The confidentiality of consensual dispute resolution processes, such as mediation and counselling, has long been considered one of the defining features of dispute resolution and to be essential to its effectiveness. This chapter will briefly explore those claims and assert that there is little, if any, empirical evidence to support them. Indeed the Family Consultants Confidentiality Survey 2012, the results of which will be presented and discussed in this chapter, suggest quite to the contrary.

While many of the points made here can apply to consensual dispute resolution processes generally, the context here is primarily family law under the Family Law Act 1975 (Cth). As the focus of this chapter is consensual family dispute resolution, the two statutory concepts of family dispute resolution (or mediation) and family counselling will be treated in the same way (despite their obvious and important differences in other contexts). For practical purposes, the terms “mediation” and “family dispute resolution” will be used interchangeably. The Act also distinguishes between confidentiality and admissibility, two very different concepts. Here, the authors will use the more generic term, “confidentiality”, conscious that this chapter may have a non-legal audience, but also desiring to elevate the discussion to a theoretical and policy level without distancing too far from practice.

The present discussion about confidentiality of consensual dispute resolution processes takes place in a particular context. The 2012 amendments to the Act, commonly known as the family violence amendments, are the result of much research (e.g., Chisholm, 2009; Family Law Council, 2009; Kaspiew et al., 2009). The family law system in Australia continues to struggle with managing and responding to allegations of family violence. One of the important findings of the research was about the critical importance of sharing information about families with other people and institutions within the family law system who are working with that family. Indeed, this chapter will contend that

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existing confidentiality rules and practices act as an artificial barrier to the sharing of that information, particularly about violence and abuse, and that this is contrary to the interests of families, and the best interests of children.

A particular perspective of the authors is, unsurprisingly, judicial decision-making. If family law litigation is properly understood as being what it really is—a process rather than an event—there are particular problems caused for decision-makers early in the process as a result of artificial confidentiality rules. Some of the most important decisions about families are made very early in the litigation process at an event, or series of events, often described as an interim hearing. The context of these interim hearings is often one of urgency; of risk to a child or a parent; of highly conflicted, hastily prepared, irrelevant and often inconclusive evidence; and of highly partisan, subjective, uncorroborated assertions. This chapter contends that confidentiality rules impede better decision-making at a critical time in the lives of parents and children. Ironically it’s not that better information to inform risk assessment does not exist—rather it is not made available to the court in a timely and efficient manner.

No research is perfect or conclusive. The Family Consultants Confidentiality Survey 2012 has obvious limitations, foremost of which is that it is not a survey of those who participate in family dispute resolution, but rather of those who deliver it in a particular context. But in the kingdom of the blind, the one-eyed man is king. This is not an area where there is much, if any, empirical research. The authors call for more research on the topic of confidentiality and urgently call for a reconsideration of the existing dogma that seems to pervade professional and even academic writings and practice about confidentiality in family dispute resolution.

Benefits of and reservations about confidentiality
Most of the literature on confidentiality focuses primarily if not exclusively on mediation. Very briefly, in the large amount of mediation literature reviewed for the purposes of this chapter, there was almost universal consensus about the benefits of confidentiality. Brown (1991), after reviewing the literature, concluded that it “reveals an almost universal agreement that confidentiality is necessary to the survival of mediation” (p. 308). More recently an Australian author, Harman (2012), asserted: “It has long been accepted that confidentiality is inherently important to mediation” (p. 179). Charlton (2000), also from Australia, stated that confidentiality in mediation has taken the status of “an almost holy untouchable tenet” (p. 15).

There is much less literature that expresses reservations about confidentiality in consensual dispute resolution processes. Nevertheless, some of it could be described as being quite strident. Reich (2001) called for “intellectual honesty” in discussions on the topic. In articulating a strong argument against statutory mediation privilege, he said that such a privilege “substitutes convenience for intellectual honesty” (p. 198), that “there is no empirical support” for the creation of such a privilege, and that there is “no demonstrable utilitarian societal justification” for such a privilege (p. 199). He plainly called the orthodox view about confidentiality dogma, was highly critical of the limited debate that has taken place on the topic, and warned about the dangers of adopting “the everybody knows its important standard” (p. 207) because of its subjectivity. Reich’s concern about the creation of mediation privilege was that it was “nothing more or less
than privilege to suppress the truth” (p. 203). Using analogous empirical research drawn from psychotherapist-patient privilege research, attorney-client confidentiality and privilege research, and therapeutic communication confidentiality and privilege research, he contended that none of the orthodox policy assertions in support of mediation’s need for confidentiality are justified.

