Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?

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1 *Introduction*

The South African Law Reform Commission (SALRC) recently published Issue Paper 31 of 2015 on Project 100D, entitled *Family Dispute Resolution: Care of and Contact with Children* (the Issue Paper).[1] Although the project owes its existence to concerns about children who are affected by the adversarial nature of the divorce and separation proceedings of their parents, it has been extended to include the development of proposals for alternative dispute resolution for all family disputes, including both private and public law disputes.[2] Project 100D therefore involves the development of an integrated approach to the resolution of family disputes in general.

This article begins with a brief examination of certain problems with the adversarial system of litigation in family matters as highlighted, *inter alia*, by the Issue Paper, the various alternative dispute resolution processes acknowledged by the Issue Paper and the various structures necessary for dealing with family dispute resolution. This is followed by an examination of the development of a coherent family law system with specific focus on the manner in which the establishment of family relationship centres has led to a more accessible and integrated family law system in Australia. The article concludes with some proposals on how all the relevant alternative dispute resolution processes and the various structures could possibly be built into an integrated family law system in South Africa.

2 *Problems with the adversarial system of litigation*

In terms of the adversarial system of litigation, it is presumed that the best resolution to a dispute is obtained when two opposing parties are each given a chance to argue their case before a court and the presiding officer, as a neutral third party, then makes a decision based on the confrontational evidence of each party.[3] In this system the necessary business of resolving divorce-related or other family disputes becomes a contest between two opposing parties who are forced to set out their

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1 SALRC *Family Dispute Resolution: Care of and Contact with Children* Issue Paper 31, Project 100D (2015) available at http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf (01-07-2016).

2 SALRC (n 1) par 1.1.2.

3 De Jong "Mediation and other appropriate forms of alternative dispute resolution upon divorce" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 575 578.

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claims and positions in the best possible way and to criticise and attack the other party's arguments, or risk losing their case.[4] In this regard, it is pointed out that the adversarial atmosphere in which care and contact disputes are currently determined − both in and out of court − tends to exacerbate the already problematic family situation.[5] Each parent has to try to prove that he or she is the better parent − usually by making the other parent look bad, wrong or unfit.[6] A significant number of divorcing or separating parties therefore become locked in bitter and occasionally violent family disputes, both before, during and after divorce or separation.[7] It is therefore not wide of the mark to say that litigation in family matters typically ends in bitterness, unresolved feelings and irreconcilability between parties, a situation which is particularly detrimental to any children involved.[8] They often become the spoils of war when their parents insist on waging protracted battles over their care or best interests.[9] It is also generally acknowledged that continued parental conflict prior to, during and after divorce or family separation may negatively affect children psychologically and socially.[10] The Issue Paper therefore accepts that the adversarial system of litigation, which works well in most other fields of our law where disputes are essentially transactional in nature, is not well suited to dealing with the immense emotional trauma and the many non-legal issues that usually accompany family law disputes, which are essentially relational in nature.[11] Furthermore, South African judges have noted that "the coldness of a courtroom and an ensuing court order is neither the best venue nor the best vehicle to resolve matters affecting children, who are often relegated to being innocent bystanders between two warring factions − long after the court's gavel has fallen"[12] and Robinson remarks that "the adversarial process is out of step with various provisions of the Children's Act 38 of 2005".[13]

Other negative aspects of the adversarial system of litigation to which the Issue Paper refers include discouragement of open communication; emphasis placed on competition; difficulty in developing true facts; polarisation of issues; escalation of the parties' emotions; lawyer's alignment with a client's view of the facts; and decreasing collegiality between lawyers.[14]

Furthermore, it is indisputable that the adversarial system of litigation is inaccessible to most South Africans in any event.[15] First, it appears that the formalism of the adversarial family law system is so foreign to people with Afrocentric backgrounds

4 De Jong (n 3) 578.
5 SALRC (n 1) par 3.2.2.
6 (n 1).
7 (n 1) par 3.1.2.
8 (n 1) par 3.2.3 and De Jong "A pragmatic look at mediation as an alternative to divorce litigation" 2010 *TSAR* 515 516.
9 De Jong (n 3) 581. See also SALRC (n 1) par 3.1.4-3.1.5.
10 SALRC (n 1) par 3.1.1; Belcher-Timme, Shorey, Belcher-Timme, Shorey and Gibbings "Exploring best practices in parenting coordination: A national survey of current practices and practitioners" 2013 *Family Court Review* 651; Fieldstone, Lee, Baker and McHale "Perspectives on parenting coordination: views of parenting coordinators, attorneys and judiciary members" 2012 *Family Court Review* 441 442 and Montiel "Why and how Alabama courts should use parenting coordination in divorce cases" 2011 *The Alabama Lawyer* 301.
11 SALRC (n 1) par 3.1.6 and 3.2.5. See also Robinson "Family relationship centres − Australian lessons for South Africa (and beyond)" in Diedrich (ed) *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (2014) 330, 332 and 337.
12 SALRC (n 1) par 3.2.7.
13 Robinson (n 11) 336.
14 SALRC (n 1) par 3.2.4.
15 De Jong "An acceptable, applicable and accessible family-law system for South Africa − some suggestions concerning a family court and family mediation" 2005 *TSAR* 33 34-35.

that, despite the provisions of the Recognition of Customary Marriages Act 120 of 1998, they still turn to traditional, informal dispute resolution procedures at community level in the case of family breakdown rather than relying on the formal family law system.[16] Secondly, it appears that the socio-economic circumstances of the majority of the South African population put the adversarial system of litigation beyond their reach.[17] It is, therefore, an unfortunate fact that today the average South African simply cannot afford to make use of the official family law system or would not choose to do so.[18]

3 *Recognition of various alternative dispute resolution processes*

Subject to certain reservations[19] and pertinent questions,[20] the Issue Paper recognises that various alternative dispute resolution processes may indeed address many of the problems associated with the adversarial system of litigation in family matters.[21] It points out that alternative dispute resolution involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties to the dispute.[22] According to the Issue Paper, alternative dispute resolution processes may fall into one of two categories, namely:

(a) those involving private decision-making by the parties themselves, examples of which are mediation, African dispute resolution, some forms of online dispute resolution and collaborative practice; and
(b) those involving private adjudication by third parties, of which arbitration and facilitation (or rather parenting coordination) are examples.[23]

3.1 Mediation

3.1.1 Family mediation

As regards family mediation − the process where an impartial third party with no decision-making powers facilitates the negotiations between disputing parties with the object of assisting them to make their own decisions on some or all of the issues involved and reach a mutually acceptable agreement[24] − the Issue Paper recognises that the process is practised in many different ways. It refers to the well-known models of facilitative or non-directive mediation, where the mediator merely facilitates the negotiations or communication between parties and does not make recommendations, give personal opinions or predict what a court would probably have ruled on a matter,[25] and evaluative or directive mediation, where the mediator

16 SA Law Commission *Alternative Dispute Resolution* Discussion Document 8, Project 94 (1997) 22-23.
17 De Jong (n 15) 35.
18 De Jong (n 15) 35.
19 *inter alia* that the proper place of alternative dispute resolution as a possible way to deal with family disputes should be determined in conjunction with an investigation into possible improvements of the court system: SALRC (n 1) par 3.2.13.
20 annexure A to the Issue Paper "Chapter 3: Specific issues identified for discussion: Process" questions 33-100.
21 SALRC (n 1) par 3.2.18.
22 SALRC (n 1) par 3.6.2.
23 SALRC (n 1) par 3.6.9.
24 SALRC (n 1) par 3.6.14. See also De Jong (n 3) 582.
25 SALRC (n 1) par 3.8.3-3.8.4. See also De Jong (n 3) 593.

plays a more active role in the decision-making process by determining the issues that need to be decided on and by pointing out possible outcomes should the matter proceed to court.[26] It also recognises newer mediation models such as transformative mediation, where the mediator works with the parties "to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution";[27] advocacy or activist mediation, where the mediator intervenes to ensure that parties are protected in the case of unbalanced power relationships or in the presence of domestic violence;[28] and multi-generational mediation, which entails mediation with the extended family.[29]

3.1.2 Voluntary court-annexed mediation

The Issue Paper also discusses the recent amendment of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, which introduced a procedure for the voluntary submission of civil disputes to mediation in selected lower courts.[30] Although disappointingly little has come of these voluntary mediation rules in practice, they could potentially be invoked in separation and children's issues which fall within the jurisdiction of the civil regional court and the children's court.

