family breakdown.¹⁰⁹ In making this change, the practice of family law and the role of practitioners will change accordingly. This change is largely attributed to the continual criticism that has been levelled at lawyers for their involvement in family disputes. For example, one commentator stated that:

It is a constant lament that the solicitors and barristers that inhabit the courts where family law is administered are lacking warmth and compassion, and have attitudes that foment rather than alleviate tensions that exist between human beings who are suffering the trauma of the breakdown of their love.¹¹⁰

Of course, this research is filled with praise for the skilled diplomacy of family lawyers. Family lawyers are attempting to be 90% diplomats and 10% vigorous advocates in an environment of high conflict.

[24] By restricting the involvement of lawyers in family law, the Australian Government is failing to recognise the positive impact that lawyers have in resolving family disputes. On a

¹⁰⁸ Brown, above n 96, 7.

¹⁰⁹ Attorney-General's Department, 'New Family Relationship Centres Unveiled' (Media release, 31 July 2005).

¹¹⁰ Neville Turner, 'Recent Developments in Family Law: A Revolutionary Theory, but has it Changed in Practice?' (2001) 13(4) *Legaldade* 1.

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regular basis, lawyers promote the non-adversarial settlement of disputes.¹¹¹ A survey of Queensland Family Lawyers revealed that the majority of lawyers consider litigation as a last resort, with 82% saying that FDR is worth trialling before proceeding to litigation.¹¹² This is further supported with lawyers being the key to assisting parents in resolving matters outside the court process in approximately 98% of cases.¹¹³ Whether the Australian Government actually intends to 'rid' lawyers of family disputes is a matter of contention. However, we can confidently assume that the main purpose of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which is to promote FDR, will not be achieved without the assistance of family law practitioners, or some renamed replica thereof.

The use of Family Relationship Centres

[25] The very nature of family law disputes separates them from any other type of dispute. For that reason, it is likely that FRCs will be challenged according to their ability to effectively employ cooperative parenting practices and facilitate an environment of dispute resolution.¹¹⁴ Working with high levels of conflict also requires the mediators to undergo significant levels of clinical and dispute resolution training.¹¹⁵ Mediators may also find that the best interests of the child will take a subordinate role to the dog fight that eventuates between parents post-separation.¹¹⁶ For this reason, FRCs should take the initiative of focusing on the interests and

¹¹¹ Australian Government, above n 3, 3.

¹¹² Charles Cooper, 'The Cost of Love 4: The New Family Law Parenting System' (Paper presented at the 4th *Primrose Couper Cronin Rudkin Lawyers Conference*, July 2006), 183.

¹¹³ Michael Foster, 'Looking over the Horizon: the Future for Family Law' (2005) 18(1) *Australian Family Lawyer* 1, 3.

¹¹⁴ Grania Sheehan and Belinda Fehlberg, 'Families, Divorce and Family Law' (2000) 55 *Family Matters* 4, 6.

¹¹⁵ Moloney, above n 84, 168.

¹¹⁶ House of Representatives Standing Committee on Family and Community Affairs, above n 2, [4.37].

voice of the child.¹¹⁷ FRC mediators should also recognise the inextricable link between the best interests of the child and post-separation parenting relationships.¹¹⁸ There is no doubt that FRCs will also need to implement an in-depth screening process, designed to assist staff in determining the suitability of mediation in cases of family violence.¹¹⁹ This screening process will also need to consider how allegations of abuse are investigated and what support systems will be introduced for de-briefing. Therefore, the staff and mediators employed by FRCs need to be formally trained in the relationship traits of domestic violence and its impact on the dispute resolution process.¹²⁰

[26] The new shared parenting legislation might also lead FRCs to encourage parents into a parenting plan that supports this presumption. This endeavour will be dangerous if the FRC mediators place professional standing on whether they are able to lead parents to an equal shared parenting arrangement.¹²¹ By doing so, we may actually see parents return to a fault system, where they will highlight the faults of their ex-partner in an effort to reach a more favourable parenting arrangement.¹²² Furthermore, mediators need to acknowledge that shared parenting arrangements will not be effective in cases where parents are unable to put aside their conflict and anger towards their ex-partner. Obviously, to encourage a shared parenting arrangement would appear asinine and prompt an increase in litigation.