The authors of the present chapter have sought balance in articulating the arguments for and against mediation confidentiality. It seems to us, however, that the absence of any empirical research justifying the benefits of confidentiality makes the claim problematic. A utilitarian argument for mediation confidentiality cannot be made on available empirical evidence. Indeed, the survey data presented below tend to confirm this, notwithstanding its limitations.

Even the autonomy argument for mediation confidentiality—that participants should be able to decide how their information is used—is problematic. The autonomy argument is related to a fundamental tenet of mediation; that is, it is a process that empowers the parties to take control of and resolve their own dispute (Pardy & Pou, 2011). What makes these justifications for mediation confidentiality so problematic, indeed quite ironic, is that participants in family dispute resolution in Australia are rarely, if ever, consulted about whether they would like confidentiality, and if so to what extent. Confidentiality is presented to them as an integral party of the process they are participating in. To not include the participants in mediation in discussions about the nature and scope of confidentiality is hardly fostering their autonomy or empowerment in relation to the resolution of their dispute.

What does the empirical research say?

Briefly, the main finding about empirical research in relation to mediation confidentiality is that none could be found. There is, however, research on other analogous and thus informative contexts.

Reich (2001) referred to research in a number of different contexts. He cited research conducted by Shuman and Weiner (1987) that found no support for the contention that in therapeutic contexts patient disclosure is facilitated by confidentiality. For example, they found that patients’ willingness to disclose information to their psychotherapist was not in any significant way influenced by no mention of privilege, mention of privilege, or statements of no privilege. Reich concluded in this regard:

The premise that mediation needs confidentiality implicitly holds that the existence of confidentiality is important to parties contemplating or using mediation and that confidentiality causes parties to reveal information they would not reveal in the absence of confidentiality. These enormous and fundamental assumptions are not supported by the previous empirical evaluation in psychotherapist-patient research. (p. 216)

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4 This statement is based on Dr Altobelli’s personal communications with scores of family dispute resolution practitioners at many seminars and conferences throughout NSW. Indeed Dr Altobelli’s observation is that most family dispute resolution practitioners were surprised if not confronted by the idea of asking participants in mediation whether they wanted the confidentiality so zealously ascribed to their process.

5 Reich discussed these findings in more detail at pp. 213–216. His footnotes contain references to further research on confidentiality in the therapeutic context, all of which are broadly consistent with the Shuman and Weiner research.
Reich (2001) then considered attorney-client confidentiality and privilege. A 1962 study published in *Yale Law Journal*, “Functional Overlay Between the Lawyer and Other Professionals”, indicated that a substantial majority of lay persons would continue to use lawyers even if secrecy were limited. Thus, Reich submitted:

at least in terms of fostering client disclosure of information, the Yale study certainly challenges the assumption that the attorney-client relationship needs privilege protection. If the attorney–client relationship does not need privilege to foster client disclosure … it follows that mediation may not need privilege to foster disclosures either. (p. 217)

In 1989, Zacharias published the results of the Tomkins County Study on Confidentiality and found that clients said they wanted a firm obligation of confidentiality but one was seldom offered, and thus clients were either not disclosing to lawyers because no confidentiality was promised, or disclosing even without the firm commitment of confidentiality that they wanted. While the value of confidentiality presupposes that people will reveal information if they believe that such disclosures are protected, the reality is that people do not act in accordance with that principle. Thus, for example, 11% of the respondents admitted that they did not disclose information to their attorneys even when there was a privilege, and almost 80% of those clients knew that there was a privilege. Reich (2001) thus suggested that, assuming that mediation party beliefs are similar to the attitudes shown in the Tomkins County study, it is likely that mediation parties would also withhold information even if a privilege existed. From the present authors' perspective, the fact that 11% admitted non-disclosure in a privileged context is a sobering reminder that truth is not guaranteed in any context, formal or informal, adversarial or non-adversarial, therapeutic or legal. The only real truth is that sometimes the parties we work with do not tell us the truth.

**Confidentiality in family dispute resolution in Australia**

The Family Consultants Confidentiality Survey 2012 needs to be considered in the statutory context of Part II of the *Family Law Act*, even though family consultants operate under Part III of the Act.

