Chapter 9

Family Court counselling

While the Court does have a statutory responsibility to provide reconciliation and relationship counselling, it has generally referred this work to community based agencies and concentrated its efforts and resources on conciliation counselling.[1]

The Family Court's counselling service works predominantly to help separated parents to reach agreement about the future arrangements for their children without litigation.[2]

As the Court explained in its submission, conciliation counselling relies on the application of professional technical and personal skills to assist in the reduction of often severe family dislocation. Such counselling is restricted to children's matters and is different in quality and quantity from long term therapy and the longer term interventions that normally accompany marriage and relationship counselling. On average, participants in Family Court conciliation counselling cases attend 1.8 sessions of one to two hours in length.[3]

The Court argues that conciliation counselling does more than help separating families reach agreements about the parenting arrangements for their children, and it is more than simply an 'alternative to litigation'. It involves helping parents to reach practical parenting arrangements, and to adjust to their changed parenting situation and the separation itself. According to the Court, conciliation counselling helps parents work through the hurt, anger and other emotions experienced when they separate, and generally it helps in reducing conflict.[4] Court counsellors focus impartially on the needs of the child, whose best interests are the paramount consideration.

In 1996–1997 the Court's counselling service dealt with 25,869 cases in person and 13,809 telephone counselling cases, crisis calls and intake assessments.[5] Of all the cases seen in person, 94.4 per cent were seen in the counselling service's conciliation counselling program. The remaining 5.6 per cent of cases were those where a family report was prepared. These reports were ordered in disputed cases involving children and, of those cases, some reached agreement during and after the preparation of the report and did not proceed to a contested hearing. These reports

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1 Reconciliation counselling is within the jurisdiction of the Family Court because of the breadth of the principles enunciated in s 43 of the *Family Law Act 1975*.

2 Family Court of Australia *Annual Report 1996–1997*: 28.

3 Family Court of Australia, *Submissions*, p. S1006.

4 ibid. p. S1007.

5 Family Court of Australia, *Annual Report 1996–1997:* 28.

may be written by officers of the Court counselling service or by contracted welfare officers. Family reports become part of the evidence if the case proceeds to a contested hearing. In report cases, the family has usually had previous contact with the counselling section for conciliation counselling.[6]

Access to the Court's counselling services may be either voluntary or Court referred / ordered. For voluntary counselling, clients may self refer, be referred by a solicitor, by another agency or from some other source. The major source of referral to the counselling service for voluntary sessions is the legal profession. Voluntary conciliation counselling is available both before and after applications have been filed in the Court.

In 1996–1997, as many as 47.1 per cent of all cases seen came on a voluntary basis to use the Court's PDR service; 18.6 per cent were referred to counselling by the Court after lodgement of an application for a parenting order in relation to residence, contact or specific issues was filed but prior to the matter first coming before the Court; and a further 28.7 per cent were referred by the Court after the first Directions Hearing.[7] Orders for counselling may be made on an urgent basis during the later stages of litigation with the intention that such counselling be received during a short adjournment of proceedings. The Court's counselling service therefore has counsellors on-call to deal with such urgent referrals.[8]

The Court appoints counsellors with a minimum of five years post graduate experience in psychology or social work and two years experience in family and child therapy and family relationship counselling.[9]

In its submission to the inquiry, the Family Court quoted a 74 per cent agreement rate for its voluntary counselling, 73 per cent agreement for its court ordered counselling held prior to the first day in court and 59 per cent agreement for those cases seen further down the litigation path.[10]

The proportion of Family Court applications which proceed to judgment has consistently averaged 4 per cent to 5 per cent.[11] The Court argues that such statistics indicate that counselling and more recently mediation have proved to be an important diversionary mechanism for those who otherwise may proceed further down the litigation pathway, possibly even to trial.[12]

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6 ibid.

7 ibid.

8 Attorney-General's Department *Delivery of primary dispute resolution services in family law* August 1997: 35.

9 Family Law Council, *Submissions,* p.S15.

10 *Submissions,* p. S999.

11 ibid.

12 *Submissions,* p. S999.

