

(EXTERNAL USE ONLY)

ALTERNATIVE DISPUTE
RESOLUTION WITHIN
FAMILY COURT OF AUSTRALIA

MEDIATION SUB-COMMITTEE
12.6.90

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MEDIATION: PLANNING FOR AN ALTERNATIVE TO LITIGATION

A DISCUSSION PAPER.

1 INTRODUCTION

On 20 March, 1990, the Prime Minister of Australia the Rt.Hon. R.J.L. Hawke said in a media statement under the heading "Alternative Dispute Resolution":

"...in its fourth term, the Government will also legislate to expand alternatives to Court proceedings as a means of resolving disputes.

... It is essential that the Judicial system be as efficient as possible while maintaining the capacity properly to dissolve disputes. The use of such processes as mediation and arbitration can solve this aim.

... Within the Family Court we have already encouraged resolution of disputes without reference of cases to Judges. The use of counsellors and court staff to assist parties to reach agreement has ensured that the vast majority of cases are resolved without the need for formal hearing.

For the most part, however, these processes are informal.

... The fourth term legislation will provide a statutory framework within which Federal and Family Courts can, by the use of Court rules, establish dispute resolution processes. If alternatives such as mediation and arbitration are to be used the Court rules need to deal with such issues:

- * time limits to lodge documents
- * basic procedures
- * privilege for persons taking part in the proceedings
- * recognition and enforcement of orders
- * fees and cost.

... The Courts will be given flexibility to design procedures to best meet the needs of particular jurisdictions and to encourage the parties to opt for those alternatives and to accept the result of the process.

Parties who wish to have their dispute resolved by a Judge will not, however, be prevented from doing so."....

(underlining added)

In response to this undertaking the Chief Justice of the Family Court of Australia The Honourable Justice Alastair Nicholson determined that the Family Court would initiate a mediation arm which would be a true alternative to the process of litigation which has previously been the function of the Family Court and of all other Courts in Australia. To this end, the Chief Justice appointed a committee to report to him on the terms of reference which are reproduced below.

2. TERMS OF REFERENCE

The committee is charged to draw up a proposal to include mediation as a means of alternative dispute resolution under the control of the Family Court and available to people who wish to resolve their family problems themselves with the assistance of a neutral third person. This may occur before or after the commencement of Court process.

- (a) a plan for a separately resourced and staffed mediation service to operate side by side with the litigation, counselling and administrative services of the Court and compatible with the organisational and administrative structure proposed by the Court review working party;
- (b) a report as to:
 - (i) the implementation and conduct of a mediation service staffed by tertiary qualified persons (mediators) who have separate training and accreditation in mediation;
 - (ii) a detailed assessment of the required professional and administrative staff;
 - (iii) a plan for the selection and training of professional staff, including an assessment of the need to involve CDR Associates of Boulder, Colorado U.S.A. and their availability to conduct training seminars, workshops, and cost thereof;
 - (iv) the desirability of higher status mediation by such persons as retired Judges;
 - (v) whether mediation should be integrated into the current Court structure and case management;
 - (vi) whether or not a mediation service would be cost effective;
 - (vii) the role of other agencies in the mediation service, including the role of the private legal profession;

- (viii) whether such a mediation service should be located;
 - (a) in Family Court premises,
 - (b) in the same building as the Family Court, or
 - (c) in premises separate from the Family Court.
- (vix) the introduction of the mediation service over a three year period and the assessment of costs in the financial year 1990/91 and the two succeeding years;
- (x) the preparation of a submission to the Attorney-General as to the establishment of the mediation service and relating that submission to current Government policy;
- (xi) specific matters which the committee should address are:
 - (a) staff numbers but not levels,
 - (b) judicial resources,
 - (c) savings in the current
 - (i) financial year
 - (ii) in a full year,
 - (d) legal aid considerations,
 - (e) savings in Court costs,
 - (f) application to child support,
 - (g) early settlement of difficult cases,
 - (g) changes to legislation.

