AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION INC

AUSTRALIAN MADE DISPUTE RESOLUTION

COMMUNITY OPTIONS FOR THE FUTURE

PROCEEDINGS OF THE NATIONAL CONFERENCE 1993

Edited by

ROBYN CLAREMONT

1993 CONFERENCE COMMITTEE

ROBYN CLAREMONT
PATRINA DUFFY
PATRICIA FRATER
DAVID ROLLINSON

Published by the Australian Dispute Resolution Association Inc
PO Box A2468 Sydney South NSW 2000
Australia

CONTENTS

Introduction

The impetus for ADRA's 1993 Conference arose from the same concerns which saw the inception of its Community and Environmental Divisions.

Dispute resolution in commercial and family areas has had considerable exposure in conferences and the media generally. It seemed timely to reconsider the role which community dispute resolution has played in the development and use of processes such as mediation on the Australian scene since the founding of the NSW Community Justice Centres in 1980.

Some uncertainty as to what defines community dispute resolution, and what it can - or ought to - deal with has arisen as dispute resolution practice has widened and new waves of practitioners appear on the scene.

It seems that there is a tendency to assume that community dispute resolution can be defined by its supposed subject matter: that it is the process which deals with neighbourhood matters - trees, fences, dogs and so on. The real definition of community dispute resolution, however, emphasises its location within the community, on its use of dispute resolvers who are drawn from the community in which they are to practise.

It is important here to take a wide view of the concept of 'community'. We all move in and range across a variety of communities, in which we live, or work, or socialise, or with whose interests and values we identify. We all have the potential to influence and affect these communities by our very participation in them. Conflict and change are features of communities, and effective dispute resolution skills and techniques are vital to ensure that communities are able to benefit from that conflict and change in a positive way. Dispute resolution processes which challenge societal assumptions open up the way for the conscious use of change. It is important that people with the will to do so are given the opportunity to develop the expertise to enable them to develop appropriate approaches to dispute resolution in those communities.

The 1993 Conference brought together a wide range of people drawn from many areas of the community who pointed to a varied use of dispute resolution options in broad community settings. These ranged across programs in schools, in public institutions, in retirement villages, in the workplace, in Aboriginal communities, in local government areas, in environmental issues, in changing family contexts.

A feature of the dispute resolution scene at present seems to be that there are increasing numbers of people whose interest in the field has led them to undertake training, usually in mediation, and who then find themselves without the opportunities they would like to practise these skills. I think it is likely that, even with the increasing development of court-annexed mediation programs, there will only ever be a limited use of what might be called 'pure' or 'classical' mediation.

On the other hand, however, in the light of the diversity of experience that the ADRA 1993 Conference brought to light, it may be that community dispute resolution, as widely defined, is the 'growth industry' of the dispute resolution scene. That is to say, more and more people will be encouraged to use mediation skills within their own communities to develop appropriate, culturally relevant dispute resolution programs.

This is not to say, of course, that we can happily pick up bits and pieces of processes, and smatterings of skills, and call them mediation. A number of speakers, notably Wendy Faulkes and Justice Stein, warned about the importance of developing standards of practice, and of testing programs against the philosophical imperatives of mediation.

It is important that in this evolution of community based dispute resolution there is a conscious eclecticism, a deliberate process of consultation and development, of testing and evaluation to ensure that what is developed is valid and valuable both in terms of the community's values and those of the chosen form of dispute resolution.

One of the most important attributes of a mediator is self-awareness and self-knowledge. This ability to analyse and to evaluate, to be aware of intention, is just as vital in program development and management.

The materials which form the Proceedings of this Conference are of several kinds. There are papers and presentations, there are reports of workshops, and in some instances there are also papers prepared for discussion at those workshops. Where the workshop report gives extra depth and includes outcomes of discussion, it has been published along with the paper itself.

ADRA wishes to thank all participants in this Conference for their readiness to share knowledge and experience, to examine new options, to be open to new ways of proceeding. To the speakers and workshop leaders we give particular thanks for so readily giving up time in their crowded schedules to make the Conference the success it was.

Without the work of the Conference Committee, the 1993 Conference would never have proceeded beyond the concept stage. The many hours of time which the Committee gave were rewarded by the attendance and enthusiastic participation of such a wide section of the community.

The Committee is indebted to Ms Judy Gillespie, of Focus Event and Meeting Management, for providing unfailingly effective administrative organisation for the Conference.

Robyn Claremont
ADRA President 1992-93

Tomorrow's Disputes:

Designing the Process to Meet the Times

Wendy Faulkes

Director, NSW Community Justice Centres

As we move towards the 21st Century, we are recognising more and more that we should be considering the needs of the next millenium.

