

**SUBMISSIONS FROM AUSTRALIAN INSTITUTE OF FAMILY LAW
ARBITRATORS AND MEDIATORS (AIFLAM) TO THE JOINT SELECT
COMMITTEE ON
AUSTRALIA'S FAMILY LAW SYSTEM**

20 DECEMBER 2019

AIFLAM's members are family law practitioners qualified in the areas of family dispute resolution, mediation and arbitration.

Pursuant to Regulation 67B of the Family Law Regulations 1984, AIFLAM is responsible for maintaining the list of family law arbitrators in Australia.

AIFLAM also maintains a list of National Mediator Accreditation System (NMAS) mediators, chairs of mediation style conferences and Family Dispute Resolution Practitioners (FDRP).

Given the particular scope and nature of the work of the Institute, our submissions will be limited to the following:

e the effectiveness of the delivery of family dispute resolution processes

To put our submissions into context, we start with a brief summary of dispute resolution processes that we understand currently occurs in family law matters around Australia. This is against a background of our lack of access to any meaningful statistics or data of the numbers of mediations, dispute resolution processes and private resolutions conducted in Australia. At best we have consistently received anecdotal information that dispute resolution is well received, supported and achieves a high rate of resolution of matters or, if there is no final resolution, there is often a narrowing of issues requiring judicial determination.

In relation to arbitration, AIFLAM is seeking input from its list of Regulation 67B arbitrators on the numbers of arbitrations that have been conducted over the last 12 months and to the extent that can be disclosed, the outcome of the arbitrations. We are also working with the Courts to try and gather, as best as possible, the number of matters that are referred to arbitration by a judicial officer by consent.

The arbitration statistics will hopefully be available by 1 March 2020 and we are happy to provide this additional information to the Joint Select Committee if requested.

SUMMARY CURRENT DISPUTE RESOLUTION – STATE BY STATE

Western Australia – Andrew Davies

Dispute resolution processes in family law matters in WA are principally provided by 4 different resources and services.

Family Relationship Centres are situated at numerous locations in and around Perth and in some country towns. The principal role of the Centres in family law disputes are dealing with parenting matters and the issue of section 60I certificates. The main complaint that is heard generally from separated couples is the degree of difficulty in obtaining access to these centres in a reasonable time.

Legal Aid WA has a very active and innovative dispute resolution program. Ms Lynette Hill, Managing Solicitor of Legal Aid WA's DR program, has worked closely with her team at legal aid together with the Family Court, Family Law Practitioners Association (WA) (FLPA (WA)) and AIFLAM to offer dispute resolution options for families in high conflict parenting disputes that has been highly successful. This generally involves parties affected by substance abuse and mental health issues together with cultural diversity. Of particular note is the reported success directly referable to the funding by Legal Aid of parties' legal representation during these dispute resolution conferences. Issues of funding remain a concern. AIFLAM supports further funding to be available to enable this program to continue to develop. The program now extends to some property settlement and maintenance disputes.

The Family Court of Western Australia has recently appointed 2 Registrars to concentrate on mediating disputes between self-represented litigants in both parenting and financial matters. The preliminary indications from Her Honour Justice Sutherland, Chief Judge, is that this program has been very successful to date in achieving settlement of many cases in the Court's extensive defended lists and so saving Judge time. AIFLAM supports the ongoing funding of this initiative.

The Family Court WA has also worked closely with AIFLAM and FLPA (WA) to develop case management guidelines dealing specifically with dispute resolution protocols.

Over the last 5 years there has been a significant take-up of mediation as a principal means of assisting parties in family law disputes reach resolutions quickly both on parenting and property. The Court strongly supports the referral of matters to mediation at an early stage of any court proceedings and the family lawyer culture has now developed to the point that mediation is part of the pre-action procedures. Whilst no statistics are readily available, anecdotally settlements of matters through mediation are high.

Arbitration is also supported by the court although, as has also been recognised around Australia, the take-up has been slow.

Lastly there is significant opportunity for litigants to access a number of other not for profit mediation and dispute resolution services, such as Relationships Australia, Centrecare, Anglicare etc together with many private mediation services. There is also significant support from family lawyers in WA to use mediation to seek to resolve both parenting and financial disputes.

South Australia – Julie Redman

Family lawyers in South Australia are by and large a very collegiate group of lawyers who work well together and who attempt to negotiate family law matters without the necessity of issuing proceedings in any of the Federal Circuit or Family Courts.

The majority of matters resolve after a minimal amount of correspondence, often with informal conferencing between lawyers and clients with or without a Mediator.

Due to the fused profession of solicitors in South Australia experienced family lawyers who practise primarily as solicitors tend to do the negotiation of matters at an early stage. Junior family lawyers utilise Barristers for advice and this does assist in an early resolution of matters as well.