3. THE COMMITTEE MEMBERS

The Members of the Committee established by the Chief Justice are:

Ms S Gardiner Deputy Registrar, Brisbane (convenor)
 Ms D Gibson A/Director of Court Counselling, Sydney
 Mr J Cotta Director of Court Counselling, Dandenong
 Mr F Fitzpatrick Deputy Registrar Administration,
 Parramatta

Ms A Sikiotis Deputy Registrar Dandenong
 The Honourable H.E. Emery Q.C. Consultant

Assisting the Committee are:

The Honourable A.J. Barblett, Deputy Chief Justice
 Mr L Glare A/Chief Executive Officer
 Mr I Loughnan A/Principal Registrar
 Ms N Wallace Principal Legal Officer, Chief Executive
 Office
 Mr B Frankland A/Principal Director of Administration
 Mr B Wood Establishments Officer.

4 TERMINOLOGY DEFINITIONS

Mediation:

"...a process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs." (Folberg J. and Alison Taylor, Mediation - A comprehensive guide to resolving conflict without litigation. (Jossey - Bass, San Francisco, 1984) at page 7).

Conciliation:

A process which extends mediation to include elements of expert appraisal. A neutral third party, usually an expert in the subject area of dispute, not only manages the negotiation but also makes recommendations as to solutions. These are usually not binding but are used as a guide by the parties in reaching agreement. (New South Wales Law Reform Commission alternative dispute resolution discussion paper 1989 at 7.)

Alternative Dispute Resolution (ADR)

This is a process offered to the members of the community to resolve problems occurring between them other than by resorting to litigation leading to adjudication (the traditional method of dispute resolution). This resolution process can range from mediation to conciliation and negotiation on to arbitration. Within this paper, ADR is confined to a general description of processes that are alternative to the traditional litigation process and include mediation. The different processes under alternative dispute resolution can be characterised by the amount of control exercised by the professional over the outcome.

Registrar

This term includes Registrars and Deputy Registrars of the Family Court of Australia appointed pursuant to s.38N of the Family Law Act 1975. One of the duties of a Registrar is to conduct conferences between parties to litigation to assist the parties to reach agreement on matters in issue between them.

Counsellor

Counsellor is used in this discussion paper as defined in "Court Counsellor" in s.4(1) of the Family Law Act. The major duties of a counsellor are to assist parties to marriages and their children to adjust to the consequences

of marital breakdown and to resolve by conciliation matters arising in proceedings between the parties (s.16A). Counsellors also conduct conferences between the parties to assist with reconciliation or improvement of the relationship between the parties (s.14) and with respect to children (s.62).

Mediator (Legal)

An experienced officer of the Court who is appointed to the proposed mediation service, is qualified to practice law and is an accredited mediator. A mediator (Legal) may also be a private practitioner appointed on a sessional basis.

Mediation (Social Science)

An experienced officer of the Court who has a tertiary qualification in a social science and is an accredited mediator. A mediator (Social Science) may also be an external practitioner appointed on a sessional basis.

Director of Mediation

An experienced Officer of the Court who is the senior officer in the mediation service in the Registry. This officer has tertiary qualifications in either the legal or social science areas, mediation qualifications and administrative ability.

Regional Director of Mediation

The equivalent to the Director of Mediation in the regional structure.

Principal Director of Mediation

This is the senior officer in the service with similar experience and qualifications to the Director of Mediation and Regional Director of Mediation but having the overall control in the national setting of the mediation service of the Court.

5 THE PRESENT POSITION

Since its commencement in January 1976, the Family Court has emphasised alternative dispute resolution within the litigation process. In this regard, the Court has a fine record and has led Courts in Australia and to a great extent in the world. The original Family Law Act and Regulations were designed to give the Court administration the ability to assist litigants and potential litigants with the resolution of their disputes other than by the decision of a Judge.