3.1.3 Important questions about family mediation and court-annexed mediation

Important questions in respect of both family mediation and court-annexed mediation are whether it should be mandatory,[31] and, if so, whether it should be privately or publicly funded.[32] Other relevant questions about family mediation are in what legislation mediation provisions should be framed,[33] what process should be used when mediation fails,[34] should cases in which domestic violence is suspected be mediated, and, if so, what measures should be implemented to ensure the safety of spouses and children in the mediation process.[35]

3.2 African dispute resolution

3.2.1 General

As regards African dispute resolution the Issue Paper notes that African-style mediation must be distinguished from Western-style mediation.[36] Although mediation is an innovation for common law, it has always been part of the customary divorce process since people traditionally prefer to settle their domestic disputes

[26] SALRC (n 1) par 3.8.6-3.8.7. See also De Jong (n 3) 594.
[27] Bush and Pope "Transformative mediation: changing the quality of family conflict interaction" in Folberg, Milne and Salem *Divorce and Family Mediation: Models, Techniques, and Applications* (2004) 53 59; De Jong (n 3) 594 and SALRC (n 1) par 3.8.17.
[28] SALRC (n 1) par 3.8.20. See also De Jong (n 3) 595.
[29] SALRC (n 1) par 3.8.21. See also De Jong (n 3) 595.
[30] SALRC (n 1) par 3.11.
[31] annexure A (n 20) questions 44, 46-47, 54 and 85.
[32] annexure A (n 20) questions 36, 64-66 and 86.
[33] annexure A (n 20) question 50.
[34] annexure A (n 20) question 62.
[35] annexure A (n 20) questions 73-74.
[36] SALRC (n 1) par 3.10.23.

within the family and, where possible, to achieve reconciliation.[37] In African-style mediation conflicts are seen in their social context and not as isolated events.[38] In African culture negotiations between the parties' families are mandatory upon family breakdown and family ties and community networks must be respected, maintained and strengthened.[39] Mediator neutrality is not an absolute requirement as an uncle, a respected family member or an elder in the community may be called upon to fulfil the role and function of a mediator in family disputes.[40] Mediation is not regarded as an alternative dispute resolution method[41] – together with arbitration in community forums or the chiefs' courts, it is in fact the primary method of dispute resolution for the majority of the South African population.[42]

3.2.2 Important questions about African dispute resolution

The only questions on the section on African dispute resolution in the Issue Paper are whether Western-style mediation should be improved by incorporating African dispute-resolution concepts and, if so, how this should be done.[43]

3.3 Online dispute resolution

Interestingly, the Issue Paper also refers to online dispute resolution, which has developed directly as an online extension of alternative dispute resolution.[44] The main types of online dispute resolution are assisted negotiation, which is a type of computer-assisted negotiation in which technological tools enhance the probability of reaching an agreement and help the parties to find a solution by asking questions, suggesting answers and sending reminders; automated negotiation or "blind-bidding" negotiation, a method which is limited to monetary claims where money is the only variable in the dispute; and online mediation and arbitration, which are conducted over the internet with the assistance of a human third party.[45] The Issue Paper also refers to the possibility of an online information hub, a matter closely related to online dispute resolution.[46] This would provide parents with information, which is important in defusing family disputes between parties during and after a divorce or separation, and direction to further support.[47]

3.4 Collaborative practice

3.4.1 General

The Issue Paper also refers to collaborative practice, the newest development in alternative dispute-resolution processes in the field of family law, and remarks that it is arguably regarded as the most advanced dispute-resolution process currently available anywhere in the world.[48] In terms of collaborative practice, both spouses

37 SALRC (n 1) par 4.4.49, 4.5.3 and 4.5.6.
38 SALRC (n 1) par 3.10.14.
39 SALRC (n 1) par 3.10.14.
40 SALRC (n 1) par 3.10.16.
41 SALRC (n 1) par 3.10.21.
42 SALRC (n 1) par 4.4.27 and 4.5.16.
43 annexure A (n 20) questions 83-84.
44 SALRC (n 1) par 3.5.14.
45 SALRC (n 1) par 3.5.15.
46 SALRC (n 1) par 3.5.21.
47 SALRC (n 1) par 3.5.22-3.5.23.
48 SALRC (n 1) par 3.12.2.

and their attorneys pledge in binding written agreements (the Collaborative Practice Participation Agreement) not to litigate while the process is going on, but to work together constructively and respectfully to settle the case by agreement.[49] The agreement stipulates that attorneys are engaged for the sole purpose of negotiating the divorce settlement; if a settlement cannot be reached, the attorneys agree to step out of the picture, leaving the parties free to consult other attorneys if they need to litigate.[50] An inherent part of collaborative practice is the involvement of other professionals, such as neutral child specialists, to assist the parties in developing workable parenting plans; neutral financial specialists to help the parties and their attorneys to assemble and organise information on and analyse the parties' financial situation and the various options it offers; and collaborative or divorce coaches to aid the parties with emotional and psychological issues that might otherwise get in the way of the settlement process.[51]

3.4.2 Important question about collaborative practice

The only question raised in respect of collaborative practice is whether South Africa should make legislative provision for collaborative dispute resolution.[52]

3.5 Arbitration

3.5.1 General

Despite the current prohibition on arbitration in respect of "any matrimonial cause or any matter incidental to any such cause" as set out in section 2(a) of the Arbitration Act 42 of 1965, the Issue Paper does recognise the present-day demand for, and the advantages of, family arbitration either on its own or as a useful adjunct to mediation.[53] However, the Issue Paper cautions that family dispute resolution legislation (which *inter alia* makes provision for disputes to be referred to an impartial arbitrator for final resolution)[54] should contain clear policy guidelines for appropriate balances between court supervision, family autonomy, safeguards for those entering into family arbitration agreements and safeguards for vulnerable persons.[55] The South African Law Reform Commission is also aware of the current initiative by the Family Law Committee of the Law Society of South Africa to make use of arbitration in family financial disputes, as is done in England.[56]

3.5.2 Important questions about family law arbitration

Important questions raised about family arbitration include which matters should be arbitrated − all matters or only property and spousal maintenance matters;[57] whether family arbitration is a useful adjunct to unsuccessful mediation;[58] and

[49] SALRC (n 1) par 3.12.4.
[50] SALRC (n 1) par 3.12.4.
[51] SALRC (n 1) par 3.12.5. See also De Jong (n 3) 625-626.
[52] annexure A (n 20) question 89.
[53] SALRC (n 1) par 3.9.1 and 3.9.10-3.9.11. See also De Jong "Arbitration of family separation issues − a useful adjunct to mediation and the court process" 2014 *PER* 2355 2360-2364.
[54] SALRC (n 1) par 3.6.15.
[55] SALRC (n 1) par 3.9.45.
[56] SALRC *Care of and Contact with Children (Incorporating Family Dispute Resolution)* Committee Paper 31, Project 100D (2016) par 3.9 and the annexures thereto.
[57] annexure A (n 20) question 75.
[58] annexure A (n 20) question 80.

