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An Imperfect Protection: Attitudes of Family Dispute Resolution Practitioners to Confidentiality

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Keywords

Family consultants, children, FDR, family violence

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JOE HARMAN*

Abstract

The utility of confidentiality and inadmissibility of that communicated orally or in writing during Family Dispute Resolution ('FDR') has recently been questioned. A tension exists between the confidentiality of dispute resolution processes and the desire of Courts, especially with increasing focus upon addressing abuse and family violence, to have all available evidence accessible. This article introduces and analyses data obtained from an extensive 2014/15 survey of practicing Family Dispute Resolution Practitioners ('FDRPs') from private, government and community based practice regarding their attitudes to confidentiality and its importance in Family Dispute Resolution. Discourse regarding the utility of confidentiality has pointed to the asserted absence of empirical research into the attitudes of FDRPs regarding the importance of confidentiality. This survey was undertaken to contribute to the discourse regarding confidentiality in FDR and so as to ensure that the views of FDRPs were ascertained and heard in such discourses. Ultimately, the attitudes expressed by FDRPs reflect the importance of confidentiality to the process of FDR and lend significant support to a continuation of the 'imperfect protections' offered by the present Family Law Act 1975 (Cth) provisions regarding confidentiality and inadmissibility.

I Introduction

Noble Foster and Prentice opine that 'as mediation has come into its own, courts and mediators appear to have reached consensus regarding the

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importance of confidentiality in mediation'.¹ Recent dialogue in the Australian context casts serious doubt upon this assertion.² Calls for the 'paring back'³ of mediation confidentiality⁴ are motivated principally, and

¹ T Noble Foster and Selden Prentice, 'The Promise of Confidentiality in Mediation: Practitioners' Perceptions' (2009) 1 *Journal of Dispute Resolution* 163, 172. Federal Parliament would certainly appear to have embraced the importance of confidentiality in mediation, having expressly adopted that proposition – see, eg Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 89:

Recognising the importance of confidentiality to the success of family dispute resolution, subsection 10H(1) provides that a family dispute resolution must not disclose a communication made in family dispute resolution unless the disclosure is required or authorised under this section.

² This is so at least as regards the practice of mediation (or, more accurately and as defined in the *Family Law Act 1975* (Cth) ('FLA'), Family Dispute Resolution) in the family law jurisdiction. Discourse questioning the validity and importance of mediation confidentiality is less apparent in other areas of mediation practice such as commercial mediation. The reasons for this are largely beyond the scope of this article. However, contributing factors might include differentiation between relational and transactional disputes, the predominant need to protect which arises in parenting proceedings (see *FLA* s 60CC(2A)) and differences in case management and judicial personality/activism in different jurisdictions.

³ Calls for reform have come from various quarters including, for example: Tom Altobelli and Diana Bryant, 'Has Confidentiality in Family Dispute Resolution Reached its Use By Date?' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 195; Richard Chisholm, 'Information-Sharing and Confidentiality: Issues In Family Law and Child Protection Law' (Paper presented at 'Seen and Heard: Children and the Courts': National Judicial College of Australia and the ANU College of Law Conference, Canberra, 7–8 February 2015) <<https://njca.com.au/wp-content/uploads/2013/05/6-Chisholm-R-information-sharing-final.pdf>>; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010); Family Law Council of Australia, 'Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report, 30 June 2016); Family Law Council of Australia, 'Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Final Report, 30 June 2016) <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilPublishedReports.aspx>>; Carolyn Jones, 'Sense And Sensitivity: Family Law, Family Violence, and Confidentiality' (Report, Women's Legal Service of NSW, May 2016).

⁴ Whilst the terms confidentiality, admissibility and privilege are all used in literature and jurisprudence, I propose to refer to 'mediation confidentiality' as a generic term throughout this article. Confidentiality and inadmissibility have important differences as will be discussed in Part II. Confidentiality, by and large, imposes obligations upon FDRPs separate and distinct from the parties to mediation and any Court process. Inadmissibility relates to the evidential use to which information might be put by the parties. For an excellent discussion of the provisions of the FLA relating to both confidentiality and inadmissibility see Richard Chisholm, 'Confidentiality and Information Sharing in Family Law Dispute Resolution: Aspects of Current Law, Policies and Options' (Paper presented at the 4th FRSA National Conference, Gold Coast, 8–10 November 2011) 6; and Altobelli and Bryant, above n 3, 198–200. I have chosen not to refer to the confidentiality and inadmissibility provisions collectively as a 'privilege' as a category of 'mediation privilege' has not been recognised by Australian law (although the related category of 'without prejudice communication privilege', from which mediation confidentiality has developed, has been recognised and is codified by the *Evidence Act 1995* (Cth) s 131.

explicitly, by a desire to better address family violence⁵ in parenting cases.⁶

Dialogue regarding the scope and utility of mediation confidentiality can be seen as a continuum of well-identified tensions between, on the one hand, public interest in the proper administration of justice (being to ensure that the welfare of children is properly investigated and protected with all relevant information before Courts)⁷ and, on the other, parties being free to engage in ‘without prejudice’ discussions and resolve their disputes privately and without Court intervention.⁸ This tension has generally been resolved in favour of proper enquiry as to protection from harm overriding any privilege which either parent may possess.⁹

This article introduces and analyses data obtained from an extensive 2014/15 survey of practicing FDRPs regarding their attitudes to confidentiality in FDR. This article provides only a brief summary and discussion of the survey responses. Emphasis is particularly given to exploring the attitudes of FDRPs regarding confidentiality and family violence.

Part II will briefly discuss the legislative framework of confidentiality and admissibility referable to FDR. Part III will explain the methodology of the survey administered to ascertain the views of FDRPs and forming the basis of the discussion of FDRP attitudes. Part IV of the article will canvass the frequency with which participants in FDR raise concerns as to

⁵ The second reading speech for the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) of then Attorney-General Ruddock sought to balance an expressed desire to: change the culture of family breakdown from litigation to cooperation ... and ... [t]o promote agreements outside the court system, [by] requir[ing] people to attend family dispute resolution and make a genuine effort to resolve their dispute before applying for a parenting order...

against a realistic and pragmatic recognition that cases involving family violence and abuse might be better addressed by Courts. The requirement to attend FDR does not apply where there is family violence or abuse: see Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 10 (Philip Ruddock, Attorney-General).

⁶ Like Altobelli and Bryant, the author is a Judicial Officer with an inherent interest in ensuring that decisions made in parenting cases, and especially those involving issues of family violence and abuse, are protective of litigants and their children and based upon a consideration of the best evidence available. The present focus upon the desire to better address and respond to allegations of family violence has also, no doubt, contributed to the discourse regarding confidentiality arising in the family law context more so than in other areas. Additionally, the legislative requirement or compulsion to attend FDR prior to commencing proceedings might be seen as a far broader prescription than that provided by the *Civil Dispute Resolution Act 2011* (Cth) or the *Civil Procedure Act 2005* (NSW) as it creates an expectation that each parenting matter will, prior to the case coming before the Court, involve attendance at FDR or, at least, assessment of suitability for FDR. This expectation is submitted to be erroneous as a majority of parenting cases are commenced without any attempt made to attend FDR nor any assessment of suitability (see, eg, Joe Harman, ‘Should Mediation be the First Step in all Family Law Act Proceedings?’ (2016) 27(1) *Australasian Dispute Resolution Journal* 17).

⁷ See, eg, *Benson v Hughes* (1994) 17 Fam LR 761, 763 (Chisholm J) citing *Baker v Campbell* (1983) 153 CLR 52, 66 (Gibbs CJ).

⁸ See, eg, *Cutts v Head* [1984] Ch 290.

⁹ *Re Bell; Ex parte Lees* (1980) 146 CLR 141, 146–7 (Gibbs J).

confidentiality. Part V of the article will outline and discuss the attitudes of FDRPs towards mediation confidentiality. Finally, Part IV will discuss the findings of the FDRP survey with specific reference to family violence.

II Legislative Framework of Confidentiality and Admissibility as Regards FDRPs and Family Consultants

The primary purpose of this article is to discuss the attitudes expressed by FDRPs regarding confidentiality and admissibility rather than to undertake a detailed analysis of the legislative framework applicable to FDR.¹⁰ However, it is important, in seeking to understand and contextualise the attitudes of FDRPs, to understand roles of FDRPs and Family Consultants ('FCs'), and the legislative protections which presently apply to the work undertaken by each. Further, a brief comparison of the different roles of FDRPs and FCs and the differences that apply as regards confidentiality and admissibility of communications within the processes over which each presides may be instructive in further contextualising the attitudes towards confidentiality and admissibility expressed by each group of professionals.

The terms FDR and FDRP are each defined by the *Family Law Act 1975* (Cth) ('FLA'). FLA s 10F defines FDR as 'a process (other than a judicial process) ... in which a FDRP' independent of all the parties involved in the process 'helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other'. By this definition, FDR can be seen to be fundamentally a process of settlement negotiation facilitated by a neutral third party (the FDRP).¹¹ FDR can occur prior to, during, after or in the absence of any proceedings before a court.

