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**The mediator immunity debate**

# Immunity of mediators and the proposed Family Law Act Amendments

**David Levin QC**

An article by Robyn Carroll in the *ADR Bulletin* ((2006) 8(8) ADR 145) considered the proposed amendments to the *Family Law Act 1975* (Cth). The author argued that:

- immunity should only be conferred on officers of the court invested with the power to make binding decisions, such as arbitrators, not on mediators;
- the removal of mediators' immunity in the Family Law Amendment (Shared Parental Responsibility) Bill 2006<sup>1</sup> (the Bill) meant 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; and
- mediators need to consider how best to learn about and respond to legitimate complaints about mediator practice.

suits whatever the ultimate chances of success. Fundamental to the success of mediation generally is the confidentiality of the process; failing to clearly identify the process as one which ought not to be the subject of litigation (save for fraud or other grossly reprehensible conduct which would if repeated by a judicial officer also lead to legal remedy) is to open mediation up unreasonably to judicial scrutiny.

Legislation in many States and Territories and in the Federal arena has for many years sought to provide mediators with statutory immunity from civil suit equivalent to the immunity enjoyed by judicial officers. It is therefore disappointing to discover that the Bill (which will make the most substantial amendments to the *Family Law Act 1975* in 30 years) in its current form fails to provide any statutory immunity for persons undertaking roles

In my opinion improvements in mediation practice are unlikely to discourage litigation against mediators and the family law area is one where dissatisfied clients are highly likely to initiate professional malpractice suits whatever the ultimate chances of success.

With respect to the author I dispute the implicit contention that good mediators in the family law area need have nothing to fear from the removal of any statutory immunity. In my opinion improvements in mediation practice are unlikely to discourage litigation against mediators and the family law area is one where dissatisfied clients are highly likely to initiate professional malpractice

as 'mediators'.<sup>2</sup> The Bill does not eschew all immunities: 'family consultants'<sup>3</sup> and 'arbitrators'<sup>4</sup> are provided with immunity equivalent to that of a Family Court judge. Oddly, the logic for those immunity provisions, namely that in its absence people unhappy with a court's decision could endeavour to attack the foundations of that decision by challenging the family consultants<sup>5</sup> or



that an arbitrator requires immunity to preserve the integrity of any determination and to ensure that the arbitrator is able to make determinations independently on the basis of unbiased opinions without apprehension of personal consequences,<sup>6</sup> is not adopted for the protection of family dispute resolution practitioners.

In the first exposure draft of the Bill published in June 2005 a section was included which granted immunity to family dispute resolution practitioners when undertaking facilitative (but not advisory) dispute resolution.<sup>7</sup> Apparently the Government then had second thoughts and sought advice from the NADRAC and the Family Law Council. Following the receipt of that advice the immunity section was removed.

The NADRAC/FLC advice<sup>8</sup> recommending that no immunity be given was based on the following propositions:

- immunity from suit for negligence or other civil wrong requires strong justification as a matter of public policy;
- there is no general immunity in other legislation for mediators;
- while immunity for mediators undertaking court-ordered mediations can be justified as part of the continuum of case management strategies aimed at resolving litigation and can be seen as an extension of the judicial process, mediation under the Bill may not be part of the court's case management process.

The recognition that any immunity in society today requires strong justification is understandable. However the very fact that we live in a litigious society which commonly seeks to lay blame on parties seen to be 'responsible' for another's ills might be said to support the view that persons undertaking a mediation role in the highly-charged atmosphere of a family breakdown ought to be protected from allegations of culpability if negotiated agreements fall apart.

It is true that there is no general immunity for mediators in Australia.

