Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements
Department of the House of Representatives
Canberra ACT 2600
Australia

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[redacted]

31st August 2003

Dear Committee Secretary , Standing Committee on Family and Community Affairs

> Submission to the Inquiry into Child Custody Arrangements in the Event of Family Separation

Please accept my late submission focusing on issue (a)(i) of the Terms of Reference of the Inquiry into Child Custody Arrangements in the Event of Family Separation. My submission details what I perceive to be the best manner to elicit feedback from children in the post separation environment. My solution seeks to strike a balance with United Nations Convention for the Rights of the Child, Australian obligations under this Convention, and carefully weighs the competing views of child psychologists and child focused sociologists in considering (i) the best interests of the child; and (ii) the best manner to resolve residency and access concerns.

There is no need to keep my submission confidential.

Sincerely

Jason Söderblom

Reconfiguring the Mediation Double-Diamond to Accommodate the Rights of Children in Contact and Residence (Custody) Mediation.

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5th May, 2003.

Introduction

An important recognition of children's rights is emerging in Australia.[1] It is reiterated in international law and driven by a tide of sociological research on children's rights.[2] Historically children's rights have been defined and dictated by parents, guardians, or broad public policy. The public policy to act in the 'best interest' of the child is stated in the Family Law Act (1975)(Cth) in s65E.[3] Importantly the best interests of the child "can" include the "child's right to be heard" via s68f(2)(a) however this does not mandate that the child be an actual participant.[4] Chief Justice Nicholson of the Family Court has stated "providing an actual mechanism for obtaining such views (child views) in litigation is not always easy".[5]

In this paper I consider a better mechanism than litigation in resolving child contact and residency disputes by heralding the benefits of mediation tailored to children after adjusting and qualifying the LEADR mediation model in order to recognise children as rights-bearers.[6] The United Nations Convention of the Rights of the Child (CRC) which Australia has ratified, is similar to s65E. Article 3 states that "*In all actions concerning children... the best interests of the child shall be a primary consideration*".[7] Yet in establishing the scope of the interests of the child Article 12 of the CRC states that "*State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*".[8]

Marlow and Sauber in 1990; Meggs in 1993; and Emery in 1994 each conclude that children should rarely (if ever) be included in the mediation process of custody disputes.[9] Their rationale is that child participation impels a

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[1] Australian Law Reform Commission, *Chapter 8: Children's involvement in family law proceedings*, http://www.austlii.edu.au/au/other/alrc/publications/draftrecs/3/08childr.html#FNote3 , accessed 24/04/2003. e.g. the ratification of CRC and the introduction of the *Family Law Reform Act 1995* (Cth).

[2] E. Tisdall, K. Marshall, A. Cleland, A. Plumtree, *Listening to the views of children? Principles and mechanisms within The Children (Scotland) Act 1995*, Journal of Social Welfare and Family Law 24(4) 2002: 393.

[3] FAMILY LAW ACT 1975 SECT 65E. http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65e.html , accessed 24/04/2003. s65E Child's best interests are paramount consideration in making a parenting order In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. Note: Division 10 deals with how a court determines a child's best interests.

[4] FAMILY LAW ACT 1975 SECT S68(f)(2), The Court must consider:
- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- S68(f)(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

[5] Alastair Nicholson (Chief Justice Family Court), *Children and Young People: The Law and Human Rights*, 14th May 2002, The Law Society of the ACT,11.

[6] Melinda Jones, Lee Ann Basser Marks, *Mediating Rights: Children, Parents, And The State*, Australian Journal of Human Rights, [1996] AJHR 11, 2-3.

[7] United Nations Treaty Series, *Convention on the Rights of the Child*, New York, 20 November 1989. Australia Signed 22 August, 1990, Ratified by Australia on the 17th of December 1990.

