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ADR and family law

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The Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) introduces many important changes to the law and practice of family disputes. Many of these changes are directly relevant to family mediators and other dispute resolution practitioners. The Bill introduces changes to funding procedures for counselling and mediation services, accreditation, and the admissibility of what was said in court-based services. A further change, the topic of this article, is the removal of the statutory immunity currently conferred on family and child mediators.

'Immunity' in this context means the immunity from civil suit conferred on those involved in judicial proceedings. Statutory provisions conferring immunity sometimes refer to 'protection' of the practitioner[1] or 'exoneration from liability'.[2] In this article, provisions that provide protection from liability will be referred to as conferring immunity. For a family mediator or arbitrator, this means that no legal action can be brought against them by a dissatisfied party on the basis, for example, of negligence or breach of a statutory duty.

Immunity generally

Immunity is conferred by common law[3] upon judges and upon lawyers in respect of their role as advocates before the court. The rationale for conferring immunity on judges is to protect the independence of their decision-making.[4] This in turn protects the public, by preventing disgruntled litigants challenging the decisions of judges other than through recognized channels of appeal.

The common law does not confer immunity from suit lightly. The immunity traditionally conferred on lawyers as advocates has been the subject of much judicial consideration and consequent reduced application. I will not go into the rationale for or controversy over the retention of immunity for advocates by the High Court of Australia in this article. The position is not universal in common law countries, with the House of Lords in England recently abolishing advocates' common law immunity.[5] While it is arguable that an arbitrator would have common law immunity,[6] I would submit that it is unlikely and inappropriate that mediators would be found to have common law immunity.[7] While the question has been largely academic, due to the prevalence of statutory immunities for mediators, the forthcoming changes to the *Family Law Act* (the Act) in this respect make it more likely that the argument will be made at some time.

In addition to common law immunity, there are many statutory provisions that confer immunity on statutory office-holders, witnesses and a range of other decision-makers and officials exercising judicial and quasi-judicial functions. Many provisions confer immunity on mediators and arbitrators, in court-annexed processes, mediation centres, and in respect of family mediators, where the Act and *Family Law Regulations* (the Regulations) apply. The principal justification appears to be to protect the integrity of the process by preventing a challenge to the outcomes by attacking the third party. In relation to court-annexed processes there is the important

additional justification that immunity supports the effective administration of justice, in a similar manner to the common law judge and advocate immunity.

Immunity in the family law context – current legal position

Section 19M of the Act provides that family and child mediators and arbitrators have the same protection and immunity as a judge of the Family Court. No immunity is conferred by the Act on family and child counsellors.

A 'family and child mediator' is defined in s 4(1) of the Act to mean:

> (a) a person employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services;
> (b) a person authorised by an approved mediation organisation to offer family and child mediation on behalf of the organisation; or
> (c) a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation.

Section 4(1) defines 'family and child mediation' as:

> … mediation, conducted in accordance with the regulations, of any dispute that could be the subject of proceedings (other than prescribed proceedings) under this Act and that involves:
> (a) a parent or adoptive parent of a child; or
> (b) a child; or
> (c) a party to a marriage.

An arbitrator is defined in s 4(1) to mean:

> … a person who meets the prescribed requirements for an arbitrator.

The effect of s 19M is that approved court mediators[8] and community and private mediators who meet the qualification, experience and training requirements in the Regulations[9] are protected against any civil legal action brought against them in respect of family mediations they conduct. This immunity is absolute, that is, not qualified to where the mediator is acting in good faith, as is the case in some statutory provisions. There are limits to the immunity: it would not apply to criminal proceedings, for example assault by the mediator against a party, to review or disciplinary proceedings by a body appointing the mediator, or for breach of statutory duty owed to the appointing body by legislation.