An FC is an employee of the court and their engagement with parties is in connection with proceedings before a court. FLA s 11A provides that the role of an FC is to assist and advise people involved in court proceedings, to assist and advise courts,¹² and to give evidence. Whilst the role also includes 'helping people involved in the proceedings to resolve disputes'

¹⁰ For recent discussion of the confidentiality and admissibility provisions relating to FDR and family counselling see Chisholm, 'Confidentiality and Information Sharing in Family Law Dispute Resolution: Aspects of Current Law, Policies and Options', above n 4; Altobelli and Bryant, above n 3; Joe Harman, 'In Defence of the 2006 Amendments to the Family Law Act' (2011) 1(3) *Family Law Review* 151; Donna Cooper, 'Inconsistencies in and the Inadequacies of the Family Counselling and FDR Confidentiality and Admissibility Provisions: The Need for Reform' (2014) 4(4) *Family Law Review* 213; Elizabeth Mathew, 'Concerns about the Limits of Confidentiality in FDR' (2011) 17(3) *Journal of Family Studies* 213.

¹¹ Whilst this definition of FDR has many similarities with commonly used definitions of mediation it should be noted that FDR is the terminology used within the FLA rather than mediation and that the term mediation is not used at all in the FLA. FDR adopts and incorporates many aspects of facilitative mediation and, in practice, there is unlikely to be any significantly observable difference between the two. However, the definition of FDR permits and may be envisioned as a different process to mediation.

¹² This advice may include advice about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services external to the Court to which parties might be referred.

the role of the FC is inherently forensic in that all that is done by an FC, including in helping parties resolve disputes, is reportable and admissible.

FLA s 10H prohibits an FDRP from disclosing ‘a communication made to the practitioner while the practitioner is conducting [FDR],¹³ unless the disclosure is required or authorised by’ the section. A number of exceptions to this duty of disclosure are then set out comprising:

- a) Disclosure with the consent of communicator/s (s 10H(3));
- b) When the FDRP reasonably believes that the disclosure is necessary to:
 - i) Protect a child from the risk of harm (whether physical or psychological) (s 10H(4)(a));
 - ii) Prevent or lessen ‘a serious and imminent threat to the life or health of a person’ (s 10H(4)(b));
 - iii) Report the commission or preventing the likely commission of an offence involving violence or a threat of violence to a person (s 10H(4)(c));
 - iv) Prevent or lessen a serious and imminent threat to property (s 10H(4)(d));
 - v) Report or prevent the commission of intentional damage to property or a threat of damage to property (s 10H(4)(e));
 - vi) Assist an Independent Children’s Lawyer representing the interests of a child in parenting proceedings (s 10H(4)(f));
- c) The provision of information for the purpose of research relevant to families (s 10H(5));
- d) To issue a s 60I certificate (s 10H(6)).

Further mandatory and permissive exceptions¹⁴ to the maintenance of confidentiality by an FDRP are created by *FLA* s 67ZA which requires that an FDRP who has ‘reasonable grounds for suspecting that a child has been abused or is at risk of being abused’¹⁵ must report such suspicions and the

¹³ As is implicit from the *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) reg 25 (‘*FL(FDRP) Reg*’), an FDRP does not commence conducting FDR until an assessment of suitability has been conducted and it has been decided that FDR is appropriate: *Rastall v Ball* (2010) 44 Fam LR 256, 263 (Reithmuller FM); Harman, ‘Should Mediation be the First Step in all Family Law Act Proceedings?’, above n 6.

¹⁴ Permissive exceptions to confidentiality allow disclosure of otherwise confidential information at the discretion of the FDRP and would not allow an FDRP to be compelled to do so: see *UnitingCare-Unifam Counselling & Mediation v Harkiss* (2011) 46 Fam LR 12.

¹⁵ For the purpose of this duty *abuse* is defined in *FLA* s 4 as:
 an assault, including a sexual assault, of [a] child ... [a] person involving [a] child in a sexual activity ... causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence ... or ... serious neglect of [a] child.

bases for such suspicions to a Child Welfare Agency and which also permits reports by an FDRP who has ‘reasonable grounds for suspecting that ... a child has been ill-treated¹⁶ or is at risk of being ill-treated ... or ... has been exposed or subjected or is at risk of being exposed or subjected, to behaviour which psychologically harms the child’.¹⁷

The duties of confidentiality created by *FLA* s 10H attach to and bind FDRPs rather than the parties. As such, parties to FDR may permissively make use of information disclosed during FDR¹⁸ subject to the legislative restrictions upon the admissibility of such evidence imposed by *FLA* s 10J which provides that evidence of ‘anything said, or any admission made, by or in the company of ... a[n FDRP] conducting [FDR] ... is not admissible ... in any court’.¹⁹ This prohibition upon admissibility is subject to only two exceptions, namely, ‘an admission by an adult that indicates that a child ... has been abused or is at risk of abuse ... or ... a disclosure by a child ... that indicates that the child has been abused or is at risk of abuse ... unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources’.²⁰

The distinction between confidentiality and inadmissibility becomes important as whilst FDRPs are, in limited circumstances, authorised to disclose otherwise confidential information, that which is disclosed may still be inadmissible in proceedings. Whilst an FDRP must disclose certain matters and may disclose a range of matters, only admissions or disclosures of abuse are admissible. Notwithstanding the importance of this distinction between the practical effect and operation of the confidentiality and inadmissibility provisions the two concepts shall be referred to collectively

In turn ‘family violence’ is defined by *FLA* s 4AB. The term ‘neglect’ is not defined within the *FLA* and has its common English language meaning.

¹⁶ The term ‘ill-treated’ is not defined within the *FLA* and would appear to require and allow a wholly subjective exercise of judgement by an FDRP.

¹⁷ Further, mandatory exceptions might also be created by state child welfare mandatory reporting obligations. The bases and scope of such obligations are eruditely summarised in Joanne Commerford, ‘Mandatory Reporting of Child Abuse and Neglect’ (Resource Sheet, Australian Institute of Family Studies, May 2016) <<https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>>.

¹⁸ For a discussion of this area see *AWA Ltd v Daniels* (Unreported, Supreme Court of New South Wales, Rolfe J, 18 March 1992) 9 quoting with approval *Field v Commissioner of Railways for New South Wales* (1957) 99 CLR 285, 291–2 (Dixon CJ, Webb, Kitto and Taylor JJ) and the erudite discussion of those principles in Justice P A Bergin, ‘The Global Trend in Mediation; Confidentiality; And Mediation in Complex Commercial Disputes: An Australian Perspective’ (Speech delivered at the Mediation Conference, Hong Kong, 20 March 2014) 12 [26] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Bergin_20140320.pdf>.

¹⁹ Whilst this provision purports to apply to any court whatsoever (and not just courts hearing *FLA* proceedings) this application is somewhat limited by decisions such as *R v Baden-Clay* [2013] QSC 351 (19 December 2013); *Anglicare WA v Department of Family and Children’s Services* (2000) 26 Fam LR 218; and *R v Liddy (No 2)* (2001) 79 SASR 401.

²⁰ In addition to the specific protections against admissibility created by the *FLA* provisions, the *Evidence Act 1995* (Cth) s 31 may also be relevant to excluding evidence of without prejudice settlement negotiations. This provision operates in tandem with the more specific *FLA* provisions regarding inadmissibility.

as ‘mediation confidentiality’ for both ease of reference and to ensure consistency with other literature discussed within this article.

In contradistinction to the work of FDRPs, *FLA* s 11C provides, with respect to FCs, that ‘evidence of anything said, or any admission made, by or in the company of ... a[n FC] ... is admissible’. The provision also notes that ‘communications with [FCs] are not confidential’.

III Outline and Methodology

The primary research undertaken for this article involved replicating the Family Consultant Survey (‘FCS’), the subject of Altobelli and Bryant’s 2012 article ‘Has Confidentiality in Family Dispute Resolution Reached its Use by Date?’.²¹ That survey had sought to ascertain the views of FCs employed by the Family and Federal Circuit Courts²² regarding confidentiality. The research upon which this article is based replicated the questions of the FCS, but asked those questions of FDRPs.²³ The questionnaire that was used in the FCS was modified to replace the term ‘Family Consultant’ with ‘Family Dispute Resolution Practitioner’, and to replace the phrase ‘section 11F Conference’²⁴ with ‘Family Dispute Resolution’. The questions were not otherwise modified save to omit those questions which had sought to elicit the concerns expressed by litigants regarding a lack of confidentiality²⁵ or which were clearly inapplicable to

²¹ See the responses to the FCS in Altobelli and Bryant’s article of the same name presented to the Seen and Heard: Children and the Courts conference: Tom Altobelli and Diana Bryant, ‘Has Confidentiality in Family Dispute Resolution Reached its Use By Date?’ (Paper presented at Seen and Heard: Children and the Courts, Canberra, 7–8 February 2015) <<https://njca.com.au/wp-content/uploads/2013/05/6-AltobelliJ-Confidentiality-in-Family-Dispute-Resolution-1.pdf>>.

²² *FLA* s 11C(2) infers, analogous to the obligations imposed upon FDRPs by *FL(FDRP) Reg* reg 28, that parties must be specifically advised of the absence of confidentiality (akin to being ‘Mirandarised’) stating that the absence of confidentiality ‘does not apply to a thing said or an admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1).’