Family counselling is defined in s 10B and family dispute resolution in s 10F of the Act. Both are described as a process in which help is provided to people. With family counselling the help relates to personal and interpersonal issues, including issues relating to children. With family dispute resolution the practitioner's role is to help people resolve some or all of their dispute. There are obvious parallels to mediation. Both in theory and in practice, the present authors contend that these two processes are not mutually exclusive except in the strict legal sense. In reality, experience indicates that, for example, family counselling also helps people to resolve some or all of their dispute, and family dispute resolution helps people to deal with their personal and interpersonal issues,

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6 “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.”

7 “Family dispute resolution is 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.”
Has confidentiality in family dispute resolution reached its use-by date?

Families, policy and the law

including issues relating to children. One process might use a therapeutic approach, and the other a facilitative approach, and in reality both approaches might be used in both processes some of the time. Both are voluntary consensual processes in the sense that whether attendance is mandated or not, there is no compulsion to resolve or agree. The qualifications and accreditation requirements of those who provide family counselling and family dispute resolution are quite different (see s 10C and s 10G respectively).

Contrast at this point the functions of family consultants, which are set out in s 11A of the Act. Their role is diverse and arguably embodies elements of the roles of both family counsellors and dispute resolution practitioners, but with the specific additional role of assisting, advising and reporting to the court. The definition of a family consultant is also quite specific and distinct from family counsellors and family dispute resolution practitioners.

Confidentiality of communications in family counselling is governed by s 10D, and of family dispute resolution by s 10H. These two sections are not identical, but are very similar. Chisholm (2011) described these provisions as the “statutory non-disclosure rule”. In other words, these two sections require family counsellors and family dispute resolution practitioners not to disclose certain things said to them.

The other important provisions in this regard are sections 10E and 10J dealing with the admissibility of communications made in both processes. Chisholm (2009) described these as the “statutory inadmissibility rule”, the effect of which is that evidence cannot be given of what people say in the course of the process, and is to be distinguished from the ordinary rule of evidence law, excluding evidence of settlement negotiations.

By contrast, but only since 2006, the admissibility dynamic with family consultants is totally different. Section 11C provides that “anything said, or any admissions made by or in the company of a family consultant” is admissible in proceedings under the Act, provided that the person has been informed of the effect of this, and even then not when the admission relates to a child at risk.

There are some significant differences and inconsistencies within and between sections 10D, 10E, 10H and 10J that need to be explored. The authors submit that some of these inconsistencies are illogical and demonstrate, for example, the complexity permeating any discussion of confidentiality that is not adequately dealt with in the Act.

Family consultants and confidentiality

Section 11A of the Act sets out their functions and s 11B provides a definition (see footnotes 8 and 9). They are employed internally by the family law courts.

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8 “The functions of family consultants are to provide services in relation to proceedings under this Act, including: (a) assisting and advising people involved in the proceedings; and (b) assisting and advising courts, and giving evidence, in relation to the proceedings; and (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and (d) reporting to the court under sections 55A and 62G; and (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.”

9 “A family consultant is a person who is: (a) appointed as a family consultant under section 38N; or (b) appointed as a family consultant in relation to the Federal Circuit Court of Australia under the Federal Circuit Court of Australia Act 1999; or (c) appointed as a family consultant under the regulations; or (d) appointed under a law of a State as a family consultant in relation to a Family Court of that State.”

10 The inconsistencies referred to, and the consequences thereof, are discussed in other, fuller versions of the present chapter.

11 “Family law courts” is the generic term used to describe the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, who between them are
family consultants have a degree in social work or psychology and a minimum of five years’ experience working with children and families. As previously indicated, all communications with family consultants, and referrals from family consultants for medical or other professional consultation, are admissible (s11C). In other words, all communications are not confidential and procedures are in place to ensure that clients understand this before the family consultant becomes involved.

In the present context, where the focus is on the early stages of the litigation process, the most common form of intervention by a family consultant is through a court-ordered appointment under s11F of the Act. These are known as s11F conferences and may involve parents, children and other persons concerned about the welfare of children. The conference is usually a form of early intervention but can in fact occur at any time in the proceedings. A conference is often ordered immediately following an application—sometimes at the first court event, but even earlier in some cases as a result of an order made in chambers. From the family consultants’ perspective, the conference is regarded as a preliminary assessment and screening opportunity (Karen Gabriel, senior family consultant, personal communication, 3 June 2012), and are child-focused and might involve parents only or children as well. From a judicial perspective, the memorandum produced at the end of a conference provides useful information about issues, admissions and recommended interventions that is then taken into account, together with all the other evidence, in making interim orders as well as case management. Often the memorandum is in writing, but the information may also be conveyed orally.