It is also true that there is no common requirement for mediation to be undertaken prior to the commencement of litigation. However there are many statutes in all States and Territories that do grant immunity to mediators and on that basis one might argue that statutory immunity is the norm generally rather than the exception.<sup>9</sup>

An important change to the *Family Law Act 1975* contained in the Bill is the insertion of Subdiv E to Pt VII. The

person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

- a certificate to the effect that the person attended family dispute resolution with the practitioner and

Oddly, the logic for those immunity provisions, namely that in its absence people unhappy with a court's decision could endeavour to attack the foundations of that decision by challenging the family consultants<sup>5</sup> or that an arbitrator requires immunity to preserve the integrity of any determination and to ensure that the arbitrator is able to make determinations independently on the basis of unbiased opinions without apprehension of personal consequences, is not adopted for the protection of family dispute resolution practitioners.

object of the provisions is to ensure that everyone in dispute about matters which may be dealt with by a Pt VII order<sup>10</sup> makes a genuine effort to resolve the dispute *before* any application is initiated. From the commencement in force of the Bill until 30 June 2007 the requirements for dispute resolution must be complied with before an application is made for a parenting order in any court.<sup>11</sup> From 1 July 2007 no court will be able to hear an application for a Pt VII order in relation to a child (save in specified exceptional circumstances) unless the applicant files a certificate of a family dispute resolution practitioner under s 60I(8). These requirements will mean that unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner no application can be commenced in the court. The certificate can be one of three types:

- a certificate to the effect that the

the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

- a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues.

In such circumstances it cannot be easily argued that the activities of family dispute resolution practitioners under the proposed amendments are not part and parcel of 'the continuum of case management strategies aimed at resolving litigation'. The only substantive difference is that the 'mediation' that precedes the initiation of an application



in the Family Court or the Federal Magistrates Court will have been undertaken pursuant to a statutory requirement, whereas a mediation undertaken in other circumstances is pursuant to an order of the relevant court or tribunal made after proceedings have commenced. In neither case could it be said that the mediation is entirely voluntary and both types of mediation could be the subject of challenge at a later date by a disappointed litigant.

In any event the power to order

practitioner agreeing to contractual immunity in favour of the mediator? What if he or she refuses to sign such an agreement? How can a certificate be given<sup>14</sup> which allows the intended applicant to file any Pt VII application? The refusal to enter into an agreement granting contractual immunity to the family dispute resolution practitioner before the mediation process can commence does not appear, on its face, to constitute a refusal to attend.

For these reasons the important role

The Bill has now been passed by the Senate and is awaiting final approval from the House of Representatives in a form which leaves family dispute resolution practitioners open to actions for negligence or other civil suit unless they conclude an agreement with the parties prior to undertaking their mediation role which grants them contractual immunity.

mediation once proceedings have been commenced is also included in the provisions. The Bill amends the *Family Law Act 1975* to allow the court to order parties to attend family dispute resolution<sup>12</sup> and yet even in this situation the family dispute resolution practitioner is not granted statutory immunity, although under the nearest equivalent activities under the existing law such immunity is provided.<sup>13</sup>

The Bill has now been passed by the Senate and is awaiting final approval from the House of Representatives in a form which leaves family dispute resolution practitioners open to actions for negligence or other civil suit unless they conclude an agreement with the parties prior to undertaking their mediation role which grants them contractual immunity. Given that mediation is intended to be a pre-requisite to initiating a Pt VII application all applicants will need to approach a family dispute resolution practitioner to undertake a mediation. The opposing party may be unrepresented. Will such a party lightly enter into a contractual arrangement with the family dispute resolution

of family dispute resolution practitioners should be recognised and granted the statutory immunity equivalent to that possessed by a judge of the Family Court. It is in no one's interest for disappointed couples to take out their frustrations on mediators who are doing their best to assist in resolving disputes without resorting to contested court hearings.

The outcome, in my view, is unfortunate. It is inevitable that disappointed parties in the highly stressed environment of a family breakdown, if they have entered into an agreement under the auspices of a family dispute resolution practitioner which they later regret, will seek to overturn the agreement. In such circumstances they are likely to seek relief against their own solicitors, counsel and the mediator for allegedly coercing them into the agreement. It may be a good defense for the family dispute resolution practitioner to show that the mediation was conducted according to the highest standards of mediation practice. But this point will only be reached after lengthy litigation destroying the confidentiality of the mediation process. With respect



to Robyn Carroll, whether such actions prove successful is not the issue. They will be costly, time-consuming and emotionally draining for all parties, including the family dispute resolution practitioner. It is to be hoped that on reflection the Federal Government will legislate for statutory immunity to cover family dispute resolution practitioners. ●