²³ The tasks undertaken by FCs and FDRPs are inherently different. This has not always been as markedly so. Prior to the 2006 amendments to the *FLA*, FCs (who have experienced a number of changes in title as well as role) had practiced in both a confidential and non-confidential or reportable setting. Since the 2006 amendments all work conducted by FCs is forensic and reportable.

²⁴ Section 11F conferences are court-ordered interventions whereby both parties are interviewed by an FC (an employee of the court). Following interviews with the parties the FC provides advice to the court (and to the parties, who are provided with a copy of any written memo or who are present during any oral testimony) as to the issues in dispute between the parties and appropriate services, especially FDR or Family Counselling services, from which parties might benefit. The FC process is reportable. In contradistinction to the inadmissibility provisions relating to FDRPs and family counsellors, communication with FCs is admissible in Court proceedings (*FLA* s 11C).

²⁵ This was on two bases. Firstly, the views of FDRPs were the primary matter of concern in this research. Secondly, the confidentiality provisions of the *FLA* regarding that communicated during FDR (*FLA* s 10H) was perceived as a barrier to FDRPs responding to such questions. It is accepted that comments and concerns raised with FDRPs by parties would, in all probability, have informed the views formed and expressed by FDRPs (together with their training and general FDR experience).

FDRPs.²⁶ This replication was so notwithstanding that some methodological difficulties with the survey were identified.²⁷

The survey administered to FDRPs comprised 6 quantitative questions and 4 connected qualitative responses. The respondents were not surveyed for demographic information such as years of experience, age or gender. Response rates cannot be specifically determined and it is acknowledged that all respondents self-selected by choosing to complete the survey.²⁸

The survey was distributed in 2014/2015 to three different groups of FDRPs, being:

- A group of NSW Legal Aid Commission ('LAC') 'conference chairpersons' ('LAC FDRPs');
- LEADR²⁹ members practising as accredited FDRPs ('Private FDRPs'); and
- FDRPs practicing in federally funded Family Relationship Centres ('FRC FDRPs').

A total of 169 responses were received comprising 21 LAC FDRPs, 40 Private FDRPs and 108 FRC FDRPs.³⁰ The responses are, for reporting

²⁶ Questions 10 and 11 regarding the legislative change introduced by the 2006 amendments to the *FLA* such that the confidentiality which previously attached to certain aspects of the FCs' role and duties was removed. Question 12 as posed to the FCs, regarding perceived attitudinal changes regarding the disclosure of information when confidentiality was removed, is somewhat instructive and will be considered in this article.

²⁷ Methodological issues will be discussed in Part IV. Notwithstanding any perceived methodological difficulty with the questions posed in the FCS the questions have been repeated verbatim so that direct comparison between the respondents of each survey might be made.

²⁸ Invitations to complete the survey were forwarded by LEADR (now Resolution Institute ('RI')) to its membership base. I express my thanks to RI for this assistance. The number of members to whom the request was sent is not known (and only those members who were accredited FDRPs were asked to respond). An invitation was forwarded by post to each Family Relationship Centre (8 not delivered) and the number of FDRPs employed within any centre, let alone across the 57 Centres who received the invitation, is not known. All responses are anonymous and, accordingly, it is not possible to identify individual FDRPs nor the Centre at which they practice.

²⁹ Now RI following the merger of LEADR and IAMA.

³⁰ The LAC FDRP respondents were all from NSW. Private and FRC FDRP respondents were located throughout Australia. The survey was completed by LAC FDRPs while attending a training workshop. Private FDRPs completed an online survey distributed by LEADR. FRC-based FDRPs were provided by post with a hard copy survey as well as a link to an online survey and the respondents completed the survey through either means. Response rates within each group cannot be specifically calculated save for the LAC FDRP group which involved the survey being completed by attendees at a training workshop with approximately 70 attendees (21/70 = 30%). The Private FDRP respondents completed a national online survey forwarded through LEADR (the total number of LEADR members practicing as FDRPs at that time is not known). An invitation to FRC FDRPs was forwarded by post to each of the 65 FRCs. For whatever reason 8 such invitations were returned undelivered. The invitation to FRCs permitted the survey to be completed in hard copy or online and without any form of identification of respondents. Thus, a precise response rate cannot be determined. It should be noted that some FRCs responded organisationally (with one response on behalf of all FDRPs employed at the centre) (4 responses) whilst FDRPs at other FRCs responded individually.

and analysis purposes, grouped by practice modality as well as a group of 'all respondents'. This was done as modalities of practice for the three groups of FDRPs vary substantially. Those employed in FRCs practice a facilitative model whereas LAC FDRPs might be described as practicing a hybrid facilitative/evaluative model. Private FDRPs might practice in a variety of styles including facilitative, evaluative and/or transformative mediation models.³¹

The qualitative responses provided by FDRPs were substantial. In this article the attitudes of FDRPs can only be summarised in a brief and largely collective fashion. However, where there has been divergence in views expressed by FDRPs across different practice areas, attempts will be made to explore and discuss these differences. The views expressed by FDRPs are included largely by reference to 'themes' of discussion rather than by extensive direct quotation.

This article and the research undertaken in its preparation was conceived in response to the call by Altobelli and Bryant 'for more research on the topic of confidentiality'.³² This article is inspired by and responsive to that call and is not conceptualised as reactive. Whilst reference will be made to the Altobelli and Bryant article this is not intended to be a critique or examination of the earlier work. References are intended to identify and facilitate discussion on the same themes and issues and to compare data and findings in an engaged and respectful way.

Finally, whilst the broader term of 'mediation' is adopted,³³ analysis of the dataset is intended to be specific to family law practice. It is important to note that the legislative protections of mediation confidentiality specific to FDR are considered, being those contained within sections 10H and 10J of the *FLA* and the *FL(FDRP) Reg.*

³¹ It is not intended to suggest that any form or modality of mediation has greater value or authenticity than others. All styles and modalities of FDR, as practiced across the survey group, are valid and important, adding value to the suite of services available to the community. The relevance of different modalities to attitudes as expressed will be discussed in due course.

³² Altobelli and Bryant, above n 3, 196 (although the additional comment which followed is not accepted, being the 'call for a reconsideration of the existing dogma that seems to pervade professional and even academic writings and practice about confidentiality in family dispute resolution').

³³ Altobelli and Bryant, *ibid* 195, commenced with the statement '[f]or practical purposes the term "mediation" will be used to describe "Family Dispute Resolution"' and I will adopt the same practice. It is a common practice and broadly adopted across the family law sector. FDR might, to a large extent, be seen as a specific manifestation or subset of mediation practice or skills. The similarity, if not overlap, between the two terms is determined by that shared between them as regards the key elements of mediation rather than by direct conflation of the two.

IV Concerns of FDR Participants about Confidentiality

A Adult Participant Concerns

The first question asked of respondents was: ‘In your role as an FDRP do participants ever express concerns³⁴ about the lack of confidentiality in FDR?’

This question is methodologically problematic. Difficulties arise when the question is put to either FCs and FDRPs. For both groups the question assumes a false ‘choice’ as to confidentiality (and thus there is some difficulty in drawing conclusions from any concerns expressed regarding confidentiality).

In the case of the FCs it must be remembered that since the 2006 amendments to the *FLA* all that is done by an FC is forensic and reportable. Nothing undertaken by an FC is confidential.³⁵ Further, litigants are mandated to attend upon an FC. Attendance is Court ordered rather than voluntary. The only options available to a litigant to keep information ‘confidential’³⁶ are to refuse to attend (in breach of the Court’s order) or to refuse to disclose information (with possible evidential penalties).³⁷ Each litigant is advised by the FC, at the commencement of the process, that confidentiality does not apply to that discussed.³⁸ Thus each participant is effectively ‘mirandarised’.³⁹ In the above circumstances it might be considered extraordinary that a person involved in a Court ordered family consultancy process would express any concern as to an absence of confidentiality.

In contradistinction, an FDRP is required, prior to commencing FDR, to explain that the process is confidential⁴⁰ although with exceptions (as discussed above). In the light of these exemptions FDR confidentiality is a non-complete or ‘imperfect protection’ of confidentiality whereas family consultancy processes contain no exceptions to the absence of confidentiality and thus the absence of confidentiality in that undertaken by FCs is complete or ‘perfect’. FDR is also a voluntary process and parties cannot be compelled by an FDRP to attend⁴¹ whereas parties are Court

³⁴ No definitional guidance is given to the respondents of either survey as to what the term ‘concerns’ might mean. It is a matter for each respondent to self-define. The term might be taken to infer or connote a negative context.

³⁵ See *FLA* s 11C(1).

³⁶ It is acknowledged that in any litigation there is a specific obligation of disclosure and thus the concept of confidentiality might be described as antithetical to litigation save as regards legal professional privilege.

³⁷ Potential penalties include adverse findings of credit and negative evidential inferences being drawn against that party.

³⁸ An obligation upon the FC to advise of the lack of confidentiality arises from *FLA* s 11C(2).

