

## **CHAPTER 8: MEDIATION NOT LITIGATION**

### **8.1 Compulsory alternative dispute resolution**

Compulsory alternative dispute resolution is the other major change brought in by the new amendments, which is the subject of this thesis. Although the two major ideas of shared parenting and compulsory ADR stand apart in the current amendments, in my view they are linked, as argued in the previous chapter. In this chapter, I continue my assessment of the Government's attempt to achieve a cultural change through legal norms, specifically through the introduction of compulsory alternative dispute resolution for separating parents.

There are two problems the Government seeks to resolve with this change – the adversarial nature of the system that does not facilitate the making of parenting arrangements upon separation, and the number of arrangements that allegedly prevent fathers from having a meaningful relationship with their children after the breakdown of the family. It appears that the Government is of the opinion that by making the system “less adversarial”, it will encourage more parties to make shared parenting arrangements. In this chapter, I look at various forms of alternative dispute resolution, study the variety of reasons for this drive,<sup>1</sup> critique the way in which the law has been given this norm-creating function and propose a way to make mandatory mediation even more effective upon separation.

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<sup>1</sup> In addition to the desire to increase settlements, there are certain other contributing factors motivating the thrust to resolve disputes other than by way of formal court-based adjudication, for example, to improve case load management, free up court resources and perhaps create a culture of law as a means of dispute resolution and not protecting rights. Although I suggest the Government's motives in introducing compulsory alternative dispute resolution are suspect, I do concede that the concept is still a good one to facilitate the making of parenting arrangements post-separation.

The rationale for this chapter is that the Government's desire to create a less adversarial system that maintains a child's right to have a meaningful relationship with both parents after separation, will only be possible by linking the two main reforms of shared parenting and compulsory counselling, and introducing this connection at the beginning of the life of the family. Furthermore, many of the problems identified with mandatory mediation at the point of separation that are identified in this chapter, may be overcome by introducing a similar program before the children are born.

I basically agree with the assumption underlying the reforms that ADR can change people's expectations and behaviours, however, compulsory mediation alone will not lead to the willing entry into joint parenting arrangements upon separation. I argue that the time at which compulsory ADR should be introduced to the family should be different. If it were combined with a program of early intervention and support in the life of the family, whereby couples are encouraged to share parenting from the commencement of the family, then perhaps it would have a greater chance of improving the way in which parenting arrangements are resolved upon separation, and changing the type of arrangements made. Yet, as I argue in the previous chapters, the realising of these norms would be more feasible with changes to other institutions and various areas of law to embody the same normative standards.

A general mandate of mediation for all families upon separation, without factoring in the suitability of it for each case, overlooks the protection of rights that an individual party may require. Furthermore, the reforms indicate that the Government considers the role of "family law" is to deal only with the breakdown of family relationships, rather than with

the regulation of subsisting domestic arrangements.<sup>2</sup> I argue that it could play a greater role in the intact family.

### 8.1.1 A brief background to the introduction of mandatory mediation

It has been observed that since the introduction of family mediation in the early 1980s, there have been revolutionary changes in the legal and cultural contexts within which it operates.<sup>3</sup> The FLA has been adjusted to swing the focus from parental rights to parental responsibilities. Mediation has been promoted from an “alternate” form of dispute resolution (“ADR”) to a “primary” form of dispute resolution (“PDR”), with a move from encouraging its use to now mandating separating parents to utilise it prior to, or instead of, legal processes. The 1995 reforms, the introduction of pre-action procedures with the *Family Law Rules 2004* and the current amendments are examples of the increasing emphasis placed upon community-sector based PDR to resolve family law disputes.

If the previous emphasis on alternative dispute resolution had not brought upon a less adversarial model, then it is hard to envisage that the new changes alone will make such a difference. So far, it has been difficult to assess the success of the changes as, until now, mediation has taken place in a confidential and privileged setting. As many agreements are not legalised, they have remained private and inaccessible.<sup>4</sup> It is therefore hard to ascertain

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<sup>2</sup> Problems with this view are discussed in chapter 5.

<sup>3</sup> A Bickerdike, *Mediated post-separation parenting arrangements: A context analysis of two decades of file records*, presented at the 9<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/bickerdike1.html>.

<sup>4</sup> In his paper, Bickerdike (ibid) reports on a review of 20 years of mediation cases undertaken at Relationships Australia. Over 1,000 cases were examined to provide a detailed insight into the nature of mediated parenting outcomes, and how they may have evolved over time. Questions addressed include: Do mediated parenting outcomes reflect the so-called 80/20 standard? Or are shared parenting arrangements more common? Has the role of fathers, as measured by mediation outcomes changed over the past 20 years? Have some of the legal and cultural shifts been reflected in the outcomes of mediation? Naturally, the outcome has

what post-separation parenting arrangements are being made by separating parents who use mediation.<sup>5</sup> Research weighing up results of mediation has typically concentrated on agreement rates and client satisfaction levels.

## **8.2 Types of alternative forms of dispute resolution**

The term alternative (or “primary”) dispute resolution does not have a single meaning. Below, I begin by discussing the background literature to see how the term is used in the reforms.

### 8.2.1 What is ADR?

ADR refers to processes, other than judicial determination, in which a neutral person (an ADR practitioner) helps those in dispute to resolve issues between them.<sup>6</sup> There appears to have been a general shift from the traditional adversarial method for dispute resolution to the greater use of ADR not only in the family law realm, but also in the context of a legal system that is by and large moving towards a greater and increasingly flexible control over court and tribunal proceedings and the conduct of Ombudsman investigations.<sup>7</sup> Australia has developed an array of ADR practices across its institutions of administrative justice – the courts, tribunals and the Ombudsman schemes. It has established a strong and varied infrastructure of ADR practice. In family law, the term PDR has more frequently been

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a number of significant implications for family law practice given the strong policy imperative towards mediation before resorting to litigation.

<sup>5</sup> A Bickerdike, above n 3.

<sup>6</sup> National Alternative Dispute Resolution Advisory Council – Brochure (2002):

[http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Brochure](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Brochure). The NADRAC brochure states that although ADR is most commonly used as an abbreviation for “alternative dispute resolution”, it can also be used to mean “assisted” or “appropriate” dispute resolution.

<sup>7</sup> T Buck, *Administrative justice and alternative dispute resolution: the Australian experience*, [www.nadrac.gov.au](http://www.nadrac.gov.au), at p 5.

used, again demonstrating the push for parties to seek to resolve their disputes through these processes before resorting to litigation.<sup>8</sup>

There are various types of ADR processes. They may be facilitative, advisory, determinative, or a combination of these.<sup>9</sup> In facilitative processes an ADR practitioner helps the parties in dispute to identify the issues, work out options, contemplate alternatives and attempt to reach an agreement about certain issues or the whole dispute. Examples of these processes are mediation, facilitation and facilitated negotiation.

Advisory processes involve an ADR practitioner who evaluates the dispute and gives advice as to the facts of the dispute, the law and, in certain circumstances, possible or desirable outcomes, and how these may be reached. Examples of advisory processes are expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

In determinative processes an ADR practitioner takes a more dominant role by assessing the dispute and making a determination. It may involve the hearing of formal evidence from the parties. These processes include arbitration, expert determination and private judging. There are also combined processes whereby the ADR practitioner plays many roles. For instance, in conciliation and in conferencing, the ADR practitioner may facilitate discussions, and provide advice on the merits of the dispute.<sup>10</sup>

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<sup>8</sup> In this thesis, the terms ADR and PDR are used interchangeably as they refer to the same processes.