Changes to terminology, definitions and functions of practitioners in the Bill

The Bill rearranges the provisions of the Act that apply to mediation and arbitration, and re-labels some of the key players in family dispute resolution. No substantive changes have been made to the arbitration provisions, so they will not be discussed any further. A family and child mediator will become known as a 'family dispute resolution practitioner', which is defined in s 10G as:

> (a) a person who is accredited as a family dispute resolution practitioner under the Accreditation Rules; or
> (b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
> (c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family dispute resolution practitioner; or
> (d) a person who is authorised to act under section 93D of the Federal Magistrates Act 1999, or engaged under subsection 115(1A) of that Act, as a family dispute resolution practitioner; or
> (e) a person who is authorised by a Family Court of a State to act as a family dispute resolution practitioner.

The functions of a family dispute resolution practitioner will be prescribed in the Regulations, as provided by s 10K. In addition the Chief Executive Officer of the Family Court may give directions that relate to a Court officer's or staff member's functions as family dispute resolution practitioner.[10]

A further change in the Bill is the creation of the role of 'family consultant'. The Explanatory Memorandum to the Bill explains that the Court is 'moving to a process in which a "family consultant" will be assigned to each case in the court involving children, and will manage the case, providing a continuing service, as it moves through the court process'.[11] The term 'family consultant' is defined in s 11B as a person who is:

> (a) appointed as a family consultant

under section 38N; or

(b) appointed as a family consultant in relation to the Federal Magistrates Court under the *Federal Magistrates Act 1999*; or

(c) appointed as a family consultant under the regulations; or

(d) appointed under a law of a State as a family consultant in relation to a Family Court of that State.

The functions of family consultants, as set out in s 11A, are to provide services in relation to proceedings under the Act, including:

(a) assisting and advising people involved in the proceedings; and

(b) assisting and advising courts, and giving evidence, in relation to the proceedings; and

(c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and

(d) reporting to the court under sections 55A and 62G; and

(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

Family consultants can advise a 'person or people involved in proceedings' which is defined in s 4(1AA) as:

(a) any of the parties to the proceedings; and

(b) any child whose interests are considered in, or affected by, the proceedings; and

(c) any person whose conduct is having an effect on the proceedings.

The Court may order parties to attend appointments with a family consultant.[12] Failure to comply with an order must be reported to the Court and the Court may make further orders as it considers appropriate.

The Chief Executive Officer of the Family Court may authorize an officer or staff member of the Court to provide counselling and family dispute resolution under the Act.[13] If a family consultant is appointed to fulfill either of those functions, two provisions become important. First, s 11C (which renders admissible communications with family consultants) does not apply to the officer at any time while the officer is acting as a family counsellor or family dispute resolution practitioner. Second, the officer must not perform the functions of a family consultant in relation to particular proceedings, if the officer has conducted family counselling or family dispute resolution with a person involved in those proceedings.[14]

Immunity in the family law context – changes introduced by the Bill

The Bill provides that a family consultant, in performing his or her functions as a family consultant,[15] and an arbitrator, in performing his or her functions as an arbitrator,[16] will have

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the same protection and immunity as a judge of the Family Court has in performing the functions of a judge. No immunity is conferred on family dispute resolution practitioners. There is no change to the existing position that family and child counsellors, who under the Bill become 'family counsellors', do not have immunity.

The wording of s 11D makes it clear that the immunity of a family consultant is attached to the function they perform. It is clear that family consultants will have full immunity in carrying out that function. However, as the immunity is attached to the function, not the person, a member of court staff who exercises at times the function of family consultant, and at other times the functions of a counsellor or dispute resolution practitioner, will only be protected in respect of the former. It can be expected that by virtue of s 4(1AA) the immunity will preclude actions by any person or persons involved in the proceedings, not just the parties to the mediation.

Rationale for removing immunity for family dispute resolution practitioners

In July 2005 the Government released an Exposure Draft of the Bill (the Draft). The functions of a family dispute resolution practitioner were set out and a distinction was drawn in draft s 10H between the 'advisory' and 'facilitative' functions they might perform. In the Draft immunity was conferred by s 10M on family dispute resolution practitioners, to the extent that they were acting in a facilitative, as distinct from an advisory, role. In other words, the immunity currently provided by s 19M was continued, but was more limited in application. The Family Law Section of the Law Council of Australia correctly noted in its submission on the Draft that this would mean 'that a member of the court staff who is conducting family dispute resolution of an advisory nature (for example, conciliation as traditionally understood) would not have immunity'.[17] The Section recommended that further consideration be given to this limitation on immunity.