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## Endnotes

1. The Bill is variously referred to in Government publications as 2005 or 2006. A copy of the Bill when introduced for its first reading in December 2005 is available at [www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/F082E0E36A9F193ECA2570D20010F2ED?OpenDocument&VIEWCAT=item&COUNT=999&START=1](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/F082E0E36A9F193ECA2570D20010F2ED?OpenDocument&VIEWCAT=item&COUNT=999&START=1). A copy of the original Explanatory Memorandum is at [www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/F082E0E36A9F193ECA2570D20010F2ED?OpenDocume](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/F082E0E36A9F193ECA2570D20010F2ED?OpenDocume)

[nt&VIEWCAT=attachment&COUNT=999&START=1](#). The Revised Explanatory Memorandum and the Supplementary Explanatory Memorandum are available from <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=139>.

2. The Bill does not use the term 'mediator' or 'mediation'. A new definition of 'family dispute resolution practitioner' replaces 'mediator'.

3. See s 11D to be inserted by Sch 4 cl 36 of the Bill.

4. See s 10P to be inserted by Sch 4 cl 36 of the Bill.

5. Set out in [186] of the Revised Explanatory Memorandum to the Bill.

6. Set out in [170] of the Revised Explanatory Memorandum to the Bill.

7. Section 10M.

8. 15 November 2005.

9. Some of the many current statutory immunity provisions include: *Family Law Act 1975* (Cth) s 19M; *Federal Court of Australia Act 1976* (Cth) s 53C; *Administrative Appeals Tribunal Act 1975* (Cth) s 60; *Federal Magistrates' Court Act* (Cth) s 34; *Mediation Act 1997* (ACT) s 12; *Administrative Appeals Tribunal Act 1989* (ACT) s 51; *Civil Procedure*

*Act 2005* (NSW) s 33; *Land and Resources Tribunal Act 1999* (Qld) s 74; *Magistrates' Court Act 1921* (Qld) s 40; *Supreme Court of Queensland Act 1991* (Qld) s 113; *Supreme Court Act 1935* (SA) s 65; *District Court Act 1991* (SA) s 32; *Domestic Building Contracts and Tribunal Act 1995* (Vic) s 72; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 143; *Magistrates' Court Act 1989* (Vic) s 108A; *Supreme Court Act 1935* (WA) s 70.

10. An order under Pt VII of the *Family Law Act* is one intended 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: see *Family Law Act 1975* s 60B.

11. See s 60I(2), (3) and (4).

12. Schedule 4 cl 36 of the Bill; inserts new Pts II and III, including relevantly a new s 13C, into the *Family Law Act 1975*.

13. Section 19M of the *Family Law Act 1975*.

14. See note 12 above.

## developments in ADR

- The **Family Law Council** has issued draft **Best Practice Guidelines for Collaborative Family Law Practice**. The Guidelines are designed to encourage the practice of collaborative law as the principal method of practice by family lawyers. The Guidelines can be downloaded from the council's website at [www.law.gov.au/flc](http://www.law.gov.au/flc) or hard copies can be requested from the Secretariat by phoning (02) 6234 4829.
- There are a number of useful articles on various aspects of collaborative law as well as guidelines for collaborative law available to view for free from the **Mediate.com** website at [www.mediate.com/articles/mainnext.cfm](http://www.mediate.com/articles/mainnext.cfm).
- The **National Institute for Advanced Conflict Resolution** ([www.niacr.org](http://www.niacr.org)) has announced the winners of its first **Annual Mediation Blog Roundup**, naming their top five mediation blogs. Winners were Online Guide to Mediation (<http://mediationblog.blogspot.com>); Mediator Blah...Blah... (<http://mediatorblahblah.blogspot.com>); Mediator Tech (<http://mediatortech.com>); Mediation Mindset (<http://mediationmindset.blogspot.com>); and

Florida Mediator (<http://floridamediator.blogspot.com>).

