MEDIATING THROUGH A DIFFERENT LENS: SECTION 60I, THE UNCRC AND CHILD INCLUSIVE PRACTICE

Written by Anne-Marie Rice

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OUTLINE

Australia is a signatory to the United Nations Convention on the Rights of the Child (UNCRC), which provides, among other things, for member States to ensure that a child of appropriate maturity is able to freely express views in any proceedings affecting them. Since the introduction of Section 60I to the *Family Law Act* (the Act) in 2006, mediation (defined for these purposes in the Act as Family Dispute Resolution or "FDR") prior to the commencement of formal court parenting proceedings has, with limited exceptions, been mandatory. In practice, solicitor driven FDR has been conducted early in the negotiation process and frequently without any opportunity for children to be involved in the process or for their views to be ascertained. This article examines the concepts articulated in the UNCRC in the context of FDR in private practice and considers the opportunities afforded by adopting a Child Inclusive approach to FDR.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

In September 1990 the Convention on the Rights of the Child, which had been ratified by the United Nations General Assembly in November 1989, came into effect in Australia. The **UNCRC**, as the Convention became known, recorded the acknowledgments of the signatory States Parties that, among other things, a child:

- needs specific safeguards and care, including appropriate legal protection (as indicated in the Declaration of the Rights of the Child);
- should grow up in a family environment, in an atmosphere of happiness, love and understanding; and
- should be brought up in the spirit of peace, dignity, tolerance, freedom and equality.

The Articles of the Convention provide for the ways in which those needs and interests of children should be protected, promoted and advocated by the signatory countries to the UNCRC.

Of particular relevance to Australian family law practitioners are Articles 3, 5, 8 and 12 which provide:

Article 3

1. In all actions concerning children ... the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being...

Article 5

1. States Parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 8

1. States Parties recognize the right of the child to preserve his or her ... family relations.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the **right to express those views freely** in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. ...the child in particular shall be provided the opportunity to be heard in any **judicial... proceedings** affecting the child, either directly, or through a representative... [emphasis added]

While the effect of the Convention is, of course, different to the binding nature of the terms of the *Family Law Act 1975* (Cth) ("**the Act**"), it enshrines sound guiding principles for those working with children. When considered in the context of section 60I, the UNCRC invites a deeper consideration of the approach most routinely taken by private family lawyers to FDR.

The UNCRC, and particularly Article 12, clearly contemplates the benefits of providing an opportunity for views of a child (of appropriate maturity) to be expressed and heard in relation to any [court] proceedings. While such an approach is regularly adopted in proceedings under Part VII of the Act, most commonly by the commission of a s62G Report or a private Family Report, steps to allow the thoughts and views of children to be heard, prior to the institution of formal court proceedings, are less routine.

FDR AND SECTION 60I OF THE FAMILY LAW ACT

The introduction of s60I to the Act in 2006, provided for mandatory pre-filing mediation in parenting matters (with a few exceptions). Consistent with their obligations under the Act, family lawyers routinely refer matters to FDR in an attempt to facilitate agreements, which may be subsequently formalised by way of a Parenting Plan or a Consent Order.

While s10F of the Act defines FDR as

> "a process (other than a judicial process):
>
> > in which [an independent] family dispute resolution practitioner [defined section 10G] helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other"

There is no guidance provided in the Act, or elsewhere, about the particular format FDR is to take. Accordingly, divergent practices have developed over the past decade. In many cases, the practice of solicitors working with private clients is to refer a matter to FDR with little information other than details of the historical background and current arrangements as articulated by the parents.

Section 60CA of the Act enshrines in Australian law the concept (also reflected in Article 3.1 of the UNCRC) that the best interests of the child are the paramount consideration ("**the paramountcy principle**").

> There is nothing to suggest that the paramountcy principle applies only once formal court proceedings have commenced.

Indeed, the terms and provisions of the Act routinely inform the advice legal practitioners provide to clients in all forms of dispute resolution, including prior to the commencement of any formal court proceedings.

THE VIEWS OF A CHILD

In that context, when read in concert with Article 12 of the UNCRC, the consequences of the introduction of section 60I of the Act, begs consideration both of whether FDR constitutes "proceedings" and what might constitute "views". For example: is mandatory mediation prior to proceedings, technically or in spirit, part of those potential proceedings? Must children have a "view" about the time they spend with a parent, or the nature of the relationship they have with each of their parents, in order to have the opportunity to express themselves? Is it enough that a child has an age appropriate perception of life and their experiences of their parents' separation in order to meaningfully be heard in negotiations which directly affect them?

To regard FDR as something distinct from "proceedings" in the shadow of legislation that compels the majority of parents to participate in that process, and to regard only an answer to a lineal question or series of questions as a "view" is to apply a highly legalistic framework to the FDR process. Whether doing so is in a child's best interests is worthy of consideration.

