Chapter 10

Divorce mediation

Family and child mediation is a voluntary process that enables parties to reach agreements about property, finances and ongoing care of children with the help of an impartial third person. It provides the opportunity for the more dignified and respectful resolution of disputes associated with marriage and relationship breakdown than generally occurs in a highly adversarial litigation process. This is particularly important where there are children and the parents must continue to have contact and make arrangements about the children, which is best done without ongoing conflict. [1] The 1996 reforms to the *Family Law Act 1975* emphasise family and child mediation as a method of primary dispute resolution in family law disputes.

The Family Court established its own mediation services in 1990 and currently offers services in Sydney, Melbourne, Brisbane and Parramatta registries. Additional staff have been trained to offer the service in Adelaide Registry as operational resources permit.[2] Fees for mediation were introduced on 1 July 1997 for all clients accessing the Court's service.

The Family Court stated, in its Annual Report for 1996–1997, that the integration of the mediation service with its existing conciliation and counselling services is being developed at the Parramatta Registry with the intention of introducing such a model throughout the Court. This integrated client services program aims to better identify at the time of intake procedure, the type of dispute resolution procedure best suited to the parties to proceedings in the Court.[3]

Mediation is always a voluntary service, and may be used before or after proceedings have been filed. Information sessions, provided by the Court, explain that mediation is not always a suitable intervention, and requires the willingness of both parties and an ability to enter into meaningful negotiations. If there is not a reasonable balance of power between the parties mediation is considered inappropriate.[4]

During 1996–1997, the mediation service conducted 192 mediation information sessions, and opened 556 cases for mediation. Mediators conducted 1,195 mediation sessions averaging 1.9 sessions for each matter. Of the matters closed, 53.35 per cent of disputes related to both children and property. Of all matters seen, 63.9 per cent

---

1 Attorney-General's Department (1997) *Delivery of Primary Dispute Resolution Services in Family Law* August: 30.

2 Family Court of Australia *Annual Report 1996-1997*: 31.

3 ibid.

4 Family Court of Australia, *Submissions*, p. S1031.

were fully settled, and an additional 10.55 per cent settled in at least one substantial issue.[5]

Apart from the mediation program of the Family Court, 17 community organisations are approved and funded by the Attorney-General to provide family and child mediation.[6]

Evaluations of mediation services

Between 1994 and 1996 three evaluations of federally funded family mediation services were conducted, covering the mediation services of the Family Court, Centacare, Relationships Australia and Unifam. These studies found that the mediation processes used, led to full agreement in 44 per cent to 71 per cent of cases and partial agreement in 11 per cent to 39 per cent of cases. Between 17 per cent to 18 per cent failed to reach any agreement at the mediation meetings. Generally, higher percentages of full agreements occurred in disputes over children, as compared to disputes over finances.[7]

These studies showed that altering family agreements is a 'normal' event. Within one year of settlement at mediation, about one third found it necessary to change the terms of the agreement. However these changes were made without the agreement 'breaking down' or 'being abandoned'.[8]

These evaluations also demonstrated a high level of client satisfaction with nearly three quarters of users saying they would use the process again and liked the process, even if some did not like the substantive outcome.[9]

All three studies concluded that the model of mediation used at each agency should be retained. However, it should be acknowledged that all the models surveyed were sophisticated. They included elements such as co-mediation with mediators of different gender and professional background; facilitative or problem solving process; negotiation on all problems raised, not just selected areas of conflict; extensive intake procedures and documents; mediators familiar with family law and the dynamics of separation; protocols and expertise in relation to allegations of violence and various other imbalances of power. Furthermore, they were heavily

5 Family Court of Australia *Annual report 1996–1997:* 31.

6 Attorney-General's Department 1997 *Delivery of Primary Dispute Resolution Services in Family Law* August: 30.

7 J Wade (1997) 'Four Evaluation Studies of Family Mediation Services in Australia' *Australian Journal of Family Law* 11: 344.

8 ibid. 345.

9 ibid.

subsidised by the government to reduce user costs. As Wade notes, many mediation services do not have the expertise, tradition or resources to emulate this model.[10]

The surveys found a number of distinctions between the populations, with Family Court clients being more likely than those who used the community services to be referred by solicitors, to be aware of alternative services and be prepared to litigate if mediation proved to be unsuccessful.[11] The evaluations concluded that there was no duplication of mediation services within the Attorney-General's portfolio, that mediation clients tend to approach community or court based agencies with different expectations and that it was important that clients and referring bodies have a choice of agencies available.[12]

Other views on mediation services

The Committee sought opinions from witnesses about the nature of mediation services in the community.