whether family arbitration should be regulated by the existing Arbitration Act or by a separate statute with specialised rules for family matters.[59]

3.6 Parenting coordination (facilitation)

3.6.1 General

A last alternative dispute-resolution process to which the Issue Paper refers is facilitation or rather "parenting coordination" – to use the internationally accepted and unified term for the process, which is currently inaccurately termed "facilitation" in the Western Cape and "case management" in other parts of the country.[60] The process involves a child-centred alternative dispute-resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving minor pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned, private forum.[61] A parenting coordinator will first attempt to facilitate resolution of the parenting disputes through agreement between the parties, and if this attempt fails, the parenting coordinator will have the power to make decisions or directives about the disputes which will be binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.[62] The most important reason for the development of parenting coordination is the endeavour to reduce the negative impact of ongoing co-parenting conflict on children, which the Children's Act 38 of 2005 seems to have fuelled by emphasising the importance of both parents' continuous involvement in their children's day-to-day lives.[63]

3.6.2 Important questions about parenting coordination

The Issue Paper's specific questions about parenting coordination include whether it should be regulated in legislation[64] and whether it is an inappropriate delegation of the judicial function, a denial of due process and an impediment to court access.[65]

3.7 Concluding remarks on various alternative dispute-resolution processes

It appears that many of the alternative dispute-resolution processes referred to above developed in an unstructured and piecemeal manner as and when they were needed, and that little specific provision has been made to cater for these processes in our family law system.[66] From the questions raised by the Issue Paper on the topic of an adversarial versus a collaborative approach[67] it appears that it is by no means clear to what extent alternative dispute-resolution processes should be used to complement

[59] annexure A (n 20) question 82.
[60] SALRC (n 1) par 3.13. See further De Jong "Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa" 2015 *PER* 149 156-159.
[61] SALRC (n 1) par 3.13.1. See also De Jong (n 3) 615.
[62] De Jong (n 3) 615.
[63] De Jong (n 60) 150-151.
[64] annexure A (n 20) question 90.
[65] annexure A (n 20) question 91.
[66] SALRC (n 1) par 4.9.1. See also Robinson (n 11) 337, who refers to the *ad hoc* and haphazard emergence of alternative dispute resolution processes in South Africa.
[67] See SALRC (n 1) par 3.1-3.2.

the court system and what role these processes play in the build-up to divorce proceedings or family separation.[68]

4 *Structures (or services) needed to deal with family dispute resolution*

The Issue Paper also looks at the structures or services necessary for dealing with family dispute resolution.[69]

4.1 Official courts

The first structure referred to is the official court system, which we inherited from the apartheid system of government and which was designed to exclude Africans from the mainstream of civil adjudication.[70] More specifically, attention is paid to the jurisdiction of respectively the high court, the civil regional court and the children's court to hear family matters,[71] which has developed in such a fashion that we currently have a dual and fragmented court system.[72] It is remarked that the continuation of a dual court system for divorces, which can be obtained in either the high court or the civil regional court, is a concern − those who are poor and predominantly black will use one court and those who are rich will use another.[73] It is also pointed out that "[a] schizophrenic position has emerged", where most matters affecting parental responsibilities and rights are assigned to children's courts, while some are reserved exclusively for other courts.[74] Furthermore, it is stated that the current fragmentation of courts in terms of which family matters are moved between different courts is to the disadvantage of children − this situation has in fact been described as the "secondary systematic abuse of children".[75] A very important question that the South African Law Reform Commission therefore needs to address is how South Africa's dual and fragmented court system could be improved.[76]

4.2 Office of the family advocate

Next, the Issue Paper emphasises the increasing and important role the office of the family advocate has played for the past twenty-five years in safeguarding children's best interests upon divorce in all recognised forms of marriage in the high court and the civil regional court and in children's matters in the children's court.[77] However, the Issue Paper also points out several problems relating to the office of the family advocate, which include the fact that offices are under-resourced or overburdened; that the family advocate's office is currently viewed as a decision-making body rather than an office that can help families mediate their disputes prior to litigation; that services are rendered mostly in the adversarial environment of the court process; that no services are available after a court order has been granted;

[68] annexure A (n 20) question 4.
[69] SALRC (n 1) par 4.1-4.8.
[70] SALRC (n 1) par 4.2.2.
[71] SALRC (n 1) par 4.2.5.
[72] SALRC (n 1) par 4.2.7.
[73] SALRC (n 1) par 4.2.31.
[74] SALRC (n 1) par 4.2.8.
[75] SALRC (n 1) par 4.2.32.
[76] annexure A to the Issue Paper "Chapter 4: Specific issues identified for discussion: Structure, facilities and personnel" question 3.
[77] SALRC (n 1) par 4.3.

and that no provision is made for assistance to children born of religious marriages or domestic partnerships.[78] A legitimate question is therefore what the role of the family advocate's office should be in future.[79]

4.3 Tribal or chiefs' courts

The Issue Paper further highlights the fact that the administration of justice in traditional communities in rural South Africa is predominantly carried out by tribal or chiefs' courts in which customary law is applied.[80] The primary aim of the court procedure is to effect reconciliation between the parties.[81] Legal representation in these courts is prohibited,[82] the trial is informal[83] and ndunas and councillors are often present to assist the court by mediating and constraining the powers and decisions of the presiding officer.[84] The Issue Paper points out that the chiefs' courts, currently still regulated by a number of pre-constitutional statutes but soon to be regulated by the proposed Traditional Courts Bill 23 of 2016,[85] are admirably suited to the needs of African family disputes.[86] These courts are in fact described as a means of alternative dispute resolution and it is argued that they should not be equated to civil courts, but should rather be seen as mediation and arbitration forums, dependent for their effectiveness on participation by the communities that use them.[87]

4.4 Community courts and advice centres

In similar vein, the Issue Paper indicates that in metropolitan areas unofficial dispute resolution in the form of people's courts or *makgotla* and street committees is the norm.[88] Since the official court system is inaccessible to most people, they resort to self-help in the form of unofficial or folk institutions, which have their philosophical background in the customary law that is being practised by traditional leaders in the chiefs' courts.[89] These community forums are sensitive to local community values and background conditions; they are cheap, accessible and acceptable and based on restorative justice with its holistic approach to problem-solving.[90] Similarly, community-based advice centres, which operate in close cooperation with their communities, are seen as accessible and responsive to community concerns.[91] Such centres are often the only resource in the community for residents who need information about care and contact, maintenance and divorce, and they assist parties to resolve these disputes without going to court.[92] They also play an important role in educating communities about the law and their rights.[93] A fundamental issue to

[78] SALRC (n 1) par 4.3.18, 4.3.25-4.3.29, 4.3.32, 4.3.35-4.3.37 and 4.3.44.
[79] See *eg* annexure A (n 76) question 10.
[80] SALRC (n 1) par 4.4.4 and 4.4.8.
[81] SALRC (n 1) par 4.4.10.
[82] SALRC (n 1) par 4.4.13.
[83] SALRC (n 1) par 4.4 10 and 4.4.16.
[84] SALRC (n 1) par 4.4.11.
[85] SALRC (n 1) par 4.4.7 and 4.4.26.
[86] SALRC (n 1) par 4.4.16.
[87] SALRC (n 1) par 4.4.27.
[88] SALRC (n 1) par 4.5.3-4.5.4 and 4.5.9. See also De Jong (n 15) 41-42.
[89] SALRC (n 1) par 4.5.5-4.5.6.
[90] SALRC (n 1) par 4.5.13. See also De Jong (n 8) 528.
[91] SALRC (n 1) par 4.7.2. See also De Jong (n 8) 528.
[92] SALRC (n 1) par 4.7.3.
[93] SALRC (n 1) par 4.7.3.

