FEDERAL MAGISTRATES COURT OF AUSTRALIA

Tuesday 8 November 2011

Collaborative and Creative approaches to family dispute resolution: Perspectives from the Bench.

I. Introduction.

First may I acknowledge the traditional owners of the land we meet on and pay my respects to their elders, both past and present.

It is my pleasure to be here today to take part in this workshop organised by Family Relationships Services Australia on the topic of "Innovative approaches to collaboration between Legal and Relationship Services".

I have been invited today to offer some 'perspectives from the bench' on collaborative and creative approaches to family dispute resolution. I note at the outset that because many of these collaborative approaches take place outside the Court system – particularly within and involving Family Relationship Centres – my comments will be only general in nature.

I can, however, wholeheartedly appreciate the immense value in connecting people with all the services that can assist them in negotiating family law disputes. Research has shown that people going through divorce or separation rate it as one of the most

distressing life events,[1] and people going through a separation are up to four times more likely to attempt suicide.[2]

For this reason, it is vitally important that all available options for dispute resolution be supported, provided there is scaffolding before and after the process. With more options, and greater collaboration between agencies and the profession, parties have a greater chance of successfully resolving matters without recourse to litigation, and arriving at an outcome that is in the best interests of their children.

Today, I will outline some of the encouraging initiatives regarding collaborative and creative dispute resolution which have emanated from Government and the profession. I will also provide a case study of the Federal Magistrates Court's Dandenong Project – which has put many principles of collaborative practice into action, to great success.

II. Keeping litigants out of Court – Government and Legal Profession Initiatives

Family Relationship Centre legal assistance partnerships program

I will start by mentioning the Family Relationship Centre legal assistance partnership program, which I believe will be the subject of much discussion today. Since it was launched by the Attorney-General in December 2009, I have been optimistic about this program, and in this regard I read with interest the evaluation of the program

[1] Christopher Tennant and Gavin Andrews 'A scale to measure the stress of life events' (1976) *Australian and New Zealand Journal of Psychiatry* 10(1) 27-32
[2] Australian Bureau of Statistics *Mental Health in Australia: A snapshot 2005-2009*, (2009)

which was published by the Australian Institute of Family Studies in March of this year[3].

I was pleased to see the Institute found that managers and staff thought that the program had been largely successful in achieving its objectives, namely:

- Improving the focus on the best interests of children;
- Improving power imbalances between parents in mediation; and
- Assisting clients to engage in less adversarial dispute resolution processes.

It was reassuring to read that the majority of clients reported positive experiences with the program, and that these positive responses were mirrored, for the most part, by managers and staff. I note that other benefits listed were that the program "reduced the use of an adversarial approach [to] prevent matters from inappropriately reaching Court" and that it "contributed to improving cross-professional collaboration and understanding". This latter benefit is very important, as it is often the case that a targeted combination of legal and social science resources can produce the best result for family law litigants and their children.

I am told that Lawrie Maloney from AIFS will be making a presentation to the workshop later this morning, and I look forward to hearing his insights into the partnership program.

[3] Maloney et al, 'Evaluation of the Family relationship centre legal assistance program', Australian Institute of Family Studies (March 2011), 83

Collaborative Practice

Another promising development is the trend towards "collaborative practice" in resolving family law disputes. This practice – which was first used in Australia in 2005, after significant success in America, Canada and the UK – received a significant boost in March this year, with the launch of the Law Council of Australia's *Collaborative Practice Guidelines for Lawyers*.[4] In these guidelines, collaborative practice is defined as "a process in which clients, with the support of a collaborative practitioner, identify interests and issues, then develop options, consider alternatives and make decisions about future actions and outcomes". In some respects this is similar to traditional negotiation; however a key distinguishing feature is that the clients and their lawyers co-sign a contract which states that the lawyers cannot represent the clients if negotiation fails and the matter proceeds to court.

In launching the Collaborative Practice guidelines, Law Council of Australia president Alexander Ward said that in Canada and the United States, the practice has had an extraordinary success rate in resolving disputes, with "settlement rates of over 95 per cent".

As someone who hears cases within the Family Law jurisdiction of the Federal Magistrates Court, I fully support initiatives such as collaborative practice, and I hope that the overseas success is replicated in Australia. By actively involving parties in the settlement process, and ensuring that all efforts are made to resolve disputes before they reach Court, chances of a workable outcome are maximised.

[4] Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers', (March 2011)

For this reason, I commend the Law Council of Australia, along with the practitioners who have been involved in the spread of Collaborative Practice throughout Australia.

III. Keeping litigants out of Court – FMC Initiatives.

The Dandenong Project

The Federal Magistrates Court has also been trialling new approaches to dispute resolution through its Dandenong Project. This project was launched in May 2010, and involves the Federal Magistrates Court, the Victorian Family Law Pathways Network and five service provider organisations.

