

A COMPARATIVE ANALYSIS OF THE PRACTICE OF MEDIATION AND CONCILIATION IN FAMILY DISPUTE RESOLUTION IN AUSTRALIA: HOW PRACTITIONERS PRACTICE ACROSS BOTH PROCESSES

MIEKE BRANDON¹ AND TOM STODULKA²

I INTRODUCTION

This article analyses current family dispute resolution practice in mediation and conciliation. It argues that recent changes to the *Family Law Act 1975* (Cth) ('the Act') have resulted in increasing similarity in the role of the third party facilitator in these processes. This is despite fundamental differences in well accepted definitions used to describe both mediation and conciliation.

While it is important for practitioners to be aware of their flexible role in both processes and use their ability for varied and creative interventions in assisting family law clients to achieve their goals, they also need to understand and be able to articulate the differences and similarities of these processes and their role within. This is not only for the purpose of informing and guiding mandated clients but also to demonstrate their

¹ Mieke Brandon was a family dispute resolution practitioner with Relationships Australia from 1993-2007. Mieke and Linda Fisher co-authored *Mediating with Families Making the Difference* (Pearson Education Ltd, 2002). Mieke and Leigh Robertson co-authored *Conflict and Dispute Resolution a Guide for Practice* (Oxford University Press, 2007). She continues to provide training in a range of university settings and acts as a mentor. Mieke has published many articles and presented workshops in Australia and overseas.

² Specialist mediator and conciliator working in family law, workplace, commercial and community disputes. He is an advanced mediator and mentor with LEADR, is accredited with the Institute of Arbitrators and Mediators Australia (IAMA), the Qld Courts and Law Society. In 2004 he founded the Alternative Dispute Resolution (ADR) Forum and co-founded Mutual Mediations in 2003 in Qld. Tom has published several articles and also provides conflict coaching. Both are registered Family Dispute Resolution (FDR) providers and accredited according to the Australian national standards for practice.

competence as registered family dispute resolution practitioners incorporating the national accreditation for family dispute resolution practitioners.³

As experienced practitioners we intend to provide some factual and anecdotal information available to us from our extensive involvement in family dispute resolution as mediators and conciliators, during the many changes of the Act so far. The focus of the analysis in this article therefore is on the practice of mediation and conciliation in community agencies and Family Relationship Centres (FRCs).⁴

II DEFINING MEDIATION AND CONCILIATION

The National Alternative Dispute Resolution Advisory Council (NADRAC) defines mediation as ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement’.⁵ NADRAC defines conciliation as:

a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.⁶

It is notable that there are wide variations in meanings for both ‘mediation’ and ‘conciliation’. Conciliation, for example, can be used to refer to a range of processes used to resolve complaints and disputes including informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute, and also combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.⁷ In contrast, mediation is primarily a facilitative process. In such a process assistance is provided in ‘managing a process which supports the participants to make decisions about future actions and outcomes’.⁸

Despite the wide variations in definitions of conciliation and mediation, the definitions provided by NADRAC are widely accepted. These definitions, described above, allow

³ See NADRAC
<[www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~NADRAC+Advice+on+a+New+Accreditation+System+for+Family+Dispute+Resolution+Practitioners.pdf/\\$file/NADRAC+Advice+on+a+New+Accreditation+System+for+Family+Dispute+Resolution+Practitioners.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~NADRAC+Advice+on+a+New+Accreditation+System+for+Family+Dispute+Resolution+Practitioners.pdf/$file/NADRAC+Advice+on+a+New+Accreditation+System+for+Family+Dispute+Resolution+Practitioners.pdf)> at 7 August 2008..

⁴ See Family Relationships Online <www.familyrelationships.gov.au> at 30 July 2008, for further information.

⁵ National Alternative Dispute Resolution Advisory Council, *Glossary of Terms* (Commonwealth of Australia, 2003) 1-7.

⁶ Ibid.

⁷ Ibid.

⁸ LEADR, *Australian National Practice Standards* (2007) 5 <www.leadr.com.au/accreditation> at 30 July 2008.

us to identify a fundamental difference between the role of the conciliator and that of a mediator; namely, that the conciliator is a more active intervener, and may have an advisory role on the content and the outcome of a dispute. A conciliator may make suggestions, give expert advice and use intervention techniques that not only actively influence the likely terms of an agreement, but also encourage all parties to settle. A mediator on the other hand (or co-mediation team) generally assist the parties to communicate with each other so that they can identify, clarify and explore the issues in dispute before they consider their options to 'reach an agreement or make a decision about how to move forward and/or enhance their communication in a way that addresses participants' mutual needs with respect to their individual interests based upon the principle of self determination.'⁹

It is acknowledged that while some mediators incorporate an 'advisory' role to provide expert information and advice that otherwise is readily available, this would most likely only be done in response to the parties agreeing that this may be beneficial and enhance the parties' decision making process.

Mediation and conciliation, in their current forms, both satisfy the definition of family dispute resolution under the Act which states that:

Family Dispute Resolution is a process (other than a judicial process):

- a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- b) in which the practitioner is independent of all of the parties involved in the process.¹⁰

III THE PRACTICE OF FAMILY DISPUTE RESOLUTION IN AUSTRALIA

Community agencies such as Relationships Australia, Unifam, Interelate, Lifeline, Centacare, to name a few, have provided family mediation services for both parenting and property matters, adjacent to their counselling and education services, since the mid '80s. More recently FRCs were set up to respond to the needs of separating parents. Many of the established and trusted community agencies have successfully tendered to be FRCs. The FRCs, which are federally funded specialist services, have been established to avoid long waiting lists at the Family and Federal Magistrate Courts, expensive legal action, and to provide choice of processes for separating couples and their children.

The new Australian family law system now requires parents involved in post-separation disputes about children, although there are exceptions, to participate in a family dispute resolution process before they are able to file an application in a Family Court.¹¹ Family dispute resolution practitioners (FDRPs) in these contexts are required to be registered, and are obliged by law to fully inform parents of their obligations under the Act.¹²

⁹ NADRAC, above n 5.

¹⁰ *Family Law Act 1975* (Cth) s 10F(b).

¹¹ *Family Law Act 1975* (Cth) s 60I. Note that this section also provides for a number of exceptions to compulsory family dispute resolution see s 60I(9).

