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Reflections on Primary Dispute Resolution

Abstract
Over five years have passed since the enactment on 11 June 1996 of Part III of the Family Law Act, 1975 (Cth) dealing with Primary Dispute Resolution ('PDR'). It is timely to reflect, in broad terms, on some of the implications of PDR on Australian family law, and on dispute resolution generally. Some interesting, but also disturbing, trends become apparent. Some possible indicators of future trends in dispute resolution are evident. This broad but selective collection of reflections includes a consideration of the dispute resolution aspects of the July 2001 Report of the Family Law Pathways Advisory Group ('the Pathways Report').

Keywords
primary dispute resolution, family law, July 2001 Report of the Family Law Pathways Advisory Group

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REFLECTIONS ON PRIMARY DISPUTE RESOLUTION

*by Tom Altobelli**

Introduction and Overview

Over five years have passed since the enactment on 11 June 1996 of Part III of the Family Law Act, 1975 (Cth) ('the Act') dealing with Primary Dispute Resolution ('PDR'). It is timely to reflect, in broad terms, on some of the implications of PDR on Australian family law, and on dispute resolution generally. Some interesting, but also disturbing, trends become apparent. Some possible indicators of future trends in dispute resolution are evident. This broad but selective collection of reflections includes a consideration of the dispute resolution aspects of the July 2001 Report of the Family Law Pathways Advisory Group ('the Pathways Report')[1]

Primary Dispute Resolution

Part III of the Act deals with PDR and came into effect in June 1996 though there were already provisions in the Act dealing with mediation, counselling, conciliation and arbitration. The PDR provisions contained within the Act, together with the supporting provisions in the Family Law Rules and Family Law Regulations, constitute one of the most comprehensive legislated alternative dispute resolution schemes in the world today. The key provision in Part III is section 14 which states the objects of the legislation:

> *14 Object of Part*
>
> The object of this Part is:
>
> (a) to encourage people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed;

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1 '*Out of the maze: Pathways to the Future for Families Experiencing Separation*' Report of the Family Law Pathways Advisory Group, Commonwealth of Australia 2001).

> A key description in this legislative scheme is the term 'primary dispute resolution methods'. The term is defined in Act/5.14E of the Act.
>
> *14E Interpretation*
>
> In this Division:
>
> ***primary dispute resolution methods*** means procedures and services for the resolution of disputes out of court, including:
>
> (a) counselling services provided by family and child counsellors; and
> (b) mediation services provided by family and child mediators; and
> (c) arbitration services provided by approved arbitrators.

There are other provisions which impose duties on judges and legal practitioners to consider giving advice about PDR[2] and to give information about PDR.

The historical origins of PDR in Australian family law arose out of concerns expressed about the inappropriateness of the adversarial system in the context of disputes arising out of relationship breakdown,[3] particularly where children are or were involved.[4]

Viewed historically, the development and centrality of PDR in Australian family law was quite consistent with a much broader trend across Australia and the western world - that of private ordering. There seems to have been comparatively little debate at the time of enacting Part III of the Act, about the merits and demerits of private ordering in the context of family law. The benefits of PDR were considered as axiomatic, and the seemingly lone voices who quietly but persistently expressed concern about unquestioning acceptance of PDR in family law were regarded with quasi-pariah status. The debate about the merits and demerits of alternative dispute resolution in the context of family law is by no means over. It is a necessary and important dialogue which should constantly remind the zealots of PDR that they must continually reflect on and refine their policies and practices. Just as listening is an essential micro-skill in most PDR processes, listening to the voices of those who express concern about PDR is equally essential.[5]

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2 For example s14F, s14G.

3 See, eg *Joint Select Committee in Certain Aspects of the Operation and Interpretation of the Family Law Act*, 1991-1992, Commonwealth of Australia; H Finlay 'Towards Non-Adversary Procedures in Family Law' (1983) 10 *Sydney Law Review* 61; and the Preface to Finlay & Bailey-Harris '*Family Law in Australia*' (4th ed).

4 See eg, Lamb, Stremberg & Thompson 'The Effects of Divorce & Custody Arrangements on Children's Behaviour, Development & Adjustment' (1997) 35(4) *Family & Conciliation Courts Review* 394.

5 For a more detailed consideration of the debate about the merits and demerits of PDR see the following: Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950; Mnookin 'Divorce Bargaining: The Limits on

As noted above, Part III of the Act contains a non-exclusive definition of 'primary dispute resolution methods' in s14E which specifically includes counselling, mediation and arbitration, but would seem impliedly to embrace conciliation under Order 24 of the Family Law Rules, and both assisted and unassisted negotiation. In practice, if not in theory, PDR has come to mean any non-adjudicative process used to resolve disputes arising under the Act, whether the process be formal or informal, assisted by a third party or unassisted, or consensual or mandated.

There are two unusual aspects of the PDR provisions which have not, fortunately, adversely impacted on its implementation and impact. First, despite the comprehensiveness of the legislative scheme of PDR, definitions of key processes are not handled systematically, and thus definitions or descriptions of key PDR processes are left to implication, or scattered throughout the Act, the Rules and Regulations.[6] Secondly, the PDR provisions communicate mixed messages about compulsion and consensuality. In this context, consensuality means that parties are not obliged or forced to settle their differences - consensus is voluntary. All non-adjudicative PDR processes are consensual in this regard. Strangely, however, some PDR processes are compulsory, in the sense that parties must attend and participate in the process, but others are not. Thus, in certain circumstances, attendance at counselling and conciliation is compulsory,[7] but attendance at mediation is not.[8] Whilst these two unusual aspects of PDR have not, it is argued, adversely impacted on the implementation of these provisions, one cannot help but wonder whether the legitimacy of the scheme could have been enhanced by some more attention to detail.