A common concern conveyed to the Committee was the lack of community understanding of the meaning of mediation. Witnesses cited the 1995 AGB McNair survey that found that only 17 per cent of the community had heard of family mediation.[13] Professor Hilary Astor, former Chairperson of the National Alternative Dispute Resolution Advisory Council (NADRAC) said it was a very difficult issue to deal with and suggested that providing information to the public can be something of a financial black hole. She stated further, "It is possible to pour a great deal of resources into such an enterprise without necessarily achieving your ends". [14]

Professor Astor suggested that one approach might be to educate the legal profession about the alternative ways of resolving relationship disputes. She noted that enthusiasm for mediation and alternative dispute resolution is enormous amongst her law students but somehow this enthusiasm for alternatives is lost as they progress through the profession.[15]

She also considered that one of the most important things in terms of assisting people to use dispute resolution mechanisms like mediation is to educate them about what it is they are getting themselves into. She spoke highly of the Family Court information sessions in this regard and said it is extremely important that

10 ibid. 347.

11 Family Court of Australia, *Submissions,* p. S992.

12 ibid.

13 *Submissions,* p.S358.

14 *Transcript,* p. 258.

15 ibid. 262.

mediation schemes are able to do the sorts of things that the Family Court does with people approaching the court for mediation.[16]

At the Family Court, people proposing to undertake mediation, get to talk to skilled people about what is going on in their lives, what their dispute is about and how that meshes with the process of mediation. They are assisted to make a decision, or an informed choice about what to do. Professor Astor said that the process of intake has a very important educative effect. The parties are ready to learn because they have a problem that they do not know how to resolve. They need information about whether or not a particular mechanism is appropriate for dealing with the problem that they have.[17]

Witnesses, from the Community Mediation Service Tasmania, agreed that there was a lack of community knowledge of mediation.[18] Ms Carla Wisenbeek and Ms Elizabeth Gunning suggested that many people think mediation is counselling. In their experience in Hobart, mediation is only slowly being recognised as a method of primary dispute resolution. They referred to the fact that the Family Court does not provide mediation services in Tasmania, but rather refers clients to either Mediation Services Tasmania or Relationships Australia. Ms Elizabeth Gunning said she believes mediation is conducive to an environment away from the court, however she acknowledged the mediation skills of the Family Court and suggested that it should not be a case of 'them and us' but rather giving people the option of choosing either community facilities or the Family Court.[19]

Ms Wisenbeek also suggested that mediation rather then counselling is often a more appealing dispute resolution mechanism for men. In mediation, men can see concrete outcomes for their effort.[20] She saw this as an important reason to have a range of services to offer to clients, in order that they choose the one they are most comfortable with.

Mrs Jennifer Boland, Chairperson of the Family Law Council, argued that while there is a general perception that community organisations handle children's matters very well, the strength of the Family Court mediation service is its ability to deal with cases involving a blend of property and children's matters. In these cases the legal expertise of the Court is extremely valuable. For this reason she argued for the retention of mediation service in the Family Court and in the community.[21]

16 ibid. 266.

17 ibid.

18 *Transcript,* p. 134.

19 ibid.

20 *Transcript,* p. 129.

21 *Transcript,* p. 272.

While Mr Robert Benjamin, representative of the Law Society of New South Wales, spoke positively about Family Court mediation services, he argued that the perception in the legal community is that the Court has not and can not provide as full a service in mediation as it has in counselling. He suggested that there are widely accepted mediation facilities outside the Court and stated that: "We are not saying that there should not be court mediation. We are just saying that perhaps any further growth should be measured in terms of the other facilities that are available".[22]

However, Mr Benjamin claimed that the value of court mediation has been that it has set a standard which other organisations involved in mediation can follow or adhere to. Mr Benjamin expressed concern that there is no professional structure for mediators. There are mediators coming from the law stream and others from the various counselling services, all of them having different standards and different approaches. He argued there must be consistency and a professional standard when dealing with family law, rather than the current situation in which a tension has developed between counsellors and lawyers.[23]

In its submission, the Law Society of New South Wales suggested that an appropriate step for this Committee would be to work with the Legal Aid Commissions, the Family Services Council and NADRAC towards a national family law related accreditation system for family and child relationship mediators.[24]

In an attempt to resolve this concern about accreditation standards for mediators, the government has responded with amendments to the Family Law Regulations under the Family Law Act[25]. These amendments relate to family mediation standards and accreditation in particular and came into effect on 11 June 1996.