<sup>9</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6. See also National Alternative Dispute Resolution Advisory Council (NADRAC) (2001) A Framework for ADR Standards Canberra: Attorney-General's Department, at pp 7-10.

<sup>10</sup> In other circumstances, a practitioner may first use one process, such as mediation, and then a different one, such as arbitration. In addition, there are various forms of one type of ADR process, for example, in transformative mediation the mediator endeavours to improve relationships and understanding between the parties, while in evaluative mediation the mediator may propose solutions: National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6.

ADR may be used for different categories of disputes. Since this thesis is about the family law system, the discussion will focus on family mediation. Until the introduction of the current changes to the family law system, ADR had been conducted by court staff, judicial registrars, judges and magistrates themselves or by external ADR providers approved by the court and/or chosen by the parties. It could be free, partly subsidised or completely at parties' expense, and expenses incurred on ADR could or could not be recoverable as costs. Since the introduction of the *Family Law Rules 2004*, court referral to ADR has occurred before an application is filed with the court, and also at any stage of the litigation process.<sup>11</sup> The only difference now is that no proceedings may be commenced without a certificate issued by a family dispute resolution practitioner specifically.

Although an ideal method of dispute resolution in theory, there are various concerns about mandating ADR. They include the conflict in the mediator's roles, the insincerity of the drive to settle disputes, the concealing of legal principle, the risk of compromising the best interests of the child, the prescriptive nature of mandatory mediation and concerns over the types of processes used. I discuss these issues to demonstrate that mandatory mediation at the point of separation is not ideal and will not necessarily produce the desired outcome of two happy parties who have amicably sorted out the future (shared) care arrangements for their children.

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<sup>11</sup> K Mack, *Court Referral to ADR: Criteria and Research*, 2003, Australian Institute of Judicial administration Incorporated and the National Dispute Resolution Advisory Council: [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/personal/4DC4C646C9E10D27CA256E49007C5EB0/\\$FILE/0+Court+Referral+to+ADR.pdf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/personal/4DC4C646C9E10D27CA256E49007C5EB0/$FILE/0+Court+Referral+to+ADR.pdf), at p 69.

### 8.2.2 Conflict in mediator's role

When the Government's recommendations for the current reforms were released, there was great concern about the proposal to require mediators to consider a starting point of equal time where practicable<sup>12</sup> when assisting parents in developing a parenting plan. This is because essentially such a change would set new statutory obligations for mediators that would possibly conflict with established standards of mediation practice.<sup>13</sup> The approach of most mediators is to cater to the needs of the parties and features of each individual matter.<sup>14</sup> Although parenting plans may suit some parents, others may prefer alternative outcomes, for example, informal arrangements or consent orders. Likewise, equal time arrangements may suit some families, but may not be suitable for others.

### 8.2.3 Insincerity

The general sentiment about ADR in all contexts seems to be that if it is successful and cases are settled appropriately at an early stage, judicial resources may be freed up to deal with cases that contain strong public interest points that require an authoritative determination in a court or tribunal forum.<sup>15</sup> I argue that when relationships reach breakdown point, what is required is a system that is sensitive to identifying appropriate routes of dispute resolution for cases in their individual contexts. By mandating the use of

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<sup>12</sup> Recommendation 5 of the Government's Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation stipulated the timing of mediation. Now section 65DAA *Family Law Act 1975* requires the FCA to consider this when making parenting orders.

<sup>13</sup> Various institutions including NADRAC had provided feedback to the Attorney-General in relation to the recommendations for reforms. NADRAC's comments were published in a document entitled "Report on the Inquiry into Child Custody Arrangements" and released on March 2004: [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Report\\_on\\_the\\_inquiry\\_into\\_child\\_custody\\_arrangements](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Report_on_the_inquiry_into_child_custody_arrangements).

<sup>14</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) – Brochure (2002), above n 6.

<sup>15</sup> I have already discussed this goal in relation to the motivations behind the introduction of compulsory pre-action procedures with the *Family Law Rules 2004*.

mediation specifically at the point of separation, the referral process may be too prescriptive to adequately cater to all families. Although the Government has stressed its concerns about the effect of the adversarial nature of formal court-based adjudication on separating couples, it is plain to see that other factors, such as limited court resources, are also significantly motivating the push. Hence, the Government must ensure that in its drive to mandate alternative forms of dispute resolution, it puts in place sufficient safeguards to ensure that legal rights are not jeopardised for the sake of expedition and cost saving associated with ADR.

#### 8.2.4 Risk of compromising rights

One way for the Government to justify the suitability of ADR in the context of family law is to overcome the tension between law as a means of protecting rights and law as a means of settling disputes. It must prove that the protection of children's rights will not be hindered, and show that the move away from a rights discourse for the purpose of settling disputes is an appropriate move in the short and long term. Unless this is done, legal rights will be undermined and children in particular will become more vulnerable.

Before entering into a discussion about the importance of the need to make proper assessments of the appropriateness of dispute resolution processes for different cases and client groups, it is necessary to examine a little more closely the reasons behind the increased Government push for the use of alternative forms of dispute resolution.

#### 8.2.5 Reasons for the push for alternative forms of dispute resolution

In addition to the perception of the growing litigiousness in the courts, it has been noted that the need to account more for the use of judicial and other resources and an

increase in the number of self-represented litigants are factors in the development of ADR in Australia.<sup>16</sup> Hence, the expansion of ADR in Australia has occurred partly against a background of concern about a perceived “crisis” in civil justice with difficulties experienced by heavier caseloads and the escalating costs and general inaccessibility of court litigation. As a result, there has been an obvious shift towards more active case management in the courts and an attempt by the Government to foster a culture change from the use of adversarial to enabling methods with the development of a robust infrastructure supporting ADR. The Government’s establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995 is indicative of an attempt to create cultural change.

As noted in chapter 3, the procedures of the FCA were already being transformed to encourage such developments. In addition, rules and regulations had already been introduced to compel parties to exhaust pre-action procedures.<sup>17</sup> It has been reported that the FCA was already aiming to have 90% of cases resolved through mediated agreements within six months of filing.<sup>18</sup>

There is scepticism about the relentless drive for alternative dispute resolution because although it is always presented as being beneficial to the parties, the hidden agendas, such as the aim to control judicial workload, are really viewed as the driving forces.<sup>19</sup> Also, it has been said that emphasis on the settlement of a matter helps deliver the message about

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<sup>16</sup> T Buck, above n 7, at p 1.

<sup>17</sup> The 1996 reforms to the Australian *Family Law Act 1975* emphasise family and child mediation as a method of primary dispute resolution in family law disputes. Also, the Family Court Rules 2004 stipulate that pre-action procedures must be exhausted before an application is filed, except in specific circumstances.

<sup>18</sup> Family Court of Australia 2004-2005 Annual Report, at p 21:

[http://www.familycourt.gov.au/presence/resources/file/eb000a4925e651b/annual\\_report\\_2004\\_2005.pdf](http://www.familycourt.gov.au/presence/resources/file/eb000a4925e651b/annual_report_2004_2005.pdf).