be answered is whether, and if so to what extent, these community courts and advice centres should form part of the official family law system in South Africa.[94]

4.5 Private mediators

The Issue Paper also refers to the role of private mediators, who are mostly available in bigger cities across the country, in resolving the family disputes of those who can afford the mediators' professional fees.[95] Private mediators are mostly attorneys, advocates, psychologists, social workers or religious leaders.[96] Although private mediation is completely unregulated by the state,[97] the National Accreditation Board for Family Mediators (NABFAM), launched by the University of Stellenbosch Business School, has developed requirements for the training and accreditation of family mediators.[98] Accreditation from NABFAM through NABFAM member organisations, such as the South African Association of Mediators in Divorce and Family Matters (SAAM), the KwaZulu-Natal Association of Family Mediators (KAFam) and the Family Mediators Association of the Cape (FAMAC) is, however, voluntary[99] and the question is whether this process should not be sanctioned and made compulsory by national legislation.[100]

4.6 Legal Aid South Africa

Last, but not least, the Issue Paper refers to Legal Aid South Africa, which has 64 justice centres and 64 satellite offices spread throughout the country and is responsible for the delivery of legal aid services.[101] Legal aid may be granted to vary or enforce a divorce order only when the issue in dispute deals with the care of or contact with children and the application is supported by a report by a social worker or the family advocate.[102] The only question raised in respect of Legal Aid South Africa is what its role should be in the resolution of family disputes.[103]

4.7 Concluding remarks on various structures

Here, too, it appears that many of the structures required to deal with family dispute resolution have developed in a segmented fashion along lines of race, culture and income level.[104] There seem to be a variety of structures or services available to families facing separation or other family disputes, namely the different official courts, the tribal or chiefs' courts, community structures, private mediators and/or Legal Aid South Africa. It may well be a daunting task for a person involved in a family dispute to decide which of these structures or services to approach. It further appears that some of the available and widely-used structures or services are not even regarded as part of the official family law system in South Africa. The Issue Paper therefore concludes that South Africa has not succeeded in establishing

94 SALRC (n 1) par 4.5.10. See further Annexure A (n 76) questions 17-18 and 20.
95 SALRC (n 1) par 4.6.1-4.6.2.
96 De Jong (n 3) at 588.
97 SALRC (n 1) par 4.6.3.
98 University of Stellenbosch Business School "National Accreditation Board for Family Mediators" https://goo.gl/umDoB0 (4-11-2016).
99 De Jong (n 3) 588.
100 annexure A (n 76) question 19.
101 SALRC (n 1) par 4.8.3.
102 SALRC (n 1) par 4.8.6.
103 annexure A (n 76) question 21.
104 SALRC (n 1) par 4.1.1.

a comprehensive family law system, and that ad hoc initiatives in this regard have been less than successful in the absence of an overarching plan.[105]

5 *Development of a coherent family law system*

However, the Issue Paper holds out the prospect of the development of a coherent family law system for South Africa.[106] It states that the challenge for the future does not seem to require a choice between alternative dispute resolution processes and litigation, but a plan to integrate the two.[107] It gives no indication, however, of how this should be achieved. Nonetheless, it does point out that there may be lessons to be learnt from older law reform commission reports and previous initiatives. In this regard, the 1983 *Hoexter Commission Report* proposed a family court at lower court level, which was to consist of a social component with a reception process, a conciliation process and a supporting service, along with a more inquisitorial court component.[108] Although the introduction of a fully-fledged family court would certainly address the current problems experienced with our dual and fragmented court system as far as family matters are concerned, it is evident that the institution of a family court in South Africa is not envisaged in the near future.[109] In lieu of a family court, we nonetheless urgently need some kind of reception process or intake procedure for families in distress, where they could receive information concerning family disputes and the various alternative dispute-resolution options available in their specific circumstances and from which they could be referred to an appropriate structure or service to assist them in resolving their disputes. In my opinion the answer lies in something similar to the 2006 family law reforms in Australia, in terms of which the Australian government introduced a series of changes to the family law system − the reforms entail changes to the Family Law Act 1975 through the Family Law Amendment (Shared Parental Responsibility) Act 2006, and changes to the family relationship services system which specifically made provision for the institution of family relationship centres.[110] My viewpoint that community-based centres similar to the Australian family relationship centres could be the answer to many of the problems with our inaccessible, unacceptable, uncoordinated and unintegrated family law system is supported by Robinson, *inter alia*, who argues that the adversarial system is inappropriate for dealing with family matters in South Africa and that family relationship centres as developed in Australia may be considered as a possible solution to overcoming the inappropriateness of the

[105] SALRC (n 1) par 4.9.77.

[106] SALRC (n 1) par 4.9 and more specifically par 4.9.80.

[107] SALRC (n 1) par 4.9.79.

[108] SA Law Commission Report *Commission of Inquiry into the Structure and Functioning of the Courts* RP78 (1983) vol III part 7.

[109] See Robinson (n 11) 332 and 336, who argues on the one hand that a change in culture towards divorce and child litigation may require, *inter alia*, "considering anew whether a family court should not be instituted [in South Africa]", but states on the other hand that "it is futile to wait for Government to implement a system of true family courts".

[110] Parkinson "The idea of family relationship centres in Australia" 2013 *Family Court Review* 195 200; Moloney, Qu, Hand *et al* "Mandatory dispute resolution and the 2006 family law reforms: use, outcomes, links to other pathways, and the impact of family violence" 2010 *Journal of Family Studies* 192 193; Kaspiew, Gray, Weston *et al* "Evaluation of the 2006 family law reforms: Summary Report" 1 http://dro.deakin.edu.au/eserv/DU:30029431/klettke-evaluationsummary-2009.pdf (7-10-2016) and Lewis "Issues in FDR: casting shadows by compulsion and agreement (or, am I strong enough?)" 2007/2008 *Alternative Dispute Resolution Bulletin* 1.

adversarial system,[111] and Boniface, who opines that the provisions of the Children's Act 38 of 2005, in particular sections 60(3) and 69 to 72, could be used for the introduction of family relationship centres in South Africa.[112]

6 *Family relationship centres in Australia*

6.1 Background

Australia's history regarding separation and divorce, more specifically the discontent with the adversarial process, the movement to implement alternatives to the adversarial process and the availability of a variety of structures or services to deal with family disputes, has significant parallels to the South African experience with separation and divorce, as highlighted in the sections above. As a result of discontent with the adversarial system of litigation in adversarial matters, alternative dispute resolution processes, most notably mediation, have emerged in Australia as alternatives to lawyer-led negotiation and adjudication.[113] Mediation has long been strongly encouraged, but in terms of the 2006 reforms family dispute resolution, which is basically mediation,[114] has to be attempted first before matters involving children can be filed in the family courts.[115] The rationale for mandating family dispute resolution in children's matters included the documented experience in Australia and other countries of low voluntary uptake of mediation in divorce and other family disputes and research findings indicating that mandated mediation was effective in resolving disputes involving children and other family matters.[116] Despite the fact that there are grounds for exemption under which people may be exempted from family dispute resolution,[117] the intention is to ensure that, unless there is a good reason, disputes over children should be mediated and kept out of the courts.[118] In addition, a family court also has the power to make an order that

[111] Robinson (n 11) 332.

[112] Boniface "Family mediation in South Africa: developments and recommendations" 2015 *THRHR* 397 405. I am, however, not convinced that the above-mentioned sections of Act 38 of 2005 could or should be used to create similar centres in South Africa.

[113] Kelly "Getting it right for families in Australia: commentary on the April 2013 special issue on family relationship centres" 2013 *Family Court Review* 278 279.