¹² Referral to the Advice line on 1800 050 321 and verbal and in written form relevant information details available in the Attorney-General's fact sheets available on: Family Relationships Online <<http://www.familyrelationships.gov.au>> at 30 July 2008.

In all FRCs, and in other community family dispute resolution services, an intake is conducted according to an assessment of suitability guidelines.¹³ Careful screening determines whether there are any safety concerns for the parties and children which will mean that dispute resolution either would be inappropriate or should be structured in a particular way. Possible safety concerns are investigated in three domains, being:

1. Domestic and family violence and violence towards others;
2. Child abuse and abduction; and
3. Concerns about self harm.¹⁴

Practitioners must consider the consequences of past, recent and current aspects of family violence and the affects first on the victims,¹⁵ second on the children, and third on the households of each parent. To establish whether any party can ‘negotiate freely’ practitioners providing dispute resolution under the Act must be satisfied that an assessment has been conducted to establish whether mediation is appropriate.¹⁶ The intake consists of a thorough exploration of the parties’ history of decision making and general management of their interpersonal and family conflicts and how this may have changed as a result of separation.¹⁷ One classification, based on research about typical behaviours between couples, helps to identify whether the parties are ‘perfect pals’, ‘cooperative colleagues’, ‘fiery foes’, or ‘dissolved duos’.¹⁸ The descriptions assist practitioners not only with their assessment but also with specific information necessary to consider when and how a dispute resolution process may be conducted.¹⁹ The information can also be used for parties to self-assess, and to establish what type of communication or negotiation skills they may need to further develop to adequately participate in dispute resolution.²⁰ Practitioners have an educative role not only about the process and what is expected of the parents, and their obligations to make decisions in the best interest of their children, but they also need to provide information about all relevant concerns expressed, referral to helping agencies, legal advice, and the child support agency.²¹ This includes handout materials on parenting schedules, child

¹³ This can be for mandated as well as court referred parties. See Australian Government, Attorney-General’s Department, *Information for Family Dispute Resolution Providers, Screening and Assessment Framework* (2006) 1-89 <<http://www.ag.gov.au/fdrproviders>> at 10 December 2007. See also *Family Law Regulations 1984* (Cth) reg 62.

¹⁴ Australian Government, Attorney-General’s Department, above n 13, 24-5.

¹⁵ R Field, ‘A Feminist Model of Mediation That Centralises the Role of Lawyers as Advocates for Participants Who are Victims of Domestic Violence’ (2004) 20 *Australian Feminist Law Journal* 65.

¹⁶ See *Family Law Regulations 1984* (Cth) reg 62, for a comprehensive list of considerations for assessment of suitability available at <http://www.austlii.au/au/legis/cth/consol_reg/flr1984223/s62.html>. See also *Family Law Act 1975* (Cth) s 60I(9) for family violence, child abuse and urgency.

¹⁷ Australian Government, Attorney-General’s Department, *Information for Family Dispute Resolution Providers, Screening and Assessment Framework* (2006) <<http://www.ag.gov.au/fdrproviders>> at 10 December 2007.

¹⁸ Terminology based on Ahrons (1994) and Rogers (1987) in C J Beck and B D Sales, *Family Mediation* (American Psychological Association, 2001) 66.

¹⁹ This could be face-to-face; solo or co-mediation; shuttle or by telephone; joint or shuttle; or a combination of all mentioned. Ideally, if there are any concerns for safety any process should be conducted in daytime hours.

²⁰ For a discussion regarding concerns for women in compulsory dispute resolution see R Field, ‘Using the Feminist Critique of Mediation to Explore “the Good, the Bad and the Ugly” Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45.

²¹ *Family Law Regulations 1984* (Cth) reg 63 lists the information that should be given to the parties.

developmental reactions to separation, post separation parenting, and the concept of using child-inclusive practice.²²

Practitioners are now required under the legislation to discuss with parents the option of writing up final agreements in the form of parenting plans and what information can be included.²³ They must also address the impact of entering into parenting plans and suggest getting legal advice on any consequences of formulating such a parenting plan.²⁴

At intake, practitioners also establish what the current arrangements for the children are and if any orders are in place, foreshadowing that the emphasis is placed on parents having to work together in mediation or conciliation to arrive at durable parenting arrangements that are developmentally appropriate, and in their children's best interests.²⁵ Consistent with this, the practitioner will explain to the parties the expectations of a commitment to the process, and respectful behaviour towards each other and the practitioner.²⁶ Additionally, any consequences of not settling the dispute, or the fact that some of the agreements may need to be reviewed (depending on the ages and stages of the children), sometime in the near future, may need to be flagged. Practitioners can inform those parents who seem enmeshed in their dispute and are experiencing difficulties in being co-operative, about how to set boundaries for their communication both during the mediation/conciliation and in the future. Practitioners will also ensure that parties are aware that any agreements reached cannot be legally binding until filed in court.

Practitioners must discuss with parties their duties to provide full disclosure and to bring along all relevant information and documents to the session. This is particularly important in those agencies that also offer property settlement mediation and conciliation.²⁷ The limits of confidentiality and admissibility, and the types of instances in which dispute resolution may have to be terminated, must be highlighted.²⁸ If support persons are to be involved, their roles will also need to be clarified. Separating parents will also be provided with relevant fact sheets and handout materials to assist them to adjust to separation,²⁹ and the practitioner will canvass with them issues of time-frame and any fees.³⁰ The content of, and the requirement for parties to sign, an agreement to

²² J McIntosh, *Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors* (2007) Australian Institute of Family Studies <<http://www.aifs.gov.au/afrc/pubs/resource/resource1/resource1.pdf>> at 19 November 2007.

²³ *Family Law Act 1975* (Cth) s 63DA.

²⁴ *Family Law Act 1975* (Cth) s 63DA(1)(b).

²⁵ See J Kelly, 'Parents with Enduring Child Disputes' (2003) 9(1) *Journal of Family Studies* 37, 51-62.

²⁶ *Family Law Regulations 1984* (Cth) reg 64 sets out general obligations of the dispute resolution practitioner.

²⁷ Consideration needs to take into account of post separation financial repercussions of spousal violence, see G Sheehan and B Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Family Law Journal* 102, 102-118.

²⁸ *Family Law Act 1975* (Cth) ss 10H, 10J. The information that the FDR practitioner must provide to clients is set out in *Family Law Regulations 1984* (Cth) reg 63.