<sup>19</sup> P McManus, “Informal rules in family law”, (2004) 18 *AJFL* 257, at p 267.

what it is to be a “good” or “bad” separating parent.<sup>20</sup> Accordingly, cooperation and a willingness to mediate are considered characteristics of child-friendly behaviour, whereas a reluctance to participate is viewed as child-unfriendly behaviour. Hence, the unwillingness of a victim of domestic violence to participate in negotiations risks appearing obstructive, unreasonable and selfish. Although the Rules provide victims of domestic violence with an exemption from pre-action procedures, there is still an informal expectation that efforts be made to settle in practice.

In deciding whether or not there are valid reasons for pushing the use of alternative forms of dispute resolution, there are key matters of principle to take into account, for example, the extent of the mediator’s duty of confidentiality, the level of judicial participation in ADR methods, and the suitability of mandatory mediation. It has been noted that mediation is a valuable legal tool when mediators adopt an adjudicative role that might lead to settlement or a narrowing of the issues by placing pressure on parties in suitable cases.<sup>21</sup> It could then follow from this argument that a court-like set-up, whereby the judge adopts some functions of a mediator, could also be a valuable legal tool in suitable cases. This is what the Children’s Cases Program does.

An assessment of the introduction of mandatory mediation specifically is crucial given its inherent implications of undermining the rights discourse for the sake of settling disputes. Buck states that the fact that different solutions to these problems are found in

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<sup>20</sup> Ibid, at p 269.

<sup>21</sup> Ibid.

different contexts means that ADR processes must essentially be assessed in their individual contexts to produce meaningful reflection on their “success”.<sup>22</sup>

### **8.3 Is the Government pushing the family law system in the right direction?**

Clearly, the questions of whether ADR has a valid purpose and whether the new reforms will result in successful outcomes are difficult to ascertain because measuring success and identifying purposes are far from straightforward. Research seems to suggest that ADR is suitable if it works, and the Government is pushing the system in the right direction if ADR works better than litigation.<sup>23</sup> However, as already pointed out, assessing the success and suitability of such processes is a difficult task and ideally it requires looking at cases in their individual contexts. It is not always possible to link disputes and disputants with an ADR process, as though all elements in all those types of disputes are the same.<sup>24</sup> This is because in each case there are many factors and variables involved in a dispute that exert mutual influence on each other.<sup>25</sup> Equally, the timing of a referral to ADR can factor into how successful it is in resolving a matter<sup>26</sup> – not all matters may be suitable for ADR from the point of separation.

Although one of the major areas of empirical research involving court-sponsored ADR in Australia is divorce and family mediation, much of the discussion often assumes that fixed criteria can be used to identify disputes that are suitable for ADR or to match a

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<sup>22</sup> Ibid. Buck also points out that the context-dependency of ADR has meant that the empirical research can often seem ambiguous at first instance, above n 7.

<sup>23</sup> Mack observes that much of the empirical research on ADR appears to consistently ask two questions about it – does ADR work? And, does it work better than litigation. K Mack, above n 11, at p 25.

<sup>24</sup> F E A Sander and S B Golberg, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure”, (1994) 10 *Negotiation Journal* 49.

<sup>25</sup> H Astor and C Chinkin, *Dispute Resolution in Australia*, 2<sup>nd</sup> ed 2002, Sydney: LexisNexis Butterworths, at pp 277-279; T Sourdin, “Educating Judges about ADR” (1997) 7 *Journal of Judicial Administration* 22, at p 24.

<sup>26</sup> K Mack, above n 11, at p 5.

particular dispute to a specific ADR process,<sup>27</sup> for example family law matters to mediation. The Government appears to make the assumption that all family law matters, and specifically children's matters, can be referred to alternative forms of dispute resolution, with the exception of a few types of cases.<sup>28</sup>

### 8.3.1 Definitions: success, goals and effectiveness

In light of the Government's reform to mandate mediation before the use of litigation, it must have resolved that there is a reasonable prospect of success. How the Government measures success is therefore an important question. Developing a way to identify whether an ADR process is successful is necessarily very subjective.<sup>29</sup> The success of ADR in the context of family law matters really depends on the goals these processes are intended to achieve. Naturally, there are different goals depending on the different stakeholders.<sup>30</sup> Commentators have differentiated judicial preference for settlement from party preferences.<sup>31</sup> While a court may want to reduce a crowded list to save public costs, the parties may be more concerned about saving their own money by avoiding litigation.<sup>32</sup> If a matter remains out of the court's caseload, this may be viewed by the Government and the

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<sup>27</sup> K Mack, above n 11, at p 1.

<sup>28</sup> This is apparent in recommendation 9 of its Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation, "...that the *Family Law Act 1975* be amended to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunals."

<sup>29</sup> For this reason, some analysts prefer the word "effective" as they see it as more accurately reflecting the range of possible positive results from ADR: L Boule, *Mediation: Skills and Techniques* 1996a Sydney: Butterworths, at p 11; L Boule, *Mediation: Principles, Process, Practice* 1996b Sydney: Butterworths, at pp 12-14.

<sup>30</sup> K Mack, above n 11, at p 15. Mack points out that these goals may be complementary or they may conflict.

<sup>31</sup> D R Hensler, "Suppose It's Not True: Challenging Mediation Ideology" (2002) *Journal of Dispute Resolution* 81 at p 82-86; J Resnik, "Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement" (2002) *Journal of Dispute Resolution* 155.

<sup>32</sup> D W Nelson, "ADR in the Federal Courts – One Judge's Perspective" (2002) 17 *Ohio State Journal on Dispute Resolution* 1, at p 10; D W Brazil, "Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns" (1999) 14 *Ohio State Journal on Dispute Resolution* 715.

court as a successful referral, even if the parties and the ADR practitioner are dissatisfied with the ADR process and outcome. This goal can backfire on itself given that speedier settlements may not save much money if it means greater costs are incurred earlier in the litigation process, or if it means the parties come back to court after unsuccessful mediation. Such a situation may also demonstrate the failure of ADR to protect rights. This does not in any way justify the Government's introduction of compulsory alternative dispute resolution.

Astor provides many examples of goals, which a court-connected ADR referral might include, such as: to reduce delay, clear lists, reduce the backlog of the FCA; reduce cost to parties, the court, the Government and the taxpayer; preserve ongoing relationships between the parties; achieve moral education and transformation; and to change the legal culture.<sup>33</sup> Other commentators give examples of various other goals, some of which emphasise the values that ADR can promote.<sup>34</sup> Although I believe increasing settlement rates is a genuine goal, it is not the only goal. More importantly, the Government should not lose sight of the goal to protect the rights of children.

It is easier to determine whether or not ADR has been successful if the goals are clearly identified and it is possible to assess whether those goals are met. It has been noted that the notions of "success" used in much of the empirical research are quite narrow.<sup>35</sup> Settlement rates, time and cost savings as well as party satisfaction are said to be the most widely used

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<sup>33</sup> H Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001) Carlton: Australian Institute of Judicial Administration Incorporated, at p 5.

<sup>34</sup> D W Nelson, above n 32, at p 9; D W Brazil, above n 32, at pp 725-726; L Boule 1996a, above n 29, at p 11.