Mediation

Until recent years mediation was not widely used by family lawyers in South Australia. The not-for-profit mediation services of Relationships Australia, Centacare and Anglicare primarily saw parties for children's mediation prior to the involvement of lawyers and in the absence of lawyers.

This continues in that the services tend not to use lawyers during the mediation process. These services are now extending to property matters and again to this date do not involve lawyers in mediations.

The major involvement of family lawyers in the ADR process has been through the use of the Conciliation process provided by Registrars of the Courts or through the Legal Services Commission of South Australia FDR services which have a high success rate with lawyers and clients present.

In the last few years the South Australian Federal Circuit Court Judges and Family Court Judges have developed a policy of referring out all property matters to private mediation where the pool exceeds around \$300,000.

This has had the impact of the list of private Mediators supplied by AIFLAM being utilised and available for all family lawyers. Lawyers then confer and agree on their

family law accredited mediators. The take up of family law private mediation has been excellent and the resolution rate very high.

The benefit of the private mediation is that there is no time limit, as in Conciliation Conferences in the courts, and they tend to run between half a day and a full day. The cost, however, is far greater than the courts and is \$400-\$500 per hour for the mediator and similar amounts for lawyers/Counsel fees in addition. There is also the opportunity to return to a second or third session to continue the mediation process.

There has been less take up of private mediators for children's matters. With the "well serviced" mediation being offered by not-for-profit organisations being able to provide the Section 60i Certificate, the majority of private mediators in South Australia are doing very little children's mediation.

Arbitration

There has been no take up of arbitration in South Australia to this date, despite there being qualified Arbitrators ready to commence the arbitration take up.

Multi-disciplinary team approach

Collaborative lawyers have a buoyant and active practice group in South Australia with around 20 to 25 family lawyers offering the collaborative process. This multi-teamed approach with the optional use of a financial advisor and psychologist as part of the collaborative team also has a great success rate.

It does appear that the use of the collaborative approach in family law is increasing in South Australia after quite a few years of there being very little take up.

Use of Psychologists and Family Therapists

Many family lawyers are using psychologists as part of their referral base to ensure that children's matters can be resolved with the assistance of a psychologist or a family therapist wherever possible.

There are a handful of excellent child psychologists in Adelaide who are happy to work with family lawyers to discuss the best way forward for families and children.

Alternative dispute resolution processes in South Australia are, over the last 2 years, receiving a great deal more attention and focus and they are evolving with the increasing need for cost effective alternate dispute resolution processes. This is partly being brought about by the lack of availability of the Family Court resources and a much more cost-conscious client who is seeking to resolve matters without resorting to litigation.

Tasmania – Marcus Turnbull

Private mediation in Tasmania (and particularly in Hobart) is a success story.

There are a number of legally trained private mediators (trained via the AIFLAM model) who have been conducting mediations for a long period of time. It is mainly senior practitioners that take advantage of the process, as it is deemed more affordable for the client. Over 90% of matters settle.

Private mediation in the north of Tasmania is less common because there is a Government regional program offered by Relationships Australia Victoria that provides free mediation services to parties involved in disputes in the Federal Circuit Court of Australia. Phillip Theobald runs that program and again, he settles the majority of matters, which significantly reduces the lists in Launceston and Burnie.

The mediation models mentioned are well supported by the judiciary. There has recently been a renewed effort to develop a more affordable model so that younger practitioners with their smaller property pools might adopt private mediation as a means of settling disputes.

In addition to the above, the Legal Aid Commission has recently announced a limited pilot project which will allow Legal Aid to fund 50 mediations over the next 2 years, ideally for very small property pool cases.

Arbitration is now occurring in Tasmania, recently enhanced by the AIFLAM training out of Adelaide which has seen a number of Tasmanian Practitioners accredited as Arbitrators.

There have been approximately 4 arbitrations in Hobart in 2019 and the feedback from lawyers involved in the process is generally positive. The process needs further advertisement and encouragement. Her Honour, Judge Baker has been promoting arbitration as best she can and it is anticipated that arbitration will become a more popular means of settling disputes as more information is fed back into the legal community as to its success.

It is anticipated that private mediation will remain the preferred model for settling disputes, at least for the foreseeable future.

Victoria – Emma Swart

Negotiated Settlements

The legal profession in Victoria has a well-deserved reputation for settling matters prior to litigation and before (or even during) trials. Family lawyers are no exception. Many matters resolve after lawyers have been consulted through correspondence or conversations between solicitors. Barristers are often consulted prior to proceedings being issued and many matters resolve with the benefit of that advice.