A survey of 321 pre-filing voluntary counselling clients was conducted in the Court's registries in October 1996. According to the Court, a powerful theme of the responses was both the serious nature of the issues being raised and the tendency for clients to present with two or more problems. Family violence, child abuse, neglect, drug and alcohol problems, children refusing contact and serious communication problems were the subject of concern for many of these families. The survey results indicated that pre-filing voluntary and Court ordered or Court referred clients alike present with complex problems, to the extent that the characteristics of one population are indistinguishable from those of the other.[13]

The survey further found that almost half the voluntary clients had attended individual or marriage and relationship counselling before approaching the Court. Only 29 per cent had received no previous counselling, either at the Family Court or elsewhere. Furthermore, 53 per cent of clients indicated that they were aware of other services in the community, but still chose to come to the Court.[14]

In its submission, the Court argued that the survey results point to a high degree of confidence in the Family Court counselling service, both by the clients and their legal representatives, who had referred nearly two thirds of the clients to the service.

Respondents appeared to be seeking legal solutions to their personal and family problems, and many were attempting to save costs and avoid attendance at court. The fact that nearly one third of voluntary counselling clients surveyed wanted to avoid 'going to court' suggests that the court annexed service is not seen as being synonymous with litigation, but as an alternative to it.[15]

The survey results indicated that many clients are attracted to the court-annexed nature of the Court's service. One third said they felt more secure and confident arranging their matters through a Court related service and one quarter saw the counselling services as a component of the Family Court and of the legal system.

Suggestions for change

While PDR is provided largely by the Court, some programs funded through the Family Services Branch of the Attorney-General's Department also provide PDR services.[16] Most of these services come under the Family Mediation sub-program. Under this sub-program, organisations such as Relationships Australia and Centacare receive funding to provide a number of PDR services which complement those offered by the Court.

13 ibid. S991.

14 ibid. S992.

15 ibid.

16 *Review of the Auditor-General's Audit Report*, No. 33 1996–1997: 25.

In recent years there has been increasing debate about the location of PDR services and whether the Family Court should continue to provide the bulk of these services or whether more of them should be provided by community-based agencies.

Joint Select Committee on Certain Family Law Issues

In the last parliament, the Joint Select Committee on Certain Family Law Issues supported the idea of locating at least some of the counselling services currently provided by the Court, in the community sector. That committee recommended that:

> while recognising that the Family Court of Australia will always require direct access to counselling services, in the long term there are benefits in having counselling based in the community through structures such as the Noble Park centre in Melbourne, community legal centres and organisations like Relationships Australia on a flexible and competitive basis.[17]

The Family Law Council wrote a letter of advice to the Attorney-General on the Joint Select Committee report in June 1996. The letter criticised this recommendation in the following terms:

> The Council also found that in several areas the JSC's report lacked any reasoning for its proposals (see, for example, the recommendation at paragraph 7.50) and in other areas inadequate reasoning was given. The lack of justification for, or explanation of, many of its recommendations makes it difficult constructively to comment on its recommendations.[18]

Attorney-General's Department, *The Delivery of Primary Dispute Resolution Services in Family Law*, August 1997

The debate about the location of PDR services has been taken up more recently in the Attorney-General's Department's discussion paper *The Delivery of Primary Dispute Resolution Services in Family Law*, August 1997.[19] The thrust of this paper was foreshadowed in October 1996, when the Attorney-General, the Hon Daryl Williams AM QC MP, in an address to the National Press Club announced his intention to consider making far-reaching changes to the delivery of PDR services. In that address, the Attorney-General identified as an issue the 'contradiction between encouraging people to resolve their family law problems outside the courts, while at

17 Joint Select Committee on Family Law Issues *Funding and Administration of the Family Court of Australia* November 1995: 98.

18 Family Law Council, *Submissions*, p. S98.

19 The paper is available on the internet at <http://law.gov.au/publications.familypdrs.htm>

the same time keeping a major source of counselling, including voluntary counselling within the Family Court'.[20]

The discussion paper released in August 1997 is a substantial document and calls for comment on the issue of whether significant improvements can be made to the structures now in place for family relationships services. It includes discussion of a possible model for reform involving increased community sector involvement.