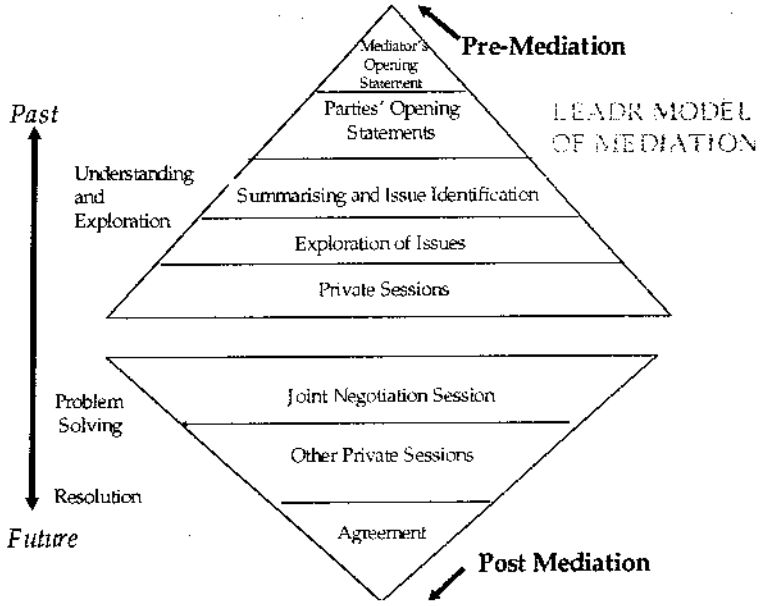
[8] Convention on the Rights of the Child, Adopted by the General Assembly of the UN on 20 November 1989.

[9] Lenard Marlow, Richard. S. Sauber, *The Handbook of Divorce Mediation*, 1990, New York, Plenum Press.
G. Meggs, *Issues in Divorce Mediation Methodology and Ethics*, Australian Dispute Resolution Journal, 1993, August, 198-209.
Robert E. Emery, *Renegotiating Family Relationships*, 1994, New York, The Guilford Press.

child to make decisions which the parents are unable to make; it erodes parental rights and responsibilities and undermines parental authority; it exposes the child to parental conflict and places further stress on the child to disclose possible divided loyalties to each parent.[10] Yet many other child studies and the CRC believe that children should participate in decisions affecting their interests.[11] Behrens in 2002 and Chief Justice Nicholson believe that children should participate in matters affecting their interests.[12]

In considering child rights in mediation this paper identifies four perceived issues facing child participation and responds by clarifying and expanding the standard LEADR model in Figure1.[13]

Figure 1. The LEADR Model of Mediation



[10] Carole Brown, *Involving Children in Decision Making Without Making Them the Decision Makers*, 2.
Australian Law Reform Commission (ALRC), *Op-Cit, para 8.15.*
8.15 It is generally assumed that children would be unduly traumatised by giving direct evidence in litigation concerning the breakdown of their parents' relationship, that they may be manipulated into giving evidence favourable to one parent or may even manipulate parents to achieve their own ends. These remain factors for concern.

[11] Alastair Nicholson (Chief Justice Family Court), *Children and Young People: The Law and Human Rights*, *Op-Cit*, 9-12.

[12] Juliet Behrens, *The Form and Substance of Australian Legislation on Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them*, Journal of Social Welfare and Family Law, 24(4) 2002: Routledge Taylor & Francis Group, 415.
Alastair Nicholson (Chief Justice Family Court), *Children and Young People: The Law and Human Rights*, *Op-Cit.*

[13] Stephen Colbran, Greg Reinhardt, Peta Spender, Sheryl Jackson, Roger Douglas. *Civil Procedure: Commentary and Materials*, 2nd Edition, Australia, 2002, Butterworths, 70. **Conciliation** is a similar process to mediation, although conciliation enables the conciliator an advisory role generally not afforded to mediators. A conciliator is obliged to advocate the rules and standards promoted by the agency they represent. **Mediation** is a process of facilitating negotiation where the parties to a dispute, with the assistance of a third party (the mediator), identify the issues in a dispute, develop options and endeavor to reach an agreement. Mediation can be connected to court proceedings (such as family mediation).
* (Söderblom) - This paper focuses on mediation yet I believe both conciliation and mediation must facilitate child rights. Article 12 of the CRC must be complied with by both conciliators and mediators in praxis. Legislation and institutional reform must engage and implement international law.