Whilst s14 of the Act 'encourages' people to use PDR, this is clearly subject to this being appropriate in the circumstances, and proper procedures being followed. Thus PDR might not be appropriate having regard to the specific circumstances of a case, or

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Private Ordering' (1985) 18 *Journal of Law Reform* 1015; D Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1074; Terrell 'Rights & Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution' (1987) 36 *Emory Law Journal* 541; Bridge, 'Family Mediation and the Legal Process: An Unresolved Dilemma' (1997) 17 *New Zealand Universities Law Review* 23; Street, 'The Mediation Evolution - Its Moral Validity and Social Origin' (1998) 9 *Australian Dispute Resolution Journal* 237; Alexander, 'Family Mediation under the Microscope' (1999) 10 *Australian Dispute Resolution Journal* 18; Alexander 'Family Mediation: Friend or Foe for Women?' (1997) 8 *Australian Dispute Resolution Journal* 255; Gee, 'Family Mediation: A Matter of Informed Personal Choice', 9 *Australian Dispute Resolution Journal* 179.

6 See, eg Regulation 63(1)(a) and Order 25 rule 10(1), both of which describe aspects of the mediation procedure, without defining what mediation is.

7 For counselling, see s62F, and for conciliation see s79(9) Act and Order 24 rules (1)-(3).

8 For a further discussion of these issues see: B Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation' (1996-97) 15 *Australian Bar Review* 213; T Altobelli 'Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?' (1997) 11 *Australian Journal of Family Law* 55.

of individual parties. Moreover, appropriate procedures may be needed to protect the rights and interests of litigants and children. This is, of course, the fundamental and preliminary issue of the suitability of cases for PDR. Concerns about suitability of cases for PDR are legitimate, but the concerns must be applied consistently and contextually. Regulation 62, for example, deals with the issue of assessment of suitability of cases for mediation. In particular sub-regulation 62(2) states:

> **62(2)** In determining whether mediation is appropriate, the mediator must consider whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:
> (a) a history of family violence (if any) within the meaning of subsection 60D(1) of the Act, among the parties;
> (b) the likely safety of the parties;
> (c) the equality of bargaining power among the parties (for example, whether a party is economically or linguistically disadvantaged in comparison with another party);
> (d) the risk that a child may suffer abuse;
> (e) the emotional, psychological and physical health of the parties;
> (f) any other matter that the mediator considers relevant to the proposed mediation.

An equivalent, but not identical provision, is found in Order 25A r5 of the Family Law Rules.[9] Both of these provisions relate to suitability of cases for mediation, but in two slightly different contexts: the Regulations govern private and community mediation, and the Rules govern in-Court mediation.

The writer does not question either the importance or appropriateness of these provisions. The writer is, however, both curious and critical as to why these assessment-type provisions only apply to mediation, but not to other PDR processes such as conciliation and counseling. Nowhere in the Act, its Rules or Regulations, are provisions which explicitly regulate the suitability of cases for counselling and conciliation, despite the fact that both are compulsory processes. And yet all the PDR processes are consensual in nature. Why the 'paternalism' towards mediation? Perhaps the explanation is that conciliation and counselling are 'trusted' processes which have been in existence since the Act came into force in 1976, whereas mediation

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9 Family Law Rules is O 25A r 5:

> **5** In deciding whether the dispute is one that may be mediated, the person authorised to conduct the interview must take into account:
> (a) the degree of equality (or otherwise) in bargaining power of the parties; and
> (b) the risk of child abuse (if any); and
> (c) the risk of family violence (if any); and
> (d) the emotional and psychological state of the parties; and
> (e) whether one of the parties may be using the mediation option to gain delay or some other advantage; and
> (f) any other matter relevant to the proposed mediation.

is the 'new kid on the block'. If this is the explanation, it is having regard to the similarities between all three PDR processes quite unsatisfactory, particularly as regards the risks to participants arising out of power issues.[10]

It should be noted that the writer is not suggesting that informal assessment procedures do not exist, or are not applied to both conciliation and counselling. It is just that those assessment procedures are informal and based on court policies rather than clearly stated statutory rules. This leads to inconsistencies and different practices. Thus, for example, family violence might preclude a case from going to mediation, but it would not of itself preclude a case from either conciliation or counselling. And yet all three processes are consensual and share more common features than differences. Moreover, the writer's experience[11] indicates that cases go to counselling and conciliation that are entirely unsuitable for example, because of serious inequality in bargaining power between the parties, family violence, emotional fragility and the like. For women victims of violence in particular, there is the risk that they are compelled to participate in processes such as conciliation with little sensitivity to their special needs arising out of their experiences. For men, there is the perception of bias and unfairness arising out of participating in processes they perceive to be permeated with gender stereotypes.[12] Clearly articulated exclusionary provisions may well help to minimise the occurrence of PDR processes being applied inappropriately, and greater consistency between PDR processes will enhance the credibility of PDR generally.

The paternalism towards mediation is also evident in the different treatment of the qualifications of PDR providers. The Family Law Regulations, for example, specify minimum training and educational requirements for private and community mediators[13] but nothing is said about court mediators.[14] Nothing is said about qualifications and training of counsellors and conciliators, be they court, community or private.[15] Again, the question may be asked, why does the legislation adopt such a paternalistic attitude towards mediation and, in any event, is this paternalism still needed?

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10 See Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Mediation Quarterly* 85.

11 The writer has been in practice for over 20 years, mainly in family law, and continues to be involved in family law practice, despite his academic commitments and interests.

12 Some of the writer's observations in practice are well-supported by the Pathways Report op cit n 1 at pp 18 and 19 (amongst other places in the report).

13 See s19P of the Act and Part 5 of the Regulations.

14 These different standards are acknowledged in the National Alternative Dispute Resolution Advisory Council report *'Primary Dispute Resolution in Family Law: A Report to the Attorney General on Part 5 of the Family Law Regulations'* Commonwealth of Australia, 1997.

15 Private ie out-of-court conciliation now seems probable as a result of both the Family Court and the Federal Magistrates Court (the other Australian court having a very broad family law jurisdiction) contracting out aspects of their PDR requirements.