> Court and community services have developed separately without any real consideration of where families might prefer to be. It is time to examine whether a greater community focus may assist more people to resolve their disputes without resorting to legal proceedings.[21]

The paper identifies the principal objectives of any reform proposal as being to improve access for clients; to improve accountability in government spending; to introduce greater efficiency through contestability; and to divert more people away from a court environment during their family disputes.[22]

With these objectives as a basis, the paper then focuses on two key proposals, namely the creation of a new administrative structure for all family relationship services and secondly the option of removing non-judicial functions from the Family Court and placing them with community organisations.

The new administrative structure suggested in the paper would involve creating one central body responsible for the overall planning, policy and funding for all non-judicial family relationship services (including those currently provided by the community and the Family Court). Such an office would be located within the Attorney-General's Department and would use a proportion of the budget from the Family Court and the Family Services Branch of the Attorney-General's Department. This central body, could manage the purchasing of services but would not be a service provider itself.[23] One likely consequence of any such new arrangement would be that counselling and mediation services would be provided to a greater extent in a community setting, rather than on court premises.

The other significant option considered in the discussion paper is the proposal of removing from the Court all non judicial services and placing them in a community setting. The paper argues that if some or all of the court-provided services not integral to the litigation process were provided in a community setting there may be a consequent reduction in the number of people becoming involved in litigation.

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20 *Family Law: Future Directions* 15 October 1996.

21 Attorney-General and Minister for Justice *Press release* 333 2 September 1997.

22 Attorney-General's Department (1997) *Delivery of Primary Dispute Resolution Services in Family Law* August: 4.

23 ibid. 11.

This may occur because clients engaged in PDR away from court premises may be less likely to consider it an adjunct to litigation.[24]

The paper acknowledges that the final settlement statistics in the Family Court are good (only 5 per cent of cases reach litigation), but considers a restructured system of delivery may further reduce filing rates or limit the issues on which filing occurs. This, it is argued, would reduce costs for the clients who need to use the Court's judicial services and potentially speed up movement through the system.[25] It may also result in clients accessing services earlier, or accessing services with a different focus, well away from the litigation stream.

> If families can be and are encouraged to access these services before considering filing any court proceedings, indeed without having to enter Court buildings at all, they may be more able to resolve their disputes completely outside the litigation process. They may be less inclined to assume that litigation is the ultimate choice for resolving the dispute. They may be more committed to reaching their own resolution if they are outside the court system even though they may still be aware there is a decision-maker ultimately available should they not succeed.
>
> Increased diversion from litigation could therefore be achieved by fostering greater recognition that PDR is not, in most cases, part of the litigation process but intended to be quite separate ñ a truly alternative means for reaching a solution.[26]

The Committee commends the Attorney-General's Department for providing an opportunity for debate and consultation about the provision of family relationships services. In light of the Department's request for comment, the Committee provides the following sections which present a range of views expressed during the inquiry. In general that evidence suggests that the discussion paper has caused considerable concern within the Court itself, amongst other family law bodies and also amongst some community organisations.

The Family Court's views on the location of PDR services

The Family Court's views on the proposed changes have been put most succinctly in its current Annual Report in the section 'Year in review by the Chief Justice'

> I have strongly opposed the suggestion that counselling and mediation services should be removed from the Court or reduced in scope. This has nothing to do with any misgivings about the effectiveness of community-

24 ibid. 19.

25 ibid. 20.

26 ibid.

