Family Law in the Future: The Role of Alternative Dispute Resolution

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Abstract

This brief paper will focus upon the recommendations of the recently released Australian Law Reform Commission (ALRC) report 'Family Law for the Future'. If enacted, the recommendations advanced by the ALRC will affect the dispute resolution community. If enacted, many of the recommendations have the potential to substantially increase the visibility of and use of alternate dispute resolution (ADR) models such as Family Dispute Resolution and Arbitration and may even lead to the birth of a community-based case management and parenting co-ordination sector. The purpose of this paper is to consider how these recommendations might aid in consolidating the gains made by the family law ADR sector and be a vehicle for unity and cohesion.

The release of the Australian Law Reform Commission Report '*Family Law for the Future – an Inquiry into the Family Law System'*[1] provides the greatest support for alternate dispute resolution[2] (ADR) since the 2006 *Family Law Act 1975 (Cth)* (FLA) reforms.[3] The recommendations focus upon 'dissuading parties from leaping into litigation'[4] and are excellent news for the ADR sector, with many recommendations focused on ADR. This is not surprising in light of recommendation 30 which proposes inclusion of an 'overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families'. This is added to by recommendation 31, which proposes a statutory duty, imposed not only on parties but their lawyers and third parties,[5] to 'cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose'.

[1] ALRC Report 135 released 10 April 2019.
[2] The use of 'alternate' rather than 'appropriate' is deliberate. Whilst the phrase 'appropriate dispute resolution' is often preferable, the use of 'alternate dispute resolution' more appropriately reflects the tone of the ALRC report by which dispute resolution, away from and as an alternative to the court, is the subject of the numerous recommendations to be discussed in this paper.
[3] The 2006 amendments saw the creation of the present network of Family Relationship Centres and subsidised community based services as well as the introduction of family dispute resolution as a pre-action procedure in parenting disputes and the availability and compellability of both family counselling and family dispute resolution as adjuncts to proceedings.
[4] Above n 1, 45–46 [1.44].
[5] This would, in light of further recommendations, (such as recommendations 10, 21-25, 30-34, 36-39, 40-41 and 43-48), extend to all who work with a party to a family law dispute from extended family members who might provide funding (see recommendation 36 as to the proposed ability to award costs against such persons) through to all and any support services working with a party or their children including legal practitioners, family counsellors and family dispute resolution practitioners.

The purpose of this brief paper is to discuss the recommendations of the ALRC Report that directly affect and benefit the ADR sector. This paper will consider six specific areas, namely:

- *The role of an 'overarching purpose' in creating a focus upon relationship building, the management of conflict and the improvement of relationships.*[6]

- *The expansion of Family Dispute Resolution (FDR) to financial disputes as well as a requirement to demonstrate that 'genuine steps'*[7] *have been taken to resolve controversy before commencing court proceedings.*[8]

- *Expansion of the use of arbitration including an expansion of arbitration beyond financial disputes and to some parenting disputes.*[9]

- *Support for an expansion of the protection of confidentiality in family counselling and FDR as well as recognising a broader category of 'protected confidences'.* [10]

- *Expansion of family consultant involvement in parenting proceedings. This might be seen as introducing concepts of 'parenting coordination',*[11] *with the potential for eventual expansion of this role to community-based services.*[12]

- *The introduction of 'case management' concepts to achieve a holistic 'whole of family\whole of dispute' approach which, again, has the potential to expand to community-based service.*[13]

It is not the intention of this paper to engage with recommendations regarding reform of legislative provisions or the structure of the courts, their monitoring or accountability.[14]

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[6] Recommendations 30 and 31.

[7] It is noteworthy that this is the language of the *Civil Dispute Resolution Act 2011*. The ALRC report does not specifically prefer the applicability of the CDRA to FLA disputes or the advisability of such application. At present, disputes under the FLA are expressly excluded from the provisions of the CDRA on the basis that the drafters of that act had, erroneously, understood that the FLA already contained broad provisions for 'pre-action procedures', Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) General Outline.