²⁹ See ch 3 (the process of separation for the 'leaver' and the 'left') in L Fisher and M Brandon, *Mediating with Families Making the Difference* (Pearson Education, 2001).

³⁰ Parents are provided with relevant resources produced by the Child Support Agency and Relationships Australia. For example, the Australian Government, Child Support Agency, booklet 'Getting Started' or 'Dealing with Separation' CD and relevant booklets (see Back On Track: Finding a Way Through Separating and Repartnering <<http://www.csa.gov.au/repartner/down.htm>> at 10

mediate/conciliate, prior to their participation must also be explained.³¹ Clearly, intake sessions are a critical aspect of both mediation and conciliation as family dispute resolution processes. This is because a properly conducted intake process helps to ensure that all parties come to the dispute resolution process well prepared, ready and able to participate.³²

Both in mediation and conciliation the dispute resolution practitioner³³ determines the phases of the process to be conducted. The process may be sequential, starting with a series of private meetings, such as a pre-mediation and intake interview to establish if the case is suitable for such a process and to assess the willingness of the parties to negotiate in a constructive way.³⁴ This can be conducted face-to-face, via shuttle or by telephone.

The process may start as a typical mediation process in which the parties commence in a joint session and after agenda setting and some exploration, the parties are separated for private sessions and come back together to propose ways for workable agreements. Alternatively, the parties may remain separated and the session continues by way of shuttle negotiations until the drafting of agreements. If the whole process is conducted as a shuttle parties may never meet each other. This may be useful if it protects parties from physical or emotional harm, or when it is considered more advantageous for a potential settlement to keep the parties apart.³⁵ Mediation and conciliation processes may vary, keeping the parties in joint sessions without private sessions, using more private sessions than joint sessions, or being conducted solely as a shuttle. In all these processes the advantages and disadvantages must be considered.³⁶

IV UNPACKING THE PRACTICE OF FAMILY DISPUTE RESOLUTION

In family dispute resolution the first critical element of practice is that neither the conciliator nor mediator has a determinative role. Conciliators, while actively demonstrating their impartiality, can have an advisory role in the process, content and

December 2007). Relationships Australia also has a range of free booklets available: 'Women and Separation'; 'Men and Separation'; 'Share the Care'; and many other pamphlets and information sheets, see Relationships Australia <www.relationships.com.au/resources/publications> at 31 July 2008. Clients are also provided with the phone number of the Family Relationships Online, Family Relationships Advice Line (see Family Relationships Online <www.australia.gov.au/familyrelationships> at 31 July 2008) and refer to Centrelink.

³¹ In most FRCs parents are referred to educational sessions before they can attend mediation, this is in contrast to fee paying parties seeking mediation in community agencies such as Relationships Australia where there is no compulsion to attend such sessions.

³² D Cooper and M Brandon, 'Non-Adversarial Advocates and Gatekeepers: How Lawyers and Family Dispute Resolution Practitioners Can Encourage Cooperative Post-Separation Parenting' (2008) 19 *Australasian Journal of Dispute Resolution*, 104.

³³ The definition of 'dispute resolution practitioner' can be found in the *Family Law Act 1975* (Cth) s 10G and is used for both the mediator and the conciliator.

³⁴ In court ordered property conciliation an intake may not be conducted as most likely legal representatives attend the conciliation, see also M Brandon and T Stodulka, 'Federal Magistrate Court-Ordered Property Conciliation at Relationships Australia Queensland' (2006) 9(2) *ADR Bulletin* 33, 34.

³⁵ Shuttle can be conducted with the practitioner moving between the parties; or by telephone mediation; or conciliation.

³⁶ M Brandon, 'Use and Abuse of Private Sessions and Shuttle in Mediation and Conciliation' (2005) 8(3) *ADR Bulletin* 41, 42-46.

Conciliators can be seen more at the directive end of the spectrum as they have more control over and provide more process, and content-directed, interventions than that which is generally expected from mediators, using a facilitative approach.⁴¹ There are many variations in practitioners' control and focus. Conciliators could be regarded as belonging to the outcome and settlement end of the spectrum as 'dealmakers' in contrast to mediators at the other end, remaining client-centred regarding their self determination to settle and are considered 'orchestrators'.⁴² Orchestrators are seen as facilitators whose main role is to intervene when the parties are unable to make progress, to educate the parties about how they can collaborate in using interest based negotiation, and to assist their decision making with a focus on the future. Although many practitioners move easily along the continuum, some may demonstrate elements of rigid objectives by either concentrating on problem solving and fostering agreement making 'on tangible, substantive issues', while others' main focus is on 'improving the parties' relationship'.⁴³ Finding a balance between a non-directive and directive approach can become particularly challenging when separating couples 'clash' as a result of each having different perceptions of the 'leaver' and the 'left' and how they define the problems they are having as a result.⁴⁴ Practitioners also need to understand that, how couples experience separation conflict, is not affected by whether they are married or de facto partners (male and female or same sex). Each couple must be treated as unique. To expect parties to always treat each other respectfully in these circumstances is naive. To lay ground rules and to enforce strict adherence leaves a practitioner open to the charge of being controlling, patronising and disrespectful of the parties' struggle to behave as well as possible under the circumstances. Parties may need to be able to express their emotions and vent in a safe environment.⁴⁵

Both mediators and conciliators are aiming to assist separating, separated or divorced parties to work together; while at the same time these couples are emotionally trying to establish that they are apart. The mere fact that any absence of cooperation may have contributed to their relationship breakdown in the first place, possibly creates a dilemma for the parties and the practitioner, in that their respective goals may be in opposition.⁴⁶ Similarities and differences are not set in concrete and many experienced dispute resolution practitioners find themselves 'crossing relatively nebulous boundaries, which are (perhaps quite artificially) drawn between and around the definitions of the two dispute resolution processes'.⁴⁷

The main hallmark of mediation is that it belongs more at the non-directive end of the spectrum, which respects parties' self determination to make their own decisions. Traditionally the mediator is seen as the facilitator, a 'steward rather than a dictator' of the process.⁴⁸ Mediators encourage interactions between the parties, using a high degree of understanding of these interactions to be able to engage with and guide the disputants. Mediators use interventions that create subtle changes between the parties to

⁴¹ L Boulle, *Mediation: Principles, Process and Practice* (LexisNexis Butterworths, 2005) 43-7.

⁴² Kolb (1983) cited in C W Moore, *The Mediation Process* (Jossey-Bass, 1996) 54.

