INFORMATION-SHARING AND CONFIDENTIALITY: ISSUES IN FAMILY LAW AND CHILD PROTECTION LAW

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PART 1: PRELIMINARY

INTRODUCTION

Legal decisions depend on information. Consequently, the law has much to say about the flow and management of information. Some of this law tells us what information the courts may use for making decisions – in the main, what constitutes admissible evidence. Other parts of the law regulate the flow of information – rules specify that in some circumstances you may not communicate things, and in others you must do so. The law tells us what is and what is not confidential – although two issues arise here: whether something is inadmissible as evidence and whether something may be, or must be, disclosed. In this paper, the focus will be on children’s cases.

Part 2 deals with the confidentiality of things said in the course of mediation and counselling - whether statements made in those settings are admissible, and whether those involved in the mediation or counselling are permitted, or obliged, to disclose them.

Part 3 relates to communications between the family law system (the work of the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia) and the child protection system (the work of the state and territory children’s courts and child protection departments). To what extent, and how, does the law seek to regulate the flow of information between those two systems? It is an important question, because in many instances each system will hold information about children that would be of great assistance to decision-makers.

GENERAL LAW RELATING TO COMMUNICATIONS

It seems useful to note what might be called ‘default’ legal principles that relate to our topic. These default principles will apply in the absence of any specific rule, such as the various legislative provisions that will be considered in this paper.

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Whether a person must, may, or may not disclose or communicate something

In general, unless some specific law provides otherwise, people are free to make statements, and equally free to remain silent.

Some areas of law prevent us from saying or disclosing things. In some circumstances, we can be penalised by such laws if we say things that are, for example, defamatory, or criminal, or in breach of a contract. And as we will see, some specific rules in family law and child protection law prevent us from saying or disclosing certain things.

Some rules go the other way and require us to say or disclose things. They include the obligation to obey subpoenas, and the obligation of witnesses to answer questions in court. They also include the statutory provisions that require us in some circumstances to notify child protection authorities that a child seems to be at risk; and, for example, to notify the police of a traffic accident in which someone is killed or injured.

The law occasionally does something else, too: it protects communicators against possible legal liability. An example of this relates to notifications of children at risk – these rules provide that the notifier cannot be sued for defamation, breach of professional responsibility, etc.

In short:
We are generally free to disclose things or not disclose them, but sometimes the law

- prevents us from disclosing things
- requires us to disclose things, or
- protects us from liability if we choose to disclose things.

Whether evidence may be given of statements and communications

The first big point of the law of evidence is that whatever is relevant to the adjudication of the dispute is admissible. But there are numerous exceptions. Material that would be relevant is sometimes inadmissible because, for example it would be unfair to admit it, or it is inadmissible as hearsay. One of the important exceptions, namely the inadmissibility of settlement negotiations (s 131 of the Evidence Act), is discussed below. The second big point is that what is irrelevant is inadmissible: to that proposition I know of no exceptions.

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2 Evidence Act 1995 (Cth) s 56(1).
Family consultants

It is not necessary to discuss the provisions relating to family consultants (who are very different from ‘family counsellors’). They are court employees (normally), who interview the parties and the children and perhaps others, write reports for the court, and generally act as expert advisors to the court. Their work is conducted in openness: everything they do, as well as their reports, and everything that people say to them, can be the subject of evidence.  

PART 2: CONFIDENTIALITY ISSUES IN MEDIATION AND COUNSELLING

The law relating to mediation (described in the Family Law Act, which likes to use as many words as possible, as ‘family dispute resolution’) is similar to the law relating to family counselling. In each case there are provisions to the effect that the mediator or family counsellor cannot disclose communications, and that they cannot be admitted into evidence. But the rules are somewhat different, and we need to identify what is mediation and what is family counselling. So it is sensible to consider mediation and counselling separately.

THE GENERAL LAW OF EVIDENCE

A great deal of what parties say in negotiations, or in mediation, would be relevant to the determination of the dispute. A party seeking to relocate, for example, might admit in mediation that it would be feasible to defer the trip for a year. A parent whose affidavit has denied all accusations of neglect and abuse might admit having left a young child unattended, or having struck the child in the face in anger. A parent might admit to wanting an extra night with the child each week because of its impact on the child support situation. A parent might admit that the children have indicated that they dislike the parent’s new partner. A party might make a threat of violence.

Statements made in mediation or counselling will normally be hearsay, but the hearsay rule does not exclude evidence being given of admissions made by a party. However the statements will normally be inadmissible because of a separate rule, of significance to the present topic, that things said in confidential negotiations to settle a dispute are inadmissible. This requires a little attention.

3 Family Law Act 1975 s 11C.
4 I will use this word instead of the correct but interminable “family dispute resolution practitioner”.
5 Evidence Act 1995 (Cth) s 81(1).
Inadmissibility of evidence of settlement negotiations: s 131 of the Evidence Act

Echoing a well-established rule of evidence law, the Evidence Act provides that evidence cannot be given of a communication made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute.\(^6\) This rule applies to situations in which the parties are negotiating with each other – whether through lawyers or not – and equally where they are negotiating with the help of a third party, as in mediation.\(^7\) It applies in children’s cases as well as other types of cases.\(^8\)

This rule is often referred to as a ‘privilege’, and that word is useful as a reminder of an important point, namely that the evidence can be admitted if both parties consent to its admission.\(^9\) As lawyers say, it is a privilege that parties can give up, or ‘waive’, if they wish. As we will see, this is different from some provisions of the Family Law Act.

The rule embodies a policy decision of great relevance to the present topic. Things said in the course of negotiating a dispute, things that would often be very relevant and could help the court discover the truth, are excluded from the court’s gaze (unless the parties consent) because the law has taken the position that the value of encouraging frank and full negotiations outweighs the value of making all relevant information available to the court. The same policy, of course, underlies the provisions of the Family Law Act that provide for confidentiality of mediation. We will return to policy issues later.

Subpoenas

In practice, issues about confidentiality and admissibility often arise in connection with subpoenas, and it might be useful to say something briefly in this connection in a paper intended for non-lawyers as well as lawyers. The law and practice on subpoenas is not dealt with in specific provisions of any act, but mainly needs to be gleaned from case law. A subpoena is a form of court order, requiring a person to come to court to give evidence or to produce documents. It is a written document, bearing the court’s stamp, and specifies what the person is to do, and when and where. It is delivered to (‘served on’) the person who

\(^6\) Evidence Act 1995 (Cth) s 131.