On the other hand, the Family Law Council, in its submissions on the Draft, recommended that no immunity be conferred on family mediators other than court mediators, and that the position under the Draft be reconsidered.[18] They argued that immunity for practitioners, other than those within a court, is anomalous and inconsistent with the position of other professionals. NADRAC flagged early on the need to 'differentiate between legal advice and the advice given by the parenting adviser' as this would 'have important implications for immunity and the meaning and consequences of the parenting arrangements'.[19]

The Family Law Section and NADRAC were subsequently requested by the Attorney-General to provide joint advice on the immunity for family counsellors and family dispute resolution practitioners under the Act. The Councils' letter of advice[20] recommended, in summary, that it was not appropriate to confer immunity for facilitative or advisory dispute resolution or for family counselling. They recommended that the immunity provisions be removed from the Bill and that immunity not be extended to counsellors. They also recommended that the distinction between 'facilitative dispute resolution' and 'advisory dispute resolution' be removed from the Bill, as the only rationale for that distinction related to the proposed immunity for facilitative dispute resolution practitioners.

A number of reasons were given in the Councils' letter for removing the immunity proposed under the Bill.[21] These reasons can be summarized as follows:

- Mediators would be in a privileged position compared to other professionals and this was not justified on public policy grounds.
- The statutory immunity conferred by s 19M is absolute and is not restricted to court-ordered mediation (unlike the immunity conferred by various statutes in Australia), and given the practitioners to whom it applies, the level of protection is unwarranted.
- Mediators, like other professionals, may limit their civil liability by contract. It is therefore possible for them to negotiate for immunity, or to include it in standard conditions for providing the service.
- Even if a family dispute resolution practitioner's civil liability is not limited by a contractual term, it will not be easy to bring a negligence action against a dispute resolution practitioner. There are essentially two reasons for suits against mediators not being commonplace:
  - Evidence of anything said or done in a dispute resolution session is inadmissible in court, subject to the exception[22] provided currently in s 19N and by the Bill in s 10J. This makes it difficult to adduce the evidence necessary to justify a negligence action against a dispute resolution practitioner.
  - It will generally be difficult to show what loss has been caused by the mediator's negligence. This is particularly the case with mediation, because agreements are made by the participants, and the mediator has a facilitative rather than advisory role. Therefore it is likely to be difficult to establish that loss has been caused as a consequence of the mediator's conduct.
- Immunity from liability for negligence is not an issue of great importance to practitioners in the field and there is no reason to suppose either that the continuation of the immunity will significantly increase the likelihood of new entrants to the field or that its removal will significantly deter new entrants from continuing to practice.
- There is no evidence that insurance issues ought to be significant in relation to the removal of immunity of mediators. Most organisations that offer mediation offer a range of other services as well, including counselling, and they need to have insurance covering the liability of the majority of their professional staff. Again, there is an inconsistency that organisations are able to rely on immunity for some practitioners assisting families but need insurance for others.

- A further reason given by NADRAC and the Family Law Council for the removal of immunity for mediators from the Act was to avoid drawing distinctions between facilitative dispute resolution and advisory dispute resolution. They argue that this is not a tenable distinction in terms of the kind of mediation that is practised in relation to disputes about children. As stated in their letter:

> While the distinction between facilitative dispute resolution and advisory dispute resolution may well be an entirely valid one for other forms of dispute, it is both necessary and appropriate at times that mediators in parenting disputes advise parties about what is likely to be of benefit for children and what is likely to be harmful to them … Giving advice of this kind is not a matter of taking sides, and nor does it compromise the independence of the mediators. It is an aspect of their facilitative role in helping the parents to work out what is likely to be in the best interests of the children.[23]

In making these arguments the Councils have applied most of the arguments that are usually made against the conferral of immunity on mediators, at least in relation to those mediators who are not providing those services as part of a court's services or statutorily based organisation. Additional reasons that support the removal of immunity are:

- The cost of bringing civil proceedings against a mediator will deter most litigants, and in most cases, even if negligence were proved, it is not likely to provide a party with the remedy they are seeking, namely a different outcome to the family law proceedings.
- Immunity may obscure a lack of care or skills by a practitioner. As with other professional service providers, the immunity from civil action may be a disincentive for practitioners to maintain high professional standards of practice.