Mediation

Mediation is widely used in family disputes in Victoria - prior to court, instead of court and after proceedings have been issued.

Unless an exemption for urgent cases applies, parties must attend mediation and obtain a certificate under s60I of the *Family Law Act 1975* (FLA) prior to issuing court proceedings. Only qualified Family Dispute Resolution Practitioners can provide certificates. They may attend a community-based service or a private mediator.

Direct mediation services are provided by trained FDRPs at Centres such as Family Relationship Centres and Relationships Australia. Centres are located throughout the state. Lawyers do not participate, but parties are encouraged to obtain legal advice before or during the process.

In Victoria there are several private lawyers both solicitors and barristers who are also qualified as FDRPs. They may be contracted by parties direct or more frequently after the parties or one of them has engaged a lawyer. An advantage of private FDRPs is that they can include the lawyers in some or all of the mediation.

After court proceedings have been issued, lawyers often invite mediation in parenting matters. This can be with a private mediator or there is a dedicated Family Dispute Resolution Centre funded by Victoria Legal Aid. It is often used in cases where an Independent Children's Lawyer ("ICL") has been appointed and the ICL can join in the mediation whether the parties are represented or not. Private mediations with FDRP qualified barristers have even been arranged part way through complex parenting cases such as international relocation of children cases.

In property cases, the Court has a legislated ADR process whereby parties must attend a Conciliation Conference at the Court with a Registrar or in regional areas with the contracted service provided by Relationships Australia. In more complex matters, parties may seek to be excused from the short 90 minute conference in return for engaging a full or half day private mediation.

Whilst there is no formal Practice Direction, the Judges of the Federal Circuit Court sitting at Melbourne take the view that all matters with a combined property and

superannuation pool over \$500,000 must go to private mediation. Private mediations are generally with a member of the Victorian Bar but occasionally with retired Judges, retired Registrars or solicitor mediators. The model of mediation ranges from a judicial settlement conference, to a conciliation conference style, to a facilitated negotiation to a full mediation. Pre-mediation conferences rarely take place in advance of the mediation day. Parties are usually represented by both solicitor and counsel and the settlement rate is reasonably high.

Even in cases where matters do not resolve on the day, settlement is often achieved over the following weeks. There are an increasing number of cases which settle after mediation and before trial. Parties are also able to use the mediation process to better understand the other party's position and narrow the issues in the eventual trial, reducing the court time needed.

Arbitration

Whilst arbitration rules have now been in place for a long time, there has been limited uptake of the option. Of the cases commencing Arbitration, most cases settle after meetings with the Arbitrator. We expect that this is partly due to the fact that Arbitrators are mediation trained but also due to the additional costs of Arbitration.

Multi-disciplinary team approach

Victoria is privileged to be the birthplace of MELCA, a collaborative alliance between a lawyer, financial advisor and psychologist which has just celebrated 10 years by launching a documentary (*Family is Family* featuring the Honourable Diana Bryant QC) about the unique collaborative model. See www.melca.com.au

Collaborative lawyers

There are a number of practitioners trained in collaborative family law who assist clients to resolve disputes without resorting to the Court process, focusing on preserving cooperation and assisting dispute resolution within families.

Family Therapists

Qualified psychologists are often engaged by the parties to assist parents where conflict has developed which impacts negatively on the children. They are able to work with parties individually and jointly, to involve children when and as required. This can be confidential therapy or reportable to lawyers and the Court.

Post Orders Programs "POP"

Some community organisations provide ongoing support for parents after final orders are made by a court, enabling them to obtain advice and support and resolve further disputes without returning to Court.

Parenting Coordination

Training is commencing in Victoria on this model from the USA for private social workers and psychologists to provide parenting mediation and support similar to the POP community programs.

Australian Capital Territory – Claire Naidu

The ACT has not-for-profit and private family dispute resolution providers. The providers of family dispute resolution in the ACT include Relationships Australia, the Conflict Resolution Service, Legal Aid ACT and a number of private family dispute resolution providers.

The Conflict Resolution Service (CRS) is a not-for-profit organisation supporting the ACT region in dispute resolution including family dispute resolution. Relationships Australia provides family dispute resolution services across Australia including in the ACT.

Subject to eligibility requirements and suitability for dispute resolution, the Legal Aid ACT may also provide family dispute resolution conferences.

There are a number of private family dispute resolution providers in the ACT who assist parties in the resolution of their family matters.

Where suitable, matters with current proceedings which have larger property pools may be referred to private dispute resolution processes by the Family Law Courts rather than conciliation conferences that occur within the Family Law Courts.

The Law Society of the Australian Capital Territory has re-introduced the Alternative Dispute Resolution Committee. This Committee focuses on alternative dispute resolution generally and this also includes family dispute resolution.