Terminological Turmoil

In the previous section the writer referred to the lack of systematic treatment of definitions and/or descriptions of the various PDR processes. In 2000, the Family Court implemented internal terminological changes for PDR processes. These changes are discussed by Brown and Barker[16]:

> From January 1, 2000, the Chief Justice of the Family Court re-positioned its counselling conciliation and mediation services. All of the Court's dispute resolution services are now referred to as 'mediation'. There are a number of reasons for this change. PDR services in Australia have developed in parallel with the development of similar services in the United States. Whereas the terms conciliation and counselling have long since disappeared from the literature in reference to dispute resolution services in the United States and elsewhere these terms have remained enshrined in Australian Family Law with mediation grafted on as a separate dispute resolution service in 1991. What has developed both here and overseas is a range of mediation models which vary in terms of being facilitative or evaluative and in terms of the extent to which they are transformative, that is change behaviour. The difference is that the Australian legislation uses different, and often confusing, terminology for similar dispute resolution processes, which essentially all fit within the definition of mediation. Indeed the National Alternative Dispute Resolution Advisory Council (NADRAC) make use of the generic term 'mediation' in their publication to assist parties to resolve their own disputes. To avoid confusion and to avoid drawing distinctions, which are meaningless to its clients, the Court has renamed all of its primary dispute resolution services 'mediation' and adopted the United States draft Model Standards of Practice for Divorce and Family Mediators:
>
> > 'Divorce and family mediation is a process in which an impartial third party - a mediator - facilitates resolution of a dispute between family members by promoting their voluntary agreement. The mediator facilitates communications, promotes understanding, focuses the family members on their interests, and seeks creative solutions to problems that enable the family members to reach their own agreements'

Brown and Barker go on to explain the impacts of these changes. What was once regarded as mediation is now called mediation for external purposes, but for internal purposes it will be called *facilitative mediation*. Counselling will now be called mediation for external purposes and *educative/directive mediation* for internal purposes. The Registrar's Conference (presumably conciliation) becomes mediation for external purposes, and *evaluative mediation* for internal purposes. This is said to provide greater choices for clients.

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16 Brown and Barker, '*Developments in Mediation in the Family Court of Australia - Responding to Client's Needs*' in '*Key Issues for Practitioners*', The College of Law, Sydney, publication.

Whilst the title to their paper suggests that these changes were designed, somehow, to respond to clients' needs, the writer is aware of no published research which conclusively sets out the case in favour of change. The writer does not know, therefore, what 'need' is being responded to. Moreover, the extract above suggests that at least one precipitator of change was parallel developments in the United States of America, as if this had some legitimacy in the domestic Australian context. To suggest that the terminological changes will, somehow, 'avoid confusion and…avoid drawing distinctions, which are meaningless to…clients', is the epitome of optimism. These changes may, at least in the short term, create the very confusion sought to be avoided, but never conclusively established in the first place. Clarity and consistency in the terminology has not been enhanced, it has been undermined. None of these terminological changes have been supported by legislative amendments. It may well be that the real reasons for these changes are based on either politics, or economic pragmatism related to funding. In any event, the terminological turmoil which may well result, is one of the most disconcerting developments in PDR in the last five years.

The Self-Represented Litigant and PDR

One of the most significant developments in family law and dispute resolution practice and procedure over the last five years has been the almost dramatic increase in the incidence of the self-represented litigant. The reasons for this have been discussed elsewhere[17] and discussion in the present context will focus on possible implications for PDR.

It must be acknowledged that representation by a legal practitioner is not a prerequisite in many PDR processes such as counselling, mediation and even conciliation. Historically, and as a general proposition, lawyers have played a much more active direct role in conciliation than they have in either mediation or counselling, at least as these processes are practiced within the Family Court. Moreover, historically there have always been self-represented litigants, though it is asserted that over the last five years there has been a steady increase.[18] There is every indication that self-represented litigants will use PDR services more and more in the future, with little or no assistance from a skilled helper, be that person legally

17 Dewar, Smith and Banks, '*Litigants in Person in the Family Court of Australia*' Family Court of Australia research papers, Canberra, 2000; '*Guidelines for Barristers on Dealing with Self-Represented Litigants*', NSW Bar Association July 2001.

18 See: Dewar, Smith & Banks ibid, 16; Australian Law Reform Commission *'Review of the Federal Civil Justice System'* and its preceding Discussion paper No 62 and also Issues Paper 22 and Background Paper 4 (all AGPS); Hunter, *'Family Law Case Profiles'* Justice Research Centre, 1999; and Family Law Council, '*Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council'*; August 2000, Ausinfo.

qualified or not. This will place more pressure on PDR providers, those pressures arising because there is no one to fill the vacuum created by legal representation.

The 'vacuum', in this regard, is the absence of those particular skills brought to PDR by a legal representative. Lawyers bring certain expertise to PDR. They play a role in diagnosing disputes and their causes, and then matching both the dispute and the disputant, to the most appropriate dispute resolution method. Lawyers can play a role in balancing any inequality in bargaining power which may exist. They advise clients about their legal rights and their alternatives before, during and after PDR. Lawyers can assist clients with developing options for settlement, and reality-testing them. They then have an important role in documenting settlements. Only some of these roles can be taken on by the PDR provider, and very few would even consider taking on advisory roles and documentation responsibilities. The growth in the incidence of the self-represented litigant will present a challenge to PDR providers to fill this vacuum of skills and roles. Innovative responses may well include the creation of service alliances with lawyers willing to provide some of these services on a discrete service or unbundled basis.[19]

A challenge to PDR providers is to acknowledge that one philosophical underpinning of alternative dispute resolution, ie empowering participants to resolve their own disputes, leads logically to accepting the right of the party not to be represented, no matter how inconvenient that may be to the PDR service provider. Case law has acknowledged, for example, the right of self-represented litigants to appear for themselves, irrespective of whether they can afford representation and irrespective of their motives.[20]

PDR service providers who will face the ever-increasing future challenge of dealing with self-represented litigants will do well to study those provisions of the Pathways report discussing the self-help pathway[21] and the supported pathway.[22]

Maintaining Neutrality in a Gender War

In the last decade there has been increasing attention paid to the issue of men's adjustment to separation and divorce, and the link between men's adjustment and that of their children.[23]

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19 See, for example Wade, 'New and Recycled Services by Family Lawyers - Responding to a World of Change' (1997) 11 *Australian Journal of Family Law* 68; Wade, 'Forever Bargaining in the Shadow of the Law: Who Sells Solid Shadows?' (1998) 12 *Australian Journal of Family Law* 256.