- **European Union** finance ministers have announced that they would like new mediation processes developed and implemented by European securities regulators by the end of the year in an attempt to make enforcement of securities regulations more uniform within the EU. This has become increasingly important to resolve day-to-day supervisory disputes that result from conflicting interpretations and overlapping regulations that have increased with the growth of international trade and mergers within the EU.
- **CEDR** and the **China Council for the Promotion of International Trade** have formed the **UK-China Mediation Centre in Beijing** and London. The aim of the centre is to mediate disputes between Chinese and European business in an attempt to prevent arbitration or litigation.
- Keith Seat's **Mediation News** at Mediate.com offers a frequently updated and diverse list of various international developments in ADR, particularly in the United States.
- A useful article entitled '**The most serious errors made by negotiators: Twenty-five to consider**' by James L Greenstone is available on **The Negotiator Magazine** website at [www.negotiormagazine.com](http://www.negotiormagazine.com). It lists common mistakes by mediators and some suggestions on how to remedy them.



## ADR diary

- **The Institute for the Study of Conflict Transformation** is holding **Purpose drives practice: an international conference on transformative mediation** in St Paul, Minnesota. Pre-conference workshops and training will be held on 15–16 September with the main conference held on 17–18 September. For all conference information visit <http://transformativemediation.org>.
- **ACDC** is holding a one-day course aimed at those who handle complaints in an organisation, entitled **Complaint handling — a complaint is a gift**. The course is being held in Sydney on 8 August. A one-day **Conflict resolution-dispute avoidance certificate** course is being held in Sydney on 26 July and 6 September. **ACDC** is also conducting 4-day **Mediation-conciliation accreditation — skills, techniques and practice** courses in Sydney on 1–4 August and 12–15 September and Melbourne from 15–18 August. Optional Accreditation days will be held in Sydney 24 July, 9 August, 22 August and 22 September. For more information on ACDC courses see [www.acdcltd.com.au](http://www.acdcltd.com.au).
- **The Australian Centre for Peace and Conflict Studies** will be holding a **two-day Advanced Mediation Workshop** from 20–21 October and **four-day Basic Mediation Workshops** from 5–8 October and 7–10 December. For further information, visit [www.uq.edu.au/acpacs](http://www.uq.edu.au/acpacs).
- The **Bond University Dispute Resolution Centre** in conjunction with the **Leo Cussen Institute** is holding a 4-day **Basic mediation course** on 12–15 October in Melbourne. For more information, phone (03) 9602 3111 or email [lpd@leocussen.vic.edu.au](mailto:lpd@leocussen.vic.edu.au).
- The **BUDRC** will also be conducting independent **Basic mediation courses** (27–30 July, 30 November–3 December on the Gold Coast) and **Advanced mediation courses** (in Noosa on 21–24 September). The basic courses also have a foundation family mediation stream, run in conjunction with the Australian Institute of Family Law Arbitrators and Mediators. For further information email [drc@bond.edu.au](mailto:drc@bond.edu.au) or visit [www.bond.edu.au/law/centres](http://www.bond.edu.au/law/centres).
- **LEADR** is holding several 4-day **Introduction to mediation** workshops around the country: Brisbane from 18–21 October; Sydney from 23–26 August and 8–11 November; Canberra from 16–19 August; Adelaide from 6–9 September; Perth from 4–7 October; and Melbourne from 11–14 October. For registration forms and more information, visit [www.leadr.com.au/training.html](http://www.leadr.com.au/training.html).
- **MATA** is holding their **International advanced mediator training course** at Charingworth Manor, Gloucestershire, UK on 9–15 September 2006. The **7-day residential course** is designed to develop skills of experienced commercial mediators. Numbers are limited to 12 delegates. For more information and booking details, visit [www.mata.org.uk/](http://www.mata.org.uk/).
- The **Advanced course** for the **Professional certificate in arbitration** is being offered by the **Institute of Arbitrators and Mediators Australia** and the **University of Adelaide** from 15–16 September. For further information phone (08) 8303 4777 or visit [www.adelaide.edu.au/arbitration/course](http://www.adelaide.edu.au/arbitration/course).
- **The Trillium Group** is conducting 4-day **Negotiation and mediation workshops** in Sydney from 17–20 September and in Melbourne from 24–27 October. For further information visit [www.thetrilliumgroup.com.au](http://www.thetrilliumgroup.com.au) or phone (02) 9036 0333 or 1800 636869 toll free.

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