⁴³ Ibid 54.

⁴⁴ M Benjamin and H H Irving, 'Using the "Mediatable Frame" to Define the Problem in Mediating a Parenting Plan' (2005) 22(4) *Conflict Resolution Quarterly* 473, 479.

⁴⁵ L Fisher and M Brandon, *Mediating with Families* (Thomson, 2nd ed, to be published late 2008) ch 3.

⁴⁶ Saposnek, above n 40, 49.

⁴⁷ T Altobelli, 'Private Conciliation In Family Law' (2002) 13 *Australasian Dispute Resolution Journal* 230, 235.

⁴⁸ Gaynier, above n 37, 397.

move them towards agreements. They assist parties to identify and express their interests and needs with the assumption that this will bring underlying compatible needs or areas for compromise or trade-offs.⁴⁹ In contrast to a problem solving model some mediators prefer to use a future-focused process based on a forward looking approach by first determining the end point or ‘dream solution’ in which the dispute no longer exists.⁵⁰ Mediators accordingly must have some theoretical understanding about how parties make meaning of their dispute, their own role in this interaction, how they can facilitate a shift, and why a shift has occurred. In this way, they formulate their ‘theory’ of practice.⁵¹ Mediators may also need to consider how ethical it is to push their own objectives, using methods that work for them based on their values and beliefs.

Today, in family dispute resolution, practitioners are ‘repeat players in the given domain’ and have become content experts. As a result they use a much more ‘strategic’ style.⁵² This strategic style is described as having three distinct stages: 1) in the diagnostic stage the parties tell their story in response to focused and informed questioning by the practitioner. The mediator drives this stage as they are able to recognise the causes that are likely to fuel patterns of polarisation; 2) the practitioner shares their thinking or voices a hypothesis and invites the parties to accept or reject the formulation of their strategy. The input by the parties is dependant on the urgency or levels of tensions; and 3) the practitioner orchestrates the problem-solving plan based on their familiarity with such disputes and with strategies that work.⁵³ A highly experienced practitioner can find themselves moving from being more mediator-like to resembling a conciliator and back to the mediator role, depending on the different circumstances and phases of the process.

All practitioners need to have an awareness of self within the system as distinct from the interactive disputants’ system.⁵⁴ Many practitioners find an appropriate balance between attending to the socio-emotional and the substantive details of the dispute while remaining aware of, and monitoring, how any characterisation of a party may or may not influence them. Awareness of the practitioner’s presence, their authenticity and influence, is vital because parties need more than just process: ‘they need understanding, engagement, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humor, courage, and a host of other qualities that are not only about process or substance’.⁵⁵

V UNDERSTANDING CURRENT PRACTICE IN THE CONTEXT OF THE FAMILY LAW ACT

It can be argued that since the recent changes to the Act, requiring practitioners to take on a range of roles, the practitioner’s standing as an ‘independent third party’ has been challenged, as has the ‘purely facilitative’ nature of the practice of mediation in this context. Thus a blurring of the lines between mediation and conciliation has occurred.

⁴⁹ K Kressel, ‘The Strategic Style in Mediation’ (2007) 24(3) *Conflict Resolution Quarterly* 251, 251.

⁵⁰ F P Bannink, ‘Solution-Focused Mediation: The Future with a Difference’ (2007) 25(2) *Conflict Resolution Quarterly* 163, 165.

⁵¹ Gaynier, above n 37, 404.

⁵² Kressel, above n 49, 251-83.

⁵³ Ibid 255-60.

⁵⁴ For more information on systems see Fisher and Brandon, above n 29, ch 2.

⁵⁵ B S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (Jossey-Bass, 2004) 146.

First, practitioners now have to provide additional information in pre-mediation and intake before a mediation can take place. This additional information includes informing parents about a parenting plan in which they: (a) ‘could consider’ equal time, or substantial and significant time, if either is reasonably practicable and in the child’s best interests; (b) could agree that any other decisions are being made in the child’s best interests; and (c) could stipulate how they might resolve future problems in situations where they cannot agree.⁵⁶

Second, all practitioners have to promote ‘the best interest of the child’⁵⁷ and cannot be ‘neutral’ on this. In mediation and conciliation the child’s needs are paramount and the practitioner brings the child’s voice into the session either by indirect measures or by incorporating direct involvement of children through child inclusive practice.⁵⁸ Many FRCs offer such a process in which the children are interviewed by a specially trained and qualified child consultant.

Third, the FDRP must now operate within a process where a court must not hear an application for a Part VII order in relation to a child unless an applicant files a certificate given by the FDRP.⁵⁹ Where a family dispute resolution takes place, practitioners have the added obligation to determine whether parents make a ‘genuine effort’ and provide a certificate accordingly.⁶⁰ As a result, mediators are required to switch roles as they must also make an assessment about the parties’ level of participation in the process. Some may consider this to be a conflict of interest and others may see it as a useful reminder for the parents to make every effort to negotiate an agreement.⁶¹

Practitioners employed at FRC’s may need to provide their clients with legal information whilst they are at the Centre or refer them to obtain legal information from other sources.⁶² This information can be in the form of fact sheets or providing websites. Since this is now a directive, it requires those practitioners who perhaps earlier saw

⁵⁶ *Family Law Act 1975* (Cth) ss 63DA, 63C(2), 64D, 63C(2)(d), (g), (h); see also *Share the Care* (Relationships Australia, 2005) a publication for collaborative parenting apart Parenting Plan booklet.

⁵⁷ *Family Law Act 1975* (Cth) ss 63DA(2)(c), 63B(e). See also *Family Law Act 1975* (Cth) s 63DA. There are some exceptions to this requirement, contained in *Family Law Act 1975* (Cth), ss 60I(5), 60I(9).

⁵⁸ J McIntosh and L Moloney, *Child Focused Dialogues* (Australian Government Attorney-General’s Department, 2006) DVD and Companion Handbook. See also *Children in Focus* <www.childreninfocus.org> at 2 August.

⁵⁹ *Family Law Act 1975* (Cth) s 60I(7).

⁶⁰ *Family Law Act 1975* (Cth) ss 60I(8), 60I(9) The obligation for parents to have a FDR certificate is set out in ss 60I(7)-(11). The family dispute resolution practitioner can issue four different certificates. See also T Altobelli, ‘A Generational Change in Family Dispute Resolution in Australia’ (2006) 17 *Australasian Resolution Journal* 148-9.