The Family Consultants Confidentiality Survey
The stage has been set so that this research may be presented and discussed. The electronic Family Consultants Confidentiality Survey 2012 was emailed to all 94 family consultants in Australia on 27 March 2012.

Summary of results
A total of 49 (52%) family consultants responded to the questionnaire nationally. Of these, 21 (49%) had commenced work as a family consultant prior to the 2006 Family Law Act amendments (when their work with families had been confidential).

The survey found that among the respondents:
- 94% reported that parents “never” or “rarely” expressed concerns about the lack of confidentiality in s11F conferences;
- 80% reported that children “rarely” or “sometimes” expressed concerns about the lack of confidentiality in s11F conferences;

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12 "Court may order parties to attend, or arrange for child to attend, appointments with a family consultant. (1) A court exercising jurisdiction in proceedings under this Act may make either or both of the following kinds of order: (a) an order directing one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant; (b) an order directing one or more parties to the proceedings to arrange for a child to attend an appointment (or a series of appointments) with a family consultant. Note: Before exercising this power, the court must consider seeking the advice of a family consultant about the services appropriate to the parties’ needs (see section 11E). (2) When making an order under subsection (1), the court must inform the parties of the effect of section 11G (consequences of failure to comply with order). (3) The court may make orders under this section: (a) on its own initiative; or (b) on the application of: (i) a party to the proceedings; or (ii) a lawyer independently representing a child’s interests under an order made under section 68L.”
• 94% thought there were benefits in relation to the lack of confidentiality in s11F conferences, including:
  – the ability to provide information to the court early in the process, particularly in relation to risk factors;
  – the transparency of the process;
  – the ability for the family consultants to exchange information between parties; and
  – the family consultant role being more professional;
• 55% thought there were drawbacks in relation to the lack of confidentiality in s11F conferences, including:
  – concerns about potential negative repercussions for children and other family members;
  – potential lack of openness of parents; and
  – reduced negotiability of matters;
• 61% thought there were benefits in confidential conferences within the court setting, including:
  – the greater negotiability of matters; and
  – fewer potential negative repercussions for children and family members;
• 57% thought there would be benefits to community-based family dispute resolution being admissible, primarily related to:
  – the early provision of information to the court, particularly in relation to risk factors;
  – avoiding duplication, particularly in interviewing children;
  – a greater transparency in the FDR process; and
  – better collaboration across the family law sector;
• 77% thought there would be drawbacks to community-based family dispute resolution being admissible, primarily in relation to:
  – the loss of a confidential space for families to resolve issues;
  – the need for extensive training/education in relation to assessment, report-writing and cross-examination for FDR practitioners; and
  – a potential for parents to withhold information.

Confidentiality before and after the 2006 reforms

In the present context, only one aspect of these data will be explored in further depth: the reports of those family consultants who experienced the change from confidential to non-confidential conferences, before and after the 2006 reforms.

As previously indicated, the 2006 amendments to the Act brought about many changes, one of the most significant of which was changing the role of the court-employed family consultants so that all of their work was non-confidential. Bearing in mind that about half of the respondents to the survey had commenced work as a family consultant prior to 2006, this group was well placed to comment on their experiences about a fundamentally different way of practising.

Of the family consultants who had been working in family law courts prior to the 2006 amendments, 57% (n=12) expressed that they had had some concerns prior to the implementation of the amendments. These concerns were primarily that parents and children would not talk openly and therefore risk factors may not be reported, and that the family consultant role would become restricted. Of those family consultants who had had concerns, two-thirds (n=8) did not find their concerns justified. The other
third ($n = 4$) expressed concerns about the shift in their role from dispute resolution to assessment and reporting to the court, or that parties withheld information.

In answer to the question: “Did you have concerns about the legislative changes in relation to the loss of confidentiality prior to implementation?”, 19% (4) said “yes”, 38% (8) responded “somewhat”, 38% (8) said “no”, and 5% (1) did not answer. All 12 respondents who answered “yes” or “somewhat” detailed their concerns, which have been summarised in themes in Table 1.