According to Professor John Wade, from Bond University, in a paper titled *Family mediation: a premature monopoly in Australia?*[26], these accreditation regulations indirectly prohibit any person from practising as a family mediator unless he or she satisfies new training and supervision prerequisites, or qualifies under a 'grandmother / grandfather / wise elder' clause. The regulations recognise only two types of tertiary education, namely law degrees and social science degrees and exclude other professions such as accountants some of whom are often involved in complex family property disputes. The 'excluded' professions are required to undertake one year of further study in dispute resolution.[27] Professor Wade argues

22 *Transcript,* p. 362.

23 ibid.

24 *Submissions,* p. S1039.

25 The relevant regulations are numbered 59-72.

26 J Wade (1997) 'Family Mediation: a Premature Monopoly in Australia?' *Australian Journal of Family Law* 11: 286–308.

27 ibid.

that by imposing such stringent and unrealistic standards of accreditation, the regulations have given certain lobby groups of mediators a premature monopoly and thereby suddenly disenfranchised skilled mediators.[28]

The paper also points to a number of unintentional flaws in drafting which have created unnecessarily complex demarcation questions and unintentionally excluded skilled mediators from practising[29]. Professor Wade called for the immediate suspension of these regulations for at least 12 months in order to prevent this disenfranchisement.

NADRAC, in its report to the federal Attorney-General titled *Primary Dispute Resolution in Family Law* recommended a series of amendments to these accreditation regulations. These included a suggestion that the description of 'family and child mediator' be expanded, and secondly that non-accredited mediators be allowed to practise family mediation but without the statutory protection of confidentiality and immunity. The aim being to leave private family mediation services accessible in Australia, and gradually (rather than suddenly) impose quality controls on such services.[30]

Witnesses to the inquiry also suggested there is a perception of middle class bias in the use of mediation services. Professor Hilary Astor cited as an example, research she was involved in that indicated that middle-class people are happy to use counselling organisations to assist them with their relationships and with resolving disputes attendant upon the ending of those relationships. People are happy to go to Relationships Australia, Centacare or Unifam, or any of the other service providers who are supported by the government.[31] However working class women and women who are using refuges perceived, that those services are not appropriate to their needs, that they are for middle class people, that they charge fees which they would not be able to pay and that they would not understand the reality of the lives that they are living.

Professor Astor's view of class bias was supported in the series of studies of the federally funded mediation services as reported by Professor Wade. These studies indicated that clients who choose mediation appear to be more middle class, more educated and to have more children than the average divorcing population in Australia.[32]

---

28 ibid. 296.

29 For example reg 60(2) arguably excludes a large number of Australian lawyers who became lawyers without obtaining a university law degree.

30 J Wade (1997) 'Family Mediation: a Premature Monopoly in Australia?' *Australian Journal of Family Law* 11: 306.

31 *Transcript,* p. 262.

32 J Wade (1997) 'Four Evaluation Studies of Family Mediation Services in Australia' *Australian Journal of Family Law* 11: 344.

These studies and comments raise the question of whether another, perhaps more relevant model of mediation, would be appropriate for less educated families, and families from other cultural backgrounds.

The Committee notes that the mediation accreditation standards which came into effect on 11 June 1996 may reinforce this perception of middle class bias. The regulations effectively prohibit or exclude appropriate mediators from Aboriginal and Torres Strait Islander and non-English speaking background communities. NADRAC in its report *Primary Dispute Resolution in Family Law* suggests that the government waive accreditation standards to allow limited authorisation schemes for community groups of particular disadvantaged backgrounds. [33]

Recommendation 42
The Committee recommends that the accreditation regulations for mediators be suspended pending a full inquiry into their operation and effect.

The Committee further recommends that a competency-based accreditation system be implemented.