⁶¹ D Cooper and M Brandon, ‘How Can Family Lawyers Effectively Represent Their Clients in Mediation and Conciliation Processes?’ (2007) 21(3) *Australian Family Law* 298. See also the work of Cooper and Field in this volume.

⁶² Australian Government, Attorney-General’s Department, *Operational Framework for Family Relationship Centres* (2007) 47 <http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ForFamilyRelationshipServicesPractitioners_FamilyRelationshipCentreResources> at 2 August 2008, states that legal information is information of general application such as information about what the law says. Legal advice is information that is specific to a person’s individual circumstances, such as an explanation of the legal consequences of pursuing a particular option of course of action.

themselves as purely in a facilitative role, to conform and seriously familiarise themselves with the parties' content issues.⁶³

As a result of mandated dispute resolution many concerns are being expressed about the dangers for women, in particular, who may as a result of domestic violence be unable to participate freely.⁶⁴ Practitioners must remain vigilant about perpetrators of family violence potentially being able to dominate or control their victims in an informal process, and hence taking away their potential for self-determination in decision making.⁶⁵ The type or levels of risk may alter between the intake assessment and the mediation or conciliation session(s). Therefore it is important to continue safety assessments 'in the background' while the person is a client at a FRC.⁶⁶

Similarly, as a result of FRCs offering free three hour mediation services, practitioners feel pressured by the parties to complete a parenting arrangement within this timeframe. Practitioners may feel forced to use fewer facilitative strategies to oblige. While extended time would often be beneficial, it is not uncommon for parties to be reluctant to return. Additionally, in some instances, FDRPs have experienced pressure from legal practitioners to produce certificates for their client without allowing the practitioner enough time to fulfil their obligations under the Act.

The practitioner's role must now be carried out within a framework of imposed obligations. Practitioners still manage and encourage the communication process between the parties, assisting the parties to participate in interest-based negotiations, to generate their own options, and to come to a resolution within the parameters of the legislative amendments. Practitioners must do this whilst also promoting the best interest of the child, determining whether the parties are making a genuine effort to participate, and assessing whether there are any safety issues that may impact on the process. Given that the court cannot hear an application without a certificate, these obligations, time frames in general, and other external pressures can impact the practitioner's traditional function.

A *Legal Representation*

On occasion, family lawyers can represent clients at private dispute resolution, where both parties and the practitioner have consented.⁶⁷ More commonly, lawyers will not attend mediations but will provide clients with advice before and after sessions. This is

⁶³ See also R Field and M Brandon, 'A Conversation About the Introduction of Compulsory Dispute Resolution in Australia: Some Positive and Negative Issues for Women' (2007) 18(1) *Australasian Dispute Resolution Journal* 27, 32-36..

⁶⁴ See Domestic Violence and Incest Resource Centre, Victoria <www.dvirc.org.au> at 2 August 2008; Domestic Violence and Incest Resource Centre <<http://www.dvirc.org.au/HelpHub/WarningSigns.htm>> at 2 August 2008; and Relationship Warning Signs <<http://www.dvirc.org.au/whenlove/checklist.htm>> for conditions and questions for establishing 'willingness'. See also Field, above n 15 and n 20.

⁶⁵ Field and Brandon, above n 63, 33. See also H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths LexisNexis, 2nd ed, 2002) 342-55.

⁶⁶ See Australian Government, Attorney-General's Department, *Screening and Assessment Framework* (2006) 1-89 <<http://www.ag.gov.au/fdrproviders>> at 20 March 2008.

⁶⁷ See R Field, 'Federal Family Law Reform in 2005: the Problems and Pitfalls for Women and Children of an Increased Emphasis on Post Separation Informal Dispute Resolution' (2005) 5(1) *QUT Law and Justice Journal* 28, 42.

an important role for lawyers because when clients attend mediations at FRC's a lawyer cannot be present.⁶⁸

Mediation relies upon the active participation of both parties making arrangements that reflect the need for both parents to have meaningful involvement in their children's lives, for example, 'equal shared parental responsibility for the physical and emotional wellbeing of the children' as the assumed starting point.⁶⁹ However, consideration must also be given to certain circumstances such as entrenched conflict, child abuse and violence in which the best interests of the children need to be considered so that an exception can be made.⁷⁰ Legal advice in this regard must be sought.

In FRCs parents are encouraged to develop their own arrangements for the day-to-day responsibility for the child, to work out with whom the child will live, and with whom they will communicate, as well as with whom the child will spend regular time. It is important for lawyers to advise their clients on these matters prior to their attending a dispute resolution forum. As written agreements may be set out in a parenting plan which can become effective when it is a dated agreement in writing made between and signed by the parents,⁷¹ parties need to be adequately prepared.⁷² Family lawyers can also assist their clients to understand their legal rights and the legal consequences of any agreements reached in a dispute resolution process. This enables parties to be in an informed position to decide whether to settle at the conclusion of a mediation or conciliation.⁷³

It is more likely for parties to have legal representation in a conciliation session. Conciliation can be seen as a process for a structured conversation that provides an opportunity for new possibilities for all parties participating, including the solicitors. In contrast to litigation, the conciliation process focuses on respectful collaboration; it is time effective, positive, hope-generating, and encouraging of the parties' own voices in

⁶⁸ Family Relationships Online <www.australia.gov.au/familyrelationships> at 2 August 2008; Family Relationships Online, *About Family Relationships Centres* <<http://www.familyrelationships.gov.au/www/agd/familyrelonline.nsf/Page/RWPFDAE1FF77800FB5CA25721800038A30>> at 12 January 2008. See also Australian Government, Attorney-General's Department, above n 62, 11. 'The intention is to move away from an adversarial approach to negotiating parenting arrangements after separation. However, parents are free to obtain legal advice at any time and Centres should refer clients to legal advice when appropriate, particularly where it helps them to reach agreement (for example, legal information can help to manage parents' expectations about likely outcomes if they proceed to court)' <www.ag.gov.au> at 13 May 2008.

⁶⁹ *Family Law Act 1975* (Cth) ss 60B, 60CC.

⁷⁰ *Family Law Act 1975* (Cth) s 61DA. Parental responsibility, in principle it should be shared, provided this does not harm their children as children must be protected from such risks *Family Law Act 1975* (Cth) s 61DA(2). Equal time or substantial and significant time depends on the best interests of the child, and whether this is reasonably practicable taking into account the parent's capacity to implement such arrangements, their capacity to communicate, how far they live apart and the impact on their child.