20 See *Collins v The Queen* [1975] 133 CLR 120 at 122; *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 per Kirby P; *In re an Inquiry into the Mirror Newspapers Group Newspapers* PLC (2000) Ch 194 at 214; all cited at paras 21-23 of *'Guidelines for barristers on dealing with self-represented litigants'* above n 17.

21 Pathways above n1, 68.

22 Pathways above n 1, 70.

Another parallel development is the greater profile and influence exerted by men's rights groups in public debates about family law in Australia.[24] In many ways this has culminated in the Pathways Report[25] which, whilst not overtly acknowledging that it has been heavily influenced by the men's lobby, tacitly acknowledges and makes recommendations addressing concerns expressed by men.[26] These developments will invariably have an impact on the delivery of PDR services and implementation of PDR policies. For the PDR community the great challenge will be to remain neutral in what some may perceive to be the beginning of a new gender war.[27] Pritchard,[28] in an analysis of this topic, concludes:

> The result of this persuasive and pervasive discourse is the view that separated men and women are necessarily in opposition. From this perspective, women's rights are seen as having been gained at the expense of men, leaving the men victimised and blaming women, blaming the family law system (which they see stacked against them) and blaming the state for their predicament.

For the PDR community to take sides in this debate is extremely short-sighted. A much safer and wiser strategy is to reassert the underlying philosophy and character of PDR processes - that of self determination, ie that all parties to PDR, are empowered by PDR processes to resolve their own disputes, with the assistance of a neutral third party.[29] Gender issues are not as relevant as those other issues referred to in two above dealing with the appropriateness and suitability of cases for certain PDR

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23 For example, Hetherington & Stanley-Hagan, *'The Effects of Divorce of Fathers and their Children'* in ME Lamb *'The Role of the Father in Child Development'* (3rd ed, 1997); P Jordan *'The Effects of marital Separation on Men - Ten Years on'*, a paper delivered at the National Forum on Men and Family Relationships, Canberra 1998, proceedings published by the Department Family & Community Services (Cth) Family Relationships Branch.

24 See Kaye and Tolmie 'Discoursing Dads: The Rhetorical Devices of Father's Rights Groups' (1998) 22 *Melbourne University Law Review* 162 and, by the same authors, 'Fathers' Rights Groups and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 47.

25 Pathways Report, above n 1.

26 This is evident from several emphases within the Report eg on family decision making (except where violence or abuse is present), on-going parenting, recognition of not enough emphasis on the fathering role and the problems men experience in enforcing child contact orders, in gaining access to the legal system via legal aid, lack of support services for them, the effect of contested allegations of violence, stereotyped assumptions about men's ability to function effectively as parents. See, for example, Pathways Report op cit n 1 at pp ES4 and 5.

27 One journalist, M Cosic has described it as the 'Uncivil War' in the *Australian Magazine*, August 21-22 1999,18.

28 S Pritchard, *'In Whose Best Interests? Men's Rights and Mediation'* unpublished essay submitted as part of the assessment for the UWS postgraduate subject Family Dispute Resolution, 2000.

29 See NADRAC report on PDR in Family Law above n 14 at paragraphs 2.23-2.24.

processes e.g. family violence and safety, equality in bargaining power, risk of child abuse, emotional and psychological health etc. Some of these factors may well, in fact, be linked or partly linked to gender, but they are disentitling because of the conduct concerned, not the gender of the perpetrator. The PDR community must also recognise that if its processes cannot offer self-determination, then it may have no role to play at all in the resolution of the dispute in question. The benefits deliverable by PDR must never be described along gender lines - to suggest that, for example, mediation offers better outcomes for men, but counselling offers better outcomes for women, is sterile, fruitless and probably quite wrong anyway. In disputes involving children, the focus must always be on them, and in other disputes the focus should be on the benefits of self-determination.

A more positive neutral response is possible and Pritchard[30] has some suggestions in this regard. These include making clear statements that PDR services are available to men *and* women, using co-mediation models[31], careful intake procedures, watchful monitoring of parties' behaviour during the mediation, adopting a strictly neutral and non-judgmental role in PDR, and constantly reasserting the self-determination basis of family decision making.

More Timely Interventions for PDR Processes

The writer has argued elsewhere[32] that too many cases are allowed to enter a litigated pathway without some form of dispute resolution intervention. The present level of new filings in the Family Court seems to be taken for granted, or is regarded as acceptable. Little is being done, it would seem, actually to deal with disputes before they proceed to litigation in the Family Court. If initiatives are being undertaken in this regard, they are ineffectual because the number of files opened in the Court, and the number of applications made, has gradually increased between 1990 and 1998/9.[33] Counselling on a voluntary basis, ie without court intervention, has a full or partial agreement rate of 78%.[34] Even court-ordered counselling results in full or partial agreement in 66% of cases.[35] With such success rates it is hard to understand why *all* children's cases are not referred to counselling as a precondition to the

30 Pritchard, above n 28.

31 That is using a male/female mediator model. The difficulty in this regard is that this is a more expensive model to fund.