By section 15 of the Family Law Act 1975, any party to a marriage may file a notice stating that the party wishes to have the assistance of the counselling facilities of the Court. This request may be filed in cases where no litigation has been commenced. Many people have used this service. In many registries, half of the counselling conducted by the counsellors is with parties who have not commenced litigation. The limitation is that this counselling is available only to assist in the relationship breakdown of the parties or with problems associated with children.

Once litigation has been commenced, counselling is available and in most Registries, the parties are directed to counselling in relation to children's matters immediately after the filing of the application and before the first return date.

Counselling may also be ordered pursuant to s.62 of the Act and is mandatory before parties proceed to a defended hearing (s.64(1B)).

In all disputed matters before the Court, the parties can be directed to a conference with an officer of the Court pursuant to Order 24 of the Family Law Rules. Once again, this procedure is mandatory before the parties proceed to a defended property hearing.

In the main, children's matters have been referred to counsellors, and property and financial matters to registrars as part of the conciliation program of the Court. Recently however, responding to the need to address family issues which include both children and property matters, extensive work has been done in the Newcastle, Hobart and Dandenong Registries of the Family Court of Australia, and in the Family Court of Western Australia at Perth in conferences conducted by both a registrar and a counsellor. This work has been particularly successful where there are mixed children and property matters, and in intractable matters or where the relationship between the parties is such that co-conferencing is necessary.

In spite of the present court conciliation services, available court processes do not offer sufficient early opportunities to deal with problems before people, receptive to dispute settlement, are streamed into the litigation process. There is an increasing tendency to focus available resources on dispute resolution mechanisms later in the litigation process to avoid the cost of court hearings. There is also a need to increase resources directed to the early stages of disputes resulting from family breakdowns.

Research conducted by court psychologists and supported by overseas studies shows that early intervention in the process of a family dispute often leads to settlement. Protracted disputes are much more difficult to resolve.

6 WHY MEDIATION?

There are three main differences between the present conciliation processes of the Court and the proposed mediation service. Firstly, to avail themselves of the mediation service, the parties do not need to have "a dispute" in terms of a dispute leading to litigation. The mediation service should be seen as an alternative problem/dispute resolution service rather than alternative dispute resolution. So often, on the breakdown of a marriage, or of a relationship in the case of defacto spouses, the parties are not initially in dispute, but have no way of addressing the problems which are caused by the breakdown of the relationship. The proposed mediation service will offer a method of coming to agreement on these problem areas.

Secondly, the mediation process will not be in any way linked or associated with the litigation process. The present methods of ADR used by the Court in conciliation work are part of the litigation process. Even the pre-application counselling can be seen as part of the litigation process, preventative though it may be. The mediation service being proposed is a total alternative which, although administered by the Court, runs in parallel with the litigation service and is not part of it. It is a true alternative and a separate stream to litigation. There is however, no reason why parties who are in the litigation process cannot opt to "drop out" of the litigation process and use mediation. It is recommended by the committee that case management procedures of the litigation stream be amended to allow parties this alternative option.

Thirdly, the process varies to the current conciliation processes offered in the litigation stream in terms of the process itself. Mediation empowers parties to make their own decisions. Mediators act as a neutral third person to facilitate this process. Parties themselves become responsible for the decisions that they make. Mediators do not tell people what to do, they provide a structured process which enables them to make their own decisions. All of these decisions are made within the shadow of the Court but without the fear and trauma associated with the litigation process. The mediation process allows people to learn a new basis for dispute resolution so that future problems can be resolved without the necessity to return to the Court, apart from perhaps using again the mediation service.

7 MEDIATION - AN ALTERNATIVE TO LITIGATION

The mediation service will offer mediation to the parties to a marriage or a defacto relationship where there are children. It will be voluntary. A party will have the option to apply to the Court in its litigation stream or in its mediation stream. If the latter, the Director of Mediation will assess the case and determine the type and number of court mediators who will be required. The parties will then be invited to attend a mediation session.