[114] S 10F of the Family Law Act 1975 describes family dispute resolution as a process (other than a judicial process) in which an independent 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. It has further been described as "a form" of mediation: Parkinson (n 110) 205.

[115] s 60I(1) and (7) of the Family Law Act 1975. See also Kelly (n 113) 282; Parkinson (n 110) 205; Moloney "From helping court to community-based services: the 30-year evolution of Australia's family relationship centres" 2013 *Family Court Review* 214 215; Pidgeon "From policy to implementation − how family relationship centres became a reality" 2013 *Family Court Review* 224 231; Moloney, Qu, Hand *et al* (n 110) 193 and Kaspiew, Gray, Weston *et al* (n 110) 2. See further Lewis (n 110) 1, who states that "the new FDR [family dispute resolution] and the new FRCs [family relationship centres] may be said to be the twin planks of the new family law system [in Australia]".

[116] Kelly (n 113) 282.

[117] In terms of s 60I(9) of the Family Law Act 1975, mandated family dispute resolution does not apply to cases where all parties consent to the order sought; where there has been child abuse or family violence or a risk of such abuse or violence; where the application is being brought for contravention of an order that is less than 12 months old and the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; where the application is made in circumstances of urgency; or where one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason). See also Lewis (n 110) 6.

[118] Pidgeon (n 115) 231.

the parties to the proceedings attend family dispute resolution at any stage in other proceedings.[119] If a party fails to comply with such an order, the court may make any further orders it considers appropriate.[120]

The 2006 reforms further included the creation of a legislative framework for less adversarial trials in parenting cases.[121] In terms of the newly inserted division 12A of part VII of the Family Law Act of 1975, entitled "Principles for Conducting Child-related Proceedings",[122] courts are now required to conduct proceedings in a manner which draws upon the idea of the "less adversarial trial",[123] a highly significant departure from the traditional adversarial trial. In terms of this division, there are five principles for conducting child-related proceedings,[124] namely:

(a) the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings;
(b) the court is actively to direct, control and manage the conduct of the proceedings;[125]
(c) the proceedings are to be conducted in a way that will safeguard, first, the child concerned from being subjected to, or exposed to, abuse, neglect or family violence, and secondly, the parties to the proceedings against family violence;
(d) the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties; and
(e) the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Other legislative changes which formed part of the 2006 reforms concerned a greater emphasis on the need to protect children from exposure to family violence and child abuse,[126] and an increased emphasis on the need for both parents to be involved in their children's lives after separation, through a range of provisions, including the introduction of a presumption in favour of equal shared parental responsibility.[127]

The centrepiece of the 2006 family law reforms in Australia was, however, the establishment and funding of a network of community-based family relationship centres by the Australian government.[128] They were designed to bring about a cultural change or paradigm shift in the way people set about resolving family disputes, especially children's issues, and to replace the court system or a lawyer's office as

[119] s 13C(1)(*b*) of the Family Law Act 1975. The family court had this power even before mandatory mediation in parenting matters was introduced with the 2006 family law reforms.
[120] s 13D(1) and (2) of the Family Law Act 1975.
[121] Parkinson (n 110) 200; Moloney (n 115) 220 and Kaspiew, Gray, Weston *et al* (n 110) 2 and 19.
[122] For a summary of this part of the legislation, see Family Court of Australia "Less adversarial trial handbook" 25-41 https://goo.gl/yUUzUe (1-10-2016).
[123] Parkinson (n 110) 200 and Moloney (n 115) 220.
[124] s 69ZN of the Family Law Act 1975.
[125] Pidgeon (n 115) 220 notes that courts are now empowered to engage in a considerably more proactive approach to case management.
[126] s 60B(1)(*b*) and 60CC(2)(*b*) of the Family Law Act 1975. See also Kaspiew, Gray, Weston *et al* (n 110) 2 and 13-14.
[127] s 60B(1)(*a*), 60CC(2)(*a*) and 61DA of the Family Law Act 1975. See also Parkinson (n 110) 199; Kaspiew, Gray, Weston *et al* (n 110) 2 and Berry, Stoyles and Donovan "Postseparation parenting education in a family relationship centre: a pilot study exploring the impact on perceived parent-child relationship and acrimony" 2010 *Journal of Family Studies* 224 225.
[128] Kelly (n 113) 284; Parkinson (n 110) 195 (Abstract); Pidgeon (n 115) 225 and Kaspiew, Gray, Weston *et al* (n 110) 2.

the first port of call for divorcing and separating families.[129] It is felt that separating and divorcing families, along with the impact on the parties' mental health, the children involved, the workplace, the court system and the future of society, are the communities' responsibility, and not that of the legal system alone.[130] In particular, disputes about parenting after separation should not be regarded as merely a legal problem requiring the intervention of lawyers and courts for its resolution.[131] Therefore, to adopt a community-centric rather than a court-centric approach and to recognise and support the different pathways to the resolution of family disputes, a total of 65 family relationship centres were established in the communities by the Australian government over a period of three years from 2006.[132]

6.2 Services rendered by centres

Although it is not compulsory to use the family relationship centres,[133] these centres serve as an information hub and an entry point or gateway to the wider service system for families in distress.[134] Intact families, separating families or separated families may approach the family relationship centres.[135] They do not need to have a case in court to access the centres − "interested people can simply walk in the door".[136] Specific provision is also made for grandparents and other extended family members affected by a family separation, and for couples about to be married, to approach the centres.[137]

At the centres family members will obtain information and education, be screened, assessed and referred to other appropriate services, and, if suitable, undergo mediation.[138]

Upon intake people usually first have an individual session with a family adviser to receive information about relationship breakdown and separation, sources of help and options available given their specific circumstances.[139] If the matter concerns children, the adviser will explain that, unless exempted or unsuitable, mediation (family dispute resolution) will be required.[140] In such cases, most family relationship centres mandate attendance of group parent education sessions of two to three hours by each parent separately before they can proceed down the

[129] Schepard and Emery "The Australian family relationship centres and the future of services for separating and divorcing families" 2013 *Family Court Review* 179 181; Kelly (n 113) 282; Parkinson (n 110) 197 and 208; Moloney (n 115) 214; Moloney, Qu, Weston *et al* "Evaluating the work of Australia's family relationship centres: evidence from the first 5 years" 2013 *Family Court Review* 234 and Robinson (n 11) 338-339.

[130] Schepard and Emery (n 129) 180-181. See also Robinson (n 11) 340.

[131] Parkinson (n 110) 196 and Robinson (n 11) 340.

[132] Schepard and Emery (n 129) 181; Parkinson (n 110) 211 and Pidgeon (n 115) 227. Fifteen family relationship centres commenced operation in 2006, 25 in 2007 and 25 in 2008. The attorney-general's department and the department of families and community services shared the responsibility for the establishment of the new centres.

[133] Pidgeon (n 115) 231.

[134] Kelly (n 113) 281; Parkinson (n 110) 197, 201 and 203-204 and Pidgeon (n 115) 227.

[135] Parkinson (n 110) 201-202; Moloney (n 115) 214 and Robinson (n 11) 346-347. Note further Moloney, Qu, Weston *et al* (n 129) 236-237 and 243, who point out that most family relationship centres' direct services are, however, aimed at separating families.

[136] Schepard and Emery (n 129) 181.

[137] Parkinson (n 110) 201-202. At 196 he observes that family relationship centres offer a way of addressing grandparents' desire to remain involved in their grandchildren's lives when involvement has become problematic as a consequence of parental separation.

[138] Kelly (n 113) 282; Parkinson (n 110) 195; Moloney (n 115) 214 and Pidgeon (n 115) 225 and 227.

[139] Kelly (n 113) 282; Parkinson (n 110) 202; Pidgeon (n 115) 225 and Robinson (n 11) 351.

