To what extent does the law encourage cooperation to resolve conflict in families

The notion of ‘cooperation’, either referring to disputing parties reaching consensus, or an offender’s compliance with the law, is particularly valuable, since it results in the greater efficacy of the legal system in achieving just outcomes for all stakeholders. While in the past the process of resolving conflict in families has typically involved the Family Court issuing definitive orders outlining the legal obligations of the parties involved, there is now a greater emphasis on encouraging cooperation between family members by discussing these matters among themselves, thereby improving the likelihood of cooperation. As mentioned previously, cooperation may also refer to an offender’s compliance with police orders. By examining the law’s response to areas like the Care and Protection of Children, Dispute Resolution Methods, Domestic Violence and Surrogacy, it can be ascertained that the law is moderately effective in encouraging cooperation to resolve conflict and achieve just outcomes for families, but requires further reform.

Due to society’s view that children are vulnerable members of the community and require greater protection, the law places a significant emphasis on encouraging cooperation between parents to fulfil their responsibilities during situations of conflict like separation and divorce. This need for cooperation between parents aims to uphold “the best interests of the child”, in alignment with the Convention on the Rights of the Child (1989). The introduction of mandatory Family Dispute Resolution (FDR) prior to lodging a court application, under the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) enables the law to promote such cooperation through family discussion in a non-threatening atmosphere. The establishment of 65 Family Relationship Centres (FRC) to facilitate FDR exemplifies the responsiveness of the law in providing an accessible and resource efficient means for families to attempt to resolve conflict through mutual agreement and access to counselling services, thereby achieving cooperation with each other and the law itself. The child’s right to maintain meaningful relationships with both parents is a significant element of the Act, aiming to ensure their emotional wellbeing is accounted for. Thus, the “Friendly Parent Provision” attempts to enforce this and encourage cooperation between parties by looking unfavourably upon a parent who undermines their child’s relationship with the other parent. While the Act’s “Vexatious Complaint Provision” also demonstrates the law’s inclination to encourage cooperation in situations of divorce by awarding costs against parents who made false allegations about the other, for instance, domestic violence, the subsequent removal of the Provision highlighted its ineffectiveness as women who found it difficult to prove acts of violence by their husbands often did not report abuse at all. Nonetheless, legislation concerning the care and protection of children demonstrates the law has been mostly effective in encouraging cooperation during situations of divorce and separation.
The increasing popular practice of Collaborative Law as an alternative dispute resolution method signifies the legal system’s interest and effectiveness in encouraging cooperation between family members to resolve divorce and separation related conflicts. Unlike the “risky and expensive undertaking” of Family Court proceedings, as outlined in the ABC program “Finding Fault”, where emotional anguish often escalates the conflict and results in bitter post-divorce relationships, Collaborative Law encourages cooperation between parties by enabling them to take responsibility for their own issues and attempt to arrive at mutual resolutions. According to the ABC Network’s “Collaborate Law” Law Report (2009), the lawyers’ responsibility “to shift the thinking of their clients away from a ‘winner takes all’ approach and towards one that’s aimed at maintain post-divorce relationships”, enables the law to encourage cooperation by focusing on resolving the dispute at hand, without the threat of needing to attend court. Further, this process is particularly effective at encouraging cooperation, since an independent financial consultant and child development specialist is appointed to ensure both sides are aware of the nature of their financial situation and what is considered best for the child, both of which can sometimes be lost among the emotion of traditional litigation. The ‘Parent Plan and Financial Agreement’ written by lawyers at the conclusion of Collaborative Law is registered with the court, thereby encouraging prospects of cooperation with what has been agreed upon, minimizing the likelihood of exacerbating the conflict or the need to attend court. Thus Collaborate Law is an effective, resource efficient means of encouraging parties to a dispute to arrive at a consensus on matters such as finance, property and children, thus encouraging cooperation in the resolution of conflict.

Conflict in families also encompasses domestic violence, and while the law may strive to encourage an offender’s cooperation with an apprehended domestic violence order (ADVO) under the Crimes (Domestic and Personal Violence) Act 2007, the challenges associated with enforcing ADVOs renders the law only moderately effective in ensuring such cooperation. The most commonly used legal tool against domestic violence, ADVOs are imposed by the local court, with the aim of protecting the applicant by restricting the behavior of the defendant for a specified period of time. The law attempts to encourage an offender’s cooperation with ADVOs by rendering any breach a criminal offence, and through penalties such as a hefty $5500 fine and/or imprisonment. Despite this intention of ensuring compliance, such consequences are mostly ineffective at deterring persistent offenders, raising concerns about the enforceability of ADVOs. The Sydney Morning Herald Article “Husband charged with 100 domestic violence-related offences” (2015) exemplifies deficiencies in the law’s ability to encourage cooperation with ADVOs and thereby protect the victim. The husband reportedly contravened the ADVO 19 times, subjecting the woman to 100 cases of violence over 18 years, yet the court’s reactionary response by laying criminal charges was deemed “too late”. These sentiments are echoed by a Canberra Times article (2016) highlighting how an interim ADVO was breached by Marcus Rappel who also murdered who girlfriend the next day, coupled with the Four Corners documentary “Matter
of Life and Death” stating “ADVOs are not worth the paper they are written on as they can be breached”. While it is argued that the contravention of ADVOs will inevitably occur, these articles question the extent to which the law is able to effectively ensure cooperation is achieved, and minimize the likelihood of breaches that endanger the lives of victims. Accounting for this, it is to only a small extent that the law is successful in encouraging cooperation to resolve conflict stemming from domestic violence.

Family conflict is not limited to situations of divorce or domestic violence, since the area of surrogacy is fraught with moral and legal conflicts between the surrogate mother and commissioning parents, with regards to parentage of the baby and International Commercial Surrogacy (ICS) arrangements. The absence of relevant legislation in these areas renders the law mostly stagnant in encouraging cooperation between these parties. The inability of the Surrogacy Act (2010) to enforce non-formal contractual surrogacy agreements increases the possibility of conflict between the surrogate mother and commissioning parents, since there is no fixed legal obligation for the surrogate mother to relinquish the baby. While such a situation is considered unlikely, the lack of provision to deal with the risk of commissioning parents not receiving their child in the Act highlights that the law has not prioritized the need for moral and legal cooperation between parties, and is therefore largely ineffective in resolving potential conflict in this facet of family law. Further, the prohibition of ICS arrangements under the Act signifies the minimal extent to which the law attempts to encourage and facilitate cooperation between Australian commissioning parents and overseas surrogates embroiled in “murky and corrupt legal system(s)” offshore, according to The Guardian article “Baby plans in limbo” (2016). Major legal disputes in the case of Baby Gammy (2014) over the Australian parents’ refusal to accept Gammy, and the Thai surrogate mother’s vulnerability to financial exploitation from loan sharks as a result demonstrate that further need for law reform in clarifying obligations and rights, and hence engender cooperation. This paramount should the legal system be considered particularly effective in resolving conflicts in surrogacy arrangements.

Regardless of which specific issues they encompass, it is evident that all areas of family law will benefit greatly from increased cooperation between family members during times of conflict, in order to achieve just outcomes for all parties. Such cooperation can be realized through mutual agreements concerning care of children and division of financial assets, compliance with ADVOs, and understanding obligations and rights in surrogacy arrangements. While the law has some successful mechanisms in place to encourage such cooperation particularly in the area of divorce, issues concerning the enforceability of these means or the absence of such law renders the legal system only effective to a moderate extent in doing so.