There is a Collaborative practice group in the ACT which includes lawyers, financial planners/advisors, psychologists and other specialists that aim to assist parties experiencing family disputes.

The Resolution Institute has recently held an education event in the ACT presented by Judge Harman regarding Arbitration and the uses of alternative dispute resolution with a focus on family law matters.

Most matters will have engaged in some form of family dispute resolution process before an application is filed in Court. Once in Court, many parties attend dispute resolution process while their matters are on foot and resolution may be reached on interim or final matters.

Queensland – Philip Looney QC

I must caveat my response in that it is largely anecdotal and based on my understanding of what is occurring, uninformed by any particular enquiry on my part which has not been possible in the time available.

Activities in this State can be usefully characterised into 4 topics:

1. private mediations;
2. private arbitrations;
3. legal aid property arbitrations
4. court based processes.

Private mediations

Virtually all property matters in which parties are represented will have a private mediation prior to the matter proceeding to trial. There are many practitioners, both solicitors and barristers, who conduct such mediations with a number of them offering only such services. The process appears to be well understood by lawyers who represent parties and the only significant barrier to the use of this process appears to be cost. In that regard, there are a range of fees being charged by mediators.

The position appears to be similar for parenting matters save that fewer parenting disputes will go to mediation.

Child inclusive mediations (involving a social worker or psychologist) appear to be increasing in number and there has been some steps taken to educate practitioners as to their nature and effectiveness.

Private arbitrations

The uptake of private arbitrations continues to be limited. The awareness amongst practitioners of the process is patchy. There are practitioners who offer this service and they are mainly senior barristers. There is a continuing push to promote private arbitrations with HopgoodGanim and a number of barristers (FLAGQLD) doing so although the level of effort in this regard is up and down.

Legal Aid property arbitrations

Legal Aid Qld continues to offer property arbitrations on the papers for uncomplicated property disputes. They have details of their service on their website at <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Family-law/Property-disputes/Property->

[arbitration?BestBetMatch=arbitration|33642ca2-1ee0-427b-938e-96024c6f8bda|0a4b0d77-1b6c-4201-871e-25d5b0944cb0|en-AU](https://www.aiflam.org.au/arbitration?BestBetMatch=arbitration|33642ca2-1ee0-427b-938e-96024c6f8bda|0a4b0d77-1b6c-4201-871e-25d5b0944cb0|en-AU).

Court-based processes

From 30 September 2019 there has been a new process adopted in the Federal Circuit Court in Brisbane for case management of financial applications. Applications which seek financial orders only are listed before a Registrar on the First Court Date and managed by a Registrar until the conclusion of the dispute resolution process.

The Federal Circuit Court also called for expressions of interest for a list of family law mediators that were willing to conduct private mediations as part of the Federal Circuit Court Trial Pool Callover arranged for 23 September to 27 September 2019. A callover of approximately 250 matters awaiting a trial date in the Brisbane Registry was arranged to, amongst other things, promote the resolution of matters. Those matters that were ready for trial were allocated trial dates. If a matter was not ready for trial and would benefit from alternative dispute resolution, it was the intention of the Court to refer suitable matters to ADR.

Conclusion

Despite the lack of statistics, AIFLAM members throughout Australia suggest that the various forms of family dispute resolution options are effective in resolving matters or at least reducing issues and so reducing the costs and delays associated with going to Court.

There remain funding issues which cause unnecessary delays and we submit increasing funding to Family Relationships, Legal Aid in each state and the courts would assist greatly.

Private arbitration is currently underused but gaining momentum with the support of the Court.

AIFLAM supports the recommendations in The Australian Law Commission's report '*Family Law for the Future – An Inquiry into the Family Law System*' which discusses the issue of family dispute resolutions processes in chapters 8 and 9.

In particular AIFLAM supports:

Recommendation 21

That the *Family Law Act* 1975 (Cth) (FLA) should be amended to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and

- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

Recommendation 22

That Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.

Recommendation 23

That the FLA should be amended to require Family Dispute Resolution Practitioners to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.

Recommendation 24

That sections 10H and 10J of the FLA, which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.

Recommendation 25

That the FLA should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.

Recommendation 26

That the FLA and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not on referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;
- under ss 79A or 90SN of the FLA (subject to limitations); and
- in which a litigation guardian has been appointed.

Recommendation 27

That the FLA should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

Recommendation 28

That the FLA should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the FLA.

Recommendation 29

That the FLA should be amended to provide that on application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

It is the view of AIFLAM that by adopting these recommendations as well as increasing funding to Family Relationship Centres, Legal Aid and the Courts themselves will only increase the effectiveness of the delivery of the successful family dispute resolution processes that are already in place.

20 December 2019.