[8] Recommendations 21 to 25.

[9] Recommendations 26 to 29.

[10] Recommendation 24 and 37.

[11] Association of Family and Conciliation Courts guidelines 'Overview and Definitions' FCR (2006) 44(1) 165 defines parenting co-ordination as 'a child focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the Court, making decisions within the scope of the Court order or appointment contract'.

[12] See recommendations 38 and 39.

[13] See recommendations 57–60.

[14] These include the recommendations relating to jurisdiction (recommendations 1–3) regarding the establishment of state courts and/or information sharing regimes, amendment of the parenting provisions of the act (recommendations 4–10), amendment of

Overarching Purpose

As discussed above, it is recommended that an overarching purpose be clearly stated in the FLA 15 as being '…the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families'.

The ALRC is clear that an overarching purpose is not simply a resource saving proposal,[16] stating that 'restricting litigiousness in the family law sphere is…about much more than the efficient use of resources, important though that is.' It is recognised that whilst family law disputes involve legal issues that they also involve social and medical issues. Hence, the benefit of social science and medical support services that 'many parties need at the time of the breakdown of a relationship'[17] are acknowledged.

A thorough reading of the ALRC report reveals a nuanced approach by the Commission towards the terms of reference of the inquiry. From the outset, the ALRC adopted four overarching principles.[18] The third principle is particularly important in understanding the ALRC's approach, namely, that:

> *it is essential to the integrity of the family law system that all those who work within the family law system (including judges, registrars, lawyers and the wide range of medical and social science professionals), are equipped with the skills and the tools necessary to achieve outcomes that are in the best interests of children and fair to the parties, and which are designed to promote conciliation and reduced contention at every step.*

This principle contains three important concepts, namely:

- The 'family law system' includes, but is not solely comprised of, courts. By approaching family law disputes within the paradigm of a 'system', the ALRC recognises the interconnectedness of all who work with and assist separated parents and their children. This recognition underscores the importance of uniformity of approach and what might be

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the property division aspects of the act (recommendations 11–20), amendment of costs and vexatious litigant provisions (recommendations 32–37), amendment of the parenting order compliance regime (recommendations 40–42), amendment of provisions relating to Independent Children's Lawyers, family consultants and judicial officers and their qualification and appointment criteria (recommendations 43–56).

[15] In the absence of response to the ALRC report by the Attorney-General, a joint Practice Direction (Practice Direction 1 of 2020) has been issued by the Family Court of Australia and Federal Circuit Court of Australia which purports to adopt as 'core principles in the Management of Family Law Matters', the overarching purpose recommended by the ALRC (Principle 2). This falls short, however, of a legislative mandate (as is found, for example, in s 69ZN Family Law Act 1975 in the context of parenting disputes). A practice direction cannot create law. A practice direction has no legislative force and cannot create a duty where one does not already exist– see Brooke LJ *KU (A Child) v Liverpool City Council* [2005] EWCA Civ 475.

[16] Above n 1, 46 [1.44].

[17] Ibid.

[18] Above n 1, 36 [1.25].

described as a 'common purpose'.

- This 'common purpose' is clearly defined as the promotion of conciliation and the reduction of conflict.

- The hierarchical structure of family law services, as they are often seen by the legal profession, is disavowed. The importance of ***all*** who work with families, irrespective of their qualification, is recognised.

Through this prism, the ALRC report prioritises the need to work towards and achieve non-adversarial address of family law disputes. At an early point in the report[19] the ALRC opines that 'restricting or inhibiting litigation through procedural devices is consistent with the principles that the Courts are required to apply…', including, as section 43(1)(d) FLA requires, that courts assist parties 'to consider…improvement of their relationship to each other and to their children'.