<table>
<thead>
<tr>
<th>Themes</th>
<th>Number of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties and children would not speak openly/would create environment not conducive to dispute resolution</td>
<td>6</td>
</tr>
<tr>
<td>Would restrict the role of the family consultant or lead to change of role</td>
<td>2</td>
</tr>
<tr>
<td>Potential for family violence/other risk factors to be under-reported</td>
<td>2</td>
</tr>
<tr>
<td>General anxiety about change</td>
<td>1</td>
</tr>
<tr>
<td>Lawyers may advise parents not to disclose certain information</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: There may have been more than one theme per answer.

The respondents’ comments about their pre-2006 concerns include:

- That parties might be more circumspect in the information they provide and in how prepared they might be to join in open discussion and negotiation. There was a concern that lawyers might advise their clients to say nothing so as not to prejudice their cases.
- That the counselling process would be focused on evidence gathering and not attempting to assist the parties to resolve their conflict. Feminist theory predicted that this would cause [domestic violence] victims to under-report violence.

Participants were then asked: “Did your experience justify your concerns?” One-third (4) responded “yes” and the remaining two-thirds (8) said “no”. Two of the respondents who said their concerns had been justified said that there has been a significant shift from dispute resolution to providing information to the court:

- The current process focuses on gathering evidence (he said/she said) rather than assisting the parties to resolve their dispute. Counsellors’ work is now preoccupied with writing reports and gathering statistics instead of working with clients.

Another consultant felt that information had been withheld in some matters:

- I’ve had examples where a lack of confidentiality has been a hindrance, as some information had been deliberately withheld during discussion with clients.

On the other hand, among those who said their concerns had *not* been borne out, five provided further comments, including:
My concerns proved to be quite wrong, and irrelevant. Immediate experience was, and has remained, that the issue is irrelevant to clients. To some the whole concept appears to be irrelevant. Many others appear to me to accept and welcome the assess-and-advice role.

My anecdotal experience has been the opposite. Victims are typically only too willing to discuss the violent behaviour of their former partners, in the knowledge this information will be available to the ultimate decision-maker.

In 2006 I thought there would be drawbacks, but I haven’t become aware of any yet.

Discussion

Family consultants are well-placed observers of the role and importance of confidentiality in family law consensual dispute resolution processes. They provide a key service for those families who need to transition into the family law system. Indeed, sometimes they are the entry point into the family law courts and the first person the family meets, and at other times it is the first key event in the litigation process where someone sits down with them personally, in a private setting, to discuss their case for any reasonable measure of time.

Those family consultants who practised before 2006 in a confidential context are in a unique position to comment on the role and importance of confidentiality. While the authors call for more research, and better research that involves surveying participants in both confidential and non-confidential contexts (randomised if possible), the present study provides a good window through which to discuss confidentiality.

The vast majority of respondents (94%) reported that parents either never or rarely express concerns about the lack of confidentiality of s 11F conferences. Unlike some of the research discussed earlier in this chapter, where there was some uncertainty about the level of awareness of clients in relation to confidentiality, there is no room for doubt here. Before an s 11F intervention commences it is made clear to the participants that the process is not confidential. Participants must therefore be deemed to know that what they say can be both recorded and reported and made available to the judicial officer dealing with their case. This is paradoxical and counter-intuitive. Why make admissions about, for example, family violence, drug and alcohol issues, and mental health issues, when these will be recorded and reported? One can understand why allegations and denials would be made, but why admissions? A reasonable inference is that confidentiality is not valued by the participants in s 11F conferences.

Most of the participants in an s11F conference would have previously participated in some other form of intervention, including family counselling or family dispute resolution. The latter is more likely because of the effect of s 60I(7)–(9). In most cases an application could not have been made to a family law court without attempting family dispute resolution, though exceptions apply, as defined in s 60I(9). What is not known, of course, is whether those who made admissions in s11F conferences also made admissions in those other pre-filing processes, which are confidential. The ideal research on this topic would be not just randomised, but longitudinal as well—in effect

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13 When the s11F conference occurs before the first court date.
14 All of these admissions often appear in the memoranda received following s11F conferences that both authors have read.
tracking families as they move through the family law system, especially as they move from confidential to non-confidential arenas. While the authors concede there is an element of speculation in this statement, nonetheless it is reasonable to infer that those making admissions in non-confidential s11F conferences are likely to also make those admissions in confidential pre-filing processes. Research questions abound: If they did make those admissions, how were those admissions dealt with? If they did not make those admissions, why not?