Violence and mediation

There is a substantial body of literature which argues that family disputes with a history of violence should not go to mediation. Professor Hilary Astor argues there are a number of reasons for this conclusion: the imbalance of power created by violence is extreme and is too great for a neutral mediator to redress; the nature and history of the relationship between the parties makes consensual decision making impossible; mediation places an extreme burden on the target of violence; mediation can endanger the safety of women who are the target of violence and the safety of children in their care; and mediation is highly likely to result in unjust and exploitative agreements where there has been violence. Further, mediation of family disputes involving violence creates a risk that violence against women will be removed from the public eye and existing protections threatened.[34]

Evidence to the inquiry confirmed the view that mediation is not an appropriate mechanism for solving disputes involving family violence. Many witnesses referred to the value of the Family Court in having well defined and appropriate procedures in place for screening and identifying potential violence so that people who are in fear of each other are not brought together and can be excluded from the mediation process.[35]

33 J Wade (1997) 'Family Mediation: a Premature Monopoly in Australia?' *Australian Journal of Family Law* 11: 306–308.

34 H Astor (1994) 'Violence and Family Mediation: Policy' *Australian Journal of Family Law* 8: 3.

35 For example, Ms Pauline Eglington, *Transcript*, p. 575.

However, the view that mediation is always inappropriate in cases of violence is not supported by the recent evaluations of the federally funded mediation services. In particular the 1996 Violence study which surveyed 12 mediation services agencies around Australia found that 31 per cent of the women who took part in the survey stated that 'I had experienced physical violence from my partner'. The findings of the 1996 Violence study indicated that there was generally less pre-mediation anxiety, more positive experience of the mediation process and a higher level of satisfaction with agreements where women:

- reported that they had been subject to emotional abuse or one off physical abuse or threats only;
- had been separate from their ex-partners for a considerable time;
- had received personal counselling to deal specifically with the abuse;
- reported that they no longer felt intimidated by their ex-partner;
- felt confident in their legal advice and knew what they could reasonably expect from a settlement;
- and where mediators;
- asked specific questions about domestic violence or abuse, including non-physical types of abuse or harassment;
- offered women specific guidance in considering the possible impact of violence or abuse on the mediation process; and
- offered women separate time with the mediator to disclose or discuss any concerns before, during and after the mediation process.[36]

The Committee's views on mediation

Evidence to the inquiry and recent surveys of federally funded mediation services indicate that mediation is a successful, if under-utilised method of primary dispute resolution (PDR)[37]. The Committee believes that the government should remain committed to the support of family mediation services as an important method of PDR.

While acknowledging the value of providing mediation services via community agencies, the Committee believes there is evidence that Family Court mediation services provide a complementary service and are still the preferred choice for many families. The Family Court information sessions, which educate people on the process of mediation, the Integrated Client Services program and the legal expertise of staff are all factors that ensure that the mediation services available within the Court are of a high standard and worthy of emulation within community

36 J Wade (1997) 'Four Evaluation Studies of Family Mediation Services in Australia' *Australian Journal of Family Law* 11: 347.

37 Primary dispute resolution (PDR) services are combinations of counselling, conciliation and mediation services provided by the Court. The term ADR (alternative dispute resolution) is often used interchangeably with PDR.

organisations. In the Committee's view, the government should continue to support a range of programs from both the Family Court and the community sector.

Recommendation 43
The Committee recommends that the Government continue to support a range of mediation programs from both the Family Court and the community sector.

The Committee acknowledges the importance of accreditation standards but is also concerned about the perceived middle class bias of mediation programs. It suggests that the government take account of the recommendations of NADRAC in relation to accreditation and work with bodies such as NADRAC to make mediation more widely utilised by disadvantaged groups within the community.

The Committee accepts with caution the findings of the Violence Study of 1996 in relation to the appropriateness of using mediation in disputes with a history of violence. The Committee believes that the significant body of literature which contradicts these findings should not be ignored.

Recommendation 44
The Committee recommends that cases involving domestic violence continue to be excluded from the mediation process until the appropriateness of mediating in cases involving violence can be further reviewed.

Recommendation 45
Given the relatively recent implementation of mediation services, and the concerns expressed in evidence to the inquiry, the Committee also recommends that the government continue to monitor mediation services used in the divorce process.

To this end, the Committee recommends that the Attorney-General report to Parliament within two years on the use and effectiveness of mediation as a method of primary dispute resolution.