³⁹ ‘Miranda rights’ is a term arising from the 1966 US Supreme Court decision in *Miranda v Arizona*, 384 US 436 (1966), whereby an arrested person has a right to remain silent and is made aware that should they waive their right of silence, anything said may be used in evidence.

⁴⁰ See *FL(FDRP) Regs* regs 28(1)(b)–(c).

⁴¹ Whilst it is possible for the court to order parties to attend upon an FDRP it is not possible for the court to compel that FDR occur. All that the court can compel is attendance for the

ordered or mandated to attend upon a FC.⁴² One might expect a greater level of concern regarding confidentiality from those involved in a voluntary and confidential (FDR) process than those involved in a mandated and non-confidential process (i.e. those who are offered confidentiality may have some apprehension of its breach as opposed to those with no expectation of confidentiality). This expectation was borne out by the data obtained (see Table 1).⁴³

Table 1: Percentage of FDRP respondents who said that participants express concerns about confidentiality and (if so) how frequently

Respondent	Frequency				
	Never	Rarely	Sometimes	Regularly	Always
LAC	57	33	10	0	0
Private	35	38	20	2	5
FRC	33.5	44	20.5	1	1
Total (weighted) FDRPs	36.8	41.2	19.1	1.1	1.8

Altobelli and Bryant reported that 93.9% of FCs identified that parents ‘never’ or ‘rarely’ expressed concern about a lack of confidentiality.⁴⁴ FDRPs reported that 78% of parents ‘never’ or ‘rarely’ expressed concern.⁴⁵ This leaves 22% or approximately one quarter of FDR participants raising concerns ‘sometimes’, ‘regularly’ or ‘always’.

Altobelli and Bryant conclude that the fact that an overwhelming number of FC participants were reported to ‘never’ or ‘rarely’ raise concerns about confidentiality supports the hypothesis that participants are not greatly concerned with confidentiality. However, an alternate hypothesis is that an absence of concern is entirely to be expected in the

assessment of the suitability of FDR and, if assessed as suitable, for the parties to then attend FDR. This arises as the FDRP has an obligation per *FL(FDRP) Regs* reg 25 to assess suitability for FDRP before proceeding to provide FDR. Even when parties have been ordered to attend upon an FDRP and that FDRP has assessed FDR as suitable the FDRP cannot compel attendance. The court can address such failure to attend through an order for costs (see the note to *FLA s 60I(8)*) or adverse findings against a party (especially as to attitude), and the failure to attend might impact the making of parenting orders such as the allocation of parental responsibility or possibly refusal to hear or dismissal of the application of the delinquent party.

⁴² It is not possible for parents to attend upon a FC other than by court order.

⁴³ The inherent shortcoming of each survey is that what is sought and reported are the perceptions of service providers rather than direct views imparted by participants in those processes. The absence of direct, qualitative responses from participants (especially as regards FDRPs) requires that broad assumptions as to the importance that participants place on confidentiality not be drawn.

⁴⁴ Altobelli and Bryant, above n 21, 20.

⁴⁵ This adopts the methodology of the FCS and assumes that *rarely* is considered as validly grouped with *never* as suggesting an absence of concern. This assumption is not accepted as valid. Any concern raised, whether rarely or always, is nonetheless a concern.

case of family consultancy as the process is entirely non-confidential.⁴⁶ Thus, there is no confidentiality to be concerned about. Further, as the process is court-ordered and mandated⁴⁷ it is not a realistic option for participants who are concerned to elect not to participate.⁴⁸ A further and equally plausible hypothesis might be that participants are accepting of the reality explained by the FC (i.e. that there is no confidentiality).⁴⁹

FDRPs report a lower number of participants who ‘never’ or ‘rarely’ raised concerns. This might be partially explained by the existence of the mandatory and permissive exceptions to confidentiality which, at least, generate enquiry (or ‘concern’). The circumstances in which those exceptions might come into play, for example, would be a basis for ‘concerns’ to be raised by participants.

If one were to focus on responses when participants are reported to have raised any concern at all as to confidentiality,⁵⁰ even if concerns are suggested to arise ‘rarely’, then concerns as to confidentiality are raised by 63.2% of FDRPs overall.⁵¹ Similarly, if one focuses on responses by FCs when it is reported that participants have raised any concern at all as to confidentiality, then concerns are reported by a significant minority of FCs, approaching half of all responses (44.9%).⁵² This is so notwithstanding that the family consultancy process is not at all confidential. Thus, a significant minority of participants in family consultancy processes raise concerns even though they have no choice as to participation and are not offered confidentiality.

These responses would suggest that participants in both FDR and family consultancy are concerned with confidentiality and thus raise their

⁴⁶ Further, all family consultancy processes take place in a litigious environment with expansive obligations of frankness and candour of disclosure.

⁴⁷ Consequences (specified as being the possibility that ‘the Court may make any further orders it considers appropriate’) apply if a litigant fails to attend the FC conference as ordered (*FLA* s 11G(2)). In addition, evidential consequences might arise.

⁴⁸ In contradistinction FDR is entirely voluntary. The obligations attached to *FLA* s 60I(7) (to not hear an application) apply to the court and not to litigants. Whilst the note to *FLA* s 60I(8) hints at consequence for failure to attend FDR in the form of a costs order (determined by reference to the type of certificate issued – presumably ‘non-attendance’ certificates being the principle focus) and *FLA* s 60I(9) allows the court to order attendance at FDR (especially if FDR was not attended prior to an application being filed). FDR cannot, in reality, be described as *mandatory*. Rates of actual attendance at FDR prior to filing (17%) confirms the non-mandatory and entirely voluntary nature of FDR: see Harman, ‘Should Mediation be the First Step in all Family Law Act Proceedings?’, above n 6, 39.

⁴⁹ In addition, the court process imposes an obligation of full and frank disclosure completely antithetical to any concept of confidentiality at least in dealings with the court.

⁵⁰ This being cases where FDRPs report that concerns are raised with any frequency or at all including cases when concerns are raised ‘rarely’, ‘sometimes’, ‘regularly’ or ‘always’.

⁵¹ 44.9% of FCs identify that concerns are raised ‘sometimes’, ‘regularly’, ‘often’ or ‘always’. That concerns as to confidentiality are raised in nearly one half of cases where there is no confidentiality at all lends some support to the interpretation that litigants are concerned with confidentiality even when it is not offered or applicable.

⁵² Altobelli and Bryant, above n 21, 22.

concerns and confidentiality or seek clarification or reassurance as to confidentiality and, in the case of FDR, the exceptions to confidentiality.⁵³

B Does the Model of FDR Make a Difference to Concerns?

Differences in FDRP reports of participant concerns with respect to confidentiality are apparent as between entirely forensic (FC) and primarily confidential (FDR) processes. To explore this further the perceptions and responses of LAC FDRPs, as compared with other FDRPs, is instructive.

As noted above there are important differences between the modalities of practice of the three groups of FDRPs. In particular, the Legal Aid Conferencing model ('LAC model') of FDR has significant practical differences to other modalities of FDR. The LAC model involves exceptions to confidentiality beyond those relating to 'mandatory reporting' or FLA exceptions.⁵⁴ In the LAC model legally aided parties are 'compelled' to attend FDR⁵⁵ rather than it being a truly voluntary process.⁵⁶ All participants are required to execute a written 'confidentiality agreement' authorising the FDRP to release certain information to the LAC.⁵⁷ The information disclosed by the FDRP is then used for a determinative purpose, namely, as the basis of funding decisions⁵⁸ for legally aided parties. Accordingly, in the LAC model, all participants are

⁵³ Assuming, for one moment, that this is the basis of the *concerns* as reported by FDRPs.

⁵⁴ *FLA* s 10H(2) requires mandatory disclosure 'if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory'. *FLA* s 10H(4) allows non-consensual disclosure of otherwise confidential information for the purpose of:

protecting a child from the risk of harm (whether physical or psychological) ... preventing or lessening a serious and imminent threat to the life or health of a person ... reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person ... preventing or lessening a serious and imminent threat to the property of a person ... reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property ... if a lawyer independently represents a child's interests under an order under section 68L--assisting the lawyer to do so properly.

This is in addition to any State Child Welfare law requiring *mandatory reporting*.

⁵⁵ Compulsion arises from the terms of a grant of Legal Aid. If FDR is assessed as suitable and a party fails or refuses to attend, then termination of funding and representation might occur.

⁵⁶ See Harman, 'Should Mediation be the First Step in all Family Law Act Proceedings?', above n 6, 26, 39, and especially noting that 52% of parenting cases are commenced without any attendance at FDR or even assessment of suitability of FDR (exemptions) and that only 17% of parenting cases are commenced with a 'genuine effort' certificate. These findings are comparable with an Australian Institute of Family Studies' Report, which found that only 44% of parenting cases (6,549/14,826) were commenced with a *FLA* s 60I certificate filed: Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, October 2015) 27.

⁵⁷ The foundation for this release of otherwise confidential information is found in *FLA* s 10H(3): '[a] family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by ... that person'.

