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Committee Secretary
House of Representatives Standing Committee
On Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Re: National Legal Aid (NLA) response to request for further information

Background

On the 31st October 2014, NLA was contacted by the Parliamentary Inquiry into the Child Support Program seeking further information in relation to:

- *how mediation at the initial stages of a child support process could be implemented, and*
- *on the relative merits of using family law mediators or other professionally accredited mediators in child support matters.*

About NLA and legal aid commission business

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia.

We confirm that commissions operate family law practices including the provision of legal services in relation to child support and family dispute resolution (mediation in family law matters). Commissions engage both in-house and external family dispute resolution practitioners experienced in family law and legal practitioners with a detailed understanding of child support.

Response to request for information – relevant matters

For the purposes of our response we have set out our understanding and experience of mediation processes below, as we believe that they are relevant to any consideration of the questions raised by the Committee.

- **Length of time taken to commence the mediation process**

- Referral to a Family Relationship Centre, legal aid family dispute resolution, community mediation service or private mediation service.

It is noted that there are significant delays associated with participating in mediation. Some of these are inherent in the mediation process, and others are related to limited resources in the sector. This is an important consideration relevant to meeting the needs of children in the post separation period in a timely manner.

- Contacting the other party.

If the address of the other party is known or can be ascertained, an invitation is extended to the other party to attend mediation.

- Intake interview and screening process.

If the invitation is accepted an intake interview is conducted with each party to screen their suitability to attend mediation. For example, screening can identify issues of family violence, mental health problems and substance abuse in order to determine whether it would be appropriate to mediate in the particular circumstances of the case.

- Scheduling a joint session.

Mediation would be scheduled at a time that would suit both parties and the mediator.

- Failure to engage the other party.

If the other party could not be found or refused to engage with the process, the mediation would not proceed. An alternative mechanism to progress the issue would need to be identified¹.

- Waiting periods for existing family law mediations.

We are aware that there are significant waiting times for many mediation services across the country, commonly in the order of at least a couple of months. If mediation were to be required in all matters it would be expected that waiting times would increase dramatically.

- **Volume of Child Support Cases**

Because of the large numbers of cases involved, and the need for a cost effective and timely mechanism to provide financial support for children whose parents are not together, we do not think that it is feasible, in the first instance, to replace the current system of applying to the Department for a child support assessment with mediation.

We note the following statistics from the *2008/09 Child Support Facts and Figures* report which reported that there were 827,761 child support cases, involving more than 1.5 million parents and providing for 1,153,151 children. In 2008/09 the number of child support cases was increasing by approximately 1300 per month. At these rates, it would not be possible to commence each case by way of mediation.

¹ For example, the certification process in family law matters, allowing parties to proceed to make a court application.

As indicated in our original submission (p. 5), the child support formula provides a generally effective, reasonably flexible and consistent way of ensuring children continue to receive the financial support from both parents following separation. As the initial assessments made by the Department are also accepted by many people it would not seem cost effective to refer all applications for mediation.

- **Appropriate referrals and screening for family violence and other issues**

A highly developed process would be required in order to identify the matters that could be appropriately referred to mediation by the Department.

A further screening process would need to be conducted by the mediation service in order to identify family violence issues, including patterns of financial control and manipulation, as well as mental health issues and substance abuse, which may render a case inappropriate for mediation. While the existence of these issues may not render mediation impossible, it may indicate a need for specialist intervention such as lawyer assisted mediation.

- **Compliance with the legislation**

To the extent that it is proposed that mediation take place before an assessment is made by the Department, there are also practical concerns about the fairness and workability of any agreements reached through the mediation process.

In the case of Limited Agreements, there is a legislative requirement that there is a current child support assessment in place at the time the agreement is made.

In making an assessment of child support, the Department utilises information from the Australian Taxation Office and Centrelink. A formula assessment can provide a starting point in relation to a person's financial position.

Although a Binding Child Support Agreement can be executed without first having an assessment in place, it would not be recommended to do so without obtaining further information or full financial disclosure. To execute a Binding Agreement the legislation appropriately requires each party to have obtained particular independent legal advice and a certificate to that effect must be annexed to the Binding Agreement.

An understanding of the relationship between child support payments and Centrelink entitlements is another complex area that would be essential in the context of mediation.

- **Training and accreditation of specialist mediators**

As mentioned above, the law relating to child support agreements and the interaction between child support and Family Tax Benefit is complex, and there is a risk that people may agree to arrangements that either cannot be implemented or that lead to adverse outcomes. To avoid these outcomes, the mediator would need access to expertise and/or training in child support and family assistance legislation, and the parents/carers would also each need access to information and legal advice. For this reason also, we are of the view that

mediation should not be used as an initiating process, but rather as a means of addressing some disputes arising from an assessment.