At a mediation session itself, people will be taken through the process of firstly, clearly defining all aspects of the dispute they wish to resolve, secondly, considering all the possible solutions, and thirdly, reaching a mutual agreement satisfactory both for the immediate future and over time. The Court mediators will help the parties explore the "workability" of the arrangements. They will also provide information about how registered agreements have the same effect as orders of the Court and for any further counselling necessary to allow people to be in a position to reach settlement. The parties and the mediator can determine when sessions end and whether further sessions are advisable.

Ultimately if the parties come to agreement, then they can be assisted in the preparation and filing of agreements pursuant to ss.66ZC and 86 of the Family Law Act if they wish to formalise the agreements. It is the committee's recommendation that s.86 of the Act be amended from its current form to allow a s.86 agreement to give the same finality to these agreements as do orders under s.79 of the Family Law Act. If no amendment to s.86 is made, then an alternative to this is an administrative "fast tracking" of consent orders pursuant to Order 31 Rule 8 of the Family Law Rules to achieve this sense of finality for the parties. This has a present problem as an order requires the filing of an application but legislation could overcome this.

Research shows that agreements where the parties have had an input and come to the decisions themselves, are more likely to be seen by the parties as binding than orders made in defended proceedings where the solution is imposed on them. By virtue of the sections referred to, the agreements which are registered with the Court will have the same force as an order. It is the Court's experience that it is important to parties in the Court system to have an authoritative piece of paper detailing their legal rights.

If mediation fails, then the litigation process will be commenced by one or other of parties by filing an application for such orders as they seek. This will not prevent or in any way hinder the Court using other ADR strategies which are part of the present litigation process in a further attempt to settle the issues between the parties.

What the mediation service will offer is assistance to the parties at the very earliest opportunity, in a neutral setting giving the parties an opportunity to resolve issues/problems themselves.

The new service will consist of:

- 1 early mediation - a process undertaken by consent of the parties to resolve problems with one or two mediators and with or without legal representatives without the need to resort to litigation;
- 2 integrated mediation - a process by consent of the parties whereby disputes which have arisen in litigation are dealt with by the mediation service with legal representatives and during which the legal process is stayed; and
- 3 authoritative mediation - integrated mediation used by parties immediately before a hearing with an authoritative mediator such as a retired Judge or a Q.C.

8 AUTHORITATIVE MEDIATION

A further mediation process called Authoritative Mediation is recommended by the Committee as a final mediation process available just prior to the judicial hearing of the matter.

Authoritative Mediation is defined by the Committee as mediation conducted by authoritative figures such as retired Judges, Queen's Counsel, or persons of similar authority.

Authoritative Mediation would be conducted on a sessional basis within the mediation service of the Court. It would not be a daily form of mediation but used only in those intractable cases deemed by the Director of Mediation to be appropriate to the more authoritative approach inherent in mediation by an authoritative figure.

The Committee considers it important that the process does not become a "mini trial" in the eyes of the legal profession and careful selection of cases for authoritative mediation would be essential.

It is important that while authoritative this process be true mediation. The "authority" should be external to the Court. The process must be consensual and non-directional. The parties must not be or be seen to be pressured into settlement.

Authoritative Mediation is the successful model used in Canada and New Zealand. However, in those Court structures there are no equivalent Registrars or Court Counsellors so that all mediation undertaken is by a Judge.

9 MEDIATION - WHY THE FAMILY COURT?

What the mediation service offers is twofold. Firstly, it offers to both parties accurate information about their rights and obligations and about the emotional processes of the marriage breakdown. So often, each party has unrealistic expectations both legally and emotionally. So often, each party is advised by friends, family or other social groups in ways that are quite unrealistic and frequently totally wrong. The Court mediators are in a position to explain the emotional processes of marriage breakup and to inform the parties of the legal process and the parameters for ratification by the Court.

