

1. ***Mediation already works very well*** - In both New South Wales<sup>[1]</sup> and The United Kingdom<sup>[2]</sup> mediation resolves about 80% of disputes per annum between litigants and has done so for more than two decades. Almost all western democracies now favour<sup>[3]</sup> mediation prior to litigation. A cooperative solution makes innate sense where the parties must, for other reasons, have an ongoing relationship - such as shared parental care. To be clear, mediation is not a perfect solution. But mediation is demonstrably more efficient than the costly alternative of litigation, which is just so often a form of financial violence.
2. ***Closure rates depend on the issue being mediated*** - The Australian Institute of Family Studies in their 2009 report on The Shared Parenting Amendments found that compulsory<sup>[4]</sup> *parental mediation* did work for 39.4 % of the population; but failed in 21% of disputes resulting in the issue of a certificate enabling litigation; and another 30% also failed but first time, but received no certificate. There were design faults in the 2006 parental mediation regime and we can learn from the experiences of the last 11 years. But even if property mediation performed as poorly as parental mediation a 39.4 % clearance rate for victims of financial violence and for all distressed families would still have a significant impact on lives, duration of relationship conflict, and levels of violence in our community. Moreover, because parenting is an innately emotional issue there is good reason to believe that financial mediation will be considerably more successful.
3. ***Financial returns are better for citizens pre-and post-fees if you mediate.*** In 2014 The Australian Institute of Family Studies<sup>[5]</sup> reported that solicitors negotiated a 56% return for women, pre-fees, on average when couples separate. And that women negotiated a 57% return without lawyers, on average. But delays were pervasive across the system, not just in Court rooms. So there is negligible marginal difference between outcomes, other than legal fees which can range up to 40% of a couple's wealth. A fair estimate of the cost of a Federal Circuit Court case is \$120,000 per parent, inclusive of barristers and psychologist costs. In late 2014 The Productivity Commission recommended substantial de regulation of the legal services market to reduce the eye-watering legal fees paid to family law firms. They also recommended that competition for family law advice would materially improve access to justice. We are all for reducing legal fees but our broader point is that we question why legal fees are needed at all for the majority of our fellow citizens, when mediation produces superior economic outcomes. In our experience mediation outcomes are 90-97 % cheaper than fees incurred by forcing people to litigate if they require access to justice.
4. Mediation does not need to be face to face. Indeed, in our "shuttle mediation" model, the couple need never confront each other physically. They each talk separately to the mediator by phone or video conference.
5. ***We already mediate property matters in family law.*** Australians wealthy enough to litigate financial disputes must, at present, mediate financial disputes – but only AFTER they file in Court, at taxpayer expense. The Family Court's Annual Reports show that 7 out of out of 8 family law property disputes in courts are currently being resolved by

mediation from a government paid for mediator (being a Registrar) or are resolved pre-hearing. Our proposal is economically superior because it will bring forward in time compulsory financial mediation, regardless of one's ability to fund litigation, and without the need to do so, simply to get your spouse to cooperate. Our proposal would reduce costs for citizens and for taxpayers.

The learnings from other data and most importantly insights from "game theory" (the mathematical modelling of the optimisation of negotiations) suggest that a cooperative outcome will best succeed for both parties where:

- There is a consequence of failing mediation so that it's not a "costless option".
- The duration of the mediation is clear – it can't drag on and on.
- Decision makers are economically incentivised to behave rationally and communicate cooperatively rather than the current system where one side is often incentivised to delay.
- The non-confrontational nature of the dialogue is assured.

So, with those lessons in mind Divorce Partners proposed the 90:90 solution which has these core features:

1. The negotiation regime deals only with property matters between couples who can't agree promptly, and does not seek to provide a whizz bang solution to every financial issue theoretically capable of being raised. Some matters will still need to go to Court- but less than 20% of the current 3-year property queues need exist. And probably much less than that.
2. The proposed regime would mandate a ***minimum distribution of 70% of wealth and require disclosure to arise as a matter of clear law***, so that neither spouse can make it an "all or nothing" style mediation. Presently where one spouse refuses to even pay undisputed sums their ex-partner gets nothing immediately and then waits years for any payment at all, at great personal cost, both financially and mentally.
3. An ***assessment process*** fortifies the mediation, so that:
  - a. Victims of family violence could – if our proposal is adopted – side-step mediation and go straight to an early assessment "on the papers" without the need to endure contact with their spouse.
  - b. Free riders who currently abuse the court system to drag out their dispute for no reason would be neutered because they would have to pay before they argue. Just as in tax disputes. Rorting the system for an improper purpose of delaying payment, or other forms of state sanctioned financial violence, would no longer be a legal strategy tolerated by The Parliament and subsidised by all other taxpayers.
  - c. Where one partner won't budge, their former partner still gets paid promptly. After payment go to Court and argue. But experience tells us that economics shortens court queues. If your wife has 60% you don't then go to Court and argue that it should have been 57. 8764%. If disputes are narrowed quickly benefits abound.
4. If enacted, financial violence will fall. Most symbolically, sensible centre politicians will have sent a clear message that The Family Law Act 1975 is only to be used as a shield for the weak, and no longer to be used a weapon of the strong and well-funded. Victims will be safer, sooner. Many cross examinations will simply never arise.
5. Time frames are limited to 90 days. At Divorce Partners, we have a 92% clearance rate inside 4 weeks on financial mediations. We achieve an average return well above 57% for females, both pre-and post-fees.
6. There are clear safeguards for the financially weaker spouse. These are built into the legislation that we drafted and submitted. They reflect current best practice.

We trust this memo clarifies matters. If the Committee decides to merely tinker with the status quo, that will, in effect, be a vote for a continuation of the high levels of financial violence currently being perpetrated against the weakest members of our communities.

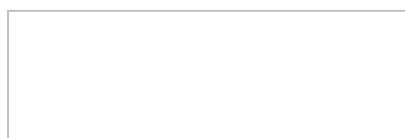
[1] [http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin\\_2012.05.11.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf)

<sup>2</sup> <http://asauk.org.uk/archive/policy/policy-2005/civil-justice-since-the-woolf-reforms-how-useful-is-adr/>

<sup>3</sup> “Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.”. Chief Justice of the US Supreme Court Warren Burger, 12 September 1984, Speech to the American Bar Association.

<sup>4</sup> <https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/5-family-dispute-resolution>

<sup>5</sup> <https://www.ag.gov.au/Publications/Documents/Post-SeparationParentingPropertyAndRelationshipDynamicsAfterFiveYears/post-separation-parenting-property-and-relationship-dynamics-after-five-years-full-document.PDF>



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[1] [http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin\\_2012.05.11.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf)

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[5] <https://www.ag.gov.au/Publications/Documents/Post-SeparationParentingPropertyAndRelationshipDynamicsAfterFiveYears/post-separation-parenting-property-and-relationship-dynamics-after-five-years-full-document.PDF>