Pre-Mediation – Not merely preparing the mediator but preparing the parents and child

By the time custodial disputes reach mediation or conciliation, parents have often become preoccupied with their own needs and interests and are at their least capable of focussing on their child's interests.[14] To counter this effect the pre-mediation session should be expanded to include "parent education sessions" that teach or tell parents to listen and interpret the language children may use pre and post mediation. Pre-mediation parent education would mitigate the power imbalance between parent(s) and child whilst facilitating the best interests of the child by raising the profile of the child's interests. The importance of parent education is also seen in studies that demonstrate the psychological damage caused by "brain washing a child" or "bad mouthing the other parent".[15] Raising awareness of the child's interests will help focus mediation upon the child's best interests and mitigate adversarialism.

Pre-mediation also allows the mediator to build a rapport with the child so that during the mediation the child should be more comfortable in revealing their views to the mediators.[16] Pre-mediation with the child also allows the child time to process the fact that what the child says in private mediation will be shuttled to the parents in their joint mediation session.[17] The child should never feel they have been tricked into participating in the ultimate child custody outcome.

Mediator's opening statements on neutrality and impartiality

The mediator's role as (1) a neutral and impartial third party with no interest in the outcome and (2) promoting the best interests of the child is incompatible and I would debate whether child custody cases could ever be "classically neutral".[18] The interests of the child must be paramount whilst the competing parents' interests remain secondary as it is not the parent but the child who is disadvantaged in advocating their own best interests.[19] To address this conflict between "neutrality" and "child's best interest" I propose a shift away from commencing mediation with claims of "classical neutrality", and move towards asserting the mediator's position of being

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[14] Carole Brown, *Children's wishes in custody and access disputes*, http://www.familycourt.gov.au/papers/html/sanatonio.html , 9.
[15] *Ibid.*
[16] Anne B. Smith, Nicola J. Taylor, *Rethinking Children's Involvement in Decision-Making After Parental Separation*, Children's Issues Centre, Paper Presented at the Eighth Australian Institute of Family Studies Conference, Melbourne, 7.
[17] Carole Brown, *Children's wishes in custody and access disputes: An overview*, *Op-Cit*, 2.
[18] National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law: A Report to the Attorney-General on Part 5 of the Family Law Regulations*, March 1997, Canberra, Commonwealth of Australia, 13.
Stephen Colbran, Greg Reinhardt, Peta Spender, Sheryl Jackson, Roger Douglas, *Civil Procedure: Commentary and Materials*, 2nd Edition, Australia, 2002, Butterworths, 85-86.
Peter E. Nygh, Peter Butt, *Butterworths Concise Australian Legal Dictionary*, 2nd Edition, Canberra, 1998, 287.
– "... A mediator is usually an impartial third party".
[19] Carole Brown, *Children's wishes*, *Op-Cit*, 7.

"neutrally compassionate in the interests of the child (NCIC)".[20] Whilst it is unquestionably wrong to assume before or during the mediation session, that one parent bears a greater right to contact or residence than another, mediators should declare outright that their role stipulates bias towards the child's interests whilst remaining neutral between the parents. This premise can be derived from the fact that NCIC accords with the notions of the child right to be heard whilst leaving the decision making participants to make up their own mind.[21] The following example seeks to illustrate my need for and interpretation of the phrase "neutrally compassionate in the interests of the child (NCIC)."