Secondly, mediators offer to the parties a communication bridge using a neutral process. On the breakdown of a relationship many parties find a total inability to communicate with each other. While each remains in isolation from the other, resolution of their problems is impossible. In most such cases the answer is to commence protracted and emotionally and financially debilitating litigation. While this litigation results in settlement in well over 90% of cases the reasons for settlement are often influenced by emotional and financial costs. The advantage of mediation is that it allows this resolution of family problems at the earliest possible time and at the cheapest possible cost and provides the parties an opportunity to fully participate in the process leading to agreement.

At present in Australia there is no national agency which fills this need. There is unlikely ever to be another agency which will allow mediators to assist parties with information as to their legal rights and obligations and the emotional processes of marriage breakdown in a properly structured mediation service. Australian society has looked to the Family Court to resolve the problems of breakdown of marriage and relationships for nearly two decades. This is a social phenomenon that will be continued and not changed by placing the mediation service within the Family Court. What the Family Court can offer within this mediation service is the experience of lawyers and social scientists working in the Court setting and with direct access to the Court for ratification of agreements reached.

10 THE ROLE OF ORGANISATIONS ASSOCIATED WITH THE COURT IN MEDIATION

The Court deals with a number of organisations and groups on a regular basis. In the development of the new service it is expected that local consultative committees of representatives of all of these groups would be established to ensure that issues are dealt with co-operatively and that the new service works effectively. This section discusses the likely impact of the new service on specific organisations and the role each of them will be called upon to perform.

10.1 THE LEGAL PROFESSION

The continued co-operation and assistance of the legal profession will be crucial to the success of the new service. In many cases the presence of lawyers will be vital in order to reach settlement and Solicitors and Barristers will be able to represent clients in mediation sessions where the client so desires. Lawyers will also have to understand the new service and the Court will devote resources to ensuring that information is made available. More importantly, the Court will ensure that lawyers are involved from the very beginning and the new training courses as proposed by the Committee to be established for Court mediators will be open to the members of the profession.

It is hoped that lawyers will take advantage of the new service and will provide a greater choice of settlement options to their clients. Solicitors will also be encouraged to refer recently separated clients to the mediation service at the earliest opportunity.

The mediation service will also look to the legal profession as a source of sessional mediators to supplement the work of the staff of the mediation service should the need arise. These outside mediators will necessarily have mediation training and a professional background that is acceptable to the Court's standards for internal mediators.

10.2 MARRIAGE COUNSELLING SERVICES

The Court will consult with Marriage Guidance Counselling Services in order to integrate referral processes thus developing a forum in which all clients are offered a more flexible and appropriate service. Seminars on the new service will be open to marriage guidance counsellors both in initial training stages and any later training initiatives undertaken by the Court.

The Court does not see itself in competition with Marriage Guidance Services and recognises the expertise of these services in the areas of marriage guidance and family counselling prior to the breakdown of a relationship.

However, once a breakdown has occurred, the expertise and experience of the Court in assisting the parties to settle problems and disputes arising from the relationship cannot be matched by that offered by Marriage Guidance staff, many of whom do not have tertiary legal or social science qualifications.

10.3 LEGAL AID

Legal Aid organisations around Australia have recognised the advantages in achieving settlement through early intervention in family disputes. This is often done through mediation and other associated processes. Legal Aid Commissions are expected to make it a pre-requisite to

the granting of legal aid that the applicant applies to the mediation service of the Family Court prior to legal aid being granted. The settlements achieved through this process should reduce the drain on legal aid resources.

10.4 COMMUNITY HEALTH ORGANISATIONS

Community Health Organisations will be offered educative seminars on the Family Court Mediation Service to inform health workers of the benefits of the service and to enable them to make appropriate referrals. They will also be provided with advertising material of the service to be made available to their clients. This educative process will also assist where referrals are made to such professionals from the Court.