\(^8\) The ‘less adversarial’ provisions of the Act (Division 12A of Part VI) do not change the position. Section 69ZT says that that in children’s cases certain provisions of the Evidence Act normally do not apply - (although the court can apply them in exceptional circumstances: s 69ZT(3) - but the provisions referred to do not include the one that makes settlement negotiations inadmissible (s 131).

\(^9\) Evidence Act 1995 (Cth) s 131(2).
subpoenaed. Because it is a court order, it must be complied with. If a person simply fails to
turn up, the court may issue an arrest warrant requiring the person to come to court.

Subpoenas are normally issued as a matter of course by court officials if a party to litigation
applies for them. This power can of course be abused, and subpoenas can be issued
unreasonably, putting the person to the trouble and expense of coming to court for no good
reason. The system tries to prevent such abuse of subpoenas in a number of ways. Lawyers
have an ethical duty not to have subpoenas issued improperly. And the person who is
subpoenaed can come to court and object, and if the court agrees and sets the subpoena aside,
it can order that the party who issued the subpoena must pay the costs of the person who had
to come to court unnecessarily.

A counsellor or mediator served with an unwelcome subpoena will usually find it a good idea
to get on the phone and discuss the matter with a friendly lawyer or, if that is not possible in
the time available, with the lawyer who issued the subpoena. It might be possible to agree
that the issue can be deferred, or that the lawyer would be satisfied with certain documents,
and so on. It is even possible that the person who issued the subpoena was unaware of the
relevant provisions in the Family Law Act, and might agree to set aside the subpoena.

Broadly, it is reasonable for a party to issue a subpoena when the party requires the document
or information for what the cases call a ‘legitimate forensic purpose’ – ie, where it is
reasonably required for the court case. This is not quite the same as saying the document
contains what would be admissible evidence. Nevertheless, the admissibility of the material is
an important aspect. On the face of it, if the Act says, as it does, that communications made
during mediation are inadmissible, then the court would be inclined to set aside a subpoena
that asked for the production of the record of that inadmissible session.

Sometimes subpoenas ask for a wide range of documents – eg everything in the agency’s
files relating to a particular family. Ideally the subpoena should ask only for material that is
likely to be admissible, or otherwise serves a legitimate forensic purpose. One of the
common objections to subpoenas in many areas of law is that they are too widely drawn –
they ask for too much, and are, as lawyers love to say, ‘fishing expeditions’. 10 Often, when
objection is taken, the parties agree, or the court orders, that the subpoena should in effect be

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10 It’s not a particularly good metaphor, though, because fishing is generally highly targeted – just as subpoenas should be. Maybe we need to think of dragnet fishing, or putting explosives in rivers. But I digress...
narrowed down, so that the person only has to produce material that is, or might reasonably be, necessary for the court hearing. To sum up, as a very rough guide:

- Unless it is set aside, a subpoena must be complied with;

- A person or body served with a subpoena can immediately negotiate with the party that issued it, either directly or through a lawyer, and can ask the court to set it aside.

Broadly speaking, to the extent that the subpoena seeks documents or oral evidence that discloses communications that are inadmissible (either because of the statutory inadmissibility rule or the inadmissibility of negotiations rule) the court is likely to set it aside, or not require you to produce the documents, and not permit anyone to inspect them.

Let’s now have a look at the Act.

2. SPECIFIC PROVISIONS OF THE FAMILY LAW ACT RELATING TO MEDIATORS (‘FAMILY DISPUTE RESOLUTION PRACTITIONERS’)

Quite apart from the ordinary rules of evidence, there are some specific provisions in the Family Law Act 1975 that relate to mediators. One of them, s 10H, is to the effect that mediators must not disclose certain things said to them. We can call this the ‘statutory non-disclosure rule’. The other, s 10J, is to the effect that evidence cannot be given of what people say in the course of mediation. We can call this the ‘statutory inadmissibility rule’, to distinguish it from the ordinary rule of evidence law excluding evidence of settlement negotiations (the ‘inadmissibility of negotiations rule’), previously discussed.

The two sections specify exactly when and how they apply, and we will look at some of this detail. There is considerable overlap, but not perfect overlap, between the two sections. Some communications will fall within both sections: thus the mediator will not be allowed to disclose them (s 10H), and they will be inadmissible (s 10J). But some communications will be affected by one section and not the other. This is particularly so because each section has exceptions, and they are by no means the same. For example, the only exception to inadmissibility under s 10J relates to admissions or disclosures of child abuse. By contrast, s 10H has a number of exceptions – the mediator may disclose statements, for example, if the

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11 This part of the paper draws on a paper presented at the FRSA Conference in 2011, entitled ‘Confidentiality and information-sharing in family law dispute resolution: Aspects of current law, policies and options’. Some of the issues are discussed in more detail in that paper.

12 Two other sections, namely s 10D and 10E, deal with family counselling in virtually identical terms, corresponding respectively to sections 10H and 10J.
person who made them consents, or if disclosing a statement might prevent a serious and imminent threat to a person’s life.

Unlike the inadmissibility of negotiations rule, the statutory inadmissibility rule does not create a privilege that can be waived. If as a result of s 10J evidence of a communication is inadmissible, then it simply cannot be put into evidence, even if the parties wish it to come into evidence. But what is forbidden is evidence about the communication made during the mediation, not evidence about the topic. Thus, the parties could give fresh evidence about the issue involved. For example, the parties could not give evidence that a party said in the mediation that he or she would agree to supervised time with the child, but they could indicate to the court that this was an agreed fact, or the person concerned could give evidence that he or she agrees to supervision.

Communications made in mediation, therefore, might be affected by the ‘inadmissibility of negotiations rule’ (s 131 of the Evidence Act) and also by one or both of the specific provisions in the Family Law Act. Thus, in relation to anything said in mediation, we may need to consider the following legal questions:

- Does s 10H prevent the mediator from disclosing it?
- Does s 10J prevent it being admitted into evidence?
- Does s 131 of the Evidence Act prevent it being admitted into evidence?