Rationale for conferring immunity on family consultants and arbitrators

The explanation given for immunity being conferred on family consultants is that their work feeds directly into the court's decision-making process. The Explanatory Memorandum to the Bill says with respect to the immunity conferred by s 11D:

> If the family consultants did not have immunity, people who were unhappy with the court's decision could endeavour to attack the foundations of that decision by challenging the consultants. Any problems with the Court's decision should be dealt with directly through the appeals process.[24]

NADRAC and the Family Law Council in their joint letter of advice conclude that:

> Perhaps the strongest justification for having an immunity is in relation to court-ordered mediation. Here the mediation is part of a continuum of case management strategies by which it is aimed to resolve litigation between parties and for that reason may be seen to be an extension of the judicial role – attracting the same immunity as for other aspects of the court process.[25]

Family consultants will often provide non-confidential advice to the parties and will have a function of reporting to the Court. In view of this, the Family Law Council and NADRAC in their joint letter of advice agreed that family consultants under the Act should have immunity.[26]

While the level of immunity is not uniform across jurisdictions and different Acts, it is commonplace and generally accepted that mediators conducting court-based or court-referred mediation should have the same protection as judges or judicial officers of the court.[27] This is consistent with the position in numerous jurisdictions, including State tribunals.[28] As we have seen above, the strong policy justification given for this is that the administration of justice is more effective if decisions and actions of court officers and practitioners operating within the statutory umbrella of the court or tribunal are not amenable to civil action by disgruntled parties.

I would argue, in principle, that immunity should only be conferred on officers of the court invested with the power to make binding decisions, as this is consistent with the rationale for judicial immunity. Arbitrators properly fall into this category. This would not include members of the court who have an advisory or expert role. As in most instances of conferring immunity on court officers exercising non-judicial functions, I suggest the legislation can be explained more in terms of providing a deterrent to legal action, rather than protecting against a real threat of suit. In practical terms, therefore, provided there are avenues by which parties can make known concerns and complaints about court-based practitioners, the extension of immunity to non-judicial officers will have little adverse effect.

In revising the Draft and introducing the Bill in its current form, it is clear that the government heeded much of the advice provided to it on immunity. The removal of the distinction between facilitative and advisory functions of dispute resolution practitioners, and the removal of immunity for the latter, indicates that the arguments of the Councils were made effectively.

There is one respect in which the advice of the Councils has apparently gone unheeded. The Councils stated:

> For the avoidance of doubt, we think it is important to retain the continuing immunity of employees of the courts involved in family dispute resolution whether or not they fall within the definition of being family [consultants] for the purposes of s 11D of the *Family Law Act*. [29]

Non-judicial court staff and officers, when acting as family dispute resolution practitioners, will not have immunity. This would certainly appear to be the effect of s 11D. This is notwithstanding the arguments usually made in support of court staff having immunity, and that this is the usual position in other federal courts.[30] As a result, court-employed dispute resolution practitioners will need to rely on s 10J for the inadmissibility of communications made in their company while conducting family dispute resolution, and on all the other factors noted above which make suit against a mediator unlikely.

What does this mean for family dispute resolution practitioners and mediation generally?

As the definition of family dispute resolution practitioner in s 10G makes

clear, their status will be derived from a variety of sources. In each case, consideration will need to be given to how protection from legal action can be secured. The following suggestions are made in relation to practitioners in each category.