¹¹⁷ Chisholm, above n 4, 37.

¹¹⁸ Smyth, above n 23, 65.

¹¹⁹ Brown, above n 96, 7.

¹²⁰ Smyth, above n 23, 68.

¹²¹ Field, above n 97, 33.

¹²² Catherine Caruna, 'Legislating for Shared Parenting: The "Joint Custody" Inquiry Makes Recommendations for Change' (2004) 67 *Families Matters* 16, 17.

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[27] It should also be noted that FRCs should involve family lawyers in the mediation process, the benefits of which have already been addressed. Attorney-General Phillip Ruddock has made it clear that it is not intended that lawyers take part in the FDR process at FRCs.¹²³ Although FRCs will provide assistance from Parental Advisors, they cannot offer the level of skill that is associated with a family law practitioner. Family lawyers are experienced in the field and sensitive to the fallback possibilities for their clients when one partner insists upon taking an unreasonable position.¹²⁴ If the parenting plans are poorly defined, especially in relation to the day-to-day care of the child, then parents may be forced to return to lawyers for further negotiation and clarification, or to seek determinations from the court, which is obviously in direct contradiction to the general ethos of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)*.¹²⁵

[28] The true test of FRCs will be in their implementation and the community's reaction to such an endeavour. There is no doubt that FRCs will require ongoing support, particularly financial, from the Australian Government.¹²⁶ The Australian Government might be extremely tempted to treat FRCs as part of the 'welfare' sector and as such only grant them sufficient funds to maintain basic practices. To do this would not give FRCs an opportunity to reach levels of competency, which in turn would be an injustice to the community. If there is currently an epidemic of separating families with unsatisfied needs, then the FRCs would expect to be flooded with business and complaints. The funding pressures likely to be experienced by FRCs may result in the need to keep 'settlement' statistics high and in turn 'difficult' cases will be

¹²³ Attorney-General's Department, 'New Family Relationship Centres Unveiled' (Media release, 31 July 2005).

¹²⁴ Laurence Boulle, *Mediation: Principles, Process, Practice* (2005), 333.

¹²⁵ Ryrstedt, above n 8, 17.

¹²⁶ Moloney, above n 84, 167.

rejected. Furthermore, the Australian Government may find that FRCs are unable to meet the unreasonably high expectations that have been placed upon them.

Conclusion

[29] There is no doubt that the amendments to the family law system, introduced through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), are a bold response to the report by the House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story* and the Federal Government's discussion paper *A New Approach to the Family Law System: Implementation of Reforms*. The Australian family law system has found itself on yet another ambitious reform path, with parents being directed down the pathway of dispute resolution rather than an avenue of litigation. The Australian family law system may find itself in uncharted territory or continuing to facing repetitive and familiar issues.

[30] The introduction of compulsory pre-filing FDR may improve the quality of interpersonal post-parenting relationships, because intervention occurs before parents are given the opportunity to take up entrenched positions. The use of compulsory pre-filing FDR and FRCs may also decrease the pressure and resources required from the already over-extended Family Court. FRCs may also effectively facilitate a cooperative parenting environment and promote non-legal resolutions through mediation. On the other hand, compulsory pre-filing FDR may be premature, as parents are experiencing heightened emotions while trying to 'come to terms' with the loss of their family. We may also see an increase in litigation due to the lack of legal presence in mediations and the ideological push for shared parenting arrangements. Such a result

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would directly contradict the general ethos of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). If there are efficient transparent measures of “success” in place, and if there are sufficient funds to take such measures, it may become clear whether these amendments have made the current situation for separating couples “better” or “worse”. History suggests that there will be no such transparency, and a cycle of high expenditure, complaints and anecdote will lead to more major family dispute resolution reforms in the next decade.