The provision of an overarching purpose is far from novel or revolutionary. State, territory and federal civil procedures legislation almost universally contains a statement of overarching purpose. An overarching purpose has a significant role to play in guiding the interpretation and application of legislative provisions.[20] An overarching purpose is described, by the ALRC, as the 'starting (and in many cases the finishing) point in the court's application of any civil practice and procedure provision, in a way which best promotes the quick, inexpensive, and efficient resolution of the proceedings'.[21] The ALRC is clear that the overarching purpose should assist in consideration of the best interests of children,[22] engagement with FDR[23] and consideration of costs orders against parties and/or legal practitioners or any person, including third parties, who exercise 'control, indirect control or any influence over the conduct of proceedings'.[24] It is made clear that the resolution of disputes in 'the least acrimonious' way would obviate

[19] Above n 1, 44-45 [1.42].
[20] In much the same way as the objects and principles provisions of the FLA (s.60B) have done.
[21] Above n 1, 300 [10.16] and incorporating footnote 29 setting out case law supporting the proposition.
[22] When considering how proceedings are to be conducted. This is, to some extent, already included as a principal for the conduct of parenting proceedings by reference to s 69ZN. An overarching purpose for the FLA would extend such a principal to all proceedings before the court including financial proceedings which, to date, have been absent any such guiding principles or, to a large extent, consideration of the interests of children or how those interests might be affected.
[23] This is consistent with the CDRA which requires that the parties, with exceptions, engage in facilitative dispute resolution (of which FDR is a clear example) prior to commencing proceedings.
[24] Above n 1, 300–301[10.19].

against 'unnecessary criticism, abuse or adversarial language' so as to reduce trauma and pain, support sound judgement and minimise harm.[25]

One aspect of the ALRC report which might stimulate debate amongst Family Dispute Resolution Practitioners (FDRPs) is the suggestion that certificates might be a means of 'communicating' to the court. It is suggested that the current statutory requirement, for parties to engage in FDR before filing, enables: '…greater oversight over the manner in which those processes are conducted' and hence 'parties and practitioners will need to consider their compliance with the overarching purpose when seeking a certificate, or certifying how FDR has been attempted and, in particular, the content of any 60I certificate issued in relation to that process'.[26]

Whilst it is beyond the scope of this paper, the report contains a substantial discussion of certificates.[27]

Prefiling Steps for Property Matters

Chapter 8 headed 'encouraging amicable resolution', contains recommendations regarding expansion of FDR to property adjustment proceedings.[28]

The report reviews existing literature regarding the rate of attendance at FDR in both property and parenting proceedings,[29] and acknowledges that the present use of FDR, even when mandated, as it is, in parenting proceedings, is low. The ALRC, importantly, recognises the role played by the exemptions to attendance at FDR (s 60I(9) FLA).[30]

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[25] Above n 1, 301 [10.20]. This is also consistent with the discussion of these same issues by Justice Benjamin in both extra curial writing 'Possible Solutions to Excessive Delay and Cost in the Family Courts' (paper 16 January 2018) and his honours discussion of adversarial legal practice in Simic & Norton [2017] FamCA 1007.

[26] Above n 1, 302 [10.23].

[27] Commencing at 263 [8.71].

[28] This is particularly significant as proceedings under the FLA are exempt from compliance with the *Civil Dispute Resolution Act 2011*. Further, the pre-filing requirements Rule 1.05 Family Law Rules 2004 do not apply in the Federal Circuit Court (Thompson & Berg [2014] FamCAFC 73). The ALRC recommendations, if implemented, would be the first legislative introduction of pre-action procedures in the Federal Circuit Court (and as pre action procedures impact access to the Court, it might be validly argued that the only appropriate means by which access to the Court is limited is by legislative provision, such as s 60I FLA, (and not by Rules of Court or Practice Directions).

[29] See, for example, Kaspiew, Gray, Moloney, Hand, Lixia Qu, et al 'Evaluation of the 2006 family law reforms' Australian Institute of Family Studies December 2009; [2010] ALRC 114, 'Family Violence - A National Legal Response' [2010] ALRC 2; Final Report at 21.37); J Harman, 'Should Mediation Be the First Step in All Family Law Act Proceedings?' (2016) 27 *ADRJ* 17 and Lixia Qu. 'Family Dispute Resolution: Use, Timing, and Outcomes' *Australian and New Zealand Journal of Family Therapy* 2019, 40, 24–42.