[140] Kelly (n 113) 282 and Parkinson (n 110) 202-203.

mediation track.[141] During such group sessions information is provided to parents on matters that include the value of parenting plans and cooperation; the developmental and psychological needs of children; the negative effect of children's exposure to parental conflict; the issue of children's participation in decision-making about arrangements; the value and limitations of shared parenting; available sources to help with family violence and child abuse; and the pitfalls of litigation as an option for dealing with disputes concerning children.[142]

At these group sessions legal information as opposed to legal advice is provided.[143] Other group sessions such as talks by lawyers on the family law system, or information about child support, may also be available.[144] All these information and education sessions at the family relationship centres are provided at no cost to the parties.[145]

At the initial individual session the family adviser will simultaneously begin the ongoing processes of screening the parties for any signs of family violence and assessing whether the matter is suitable for mediation.[146] As the family relationship centres are not one-stop shops, the parties will then be referred to an appropriate and accessible service for assistance.[147] Such services include the range of counselling, mediation and other specialist services[148] funded by the government as well as private mediation practices and other agencies in the community.[149] People could even be referred to a telephone mediation service.[150] The important point is that family members will be assisted in choosing the most appropriate pathway for resolving their disputes.[151] It appears, however, that the family relationship centres have also become the primary providers of mediation (or family dispute resolution) in Australia.[152] At the centres the first joint one-hour mediation session is provided free of charge by well-qualified and accredited mediators and the second and third sessions are charged at a heavily subsidised rate, unless the clients earn less than a certain amount, in which case these sessions are also provided free of charge.[153] If further joint sessions are required, they are charged in accordance with each centre's fees policy.[154] As the division of property and child support are intrinsically linked to issues concerning children's care and contact, financial issues may also be discussed

141 Kelly (n 113) 282 and Parkinson (n 110) 203.
142 Kelly (n 113) 282 and 283 and Parkinson (n 110) 201 and 203-204.
143 Parkinson (n 110) 201.
144 Parkinson (n 110) 204.
145 Schepard and Emery (n 129) 181.
146 Kelly (n 113) 282; Parkinson (n 110) 203 and Robinson (n 11) 351. In terms of reg 25 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 assessment of suitability for mediation is mandatory.
147 Kelly (n 113) 281; Parkinson (n 110) 196 and Pidgeon (n 115) 225-226.
148 This might include services to address more specific problems such as gambling, alcohol addiction, financial problems, or anger management.
149 Kelly (n 113) 282; Parkinson (n 110) 196 and Pidgeon (n 115) 226.
150 Pidgeon (n 115) 228.
151 Parkinson (n 110) 197.
152 Kelly (n 113) 282; Parkinson (n 110) 205; Moloney (n 115) 215 and Kaspiew, Gray, Weston *et al* (n 110) 2. It appears that approximately two-thirds of family dispute resolution or mediation in Australia takes place at the family relationship centres: Moloney, Qu, Weston *et al* (n 129) 238 and 243.
153 Parkinson (n 110) 196 and 204. See also Family Relationships Online "More information about family relationship centres" http://www.familyrelationships.gov.au/Services/FRC/Pages/MoreFRCInformation1.aspx (15-09-2016).
154 Family Relationships Online (n 153).

in mediation at the centres.[155] However, the primary focus of the mediation offered at the centres is on resolving parenting arrangements.[156]

6.3 Government's role in the running of centres

Non-profit organisations experienced in counselling and mediation compete to operate the family relationship centres through an onerous, renewable application process based on criteria established by the government.[157] Government funding has been made available for the once-off establishment costs and the annual running costs of the centres.[158] The government has also rolled out an ongoing public education campaign to market the services of the centres through press and magazine advertisements and articles, posters in shopping centres and on buses, and information leaflets in fifteen languages at the centres, doctors' consultation rooms, after-school care services and community health centres.[159] At the time when the centres were established, the government also set up a national telephone service[160] and website[161] to provide information on family relationship issues and assist people in locating local services, including the nearest family relationship centre.[162] To ensure that the family relationship centres are accessible they are located close to public transport centres and in high-visibility shopping malls in all the major cities and regional areas.[163] To ensure high standards of quality the government has not only provided establishment training for staff of the family relationship centres as they opened each year, but has also developed specific policies, practices and procedures for handling cases involving family violence[164] and offered specific training on issues such as screening for violence.[165] In addition, the government has funded the development of national competency standards[166] and developed a national training and accreditation process for all family dispute resolution practitioners, including those in private practice.[167] Lastly, to measure what difference the 2006 family law reforms have made, the government commissioned an evaluation of and longitudinal research study on the reforms, of which the establishment of the family relationship centres formed a very important part.[168]

[155] Parkinson (n 110) 204 and Robinson (n 11) 352-353.
[156] Parkinson (n 110) 204 and Robinson (n 11) 353. The centres will not provide mediation in matters that involve only property issues, but will refer such cases to other community-based or private mediators.
[157] Schepard and Emery (n 129) 181 and Pidgeon (n 115) 228.
[158] Pidgeon (n 115) 228 and Kaspiew, Gray, Weston *et al* (n 110) 1 and 2.
[159] Schepard and Emery (n 129) 181; Kelly (n 113) 281; Parkinson (n 110) 202 and Pidgeon (n 115) 228-229 and 230.
[160] the Family Relationship Advice Line.
[161] Family Relationships Online http://www.familyrelationships.gov.au (15-08-2016).
[162] Parkinson (n 110) 195 and Pidgeon (n 115) 228.
[163] Schepard and Emery (n 129) 181 and Parkinson (n 110) 195.
[164] The attorney-general's department commissioned the Institute of Child Protection Studies in Canberra to develop a screening and assessment tool to be used as a minimum standard by family relationship centres: Kelly (n 113) 282 and Parkinson (n 110) 206.
[165] Pidgeon (n 115) 229-230.
[166] This was developed by the national community services and health industry skills council.
[167] Parkinson (n 110) 210 and Pidgeon (n 115) 231. See also reg 5-6 and 14 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008.
[168] Pidgeon (n 115) 231-232. The Australian Institute of Family Studies was commissioned to undertake the evaluation and research.

6.4 Benefits of centres

Early evaluation of the family relationship centres has produced encouraging results.[169] It appears that in the first five years since the establishment of the centres there has been a 32% reduction in applications to the family courts in parenting cases and a concomitant decline in the use of lawyers for parenting disputes.[170] Simultaneously, the number of parents using the centres' services has increased steadily, as has the public use of mediation and counselling services.[171] It further appears that the parent education sessions at the family relationship centres have had the beneficial effect of improving parent-child relationships and contributing to better outcomes for children upon family separation.[172] In particular, contact between children and their non-resident parent, usually the father, increased after attendance of the parent education and mediation sessions at the centres, and the majority of parents who attended such sessions have indicated that their children's needs were taken into account in the process.[173]

In addition, since the family relationship centres play an important frontline role as points of first disclosure of family violence from which victims are referred to appropriate services, they assist Australian society in addressing the tension between party autonomy in family dispute resolution and family violence.[174] In the first three years following the establishment of the centres, the use of specialist domestic violence services almost doubled, indicating a greater awareness of the availability of these services.[175]

Another important benefit of the family relationship centres is that they seem to reach more people. It is pointed out that the centres offer a means of assisting the large body of people who cannot realistically afford private lawyers but who also do not qualify for legal aid and are not able to represent themselves in litigation.[176] Therefore, many people who might otherwise not have had access to the legal system or education and mediation services now receive them from the family relationship centres.[177]

It is further clear that the centres "also seem to be a good investment of comparatively limited public funds" as "[s]ettlement of parental disputes through their processes costs significantly less than settlement through processes involving more professionals or through the family courts".[178] Their establishment has therefore also resulted in a reduction in cost to the government.[179]

Last but not least, the family relationship centres provide families with an early, non-adversarial, community-based intervention and a new process where the family court is not the first pathway for settling family disputes, but is available as the backup resort.[180]

[169] Schepard and Emery (n 129) 181.
[170] Schepard and Emery (n 129) 181; Kelly (n 113) 283; Parkinson (n 110) 208 and Moloney (n 115) 220.
[171] Schepard and Emery (n 129) 181 and Kelly (n 113) 283.
[172] Berry, Stoyles and Donovan (n 127) 230 and 232-233 and Parkinson (n 110) 204.
[173] Kelly (n 113) 283; Parkinson (n 110) 208 and 211 and Moloney, Qu, Weston *et al* (n 129) 242-244.
[174] Schepard and Emery (n 129) 182 and Parkinson (n 110) 210.
[175] Parkinson (n 110) 210.
[176] Parkinson (n 110) 208.
[177] Schepard and Emery (n 129) 182. See also Kelly (n 113) 283.
[178] Schepard and Emery (n 129) 181.
[179] Kelly (n 113) 283 and Parkinson (n 110) 208.
[180] Kelly (n 113) 278 and 281.