The orthodox view about confidentiality reflected in practice would suggest that disclosure is more likely in a confidential setting, rather than in a non-confidential one. The family consultants in this survey reported a high level of indifference about confidentiality. The authors' practical experiences are that admissions are routinely made in s11F conferences. All of this casts doubts about the orthodox view. Of course it could be argued that participants' seeming indifference to confidentiality is because the s11F conference is a court-based reportable meeting. The inference is that in a confidential non-court-based setting their behaviour is different. It only takes a moments' reflection to dismiss this argument as unlikely. At its core is an assertion that participants are more frank and open in a non-confidential process than they are in a confidential one. That is not the orthodox view. These survey findings cannot lightly be dismissed because of the court context.

The seeming indifference about confidentiality by participants in s11F conferences challenges orthodox thinking about confidentiality. Moreover, if the participants in s11F conferences do not value confidentiality, and if this finding can be generalised to apply to consensual dispute resolution processes generally, then it is legitimate to ask whose interests are served by confidentiality rules? It does not seem to be the interests of the participants. If that is the case, then how is participant self-empowerment—a key philosophical basis of consensual dispute resolution processes—manifested when those participants are not even consulted about whether they want confidentiality, and if so to what extent and in which contexts?

Bearing in mind that the family consultants report parties as expressing concerns about lack of confidentiality either rarely (39%) or sometimes (6%), the concerns expressed are nonetheless significant. When concerns are expressed they seem to focus on detrimental or adverse repercussions for other persons, including children and themselves. This is entirely understandable. One hopes that being in court provides parties with the opportunity to seek protective orders. Thus, for example, it is not unusual in the authors' experience that following an s11F report, orders are made, usually by consent, that parties not denigrate each other, or discuss the proceedings with or in the presence of the children. Often an Independent Children's Lawyer is appointed, pursuant to s68L of the Act. Injunctions for the personal protection of children and parents are also sometimes made. Thus, while recognising the validity of concerns expressed, disclosure becomes an opportunity to frame orders that assist, restrict and protect when needed. The truism remains that if participants in the family law system do not articulate the existence of issues in respect of which they need help, no help can be given.

There is a significant difference in family consultants' experience of children expressing concerns about lack of confidentiality in s11F conferences compared to their parents. A significant proportion of the s11F conferences are child-inclusive. Children then become active participants, subject to their developmental capacity to be so. Children are reported to express concerns sometimes or regularly by nearly 41% of family consultants. They seem overwhelmingly concerned about the repercussions of family disputes on children,
and to other family members. Clearly children’s needs and interests about confidentiality are different to those of their parents. A much smaller majority could be described as being indifferent about confidentiality. The significant minority cannot be ignored. In formulating confidentiality rules, the interests and needs of children may well need to receive different treatment compared to their parents. From the children’s perspectives, the role of protective and restrictive orders that are raised as a result of s11F conferences (as discussed above) is doubly important.

An overwhelming majority of family consultants (94%) believed there are benefits to having a lack of confidentiality. Bear in mind that about half of these consultants had previously worked in a confidential environment and are therefore ideally, indeed uniquely, placed to make these observations. The reasons given emphasise the benefits of early intervention, risk assessment, transparency of process and information flow.

**Conclusion**

Family consultants have experienced significant changes since 2006, with communications at family dispute conferences no longer being confidential. A recent survey of family consultants, many of whom have practised in both confidential and non-confidential settings, canvassed them about their experience, perceptions and understandings in relation to confidentiality, and the results suggest that confidentiality in family dispute resolution may have reached its use-by date.

At the very least the findings represent a call for more research about confidentiality in consensual family dispute resolution processes. It is also a call for greater rigour and intellectual honesty when discussing this issue. A robust and open discussion needs to take place between the stakeholders in confidentiality, freed from the shackles of mantras and dogmas. The various participants in the family law system have diverse interests in relation to confidentiality. When the question is formulated from the child’s perspective and the perspective of victims of violence and abuse: “Do existing confidentiality rules serve their interest?”, the authors submit the answer is no. If that is correct, then whose interests are served by confidentiality rules?

**References**


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