[30] Family violence is a significant reason for non-attendance at FDR (see Harman 'The Intersection of Family Violence and Family Dispute Resolution: Implications for Evidence Gathering and Mediation Confidentiality' (2019) 33(1) *Australian Journal of Family Law* 1–28.

Ultimately, the ALRC recommends that parties be required to demonstrate that they have taken 'genuine steps' before commencing proceedings. This requirement largely mirrors the provisions of the *Civil Dispute Resolution Act 2011 (Cth)* (CDRA). To this end it is recommended that a 'genuine steps' provision be included in the FLA, requiring that parties certify in writing that they have taken genuine steps to resolve their dispute at the time of filing and absent which they would not be permitted to file. [31]

The recommendation to expand pre-filing FDR to property proceedings incorporates a requirement that both parties give disclosure prior to either attending family dispute resolution or commencing proceedings with the court. It is suggested that the assessment of suitability for FDR would include a consideration of 'an imbalance of knowledge in relation to financial arrangements' such that, if the imbalance cannot be cured, an FDRP would be entitled to issue a certificate indicating that FDR is inappropriate

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The ALRC proposes an expansion of the bases upon which an exemption from attendance at FDR might be granted to include:

- Urgency (such as a need to restrain disposal of assets)
- An imbalance of power, including as a result of family violence, and which affects the capacity of a party to negotiate
- Where there are reasonable grounds to believe that nondisclosure has occurred
- Where a party is attempting to delay or frustrate resolution
- Where there are allegations of fraud.

Attempts to delineate issues in dispute and resolve them, prior to commencing proceedings, is acknowledged as universally poor. In a 2014 study Harman found that prefiling FDR occurred in only 5% of property adjustment proceedings before the court. More importantly, Harman found that disclosure had occurred in less than one quarter of cases, [32]that parties had exchanged settlement proposals in less than half of cases, [33] that the assets in dispute had been agreed in less than half of cases [34] and that the parties had

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[31] Above n 1, 261 [8.62] there is reference to the 'genuine effort' statement to be required being modelled upon the CDRA. The same outcome might be achieved by causing the CDRA to apply FLA proceedings.
[32] 24%.
[33] 41%.
[34] 49%.

agreed on the value of assets in only fifteen percent of cases. This is concerning and would, if continued, significantly erode the utility of pre-filing FDR in property cases. The High Court was clear in *Stanford* that the identification and valuation of the legal and equitable interests of the parties is a fundamental precondition of the resolution or determination of competing claims for property adjustment. Accordingly, the mechanisms to be incorporated to address and obtain full disclosure will be fundamentally important.

There are two aspects of the ALRC report that are of significance to FDRPs. Firstly, it is proposed that the categories of certificate (and which would apply to both parenting and property proceedings) be simplified to focus upon attendance or non-attendance and the assessment of suitability rather than seeking to categorise effort as genuine. The report recognises that certificates suggesting either genuine or non-genuine effort, are both highly subjective in nature and carry little or no forensic weight in the court process.[35] In a survey of FDRP attitudes,[36] Harman recorded that FDRP's were particularly concerned to notify the court as to the basis upon which they had assessed FDR as unsuitable. At least, in part, and specifically relating to property adjustment proceedings, it is proposed that the categories of certificates permit such notice. The report proposes six specific certificates namely that:[37]

- The person to whom the certificate is issued had attempted to initiate an FDR process, but the other party did not respond or failed to attend

- The party to whom the certificate was issued attended for assessment and the matter was assessed as not suitable

- That both parties attended for assessment and the matter was assessed as not suitable

- Both parties attended for assessment and the matter was assessed as not suitable as the FDRP was concerned about an imbalance in knowledge of the parties' financial arrangements[38]