<sup>35</sup> K Mack, above n 11, at p 2.

measures.<sup>36</sup> However, there is no evidence that higher rates of settlement mean a better process or outcome.<sup>37</sup> As two commentators point out, very high settlement rates may involve dissatisfied parties, who felt pressured to settle.<sup>38</sup> Also, assessing success based on settlement rates does not factor in the durability of the outcome. If an agreement later falls apart, it cannot really be considered an effective settlement, especially as it may lead to litigation.<sup>39</sup>

To assess the effectiveness of mediation, many researchers examine client satisfaction, and the most consistent finding is that it is high.<sup>40</sup> Again, it is difficult to determine the validity of mediation based on this evaluation given one must ask how satisfaction is measured. Assessing satisfaction is difficult for many reasons.<sup>41</sup> For one, it may not be an adequate measure of success as some studies have shown. It has been pointed out that it is usually measured simply by asking ADR participants if they were satisfied with the process and/or the outcome, or with other specific features.<sup>42</sup> A participant's subjective assessment of satisfaction may be based on insufficient information about entitlements or alternatives. Much emphasis is placed on client satisfaction to support the push for the use of alternative forms of dispute resolution, with one Australian research team arguing that satisfaction is, "the only relevant and certainly the only practical criterion by which the quality of non-

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<sup>36</sup> Ibid and at pp 19-20.

<sup>37</sup> J B Kelly, "A Decade of Divorce Mediation Research" (1996) 34 (3) *Family and Conciliation Courts Review* 373, at p 375.

<sup>38</sup> K Kressel and D Pruitt, "Conclusion: A Research Perspective on the Mediation of Social Conflict" in K Kressel and D Pruitt (eds) 1989 *Mediation Research: The Process and Effectiveness of Third Party Intervention*, San Francisco: Jossey-Bass Publishers, at pp 397, 400-401.

<sup>39</sup> R A Whiting, "Family Disputes, Non-Family Disputes and Mediation Success" (1994) 11 *Mediation Quarterly* 247, at p 251.

<sup>40</sup> K Mack, above n 11, at p 2.

<sup>41</sup> For a detailed discussion of these reasons, see B G Garth, "Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research" (1997) 49 *Alabama Law Review* 103, at p 108.

<sup>42</sup> K Mack, above n 11, at p 20.

adjudicated outcomes can be evaluated”.<sup>43</sup> Other commentators have criticised satisfaction as an “ambiguous” value<sup>44</sup> as it alone cannot adequately measure the quality of a court-connected process, which has a specific public responsibility for enforcement of rights.<sup>45</sup> Levels of satisfaction are likely to be affected by what participants believe would have been the result had the dispute been litigated.<sup>46</sup> As already noted, although participants may believe they are well informed when assessing outcomes, they may be unaware of the choices available or to their legal entitlements.

Furthermore, the results indicating client satisfaction are not restricted to Australia. Extensive research on divorce mediation in many countries indicates that parties usually settled and that most reported they were satisfied with the process and the outcome, though naturally those who settled reported greater satisfaction.<sup>47</sup> Mediation dealing with contact and residence disputes also appears to have had positive features, mainly involving improved communication, though these improvements reportedly do not appear to last beyond the mediation process itself.<sup>48</sup> Research on mediation has found that most disputes referred to mediation will settle before, during or shortly after mediation. It is interesting to note that results, including rate of settlement and level of satisfaction, do not appear to differ much, whether voluntary or compelled.<sup>49</sup>

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<sup>43</sup> M Delaney and T Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997) Sydney: Justice Research Centre, at p 9.

<sup>44</sup> R Singer, “The Rolling Stones Revisited: Exploring the Concept of User Satisfaction as a Measure of Success in Alternative Dispute Resolution” (1995) 6 *Australian Dispute Resolution Journal* 77.

<sup>45</sup> D R Hensler, “Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System” (2003) 108 *Penn State Law Review* 101; K Kressel and D Pruitt, above n 38, at p 396.

<sup>46</sup> K Mack, above n 11, at p 21.

<sup>47</sup> *Ibid.*, at p 3.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, at p 2.

Some commentators have raised significant criticisms about the value of certain research findings. One has stated that “there is a tendency... to place too much emphasis on empirical research as... a device for the evaluation of solutions to particular problems”.<sup>50</sup> This can result in “false expectations and... disappointment that is... unjustified”.<sup>51</sup> More recent ADR research has taken a different direction by analysing participants’ perceptions of ADR in relation to vital elements of the psychology of procedural justice, or raising policy questions about the role of ADR in the courts apart from efficiency claims.<sup>52</sup>

From the above discussion, it appears that mediation would be a better alternative to litigation in solving child related disputes only if it upholds the rights of the child as well as of the other parties.<sup>53</sup> Extensive research concerning family mediation, including Australian research, would support this as it concludes the following: clients across countries reach agreement in divorce mediation more than half of the time;<sup>54</sup> client satisfaction with both the mediation process and outcomes in all countries and settings is quite high;<sup>55</sup> satisfaction with mediation was higher among those who reached agreement than among those who did not;<sup>56</sup> positive features of mediation for participants in contact and residence disputes focus on the capacity to communicate to the other party in an enclosed setting, and include the opportunity for parents to express their opinions, talk about their children, have their concerns taken seriously and receive helpful ideas from mediators about parenting issues

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<sup>50</sup> B G Garth, above n 41, at p 131.

<sup>51</sup> Ibid.

<sup>52</sup> As observed by K Mack, above n 11, at p 25.

<sup>53</sup> Most evaluative research on ADR has been directed at mediation specifically, especially family mediation and the comparison between mediation and litigation: K Mack, above n 11, at p 2.

<sup>54</sup> J B Kelly, above n 37, at p 375; J A Pearson, “Family Mediation” (1994) in S Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings – Implications for Courts and Future Research* State Justice Institute, at p 60.

<sup>55</sup> J B Kelly, above n 37, at p 377; J A Pearson, above n 54, at p 63.

<sup>56</sup> J B Kelly, above n 37, at p 378.

and plans;<sup>57</sup> clients benefit from small but more short-term improvements in cooperation and in communications following custody mediation.<sup>58</sup>

Wade has summarised mediation results generally, emphasising that the positive results are linked to high quality and well-resourced programs.<sup>59</sup> Kressel and Pruitt also summarise mediation research in generally positive terms.<sup>60</sup> Based on these findings, it would appear that the reforms are heading in the right direction with the emphasis on alternative forms of dispute resolution, however, as I have indicated, these can not be the only factors that determine the success and suitability of these processes.

I now turn to the issue of ADR versus litigation. A comparison of ADR generally to litigation is difficult because of the diversity of ADR processes. Again, I am endeavouring to assess if ADR works better than litigation to resolve disputes relating to children. This will help me determine whether or not ADR has a valid purpose and whether or not the reforms will result in more successful outcomes.<sup>61</sup> Briefly, the positives of ADR are user satisfaction and cost effectiveness; and the negatives are the lack of guarantee of substantive fairness and potential pressures imposed on a vulnerable party.

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid, at p 379.