Relevant matters in the initial stage of a child support case

- **Maintenance Action Test**

It is recognised that Centrelink requires any parent, who receives more than the base rate of Family Tax Benefit Part A for a child, to obtain a child support assessment within 13 weeks of either the date of birth of the child or the date of separation. The child support assessment influences the rate of payment of FTB (A). This requirement is premised on the principle that parents should be primarily responsible for providing financial support for children, and that social security payments are a secondary resource. The purpose of the Maintenance Action Test is to protect public funds, and it is presumed that this principle will still apply in child support matters.

The current application process allows a child support assessment to be created in most cases within the time frame allowed by Centrelink. If the process to commence a case was done by way of mediation, these time frames could not be met without a vast increase in resources available to mediation services.

In the period of emotional turmoil following separation, many parents appreciate access to an independent administrative process to determine the rate of child support payments. For many parents the formula assessment reduces the potential for conflict by providing an automatic calculation of the payments.

- **Proof of parentage**

Proving parentage is a threshold issue in commencing a child support case. There is a clear non-negotiable requirement that only parents can be assessed in respect of the costs of a child. It is a factual issue that can be resolved with DNA parentage testing. This can be done by the parties themselves, or legal assistance can be sought to provide negotiation and funding for DNA testing, if needed. We do not consider this is an appropriate issue to be determined at mediation.

- **Care arrangements**

Parents are required to provide information about the care arrangements for children at the time an application for child support is made. Disputes about how much time is spent with each parent are already dealt with in mediation services. These issues are determined with the best interests of the children as the guiding principle, and while an understanding of the child support scheme should be encouraged, bargaining for time in order to achieve a financial benefit should not displace the 'best interest' principle.

Changes in care arrangements that result in changes to the child support assessment and/or FTB (A) entitlement have been the subject of many representations to the Parliamentary Inquiry. It is a difficult area, and one which, subject to appropriate screening of individual cases, would be appropriate to refer to mediation.

We make the following observations;

- a) care arrangements must be made by reference to the best interests of the children and not to achieve a perceived financial benefit, and
- b) care arrangements should not be manipulated unilaterally by either party in response to child support related issues, such as non-payment or under-payment of child support.

Mediators would need to be highly skilled to maintain the focus on reaching an agreement that was in the best interests of a child.

- **Collection and enforcement of child support payments**

The parent who is to receive child support can ask the Department to collect the payment of child support. Parties should be aware of the impacts of their decision, either to ask the Department to collect the liability or to have a private collection arrangement, on their entitlement to FTB (A). In private collection arrangements FTB (A) is paid on the assumption that the parent is receiving the full rate of child support payments. If collection is made by the Department, FTB (A) can be paid in accordance with what is actually being received, not what ought to be received. Decisions regarding collection can have impacts if retrospective changes to the assessment are made at a future date. We do not consider this is a topic that would be appropriate for mediation. In our experience private collect arrangements are often seen in cases where there is family violence.

Matters subsequent to the creation of a child support assessment

- **Early intervention services**

There may be a role in some cases for developing early intervention specialist mediation and family dispute resolution services to assist those clients who are identified as having child support difficulties before those problems become entrenched. Commissions have expertise in both child support law and family dispute resolution and, with appropriate funding, would be well placed to provide input in this area.

Assistance for child support customers could include providing education to parents about the scheme, advising parents about the flexibility of utilizing existing remedies available under the child support legislation and exploring the opportunities to enter a child support agreement. All of these could be addressed within mediation if appropriately skilled mediators were available and clients were able to obtain specialised legal advice.

- **Changes to the child support assessment**

Child support assessments are usually created in an automated way by using the previous year's taxable income for each parent, as well as information provided by the parties. Information about taxable incomes is obtained from the ATO. This is a quicker and cheaper option than parties being referred to mediation.

Where an assessment created in this way results in an incorrect rate of child support, remedies are available to parties to change the assessment. If a recent taxable income is not

available, or where it does not accurately reflect the income of either parent, or where there are special circumstances to be taken into account, there are a variety of remedies available to the parents to change the assessment.

Some of the changes may be more suited to mediation than others. For example, ongoing disputes about care arrangements, or the payment of private education costs, special needs costs, extracurricular expenses and their relationship to the assessed rate of child support payments may be topics that could be successfully explored at mediation.

Other issues, such as determining a parent's income and financial resources in cases where the parent is self-employed or there are complex financial arrangements, especially where there are disputed financial circumstances, would be less suited to mediation. Disputes of this kind would be better suited to the Change of Assessment model already in place, where information can be obtained in a timely manner if it is not provided voluntarily, and the Senior Case Officers (SCOs) of the Department also have some investigative powers, such that representations by a party about their resources can at least be confirmed or investigated to some extent. We would suggest that there are significant numbers of people who, were it not for the change of assessment process and the investigative powers of the SCO, would not be making appropriate contributions to the support of their child/ren. Such circumstances generally reflect the sort of family violence dynamic that can make mediation, and particularly non-legally assisted mediation, inappropriate.