> Mediator to child: (in private session): We are here to help decide which parent you will live with and when you will live with them.
>
> Child to mediator: *I want to always be with my Mummy as we go roller-skating, we go to the beach and we go the cinema. It's important, I don't feel sad when we do this.*
>
> Mediator: (shuttles to mother and father in joint session): X *(the child) has indicated that doing social activities to alleviate unhappiness is important to X.*

In this scenario what the child enunciated to the mediator is not conjectured as verbatim of the child's statement. Similarly, what the mediator reported in turn to the parents is likewise rephrased. Arguably such an approach misrepresents the child's preference and thus they are not given the right to have their wishes heard. However, in the example, I believe the child's wishes and rights are more clearly recognised than a verbatim recital of the child's statements and so can be better considered.

The practical benefits of 'rephrasing' are articulated by Dr Carole Brown's view that rephrasing a child's statements will lessen the potential for recrimination toward the child from a disappointed parent. Rephrasing the child statement is in the child's best interests for maintaining a positive relationship with both parents (in non-abusive relationships). Arguably "rephrasing" creates a tension between the child's rights to be heard and the child's best interests. Yet in the example dialogue, the child showed preference to being with the mother because of social activities - an approach that both parents could move to accommodate. Thus there is no need at this stage of the mediation process to quote verbatim the child's preference to "always be with ... Mummy..." The

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[20] Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice – Part II*, (2000) 11 ADJR 145.

child's response may not be so absolute if the father also engaged in social activities with the child. However a moral onus is now placed on the father to consider his ability to accommodate the social interests of the child when deciding when, where, how and what form residence and contact should take. The risk of emotionally injuring one party at the mediation table is unnecessary and may damage the child-parent bond. The bias is therefore placed on the child's statement facilitating their own best interests; this is not the role of a classically neutral or impartial mediator. It is however compassionately neutral in that the same approach would be used whether the child's statement favored the mother or the father.

Joint negotiation sessions with parents are inadequate forums for child self-advocacy

Joint negotiation sessions are an inadequate method of reaching agreement between adults and children. Studies demonstrate that children quickly become confused as they lack the cognitive skills to follow complex arguments in joint negotiation.[22] Children can also be easily coerced or influenced by a parent.[23] Thus joint negotiation is useful between adult participants but private sessions are a more appropriate forum for child self-advocacy and are essential to avoid intentional or unintentional coercion of the child. The mediator then shuttles the child responses to the parents' joint negotiation session.

A similar problem facing child participation is that children may treat the mediator's questions as a game which they think requires an answer either to match a social norm or that one or other parent might want to hear. Thus it is sometimes difficult to decipher what a child believes and wants from what they assert to be their wishes. Special skills and training are required to ask questions that avoid eliciting a tailored response from the child. Mediators must therefore possess behavioral science skills or include in mediation a party who possesses such skills.[24] Family Law Regulations (as amended) in 1996 and commenced operation on 11 June 1996 now addresses this issue.[25]

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[21] Melinda Jones, Lee Ann Basser Marks, *Mediating Rights: Children, Parents and the State, Australian Journal of Human Rights*, (1996) 2(2) AJHR, 7.
[22] Carole Brown, *Involving Children in Decision Making Without Making Them the Decision Makers*, 7.
[23] *Ibid.*
[24] National Alternative Dispute Resolution Advisory Council (NADRAC), *Op-Cit.* 31.
Laurence Boulle, Miryana Nesic, *Mediation: Principles, Process, Practice*, 2001, London, Butterworths, 186.
[25] ALRC, *Alternative or Assisted Dispute Resolution*, December 1996.
http://www.austlii.edu.au/au/other/alrc/publications/bp/2/alternative.html#Footnote78 , accessed 24/04/2003.
Those regulations require a family and child internal 'court' mediator to be approved by the Chief Judge of the Family Court. A community or private mediator is required to have a degree in law or social science or have undertaken a course or study in mediation completed a course of training of at least five days in family mediation engaged in not less than 10 hours of supervised mediation in the 12 months following completion of that training, or, provided mediation for at least 150 hours since June 1991and enrolled in a tertiary course or be employed with a 'recognised' organisation. All mediators must have continued with at least 12 hours in family mediation training per year.
A. Davies, *Regulation of family and community mediators*, Brief Western Australia July 1996.