⁷¹ Separating parents can seek free information via an advice line on 1800 050 321 and online, Family Relationships Online <www.australia.gov.au/familyrelationships> at 2 August 2008.

⁷² *Family Law Regulations 1984* (Cth) reg 63, sets out the information which must be provided to family dispute resolution clients.

⁷³ Cooper and Brandon, above n 61, 295-307, for a discussion how lawyers can assist before, during and after the process.

overcoming their dispute.⁷⁴ Having participating solicitors' makes the role of the conciliator easier, as legal advice can be readily provided. Ideally, when legal representatives are present, the session is conducted by a co-conciliation team, with the advantage that a gender and expertise balance can be achieved.⁷⁵

Family lawyers play an important role in supporting and advising their clients before, during and after a dispute resolution process. When there are high levels of conflict and emotional stress it can be beneficial for the parties to be out of the process temporarily while the lawyers and the practitioner, in a separate meeting, work on some options. Subsequently the lawyers return to their clients to report on any progress made and discuss this in regard to any further instructions. As such their role is particularly significant in assisting their clients in the final negotiations, in drafting agreements, ensuring that any arrangements are fully understood, and that final agreements are signed so these can be lodged in court.⁷⁶

B Confidentiality

It is important that practitioners use an Agreement to Mediate/Conciliate to acknowledge confidentiality and the limits of confidentiality. Such an agreement represents the terms and conditions that the parties agree to when they enter their chosen process. The Agreement to Mediate/Conciliate becomes the contract upon which the parties and mediator/conciliator can rely. It therefore needs to be comprehensive in the rights and obligations placed on all parties involved. Included in such an agreement is the notion of full disclosure such that parties should be able to reveal all relevant information without the apprehension that it could be used against them at a later date.

An Agreement to Mediate/Conciliate defines the scope and limitations of the confidentiality agreed upon between mediator/conciliator and parties. The expectation that discussions are privileged from disclosure can only be achieved through a written document that is signed by all participants in mediation/conciliation. Some of these limitations are legally based and therefore mandatory to administer; for instance, threats of imminent harm to self and others, and admissions of criminal activity - such as child abuse. Ideally the conditions of the Agreement to Mediate/Conciliate are also clear about other limitations of confidentiality, such as discussions with advisors, friends, colleagues or parties' spouses.

Field and Wood state that mediation:

offers confidentiality (as far as the law allows) ensuring parties that any information introduced or exchanged in the process cannot be used later against a party in any subsequent court proceedings and cannot be divulged by the mediator or another party outside the mediation process, at least not without consent.⁷⁷

⁷⁴ M Emerson, 'The Lawyer and Mediation' (Paper presented at LegalWise, Brisbane, 31 March 2006) 6-10. Note the comment that lawyers should discard their 'adversarial suits and gladiator manner' in family dispute resolution.

⁷⁵ Brandon and Stodulka, above n 34, 33-9.

⁷⁶ Cooper and Brandon, above n 61, 305-7.

⁷⁷ R Field and N Wood, 'Confidentiality: An Ethical Dilemma for Marketing Mediation?' (2006) 17(2) *Australasian Dispute Resolution Journal* 79, 80.

What is confidential within the process needs to be clearly documented. By signing the Agreement to Mediate/Conciliate, the practitioner and the parties agree that in relation to all confidential information disclosed to them during any pre-dispute resolution process, during the process and in private sessions, shall remain confidential and shall not entitle a party, representative, or practitioner to use any information (unless compelled by law to divulge certain information) as evidence if the matter goes to court. Parties need to know, as part of their Agreement to Mediate/Conciliate, that the practitioner's duty of care will override any elements of the practitioner's or dispute resolution process's confidentiality aspects. In cases where serious allegations are made, or where there are threats of harm to life or to the safety of a party or other person, within the family or outside the family, the practitioner's duty of care overrides the obligation of confidentiality.⁷⁸

Confidentiality between the parties and practitioner in private sessions can also become problematic.⁷⁹ Private sessions are structured so that a party can talk freely with the practitioner and the party does not want to have the content of that conversation necessarily divulged to the other party.

Shuttle is regularly used in conciliation and since it is expected that conciliators have a grasp of the likely outcomes, they can influence parties by invoking ethical standards and moral judgments. Due to their frequent use of private sessions or shuttle, conciliators have access to restricted information and therefore act as a go-between, transmitting messages that they think are relevant. What can be divulged and what is confidential is often vague in conciliation,⁸⁰ conciliators commonly use what they think is important as leverage for successful outcomes.

Dispute resolution practitioners need to make sure that they include provisions in their mediation or conciliation agreement to handle legitimate complaints about their service, and prepare for a response to an aggrieved party, who may sue. Participating legal representatives for the parties attending mediation are also bound by the limits of confidentiality. Anyone else attending, such as an advocate or support person, needs to sign the agreement to contractually bind them to the conditions set out in such a document. Family law dispute resolution Agreements to Mediate/Conciliate also include a clause that requires parties to make a 'genuine effort', meaning that they must use their best endeavours and have a willingness, or obligation to cooperate.⁸¹

When the mediation or conciliation is attended by the parties and their legal advisors, one grey area of confidentiality is the area of solicitor–client privilege. While the private sessions held within the mediation/conciliation process are usually covered by the agreement, any private discussion held between solicitor and client would fall under professional privilege. Therefore any information obtained in that discussion would not fall technically under the mediation or conciliation guidelines, unless specifically consented to by all parties and in writing.

⁷⁸ *The Family Law Act 1975* (Cth) requires that communications made in family dispute resolution be confidential unless disclosure is required or authorised by the law of the Commonwealth, State or Territory (such as the mandatory disclosure of child abuse).

⁷⁹ Field and Wood, above n 77, 80-7.

⁸⁰ Brandon and Stodulka, above n 34, 38.

⁸¹ *Family Law Act 1975* (Cth) ss 60I(7)-(11).