In contrast, to regard a "view" as an age appropriate articulation of a child's experience, on which parents are invited and encouraged to reflect, is

to approach FDR from a perspective embedded in the fundamentals of Child Development Theory and, arguably, to pay more than lip service to the paramountcy principle. Each approach produces different results.

Section 60CC(3)(a) compels a court to give any views of a child such weight as is appropriate (although the recent High Court decision in *Bondelmonte*[1] makes it clear that the court itself is not mandated to ascertain those views). The Act provides, in s60CD(2), that the court may inform itself of the views of a child in any manner it thinks fit and, by the time formal proceedings are on foot, the most common form for doing so is by way of a private Family Report or a s62G report. Family Report writers appointed pursuant to the Act are, of course, mandated to attempt to ascertain, and then record, any views of children, in an approach which is reflective of the legalistic approach to the determination of the relevant issues.

That process might arguably be said to influence the pathway adopted by many practitioners in preparation for those FDR sessions where the views of the child are sought to be articulated by someone other than the child's parents.

Accordingly, and with the ability to secure a family report if required, many legal practitioners comfortably operate in a Child Focussed FDR model, ie one in which the best interests of the child are at the forefront of the process, but in which the child has very little, if any, active involvement. However, frequently, such an approach is resisted as a way of avoiding children's exposure to invasive interviews and as part of a strategic legal decision to avoid the early preparation of an ultimately unfavourable report.

The litigation process (or any inherently lawyer-centric process) invites parties to position themselves as the "good parent" and to see the other as the "bad parent". Such a dichotomy is frequently inconsistent with the perception of a child who is attached to, and loves, both parents. The creation of a report in those circumstances defines the issues in a highly legal framework which arguably contributes to a level of simplicity about how to approach those issues and potentially decreases the prospect of reaching a lasting parental agreement.

1 [2018] HCA 8

CHILD INCLUSIVE PRACTICE

> Child Inclusive Practice facilitates the active involvement of children and focuses on providing them with an opportunity to be heard in an age appropriate manner. An additional, and important, characteristic of Child Inclusive Practice is that it allows parents to hear, and meaningfully consider, the child's experience in a highly supportive, resolution focussed environment.

While it is acknowledged that the Family Court, and organisations such as Relationships Australia and the Family Relationships Centres in various locations around the country, have adopted a Child Inclusive model, this paper is primarily concerned with the approach to FDR most regularly adopted by private family lawyers and FDR Practitioners with legal backgrounds.

If it is accepted that the views of children should be heard in any forum where decisions affecting them are being made, a Child Focussed, but lawyer-centric, FDR process risks significantly curtailing the opportunities for the family, and particularly the children. The opportunities lost are most compellingly articulated in the *Children Beyond Dispute* study conducted by Professor Jennifer McIntosh over 10 years ago.

In late 2006 Professor McIntosh published the report in relation to the *Children Beyond Dispute*[2] study, which detailed the outcomes of 142 mediations conducted in either a Child Focussed or Child Inclusive intervention (mediation), across three major metropolitan cities. Importantly, the study also reviewed the progress and functioning of the participant families a year after the mediation process had ended. While the study took place prior to the 2006 amendments and the participants had entered the mediation process voluntarily, there is nothing to suggest that the outcomes of matters brought to

2 October 2006 : https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/Report1.pdf

See also
McIntosh, J.E., Wells, Y.D. & Long, C.M. (2007). Child Focused and Child Inclusive Family Law Dispute Resolution. One year findings from a prospective study of outcomes. Journal of Family Studies, 13(1), 8-25

McIntosh, J.E., Wells, Y.D., Smyth, B.M., & Long, C.M. (2008). Child-focused and child-inclusive divorce mediation: comparative outcomes from a prospective study of post separation adjustment. Family Court Review, 46(1), 105-124

mediation as a result of the s60I requirements would yield materially different results.

Professor McIntosh's participant families were separated into two groups and both were largely indistinguishable so far as socio-economic and other relevant factors (such as psychological health of the parents) were concerned. All families reported high levels of conflict and limited capacity for dispute resolution. One third of all children in these families were in the clinical range of psychological distress.

In the Child Inclusive Intervention the parties' children met privately with a highly trained, specialist child consultant (children did not attend any joint sessions with their parents). The issues which emerged during that session were then carefully conveyed to the parents by the child consultant. An independent mediator was also present to work with the parents and, while acknowledging that the agendas of the parents were likely to be different, the mediator consistently invited the parents to consider and focus on their child's specific developmental needs.

By contrast, the parents in the Child Focussed Intervention were provided with generic information about child development theory and the needs of children similar in age to their own.