- FDR commenced (thus FDR must, at the intake stage, have been assessed as suitable) and the FDR process was terminated on the basis of a fresh assessment of suitability

[35] Further, a difficulty arises as ss 10H and 10 J render evidence of that which occurred during family dispute resolution inadmissible and, thus, the subjective opinion of the FDRP can (appropriately) never be properly understood or challenged.
[36] Harman, Joe, 'An Imperfect Protection: Attitudes of Family Dispute Resolution Practitioners to Confidentiality' [2017] *BondLawRw* 4; (2017) 29(1) *Bond Law Review*, Article 4.
[37] Above n 1, 269 [8.98].
[38] Above n 1, 270 [8.103].

- FDR commenced and concluded with either no resolution or partial resolution of issues only.

In the case of the first four certificates, without amendment of regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*, evidence would be admissible as to that which was disclosed to the FDRP and which informed the issue of the certificate. This might well be relevant as regards costs.[39]

Finally, the ALRC proposes that sections 10H (confidentiality) and 10J (inadmissibility) would apply to all FDR including in financial cases. However, an important exception to the inadmissibility provisions is proposed, such that any sworn statement made by a party in relation to the income, assets, liabilities or superannuation interests of the parties would be admissible.[40] The ALRC recognises[41] and accepts that confidentiality and inadmissibility encourage attendance at FDR.[42]

Arbitration

Chapter 9 of the report opens with the statement 'arbitration has the potential to help relieve the workload of the Court and provide parties with immediate access to adjudication. Parties also benefit from quick delivery of the award[43]… However, arbitration has not been used much'[44]

Arbitration is identified as an alternative or 'midway point' between FDR and engaging in court process[45] and identifying that 'parties should have the full suite of dispute resolution options available to them tailored to the particular needs of the jurisdiction'.[46]

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[39] As regards the use of certificates in supporting any application for costs it must be observed that a 'not suitable' certificate would issue prior FDR commencing (see Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*) and, thus, the notes of the FDRP who issued the certificate would be compellable and evidence could be adduce, through issue of subpoena. without infringing upon s 10J FLA.

[40] Without this exemption it would be possible for a statement made during FDR and relied upon by a party to be excluded. This would cause significant issue if a party then sought to impeach any order made in reliance upon the sworn statement as was highlighted in *Roux & Herman [2010]* FMCAfam 1369.

[41] Above n 1, [8.110].

[42] The report expressly refers to the debate with respect to confidentiality between authors such as Altobelli and Bryant, on the one hand, and Harman on the other—see footnote 154, 271.

[43] Matthew Shepard 'Family Law Property Arbitration: Progress, Reviews and How to Increase Uptake' *Australian Family Lawyer* Volume 28/1.

[44] From the author's own research, it is apparent that, to date, not less than 115 matters have been referred to arbitration by the Federal Circuit Court (Australia wide) in the period from June 2016 to 31.03.2019. The vast majority of these referrals, in excess of 90%, have occurred in New South Wales.

[45] Above n 1, 46 [1.45] 46.

[46] Ibid.

The ALRC report supports the expansion of arbitration as both prefiling and court ordered processes as well as by expansion of the categories of matters that can be referred to arbitration (recommendation 26). This includes expansion to allow arbitration of:

- Applications for enforcement
- Applications to set aside or vary property orders
- Proceedings in which a litigation guardian has been appointed
- Some children's matters including international relocations, special medical procedures[47] and contravention applications.

As regards the expansion of arbitration to parenting disputes the recommendation is tempered[48] by recommendations that referral to arbitration:

- Occur only by court order
- Be based on a determination of appropriateness by the court (and with guidance as to the relevant criteria to determine appropriateness to be set out within the FLA)
- Be with the consent of the parties, and
- Result in an order made by the court, treating the arbitral award as something in the nature of a recommendation, rather than registration of the award.[49]

Importantly, the report recommends that the various provisions regulating the conduct of arbitration, presently contained across the FLA, *Family Law Regulations* and *Family Law Rules*, be consolidated within the FLA, for the sake of both clarity and certainty.