Role of mediation and counselling services in education

It is well established that as people end one relationship or marriage, they have either entered into a new relationship or will enter into a new one at some future point in time. Divorce rates for these second or subsequent marriages are higher than for first marriages and the literature clearly identifies those marriages at greater risk of break up.[38] With this in mind, the Committee explored with relevant witnesses the possibility of using this period of transition to provide further relationship training and education.

38 Keys Young (1997) *Evaluation of Marriage and Relationship Education Sub-Program: Final Report* Sydney: 40.

In other words, the Committee sought ideas about whether more could be done during the processes of mediation and conciliation counselling, to provide people with more skills and knowledge for subsequent relationships.

In relation to mediation, Professor Hilary Astor said that when the present interest in mediation began, mediators, particularly in family areas, were very optimistic that the process of mediation, which involves giving the parties responsibility for forging their own agreements, would also have the effect of educating the parties about better ways to resolve disputes. Some authors even claimed that mediation had a therapeutic effect in reducing anger and distress as well as teaching the parties about better ways to resolve disputes than fighting about them.

However Professor Astor thought that such optimism has somewhat ameliorated. She cited US mediator Ms Joan Kelly, who did carefully controlled research studying groups of people going through litigation and groups of people going through mediation. What she wished to examine was the effect that the two different processes had upon the relationship between the parties and their children after divorce.

Ms Kelly found that there was some beneficial effect for those parties who went through mediation. For about a year after the end of mediation, the parties reported measurably less conflict. However, after about a year, that effect disappeared.

The conclusion that Professor Astor draws from this research is that while mediation may be excellent as a short term focused intervention, it is not appropriate for teaching the parties more substantive lessons about how to conduct a healthy relationship.[39]

Professor Astor's view is supported by the recent studies of federally funded mediation services. While the customer satisfaction level of these particular mediation services was very high, the couples in these studies rarely agreed that the short term mediation intervention had caused changes to their long term problem-solving skills.[40]

On the other hand , Mrs Jennifer Boland, Chairperson of the Family Law Council, was supportive of using this transition period to promote relationship education. She praised the information sessions in the Family Court and suggested similar programs could be used to promote future relationships education. However, she also proposed education for future relationships education should be promoted through a wider network than the Family Court. Rather, promotion could be undertaken through a range of court lawyers and community education and even through the Child Support

39 *Transcript*, p. 261.

40 J Wade (1997) 'Four Evaluation Studies of Family Mediation Services in Australia' *Australian Journal of Family Law* 11: 345.

Agency. Such a link could be as simple as offering brochures and suggesting 'Here is a service that may help you in developing relationships'.[41]
Mrs Boland also suggested that if there were ongoing programs to help people come to terms with the grief and the loss of self esteem associated with separation and divorce, then they may prevent some of the difficulties that arise when people rush into inappropriate relationships.[42]

Family Court programs

The Family Court currently offers both information sessions and group conciliation and cooperative parenting education programs. All registries provide information session to inform clients and prospective clients of what to expect when they come to court and to prepare them for any counselling or conciliation conferences they may attend with registrars. The cooperative parenting education programs and the group conciliation programs are aimed at assisting parents resolve their differences, develop better communication patterns and find more cooperative and less conflictual ways of parenting after separation.

The Committee agrees with evidence that suggests that the time of separation and divorce is a key transition point in couples lives and a critical time to undertake further education for relationships and marriage.

The Committee notes the research and studies that indicate that mediation as a process does not necessarily provide couples with long term skills in resolving disputes and living in healthy relationships.

However, the Committee does believe that the Family Court should play a more proactive role in supporting and encouraging couples to learn new skills to enable them to proceed into more stable marriages or relationships in the future. The Committee suggests that services already in place within the Family Court should be used effectively and modified to promote relationships education.

> ***Recommendation 46***
> **The Committee recommends that the Family Court use its information sessions, parenting programs and the counselling services to educate couples about the complexities involved in remarriage and the value in undertaking further relationships education and training. The Committee is not suggesting that the Family Court undertake this training, but rather that it be seriously involved in referring couples to appropriate marriage and relationship education services available in the community.**

41 *Transcript*, p. 262.

42 ibid.

Recommendation 47

As more community based agencies become involved in divorce counselling and mediation, the Committee recommends that these agencies also encourage couples to participate in further relationships training and programs aimed at teaching skills to cope with step parenting, blended families and other issues associated with remarriage.