> based organisations or because of any 'territorial' concerns. Rather it has everything to do with the success of the existing Court services, the apparently high esteem in which they are held by clients and the legal profession and because to dismantle them appears to fly in the face of progress made by family courts not only in this country but around the world. Indeed it is inconsistent with the developments taking place in all other Australian courts in the promotion of mediated resolutions of disputes. There is room for such services in the community but clients should have maximum choice and, in any event, the development of services external to the Court is not inconsistent with the retention of those provided within it.[27]

The Court, in its submission to the Committee, also argued strongly for the maintenance of the present system. The submission describes in some detail the extent to which the Court's services are integrated with each other, the serious and acute nature of the disputes which voluntary clients bring to counselling, the high settlement rates which occur at this stage and the propensity for pre-filing disputes to develop into intractable problems if they are not managed effectively at an early stage.[28]

As discussed above, voluntary counselling clients have already separated from their partners, many are referred by solicitors, and their expectation is that they will receive expert advice and assistance relating to their circumstances, which usually centre around their children. Many have previously sought out the services of community organisations, possibly prior to the separation.[29]

As the Court argued in its submission:

> To prevent the Court from dealing with these clients would therefore create the potential for more serious child related problems to arise, which would disrupt the inter-disciplinary liaison which currently occurs within the Court and would have a flow-on effect in relation to settlement rates and the extent to which litigation is relied on.
>
> Similarly it makes no sense to remove the Court's mandatory counselling function. Court counsellors work with judges and registrars in providing information which the legislation requires to be in the child's best interests. Furthermore, the presence of counselling within the Court allows urgent matters to be dealt with immediately if necessary.
>
> Although integrated, the Court's system allows flexibility where this is required. Disputes do not go through the stages of primary dispute resolution and litigation sequentially, the processes are interwoven and parties move

27 Family Court of Australia *Annual Report 1996–1997*: 17.

28 Family Court of Australia, *Submissions*, p. S1097.

29 ibid.

> backwards and forwards from one to the other according to the particular needs and nature of their matters. This works extremely well and can occur easily within the integrated system which the Court has developed. It would certainly not work otherwise.[30]

The Court's submission was also critical of the concept of a single administrative body responsible for all family relationship services.

If a new bureaucracy, such as a family commission, were established to fund, monitor and co-ordinate some or all of the services which the Court currently provides, the separation of these aspects and particularly the funding from the delivery would provide opportunities for dislocation, the introduction of inconsistent standards and inappropriate interventions. Such a high integrated system of primary dispute resolution requires the service provider to have full control of the resources available to it. Dismantling the integrated nature would similarly create a number of difficulties.[31]

Other views on the location of PDR services

The Family Court's strong opposition to the Attorney-General's proposal for change was also supported in submissions by other legal bodies.

The Law Society of New South Wales submitted that, if court counselling is removed or significantly reduced, the converse effect will be a significant increase in, not just initial applications for family law relief, but most probably, disputes, that will reach the point of trial before judges and judicial registrars. While not opposed to community-based counselling, the Law Society believes voluntary pre-court filing counselling fills an hiatus which cannot be covered by other agencies.[32] Mr Robert Benjamin, a representative of the Law Society, told the Committee that from his experience in legal practice, the majority of people experiencing marriage break-up prefer to go to court counselling rather than outside agencies. He believes the imprimatur of the Court has a tremendous effect on the parties.[33]

In evidence, other members of the legal profession spoke highly of the expertise and long experience of the Family Court counselling service. Ms Ruth Venables, Principal Solicitor of the North Queensland Women's Legal Service, said Family Court counsellors were the 'most experienced' and 'most skilled' counsellors available. She said further that the body of expertise built up over 22 years is not found anywhere else.[34] James Gibney, Managing Solicitor of the Cairns Community

30 ibid. S1098.

31 ibid.

32 *Submissions,* p. S1038.

33 *Transcript*, p. 324.

34 *Transcript*, p. 805.

Legal Centre, also argued, from a regional perspective, that if the Family Court withdraws from counselling, community organisations in Far North Queensland will not have the skills base to fill the vacuum.[35]

Mr Alan Campbell of the Noble Park Family Mediation Centre, and previously a counsellor with the Family Court of Western Australia, claimed that the Court's counsellors are more in tune with the needs of the particular clients than those in community organisations. From his experience with the Western Australian Family Court he claimed that counsellors there were able to respond to the Court's requirements quickly and had the advantage of working with the support and back-up of other infrastructures within the court system. As he said, many of the clients who go to the Family Court go there having tried other options and therefore the Court is seeing clients at the more difficult end of the spectrum. At this stage, it is then important to respond quickly and effectively, in order to prevent disputes going to trial.[36]

Evidence to the Committee from community organisations was also supportive of the current arrangements.