<sup>59</sup> J Wade, "Current Trends and Models in Dispute Resolution Part II" (1998) 9 *Australasian Dispute Resolution Journal* 113, at p 115. He refers to many surveys in Australia and the US, which consistently show that highly trained, debriefed, problem-solving mediation services (especially in family disputes), staffed by well-paid mediators, who use an intake process, are successful in that they have moderate to very high levels of settlement, durability of settlements, customer satisfaction, and preservation and/or restoration of the parties' ability to communicate in the future.

<sup>60</sup> K Kressel and D Pruitt, above n 38, at pp 396-399. They conclude that: parties perceive that mediation affords them a degree of control and privacy as well as satisfaction at being able to state their own position; the evidence on rates of compliance with mediated agreements is generally favourable; mediation is usually unable to alter incompatible patterns of relating.

<sup>61</sup> I wish to reiterate that the usual ADR process in court-connected programs is "mediation" in some form: K Mack, above n 11, at p 27.

Comparing mediation specifically to litigation is a difficult task because of the lack of clear performance standards or quality measures for litigation, and the need for clarity in what “litigation” consists of.<sup>62</sup> For instance, one must ask if the comparison is between ADR and trial, or ADR and lawyer negotiation, or ADR and a judicial settlement conference. These difficulties make it almost impossible to assess whether or not ADR is more successful than litigation in the realm of family law.

Although many of the major research findings illustrate the difficulty of reaching reliable, empirically based conclusions with enough accuracy to determine whether or not ADR works better than litigation, some broad generalisations may be possible.<sup>63</sup> In terms of user satisfaction, it appears that participants in family mediation report considerably greater satisfaction than those who litigate their divorce or residence and contact dispute. One researcher states that, “with few exceptions, study after study concludes that mediation is consistently favoured as compared with adversarial interventions”.<sup>64</sup> Although outdated, another report demonstrates that participants in mediation experience high levels of satisfaction with mediation, in contrast to the dissatisfaction felt with “the adversarial legal system”.<sup>65</sup>

From a costs savings point of view, there is some evidence of benefits for users of mediation, but the benefits for the courts are not so clear.<sup>66</sup> Several studies have found that

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<sup>62</sup> K Mack, above n 11, at p 3.

<sup>63</sup> For a more detailed discussion on these generalisations, see W D Brazil, “Court ADR 25 Years After Pound: Have We Found a Better Way?” (2002) 18 *Ohio State Journal on Dispute Resolution* 93.

<sup>64</sup> J A Pearson, above n 54, at p 63.

<sup>65</sup> J A Pearson and N Theonnes, “Divorce Mediation: Reflections on a Decade of Research” in K Kressel and D Pruitt (eds) 1989 *Mediation Research: The Process and Effectiveness of Third Party Intervention*, San Francisco: Jossey-Bass Publishers, at pp 27-28.

<sup>66</sup> K Mack, above n 11, at p 28.

“mediation... was significantly less expensive” than the adversarial process<sup>67</sup> and other research has provided important evidence that mediation will reduce legal fees.<sup>68</sup> Interestingly, upon reviewing divorce mediation research, Pearson concluded that “compulsory mediation programs... have been found to be highly cost effective and helpful to courts”,<sup>69</sup> however, she has noted elsewhere that there is “little impact on the courts’ overall workload”.<sup>70</sup>

In relation to whether results differ in any significant way between family mediation and litigation, the research is contradictory. One pro-mediation commentator summarised the research as demonstrating the following: mediation results in more joint parenting arrangements; there are higher rates of compliance with mediated agreements compared to arrangements reached in the adversarial process; and users of mediation are notably more satisfied than adversarial comparison groups.<sup>71</sup>

On the other hand, research conducted by Pearson reports the following: while some studies find evidence of generosity in mediation agreements, others reveal the opposite; although early evaluations showed a tendency towards joint parenting, more recent evaluations fail to reveal outcomes of distinct parenting arrangements; regardless of the dispute resolution process, children tend to live with their mothers; contact patterns are fairly consistent across forums; some studies find short-term improvements in compliance and relitigation for those who mediate and mediated agreements can be equally as unstable as those originating from judicial forums or lawyer conducted negotiations; and while

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<sup>67</sup> J B Kelly, above n 37, at p 376.

<sup>68</sup> J A Pearson, above n 54, at p 62.

<sup>69</sup> J A Pearson and N Theonnes, above n 64.

<sup>70</sup> J A Pearson, above n 54, at p 61.

<sup>71</sup> J B Kelly, above n 37, at pp 376-378.

mediated agreements resemble non-mediated ones in many ways, they usually contain more detail about visitation arrangements and avoid the use of vague contact orders that often bring parents back to court.<sup>72</sup> Essentially, Pearson concludes that “mediation outcomes resemble those generated in other forums and share many of the same weaknesses”.<sup>73</sup>

After two decades of research into US court-based ADR program development, Bergman and Bickerman observed “that well-run ADR programs *may* reduce cost and time, that ADR is satisfying and fair for *most* participants and that good ADR can cost money.”<sup>74</sup> This demonstrates the difficulties in assessing the general suitability of ADR to all family law matters. An investigation of conciliation of child disputes in the UK contrasted different models of conciliation and concluded that “in general, conciliation of all types reduced the number of disagreements between parties and generated settlements which the parties regarded as satisfactory – agreements were reached in 71 per cent of cases and of these 74 per cent were described as satisfactory”.<sup>75</sup> However, the same investigation concluded that on economic grounds alone the increased cost of providing conciliation was not sufficiently offset by cost savings to the public or the parties, and identified “the policy question” as whether the other benefits gained from conciliation can be shown to justify the additional cost.<sup>76</sup> Hence, the issue raised by this investigation is whether or not it is really economically beneficial to make these resources widely available. This brings us back to the question of the Government’s goals in pushing ADR.

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<sup>72</sup> K Mack citing J A Pearson, above n 11, at pp 28-29.

<sup>73</sup> J A Pearson, above n 54, at p 80.

<sup>74</sup> E Bergman and J Bickerman (eds) (1998) *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs*, Pike & Fischer Inc, Bethesda, Maryland, at p ii.

<sup>75</sup> A Ogus et al, “Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs” (1990) 53(1) *Modern Law Review* 57.

<sup>76</sup> *Ibid*, at p 74.

The Government's implied claim that ADR is better than litigation does not have any sound empirical basis. At best, it is a value preference driven by an ideological stand and economic factors. In the following section, I assess why mediation and mandatory mediation can be problematic.

#### **8.4 Problems with mediation and mandatory mediation**

In this section, I will discuss the possibility of a flexible referral criterion for mandatory mediation; the substantive fairness of mandatory mediation; its significance for access to justices; and its implications for victims of domestic violence.

It will not always be possible upon first glance to assess whether a matter should be exempt from the requirement to undertake mediation, and for this reason, the reforms ought to allow for the circumstances of each case to be scrutinised before a referral is made.<sup>77</sup> Clearly there are difficulties in assessing the suitability of ADR for family law matters as compared to litigation, and the number of variables in each dispute makes the task even harder. For some cases, mandatory mediation at the time of separation may be absolutely inappropriate, yet for others, mediation may be more suitable at another point in time. For these reasons, flexible referral criteria may be more useful than the general rule of mandatory mediation for all families.