⁵⁸ The FDRP does not determine a party's funding. The report of the FDRP is taken into account in that decision being made by an authorised grants officer. Thus, the provision of the report to a person who will then make a determination is directly comparable to that which follows a family consultancy process.

clear from the outset that confidentiality will be ‘waived’ to allow the FDRP to make a report to the relevant funding body disclosing that discussed at FDR.⁵⁹ In this way the LAC model of FDR has much in common with the forensic FC process wherein a report is made by the FC with that report to be used in a subsequent determination.

The proportion of FDRPs who report that participants ‘rarely, sometimes, regularly or always’ raise concerns as to confidentiality is relatively consistent as regards private FDRPs (65%) and FRC FDRPs (66.5%).⁶⁰ For LAC FDRPs this falls to 43%. Further, if one focuses on reports of parties who ‘sometimes, regularly or always’ raise concerns with respect to a lack of confidentiality (as Altobelli and Bryant did) then only 10% of LAC FDRPs, report such concerns as opposed to 27% of Private FDRPs and 22% of FRC FDRPs.⁶¹ It may be that the additional ‘exceptions’ to confidentiality that apply to the LAC model explain this.

Reportage by LAC FDRPs of parties who ‘sometimes, often or regularly’ raise concerns (10%) and parties who ‘rarely’ or ‘never’ raise concerns (90%) is far closer to the rates of such concern reported by FCs (6.1% and 93.9% respectively)⁶². Similarly, the reports of LAC FDRPs and FCs as to concerns ‘never’ being raised is almost identical (57% and 55.1% respectively)⁶³. What might be learnt from these variances and similarities?

One interpretation might be that the greater the move towards non-confidentiality and the removal of expectations of confidentiality (family consultancy processes being entirely reportable and LAC model processes being entirely reportable at least to the extent of release of information to the LAC), the less concern is expressed as to a lack of confidentiality. If parties are engaged in a non-voluntary process⁶⁴ and are clearly advised

⁵⁹ *FLA* s 10H(7) makes clear that a report prepared with the express or implied consent of the parties is inadmissible: ‘[e]vidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure’.

⁶⁰ The average for all FDRPs being 63.2%. The responses of LAC FDRPs are somewhat reduced being 43%. It is this group that is the most interesting as there is some degree of direct comparison between this group and FCs having regard to the relatively mandated nature of attendance at a Legal Aid Conference (at least for the legally aided party who will not likely be further funded if they refuse to attend) and the expanded exceptions to confidentiality (whereby the parties agree to the FDRP providing a report to the LAC as the funding body). The lack or relative lack of confidentiality in both Legal Aid Conferencing and family consultancy processes might provide some explanation for the relative congruence of concerns *never* being raised in the two processes (57% and 55.1% respectively: see Altobelli and Bryant, above n 21, 22).

⁶¹ Conversely, 90% of LAC FDRPs report participants *never* or *rarely* report concerns as opposed to 73% of Private and 78% of FRC FDRPs. 93.9% of FCs reported such concerns: Altobelli and Bryant, above n 21, 22.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Attendance upon an FC is court mandated. Attendance at a LAC conference might also be court mandated. The court has specific power to direct parties to attend FDR (*FLA* s 13C(1)(b)). For parties who are legally aided or have applied for legal aid funding attendance at LAC conferencing is mandated as a term of the legal aid grant and, thus, I have referred to both LAC facilitated FDR and Family Consultancy services as non-voluntary.

that the process is not confidential,⁶⁵ it is plausible that those parties would then not raise concerns as to confidentiality as to do so would be pointless (and all the more so when any refusal to participate might bring potentially adverse consequences for that party)^{66, 67}

Some indication of the potential importance of confidentiality to those who participate in confidential processes such as FDR can also be ascertained from the FCS. The FCs surveyed perceived that in a [previously] confidential setting⁶⁸ parties had willingly revealed information in 95.2% of cases.⁶⁹

This suggested coincidence between confidentiality and willingness to disclose raises a fundamental question as to the utility of removing confidentiality from FDR. If parties are willing to reveal information in confidential processes, then to remove confidentiality would limit the information that parties disclose. This obviates against the utility of interference with confidentiality as:

1. The primary reason advanced for seeking to interfere with mediation confidentiality is a desire by courts to obtain *evidence*. If information is more abundantly disclosed in confidential settings, then this desire would be frustrated by the removal of confidentiality;⁷⁰
2. If the removal of confidentiality impacted upon and limited disclosure or admission of family violence, then parties would potentially be deprived of:
 - a. The opportunity to engage in appropriate dispute resolution (denying agency to victims of violence or exposing those parties to

⁶⁵ In the case of LAC conferencing the process is, as between that to be disclosed to the LAC, effectively non-confidential.

⁶⁶ In the case of Family Consultancy Processes a failure to attend would be a breach of a court order and carry with it potential penalties (by evidential and procedural address if nothing else). In the case of a party failing to attend LAC FDR, a *penalty* might include the termination of funding for a legally aided party or the extension of funding to the aided party if a non-aided party refused to participate.

⁶⁷ An alternate and equally plausible explanation might be that the perception and reportage of those FDRPs used to working with limited or no exceptions to confidentiality (and as regards FCs – no exceptions) is markedly different to those who work with broader expectations of confidentiality such that LAC FDRPs (and FCs) employ subjective interpretation of what constitutes an *expressed* concern with less sensitivity.

⁶⁸ Prior to the 2006 amendments to the *FLA* FCs undertook both confidential and reportable work. It is not possible to ascertain from the question as posed and answered in the FCS whether there is variance in the perceived willingness of parties to disclose information now as opposed to when confidentiality applied (i.e. the FCs were not asked whether they felt parties now failed to provide information when confidentiality did not apply or whether there had been any change). However, it might well be inferred that it is so.

⁶⁹ Taking the categories ‘rarely’, ‘sometimes’, ‘regularly’ and ‘always’ as a cluster: see Altobelli and Bryant, above n 21, 31.

⁷⁰ This would represent the ultimate Hellerian ‘Catch 22’ reflected by Yossarian’s dilemma – if the process is confidential then disclosure will occur and we are deprived of access whereas if the process is not confidential then there will not be disclosure but there will be access, albeit, likely, access to nothing.

- the ‘violence’⁷¹ of an adversarial process) or inappropriately engaging in ‘unsafe’ dispute resolution or arriving at ‘unsafe’ agreements with incomplete or less candid disclosure;⁷²
- b. The opportunity to obtain appropriate support and assistance (aimed at lessening risk and increasing agency);
 - c. An ability to have appropriate investigation of risk arising from permissible and mandated disclosure by FDRPs and potentially further eroding the safety of victims and their children.

C Children’s Concerns About Confidentiality in Child Inclusive FDR

FDRPs were also asked whether child participants in child-inclusive FDR ever expressed concerns regarding a lack of confidentiality. Similar methodological problems arise with this question as with the first question. However, the responses provided are highly important relating, as they do, to concerns expressed by children.⁷³

Of those FDRPs that engage in child inclusive practice⁷⁴ the following is reported as to the frequency with which children raise concerns as to a lack of confidentiality:

⁷¹ The adversarial process involves the court controlling the process with a coercive power and intent. Thus, the adversarial process is coercive and controlling. The definition of family violence is founded in coercion and control. In addition there is violence rort and potentially generated or accentuated by the cost of litigation as discussed, for example, in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 170 (Kirby J) being not only financial costs but also ‘the anxiety, distraction and disruption which litigation causes’ combined with Judge Gray, ‘Inquest into the Death of Luke Geoffrey Batty’ (Finding into Death with Inquest, Coroner’s Court of Victoria, 28 September 2015) 24 [124] <http://www.coronerscourt.vic.gov.au/resources/07cc4038-33f8-4e08-83b5-fd87bd386ccc/lukegeoffreybatty_085514.pdf> that ‘delays such as these ... particularly when combined with other delays within the system, can lead to a risk of escalating problematic behaviours on the part of the perpetrator.

⁷² These concerns are especially highlighted in Family Law Council of Australia, Final Report, above n 3, 143.

⁷³ A child’s perception of confidentiality in a child inclusive process is especially important although further discussion and exploration is beyond the scope of this article and the data collected. Suffice to observe that special care is warranted in protecting a child’s confidence in such an environment so as to avoid damage to their relationships with their parents and others, risks of harm and/or their enmeshment in the conflict.

⁷⁴ Child inclusive practice is intended to refer to models of FDR wherein a person separate to the FDRP meets with the child or children the subject of the dispute between parents to explore and gain an understanding of the child’s experience of the family separation and dispute and, where appropriate, ascertain the child’s views. Feedback is then provided to the parties by this person who might also participate in the FDR session with the parents. For discussion of child focused versus child inclusive practice see Jennifer McIntosh, ‘Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors’ (Report, Australian Family Relationships Clearinghouse, Australian Institute of Family Studies, July 2007) <<https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practic/resource-sheet>>.