Mediation and conciliation are always conducted in private, away from the public eye and in a private space so the parties can feel free to open up and deal with their real interests. However, as Coleman reminds us, power differences must be understood in the wider structure of history and society.⁸² Dispute resolution practitioners conducting mediations or conciliations must not ignore this as this may disadvantage the weaker party in the decision making process. Practitioners need to work at all times as if they are under legal scrutiny, with professional, legal and ethical obligations, so that any action can be justified if the law were ever applied.⁸³

C *Skills and Techniques*

Practitioners tend to draw on a range of theories and as they gain more experience across mediation and conciliation they will be able to expand their approaches to be able to manage a variety of disputes and clients.⁸⁴ Mediators and conciliators use many of the same skills and techniques to assist parties to resolve their disputes and reach agreements.⁸⁵ Both use rapport building, active listening, empathy, reframing, summarising, a range of questioning techniques, problem solving, and option generation, interest based negotiation, and agreement writing skills. Ideally practitioners must have knowledge of conflict and negotiation theories, relationship forming and breakdown, family violence, relevant legislative requirements, social science research in the area of child development, the effects of separation and persisting inter-parental conflict, attachment theory and 'parental attunement'.⁸⁶ Their training, ideally, also includes such subjects as emotional intelligence, non-violent communication, and neuro-linguistic programming.

Practitioners need to be mindful, use their intuition, gut instinct, their imagination and become creative. Strategies and techniques being used need to be congruent with the underlying purpose and with what the process is trying to achieve, and as such practitioners make ideological choices.⁸⁷ While some conciliators may go quickly to what keeps the parties apart, for example, in their differences in property settlement proposals, mediators and conciliators must work with the focus on the best interests of the child and encourage their voice to be heard, their needs and developmental interests to be tabled and discussed. Some practitioners prefer to use a more transformative approach through asking questions, listening and rephrasing, going to where the parties want to go, when they want to go there. Others prefer to work with the different constructs or stories parties bring. They work with the deconstruction of the dominant

⁸² M Deutsch and P T Coleman (eds), *The Handbook of Conflict Resolution* (Jossey-Bass, 2000) 119-25.

⁸³ R Kennedy and J Richards, *Integrating Human Service Law and Practice* (Oxford University Press, 2004) 76-7.

⁸⁴ C A Picard, 'Exploring an Integrative Framework for Understanding Mediation' (2004) 21(3) *Conflict Resolution Quarterly* 295, 307-08.

⁸⁵ J H Wade, 'Strategies and Interventions Used by Mediators, Facilitators and Conciliators' (1994) 5(4) *Australasian Dispute Resolution Journal* 292, 204-6.

⁸⁶ J McIntosh, 'Child Inclusion as Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors' (2007) 1 *Australian Family Relationship Clearinghouse Issues* 1,4.

⁸⁷ See J P Folger and R A B Bush, 'A Response to Gaynier's "Transformative Mediation": In Search of a Theory of Practice' (2005) 23(1) *Conflict Resolution Quarterly* 123-7. See also F P Bannink, 'Solution-Focused Mediation: The Future with a Difference' (2007) 25(2) *Conflict Resolution Quarterly* 163, 168-70.

narratives to assist parties to separate from their story and encourage a relational atmosphere in which a collaborative conversation can occur.⁸⁸

Such practitioners look for clues, follow instead of lead, do not interrupt and stay in the moment to allow mutual understanding and transformation of the parties' relationship. This may be the goal and the outcome for the session paving the way for a better future parenting relationship. This is in contrast to practitioners using more robust impasse breaking strategies, which can include such techniques as imagining how their children's 18th or 21st birthday, graduation, or wedding may be celebrated, what they would say about their parents' way of having managed their roles over the years, or what a judge or magistrate would rule if the decision were in their hands. Most practitioners sensitively and appropriately use doubt creating, probing, and raising hypotheticals. They also use a future focus, suggestive, rhetorical and closed questions, as well as sharing relevant information. An understanding is also required of how the parties' emotional interactions influence the negotiations and proposals, and how personality attributes, cultural backgrounds and diversity enhance or hinder the likelihood of reaching agreements.⁸⁹

Many variables contribute to the success or failure of both the process and outcome of mediation or conciliation.⁹⁰ Saposnek suggests that 'from a family systems point of view, which dynamics of couples, with what degree of conflict, with how many issues to resolve, and at what time period in their separation or divorcing process are predictive of success and failure in mediation'.⁹¹ This is possibly also influenced by the setting in which the meeting takes place, and the practitioner and participants characteristics, such as personality, gender, age, education, cultural background, appearance and so on.

Practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal development, membership of professional bodies and their organisational or agency standards and accreditation requirements.⁹² Each practitioner brings their values and ethics from their personal and professional backgrounds⁹³ and could, from time to time, take on situations beyond their experience.

⁸⁸ L Fisher and M Brandon, *Mediating with Families, Making the Difference* (Pearson Education Ltd, 2002) 15-17. See also J Winslade and G Monk, *Narrative Mediation, a New Approach to the Conflict Resolution* (Jossey-Bass, 2000).

⁸⁹ See J B Kelly, 'Family Mediation Research: Is There Empirical Support for the Field?' (2004) 22(1-2) *Conflict Resolution Quarterly* 3.

⁹⁰ J Gale et al, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Journal* 389, 389-400.

⁹¹ Saposnek, above n 40, 43.

⁹² J Wood, 'Mediation Styles: Subjective Description of Mediators' (2004) 21(4) *Conflict Resolution Journal* 437, 438. See also proposed standards of competencies for family mediators endorsed 24 September 2007, for more information about the Family Relationship Qualifications Framework (CHC02) via the Community Services & Health Industry Skills Council (ISC) <<http://www.cshisc.com.au/index.php>> at 3 August 2008. For free download of the units of competency see National Training Information Service <www.ntis.gov.au> at 3 August 2008.

⁹³ F Blechman, 'Ethics and Field Building: the Chicken and the Egg' (2002) 19(3) *Conflict Resolution Quarterly* 373, 373.

Family dispute resolution is challenging work and practitioners need to have a very clear sense of what the law says and what a court might decide. They need a lot of understanding, maturity, life skills, empathy and compassion. In a very short time with clients, practitioners need to build trust in the process and in themselves as facilitators.