A number of Victorian service providers, in their joint submission, argued that pre-filing conciliation counselling or mediation should be done by both the Family Court and outside bodies. However they argued strongly that court ordered counselling or family reports should be provided solely via the Family Court and should not be required of community based organisations.[37]

These service providers supported the Court's arguments that there is need for a close liaison between counselling services and the Family Court; they pointed to the supportive infrastructure available within the Court structure which gives the counselling services the capacity to respond quickly and potentially prevent further litigation. Significantly, these providers added that from their perspective, moving court ordered counselling services to the community and thereby significantly increasing the number of separation and divorcing clients that agencies would be dealing with, could potentially threaten the community organisations' focus on prevention.[38]

The Victorian service providers argued that to be most effective in supporting and strengthening relationships it is critical that the public seek help from their organisations as soon as relationship difficulties first appear. It is already a problem that many people in the community believe that, if you are seeing a marriage

35 *Transcript*, p. 804.

36 *Transcript*, p. 202.

37 Anglican Marriage Education and Counselling Services, Catholic Family Welfare Bureau, Drummond Street Relationship Centre, Family Mediation Centre (Noble Park) and Relationships Australia (Victoria) prepared a joint submission. *Submissions,* p. S598.

38 ibid. 598–599.

counsellor, your relationship must be 'on the rocks'. This unhelpful perception will be significantly reinforced by any increase in the amount of counselling for separating and divorcing couples conducted by community organisations, particularly if these additional services include court ordered counselling and family reports.[39]

These Victorian service providers also made the point that if staff caseloads become skewed toward these court ordered cases, staff may lose some of their capacity to undertake effective therapeutic work with individuals, couples and families. Court ordered cases require intensive intervention, and therefore considerable resources. There will inevitably be a tendency for resources to flow in their direction, leaving existing preventative work under-resourced.[40]

Family Services Australia, one of the three peak family services bodies, also argued that existing community services do not want to be identified with court ordered counselling services because this could compromise the community's view about the voluntary and preventative nature of their work and interfere with couples using the services to improve relationships rather than just end relationships. This submission also suggested that specialised work such as the preparation of family reports requires particular skills and court time for cross-examination. Existing community services are largely unprepared for such work.[41]

Another peak body, Centacare Australia, expressed a similar opinion. Based on a survey of Centacare organisations throughout Queensland, Victoria and New South Wales, it argued that Family Court counselling has for many years served a different and complementary role to that of the community based marriage counselling agencies because it has had the resources to handle the potentially dangerous cases and the perceived authority to address cases where children are at high risk. This is a much needed role which cannot and should not be taken on by community agencies.[42]

An alternative – remove all voluntary PDR from the Family Court

The Attorney-General's discussion paper suggests that one possible option would be to retain court ordered counselling and family reports with the Family Court and to move voluntary or pre-filing counselling into the community. The Committee received conflicting evidence in relation to this option. Family Services Australia suggested that this alternative may be particularly worthwhile in terms of what is the best location of services to meet the needs of the family most effectively. Such an

39 ibid.

40 ibid.

41 *Submissions,* p. S696.

42 *Submissions,* p. S847.

option would help to counter a common view, often supported by the legal profession, that the Family Court is the main provider of family services.[43]

Other evidence to the Committee suggested there are difficulties with this option as the distinction between voluntary and non-voluntary counselling is often artificial. A 19961997 survey conducted by the Family Court suggests that voluntary clients are often indistinguishable from court ordered clients and many of the most difficult cases present first as voluntary counselling at the behest of the legal profession. These clients, it is argued, require the expertise of trained counsellors prior to filing an application for parenting orders.[44]

The Family Law Council is strongly opposed to the suggestion that all voluntary counselling provided by the Family Court should be provided by agencies outside the Court on the basis that it would put an artificial barrier in the way of those wishing to access the service.