Table 2: Percentage of FDRP respondents who said that child participants express concerns about confidentiality and how frequently

Respondent	Frequency				
	Never	Rarely	Sometimes	Regularly	Always
LAC	45.5	36.5	9	9	0
Private	44.5	33.5	5.5	11	5.5
FRC	41.5	36	18	4.5	0
Total (weighted) FDRPs	42.7	35.5	13.9	6.6	1.3

Concerns as to an absence of confidentiality (concerns raised ‘rarely, sometimes, regularly or always’) arise in 57.3% of FDRP responses overall and 81.6% of FC responses.⁷⁵ Importantly, concerns are raised by a majority of children in both samples and at a higher rate in the non-confidential FC process. This would suggest support for the proposition that an absence of confidentiality causes concern for children (and thus the corollary that children value confidentiality). That the majority of children are reported as raising concerns as to confidentiality also raises issues as to children’s participation and the consequences for children if their concerns are well founded and not appropriately addressed

Again, the FCS responses give some weight to a linkage between confidentiality and disclosure of information by children. 90.5%⁷⁶ of FCs believed that children were willing to reveal information when there was confidentiality.⁷⁷ This reportage is very similar to that reported of adults. This would suggest that children are more willing to disclose information when confidentiality applies and that children value confidentiality.

⁷⁵ Altobelli and Bryant, above n 21, 23. This significant difference is perhaps amenable to explanation on the basis that confidentiality does not apply in FC processes and thus children, as non-party participants, might experience a higher anxiety as to a lack of confidentiality when involved in a litigious and non-confidential process than when involved in a largely confidential process such as FDR. Even with that distinction the rate of concern raised by children is high.

⁷⁶ In fact, 95% of FCs (19/20) who answered the question referred to children being ‘sometimes, regularly or always willing to reveal information when there was confidentiality’. One FC did not answer the question.

⁷⁷ Altobelli and Bryant, above n 21, 32.

V The Attitudes and Views of FDRPs

A *Could There be Benefits to a Lack of Confidentiality in FDR?*

Each of the participants was asked ‘Do you think there are or would be benefits to a lack of confidentiality in FDR?’ and ‘Do you think there would be benefits to FDR being admissible?’.⁷⁸ Practitioners who expressed a view that there might be benefits were also asked to provide qualitative responses. Those who rejected any benefit were not asked to provide a qualitative response.⁷⁹

The responses of FDRPs were as follows:

Table 3: Percentage of FDRPs who saw potential benefit in a lack of confidentiality

Respondent	Frequency	
	Yes	No
LAC	24	76
Private	17.5	82.5
FRC	37	63
Total FDRPs	30.8	69.2

Table 4: Percentage of FDRPs who saw benefits in FDR being admissible

Respondent	Frequency	
	Yes	No
LAC	33	67
Private	40	60
FRC	41.5	58.5
Total FDRPs	40.1	59.9

It is important to bear in mind that 69.2% (or a little over two thirds) of FDRPs expressed the view that there were not or would not be benefits to a lack of confidentiality and 59.9% saw no benefit to that communicated in FDR being admissible. 30.8% of FDRPs believed that there were or could be benefits from a lack of confidentiality and 40.1% felt there could be a benefit in admitting that which was communicated in FDR into evidence.

⁷⁸ The two questions are included and considered together at this point as the phrase ‘mediation confidentiality’ has been used to encapsulate both.

⁷⁹ Although some did. These respondents need not be considered for addressing this question although they are relevant to the countervailing proposition regarding the benefits of confidentiality.

Of those FDRPs who saw that there could be a benefit in a lack of confidentiality, 72% of that group believed that this benefit was achieved by the existing exceptions.⁸⁰ Of those FDRPs who saw a potential benefit to admissibility, the vast majority (85%) expressed the view that the present exceptions were adequate.⁸¹

A significant minority of FDRPs were prepared to consider that a benefit might arise from a lack of confidentiality or from admissibility. This might, again, go some way to discounting any suggestion that FDRPs are ‘*dogmatic*’ in their defence of confidentiality. The number of FDRPs prepared to consider potential advantage would suggest a far more nuanced, open minded and ‘balanced’ approach to the issue by FDRPs.

Those who saw benefit in a lack of confidentiality largely fall within three themes:⁸²

1. A desire for better protection of victims of family violence and abuse (89% of respondents);
2. Being able to give reasons for the type of certificate issued (28%);
3. Transparency and the ability to improve FDR practice (e.g. better referrals, co-operative case managements between agencies and practitioners’ training) (25%).

Of those FDRPs who saw a potential benefit to admissibility two broad themes were identified, namely:

1. A concern to ensure the safety of parties and children (92%);
2. A desire to share or better share information regarding risk (73%).

The general sentiment of the FDRPs was perhaps well summarised by an FRC FDRP’s comment: ‘There would be some benefit to being able to alert the court to high risk situations (i.e. concerns re-family violence or child safety)’.

Some pragmatism on the topic, consistent with overall support for the present exceptions, was shown by another FCR FDRP who, whilst agreeing that there might be benefits to admissibility, commented: ‘I can’t see what the benefits might be. Anything that is of interest to the court is generally reportable’.

The overall reality of the views of FDRPs is perhaps best encapsulated in this FDRP’s comment balancing the protection of individuals, the process and FDRPs:

⁸⁰ Similarly, a respondent who did not see benefit in an absence of confidentiality need not be taken to either support or attack the present exceptions to confidentiality (although they might well be inferred to see no merit in an extension of those exemptions). Even amongst those who saw no benefit in a lack of confidentiality there was broad support for the importance of discretionary and mandatory reporting of risk.

⁸¹ Many of the FDRPs who saw the present exceptions as adequate expressed awareness of Chisholm’s comments (see Chisholm, ‘Confidentiality and Information Sharing in Family Law Dispute Resolution: Aspects of Current Law, Policies and Options’, above n 4) and supported removing the prefix ‘imminent’ from the harm-based permissive exception to confidentiality.

⁸² Many FDRPs touched upon a variety of areas and the percentage quantification of the frequency with which issues have been raised thus exceeds 100%.

Only in cases where there would be risk to children or parties and where FDR is deemed inappropriate. This would help decrease the amount of time the clients may need to repeat their story ... However, admissibility needs to be done carefully, preferably without FDRPs needing to attend court.

B Would There be Drawbacks in a Lack of Confidentiality or Admissibility of FDR?

Participants were asked ‘Do you think there would be drawbacks in relation to a lack of confidentiality in FDR?’ and ‘Do you think there would be drawbacks to FDR being admissible?’.⁸³ Practitioners who expressed a view that there might be benefits were also asked to provide qualitative responses.

Table 5: Percentage of FDRPs who saw drawbacks in a lack of mediation confidentiality

Respondent	Frequency	
	Yes	No
LAC	100	0
Private	97.5	2.5
FRC	88	12
Total FDRPs	91.8	8.2

Table 6: Percentage of FDRPs who saw drawbacks in FDR being admissible

Respondent	Frequency	
	Yes	No
LAC	95	5
Private	90	10
FRC	94	6
Total FDRPs	93.2	6.8

91.8% of FDRPs believed that there would be drawbacks from a lack of confidentiality. Similarly, FDRPs overwhelmingly saw drawbacks in the admissibility of FDR (93.2%). These responses, when compared with the willingness of, at least a significant minority of FDRPs, to consider the potential benefits of limiting confidentiality and allowing some admissibility, demonstrates the ability of FDRPs to think outside of doctrinal arguments.

In addressing the drawbacks of limiting confidentiality, a number of substantial themes were raised including:⁸⁴

⁸³ The two questions are included and considered together at this point as the phrase ‘mediation confidentiality’ has been used to encapsulate both.

⁸⁴ The themes identified by FDRPs largely correspond with the matters raised and discussed by the Family Law Council of Australia: see above n 3.

- Participants in FDR would be less likely to be frank and candid in disclosing information or accurate information (79%);
- A potential for an escalation of conflict and safety concerns (68%);
- The FDR process would become an extension of court processes and an ‘evidence gathering’ exercise (42%);
- The integrity of FDR would be impacted and/or less parties willing to participate (31%);
- A negative impact on the perception of mediator impartiality or neutrality (26%).
- Comments made by FDRPs regarding admissibility fell within four central and largely overlapping themes. The dominant theme was a concern by FDRPs for the safety of parents and their children (87%) followed by:
 - Nondisclosure of information and agreements reached with incomplete information (72%);⁸⁵
 - Non-use, misuse or ‘unsafe’ use of services (64%);
 - Significant impact on FDR practice and workloads (23%).
 - An excellent and insightful starting point for a consideration of FDRP attitudes is this substantial comment by a private FDRP:

Mediation has its philosophical foundation rooted in party self-determination and as an alternative to the adversarial process. It therefore ought to be clearly separate ... If this separation is blurred it may adversely impact on the efficacy of FDR and its legitimacy as a dispute resolution process. It is important that the judiciary not shirk its responsibilities in administering justice by seeking to access to [sic] confidential information beyond what it may currently have access to.⁸⁶ The rules of evidence are already flexible in family law proceedings. The probative value of any disclosures during the FDR would be negligible but almost certainly harmful to non-adversarial dispute resolution processes such as FDR. Parties must be able to trust the FDRP in order to be open in discussions. This is essential for the FDRP to carry out his/her function (such as assessing suitability for FDR).