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[47] The Full Court's decision of *Re Kelvin [2017]* FamCAFC 258 significantly impacts this jurisdiction as regards trans-gender children who have, for some time, been the subject of the vast majority of such cases.
[48] Above n 1, 290 [9.40].
[49] In the Elizabethan era arbitration was routinely used in this fashion as an evidence gathering and testing tribunal and advancing an award as a recommendation — see Derek Roebuck's excellent '*The Golden Age of Arbitration: Dispute Resolution under Elizabeth I*' Hollo Books, Oxford, 2015.

A number of matters of procedural importance are also touched upon by the Report. It is recommended (recommendation 27), that the present provisions, allowing objection to registration of an arbitral award,[50] be removed. It is also recommended that there be an expansion of the ability of an arbitrator or a party to approach the court to obtain directions regarding the conduct of the arbitration and/or to terminate the arbitration.[51]

The report also recommends (recommendation 35) that the FLA make provision for the appointment and protection of referees in the same terms as ss 54A and 54B of the *Federal Court of Australia Act 1976* (Cth). A referee investigates facts and can call and examine evidence for the purpose of providing a report to the court setting out their findings. It is open to the court to then adopt the report (or the findings made) in whole or in part and to making orders based on the referee's findings.

Confidentiality

As discussed above, the report recommends (recommendation 37) that the existing confidentiality and inadmissibility provisions applicable to FDR (sections 10H and 10J FLA) continue to apply including with respect to any expansion to include financial proceedings. The report goes further, recommending the recognition and protection of additional categories of professional relationship confidentiality.

Recommendation 37 of the report is of great significance to doctors, therapists and clinicians and all non-lawyers working with families[52]. Neither the FLA nor the *Evidence Act 1995* (Cth) presently protects confidentiality in professional relationships other than family counsellors,[53] FDRPs[54] and legal practitioners.[55] As a consequence, all other professionals who are engaged in working with families, such as counsellors who are not funded by the Attorney-General's Department to provide family counselling services,[56] psychologists, psychiatrists, medical practitioners and other support services, have no statutory protection that protects confidential communications which arise from their engagement with the family.[57] Those professionals remain compellable witnesses in any proceedings. The *Evidence Act* of each state and

[50] Regulation 67Q(3) of the *Family Law Regulations 1984*.
[51] The later power is not presently contained within the FLA or regulations and, whilst not the subject of any settled precedent, might be inferred.
[52] The confidentiality of communications between lawyers and their clients is protected by legal professional privilege (ss 117–126 *Evidence Act 1995*).
[53] Ss 10B–10E FLA.
[54] Ss 10F–10K FLA.
[55] Ss 117–126 *Evidence Act 1995* (Cth).
[56] J Harman, 'The Intersection of Family Violence and Family Dispute Resolution' (2019) *Australian Journal of Family Law.*
[57] See Harman 'The Protection of Confidentiality in Australian Family Law' Family Court Review Volume 58, Issue1 January 2020, 126–141.

territory includes some degree of protection for 'protected confidences'[58] although these state provisions do not apply in proceedings under the FLA.

The report recommends that courts be invested with power to exclude protected confidences and to exclude material, especially when the child is the protected confider, when the sensitivity of the record outweighs its relevance.[59] This recommendation is advanced on the basis of recognising a public interest in ensuring that parties receive therapeutic assistance. This recommendation is a significant step towards the protection of professional confidential relationships[60] and recognises the importance of therapeutic engagement in the address of conflict and the resolution of family law disputes. The protection of such confidences would also allow a far more therapeutic/ restorative justice approach to be adopted in FLA proceedings.

Parenting Coordination

Whilst the term 'parenting coordination' is not used in the report, a number of the recommendations, including recommendations 38 and 39 (Chapter 11 'Compliance with Children's Orders'), might be seen as introducing a model of parenting coordination. Fundamental to each of these recommendations is a call that services, including the provision of family consultancy services, be properly funded.