The Council is of the view that where parties are clearly in dispute about their children or wish to discuss future parenting issues with a court counsellor, then they should not be required to make an application to the court before they are able to utilise its primary dispute resolution services. The unintentional consequences of such an action could result in parties filing an application to access services. To do so would be to formalise intervention too early and thereby reduce the likelihood of a non-adversarial solution.[45]

A common theme in evidence to the Committee on this issue was concern about the greater security risks involved in moving the Family Court's counselling functions to community organisations.

As the submission of the Victorian service providers argued, there is a greater risk of serious violence in cases which have traditionally been handled by the Family Court. According to the Court's 19961997 annual report there were 8597 cases where separate interviews were requested and held because of family violence.[46] As the major service providers stated:

> The Court has put substantial resources into security systems for staff and clients, which are not currently available or desirable for community based services and those in the community.[47]

43 *Submissions*, p. S696.

44 Family Court of Australia *Annual Report 1996–1997*: 29.

45 Family Law Council, *Submissions*, p. S577.

46 Family Court of Australia *Annual Report 1996–1997*: 28.

47 *Submissions*, p. S599.

Community counsellors dealing with domestic violence also affirmed the value of the Family Court's counselling services and the Court's ability to handle security problems.

Ms Clarke, Domestic Violence Outreach Worker for the Salvation Army Crossroads Project Melbourne, stressed the need for safety in conciliation counselling. She said family law counselling should remain within the family law structure because the Family Court was able to offer a certain amount of safety for women and children accessing the service.[48] In her submission she outlined various areas where women had expressed concern about the counselling services they had accessed.[49]

The impact of fees on counselling services

As of 1 January 1998, the Family Court introduced fees for conciliation counselling. Prior to that date this service was available free of charge whereas similar services provided though community organisations such as Relationship Australia were only available for a fee. It is arguable that this arrangement may have been an additional incentive for clients to use the Family Court counselling services.

The Committee therefore sought opinions from witnesses regarding the possible impact of fees on the Court's counselling services.

Members of the legal profession said that even with the introduction of fees they would prefer to refer clients to the Family Court's counselling services because they have confidence in the staff of the Court to resolve matters quickly without incurring further legal costs. Mrs Jennifer Boland, Chairperson of the Family Law Council, said regardless of the fees involved, she would continue to refer clients to the Family Court on the basis of the tremendous expertise available in the Court and the fact that their services are the best at this particular time.[50]

However, these witnesses also pointed out that the introduction of fees may deter people from using the resources of the counselling services. As Professor Hilary Astor, Chairperson of National Alternative Dispute Resolution Advisory Council, suggested there is then a danger that disputes which could be solved expeditiously and quickly will end up in the court with a consequent far greater cost to the disputants and the whole community.[51]

The Committee acknowledges this concern but points to the inequity of an arrangement where community organisations' clients are charged fees while Family

48 *Transcript*, p. 419.

49 Salvation Army Crossroads Network, *Submissions*, p. S437.

50 *Transcript*, p. 274.

51 *Transcript*, p. 267.

Court clients are exempt. Such a system is not only inequitable but could be perceived in the community as placing a greater value on separation counselling over reconciliation or marriage relationship counselling.

The New Zealand experience

The Family Court of New Zealand was set up by virtue of the *Family Courts Act 1980*. In 1981 it was decided that the court would not have an in-house counselling service like the Australian model. Rather, the Government was persuaded that the Marriage Guidance Council, which had previously provided conciliation services under the old Domestic Proceedings Act would be able to service the counselling needs of the new family court. The practice of using community-based services was thus established at the outset, and has been retained. According to the 1993 Boshier report, the Marriage Guidance Council provides about one-third of the required counselling and the remainder is spread among a variety of community agencies and private practitioners.[52]

Given this emphasis on community based conciliation counselling, the Committee believed that the New Zealand experience might be valuable in making decisions about the future direction of Australian conciliation counselling services.