An example of s 10J is provided in a case where a party’s affidavit said, referring to the mediation, that the other party “would only agree to [the child] sharing three nights per fortnight on alternate weekends with me during this negotiation. This was not preferred by me as I believed equal shared time was in [the child’s best interests]”. These sentences were inadmissible because of s 10J. In substance (though not in form) they set out parties’ communications in mediation.

An example of the operation of the inadmissibility of negotiations rule (s 131) would be where a retired mediator conducted a mediation at the request of the parties: neither s 10H

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13 Mediators may also need to think about any relevant ethical, or professional or other rules or guidelines - topics not covered in this paper. The Family Law Act makes no mention of such matters.

nor s 10J would apply, but s 131 of the Evidence Act would normally prevent evidence being given of what they said during the mediation, unless they consented.

We can now look at section 10H and 10J a little more carefully.

**The statutory non-disclosure rule: s 10H**

Section 10F defines “family dispute resolution” as a process (other than a judicial process) (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all of the parties involved in the process. This is relevant to s 10H and 10J.

The basic principle, in subsection (1), is that ‘A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section’. Then we have a series of qualifications which I would summarise as follows:

*Must disclose, to comply with law:* Subsection (2) says that the mediator must ‘disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory’.

*May disclose if consent:* Subsection (3) says the mediator may disclose a communication if consent to the disclosure is given by the person who the communication, or, in the case of a child, each person who has parental responsibility, or a court.

*May disclose if necessary to prevent harm etc:* Subsection (4) says the mediator may disclose a communication if the mediator reasonably believes doing so is necessary for one or more of several purposes:

- protecting a child from the risk of harm (whether physical or psychological);
- preventing or lessening a serious and imminent threat to the life or health of a person;

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15 Although there is a general principle that ignorance of the law is no excuse, the wording of this section seems to mean that a mediator who is unaware of obligation to comply with the law would not be obliged to make the disclosure. This is probably what was intended.
• reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person, or intentional damage to property;

• preventing or lessening a serious and imminent threat to the property of a person; or

• assisting a lawyer independently representing a child’s interests under a s 68L order.

May disclose for research relevant to families (subsection (5), or in connection with a s 60I(8) certificate: subsection (6).

The statutory inadmissibility rule: s 10J
Section 10J(1) provides, in substance, that evidence of anything said, or any admission made, by or in the company of a family dispute resolution practitioner conducting family dispute resolution is not admissible in any court. The section goes on to set out certain statements to which the inadmissibility rule in sub-section (1) does not apply:

• to an admission by an adult, a disclosure by a child, that indicates that a child under 18 has been abused or is at risk of abuse (unless in the court’s opinion there is sufficient evidence of the admission or disclosure available from other sources); or

• to information necessary for the practitioner to give a certificate under subsection 60I(8).

In short, the rule about evidence of family dispute resolution communications is inadmissibility, except for child abuse, and except for giving s 60I certificates. Notice that the parties’ consent is not an exception: evidence of communications is inadmissible, even if everyone wants it admitted. This is perhaps surprising, and contrasts with the position under s 131 of the Evidence Act.

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16 It extends to persons carrying out professional services for the dispute resolution practitioner: s 10J (1)(b).
Selected case law relating to mediators and confidentiality

Sections 10H and 10J have been considered in a number of decisions. In Relationships Australia Queensland and B and B (2005), Jordan J set aside a subpoena requiring production of confidential documents. Trapp & Vonn (2009) contains a helpful exposition of the law. Roux v Herman (2010) raises a troubling issue about the operation of s 10J and deserves comment. In that case Reithmuller FM (correctly, in my view) held, in substance, that under s 10J statements and admissions made in the dispute resolution process are inadmissible, but the section does not make inadmissible any resulting agreement. But suppose Party A applies threats in the dispute resolution process, and Party B, affected by the threats, signs an agreement in which Party B will see the child only once a month. Party B now seeks orders for weekly times with the child, but Party A seeks to tender the agreement, as evidence to show that Part B had agreed to monthly contact.

The agreement is not rendered inadmissible by s 10J. But Party B cannot give evidence about the threats during the mediation – nor can the mediator - because s 10J makes such evidence inadmissible. This places the court in a difficult situation, since it would be manifestly unjust for the court to take the agreement into account but not allow Party B to explain that it resulted from threats. The best response for the court would probably be to refuse to admit the agreement into evidence, since it would be unfair to do so in the circumstances that one party could not lead evidence that it had been obtained by threats. But even so, the result would be less than optimal, since s 10J would have prevented the court from hearing all the relevant evidence, namely the making of the agreement and the threats leading to it. These matters might have been relevant to the court in considering what arrangements would be best for the child – they are part of the story, and might throw light on the character of the parties. As Reithmuller FM pointed out, this problem would have been avoided if the Family Law Act had adopted the approach of s 131 of the Evidence Act. I

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17 A fuller discussion is contained in my 2011 FRSA paper.
21 Roux v Herman [2010] FMCAfam 1369.
22 See Evidence Act 1995 s 135.
agree with his Honour that this it would be desirable for s 10J to be reconsidered having regard to this problem.

*Rastall & Ball* (2010)\(^{23}\) contains a detailed and interesting discussion of the meaning and application of s10H and 10J, and some related issues. For present purposes the main points can be summarised briefly. The actual decision was unremarkable: the mediator’s evidence was that the parties “did not attend family dispute resolution with me”, and consequently the sections did not apply, and the communications were not confidential: the mediator could disclose them and (unless there were other issues) they might be admissible in evidence. After a careful analysis, Reithmuller FM held – rightly, I believe - that the confidentiality and inadmissibility provisions, s 10H and 10J, which create what he memorably called a ‘cone of silence’, did not include intake and assessment processes. Although not strictly necessary for the actual decision, and therefore not binding, this is an important ruling, since mediators might otherwise have assumed that the lead-up process to mediation would have the same confidentiality protection as the mediation itself. Whether the law *should* make intake confidential is another matter, of course: Reithmuller FM was expressing views about what the law *is* under the provisions we currently have.