32 T Altobelli, '*It's Time for a Change - Resolving Parenting Disputes in the Family Court of Australia*' (paper presented at the International Society of Family Law 10th World Congress, Brisbane 2000). This paper subsequently formed the basis of the writer's submission to the Family Law Pathways Advisory Group referred to elsewhere in this article.

33 See Family Court Annual Report 1999, Figure 3.5.

34 See Brown and Barker, above n 16 at p 29.

35 Ibid.

commencement of proceedings in the Family Court.[36] All of the data indicates that the likelihood of reaching an agreement declines once an application is filed, and then declines again following the Directions Hearing. Mediation, whether provided by the court or external providers, results in full or partial agreement rates of between 70%-92%.[37] Given these rates of success, it is also hard to understand why mediation is not used as an intervention to prevent matters proceeding to a litigated pathway. It is also hard to understand why only 418 new mediation cases were opened in the Family Court in 1998/9 when the full settlement rate for mediation that year was 70%.[38] Thus there is no systemic attempt to *prevent* cases going to court even when there is ample evidence to suggest that if dispute resolution interventions were undertaken, many of these disputes would be resolved.

Thus the more timely application of PDR processes may well lead to more satisfactory outcomes for all parties. The writer also suggested that PDR interventions such as counselling and mediation should, in certain cases, be mandatory before filing in courts exercising jurisdiction under the Act. The Pathways Report[39] was not in favour of mandatory pre-filing PDR, preferring instead to encourage the use of non-adversarial services by way of offering incentives. The Report does acknowledge, however, that in order to encourage families to use non-adversarial services, some preconditions or requirements that currently exist in the system might be better placed at other points in the system, where the benefits for the family are more immediate.

More adequate and timely diagnosis of disputes

PDR processes are not being fully utilised because there is no adequate and timely diagnosis of disputes when they are commenced in courts exercising jurisdiction under the Act.[40] The assertion is that, at the moment, the individual assessment and monitoring of cases is inadequate, not just in children's cases, but in all cases. At one level, there is inadequate diagnosis of the causes of the conflict, ie what is driving the dispute, and also of the type of conflict. This means that dispute resolution processes are not tailored to meet the needs of the individual case. The writer wishes to be very clear about this – it is asserted that this is taking place neither in theory, nor in practice, at an adequate level. Before any matter embarks upon a litigation pathway in the Family Court, the disputants must attend an Information Session and in children's cases the parents must attend post-filing court ordered counselling either before or

36 Of course this is subject to screening as to suitability. This screening already takes place, and it is not suggested that the screening should be relaxed in any way – it is simply suggested that all children's cases should go to counselling or mediation as a pre-condition of filing in the Family Court.

37 See Brown and Barker, above n 16 at 29.

38 Family Court Annual Report 1999 Tables 4.18, 4.22 and 4.22B, 91-93.

39 Above n 1, 5.

40 This section is also based on the writer's paper and submission to Pathways, above n 32.

shortly after the Directions Hearing. The Information session is a group activity, and was never contemplated as having an individualised diagnostic function. Counselling under s62F(2) is described by Brown and Barker[41] as having certain characteristics. These include:

> Conference with a Family and Child Counsellor in Children's matters:
> - The sessions are conducted by family and child counsellors trained in psychology or social work.
> - It is appropriate in children's matters.
> - It is therapeutically oriented.
> - The Counsellor deals with underlying emotions blocking resolution of the dispute.
> - The process is directive and educative in the feedback given to parents about the likely impact on the child, factors taken into consideration by the Court in determining these matters and the over-riding principle of the best interests of the child.
> - The goals are to settle the dispute and resolve the conflict.
> - Clients are not screened for suitability or willingness to attend.
> - Clients can attend voluntarily or be ordered to attend.

The task of the counsellor is not to undertake any diagnosis of the dispute which may guide the Court itself in how to deal further with the case, but rather to undertake therapeutically oriented conflict resolution. This is certainly effective, but it is not adequately diagnostic. In any event, if counselling is unsuccessful, the extent of the report back to the Court is limited to the ticking of boxes in a pro-forma document which indicates whether further counselling is recommended, whether a Child Representative should be appointed and whether a Family Report should be ordered.

Even at a Directions Hearing[42] there is the scantiest regard for a consideration of what is causing or driving the conflict, and what is the most appropriate method for dealing with it. In any event, where obvious causes are manifest, nothing is in fact done about it because of lack of resources. Thus there is no adequate diagnosis of the dispute, and it will be argued below that this is a missed opportunity, and unwittingly causes cases to be continued longer than they need to.

A simple illustration not only demonstrates the problem, but also shows how the Family Court is trying to alleviate it. Assume that in a dispute between parents as to where their children will reside, each of the parents asserts that some or all of the children wish to reside with them, and that the children have made statements to

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41 Brown and Barker, above n 16, 22.

42 The Directions Hearing in the Family Court, soon to be replaced in many cases by the Case Conference, also does not play a diagnostic role. A detailed explanation of what occurs in the Directions Hearing is found in Altobelli *'Family Law: Theory Meets Practice'* (1999), Chapter 4. See also: Sikiotis *'Case Conferences in the Family Court'* <www.familycourt.gov.au/papers/html/ sikiotis.html/>.

them in this regard. This is obviously an issue which needs to be dealt with sensitively, not only for the sake of the children, but for the emotional well-being of their parents as well. This presents as a dispute about children's wishes. If this diagnosis is correct, the traditional response has been to try to ascertain those wishes by way of an independent source – perhaps a Child Representative[43] or by way of court-ordered Family Report[44] Hunter found, however, that the presence of a Child Representative significantly increased the chances of a case proceeding to a hearing[45]. As for Family Reports, whilst they represent only 5.68% of the cases opened by the Family Court Counselling Service, they represent 20.02% of the total interviews held.[46] As the preparation of a report is so resource intensive, it is left to the final stage of the matter – usually immediately prior to the hearing. By this time the dispute is well and truly entrenched. Generally the affidavit evidence has been filed and counsel has been briefed. Whilst settlements do occur at such a late stage, they are rare. This example illustrates that even when a dispute has been accurately diagnosed, the intervention was inappropriate and in fact probably exacerbated rather than ameliorated the problem for the litigants and their children. The greatest problem was the delayed intervention – what the dispute required was not only *timely diagnosis*, but *timely intervention*. A short Family Report as to the children's wishes should have been ordered at the Directions Hearing. Indeed the court itself is recognising this, and it is to be hoped that Family Reports will be obtained at a much earlier stage of proceedings than has historically been the case.[47]

The writer recognises that as part of the repositioning of the Family Court's conciliation, counselling and mediation services there will be a greater emphasis on individual assessment and monitoring.[48] It remains to be seen whether this assessment and monitoring will go as far as the diagnostic functions suggested by the writer and whether, in any event, the intervention will be appropriate and timely.

