

NOTES FOR GEORGE TURNBULL PANEL PRESENTATION

NATIONAL ACCESS TO JUSTICE AND PRO BONO

CONFERENCE 2008

“It won’t hurt a bit...” A report card on Family Relationship Centres. Can there be justice when power is imbalanced?

Ms Liz O’Brien — National Convenor, National Association of Community Legal Centres

Mr George Turnbull — Director, Legal Aid Western Australia

Ms Sue Pidgeon — Assistant Secretary, Family Pathways Branch, Commonwealth Attorney-General's Department

KEY PRESENTATION POINTS

- Following on from Sue, I wanted to start by saying that Legal Aid supports the provision of increased funding for family services, including family dispute resolution, through the 65 Family Relationship Centres Australia wide and strongly supports the current Attorney General's promotion of dispute resolution services generally throughout the legal system. However, like the Attorney General we are also concerned that appropriate legal assistance be made available to separating couples, particularly for those individuals who are disadvantaged, including victims of family violence, to ensure equitable access to justice throughout the family law system.
- National Legal Aid supports the reforms to the family law system introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006 providing for an emphasis on assisting separating couples to resolve parenting disputes outside the adversarial Court system.
- I would like to give you a brief overview of the family dispute resolution programs run by each of the Legal Aid Commissions in the 8 States and Territories in Australia to put in context any comments I may make about some of the risks of family dispute resolution.
- In the last financial year, the combined Legal Aid Commissions' family dispute resolution programs held over 7,000 family Conferences with 80% of those Conferences reaching settlement on a final or partial basis.
- The majority of Legal Aid family dispute resolution Conferences take place with parties represented by legal practitioners. Each Commission has screening processes in place to ensure that the family dispute resolution is appropriate for each participant. The presence of legal practitioners at most conferences, in addition to the trained Family Dispute Resolution practitioner (FDRP), helps ensure an appropriate process for clients.
- It is worth noting that Legal Aid Commissions had developed extensive ADR programs many years before the current reforms to the family law system.
- In part this is because of funding constraints which limited the number of clients that were able to receive assistance for high cost Court proceedings. Today it is widely accepted that the availability of family dispute resolution programs through Family Relationship Centres, non-Government agencies and other service providers including the Legal Aid Commissions is vital to assist separating couples endeavouring to sort matters out amicably or less acrimoniously than might otherwise be the case.

- The reality, however, is that, unless a person is legally assisted, most people find it difficult to navigate through the family law system, even though the Family Courts endeavour to make family law processes as user-friendly as possible, particularly with the recent introduction of more child-focussed, clinical models such as the Case Assessment model operating successfully in the Family Court of Western Australia.
- Furthermore, where there are power imbalances, such as where one party has access to substantial income or financial resources and where there has been family violence or abuse, justice can be difficult to achieve for a disadvantaged client unless they are assisted legally through the process.
- The same power imbalances can apply through family dispute resolution processes when there has been a history of family violence or abuse.
- Section 60I(9) of the Family Law Act sets out a number of exceptions allowing exclusion from mediation including circumstances where an applicant to Court can show that there are reasonable grounds to believe that there has been past abuse of a child or family violence or there would be a risk of abuse of a child or of family violence if there were to be a delay in applying for the order sought. Further, the mandatory requirements for family dispute resolution do not apply in circumstances of urgency or where one or more parties is unable to participate effectively in family dispute resolution (through incapacity, physical remoteness or other reason).
- Family dispute resolution practitioners may also give a certificate that family dispute resolution would not be appropriate without proceeding with family dispute resolution. The practitioner has to consider whether the ability of any party to negotiate freely in the dispute is affected by safety issues, inequality of bargaining power, risk of child abuse, the health of the parties (emotional, psychological and physical) or any other relevant matter.
- All of these exceptions are designed to ensure that the mandatory requirements for family dispute resolution are only enforced in appropriate situations.
- These exceptions follow research which shows that, where there are significant power imbalances such as in cases involving family violence, family dispute resolution may not be appropriate. The substantial imbalance in the power relationship may make it very difficult for victims to negotiate for their own needs and interests.
- It seems clear that many victims of family violence will nevertheless undertake family dispute resolution either because the violence is not detected through screening or because the family dispute resolution practitioner determines that the violence does not affect the parties' capacity to participate and because the victim may wish to participate despite past abuse, family dispute resolution often being perceived to be better than attempting to go through Court.

- Some have raised concerns at the lack of availability of legal assistance for participants in family dispute resolution processes through Family Relationship Centres and at the relative lack of training and experience of some of the new family dispute resolution practitioners in different agencies and services who are still learning their craft as the mediation industry matures in Australia. The greater the level of experience across all service providers including Family Relationship Centres, the more likely that inappropriate matters will be screened out of family dispute resolution or that appropriate legal assistance will be obtained. What we are witnessing is effectively a work in progress.
- Family Relationship Centres already regularly refer clients to other services including Community Legal Centres, Legal Aid Commissions and private legal practitioners for advice and assistance. This is to be encouraged, most particularly where there are power imbalances or issues of family violence or allegations of child abuse. However, some of these issues may not emerge initially and it is important that all clients, so far as practicable, have early access to legal advice and assistance and also have access to such assistance prior to finalising parenting agreements or Consent Orders.
- Otherwise, in cases of power imbalances, even where there appears to be an agreement, justice is denied and there may be risks to both the victim of violence and children if all issues and concerns have not been canvassed properly.
- There is no doubt that the services provided by Family Relationship Centres have improved greatly the experience of a large number of separating couples in Australia, however the note of caution being sounded is that, notwithstanding the protections in the family law legislation, all service providers need to remain on guard that justice is not denied and that inappropriate matters are screened out of family dispute resolution or appropriate legal assistance is provided to the process.
- The overall system changes should allow for improved, child-focussed settlement processes for the majority of separating couples with prompt identification of clients who do need access to the Court system due to family violence or child abuse allegations. Legal Aid is keen to support Family Relationship Centres in their work and to provide legal assistance and advice to eligible clients and also continue to offer legally assisted family dispute resolution services so that the imbalances of power can be balanced as far as possible and so that justice is available to all, either through an appropriate family dispute resolution process or through prompt access to Court determinations. Separation is always painful but between us we can make it less painful for our clients! **(Mention NLA/FRC Referral Guidelines if approved by Directors/AGD?)**

LAC FDR CONFERENCES TABLE

State/Territory	Conferences Held 2007-2008	Conferences Settled	% Fully or Partially Settled
ACT	100	84	84%
Northern Territory	110	88	80%
Queensland	2,431	1,809	74%
New South Wales	2,524	2,153	85%
* Figures from draft State Report			
South Australia	381	320	84%
* Est settlement rate			
Tasmania	529	466	88%
Victoria	931	813	87%
Western Australia	349	286	82%

* Some figures may not be 100% accurate – just for reference in terms of the size of each State.