The subject matter of this comment, touched on by many others, highlights both important philosophical issues as well as practical and evidential issues. The tenor of the 2006 amendments to the *FLA* is to

⁸⁵ One might even question the ability of the adversarial system to get to the truth. As former Federal Court Judge the Hon Ray Finkelstein opines, ‘the adversarial system is not well adapted to arrive at the truth’: see Ray Finkelstein, ‘The Adversarial System and The Search For Truth’ (2011) 37(1) *Monash University Law Review* 135, 135.

⁸⁶ This concern is mirrored in Jones, above n 3, 40.

encourage and assist parents to negotiate individualised arrangements with assistance from FDRPs in a confidential setting with minimal delay and cost.⁸⁷ The ‘self-determination’ of this envisioned model of justice is reflected in the object of s 60I being ‘to ensure that all persons who have a dispute about matters ... make a genuine effort to resolve that dispute by [FDR] before [an] order is applied for’.⁸⁸ The comment of the above FDRP speaks to these objectives. The FDRP’s comment also speaks to the limited probative value of evidence that might be obtained from FDR and the concern that anything gained would largely be outweighed by that which might be lost to FDR by an interference with confidentiality.

The purposive distinction between FDR and court processes was touched upon by several other FDRPs with comments such as:

People need to trust the process and if it is not confidential they will not trust it. Instead they will treat it as they do all legal processes ... keeping their cards held tightly to their chests⁸⁹... and we will get nowhere.

Many FDRPs raised concerns regarding the impact of admissibility of mediation communications upon either the take-up of services or their misuse. One FRC based FDRP commented that ‘[m]ediation would become a fishing expedition. Clients wouldn’t actually want agreement. They would just want to get information to report back to their lawyer’. One FDRP was even more blunt offering the view that ‘people would not mediate. People would attend FDR but not effectively participate due to confidentiality concerns. Lawyers and participants would use the process to collect information for later use’. Many FDRPs were concerned that mediation would simply become an extension of the court process and a necessary ‘box to tick’ as exemplified by the comment that ‘FDR will become or will be seen as aligned with the court and adversarial processes’.

A clear focus on evidential issues and where the responsibility should fall for collecting evidence arose from the comments of one FDRP:

Mediators should not be compelled to give evidence; this is not their role to collect evidence, except if one of the current exemptions applies e.g. child abuse. If the Court wishes to collect evidence from the parties it should do so by compelling the parties to go to a Court officer for mediation, not outsourced FDR agencies. To do away with inadmissibility and confidentiality in

⁸⁷ Reflected and reaffirmed in George Brandis, ‘State of the Nation Address at this 17th Biennial National Family Law Conference’ (Speech delivered at the 17th Biennial National Family Law Conference, Melbourne, 19 October 2016) <<https://www.attorneygeneral.gov.au/Speeches/Pages/2016/FourthQuarter/State-of-the-nation-address-at-this-17th-biennial-national-family-law-conference.aspx>>.

⁸⁸ *FLA* s 60I(1).

⁸⁹ This comment also touches upon other privileges such as the confidentiality of settlement negotiation (largely codified by *Evidence Act 1995* (Cth) s 131) and legal professional privilege (*Evidence Act 1995* (Cth) pt 3.10 div 1) together with a more general concern as to an absence of ‘good faith’ or ‘genuine effort’ negotiation and positional rather than interests-based bargaining if confidentiality were not afforded.

mediation only goes to show how little those who are involved in seeking this outcome know about the process of mediation and how it works.⁹⁰

Comments by many FDRPs suggested a concern that issues creating difficulties for the court in evidence gathering (such as a lack of resources and self-representation) motivated a desire to 'shift the burden' to FDRPs.

The theme of 'holding back' information was common to many of the responses given by FDRPs. There was concern that a lack of confidentiality would not only impede '*take up*' of service and resolution of disputes but would also potentially render settlements '*unsafe*'. FDRPs were clear in their shared belief that confidentiality is fundamental to disclosure, and one is faced with the conundrum that by rendering the FDR process non-confidential the potential for disclosure is reduced.

Several FDRPs identified the potential therapeutic benefits of confidentiality and the potential for FDR to aid the longevity or 'stickability' of arrangements including one private FDRP who commented:

In my experience parties appreciate and children appreciate the value of confidentiality in FDR processes. It enables them to talk freely and to make concessions in the interest of reaching a lasting settlement without worrying that if the matter is not settled then their concession will be used against them in court.

One LAC FDRP expressed the view that 'when parents know that what they say can be used against them then they simply won't admit that they need help' and would not receive it.

FDRPs clearly expressed that participants place significant store in confidentiality, with one comment by an FRC FDRP noting that participants:

appear to visibly relax when the issue of confidentiality is explained. The issues are personal and sensitive and it facilitates the establishment of rapport and trust between parties and mediator. I believe that parties would immediately become defensive and paranoid should confidentiality be removed.

A private FDRP commented that:

Confidentiality allows parents to more fully and honestly disclose their concerns and needs at FDR. It helpfully disconnects the FDR process ... from the court process (and the narrowing of legal issues).

FDRPs clearly expressed a desire to ensure that information relevant to address protective concerns was available to Courts when possible. One practical solution raised by a LAC FDRP focused on presently available and under-utilised avenues of information sharing, suggesting that 'if the independent children's lawyer was compelled to contact the FDRP ... then

⁹⁰ I make clear that the final comment of the FDRP is included for completeness and without editing of the statement made. The sentiment is not adopted by the author.

the law allows full and frank disclosure to them. There is no need to jeopardise confidentiality if this simply happened'.⁹¹

In their response, one private FDRP encapsulated the quandary posed by the tensions between mediation confidentiality and the earnest desire of the courts to have all available information: 'If parties know that what they disclosed during FDR is admissible they will disclose nothing. That's if they came at all.'

The reality is, perhaps, that if confidentiality is removed then there will be no information to obtain, either because parties do not attend FDR or, if they attend, they will not frankly and candidly disclose information.

FDRPs articulated real concerns as to the potential for disclosure of otherwise confidential information to create rather than ameliorate risk. One FRC FDRP observed that it 'may escalate the situation, particularly if they present as high conflict individuals. Confidentiality provides clear boundaries for both parties', whilst another FRC FDRP observed that clients 'would be reluctant to share important information regarding, for example, their mental health. This would make assessment of their suitability difficult at the least and, at worst, place a child at risk if we proceeded'.

Saliently, one FDRP, crystallised the majority of concerns raised by FDRPs regarding the impact on FDRPs if they became compellable witnesses. The comments by this FDRP highlight the significant skill which FDRPs bring to the assessment of risk and suggests that FDR is unlikely to be assessed as appropriate when risk is present:

How much FDRP time would be taken up dealing with litigation rather than spending it with parents and supporting discussion. There are significant checks and balances in place to assess risks and appropriateness for FDR. FDRPs are some of the most informed practitioners regarding family violence. The courts can assume that the information currently provided is useful and valid.

C Are There Any Benefits in the Confidentiality of FDR?

Finally, FDRPs were asked: 'Do you think there are benefits in confidentiality of FDR?' Overwhelmingly FDRPs saw benefit in confidentiality. Their responses are summarised in Table 7:

⁹¹ This means of using information that is otherwise confidential or inadmissible is discussed by the High Court in *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285. An FDRP is authorised to provide information to an independent children's lawyer as an exception to their duty of confidentiality and, whilst such a lawyer cannot give evidence of that communication with the FDRP, the independent children's lawyer can use that information to obtain admissible evidence, undertake further enquiry or to inform, for example, cross examination.

Table 7: Percentage of FDRPs who saw benefits in mediation confidentiality

Respondent	Frequency	
	Yes	No
LAC	95	5
Private	97.5	2.5
FRC	98	2
Total FDRPs	97.5	2.5

The responses of FDRPs fell broadly within four themes comprising:

- Confidentiality promotes openness and candour (87%);
- Confidentiality enhances safety of parties, their children and FDRPs (62%);
- Without confidentiality parties would not be likely to access services or the correct services or would not obtain any benefit (41%); and
- Without confidentiality FDRPs would be routinely subpoenaed to produce notes or attend court or both (23%).

For most FDRPs the significance of frank and candid disclosure was not the potential of agreement but the safety of the parties and the ‘safety’ of any agreement that might be reached. As one FRC FDRP put it, ‘[c]lients can feel safe giving full disclosure, getting to the root of the conflict and what is said remains in the room’. A private FDRP suggested that confidentiality was fundamental to the ‘safety of all parties including FDRPs. The principles of mediation rely on trust and openness. If people don’t feel safe and trust the mediation will not work’.

In addition to the issue of encouraging open dialogue most FDRPs commented upon the therapeutic and protective benefits of confidentiality suggesting that confidentiality:

(with exceptions) is very important — with people free to express their thoughts and feelings and to get help to manage those thoughts and feelings so that they are less likely to become actions. And they are more likely to seek help i.e. if no one is actually able to express their thoughts and feelings and keeps them to themselves how can you tap into appropriate supports?

The responses by FDRPs were far from doctrinal and dogmatic. Clear thought was given to the role of confidentiality in facilitating agreement but also in protecting the safety of participants and their children and providing therapeutic assistance. The potential and practical consequences of confidentiality were carefully and delicately considered in the responses given by FDRPs.