### 2. SPECIFIC PROVISIONS OF THE FAMILY LAW ACT RELATING TO ‘FAMILY COUNSELLING’

We now turn to the equivalent provisions relating to ‘family counselling’.\(^{24}\) With only minor exceptions, they correspond to the ones that apply to mediators, considered above. In relation to family counsellors, the statutory non-disclosure rules, corresponding to s 10H, is s 10D. The statutory inadmissibility rule, corresponding to s 10J, is s 10E. The substance of the sections, including the various exceptions, is essentially the same – and need not be repeated here. It is only necessary to say something about what is and what is not ‘family counselling’.

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\(^{23}\) Rastall & Ball & Ors [2010] FMCAfam 1290 (Reithmuller FM).


Some of the issues mentioned in this paper are discussed in more detail in those publications.
Defining ‘family counselling’: preliminaries

The term ‘family counselling’ is defined in the Act. The words used in the definition are ordinary words, and on ordinary approaches to statutory interpretation would not be given any special meaning they might have in the field of counselling. There are two components: it is a certain kind of activity, ‘family counselling’ (defined in s 10B), conducted by a certain kind of person, a ‘family counsellor’ (defined in s 10C).

The activity of ‘family counselling’

The activity ‘family counselling’ is defined by section 10B of the Act as follows:

*Family counselling is a process in which a family counsellor helps:*

(a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or

(b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:

(i) personal and interpersonal issues;

(ii) issues relating to the care of children.

Components of the definition

Paragraph (a) is limited to marriage, defined by s 4 of the Marriage Act 1961 as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. Anything done in relation to family units other than marriages does not fall under this paragraph.

It is family counselling under paragraph (a) if a family counsellor ‘helps one or more persons to deal with personal and interpersonal issues in relation to marriage’. This seems wide enough to include virtually any issue that has - to use the High Court’s language in another context - a ‘relevant’ or ‘appropriate’ association with the marriage. We do not yet have any case law that really analyses the definition. The section does not say ‘helps a party to a marriage…’, but refers to helping ‘one or more persons’. It would therefore seem to include helping other family members deal with issues in relation to marriage. However if the court

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25 Although Australian law currently recognises same-sex relationships and de facto and other relationships for various legal purposes, those relationships are not included in the definition of ‘marriage’ (although constitutionally they could be).

is not told the nature of the counselling, it might be unable to find that it constitutes family
counselling, and therefore unable to rule that the statutory provisions apply.  

The issues must be ‘personal and interpersonal’. In practice, however, issues troubling one or
both parties will almost inevitably be properly described as both ‘personal and
‘interpersonal’, so it usually won’t matter whether the word ‘and’ requires that the issues be
both personal and interpersonal. Marriage counselling can range over all sorts of topics, but
as long as there remains a connection with the marriage, it will probably be easy enough to
say that the whole process involved helping people with ‘personal and interpersonal issues in
relation to marriage’.

Paragraph (b) is not limited to marriage, and essentially relates to family breakdown. The
components of para (b) might be broken down as follows:

• **a process in which a family counsellor helps persons, including children**, 
  These words obviously include help to children, and to other family members, as well as to one or both parents.

• **who are affected, or likely to be affected, by separation or divorce**, 
  The word ‘separation’, occurring in the phrase ‘separation and divorce’, obviously refers to separation between the parents. However it is not explicitly limited to that situation, and it may also refer to a separation between a child and a parent, or, indeed a separation involving other family members.

• **deal with personal and interpersonal issues**, 
  Like paragraph (a), the paragraph refers to ‘personal and interpersonal issues’.

• **deal with issues relating to the care of children**. 
  The ‘care’ of children probably includes virtually all aspects of parenting. The definition is not limited to children of the parties, and so, for example, family counselling might include issues relating to a foster child, or a child of one of the parties, and even where the child is not living in the household.

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28 For an unusual situation where there might be a personal issue that is not also an interpersonal one, see Kidd & London [2011] FMCAfam 1084.
Illustration

The potential scope of paragraph (b) of the definition is illustrated in Medeiros & Fink,29 which involved a dispute between two sets of grandparents after the death of the child’s father. The parents had been unmarried.30 The mother had killed the father, and at the time of the hearing she was serving a term of imprisonment for manslaughter. The child had been seeing an ‘art therapist’ in a confidential setting. The art therapist was taken to be qualified as a ‘family counsellor’ within the definition in s.10C. All the court was told about the nature of the counselling was that the counsellor was ‘working with [the child] to assist her recovery from trauma’. Burchardt FM upheld an objection to a subpoena addressed to the counsellor, holding that the process was ‘family counselling’:

... [the family counselor] was a person engaged in a process designed to help [the child], as a person affected by separation, to deal with personal and interpersonal issues and issues relating to her care. In these circumstances, the prohibition on disclosure contained in s.10D of the Act seems to me to apply...

It may be uncertain just when a process becomes and ceases to be family counselling – in particular, a question arises whether it would include intake and assessment procedures conducted by a family counsellor. The decision in Rastall v Ball31 is not directly applicable (because it relates to mediation and the relevant provisions are not identical) but may suggest that intake processes will not normally be included. In the absence of much case law, we can only say that the question will be whether at any particular time there is ‘a process in which a family counsellor helps persons...’.

‘Family counsellor’

The second ingredient is that the activity be conducted by a ‘family counsellor’. The term ‘family counsellor’ is defined in s 10C. It enables people to become family counsellors in a number of ways, but in practice only one has been used, namely s 10C(b), by which a family counsellor is ‘a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph’.32 It is a matter for the designated organisations to authorise individuals to act on behalf of the organisation. Whether an individual has been

30 The report of the case speaks only of a ‘relationship’ between them.
31 Rastall & Ball & Ors [2010] FMCAfam 1290.
32 Until recently, a list of designated family counselling organisations has been available on the Attorney-General’s Department website http://www.ag.gov.au.
so authorised appears to be a question of fact. As far as I know it has not been the practice of agencies to formalise such authorisation.