11 THE AIMS OF THE MEDIATION SERVICE

The aims of the new service must be consistent with the objectives presently being developed in the corporate plan of the Family Court. This plan has as a major objective the provision and expansion of alternative dispute resolution services to resolve family problems. These specific aims of the mediation service are:

- (a) to permit a fair and informed resolution of disputes;
- (b) to provide a balanced multi-disciplinary and early dispute resolution service;
- (c) to reduce the trauma and breakdown associated with lengthy disputes over family breakdown through the provision of the service whereby these disputes can be settled quickly and effectively;
- (d) to provide an environment which can ensure equity at all times and protection of the rights of the parties;
- (e) to achieve lasting agreements.

12 ADVERTISING THE MEDIATION SERVICE

The service will only achieve maximum effectiveness if all of those who need its services know what it offers. It is envisaged that information about its existence be provided;

- through the various agencies associated with the Court, including the private legal profession, legal aid commissions, community legal centres, and marriage guidance services;
- through information sessions conducted by the service which allow members of the public to understand this service and the alternatives that are available to them. Such sessions will also address such issues relating to family breakdowns and problems that arise therefrom;
- through signs, posters and pamphlets available in Court premises;

- through media programs and the Court's information officer.

13 ANTICIPATED NUMBERS FOR THE MEDIATION SERVICE

In the year 1 July 1988/30 June 1989 nearly 42,000 applications for dissolution of marriage were filed in Australia. In the same period, approximately 27,500 applications were made to the Court for ancillary relief. In the same financial year approximately 55,000 applications for legal aid were received in Family Law matters. It is expected that the Legal Aid Commissions will make it a prerequisite to the granting of legal aid that the applicant applies to the mediation service of the Family Court prior to legal aid being granted. In addition, many thousands who are assisted by community legal centres will no doubt also be referred to the service. Apart from the various agencies referred to above, the Department of Social Security and the Child Support Agency also see large numbers of people shortly after the breakdown of their relationships.

- from whom this political impetus is, which dept(s)?

The above figures do not adequately reflect the increase in numbers caused by the reference of power in relation to ex-nuptial children or the child support scheme. The demand for the mediation service cannot be predicted other than to point out the scope of the likely demand and even that minimum demand is large.

14 EDUCATION OF MEDIATORS

The selection, training and accreditation of Court mediators is essential for the establishment of a professional credible service.

Selection of mediators would involve a process whereby applicants were selected for:

- an appropriate degree in law or social science;
- knowledge and experience of Family Law and issues related to family breakdown;
- personal attributes relating to communication skills, belief that people have an ability and right to pursue their own decision making and ability to adopt a non-judgemental, non-directive role in the mediation processes.

It is important to the success of the service that the quality of the initial training of the mediators is of a high standard and that there is ongoing attention to in-house development of skills and further training programs. Initial training would be conducted by outside organisations or individuals and would be based on a conceptual model of mediation compatible with the needs of people using the Court mediation service.

ie, it is a qstn of "predicted needs"

catch 22?
How do we know "needs" until
up & running v. training
must be broad enough to
allow specific needs for the
range of Aust. people to be
discussed

Mediation is only a developing skill in Australia. Such training courses as are available locally are presented by people whose skills are often a reflection of the infancy of the movement in Australia. There are courses available based in some law schools at an undergraduate and postgraduate level, but these would not yet be appropriate for the current needs of the Court. The committee considers that it would be necessary, in order to effectively develop the basic expertise required, to use the service of a recognised mediation training group initially. This experience, in the Committee's assessment, is not available within Australia.