The Pathways Report[49] now emphasizes the importance of assessment and referral practices at the first point of contact with the family law system, and suggests the creation of a uniform, system-wide assessment model which establishes the needs of the parties, their capacity to resolve the issues, the stages of the parties' in the process of separation, and then guides people to the best pathway for resolving their dispute. This is certainly a higher level of diagnosis than has existed to date in many parts of the system of family law dispute resolution in Australia, but probably does not attain

43 Pursuant to s68L FLA.
44 Pursuant to s62G FLA.
45 Hunter, above n 18, para 331, 159.
46 In other words 1520 cases requiring Reports may have necessitated 11,738 interviews. Source AR 1999 Figures 3.1 and 3.2, 32.
47 The Court's Future Directions Committee is presently examining the use of earlier and more targeted family reports: Annual Report 1999, 18.
48 See Brown and Barker, above n 16,16-17.
49 Pathways Report, above n 1, 37-40.

the level of diagnosis suggested by the writer. The use of PDR has not been optimized to date. Perhaps a greater emphasis on assessment and referral will improve this.

Listening more to the child's voice in PDR

Over the last decade one of the most significant developments in family law generally is the increased awareness of the need to facilitate children's participation in proceedings which relate to them. Children's participation in proceedings relating to their parenting has become almost axiomatic, with the debate focussing on the best way to listen to their voices, and make children's participation meaningful.[50] Indeed, this debate has led to a questioning of what is the best model for ensuring that children's participation is meaningful.[51] This has had and should continue to have a significant impact on how PDR is implemented in cases where the issues directly impact on children. The debate about the most effective model of children's participation is equally applicable to PDR. Amongst many issues to arise is that of competence: the competence of the child to participate in a PDR process, and, in a slightly different sense, the competence of the PDR provider to facilitate a meaningful engagement by the child in the process. There are many challenges in the present context which include developing age-appropriate processes and adequate skilling of PDR providers. The real challenge, the writer submits, is to provide a framework within which children are listened to, rather than just listening to the children's family, which is a weakness of child representation as it currently takes place.

The Impacts of Legislative Change

Do any themes emerge from the introduction of Part III of the Act in June 1996? Part III of the Act was only part of the broader scheme of legislative change enacted by the Family Law Reform Act 1995, in particular to Part VII of the Act dealing with the determination of disputes relating to children, and the introduction of new concepts such as parental responsibility, as well as a new regime of parenting orders. The research into the impacts of the new Part VII of the Act may well shed some light on the impacts of Part III, and point towards some themes about how legislative change actually brings about cultural change.

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50 See for example Wallerstein & Lewis 'The Long Term Impact of Divorce on Children: A First Report from a 25 Year Study' (1998) 36 *Family & Conciliation Courts Review* 368; Sections 62G and 68L Family Law Act 1975 (Cth); Chisholm, *'Children's Participation in Family Court Proceedings'* in College of Law Sydney paper 98/5; McDonald ,*'Children's Perceptions of Access and Their Adjustment in the Post-Separation Period'*, Family Court of Australia Research Report no 9 (1990), 25-27; ALRC, '*Seen and Not Heard: Priority for Children in the Legal Process'* ALRC Report no 84, September 1997 at 4.25-4.27.

51 For a discussion of the various models see Antrum, 'New representation principles for Children's Lawyers' (2000) 38(11) *Law Society Journal* 50 at 50-54; Family Law Council, *'Involving and Representing Children in Family Law: A Report to the Attorney General'*.

The landmark research of Dewar and Parker[52] into the impact of part VII may well provide some insights into the impact of Part III as well. The writer's observations on how Dewar and Parker's research may apply to PDR are based on inference, implication and extrapolation. Nonetheless there is much food for thought here, and there is the obvious need for research specifically into the impacts of Part III of the Act.

Reference has been made above to s14 of the Act, describing it as the key provision relating to PDR on the Act. The equivalent provision in Part VII of the Act is s60B which states:

> *60B Object of Part and Principles Underlying It*
>
> (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
>
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children.

Both s14 and s60B of the Act are objects provisions, and serve the same purpose in their respective Parts of the Act. Both send out important messages about the intention of the relevant statutory provisions they introduce. Clearly one of the messages intended to be communicated by s60B is the importance of self-determination in dispute resolution concerning the family. This is clearly an underlying philosophy of PDR as well.

One of the observations made by Dewar and Parker[53] is that there was a disjunction between perceptions of change brought about by the new legislation, and the realities of change. In other words, even though actual outcomes do not support the reality of change, the mere perception of change 'is itself a powerful engine of change…'[54]. Extrapolating this to PDR, and specifically the statutory injunction in s14(a) of the Act 'to encourage people to use' PDR, even if it could not be proven empirically that

52 Dewar and Parker with Tynan & Cooper, '*Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975'*, (Working Paper No 3, Family Law Research Unit March, 1999) <http://www.gu.edu/centre/flru/>, (called 'Dewar and Parker').