VI Specific Issues Relating to Family Violence

The predominant basis upon which FDRPs valued confidentiality was expressed by one FCR FDRP as the desire ‘[t]o be able to safeguard children’s safety, wellbeing and best interests’.

Commenting upon risk of harm a private FDRP suggested that whilst there might be a benefit to a lack of confidentiality this was ‘Only to the extent where confidentiality is limited by law, such as where there are disclosures of child abuse, neglect or risk or other safety concerns such as risk of imminent crimes’. Respondents who shared this view overwhelmingly believed that the present mandatory and permissive exceptions to confidentiality, combined with State mandatory reporting laws, achieved the right balance especially if, as called for by Chisholm,⁹² further training and clear guidance were given as to how permissive exemptions to confidentiality might be exercised.

One FDRP drew attention to the relative lack of such issues arising in practice, commenting that ‘I have not ever had cause to consider acting in this way [to break confidentiality]. I can think of no other reason [than imminent risk of harm] to break confidentiality’. To some extent this may reflect the thoroughly developed screening and assessment tools now used in FDR intake with a specific focus on ensuring the identification of family violence risks and ‘screening out’ such cases as inappropriate for FDR. The reality of rates of attendance at FDR prior to filing⁹³ and the rate at which applications are made for exemption from attendance at FDR prior to filing⁹⁴ would suggest that when matters involve risk of harm the parties are either unlikely to seek to attend FDR or, if one or both of the parties do seek to attend FDR, that FDR is likely to be assessed as unsuitable.

It is possible that information revealed in FDR has previously been disclosed to agencies such as Police, State Welfare Agencies, Medical Practitioners, Counsellors and others and available to the Court through those avenues without interference with mediation confidentiality. It is possible, however, that information is disclosed for the first time in FDR or assessment of suitability for FDR. A disclosure made during FDR which did not meet the threshold of mandatory disclosure or permissive,

⁹² See Chisholm, ‘Confidentiality and Information Sharing in Family Law Dispute Resolution: Aspects of Current Law, Policies and Options’, above n 4.

⁹³ This is not to ignore the reality that not all matters that attend FDR then result in the issue of a s 60I certificate and an application to the court. Protection and a consideration of family violence are not the sole domain of the court and such issues are taken seriously and treated with the importance they deserve in FDR and FC services as discussed by Kaspiew et al, above n 56, 31.

⁹⁴ As discussed in Harman, above n 7, 26–7, in 52% of cases commenced in the Federal Circuit Court in a 3-month period between October and December 2014, a party had, for a variety of reasons (although primarily founded in allegations of family violence), sought exemption from attendance at FDR (the figure has also been stated as 56% per Kaspiew et al, above n 56, 28). Only 17% of cases were commenced on the basis of a s 60I certificate having been issued asserting genuine effort: Harman, ‘Should Mediation be the First Step in all Family Law Act Proceedings?’, above n 6, 26, 39.

‘imminent risk of harm’⁹⁵ disclosure would likely be protected by mediation confidentiality and rendered inadmissible. In such cases:

- The removal of the prefix ‘imminent’ from the risk of harm test (as advocated by Chisholm and the Law Council and as raised by many FDRPs) might go some way to address concerns;
- Disclosures made during assessment of FDR suitability would likely lead to FDR being assessed as ‘inappropriate’.⁹⁶ If disclosure was not made during intake assessment, but during FDR, then FDR would likely be terminated as having become ‘inappropriate’ at the point of disclosure. As such cases comprise only 2.4% of parenting cases filed with the Court,⁹⁷ the utility of interference with confidentiality would be questionable;⁹⁸
- It may still be possible for admissions to be permissibly raised in litigation notwithstanding mediation confidentiality.⁹⁹

A considerable number of FDRPs were concerned that victims of family violence should be assisted to avoid having to repeat ‘*their story*’. However, the utility of this must be balanced against denial of agency to

⁹⁵ Assuming that obligations of disclosure and other litigation tools, including discovery and cross examination, did not compel and require the disclosure or repetition of this evidence. For an excellent discussion of the present threshold test of ‘imminent risk of harm’ (as opposed to, for example, a potentially lesser and more readily invoked test of ‘serious harm’ or ‘likely harm’), see Chisholm, ‘Confidentiality and Information Sharing in Family Law Dispute Resolution: Aspects of Current Law, Policies and Options’, above n 4.

⁹⁶ The drafting of *FL(FDRP) Reg* reg 25, which separates the assessment of suitability from FDR itself, likely renders material disclosed during assessment (or ‘intake’) beyond the scope of the mediation confidentiality provisions (*FLA* ss 10H, 10J).

⁹⁷ Harman, ‘Should Mediation be the First Step in all Family Law Act Proceedings?’, above n 6, 26. On the basis that extremely few certificates are issued suggesting that the FDR became inappropriate during FDR, and after having been previously assessed as appropriate, it might be accepted that intake procedures are exceedingly effective at determining inappropriateness. If FDR has commenced and not been terminated, matters have not arisen during FDR (whether in a joint session or as a shuttle FDR with substantial caucusing) that have caused the FDRP any concern as to the appropriateness of FDR. This would lend further support to the relative infrequency with which allegations arise in matters assessed as appropriate for FDR.

⁹⁸ See, eg, Jones, above n 3, 1. In some cases information sharing will lead to more timely and safer outcomes, however an increase in information will not address systemic issues such as delay or inexperience in matters involving family violence. The unintended consequences, including providing perpetrators with additional means to cause harm to victims or to abuse litigation processes and further disrupt the mother and child relationship, are relevant.

⁹⁹ As opined in *Field v Commissioner of Railways (NSW)* (1957) 99 CLR 285, 291 (Dixon CJ, Webb, Kitto and Taylor JJ):

This form of privilege [in that case without prejudice negotiation privilege] ... is directed against the admission in evidence of express or implied admissions. ... It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence ... In other words there is a difference between evidence of a mediation communication referring to an objective fact (and perhaps explicitly to direct evidence of it), and that other direct evidence itself. The latter is not necessarily privileged.

victims of violence and evidential and due process considerations.¹⁰⁰ FDR is an important means of support and empowerment for victims of family violence. It would be unrealistic, disingenuous and disrespectful to a victim of family violence to assume that they are incapable, especially with the support of those engaged in the provision of FDR and family counselling services, of repeating their allegations and ‘telling their story’ in subsequent litigation. Indeed, as Judge Gray observed,¹⁰¹ such narratives are more likely to be told with such supports.¹⁰²

An FDRP’s notes might be relevant as corroboration. However, this proposition is also problematic. The notes that would be produced by FDRPs are, at best, hearsay and are proof of nothing more than a prior statement. As such any notes would have limited evidential value and would be far from dispositive. There is also the danger, as regards victims of family violence, that the notes made by an FDRP, on whatever basis and for whatever reason, might be inconsistent with the evidence of that party and difficulties might be created for the alleged victim as a consequence of their suggested prior inconsistent statement or, if the evidence were available and not adduced, *Jones v Dunkel* inferences may be drawn.¹⁰³ Proceedings might also be unnecessarily made more complex by the requirement to call the maker of the document.

VII Conclusions

The attitudes of FDRPs demonstrate a real and genuine concern to ensure the safety of the adults and children who attend FDR as well as a professional desire to maintain the integrity of the mediation process. It is clear from the attitudes expressed by FDRPs that confidentiality is seen by FDRPs as fundamental to achieving this protection as well as integral to the mediation process. FDRPs approach and balance these conflicting issues in a considered and reasoned fashion. The attitudes of FDRPs towards confidentiality are not rigid or dogmatic. FDRPs are open to and clearly consider the importance of information sharing to allow both assessment of suitability for family dispute resolution and to ensure the safety and protection of all involved in the mediation process.

¹⁰⁰ At best such evidence, even leaving aside *FLA s 69ZT* (which excludes the operation of certain provisions of the *Evidence Act 1995* (Cth), although material admitted as a consequence is afforded ‘such weight if any’ as the court determines) the material that could be produced would be hearsay, not evidence on oath and not direct evidence. Therefore it could not be properly tested and is most likely limited to evidence of a prior representation with limited probative value, which may potentially be the subject of limitation or exclusion per *Evidence Act 1995* (Cth) ss 135, 136.

¹⁰¹ Gray, above n 71, 77 [431], 82–4 [454]–[466].

¹⁰² It is not possible for a party to be relieved of the obligation to lead direct evidence in their case. The best evidence available is direct, first hand testimony on oath rather than evidence of a prior representation. The production of evidence by an FDRP of what they have been told is hearsay (although *FLA s 69ZT* permits the admission of hearsay evidence subject to the relative weight ascribed to it) and cannot be tested.

¹⁰³ (1959) 101 CLR 298.

The desire of Courts to have all relevant information available is both acknowledged and supported by FDRPs who share the Court's concern to ensure the safety of parties and their children. Overwhelmingly, however, FDRPs are able to demonstrate a nuanced approach towards and a sophisticated understanding of the issues relating to confidentiality. On that basis the attitudes of FDRPs lend support to a continuation of the present 'imperfect protections' offered to mediation confidentiality by the *Family Law Act*.