Chapter 11 contains a suite of recommendations which recognise the importance and utility of family consultancy services within the court. It is recommended[61] that greater use be made of registrars and family consultants in conducting case assessment conference at the commencement of each parenting proceedings.[62] The intention of this recommendation is to better assess risk and to recommend suitable family counselling and support services with which the parties might therapeutically engage to work towards improving their co-parenting relationship.

Recommendations 38 and 39 are focused upon compliance with parenting orders. The recommendations resemble the existing structures of parenting coordination in North American jurisdictions. Recommendation 38 provides for a post-orders referral to family consultants to assist parties in their

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[58] Each State and Territory provides for exclusion of sexual assault counselling (at least in the context of criminal proceedings). South Australia has the strongest protection (such that the protection cannot be waived even with the consent of the counsellor or victim). NSW, ACT and Victoria make provision for 'Protected Confidences' which would include medical practitioners (see schedule in materials). The provisions provide discretion to exclude evidence rather than an evidential privilege and the discretion to exclude is limited, subject to terms and conditions, can be waived expressly or impliedly and can be effectively removed by leave being given to adduce otherwise excluded evidence. Tasmania, the Northern Territory and Victoria have specific statutory provision providing a privilege to Medical Practitioner-Patient relationships as regards civil (though not criminal) proceedings.

[59] Above n 1, 336, [10.151].

[60] See RANZCP Position Statement 89: *Patient - psychiatrist confidentiality: the issue of subpoenas'* and Carolyn Jones, (2016) *'Sense and Sensitivity: Family law, Family Violence and Confidentiality* (Women's Legal Service NSW).

[61] See for example recommendation 18.

[62] The report emphasis that proper funding would be necessary. This funding would be substantial.

understanding of the orders made by the court. To some extent such a power exists.[63] However, the power is rarely used, primarily as a consequence of resources limitations. It is envisaged that a family consultant might act in a role similar to that generally discussed in parenting coordination literature. This is expanded by recommendation 39[64] which gives some indication of the scope of the post-order case management role envisaged for family consultants, including:

- The provision of information to parents
- Referral to appropriate support services (and monitoring engagement with those services)
- The provision of counselling to parties
- The facilitative resolution of disputes between parties
- Supervising handovers
- Generally monitoring compliance by the parties with any order.

It is proposed that the appointment of a family consultant to assist with 'post-order case management' be mandated whenever final orders are determined by the court following hearing. In these circumstances the family consultant would be able to return the matter to court to seek additional orders or alert the court to non-compliance or contravention.[65]

Whilst the report recommends that case management services be provided by family consultants, it could well be envisaged, analogous to the present arrangements for the preparation of family reports by external report writers,[66] that the recommendations, if implemented, might be a first step towards a community-based regime of parenting coordination services.

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[63] For example, s 65L which permits the court to make an order requiring compliance with a parenting order to be supervised by a family consultant or for a family consultant provide assistance to a party who requests it in relation to compliance with in the carrying out of the parenting order.
[64] Above n 1, 343 [11.18].
[65] This is a fundamental change that would require legislative change to either empower the family consultant, as case co-ordinator, to 'apply' or allowing the court to consider the matter once proceedings are concluded and the court functus.
[66] The report also contains recommendations regarding the accreditation of such external report writers and other services such as children's contact services.

Case Management of Services

For all who have worked in the family law space, a frustrating aspect of the system, if it might be so described, is the absence of any substantial form of case management -someone responsible for locating, connecting parties with and coordinating services and interventions, is absent. There have been many reports, of which the current ALRC report is the culmination, calling for holistic and coordinated approaches towards family disputes and overcoming the 'siloing' that all too often occurs, with parties engaged in myriad services which lack the ability to adequately exchange information or cooperate with each other[67] or meet all of the needs of the family, all of which has the potential to frustrate or exhaust parties.[68] Recommendations 57 to 60, contained within Chapter 16 'Secondary Interventions', are a step towards the introduction of holistic, one-stop support services.