Reasons for non-referral have been identified, and there is much debate about the substantive fairness of mediation and its significance for access to justice.<sup>78</sup> For example,

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<sup>77</sup> Alternatively, the reforms should recognise the diversity of contexts in which ADR will be called upon to assist. This would be problematic, however, given the impossibility of predicting all the types of disputes and issues that arise in each matter. Inevitably, certain variables from certain matters would be omitted and this line of approach would also become too prescriptive, and potentially discriminatory.

<sup>78</sup> As noted by K Mack, above n 11, at p 2.

there is a substantial body of literature, which argues that family disputes with a history of violence should not be referred to mediation. Astor provides numerous justifications for this: the imbalance of power created by violence is extreme and too significant for a neutral mediator to remedy; the nature and history of the relationship between the parties renders consensual decision-making impossible; mediation places undue pressure on the target of violence; mediation can endanger the safety of women who are the victims of violence and the safety of children in their care; and mediation is highly likely to result in unjust and exploitative agreements where there has been violence. In addition, she argues that mediation of family law matters involving violence removes the issue of violence against women from the public eye and threatens existing protections.<sup>79</sup>

A major concern amongst many commentators is how to ensure that victims of family violence are not disadvantaged or put at risk by the current changes to the system, while at the same time allowing them to benefit from some of the opportunities that ADR can potentially offer.<sup>80</sup> Similar concerns have been raised about the possible power imbalances in ADR processes between parties along cultural, ethnic, gender and age dimensions. Some researchers point to the capacity of certain ADR processes to be flexible and adapt to these factors.<sup>81</sup>

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<sup>79</sup> H Astor, "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3.

<sup>80</sup> A Bickerdike, A Bailey, J Pullen and H Cleake, *Family violence and family mediation. An arranged marriage or an opportunity for growth*, presented at the 9<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/bickerdike2.html>. This group of researchers has outlined a service delivery model detailing referral mechanisms, exclusion criteria, assessment methodologies and specific clinical interventions that are appropriate for this client group.

<sup>81</sup> As pointed out by T Buck, above n 7.

#### 8.4.1 Possible solution: flexible referral criteria for dispute resolution

I believe that if the Government had made ADR processes flexible to fit the variables of each matter, it would have been pushing the system in a better direction. By assessing the suitability of mediation on a case-by-case basis, the use of mediation would arguably have a more valid purpose with successful outcomes on a short- and long-term basis.

The voluntary use of mediation has also been said to have an impact on the validity and success of the new reforms.<sup>82</sup> Many argue that consensual participation is a given for most ADR processes<sup>83</sup> and is crucial to its legitimacy.<sup>84</sup> The supposed basis for ADR effectiveness and legitimacy is that parties voluntarily participate in good faith with a shared desire to resolve their dispute.<sup>85</sup>

It has been argued that mandatory mediation can impact negatively on meaningful involvement in the dispute resolution process because it could be seen as simply a procedural step, which parties must overcome in order to file a court application.<sup>86</sup> Furthermore, it could lead to a rise in bad faith negotiation, early termination, a decrease in agreement rates, greater entrenchment of the dispute, reluctance to use mediation in the future, lower job satisfaction for mediators, and increased public dissatisfaction with both mediation and the family law system in general.<sup>87</sup>

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<sup>82</sup> H Astor and C Chinkin analyse the debate on party choice, above n 25, at pp 269-274.

<sup>83</sup> J Howieson, "Perceptions of Procedural Justice and Legitimacy in Local Court Mediation" (2002) 9(2) *Murdoch University Electronic Journal of Law*, at paras 10-11.

<sup>84</sup> H Astor, "Rethinking Neutrality: A Theory to Inform Practice: Part I" (2000) 11 *Australasian Dispute Resolution Journal* 73.

<sup>85</sup> *Ibid.*

<sup>86</sup> As pointed out by NADRAC, above n 5.

<sup>87</sup> *Ibid.*

One Canadian commentator contrasted levels of coercion and found some evidence that greater coercion implied cases were slightly less likely to settle, whereas referrals that were less coercive meant there was a slightly higher chance at settlement.<sup>88</sup> Hence, mandatory mediation at the point of separation should be subject to the same screening process as voluntary mediation, and mediators should be permitted to decline cases that are unsuitable.

On the other hand, numerous studies have shown that voluntariness does not affect settlement,<sup>89</sup> nor does initial party interest affect satisfaction.<sup>90</sup> There are comparable findings for divorce mediation where agreement rates, satisfaction and willingness to suggest the process to others are similar for mandatory and voluntary participants.<sup>91</sup> Some even argue that without compulsion, few litigants (and their lawyers) would use ADR.<sup>92</sup> Perhaps one way to judge the validity of mandatory mediation in family law is to look at what parties choose when given the option.<sup>93</sup>

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<sup>88</sup> T Hedeem, "The Effects of Coercive Referrals to Dispute Resolution", paper presented at the LSA/CLSA Joint Annual Meeting, Vancouver, British Columbia, 30 May – 1 June 2002, at p 17.

<sup>89</sup> J M Brett, Z I Barsness and S B Goldberg, "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers", (1996) 12 *Negotiation Journal* 259, at p 259; D Smoyer, "District of Columbia Superior Court, Multi-Door Dispute Resolution Division" (1998) in E J Bergman and J G Bickerman, above n 73, at pp 32-33.

<sup>90</sup> J D Rosenberg and J Folberg, "Alternative Dispute Resolution: An Empirical Analysis" (1994) 46 *Stanford Law Review* 1487, at p 1539.

<sup>91</sup> J A Pearson, above n 54, at p 73.

<sup>92</sup> J Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) *Journal of Dispute Resolution* 241, at pp 299-301; J A Pearson, above n 54, at p 27; A Zariski, "Disputing Culture: Lawyers and ADR" (2000) 7(2) *Murdoch University Electronic Journal of Law*, at

[www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html](http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html), para 3. Research findings are contradictory and inconclusive on the effect of compulsory referral success, for example, an assessment of the Ontario court-connected mediation program found that cases where parties selected the mediator were most likely to achieve complete settlement: K Mack, above n 11, at p 47. A US researcher found that in Ohio, cases were more likely to settle if they entered mediation at the judge's initiative or at a party's request than if they were arbitrarily referred to mediation: R L Wissler, "Court Connected Mediation in General Civil Cases: What We Know from Empirical Research" (2002) 17 *Ohio State Journal on Dispute Resolution* 641, at p 676. Other studies have identified links between voluntariness and greater success: K Mack, above n 11, at p 48.

<sup>93</sup> K Mack looks into this, above n 11, at p 48. In Australia, the AC Nielson research into family mediation has indicated that most people simply do not know about mediation: AC Nielson (1998) *Family and Child Mediation Survey: Final Report*. It reported that in 1995, 17% of people surveyed indicated they had heard of family mediation; by 1998, the figure had risen to 18%. Of those aware of it, 16% said they would not be

After considering the research findings on the voluntariness of mediation, I reiterate that carefully considered intake procedures that factor in the individual circumstances of each dispute are imperative. Astor notes that, “one of the important determinants of the efficiency and effectiveness of any court connected dispute resolution program is that of appropriate diagnosis and referral.”<sup>94</sup> Hence, a determination of whether or not an individual case would benefit from ADR and the timing of that intervention requires careful consideration.