- A person who is accredited as a family dispute resolution practitioner under the Accreditation Rules will need to rely on contractual terms that exclude liability for negligence and other civil actions and to obtain professional indemnity insurance to cover any liability not covered by contract.
- A person who is 'authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph' (see s 10G(b)) will need private protection as above or to seek protection under the organisation's contracts with clients and insurance policies.
- A person who is authorised to act under s 38BD, or engaged under s 38R(1A), as a family dispute resolution practitioner will need to obtain private insurance or a contractual indemnity or an undertaking from the Court to meet any costs or damages awards resulting from defending a legal action arising out of the exercise of their duties.
- A person who is authorised to act under s 93D of the *Federal Magistrates Act 1999*, or engaged under s 115(1A) of that Act, as a family dispute resolution practitioner would appear to be in the same position regarding immunity as a family consultant in the preceding paragraph. This, apparently, is the effect of ss 93A and 93D of the *Federal Magistrates Act*, both introduced by the Bill.
- A person who is authorised by a Family Court of a State to act as a family dispute resolution practitioner will be in the same position as a person authorised under s 38BD or engaged under s 38R(1A) (see above) unless the legislation under which the State court operates confers immunity.

At a different level, what the removal of immunity means for mediation generally is that family dispute resolution practitioners, like other professionals who offer services to the public, need to look to achieving and maintaining acceptable standards of practice to avoid being successfully sued by dissatisfied clients. More importantly, practitioners need to consider how best to learn of and respond to legitimate complaints about mediator practice. The moves afoot to introduce Accreditation Rules for family dispute resolution practitioners, and the discussion of accreditation standards for mediators being conducted by the National Mediation Conference,[31] will assist in the further development of defensible mediation practice. ●

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Endnotes

1. For example, *Supreme Court Act 1935* (WA), s 70; *Mediation Act 1997* (ACT), s 12; *Family Law Act 1975* (Cth), s 19M.
2. *Evidence Act 1958* (Vic), s 21N; *Community Justice Centres Act 1983* (NSW), s 27.
3. 'Common law' in this context means 'judge made law'.
4. For example *Yeldham v Rajski* (1989) 18 *NSWLR* 48 per Hope A-JA at 69.
5. *Arthur J S Hall v Simons* [2000] 3 All ER 673.
6. Support for this argument can be found in *Najjar v Haines* (1991) 25 *NSWLR* 224.
7. Generally, see R Carroll, 'Mediator immunity in Australia', (2001) 23 *Sydney Law Review* 185 at 197–200.
8. Regulation 59.
9. Regulations 60 and 61.
10. Section 38BC(b). Directions may also be given under this section to family counsellors and family consultants.
11. Explanatory Memorandum, para 78.
12. Section 11F.
13. Section 38BD.
14. Section 38BD(3)(a) and (b) respectively.
15. Section 11D.
16. Section 10P.
17. Family Law Section, Law Council of Australia, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 18 July 2005, at p 51.
18. Family Law Council, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, July 2005, p 7.
19. National Alternative Dispute Resolution Advisory Council, *Submission in response to 'A New Approach to the Family Law System: Implementation of Reforms' discussion paper*, 10 November 2004, at p 2.
20. Dated 15 November 2005, available by following the link at <www.ag.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications>.
21. See further, Carroll, above note 7 at 205–219.
22. The exception allows evidence to be admitted in subsequent proceedings that are an admission by an adult of abuse or a disclosure by a child of abuse, see s 19N(3) and proposed s 10J(2).
23. Above note 20 at p 5.
24. Paragraph 186 of the Explanatory Memorandum.
25. Above note 20 at p 3.
26. Above note 20 at p 4.
27. For example, s 34(1) of the *Federal Magistrates Act 1999* (Cth) provides that proceedings may be referred to mediation. Subsection (5) provides that a mediator has, in mediating anything referred under subs (1), the same protection and immunity as a Federal Magistrate has in performing the functions of a Federal Magistrate. Section 53C of the *Federal Court of Australia Act 1976* (Cth) provides that a mediator or an arbitrator has, in mediating or arbitrating anything referred under s 53A, the same protection and immunity as a judge has in performing the functions of a judge.
28. For example, the *State Admininstrative Tribunal Act 2004* (WA) confers on a member of the tribunal, in the performance of his or her functions as member, the same protection and immunity as a judge of the Supreme Court has in the performance of his or her duties as a judge.
29. Above note 20 at p 4.
30. See above note 27.
31. See <www.mediationconference.com.au/html/Accreditation.html>.