The report speaks in terms of enhancing Family Relationship Centres (FRCs) so that they offer a genuine single-entry point, similar to state government service delivery hubs.[69] It is envisaged that FRCs would broaden the range of services presently available to become 'visible contact points for accessing a range of services, assisting families to navigate and engage with existing services, having services in close proximity to each other, providing a case management function and providing wraparound service delivery.'[70] The recommendations also call for an expansion of the Family Advocacy and Support Service (FASS) models of legal and non-legal assistance which have been trialled in a number of Family Court and Federal Circuit Court registries throughout Australia since May 2017.

Consistent with the overarching purpose, which the report commences with, the recommendations regarding secondary interventions recognise the importance of addressing family law disputes and assisting the families involved in those disputes on a 'whole of family\whole of dispute' basis. The ALRC report fundamentally recognises, refreshingly so, that the legal, social and economic issues a family faces at separation cannot be separately addressed and require holistic address.

Conclusion

The release of the ALRC report, in the midst of a federal election campaign, detracted from the attention which this comprehensive and detailed report deserves. Following the federal election, it might have been hoped that immediate and serious attention might have been given to implementing those aspects of the

[67] Often an unintended consequence of confidentiality provisions.
[68] When, for example, they are required to engage with a variety of different services some or all of which may not fully meet their needs, or which might duplicate service.
[69] See for example 465 [16.27].
[70] Above n 1, 467 [16.30].

report which are relatively non-contentious, including the above recommendations which directly or indirectly impact upon the ADR sector. Those recommendations are designed, as a suite of recommendations, to lead to cost savings and structural and systemic reforms. But, more importantly, the recommendations are designed to shift the focus away from adversarialism and towards a long overdue recognition that what is required, in response to family breakdown (and the resolution of conflicts arising therefrom), is a whole of family system approach, not just a legal response but a broader, 'public health' approach.[71] The above recommendations are designed to positively focus upon the minimisation of damage to families and the individuals which comprise them, (especially children).

The ALRC report delivers excellent opportunities and good news for the ADR sector if they are enacted. The recommendations generate significant potential for the ADR sector to develop more responsive and holistic approaches, to grow (both qualitatively and quantitatively) and to dramatically expand the range of services that are offered. By doing so, the community would be greatly benefited and the original intention of the 2006 amendments to the FLA more likely realised, with a shift to therapeutic and restorative practice and with a view to maintaining and strengthening relationships, rather than approaching family law issues as adversarial contests between combatants.

Postscript

This paper was written some weeks after the release of the ALRC report (March 2019). Since the release of the ALRC report there has been no response to the report by the AG. What has occurred in the absence of response is the announcement, in September 2019, of a Joint Parliamentary Inquiry into Family Law and Child Support. That Inquiry is not due to report until late 2020. A response to the ALRC report is unlikely before that time. In January 2020 the Family Court of Australia and Federal Circuit Court of Australia released a joint Practice Direction seeking to adopt as a 'core principle' of Case Management the 'overarching purpose' recommended by the ALRC. However, this does not represent legislative adoption of the overarching purpose. Also in January, 2020 the Chief Executive Officer of the Family Court and Federal Circuit Court used the power under s 38BD FLA for the first time to authorise Registrars of the Court to act as FDRPs (and Family Consultants employed by the court to act as Family Counsellors).[72]

[71] The term 'public health approach' is used to mirror the language adopted by the ALRC report — commencing [2.13] 59.
[72] This is in combination with the announcement of a 'Summer Campaign' of call overs dealing with cases that have been before the court for two years or more. A Press Release by the court 10 February 2020 indicates 'The campaign will provide an opportunity for families to resolve their dispute and they will be encouraged to reach an agreement through various forms of alternative dispute resolutions (ADR). For appropriate cases, court-employed Registrars will conduct family dispute resolution conferences and will be assisted by family consultants.'