In 1993, the Chief Justice Boshier of the New Zealand Family Court established an inquiry into the family court system to investigate the reasons for the sharp annual increase in public funding for legal services and to look at ways of containing costs and restoring the principles and philosophies of that Court. In relation to counselling, the Boshier Committee was required to look specifically at 'ways in which the conciliation process can be reinforced and where necessary restored and where appropriate, extended'.[53]

The report of that inquiry indicates that the New Zealand focus on community based counselling has not solved the difficulties perceived to exist within an in-house court counselling structure.

A theme that comes through this report is the lack of confidence in the counselling services offered. The report suggests there are difficulties liaising between the court and counselling services. The Boshier Committee noted that counsellors feel they are often seen as the 'poor relations' of the family court team. Counsellors often work in isolation, vary widely in their skills and training, are recruited in a somewhat piecemeal fashion and suffer from a lack of nationally-recognised standards. Unlike the Australian system, where legal practitioners indicate great confidence in the Family Court counselling services, the Boshier report suggests that while lawyers were generally supportive of the counselling process, few have high expectations of

52 (1993) *A review of the Family Court: a report for the Principal Family Court Judge* Auckland.

53 ibid.

its success.[54] Many counsellors told the Boshier Committee that they received too little feedback on the quality of their work, and would welcome a closer relationship with the court and greater accountability in terms of their effectiveness. Both Marriage Guidance Council and private counsellors said they would like training in mediation skills to be provided for them by the family court, so that uniform and consistent standards could be reached. [55]

A major concern of the Boshier Committee was to look at ways in which counselling could be encouraged over litigation. To this end, that Committee recommended that a family conciliation service with a system of counselling coordinators be established alongside the judicial family court structure. Since 1993, there has been no further documented research on the success of these proposed reforms. On this basis, the Committee draws its conclusions from the 1993 Report and suggests that the greater community focus of the New Zealand system has not been any more successful than the Australian system in containing costs and assisting people to resolve their disputes without resorting to legal proceedings.

The Committee's views on the proposed changes

The Committee commends the community consultation the Attorney-General's Department is undertaking to improve services. However, on consideration of the evidence to the inquiry, the Committee believes that the reform proposals involve complexities that require a more detailed analysis and consideration.

These complexities include the importance of acknowledging the distinctive differences between the counselling services offered by community organisations and those of the Family Court. Many community-based services are provided by churches which have a deep philosophical commitment to the support of marriages through bad times Their focus is on prevention and therapy. On the other hand, the PDR services provided through the Family Court are crisis counselling to help couples who have already determined to separate, to solve the problems involved in doing so. The focus of these two groups is different and attempts to merge these types of services may jeopardise the valuable work of each.

The frequency with which security issues were raised in the evidence suggests that the security offered by the Family Court is one of the significant differences between the court-based services and those in the community. The Committee believes that the need to provide protection and security against family violence is a key reason for retaining counselling services within the environs of the Family Court. Evidence clearly supported the retention of counselling services within the Family Court on the basis that community organisations can not provide the sophisticated intake screening procedures offered by Family Court registries. Not all community based

54 ibid. 43.

55 ibid. 44–45.

agencies would be able to meet the requirement suggested in a position paper on mediation prepared for the National Committee on Violence Against Women:

> Intake interviews must always be conducted with the disputants separately whatever the circumstances and whatever the desires of the parties. It is unlikely that any interview with both parties present will identify violence.[56]

The Discussion Paper makes no attempt to provide a solution to this complex problem. Rather it bypasses the issue with the following question:

> Q. 7 Does the fact that the Family Court already has in place significant security measures to respond to a violent incident require the current model to be retained?[57]

The Committee believes that until a satisfactory solution can be found to the issue of security, there is good reason for retaining the current model.

According to the Attorney-General's Department, the main rationale for the proposed reform is to encourage more people to avoid litigation. This could be misleading. The Family Court's PDR services are already focused on helping couples resolve their differences without resort to litigation. With 95 per cent of matters being settled without judicial determination, they have been most successful in doing this. The Committee is impressed by the high settlement rates achieved by the Family Court and believes that any proposal to change the current arrangements should be based on solid evidence that these figures can be improved substantially.