6.5 Lessons to be learnt from the Australian experience

There are indeed important lessons to be learnt from the 2006 Australian reforms, in particular from the establishment of family relationship centres, where most mandatory mediation in parenting matters occurs. First, it appears that good decisions can be arrived at in family disputes without resorting to litigation.[181] Most families who attended family dispute resolution either at the family relationship centres (or elsewhere) reached agreement about their parenting arrangements and reported that they were satisfied with the agreements and that the agreements took care of their children's needs.[182] Secondly, it transpires that the family relationship centres provide family members with a gateway to the whole family law system by helping them to choose the most appropriate pathway to resolve their disputes.[183] Thirdly, the Australian experience proves that community-based mediation services which are not located in or nearby the court complex have succeeded in bringing about a cultural shift in the way people set about resolving family disputes.[184] Furthermore, it appears that although the Australian law allows parents to bypass the mediation requirement on the basis of family violence, a sizable percentage of families who reported physical and/or emotional abuse prior to or during the separation period elected to proceed to mediation at the family relationship centres.[185] While debate will no doubt continue on the appropriateness of mediation in cases where there is any history of family violence, it does appear that the family relationship centres have been playing an important protective role in relation to these cases whether or not mediation occurs.[186] Where mediation has taken place in any case, safety arrangements and procedures have been implemented to protect the parties and staff.[187]

The South African law reform commission would do well to consider this new integrated family law system in which families find the advice and resources they need in the community to settle what is primarily a relationship rather than a legal problem.[188] It is indeed important to note that the family relationship centres have had the effect of reframing parental conflicts arising from divorce and separation from a legal problem with relationship conflicts to a community public health problem with legal elements.[189]

[181] Moloney (n 115) 221.
[182] Moloney, Qu, Weston *et al* (n 129) 242-244.
[183] Kelly (n 113) 284.
[184] Parkinson (n 110) 196-197 and Kaspiew, Gray, Weston *et al* (n 110) 21, 25 and 26. It has been found that most people who attempt community-based mediation have sorted out their arrangements and most have not seen lawyers or used the court as their primary dispute resolution pathway.
[185] Kelly (n 113) 283 and Parkinson (n 110) 209.
[186] Parkinson (n 110) 210.
[187] Kelly (n 113) 282. See also Pidgeon (n 115) 230, who reports that effective policies and practices for handling cases involving violence were developed for the centres. She indicates that these started with the approval of premises, where separate waiting areas were to be provided to ensure that clients could wait for appointments without seeing an ex-partner and a safe, alternative exit was required to enable a client to leave the premises safely without being seen by an ex-partner who may be "staking out" the main entrance. It also appears that duress alarms were installed for the safety of clients and staff at the centres.
[188] Kelly (n 113) 278 and 281.
[189] Schepard and Emery (n 129) 180.

7 *Conclusion and recommendations*

It may well be that the existing community-based advice centres in South Africa referred to above could successfully be expanded to become centres which provide the needed intake procedure to a fully integrated South African family law system. These centres have, however, been established on too small a scale and are seriously hampered by a lack of funds and human resources.[190] Another option might be to build upon past attempts in terms of which two people's family law centres were established in 2002 and 2013 in Cape Town and Johannesburg respectively in an endeavour to find a holistic solution which incorporates all the diverse aspects of South African family law.[191] The intention was that these centres would offer much of what is currently offered by Australia's family relationship centres. It is stated that the generic flow of service provision at these two centres, which were supposed to be run by appropriately qualified paralegals,[192] consisted of screening or problem identification; video adult education; reinforcement of adult education and route selection (either the traditional legal route or alternative dispute resolution); information extraction and document generation; formalisation, filing and the provision of take-home information booklets; and telephonic support.[193] However, not much came of these efforts, probably because the people's family law centres were also established on too small a scale in only two major cities of South Africa and not in the communities across the country.

Boniface, who opines that there is a need for a gradual phasing in of family mediation centres in South Africa, proposes that such centres could be established at existing structures such as universities and legal aid clinics.[194] It is undoubtedly a good idea to use existing structures, but in a country like South Africa, where the law has been out of the reach of the majority of the population for years, the proposed intake centres should be readily available and accessible in the communities to all South Africans. It is further argued in this regard that the intake centres should not be attached to the courts since if they are situated in or near the court complex, the message conveyed will be that legal practitioners and the courts, and not the community, are still at the centre of the process of determining family separation and other parenting disputes.[195]

In the light of the Australian example, which reframed parental conflicts arising from divorce and separation from a legal problem with relationship conflicts to a public health problem with legal elements, a more viable and effective option in my opinion would be to transform the network of primary healthcare clinics into fully fledged family health and relationship centres which also cater for families in distress. Since 1994 more than 1600 clinics have been built or upgraded and there

[190] De Jong (n 15) 42.
[191] SALRC (n 1) par 4.9.47-4.9.48.
[192] SALRC (n 1) par 4.9.49.
[193] SALRC (n 1) par 4.9.52.
[194] See Boniface (n 112) 405 and 406. See further above where it is indicated that Legal Aid SA has 64 justice centres and 64 satellite offices spread throughout the country.
[195] Parkinson (n 110) 196 and Robinson (n 11) 338-339. See also Lewis (n 110) 1 who refers to the quantum leap of making mediation compulsory *away* from the court system in parenting matters.

are currently 4200 health facilities in South Africa.[196] The locations of the clinics were decided on by communities through their community representatives.[197] These clinics already serve as the first line of access for people needing healthcare services. The majority of people involved in family disputes, especially those who have children, would already have been in contact with the primary healthcare clinic in their community. It is therefore my opinion that these clinics should be expanded so that they also serve as the first line of access or gateway to the wider service system for people involved in family disputes.

As the clinics are already available countrywide, transforming them into family health and relationship centres would be a relatively cheap option for the government. As regards staffing of the family relationship sector of the clinics, it is my belief that the state should seriously consider the suggestion that, like health sciences graduates, newly qualified law graduates should be required to do community service for one or even two years.[198] This suggestion was in fact put forward in the 1997 *Hoexter Commission Report* and is not really revolutionary.[199] After an extensive and intensive training programme, preferably by Justice College,[200] which has the infrastructure and expertise to develop and provide such training programmes, these law graduates could then work in the primary health and relationship clinics as family advisers.[201]

At the clinics people would first receive information and education and from there they would be referred to the appropriate service or services, which would not necessarily include the official courts, but rather the chiefs' courts, community structures and private mediators, arbitrators, parenting coordinators or collaborative practitioners. All these services should form part of a coherent procedural family law system in South Africa.