There are some difficulties in the interpretation of the term ‘family counsellor’. The family counsellor is a person who, in the words of the section, is ‘authorised to act on behalf of’ the designated organisation. The wording says nothing about the qualities or qualifications of the individual - this is left entirely to the designated organisation. In effect, by way of the definition, the legislature trusts the designated organisations to provide suitable people to work as family counsellors. It seems surprising that the section refers to a person ‘authorised to act on behalf of’ the organisation, rather than a person authorised by the designated organisation to carry out family counselling. If the section is given its literal meaning, there might be a danger some people who consider themselves to be doing, say, drug or employment counselling for family members might as a matter of law be doing ‘family counselling. If so, they and their clients would probably be unaware of the statutory confidentiality that the Family Law Act confers on them. Consideration might usefully be given to amending section 10C(1)(b) to read ‘a person authorised to conduct family counselling by an organisation designated by the Minister for the purposes of this paragraph’.

PART 3: INFORMATION-SHARING BETWEEN THE FAMILY LAW AND THE CHILD PROTECTION SYSTEMS

This section of the paper is based on two reports I prepared for the Attorney-General’s Department in 2013 and 2014.33 The first report dealt with information sharing generally, and the second dealt with the more specific question of the sharing of reports by experts. In this paper I will pick out some particular issues.

What does the law say about the sharing of information between the two systems? The answer is rather complex and messy. The information flow can go both ways; let’s start with the transmission of information from the family courts to Child Protection.

PROVIDING INFORMATION FROM THE FAMILY LAW SYSTEM TO THE CHILD PROTECTION SYSTEM

33 Information-Sharing In Family Law & Child Protection: Enhancing Collaboration (March 2013), and The Sharing of Experts’ Reports Between The Child Protection System and the Family Law System (April 2014) both available on the Attorney-General’s Department’s website.
The Family Law Act has provisions requiring or encouraging people involved in family court proceedings to notify Child Protection, and provide relevant information, when there is an allegation of child abuse or ill-treatment in proceedings, or when a family law professional considers that a child might be at risk. The key provisions are s 67Z and 67ZA of the Family Law Act 1975.

Section 67Z
If a party to proceedings under the Family Law Act or an Independent Children’s Lawyer\(^ {34} \) alleges that a child has been abused or is at risk of being abused, that party must file a notice to that effect (a ‘Child Abuse Notice’), and serve it on the person alleged to have abused the child, or from whom the child is alleged to be at risk of abuse.\(^ {35} \) When such a Child Abuse Notice is filed, the ‘Registry Manager’ of the family court is then required to notify a prescribed child welfare authority. Section 67Z also provides, in substance, that when the Registry Manager notifies Child Protection, he or she ‘may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification’\(^ {36} \).

Section 67ZA
Where one of the specified persons in a family court has reasonable grounds for suspecting that a child has been abused or is at risk of being abused, that person must notify a prescribed child welfare authority of ‘his or her suspicion and the basis for the suspicion’. The persons specified are Registrars and Deputy Registrars of the family courts; family consultants, family counsellors and family dispute resolutions practitioners, and arbitrators, and Independent Children’s Lawyers.

Where the specified person has reasonable grounds to suspect that the child has been or is at risk of being ill-treated, or ‘has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child’, the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.\(^ {37} \) Thus, notification by a professional is mandatory in relation to the more serious sorts of risk to the child (abuse), and discretionary in relation to less serious risks (ill treatment).

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\(^ {34} \) Strictly, an ‘interested person’, defined in s 67Z(4) as a party, an Independent Children’s Lawyer, or a person prescribed by the Regulations.

\(^ {35} \) Note that the meaning of ‘abuse’ was enlarged by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

\(^ {36} \) Section 67Z(6).

\(^ {37} \) Section 67ZA(3).
The provisions for both voluntary and mandatory notification, and the supply of information, prevail over any other law or ‘anything else’ (including a contractual obligation). Further, the person who makes the notification or provides the information in good faith ‘is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics’.

Although it is not made an offence to reveal the disclosure or notification, evidence of the notification ‘is not admissible in any court’, except where that evidence is given by the person who made the notification or disclosure.\(^{38}\) There is no other stated exception to this rule of inadmissibility. The rule applies to all courts (state and federal), and to any tribunal or other body concerned with professional ethics.\(^{39}\) The inadmissibility relates to the notification or the disclosure, not to the contents of what is disclosed.

**Voluntary provision of Information from family courts to child protection**

The voluntary provision of information from the family courts to child protection is considered in some detail in the report. In this paper it is sufficient to say that in my view there is nothing in the Family Law Act to prevent those in the family law system from providing information to child protection. In particular, s 121, which prohibits publication or dissemination ‘to the public or to a section of the public’ would not apply. In practice however, family law personnel such as independent children’s lawyers take the precaution of obtaining the court’s leave to provide the information.

**Summary: transmission of information from family law to child protection**

To sum up the main points (somewhat simplified):

- When there is an allegation of child abuse, a notice to that effect must be filed, and the court must notify Child Protection, whether or not the child abuse also involves family violence.

- If the notification takes the form of sending the child abuse notice to Child Protection, it should contain considerable information relevant to Child Protection’s work.

- The court may add other information to assist Child Protection.

- The amendments of 2011 increase the situations that fall within ‘child abuse’.

- In addition, under s 67ZA certain professionals who have reasonable grounds for suspecting child abuse are required or in some situations permitted to notify child

\(^{38}\) Section 67ZB(4).

\(^{39}\) In this paper I will not consider the constitutional validity of this or other provisions.
protection; the communications are inadmissible, and the professionals, and are protected from liability for making the communication.

- The Family Law Act does not inhibit family law personnel from providing information to child protection, although apparently some feel that doing so might breach s 121 and therefore take the precaution of obtaining the court’s permission.

**PROVIDING INFORMATION FROM THE CHILD PROTECTION SYSTEM TO THE FAMILY LAW SYSTEM**

In general, the relationship between the family law system and the child protection system is as follows: although under s 109 of the Constitution the federal act would prevail over the state or territory legislation in the event of inconsistency, because of a provision in the Family Law Act the child protection system prevails.

There are, however, two ways in which the family courts can require Child Protection to provide information: by issuing a subpoena and by making an order under s 69ZW.

In relation to subpoenas, although child protection personnel and agencies must in general comply with subpoenas issued by the family courts, there is an exception: child protection legislation includes provisions to the effect that certain information, notably information that would reveal the identity of a person who notified Child Protection of suspected child abuse, must not be disclosed. There is authority to the effect that (there being nothing inconsistent in the Family Law Act) such state laws preventing the disclosure of notifications of child abuse have effect in family court proceedings, and will therefore apply in connection with subpoenas and the admissibility of evidence.