As part of this inquiry, the members of the Committee visited the several family court registries in order to gain a better understanding of the PDR services provided there. The Committee was impressed with the highly integrated approach of the Courts. The Committee saw no evidence to suggest that the particular situation of the Family Court's counselling service substantially encourages litigation. Rather, the Family Court maintains a physical separation of its counselling and mediation services. People using conciliation and mediation services, or attending information sessions, are not thrust into a confrontational atmosphere.

On the basis of the Committee's own observations, and the arguments presented in evidence to the inquiry including a review of the New Zealand experience, the Committee is persuaded that the counselling services offered by the Family Court are an integral part of the Court's core functions. Attempts to differentiate between court ordered and voluntary counselling seem to be artificial and it is arguable that removing pre-filing counselling from the environs of the Family Court may result in earlier filing. The Committee believes strongly this is to be avoided.

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56 H Astor (1991) *Position Paper on Mediation* December: 41.

57 Attorney-General's Department (1997) *The Delivery of Primary Dispute Resolution Services in Family Law* August: 10.

The Committee does however acknowledge that a difficulty of the current arrangements may relate to the community's perceived role of the Family Court. The Committee believes that in acknowledging the distinctive differences between the counselling services offered by community organisations and those of the Family Court, it is important that a clearer distinction be drawn between the marriage and relationship counselling and therapy offered by community based organisations and the crisis counselling offered by the Family Court to separating couples. To this end, the Committee makes two recommendations.

> ***Recommendation 40***
> **The Committee recommends that the Family Court of Australia rename its conciliation counselling services as separation counselling services in order to avoid confusion with the reconciliation counselling services offered by marriage and relationship counselling agencies.**
>
> **The Committee reiterates the recommendation of the Joint Select Committee on Certain Family Law Issues that the *Family Law Act 1975* be amended to remove the statutory obligation on the Family Court to provide reconciliation counselling.**[58]

As Chief Justice Alastair Nicholson told the Committee, the Family Court has already relinquished this statutory responsibility of providing reconciliation counselling and instead has concentrated its efforts on crisis counselling.[59] The Committee believes therefore that the Act should be amended to more accurately reflect the current practice.

A new administrative structure

As noted above, the Attorney-General's discussion paper proposed a central body (to be part of the Commonwealth) which would have responsibility for all counselling services currently provided through the Family Court PDR services and the Family Services Branch of the Attorney-General's Department.

There would be a major change to the functions of the Family Court if PDR services were to be moved away from its control.

The Coaldrake Report, *Review of the Top Structure of the Family Court of Australia* notes:

58 Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* November 1995: Recommendation 7.50.

59 *Transcript* p. 165.

> If there were to be a move away from the Court for non-judicial services, the organisational ramifications would be very considerable, the more so given that the Judges of the Family Court are professionally involved in only a tiny proportion of the matters dealt with by the organisation.[60]

It is clear that the question of counselling services and the Family Court is complex, but the Committee believes it is crucial that it should be resolved quickly. The Committee notes the concern expressed in the Family Court's most recent annual report:

> The impacts of various inquiries into areas such as this [counselling services] have the capacity to increase uncertainty and to impact negatively on the morale of staff who may be affected by their outcomes.[61]

The Committee considers that there is a prima facie case for the Family Court retaining control of PDR services. Any proposal to re-locate PDR services away from the Court should be based on solid evidence that the provision of the services could be improved by those proposed administrative arrangements.

Any such decision should be approached with a great deal of caution. Attention must be paid to the different types of counselling services and the suitability of particular bodies for delivering different services. On the basis of the evidence to the inquiry, the Committee considers that PDR services are an integral part of the Family Court's operations. Future administrative arrangements will have to take this factor into account.

> ***Recommendation 41***
> **The Committee recommends that primary dispute resolution services remain a part of the Family Court.**

60 The Coaldrake Report (1997) *Review of the Top Structure of the Family Court of Australia* June: 6.

61 Family Court of Australia *Annual Report 1996–1997:* 17.