The results were startling and some of the key findings are summarised below:

CHILD FOCUSSED INTERVENTION ***Immediately following mediation***	**CHILD INCLUSIVE INTERVENTION** ***Immediately following mediation***
Enduring reduction in conflict levels	Enduring reduction in conflict levels
66% reported improvement in management of the dispute which initiated the mediation	82% reported improvement in management of the dispute which initiated the mediation
34% reported no improvement in the family dynamic	18% reported no improvement in the family dynamic
Universally poor outcomes where one parent had severe mental health concerns (no reflective capacity)	Perceived value in children's interview for child and mentally healthy parent even if conflict remained unresolved
Immediate increase in time followed by a decline in satisfaction of overall arrangements – for the whole family but especially for children	Father's acrimony reduced – fathers were more satisfied with the arrangements even though they generally secured less overnight time than CF group
Families more frequently changed the arrangements agreed at the mediation and were twice as likely to litigate to effect change	Agreements more durable and workable
	Mother/child relationship improved – greater emotional availability

The impact of the two processes on the family dynamics 12 months after the mediation were also significant:

CHILD FOCUSSED INTERVENTION ***12 months after mediation***	**CHILD INCLUSIVE INTERVENTION** ***12 months after mediation***
41% of children reported conflict was worse than pre-mediation levels	61% of children reported positive outcomes for the family - children reported being more content and less inclined to want to change arrangements
Children's emotional distress improved in first 3 months as perception about intensity and frequency of conflict decreased	Children's emotional distress improved in first 3 months as perception about intensity and frequency of conflict decreased

CHILD FOCUSSED INTERVENTION ***12 months after mediation***	**CHILD INCLUSIVE INTERVENTION** ***12 months after mediation***
Improvements in children's psychological wellbeing plateaued	Children's psychological distress and disturbance improved further – parents reported reduced anxiety/clinging behaviours, fewer fears and depressive symptoms
Parents maintained their "beliefs" about what their children needed – perceptions unchallenged	Removed mothers as the psychological "gatekeepers" of information about the children
	Fathers felt heard and also found it easier to hear of views contrary to their own (when came from the child)
	Parents had clear impression of what had helped: • were moved in a lasting way about the immediacy and intimacy of the material created by the child • were encouraged to be parents (stronger, wiser, kinder) and to allow for realities alternate to their own

Understandably, Professor McIntosh formed the view that Child Inclusive Practice is the model of choice for creating more durable parenting relationships and improving stability, but cautions against adopting the view that children should be seen in all circumstances.

THE ROLE OF FAMILY LAWYERS

Different models of Child Inclusive Practice exist within Australian and overseas. Some pose greater challenges than others and have been reviewed elsewhere[3] but all require the deft touch and considerable skill of the specialist child expert, ideally working in tandem with the skilled lawyer (or non-lawyer) mediator. The role of family lawyers, guiding and advising clients in this process, is also crucial.

> The ability for a client to embrace a Child Inclusive process can be positively influenced by the advice of a lawyer who encourages an open mind and ability to reflect meaningfully on their child's account of his or her experiences.

Lawyers as wise counsel can offer clients much support and guidance in a Child Inclusive process from as early as the initial consultation: but a preparedness to do so requires a significant paradigm shift.

The focus of Child Inclusive Practice is not the gathering of evidence to support a outcome which is, within terms of the Act, successful. It is not about adopting and protecting a parent's agenda or interests. It is not about securing a binding agreement as quickly as possible or in a single day of mediation/FDR. Rather, the focus is on carefully investigating the child's experience, on assisting parents to leave the process with better parenting capacity than when they entered and, finally, and if necessary, crafting any documentation to enshrine arrangements which best meet the child's developmental agenda. For most committed family lawyers, the notion that the emotional scaffolding provided to a parent who participates in a Child Inclusive process might ameliorate the potentially toxic impacts of enduring conflict on children, is a powerful motivation.

There would appear to be a very high likelihood that an outcome reached via a Child Inclusive process:

- meets the objects and principles of Part VII of the Act;
- satisfies the paramountcy principle;
- meets the aspirations of the UNCRC; and
- is capable of being enshrined into a legally binding document if required.

3 See the work of Linda Kochanski - Bond University

All of which should give lawyers significant comfort.

One of the factors working against the uptake of Child Inclusive Practice may well be perceived as the financial cost. While that will no doubt be a factor for some families, the responsibilities of a skilled family lawyer include the requirement to fully understand and articulate for clients all that stands to be gained from a Child Inclusive Process and what, in addition to financial expense, is at stake in an inherently legalistic one.

Lawyers have much to reflect on when considering the results of Dr McIntosh's study, the requirement for mandatory FDR, the objects of the UNCRC and the true purpose of lawyers as dispute resolution professionals. Embarking on a dispute resolution process without doing so may not be a satisfactory discharge of professional obligations in parenting matters.

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