**The family courts can order Child Protection to provide documents and information**

Section s 69ZW provides, in substance, that the family courts can, in child-related proceedings, make orders requiring Child Protection to provide the court with certain documents or

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40 Unless otherwise specified, the state legislation to be cited in this discussion is: Children and Young Persons (Care and Protection) Act 1998 (NSW); Children, Youth and Families Act 2005 (Vic); Child Protection Act 1999 (Qld); Children’s Protection Act 1993 (SA); Children and Community Services Act 2004 (WA); Children, Young Persons and Their Families Act 1997 (Tas); Children and Young People Act 2008 (ACT); Care and Protection of Children Act (NT).

41 Section 69ZK (which provides, among other things, that nothing in this Act, and no decree under this Act, affects ‘the operation of a child welfare law in relation to a child’).

42 The Full Court has held that a request under s 91B that the department intervene cannot require Child Protection to do so: Secretary, Department of Health and Human Services v Ray and Others (2010) 45 Fam LR 1.


44 Literally a ‘prescribed State or Territory agency’ (which may include police).
information. The word ‘requiring’ indicates that the order legally obliges Child Protection to provide the documents or information; in contrast, for example, with s 91B, which provides for the court to ‘request’ Child Protection to intervene. Again, however, there is protection for notifiers of child abuse: s 69ZW(3) says that nothing in the order is taken to require the agency to provide documents or information that include the identity of the person who made a notification.

To sum up, Section 69ZW allows a family court to require Child Protection to provide documents and information relating to notifications of suspected child abuse and records of consequent assessments and reports. Such an order prevails over any inconsistent state legislation. But the court cannot require Child Protection to provide material that identifies persons who have notified Child Protection of suspected child abuse, unless the notifier consents, or the court is satisfied (after hearing submissions from the agency that was required to produce the identifying material) that the person’s identity is critically important to the proceedings, and that not disclosing it would ‘prejudice the proper administration of justice’.

**Child protection voluntarily providing information to the family courts**

There is now widespread agreement that relevant information should be shared between Child Protection and there are many arrangements in place by which it is done. We know that the family courts can require information - by subpoenas or s 69ZW orders. But in other situations can child protection voluntarily disclose relevant information to the family law system?

The answer is remarkably complex, unfortunately. Only in one jurisdiction, New South Wales, are there laws that clearly encourage the flow of information from Child Protection to the family courts. In other jurisdictions there are provisions that could inhibit such provision of information, and difficult questions arise about whether providing information in particular circumstances falls within one of the exceptions in the state and territory legislation. It is not necessary to go into the intricacies here. Briefly, the provisions that could inhibit the flow of information

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45 The court must not rely on any such documents or information without admitting them into evidence: subs (5).
46 See also sub-ss (6) and (7), providing that the court itself may not disclose the notifier’s identity except in certain situations.
47 The court cannot of course rely on any such documents unless they have been admitted into evidence: a general requirement made explicit by subsection (5).
• make it an offence to disclose the identity of a notifier;
• make evidence of the notifier’s identity inadmissible and preventing the compulsory production of documents that would identify a notifier; and
• make it an offence for Child Protection personnel to disclose information obtained at work.

The protection of notifiers is a defensible exception to information-sharing, but the last group of offences pose a major obstacle, at least in theory. Read literally the provisions would appear to criminalise some perfectly reasonable and responsible actions. Suppose, for example, that a Child Protection officer, in order to protect a child, voluntarily discloses, to an Independent Children’s Lawyer or a member of the family court staff, matters indicating the child is at risk, those matters arising from investigations by Child Protection. The disclosure would seem to involve an offence in all jurisdictions except Queensland and New South Wales. It may well be that these provisions are not generally enforced, but it seems unreasonable to expect departmental officers to have to worry about the risk of prosecution for doing the right thing. In my Report I echoed recommendations from the Law Reform Commissions48 that these laws should be amended so that they do not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances. Indeed, as the Commissions recommended:49

State and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.

I would add that the legislation should also protect those who make such notifications in good faith from legal liability, as the family law legislation does in relation to communications to the child protection system about suspected child abuse (considered above).

THE SHARING OF EXPERT REPORTS

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49 Recommendation 30–12.
Particular issues were seen to arise relating to the sharing of experts reports and I was asked to prepare a supplementary report on this topic.\textsuperscript{50} A brief treatment will suffice in this paper.

**The questions**

There were two main sets of issues. The first set of issues related to advantages and risks associated with sharing expert reports. Such reports are prepared for a particular purpose, and are based on particular information. They express the authors’ views on many issues relating to the children involved. Could it be dangerous to rely on them in a different context, or for a different purpose? Might sharing of these reports mean that experts would be subjected to cross-examination in more than one forum? Would the experts need to write their reports in a different way to cater for the possibility that they might be used for purposes other than the one for which they were written? What would be the benefits of sharing expert reports? Would the benefits be likely to outweigh the dangers? Should measures be put in place to reduce the dangers?

The second set of issues relate to the legal permissibility of sharing these reports. In addition to the legal issues that relate to all information – reviewed in the first Report – legal issues arise from the fact that experts reports are, in the main, written for the courts. Would it be contempt of court for them to be used in other ways? Would the court’s permission be required? Should there be changes in the courts’ rules, or in their standard practices when releasing expert reports?

In relation to the policy issues, I concluded that the advantages of sharing should outweigh the dangers, and that the dangers, or disadvantages, could be significantly reduced by certain measures. In relation to the legal issues, I reviewed some valuable recent developments in the Federal Circuit Court of Australia, and made some suggestions. In relation to the legal issues, the report explores what has been referred to as the ‘Harman principle’.\textsuperscript{51} It is, in short, a rule that a document that has been provided by one party to the court, under legal compulsion, must not be used by another party without the court’s permission (unless it has been received into evidence). Although this rule is reasonably clear in relation to a party’s documents that have been subpoenaed in civil proceedings, its application to expert reports of

\textsuperscript{50} Richard Chisholm, *The Sharing of Experts’ Reports Between The Child Protection System and the Family Law System* (April 2014) both available on the Attorney-General’s Department’s website.