One training course to which the Committee has been exposed is that conducted by CDR Associates of Boulder Colorado, United States of America. This organisation offers training programs in mediation for both basic and advanced training. The organisation has conducted courses both in the United States and internationally. Many of the short mediation courses available in Australia are conducted by people themselves trained by CDR Associates. It is the Committee's assessment that this organisation offers a very professional 40 hour program that could effectively be tailored to the needs of the Court. The mediation model adopted by CDR Associates is very similar to the model adopted by the Committee as appropriate in the context of the Family Court.

In the future a training program could be undertaken using the services of a suitable tertiary institution for the training of mediators. In the immediate future, it may be necessary to use the services of an overseas leader for these courses, but the Committee envisages the long term courses being run by an appropriate tertiary institution as mediation skills in Australia increase. Initially the Court will accredit mediators but finally accreditation could pass to the tertiary institution offering an accepted mediation course.

The Committee recommends the use of CDR Associates for the initial training, being two, five day seminars (one in Melbourne and one in Sydney), training a total of 80 mediators, 40 at each course. The costs of training would be offset by offering 20 places in each course to outside interested persons for a fee. The Committee expects it would not be difficult to fill these courses.

The Committee envisages that the Principal Director of Mediation will be closely involved in and have input into the current movement to set up a national accreditation system for Australian mediators and any national professional associations of mediators currently being established within Australia.

15 LOCATION OF THE MEDIATION SERVICE

Mediation sessions need to be conducted in an area which is distinct from the formal judicial sections of the Court, but which is within the precincts of the Court. The Court has had considerable experience in holding informal sessions with people in the conciliation process and has found that this is the most successful forum. The arrangement also has major security advantages especially in difficult disputes. Accordingly the Committee recommends that the service be located as far as possible within current Family Court facilities.

Practically, this also will facilitate ease of administrative flow and file movement.

The Committee further recommends that the same separation of accommodation which currently applies to the counselling service also apply to the mediation service.

16 THE THREE YEAR IMPLEMENTATION PROGRAM

The Committee recommends that implementation of the mediation service be phased into the Court structure over a three year period.

Phase 1

Phase 1 implementation is recommended by the Committee to be the setting up of a mediation service in the Melbourne and Parramatta Registries of the Court, being a large and medium sized Registry respectively. It is proposed by the Committee that this be implemented on 1 January 1991 and that the first year of the implementation be the calendar year 1991. The phasing in of the program will allow monitoring and evaluation in the early stages of the success of mediation in increasing the rate of early settlements and the consequent effects on the cost of court processes and cost to litigants, including legal aid costs.

*how to be
evaluated
by
Whom*

Phase 2

The Committee recommends that phase 2 implementation be in the calendar year 1992 and that in that year the mediation service be extended to all multi-Judge Registries including Dandenong Registry.

Phase 3

The Committee recommends phase 3 of the implementation process to be the final involvement of all "A class" and "B class" Registries (using the review working party's description of a "B class" Registry) in the 1993 calendar year. The "A class" Registries in each region would be responsible for any circuit work to "C class" Registries and to any circuit towns within the Region.

The Committee recommends the appointment of the Principal Director of Mediation and the Director of Mediation of the Melbourne and Parramatta Registries in Phase 1 of the implementation process.

The Committee recommends the appointment of the Regional Director of Mediation in phase 2 of the implementation process.

17 LEGISLATIVE CHANGE

One of the basic philosophies of mediation as proposed by the Committee is that there be no nexus between the litigation and mediation streams within the Court.

The Committee recommends that legislation recognise the separateness of the two streams and that within the litigation stream conciliation powers are used rather than mediation. The Committee further recommends that if parties in the litigation process decide to try to mediate their dispute, then the dispute, for the duration of the mediation process, be removed from the litigation stream by removing the matter from the active pending cases list or such other mechanism within the case management guidelines that is appropriate.

In order to emphasise the separateness of the mediation service, a new part of the Family Law Act would be required. This new part would cover such issues as commencement of mediation sessions, confidentiality, secrecy, advertising of the mediation service, use of outside mediators, appointment of staff, production of documents, protection and immunity of mediators, and if desired, a regulation of fees for the service.