The point at which a dispute should be directed to ADR or should be re-routed from litigation to ADR is a controversial issue as there are many factors to be taken into account with each individual case. Mack’s review of court referral to ADR effectively exposes the assumption that specific types of disputes can be regularly “matched” with a particular type of ADR method, and concludes that there are considerable limits on the capacity of empirical research to establish clear referral criteria.<sup>95</sup> Her research does, however, provide some positive and consistent messages, for example, the recurring results of high client satisfaction with mediation, which hardly changes according to whether the mediation is voluntary or involuntary.

Therefore, before mandating mediation for all but a few types of matters, the reformers ought to have thought carefully about why a party might choose or resist ADR, as this may affect the appropriateness of a compulsory referral. For example, if a party refuses ADR because of a fear of violence, that fear should not simply be overridden without precise

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keen to use family mediation, and 52% of those said they preferred to handle their problems themselves or not involve other people. Of the 70% who said they would be willing to use family mediation, the most commonly voiced reasons were that it would be better than court, less stressful, help with communication, provide an objective opinion and be more cost-effective.

<sup>94</sup> H Astor, above n 84.

<sup>95</sup> K Mack, above n 11.

intake procedures and measures to ensure personal safety, nor should it automatically mean the case is eliminated from the potential benefits of such processes. If a party refuses because they simply believe mediation is not appropriate for their dispute, a different response may be necessary to ensure the party is well-informed about what ADR actually involves and its potential value. An important question relating to party choice is, who would be appropriate to analyse the suitability of referral? It has been suggested that although parties and their lawyers will have a more detailed understanding of their own dispute and needs, they may not have sufficient understanding of ADR processes to make suitable choices.<sup>96</sup>

I have pointed out that the Family Court Rules 2004 already stipulated that pre-action procedures were to be exhausted before a party filed an application in the FCA. Hence, the reforms extend those rules in the FLA. Perhaps the Government feels justified in mandating mediation in light of research indicating that those who are compulsorily referred to ADR do not generally express objections after attending the process,<sup>97</sup> nor do they opt out, if given the choice.<sup>98</sup> However, as one commentator has stated, acceptance of an ADR process does not necessarily mean that it is the preferred process.<sup>99</sup>

By automatically assigning disputes to an ADR program, a legal culture is fostered to enhance the acceptance of ADR and make it part of standard judicial practice.<sup>100</sup> It has been observed that while in some jurisdictions, mandatory referral of disputes to ADR is

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<sup>96</sup> K Mack, above n 11, at p 50.

<sup>97</sup> J Macfarlane, *Court Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (1995) Toronto: Queen's Printer for Ontario, at p 72.

<sup>98</sup> J D Rosenberg and J Folberg, above 90, at p 1538.

<sup>99</sup> K Mack, above n 11, at p 50.

<sup>100</sup> R M Shusterman and E K Burrows, "Mediation in Michigan State and Federal Courts" in E Bergman and J Bickerman, above n 73, at pp 132-133.

thought inappropriate and problematic, in others it is considered standard and rarely discussed.<sup>101</sup> Perhaps what the Australian Government is trying to achieve is the latter system.

I will go as far as arguing that it would be beneficial to assess the intensity of the conflict in all matters so as to avoid wasting resources. This would inevitably be a risk in mandating mediation rather than assessing the characteristics of each dispute. Case types are not themselves predictive, even though some of the bundles of features that recur in a particular case type may be.<sup>102</sup> One commentator has suggested that it is not specifically the family nature of the dispute that will determine the success of ADR, but the multi-issue nature and the ongoing relationships that are key factors in successful ADR.<sup>103</sup>

My proposal is to provide mediation upon separation with a greater chance of success. I acknowledge the drawbacks in the implementation of a system that assesses the factors of each individual case to determine the suitability of a referral to mediation, notably that it would require an enormous amount of resources and raise several questions of principle,<sup>104</sup> however, in circumstances where the ADR process would be dealing with entrenched disputes, this would be a better direction than mandatory mediation.

In summary, I argue that the reforms would go in the right direction when a flexible, case-by-case approach to dispute resolution is adopted. However, for the Government to really make progress in its support for families through the use of ADR, it must not only develop a flexible assessment of the suitability of mediation upon separation, but also

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<sup>101</sup> Ibid.

<sup>102</sup> K Mack, above n 11, at p 67.

<sup>103</sup> R A Whiting, above n 39.

<sup>104</sup> Such as the question of who would make the referral.

provide assistance to couples before separation. A prime time would be before the children are born.

### **8.5 A better direction for the family law system: early intervention**

I am arguing two major points: that ADR should not be mandatory at the point of separation; and that if the goal is to teach people skills for dispute resolution, then intervention in the form of compulsory counselling should happen much earlier than at the point of separation.

It should not be mandated at the point of separation because this is only effective for many families as a short-term, focussed intervention. Therefore, rather than mandating mediation when a relationship breaks down, couples ought to be provided with long-term skills in resolving disputes and forging suitable parenting arrangements.

Clearly the Government has identified that couples require assistance when making long-term and short-term living arrangements for their children before they reach a point where communications have completely broken down. Therefore, the Government has introduced the compulsory use of mediation as early as possible after separation. I argue that assistance to families must be provided at a much earlier point – preferably before the creation of the family. That way, mediation upon separation could be far more effective. By intervening at that early stage, many of the problems and uncertainties identified with ADR and compulsory ADR would be overcome, as I will demonstrate below.

It is important to clarify here the meaning of the term “early intervention”. It is said to refer to the early identification of problems, prevention and early remediation. Sometimes it

also applies to early intervention in early childhood.<sup>105</sup> While early intervention projects attempt to reduce risk factors and increase protective factors, positive long-term outcomes for families frequently require additional support along the way, particularly at times of transitions.<sup>106</sup>

Essentially, this proposal is compatible with the establishment of Family Relationship Centres and introduction of parenting advisers. However, I am suggesting the timing for attendance at a Family Relationship Centre be different and the services reach each and every family. Naturally, my proposal would require the use of a significantly greater number of resources given it would be catering to many more people, and such a program would not really be described as alternative or primary dispute resolution given its purpose would not be to assist with the resolution of disputes but to prevent them. The very fact that it would not be dealing with existing disputes, but would be attempting to prevent future disputes, will help overcome many of the criticisms levelled at the current reforms.

One of the major flaws in the changes to the system that I have identified above is that they are too prescriptive and ignore the variables of each dispute.<sup>107</sup> Not all disputes about parenting matters are the same. I have attempted to show that mediation may not be suitable for all disputes at the exact time stipulated by the Government, and that it may be

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<sup>105</sup> Australian Government Department of Family and Community Services, “Evaluation of the Stronger Families and Communities Strategy 2000-2004. Early Intervention – particularly in Early Childhood”, Issues Paper, June 2004: [http://www.facs.gov.au/internet/facsinternet.nsf/VIA/sfsc2/\\$File/Early\\_Intervention\\_particularly\\_in\\_Early\\_Childhood.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/sfsc2/$File/Early_Intervention_particularly_in_Early_Childhood.pdf), at p 1.

<sup>106</sup> Although I focus on early intervention in the family, I do not mean to neglect those who have existing problems and who need assistance to address them. Nor do I believe the Government should become complacent about families that have received early intervention support.