Gender influence can also colour a child's response but is unavoidable where there is only one mediator. This may occur despite the best efforts and professionalism of the mediator. It is appropriate to achieve gender balance in mediation by replacing a single mediator with a team of one male and one female mediator. Such reform will help avert the possibility of a child tailoring a response that matches a linked identity between a male mediator to the father and a female mediator with the mother of the child.

Issues of child decision-making in the final agreement

A child should not be burdened as a decision-maker in formulating the final agreement of custodial decisions.[26] Parents must reach agreement on their own, albeit having regard to the input from their child (articulated by the mediator throughout the mediation process). This is not contradictory to my earlier assertion that the child must be included in the mediation process. Participation in the process is not the same as decision making. As pointed out previously a child may lack the cognitive skills to fully comprehend all the issues surrounding custody, thus the child should have input into the process but should not be a decision maker.[27] The child should also not be placed in a position where they may feel guilt over dividing loyalties between the parents.[28] Furthermore studies demonstrate that children only wish to be listened to, they do not desire decision making power.[29]

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[26] Carole Brown, *Involving Children in Decision Making Without Making Them the Decision Makers, Op-Cit*, 7.
[27] Laurence Boulle, Miryana Nesic, *Mediation: Principles, Process, Practice*, 2001, London, Butterworths, 186.
[28] Margaret Harrison, *Resolution of Disputes in Family Law: Should Courts Be Confined to Litigation?*, Family Matters, No 46, Autumn 1997, Australian Institute of Family Studies, 44.
[29] Carol Smart, *Divorce and Changing Practices in a Post Traditional Society*, 2000, 56, Family Matters, 18.

Conclusion

The LEADR Double Diamond model and adjacent notions of mediation need modification to adequately cater for the unique and sometimes competing requirements between child rights and the best interests of the child. This Rolls Royce model will involve greater overheads for courts that utilise mediation and may potentially lead to increased costs for the participants in the mediation process. Additional cost is however justified as child focused expansion to the LEADR model remains on the whole cheaper than litigation, where mediation is successful.[30]

Private sessions for children, specialist child mediators rephrasing child statements in mediation, gender balanced mediation teams, shuttling child views whilst exempting children from decision-making all strike an equitable balance between the rights of the child to participate and the best interests of child.[31] Such reforms also allay Marlow and Sauber's concerns about child involvement in mediation whilst complying with international legal norms. Such reforms should occur to protect the softest and most important voices in the painful milieu of residency and access decision making.

Anne B. Smith, Nicola J. Taylor, *Rethinking Children's Involvement in Decision-Making After Parental Separation*, 1.

[30] Ilene Wolcott, *Mediating Divorce: An Alternative to Litigation*, Family Matters, no.28, April 1991, 47-49.

National Alternative Dispute Resolution Advisory Council (NADRAC), *Op-Cit*, 23.

> 2.11 Disputes involving families and children which could be the subject of proceedings under the Family Law Act are both complex and highly sensitive. Failure to prescribe minimum standards as to qualifications, training, supervised practical experience and continuing education would significantly increase the risk of mediations which:
> - escalate the conflict rather than resolving the dispute;
> - neglect the needs, wishes and interests of children who may be directly or indirectly concerned; (my emphasis).
> - neglect the physical safety of the participants and their children; and
> - produce outcomes which are unfair or unjust or which are not genuine, workable or lasting.

[31] Whilst writing this paper I became aware of a study by Relationships Australia as to the effectiveness (or ineffectiveness) of gender balanced mediation teams. These results are yet to be published but it seems that the results will suggest that gender balanced team have little impact on the effectiveness of mediation through the eyes of the participants. The internal study by Relationships Australia should be distinguished from my assertions as to the practical benefits of gender balanced mediation teams. Relationships Australia focused on adults and not children. Furthermore, as their study is yet to be published the study cannot yet be examined for internal or external inconsistencies in the criterions or variables used for the study.

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