Potentially suitable cases could be referred to a mediation service with qualified family dispute resolution practitioners, provided the parties are appropriately screened as part of the intake process. Those involved in the referral pathway would need to be well trained so as to avoid significant numbers of inappropriate referrals (by reason of physical and economic family violence issues, substance abuse, mental health issues etc). Inappropriate referrals often result in frustration and upset to those referred, have the potential to increase the risk to those people who are experiencing family violence, and generally cause delay and the waste of resources.

- **Resources**

A significant injection of resources would be required to deal with existing cases that were identified as having difficulties that were suited to being referred to mediation.

Concerns which require further consideration

1. We do not think that child support cases should commence by way of mediation. Child Support legislation requires parents to provide financial support for their children. Many parents are also required to obtain child support by Centrelink in order to obtain their full entitlement to FTB (A). Because of the time taken to set up mediation and the possibility that a party will refuse to engage in the process, we believe that it is not an appropriate start-up mechanism to use to commence a child support case.

The sheer volume of new child support cases is another reason that we do not believe that mediation is the appropriate frontline method to use to establish a child support case. A case is currently created by an online, written or telephone application. The cost of diverting all of these applications to a mediation service is apprehended by us to be unaffordable and unsupportable using current services.

2. While some child support matters could be appropriately addressed in mediation, we do not believe that there is currently a sufficient number of mediators with adequate knowledge of the child support scheme, family law and related laws to enable clients to reach outcomes that are consistent with the child support legislation, including;

- i) Drafting child support agreements. In our experience, agreements reached at mediation are often not sustainable because of a lack of knowledge of the child support legislation and its interaction with family assistance. In our submission we cited an example of a couple reaching an agreement at mediation that was not registrable when one of the parties applied for a Centrelink benefit (see case study 4 at p.10).
- ii) Understanding the enforceability of periodic and non-periodic payments of child support.
- iii) Understanding the relationship between child support payments and payments of FTB(A).
- iv) Understanding the impact of collection arrangements in family violence cases and the effect on FTB (A).

3. Delays inherent in;

- a) waiting times to attend a mediation service, and
- b) time taken to;
 - i) request engagement from the other party,
 - ii) conduct intake sessions, and
 - iii) arrange a joint session

c) providing alternative arrangements when one party fails to engage, or mediation is screened out.

4. The absence of any powers to obtain information about the parties' incomes and financial resources, where that is not provided voluntarily (these are powers that are appropriately placed with roles such as that of the SCO in the Change of Assessment process).

5. A client base that has a low level of understanding of the child support scheme.

6. A high level of family violence in the cohort that seek change to the legislatively prescribed level of child support.

7. Complexity of the interaction between child support, family assistance payments and taxable incomes.

8. In family law matters a party who cannot resolve an issue at family dispute resolution (mediation) because mediation is deemed to be inappropriate (because of family violence, mental health issues or substance abuse issues); or the other party cannot be found, failed or

refused to attend or did not make a genuine effort to resolve the matter, has access to a court to determine the issue. A mechanism to resolve child support issues in these circumstances would need to be developed.

Notwithstanding these difficulties, we recognise that mediation could be a useful tool in resolving certain child support (and related) disputes. Parties would require access to legal advice and accurate information. Commissions have staff who specialise in child support law. Commissions have also developed a successful FDR Conferencing model which deal with the most difficult family law children's cases using a lawyer assisted model of mediation. Commissions have, for many years, used this FDR model in helping parties achieve settlement in the most difficult of family law matters involving children and in resolving Adult Child Maintenance matters.

Relative merits of using family law mediators or other professionally accredited mediators in child support matters.

While family law mediators would have many of the necessary skills to deal with conflict in the family law area, they would need a very specific additional skill set in order to conduct child support mediations.

Family dispute resolution practitioners are required to register with the Commonwealth Attorney-General's Department and have undertaken training in relation to mediation in family law and family violence. If an increased use of mediation is to be contemplated in child support matters we would strongly recommend the development of a specific qualification and accreditation for those practitioners willing to undertake child support mediation work.

Commissions would be well placed to conduct an appropriately funded trial of the efficacy of early intervention mediation services in child support matters. Child support lawyers could provide training for mediators, as well as have a role either as mediators, legal advisers, client representatives or as a child support expert consultant.

Conclusion

We thank you for the opportunity to provide these further comments. Please do not hesitate to contact us if you have any questions or wish us to expand on any aspect of our comments.

Yours sincerely

George Turnbull
Chair