The family advisers could also be saddled with the task of assisting the government in identifying all the relevant structures and services which deal with dispute resolution in the communities. Specifically in this regard and to ensure certain minimum standards of human rights for all South Africans who are involved

[196] Jobson "Structure of the health system in South Africa" 3 http://www.khulumani.net/active-citizens/item/download/225_30267364dfc1416597dcad919c37ac71.html (26-08-2016). Access to primary healthcare services for all South Africans, measured in terms of visits per annum, increased from 67 021 961 million in 1998 to 128 984 040 by the end of March 2013: National Department of Health "Twenty year review − Background Paper: Health" 17 http://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Review%20Documents/20YR%20Health.pdf (26-08-2016).

[197] information obtained from the present deputy director general of primary health care, Hunter, of the national department of health. She also pointed out that in line with the *White Paper for the Transformation of the Health System in South Africa*, notice 667 (1997) http://www.gov.za/sites/www.gov.za/files/17910_gen667_0.pdf (27-08-2016) the department of health strives to have a clinic within a 5 km radius of all populated areas.

[198] Community services by health professionals (including medicine, clinical psychology, dietetics, environmental health, occupational health, physiotherapy, radiography and speech, language and hearing therapy) were instituted in 1998. The main objective of community service is to improve access to quality health care to all South Africans, more especially in previously under-served areas: SA Government "Health on community service by health professionals" http://www.gov.za/health-community-service-health-professionals (26-08-2016).

[199] SA Law Commission *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* RP200 (1997) vol I part 2 par 9.15.

[200] Justice College is a state academy which is located within the department of justice and correctional services. Its central focus is on offering a high-quality, relevant expanded programme that has been instituted to contribute to the department of justice and correctional services' vision and strategic objectives: Justice College "About us" http://www.justice.gov.za/juscol/index.html (27-08-2016).

[201] Service at these clinics for an uninterrupted period of a year should then surely qualify as approved community service in terms of s 29 of the new Legal Practice Act 28 of 2014.

in family disputes, there is a serious need to formally recognise the informal dispute-resolution procedures offered by traditional and community structures and to integrate them into the official family law system.[202] As private mediators, parenting coordinators and collaborative practitioners make a unique contribution to the resolution of family disputes in South Africa, their services also need to be nationally regulated and incorporated into the official family law system.[203]

In matters which could not be resolved by the more consensual processes and have to proceed to litigation, the family advocate should still be responsible for assisting the court in safeguarding the best interests of children in matters where they are involved. It is well known that the family advocate is particularly well suited to performing the function of identifying and establishing what is in the best interests of children and it is important that this expertise of the family advocate does not go to waste in the coherent procedural family law system in South Africa.[204]

To answer several of the specific questions raised in the Issue Paper about the various alternative dispute-resolution processes, it is further my opinion that, as in countries like Australia[205] and Canada,[206] all these aspects should be codified and regulated in a separate and new Family Dispute Resolution Act, which would spearhead a family law system that provides relationship-focused interventions away from the courts as the default option for most family disputes. In view of the special nature of family disputes, the special policy considerations that need to be applied, such as the best interests of children and the values of equality and non-discrimination, and the need for a less adversarial trial process, family dispute resolution does not belong in a general alternative dispute-resolution act.

Lastly, it is important to note that the creation of family health and relationship centres should not be regarded as the alpha and omega for all problems experienced with the current South African family law system. The introduction of family relationship centres in Australia went hand in hand with the implementation of legislative reforms which mandate mediation (family dispute resolution) in most parenting cases, place increased emphasis on the need for both parents to be involved in their children's lives after separation, and create a framework for less adversarial trials in parenting cases.[207] Although these aspects fall outside the scope of this article and are merely referred to in passing, they are definitely areas that need to be properly investigated when the introduction of family health and relationship centres in South Africa is considered. Nonetheless, the establishment of family health and relationship centres is surely a very important first step in the process of creating an accessible, acceptable, coordinated and integrated family law system for all South Africans as envisaged by the South African law reform commission's Issue Paper.[208] They might just be what the Issue Paper had in mind when it stated that

[202] De Jong (n 15) 41-42.
[203] De Jong (n 15) 43.
[204] De Jong (n 15) 45.
[205] See the Family Law Act 1975 and the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 issued under the act.
[206] See the Family Law Act 2011 and the Family Law Act Regulation (BC Reg 347/2012) issued under the act.
[207] Kaspiew, Gray, Weston *et al* (n 110) 2 and Parkinson (n 110) 200.
[208] SALRC (n 1) par 4.5.1 states that effective government is largely dependent on a respected legal system – one that is acceptable and accessible to the community at large.

"[a] solution may be for the State to create an avenue for the administration of justice within communities which will present the community with opportunities, thereby empowering it to participate in the shaping of its justice system"[209]

and

"[t]he therapeutic justice process should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums within one unified system where the family can resolve problems without additional emotional trauma".[210]

SAMEVATTING

AUSTRALIË SE GESINSVERHOUDINGSENTRUMS: 'N MOONTLIKE OPLOSSING TOT 'N TOEGANGLIKE EN GEÏNTEGREERDE FAMILIEREGSTELSEL SOOS IN DIE VOORUITSIG GESTEL DEUR DIE SUID-AFRIKAANSE REGSHERVORMINGSKOMMISSIE?

In die eerste gedeelte van hierdie artikel word sekere probleme met die akkusatoriese stelsel van litigasie in gesinsaangeleenthede soos na verwys deur die Suid-Afrikaanse Regshervormingskommissie in Vraagstukvrystelling (*Issue Paper*) 31 van 2015 ondersoek. Verder word verwys na die verskeie alternatiewe dispuutbeslegtingsprosesse soos erken deur die vraagstukvrystelling. Hierdie prosesse het op 'n ongestruktureerde en sporadiese wyse ontwikkel en weinig spesifieke voorsiening vir die alternatiewe dispuutbeslegtingsprosesse word gemaak in ons familieregstelsel. Daar word ook gekyk na die verskeie strukture wat nodig is om met gesinsdispuutbeslegting te handel. Hier word uitgewys dat daar 'n verskeidenheid beskikbare strukture of dienste is vir families met gesinsdispute en dat sommige van die algemeen gebruikte strukture of dienste nie as deel van die amptelike familieregstelsel beskou word nie. Die slotsom is gevolglik dat Suid-Afrika nie daarin geslaag het om 'n omvattende familieregstelsel daar te stel nie.

Daarna word die ontwikkeling van 'n samehangende familieregstelsel ondersoek met spesifieke fokus op die wyse waarin die instelling van gesinsverhoudingsentrums bygedra het tot die daarstelling van 'n meer toeganklike en geïntegreerde familieregstelsel in Australië. Laastens, na aanleiding van die Australiese voorbeeld wat ouerlike dispute wat voortspruit uit egskeiding en gesinsverbrokkeling herformuleer het as 'n openbare gesondheidsprobleem met regselemente eerder as 'n regsprobleem met verhoudingsdispute, word voorgestel dat die netwerk van primêre gesondheidsorgklinieke in Suid-Afrika omskep moet word in volwaardige gesinsorg- en verhoudingsentrums wat ook voorsiening maak vir families met gesinsdispute. By die klinieke behoort mense eerstens inligting en opvoeding te verkry en vandaar na die gepaste diens of dienste verwys te word wat nie noodwendig die amptelike howe insluit nie, maar eerder die howe van stamkapteins, gemeenskapstrukture en privaat mediators, arbiters, ouerskapskoördineerders en samewerkingspraktisyns. Al hierdie dienste behoort deel te vorm van 'n samehangende prosedurele familieregstelsel in Suid-Afrika.

[209] SALRC (n 1) par 4.5.10.
[210] SALRC (n 1) par 4.9.79.