In community agencies and FRCs practitioners are likely to have mentors they can debrief with to prevent burn out, as well as regular supervision and professional development opportunities. Practitioners, like all other learners, go through a typical learning cycle again and again. Adler illustrates four stages of skill development.⁹⁴ Participants in training courses are usually (1) firstly unconsciously incompetent, as they usually do not know what they do or do not know about the art and science of dispute resolution. As they listen and practice the theory and skills of dispute resolution, they become (2) consciously incompetent, because they discover how much there is to learn and how much they do not know. This sense of consciously being incompetent lingers until they have done a few mediations or conciliations and have received positive feedback from employers, parties and peers about their work. As their experience grows, they read on the subject and exchange information about their practice through mentoring, supervision or attending seminars and conferences. As the work gets easier and as they take on a range of disputes and disputants without fearing a disaster or having a stake in the outcome, as well as undertaking mentoring, teaching, presenting at conferences, publishing and training others they become (3) consciously competent. Many practitioners stay at level (3). Very few practitioners make it to level (4), unconsciously competent, and they are referred to as 'master' practitioners according to Young.⁹⁵

Both conciliators and mediators must learn to reflect. Reflection offers dispute resolution practitioners a process for learning how to learn about their practice. Lang and Taylor describe reflection as the process by which professionals think about their experiences, events and situations in practice and then attempt to make sense of them in the light of relevant theory.⁹⁶ They identify 'reflection in action' as the reflective process that occurs during practice and 'reflection on action' as that which occurs after the experience.⁹⁷ Rather than 'trying out one tool after another without understanding which tool would be appropriate for the task', practitioners need to make theoretical principles of practice the foundation upon which to base an assessment of a conflict situation and design an appropriate intervention accordingly.⁹⁸ Through a regular process of reflection before, during and after a session practitioners can achieve 'artistry' in practice.⁹⁹

⁹⁴ P Adler, 'Unconscious Excellence An Exploration of Mastery and Incompetence' in D Bowling and D Hoffman (eds), *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (2003) ch 2. See also P Young, *Consciously Incompetent: A Mediator's Cycle of Learning* (2003) Mediate.com 1-3 <www.mediate.com/pfriendly.cfm?id=1426> at 29 May 2006.

⁹⁵ Young, above n 94, 1.

⁹⁶ M D Lang and A Taylor, *The Making of a Mediator* (Jossey-Bass, 2000) 19.

⁹⁷ Ibid 117.

⁹⁸ M Lang, *Becoming Reflective Practitioners* (1998) Consensus, July 2000 <www.mediate.com/articles/reflect.cfm> at 7 August 2008 1, 1

⁹⁹ Lang and Taylor, above n 96, 5 promote the idea of 'artistry' characterised by wisdom, talent, and intuition and people can learn to apply these elements in their endeavours, with intention and diligence, so that artistry is not merely a fortuitous convergence of a number of personal talents and abilities but arises purposefully.

Registered family dispute resolution practitioners¹⁰⁰ are ideally found competent against the proposed competencies for family dispute resolution vocational training.¹⁰¹ Additionally, by 30 June 2009:

all family dispute resolution practitioners (except those authorised by a court or by an organisation designated by the Attorney-General under the Act beyond the transition period) will need to meet the requirements of the final Accreditation Rules as set out in the Regulations to issue valid family dispute resolution certificates.¹⁰²

They must also have the flexibility of being able to work, with certain parties, with more empathy or therapeutic approaches to build trusting relationships, and with others, being attuned to using more emphasis on problem-solving strategies and settlement. Such practitioners must be well trained and have easy access to on-the-job practice experience so that good practice principles can become incorporated. In family dispute resolution under the Act, separating parties make decisions that affect their children and may have an impact on the arrangements for the structure of their family for the rest of their lives. This means that practitioners must be highly skilled in analysing the context of the dispute, the parties' strengths, competencies and goals. They must incorporate the parties' cultural environment, needs and interests, and their specific situation, including issues of family violence, all types of abuse, and orientation such as sexual and spiritual, thus adapting their approach and interventions accordingly.

VI CONCLUSION

The differences in definitions of mediation and conciliation ought to remind practitioners of the spectrum of control and flexibility that family dispute resolution processes offer separating parties. Process guidelines are not set in concrete and one size does not fit all. The recent changes to the Act have clearly spelled out the obligations, expectations and responsibilities for both practitioners and parents. This has put enormous pressure on the FDRPs to keep up with these significant changes as well as pressure on the window of opportunity for a facilitative dispute resolution process. Practitioners working in mediation and conciliation are encouraged to remain independent third party facilitators as far as the law allows, and must be able to practice along the continuum of directive and non-directive interventions regarding both process and content directions. Since both mediators and conciliators need to use similar and

¹⁰⁰ See *Family Law Act 1975* (Cth) s 10G for the definition of 'family dispute resolution practitioner'. FDR practitioners must be on the Dispute Resolution Register of the Commonwealth Attorney-General's Department. The requirements for a mediator/conciliator to qualify for registration are set out in *Family Law Regulations 1984* (Cth) reg 58. Practitioner must successfully apply to be on the register of the Commonwealth Attorney-General's Department, see Accreditation of Family Dispute Resolution Practitioners, at http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForFamilyDisputeResolutionPractitioners at 22 August 2008. Registered practitioners are listed, see Family Relationships Online, Family Dispute Resolution Register, at <http://fdregister.familyrelationships.gov.au/Search.aspx> at 7 August 2008.

¹⁰¹ For more information about CHC 80207 Vocational Graduate Diploma of Family Dispute Resolution see Community Services & Health Industry Skills Council, *CHC02 Community Services Training Package vol 2 of 5, Qualification Framework* (2007) 143-6 www.ntis.gov.au/?/trainingpackage/CHC02/qualification/CHC30402/download at 8 August 2008.

¹⁰² See 'How to become a Registered and Accredited FDR Practitioner' www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForPotentialFamilyDisputeResolutionPractitioners at 8 August 2008..

different strategies they have a wealth of different theories, attitudes, skills and techniques to choose from to carry out the practice of family dispute resolution. At all times they need to sustain their professional ethics, curiosity and engagement with each case, as every set of parents and their dilemmas over parenting arrangements and/or the division of assets and debts has its uniqueness. To achieve 'artistry in practice' and work towards becoming 'master practitioners' in this field they also need to become reflective practitioners.

Whether practitioners use mediation or conciliation and regardless of how they move between process and content interventions, family dispute resolution must be child focused and client centred. Such processes concentrate on 'defining the problems, so they are manageable, workable, solvable and acceptable' to the participating parties.¹⁰³

¹⁰³ L S Fong, 'Adoption: The Chaos of Choice' Chapter 6 in Haynes et al (eds), *Mediation* (State University of New York Press, 2004) 169, 173.