53 Ibid, 79.

54 Ibid, 79.

people are using PDR more since 1996, the mere message contained in the statute may well create the perception that there is greater use of PDR. There is no doubt in the writer's mind, based on experience and personal knowledge, that PDR has grown in Australia since 1996, but there is, no sound empirical research substantiating this, particularly research on the rates of growth in the use of alternative dispute resolution prior to 1996. In any event, it may well be that the *perception* is more important than the reality[55] and that there is real value in statutory 'messages' about PDR.

Dewar and Parker[56]go on to explain, however, that the perceptions of change may be variably received throughout the 'system' of all those who are potentially affected by it. A person's response to the legislative message depends upon their place in the system.

They explain[57]:

> In particular, we suggested that the legislation seemed to make the biggest change the further away the actor is from the trial process. We previously attributed this to the fact that the settlement-promoting messages of the legislation are more likely to be 'heard' by those who are likely to agree. While we stand by this observation at a general level, we would suggest now that the reasons for this pattern are more complex - in other words, that it's not just a question of *disposition* to listen to settlement-promoting messages, but that it's also a question of how messages are fed back within the system itself as to what outcomes the system is likely to produce. If the parties are told, for example, that they are likely to be prevented from relocating then that prediction will assume a sort of reality in their minds even if, when tested, it would turn out to be untrue. Perceptions, as we have said, thereby assume a reality of their own.

This is, again, thought-provoking when extrapolated to the PDR context. It may help to explain, at least in part, why a cultural-shift towards acceptance of PDR is more evident amongst public consumers of these services, and the community generally, than in the legal profession itself which is so much closer to the adjudicative process.[58] The message sought to be communicated by s14(a) may be variably received, with the least impact the closer to the adjudicative system, and the greatest impact further away from the adjudicative process. Thus, legislative messages are important, but they may be received in different ways by different people.

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55 This is probably a truism for most practitioners of alternative dispute resolution.

56 Ibid, 79.

57 Ibid, 79-80.

58 Interestingly, though Dewar and Parker also noted that many lawyers they spoke to were not only accepting of but creative in their use of PDR processes such as mediation, they attribute this to a perceived business need to diversify the range of services offered to their clients. Ibid, 80.

Dewar and Parker[59] also question what they describe as 'a dominant metaphor or assumption in the legal sociology of family law', namely, that parties 'bargain in the shadow of the law' bargain against a background of what a judge in a court would order if called upon to do so. They suggest that settlement behaviour is no longer determined largely 'from above', but rather, because of the impact of so many other non-judicial influences (child support, legal aid policies, court procedures or professional style), settlements operate more independently, and more at the level of the parties and their dispute. Does this apply to PDR? There is insufficient data to be able to answer this conclusively, but there is evidence to suggest it may well be so. For example the writer's own experience in Legal Aid Case Conferencing suggests that outcomes in relation to contact disputes are as likely to be influenced by legal aid funding policies, as they are by current trends in case law. In private family law property settlement mediation, outcomes are as likely to be influenced by the cost and delay inherent in proceedings, as they are to be influenced by likely outcomes at that hearing. PDR assists parties to identify and consider the alternatives to a negotiated outcome available to them, and it seems increasingly the case that the possible outcome at a hearing (the 'shadow' of the law) is but one of many alternatives that parties take into account, not the dominant one.

The Pathways Report and PDR

The terms of reference for the Family Law Pathways Advisory Group were not specifically focussed on PDR but it would have been impossible for the Group to have completed its brief without considering PDR under the Act. The Group's vision was for an '…integrated family law system that is flexible and builds individual and community capacity to achieve the best possible outcomes for families.' The Group's strategy included formulating recommendations on how to:

(a) provide stronger and clearer pathways to early assistance that ensure people facing relationship breakdown are directed to services most suitable to their needs;

(b) help families to minimise conflict, manage change more successfully, and meet new obligations and commitments;

(c) improve the targeting, coordination and accessibility of information and support for families during transition to and settling of new arrangements; and

(d) better coordinate service delivery between the range of agencies (both public and private) involved in assisting families interacting with the system.

59 Ibid, 90-91.

It was always clear that PDR issues would thoroughly permeate much of what the Group would explore. The Executive Summary to the Pathways Report[60] states that an integrated family law system would have five key functions: education, accessible information, appropriate assessment and referral at all entry points to the system, service and intervention options to help family decision making, and on-going support. The clear emphasis on family decision making reflects the self-determination philosophy of PDR. Another clear emphasis is on the priority of non-adversarial dispute resolution. The Group acknowledged that there was not enough emphasis on agreement and on-going parenting, or guidance to make agreement easier, and not enough holistic assessment. The former does suggest, in some respects, that the s14(a) message about PDR has not been heard as effectively as is desired. The Group also noted that there was too much unnecessary litigation and adversarial behaviour, leading to public and private costs which were just too high.

Recommendation 10 of the Pathways Report[61] states:

> 10.1 That Government:
>
> (a) explore through research the potential of social, financial and information-based incentives to encourage the use of non-adversarial decision making wherever appropriate; and
>
> (b) undertake a thorough cost-benefit analysis of various financial and information-based incentives toward non-adversarial decision making.
>
> 10.2 That all government and non-government service providers and professionals in the family law system review their current practices with a view to creating new opportunities and encouraging people to pursue non-adversarial options.
>
> 10.3 That the related strategies on accessing community-based dispute resolution services presently being put in place by the Family Court of Australia and the Federal Magistrates Service be coordinated and modelled as a shared service to achieve a common purpose, common standards and common outcomes.
>
> 10.4 That strategies be developed, in consultation with the Law Council of Australia and its constituent bodies, family courts and community-based service providers, to encourage lawyers to make more referrals to community-based counselling and mediation, and that any such strategies be incorporated into a family law code of practice.
>
> 10.5 That the additional demand on community-based organisations flowing from increased referrals be recognised and appropriately resourced.