The stated vision for the Dandenong Project was "to deliver justice in a way that better meets the needs of litigants in the Dandenong region".

To achieve this vision, the Dandenong Project identified six key objectives. These were, in no particular order:

1) To increase opportunities for litigants to resolve disputes using settlement strategies rather than judicial determination;
2) To ensure each court event is constructive and advances the matter towards resolution;
3) To reduce the financial and time burden of litigation on litigants;
4) To ensure self-represented litigations are able to effectively participate in proceedings;

5) To shift the emphasis of legal aid funding away from trials toward resolution events; and
6) To enhance the Federal Magistrates Court's focus on the needs of individual litigants.

To meet these objectives, a range of initiatives were implemented as part of the Dandenong Project.

One of the first steps taken was the allocation of additional judicial resources to Dandenong, with the result being that what was previously a circuit location now has the equivalent of two full-time Federal Magistrates.

Another practical step that has been taken to meet the project's objectives is the use of a 'triage' process. This involves each matter being assessed by the presiding Federal Magistrate on the first Court date. The FM determines the central issues in dispute, then either lists the matter for further hearing or directs the parties to an appropriate dispute resolution service. This triage process provides an additional step by which parents are encouraged to negotiate out of Court, on top of the statutory family dispute resolution requirements.

To assist in linking parties with dispute resolution services, the Dandenong Project has instituted a "kiosk" on duty days, which is stocked with brochures and staffed by a representative from the Dandenong Pathways Network. Having this facility on-site has been of great benefit, as it enables parties to book an appointment with a community organisation right after the duty Federal Magistrate directs them to do so.

Another important feature of the Dandenong Project have been regular meetings between members of the Court, representatives from Legal Aid, community-based organisations and members of the legal profession. At these meetings, important issues are discussed, such as the most effective use of Legal Aid funds, and the best strategies for ensuring self-represented litigants are able to effectively participate in proceedings.

At the launch of the Dandenong Project in July 2010 I said that the Project had been "embraced by the legal profession". I am glad to say this reception has germinated into a productive and positive relationship. A full evaluation of the project is currently underway, however the initial results are pleasing. For example, the rate of judicially determined cases in Dandenong is 24 per cent, which is the lowest figure of any registry in Australia.[5] Dandenong also has the highest percentage of cases finalised within six months of any Federal Magistrates Court registry, and the lowest percentage taking over 12 months to finalise. Furthermore, Dandenong – along with Melbourne – has the lowest number of Court events per case, that being 3.5. While, as I said, the evaluation is in its early stage, these figures seem to suggest that disputes are being resolved expeditiously as a result of the triage process linking litigants with appropriate Community-based organisations and Family Consultants.

Another encouraging outcome that has emerged from focus groups and interviews thus far is that Federal Magistrates, staff, litigants and lawyers are demonstrating a heightened awareness of the specific services provided by Community-based

[5] Due to the research being incomplete, it not yet clear as to where (or how) the cases are being settled, are being settled, however the initial figures are very encouraging

organisations. This is very encouraging, as it means that there is a greater chance of litigants' needs being matched with an suitable service.

While the Dandenong Registry is in some ways unique – in terms of its size, and the types of matters it hears – it is hoped that once the evaluation is complete, the successful aspects of the project will be replicated in other registries. Already, a referrals officer has been engaged for the Sydney registry of the Court, and I am told that Judicial Officers and Associates have found this person to be a great benefit in linking litigants with community organisations and dispute resolution services.

IV. Conclusion

The phrase "access to justice" has become a familiar mantra in legal circles over the past two decades. While it is pleasing that justice has been recognised as a goal, and not just a principle, it is important to remember what "access to justice" actually means.

A useful definition of "access to justice", coined by the World Bank and modelled on a definition used by the United Nations Development Project, is as follows:

"Access to Justice… is access by people, in particular from poor and disadvantaged groups, to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and

the ability to seek and exercise influence on law-making and law-implementing process and institutions."[6]

Anyone harbouring doubts over whether creative and collaborative dispute resolution promotes "access to justice" would be reassured by the inclusion of the words "*formal and informal justice systems"* in that definition.

That being said, no single solution will achieve the result of minimising Court-based litigation. For this reason, it is encouraging that Government, the Courts, Family Relationship Centres, community organisation and legal assistance centres have all been actively promoting initiatives aimed at keeping people out of Court in Family Law disputes.

As head of one of the largest and busiest Courts in the country, I am strongly committed to ensuring "access to justice" in its widest definition and to working with other organisations to ensure that access to justice is indeed a reality for all Australians.

I look forward to hearing and engaging with some other 'perspectives' for the remainder of this session.

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[6] *A Framework for Strengthening Access to Justice in Indonesia* available from www http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf, accessed on 14 October 2011.