\textsuperscript{51} The name derives from *Harman v Home Department State Secretary* [1983] 1 AC 280. The leading authority is *Hearne v Street* (2008) 235 CLR 125.
various kinds is uncertain, for reasons set out in the report. The report’s recommendations may be briefly summarised as follows:

- The recommendations for information-sharing between the family law system and the child protection system contained in the Information-Sharing Report should be treated as generally applicable to experts’ reports where such sharing is clearly permitted by law. However having regard to the current state of the law experts’ reports provided to a family court or a children’s court should be shared with the other system when such sharing is authorised by legislation or by court orders; and reports prepared for the child protection authorities and not filed in court should be shared unless such sharing is prohibited under the relevant state or territory child protection legislation.\(^{52}\)

- State and territory legislatures other than New South Wales should consider passing legislation that positively authorises, encourages or requires the child protection to share experts’ reports with the family law system in appropriate circumstances.\(^{53}\)

- Consideration should be given to amending the Rules of Court applicable to the family courts and the children’s courts so that they clearly specify the persons to whom reports may and may not be disclosed. Alternatively, the rules should be amended to make it explicit that family courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system, and to legal aid bodies. Similarly, rules relating to the children’s court should make it explicit that children’s courts can make orders allowing the disclosure of reports to appropriate bodies in the family law system, and to legal aid bodies. The proposals under consideration by the Federal Circuit Court would be a valuable starting point in the formulation of such rules.\(^ {54}\)

- The family courts should develop model court orders providing for appropriate disclosure of experts’ reports to the child protection system, and should publish notices attached to experts’ reports when released to the parties. Such notices should refer to s 121 of the Family Law Act and to other matters relevant to the proper use of such reports, for example by pointing out that the report may not have been admitted

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\(^{52}\) Recommendation 4.  
\(^{53}\) Recommendation 5.  
\(^{54}\) Recommendations 6, 7.
into evidence and may not have been accepted by the court, and that the issues may be affected by information that was not available to the writer of the report.55

- Each system should establish appropriate education and training to ensure that its personnel are aware of the potential benefits of experts’ reports held by the other system, and procedures established for information-sharing between the family law and child protection systems should include measures to ensure that personnel in each system can readily learn whether there is a relevant expert report held by the other system.56

CONCLUSION: SOME THOUGHTS ON POLICY ISSUES

A suggested approach to information-sharing issues

The approach that underpins the work I have done in this area, and that I would advocate, may be summarised as follows.57

First, it is important that decisions about children should as far as possible be based on the best available information. Decisions based on incomplete information are more likely to be wrong, and wrong decisions can disadvantage children. Thus we should try to avoid the position where one person or agency makes a decision in ignorance of information available to another agency, where that information would have assisted the decision-maker. The most obvious example would be a family court making a decision to place a child in the care of a person in ignorance of the fact that a child protection department held information indicating that the person was a risk to the child. But although court decisions are a significant focus of this paper, this is a point of general application to all decision-makers.

Second, if a decision-maker is unaware that relevant information is held by another agency, it might put in place interviews or other measures that should be unnecessary. These measures would waste precious time and resources. They might also involve unnecessary delay and

55 Recommendation 8.
56 Recommendations 9, 10.
57 This discussion is a brisk frolic in an area of considerable importance and complexity. See generally the illuminating discussion and literature review in Diana Bryant and Tom Altobelli, ‘Has confidentiality in family dispute resolution reached its use-by date?’ at the 49th Annual Association of Family and Conciliation Courts Conference, 6-9 June 2012, Chicago, and the shorter version in Alan Hayes and Daryl Higgins, Ed, Families, policy and the law: Selected essays on contemporary issues for Australia (AIFS, 2014). See also the various presentations (especially the one by Reithmuller J) in the AIFS Webinar ‘Confidential Family Counselling in a Family Law Context: Mind the Gap’ (2013) at https://www3.aifs.gov.au/cfca/events/confidential-family-counselling-family-law-context-mind-gap.
stress for those involved, especially children, who might be re-interviewed and as a result be at risk of what has been called ‘systems abuse’.

The starting point, I suggest, is information-sharing: decision-makers should in general be provided with whatever relevant information is available. That outcome would in general be advanced by permitting or requiring people to disclose information, by allowing information to be admissible in court proceedings, and by encouraging sharing of information between agencies, notably between the agencies comprising the family law system and the child protection system.

Although I would urge that as the starting point, there may be good reasons why some sorts of information, in some circumstances, should not be shared. In the area of counselling and mediation, some would say that the benefits of providing confidential communications with mediators and counsellors outweigh the benefits of having all the information available to courts: a debate to which I will return. Our evidence law, for example, has consistently reflected the view that the value of providing an opportunity for frank and private settlement discussions generally outweighs the value of having evidence of what is said admissible in court.

In some circumstances the competing benefits are differently balanced. Thus, for example, even in the generally confidential processes of mediation and family counselling, a disclosure of child abuse may be disclosed, and may be admitted into evidence: here, the law reflects the policy decision that in this particular situation to benefit of having the information disclosed to the authorities and admitted into evidence to protect the child outweighs what could be a disincentive to some people to speak frankly in those situations.

Again, in the area of child protection, our system has taken the view that the need to encourage people to report suspected child abuse is so important that it justifies granting anonymity to notifiers, even though doing so might mean that some relevant information is not available to courts.

In the areas covered in this paper, therefore, it is a matter of balancing competing benefits. Weighing up those benefits carefully is essential to making good policy. It is possible to lose sight of this, especially where the law gets technical. If my general approach is to be adopted, in each area we would approach the topic by saying, in effect: “Sharing information, so that decisionmakers are well placed to make good decisions for children, and so that
unnecessary investigation is avoided, has clear benefits; we should encourage such sharing except where it there is a demonstrable net public benefit in restricting the flow of information (eg by making it inadmissible, or non-disclosable).”

Under this approach, we would take seriously the potential problems of sharing information, but try to address them if possible without giving up the information-sharing project. For example, sharing information could in some circumstances mean circulating a document that contained a person’s address, exposing the person to a risk of violence if it came into the wrong hands. A sensible response to this, however, would be to consider limited distribution, or circulating the document with the address removed. This sort of solution is routinely adopted in child abuse situations, where the notifier’s identity is removed from the documents that are shared and received into evidence.