60 Pathways Report, above n 1, ES1-2.
61 Ibid, E513

> 10.6 That definitions of primary dispute resolution methods be developed, adopted across the family law system and published in language which accurately and clearly describes what is available.

The recommendation, if adopted and effectively implemented, will have far-reaching impacts on PDR in Australia. The research and analysis referred to in 10.1 (a) and (b) is long overdue, and very important. The exhortation to innovation in encouraging people to use non-adversarial options referred to in 10.2 is commendable, provided the incentives address the stated purpose, rather than merely address pragmatic and economic rationalist interests. The call for coordination in 10.3 is sensible, and the PDR community must engage in a dialogue with funders about the efficient delivery of PDR services appropriately and creatively, without compromising the underlying philosophy of PDR. Recommendation 10.4 may be seen as a muffled cry of anguish that cultural change in the Australian legal profession is taking too long, and 10.5 a not-so-muffled cry for additional resources for PDR providers at the coal face. Finally, 10.6 hopefully reflects some of the writer's own concerns expressed above about PDR terminology.

The Pathways Report[62]also recommends that mediation-arbitration (described as independent neutral decision making added to the mediation process) be added to those services already available to assist parents in conflict. Family law conferencing, as used by several legal aid commissions, was also endorsed as being cost-effective and achieving appropriate outcomes for children, provided certain criticisms could be addressed[63]. In relation to indigenous families, the Report[64]recommends that narrative therapy and indigenous family law conferencing, be assessed as to their suitability in family dispute resolution.

Overall the Report's approach towards new forms of PDR in family law is refreshing, and augurs well for the continued growth of PDR in Australia.

PDR: The Quest for Quality

The quest for quality in the delivery of PDR services merely reflects how much PDR has grown in Australia, and how much more growth it is likely to experience. The term 'quest for quality' captures a range of issues relating to the implementation of PDR and delivery of PDR services including standards generally, how community and private PDR providers may operate, minimum educational requirements, advertising. Part 5 of the Family Law Regulations currently sets out the regulatory

62 Ibid, ES16 and 52-53.
63 Ibid, 52.
64 Ibid, 92.

framework for out-of-Court PDR services. Part 5 has been criticised, and indeed there have been calls to abolish it completely.[65]

In October 2001, the Commonwealth Attorney General's Department released a Consultation Paper: *'Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family Law Act 1975'* (called 'Raising the Standard'). It proposes that a Quality Framework be adopted in lieu of Part 5 of the Regulations. This would provide '…a transparent and reliable means for improving practices and recognizing and approving a wide range of organisations and, through them, individual practitioners. The Quality Framework would comprise the standards of practice and service delivery for minimum (core) requirements and processes for continuous improvement [and] would cover practice standards, qualifications, training, supervision and other standards of practice and service delivery'[66].

Any discussion about standards in alternative dispute resolution in Australia must consider the important work of the National Alternative Dispute Resolution Advisory Council (NADRAC)[67]. Whilst it is beyond the scope of this article to examine NADRAC's work on standards, it is clear that Raising the Standard has been influenced by it.

And yet the precise motivation for a move towards a Quality Framework is by no means clear. Of course everyone wants standards raised, but there is no clear evidence suggesting that standards need to be raised in response, for example, to the inappropriate use of PDR. This is not just an academic point. One of the themes emerging from Dewar and Parker's research,[68] and largely confirmed by similar research conducted by Rhoades, Graycar and Harrison on the impacts of family law reform,[69] is that law reform which is in response to no clear mischief or problem may often lead to unexpected, unintended and largely adverse consequences. Specifically in the context of family law reform, the changes actually increased the level of litigation in relation to children's matters and made even more vulnerable the position of women in contested children's matters involving allegations of violence and abuse. The purpose of the reform, however, was precisely the opposite.

Of course, Raising the Standard may well be seen as a proactive rather than a reactive initiative. In other words, it may prescribe quality assurance standards in the quite

65 See for example: J Wade, 'Family Mediation: A Premature Monopoly in Australia' (1997) 11 *Australian Journal of Family Law* 286.

66 Raising the Standard, 6-7.

67 NADRAC, *'The Development of Standards for ADR: A Discussion Paper'* (2000). See <http://www.ag.gov.au/aghome/advisory/nadrac/ADRDiscussionPaper.pdf>; NADRAC, *'A Framework for ADR Standards'* (2001). See <http://www.ag.gov.au/aghome/advisory/nadrac/frameworkfiles.htm>

68 Dewar and Parker, above n 52.

69 Rhoades, Graycar and Harrison, 'The Family Law Reform Act 1998: The First Three Years' *University of Sydney and Family Court of Australia*, (2000).

legitimate anticipation that PDR will continue to grow in Australia, particularly in the community and private sector. This growth will be almost certainly the case if the government continues to outsource PDR from the Family Court itself to the community[70]. Indeed evidence of this tend towards outsourcing is found, at least implicitly, within Raising the Standard itself. Curiously, at one level, the discussion paper focuses exclusively on standards in out-of-Court PDR, and almost completely ignores PDR as undertaken by the Family Court. The arguments in favour of quality apply, one would have thought, to all PDR providers whether Court-based or community or private. On another level, however, the absence of any reference to standards for Court-based PDR services is quite consistent with the implementation of a policy to out-source all of these services to the community.

A more cynical view, however, might be that Raising the Standard, and the quest for quality generally, is in fact more about creating transparent, valid and reliable models for funding, approving and authorising organisations to deliver PDR services to the Australian community. Even this cynical view has legitimacy. The reality may well be that there are many motives behind Raising the Standard.

Overall, Raising the Standard will certainly advance and encourage the quest for quality in the delivery of PDR services, and that is a desirable thing. It will help enhance the professionalisation of PDR providers. The writer's only concern, however, is about unintended and unforeseen consequences, but that will be the theme of articles as yet unwritten.

70 This is discussed in Harrison, 'Non Judicial Services and the Family Court' (1997) 11 *Australian Journal of Family Law* 245.