<sup>107</sup> This is a recurring concern for commentators, for example, Murphy, Campbell and Pike, who believe the concentration on details of the “contact regime” by the Government rather than on an holistic “parenting plan” is too prescriptive: P Murphy, A Campbell and L Pike, “Our Children’s Health and Safety Needs: Progress Report on a Parenting Plan Template”, presented at the 9<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005, <http://www.aifs.gov.au/institute/afrc9/murphy.pdf>.

appropriate for some disputes that the Government assumes ought to be exempt from such processes. Unless a referral criteria for mandatory mediation is flexible enough to cater to a wide range of factors that are present in vastly different disputes, by nature it risks being too prescriptive.

The primary reason my proposal could not be accused of being too prescriptive is its timing. Given there would not yet be an established status quo in each individual family and no entrenched conflict at the stage at which I propose introducing counselling and education, there would arguably be no need for an assessment of the suitability of the program to the dispute, and hence no risk of a referral criteria being too narrow. Although some couples would assert they do not require counselling and education, I argue it would be suitable for all families simply based on its goals to provide preventative measures for subsequent disputes (or effective ways to deal with them), as well as education on the family law system. Due to its timing, such a program would not be trying to change already established practices and structures within each individual family, but ideas and theories on how practices and structures should be. Problems become entrenched when they are embedded in habitual ways of thinking, feeling and behaving,<sup>108</sup> and habitual behaviour is difficult to change once it has become established. For that reason, many early intervention projects seek to work with families to develop positive practices from the start, such as parenting practices from birth.<sup>109</sup>

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<sup>108</sup> Australian Government Department of Family and Community Services, above n 105, at p 6.

<sup>109</sup> Ibid.

By removing the need to deconstruct already established roles and practices,<sup>110</sup> the establishment of a comprehensive plan for the joint parenting of children would hopefully be more realistic.<sup>111</sup> Hence, the timing of the program would not only overcome problems of narrow referral criteria, but would also assist with setting patterns of behaviour and practices suitable to each individual couple before the formation of the family. It would also hopefully increase the chances of providing couples with long term skills at resolving disputes. By seeking to prevent rather than cure, the program could hopefully cater effectively to each individual couple without requiring a referral program that is necessary when assessing the suitability of mediation to specific entrenched disputes. Naturally, such a program would have to respond to the considerable diversity in cultures, language backgrounds and age of couples, and recognise the different needs among them.

It has been argued that a focus on early intervention and prevention, rather than on treatment after a problem has developed, is both socially and economically more effective in the long run.<sup>112</sup> In addition, early intervention programs have been found to provide psychological and social benefits to children, families and communities, including: higher rates of employment and skill levels in mothers; reduced welfare expenditure; improved school performance; and a reduction of child abuse and neglect notifications.<sup>113</sup> The

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<sup>110</sup> By saying this, I am not ignoring the fact that there is a need to deconstruct ideas about roles and practices that have been set by history and specific cultures.

<sup>111</sup> Joint parenting arrangements are also subject to a society that is conducive to such arrangements, as I have argued.

<sup>112</sup> E Fish, "The benefits of early intervention" in *Stronger Families Learning Exchange Bulletin No 2*, Spring/Summer 2002 pp 8-11: <http://www.aifs.gov.au/sf/pubs/bull2/ef.html>. In Australia, the Stronger Families and Communities Strategy has embraced early intervention as part of its approach to enhance family and community wellbeing. Consequently, the Stronger Families Learning Exchange at the Australian Institute of Family Studies has been developed to improve knowledge about how early intervention projects may be adapted for a variety of Australian contexts and the benefits that may result.

<sup>113</sup> Ibid.

benefits of providing such programs are also said to extend to cost-effectiveness, which is crucial for policy makers to demonstrate.<sup>114</sup>

In my view, it would be far more appropriate to assist a couple to develop a parenting plan that addresses arrangements for children before a status quo is established and while the parties are still communicating effectively, rather than after a family has become accustomed to a specific structure and precise practices, and is in the throes of separation. Joint parenting needn't be a concept for the separated family alone. At least, a couple ought to be offered the opportunity to assess whether or not it would suit their lifestyle before the birth of any children. If they choose not to embark on joint parenting, there is at least a possibility of spelling out the costs and benefits of their chosen arrangement for both the spouses.

In addition to overcoming certain flaws identified in the Government's reforms for mandating alternative forms of dispute resolution at the point of separation, my proposal would prove more appropriate for several other reasons. By mandating the attendance of a couple at a Family Relationship Centre before the birth of any children, the parenting advisor would hopefully play a greater role in promoting family relationships than during the aftermath of separation. In fact, the term "parenting advisor" would arguably be more appropriately applied to someone providing advice and guidance on parenting before a couple becomes parents, than to someone intervening after a couple has already had children. While the Government suggests the parenting advisor plays a dual role in terms of advice-giving and dispute resolution after separation, I argue it would be better to delineate the two tasks and have a parenting advisor who gives advice and guidance before the birth

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<sup>114</sup> Ibid.

of children, as well as a mediation practitioner who assists with dispute resolution after separation. This would lighten the skills set required by such practitioners and allow specialised training for the acquisition of appropriate qualifications for each role.

In terms of the Government's mediation objective of both parents having a meaningful role in their children's lives, this proposal can help before a couple becomes parents, rather than when parents are separating. Establishing such a mentality and fostering strong family relationships at the earliest point possible in the life of the family would be a much better direction for the law. This is especially so in light of research showing that parents who are able to cooperate with one another and communicate effectively are often much more able to make good parenting decisions post-separation.<sup>115</sup> Hopefully my proposal for a program of compulsory early intervention would give mediation greater validity and an increased chance at successfully resolving any disputes upon separation.<sup>116</sup>

My proposal simply assists in the development of effective practices to reach the largest number of families and to contribute to the quality and duration of arrangements put in place. It may even encourage the later use of mediation to resolve disputes if a family does subsequently separate, since many of the concepts raised in mediation, such as parenting plans and shared parenting arrangements, would have already been discussed in the counselling and education program compulsorily attended prior to the birth of the child/ren.

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<sup>115</sup> National Alternative Dispute Resolution Advisory Council, "Submission in response to 'A New Approach to the Family Law System: Implementation of Reforms' discussion paper 10 November 2004: [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(EAF6E03C496C7A11D2A141976803674B\)~05+January-+Submission.htm/\\$file/05+January-+Submission.htm](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(EAF6E03C496C7A11D2A141976803674B)~05+January-+Submission.htm/$file/05+January-+Submission.htm), at p 6.

<sup>116</sup> I reiterate that this proposal does not eliminate the option to attend mediation or other forms of alternative dispute resolution if issues subsequently arise. Unless arrangements are flexible, it is quite feasible that a couple would require assistance at a later stage to accommodate a constantly changing situation as a child progresses through his or her developmental years and/or as parents' households change and possibly merge with another household of a separated spouse.

It may also make couples think about whether or not they share the same views on parenting and parenting arrangements. What it would no doubt achieve is greater communication between future parents and an increased understanding of the way the system operates when determining the future arrangements for the children upon the breakdown of the family. This would arguably take much of the pressure off the adversarial system that is viewed by the Government as being the primary cause of the problematic way in which care arrangements are made for children post-separation.