As previously discussed within this paper, the Committee also recommends a change to the present section 86 of the Family Law Act to allow the finality of property orders currently made under section 79 to be accorded to agreements registered under section 86.

Any legislative change for the mediation service should also take into account the current provisions of the Family Law Amendment Bill 1990 particularly in the area of allegations of child abuse.

18 ESTABLISHMENT OF ORGANISATIONAL STRUCTURES

In line with a phased implementation of the mediation service, the Committee recommends the establishment in the first stage of the position of Principal Director of Mediation in Principal Registry and a Director of Mediation in each of the two Registries (Melbourne and Parramatta) involved in phase 1 of the implementation. The Committee further recommends the appointment of 14 mediators to the Melbourne mediation unit and 8 mediators to the Parramatta mediation unit.

In phase 2 of the implementation, the Committee recommends the appointment of a Regional Director of Mediation in each region.

19 CLASSIFICATIONS ISSUES

The model of mediation proposed by the Committee involves both lawyers and social scientists trained as mediators. In some sessions, joint-mediation will be undertaken by both a lawyer and a social scientist.

The Committee recommends the payment of an additional allowance of a sum to be decided to those counsellors and Registrars who undertake the additional mediation training and join the mediation service. If appointments are made from outside the Court at a future time, officers would be appointed to the appropriate professional structure within the Court and again be paid an additional allowance for mediation work.

It is envisaged by the Committee that there would be a movement of mediators after an appropriate time to other areas of the Court such as the Registrars area or the counsellors area if they wish, to avoid professional "burn out" and to maintain their professional skills in their chosen field.

The classifications of both of the positions of Regional Director of Mediation and Director of Mediation are seen by the Committee as on a par with the duties attributed by the Review Working Party to the Regional Registrar and Director of Court Counselling and Registrar and Director of Court Counselling.

The professional background of the occupant of both these positions could be either lawyer or social scientist. The Committee places importance on the proposal that there be a balanced mixture of professional backgrounds in mediation staff in each unit. It is therefore considered important that the classification of both of these positions be sufficiently high to attract lawyers, to the positions as well as social science mediators. The Committee considers that the proposed Principal Director of Mediation position carries a high level of functional responsibility in relation to the proposed mediation section of the Court.

After an examination of the proposals of the Review Working Party, the Committee recommends this position be classified at a similar level to the proposed classification of the Principal Director of Court Counselling, i.e. the upper level SES1.

20 WHAT FEES WILL BE CHARGED?

Chapter ... outlines proposals for revenue generation in the Court. These proposals will eventually be considered in the mediation service. However, initially no fees will be charged. No doubt Government will consider the question of fees for mediation and their level when considering the question of filing fees in the Court.

21 COST SAVINGS

There has been an identified need for forms of alternative dispute resolution (ADR) which are less expensive and faster than the normal Court processes. Early intervention through mediation in marriage breakdowns facilitating an agreement between the parties, promotes savings in:

- (a) the costs associated with the progression of the matter through the Court structure,
- (b) the personal legal costs of each of the parties, and
- (c) if on legal aid, the legal aid costs in funding the application.

While it is acknowledged that most cases settle before final judicial determination currently many remain in the Court system for some time before this occurs. Evidence suggests that agreements that have been settled by the parties are longer lasting in terms of effectiveness and are more likely to be adhered to by the parties. Indirect savings in the area of child support enforcement may also flow from such agreements, in that there is potential for these agreements as child support agreements under Part 6 of the Child Support (Assessment) Act 1989.

The phasing in of the establishment of the service will allow monitoring and evaluation in the early stages of the success of mediation and in increasing the rate of early settlement and the consequent effects on the cost of Court processes and cost to litigants including Legal Aid costs.

This will allow for better planning in the future management of both the service and of the other areas affected by the implementation of the service.