We can find in the case law spirited judicial statements in favour of one view or the other. Such statements helpfully identify the policies that underlie particular rules, but should not blind us to the force of the competing policy. Let’s pursue this briefly.

The openness policy
The first policy is that for courts to function effectively they need to have as much information as possible. If people have said things that are important, it is wrong in principle if the court cannot be told what was said. Lacking that information, the courts would be less able to deliver justice. Sometimes, courts emphasise this policy, as in *Smirnov & Turova*. In that case, Walters FM held that for the relevant confidentiality provisions to apply, it needed to be ‘clearly and affirmatively demonstrated’, and ‘clear beyond argument’ that the process is family counselling. This was because of

> the very serious consequences that flow from the characterisation of a process as ‘family counselling’ – which consequences obviously include the possibility of evidence which is highly relevant to the safety or best interests of a child being excluded from consideration in legal proceedings where the court is legislatively compelled to regard the best interests of the child as the paramount consideration (and, in doing so, is also legislatively compelled to consider, among other things, the need to protect the child from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence) – it seems to me that the applicability of provisions such as ss.10D and 10E should be clearly and affirmatively demonstrated.

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58 *Smirnov & Turova* [2009] FMCAfam 1083.
The confidentiality policy
The second and competing policy is that the system should provide people with an opportunity to have confidential discussions – between the parties, and by each party with advisors, mediators, counsellors, and therapists. This will be most effective if the parties feel free to say what they want, without fear that their statements will be used against them later. This policy suggests that what is said in these discussions should be inadmissible in evidence, and that the professionals involved - counsellors, mediators, etc – should not be allowed or required to disclose what was said. Here is a typical expression of this policy in relation to the inadmissibility of settlement negotiations:

“…parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations…may be used to their prejudice in the course of the proceedings. They should… be encouraged fully and frankly to put their cards on the table.” ⁵⁹

And here is a more recent statement of this policy in the family law counselling context:⁶⁰

In my view, both the letter and spirit of the legislation support confidentiality and should prevent disclosure with only one specified exception [his Honour was referring to child abuse]. That legislation is consistent with long-standing authority and public policy.

In my view, the prospect of discovery and inspection also strikes at the heart of the process designed to be protected… If parties to counselling were left to live in fear that everything that was said during such process was likely to be the subject of trawling by the other party and their legal advisors, then inevitably the process would be likely to be significantly compromised and the very purpose undermined.

In my view, consistent with public policy, the statutory provisions and previous authority, if a party wishes to seek to discover and inspect, whether by subpoena or by some third party process, against a recognised counselling agency, then a heavy onus rests upon the party seeking departure from that usual process to justify such orders for inspection by the production of appropriate evidence that their case comes within the one limited exception to the general principle…(Jordan J).

And another:⁶¹

⁵⁹ Cutts v Head [1984] Ch 290 at p. 306 (per Oliver L J).
The scheme of the family law legislation requires practitioners and the court to achieve mediated outcomes whenever possible. Confidential counselling services provided by family and child counsellors plays [sic] a critically important role in that exercise. It has the object of reconciling the parties or conciliating their dispute...The assurance of confidentiality improves the chances of reconciliation or conciliation. Without it parties are likely to be reluctant to participate fully and frankly in the process. For this reason counsellors are sworn to secrecy and as a ground rule what is said in counselling is without prejudice and legally immune from disclosure elsewhere. [...] (Carmody J).

We can note at this point that this familiar theme includes a factual statement, for which the judges cite no evidence, to the effect that without confidentiality parties are likely to be reluctant to participate fully and frankly in the counselling process.

No amount of judicial repetition makes a proposition true, however, and the truth of this traditional statement may sensibly be questioned – a point that needs to be kept in mind when considering policy issues. Indeed it has been questioned. I do not want to steal the thunder of my colleague Altobelli J.62 so I merely note that there is some evidence suggesting that many people would in fact speak fully and frankly with counsellors even if they knew evidence might be given of what they said. I well remember from my earlier years in the Family Court of Australia that counsellors who had experience with both ‘reportable’ and ‘non-reportable’ conferences would often remark that the behaviour of many litigants was much the same in each case.

I am not sure if there is any evidence relating to mediators on this point, or on bilateral settlement negotiations between parties. The important thing is to be careful to avoid making assumptions and to look for evidence one way or another. I know that confidentiality has been a strong tradition in mediation and counselling, and practitioners who have worked only in confidential settings might be surprised at the behaviour of litigants in a non-confidential setting. People’s behaviour is affected by many things, and to assume parties’ decisions are always determined by cool calculation about the possible use of their statements may be risky. It is possible that the intimate circumstances of counselling might lead many people to

62 See Tom Altobelli and Diana Bryant, ‘Has confidentiality in family dispute resolution reached its use-by date?’ in Alan Hayes and Daryl Higgins, Ed, Families, policy and the law: Selected essays on contemporary issues for Australia (AIFS, 2014). This a shortened version of a presentation by the authors at the 49th Annual Association of Family and Conciliation Courts Conference, 6-9 June 2012, Chicago.
tell their story without restraint, in part because of an emotional need to do so. This may be especially so in children’s cases, where - I suspect - many parties honestly believe their version of events, and honestly believe their proposals will be best for the children. If so, with the opportunity of an interested audience, why hold back? On the other hand, perhaps in commercial disputes parties will find it easier to be circumspect. And in bilateral negotiations, with the lawyers in the saddle, perhaps there may be even fewer ill-considered admissions. The behaviour of the lawyers, indeed, could make a big difference: a party whose lawyer has advised caution may be more able to ‘clam up’ than one whose lawyer has given no such advice, or has urged the client to give the full picture.

Applying my suggested approach to this tricky topic, we should start with the position that disclosure should possible and statements admissible, unless there are convincing reasons to think that there are net benefits in confidentiality. And in determining whether there are convincing reasons, we should look carefully at whatever evidence is available. In fact, in this area there is some relevant evidence, but a great need for more issue-oriented research to help fill the many gaps in our knowledge.