It is no longer good enough to 'trust evolution and plan for the short term'. The world's environmental problems are a clear demonstration of the success of *that* policy.

As practitioners in what may still be considered 'an emerging profession' it would be easy to assume that we are all ready and willing to be in the vanguard of change - after all we have adopted and fought for this new and trendy thing called 'mediation'. *We* have argued with the traditionalists in the legal environment; we have won over a few, worn down a few. *We* have been the radicals, the ones calling for change, the ones taking up the challenge to do, to improve, to develop.

One might think then that in this area, change would come easily. Sadly, I see more of claiming 'ownership' of mediation, I see more people wanting to enclose it within rigid boundaries, than I do of fresh ideas. Consideration of the needs of service users - as *they* understand them - has been lost in the push to impose mediation schemes as a panacea to the problems of the world.

It is not unreasonable for a new profession or discipline to take some years to establish its principles and practice, and to articulate this. I believe mediation practice has developed well in this country and against tough opposition. But the stagnation and lack of creativity when it is only just a teenager worries me.

There are too many assumptions about 'what mediation is', and about its 'essentials'. On the other hand, there is a distressing tendency to call anything that involves settling disputes 'mediation'. Perhaps it is this which provokes the 'true believers' into over-zealous restrictions, and enthusiastic cloning of existing programmes.

Nowhere is this more evident than where professional service providers seek to extend service to minority groups and other cultures.

For most of our existence we (Community Justice Centres) have been under pressure to provide mediation services and mediation training to the Aboriginal community and to other cultural groups. The pressure comes sometimes from the groups themselves, or from politicians, sometimes from academics and others. The requests are often a response to crisis, on a 'do it now' basis, sometimes more pragmatically a response to the availability of money.

There is no doubt that many communities would benefit if they had available an alternative to the existing legal system that is so often alien and incomprehensible. However I question the morality, the common sense and the effectiveness of discarding one universally applied system (such as the present legal system) and replacing it with another imposed, system -

even though it might be a better one. Let me hasten to say that I'm not suggesting a 'do-nothing' option. Far from it!

What I am suggesting is that we have to do much, much more than take a system that we know is effective in one society, and transport it, maybe with some cosmetic changes to another culture. That the system to be transported may in fact be the most appropriate is not the issue.

At issue is the cultural imperialism that *assumes* it is, and the fantasy that what works here will work anywhere else. Surely by now we know enough about how and why disputes emerge and are resolved or not, to design programmes and processes that will model co-operative and creative problem solving not simply 'plonk' mediation into the community, without reference to the cultural needs of the service users and the requirements for human rights and natural justice.

We need to carefully identify the needs of the users and to establish an unbending commitment to adequate professional standards. We need to know the cultural and economic climate in which the programme will be operating. We need to understand clearly just what it is that we are proposing, and what all of the dispute resolution options are. It is only then that attention can be given to designing a process that is appropriate to

- the culture, or cultures
- the environment
- the times.

In 1980 CJCs adapted an American model to suit metropolitan NSW. The major adaptations were to ensure that it would be appropriate to the multi-cultural community in which it was operating, and would fit (or could co-exist) alongside the existing courts and legal structure. In the beginning it was a plain canvas - the decisions on whether it would provide mediation, conciliation or arbitration were not made until all options had been considered. Its design was appropriate to the culture, the environment and the times. Most later developments in Australia built on this success, some re-importing US models, especially those servicing the Family Courts and the commercial sector. I have seen little evidence though of a thorough understanding of the options and the differences between the processes - perhaps we succeeded too well, and everyone assumed mediation was the *only* way to go!

In 1991, a model for design of a culturally relevant ADR programme was developed. This was used initially to assist in the development of the WA Aboriginal Mediation Programme. Its usefulness has since been recognised in designing programmes within the framework of the courts. It has a much broader application, and can assist in programme design and process design, provided it is accompanied by careful attention to defining the essential requirements of the specific type of ADR programme proposed.

Designing an ADR programme for any strongly traditional culture - be that a formal court culture, or the Aboriginal culture, will raise many difficult issues and servicing inconsistencies. These become insoluble only if ignored. They need to be recognised and explored in detail if the proposed programme is to operate at an acceptable professional standard, and is to be relevant and sensitive to the culture in which it is to operate.

A mediation programme does not operate in a vacuum. (See Fig 1) It operates within a culture, or a mix of cultures and any one of these can place requirements or restrictions on the programme. Of course any programme may be designed without considering the 'culture' but it is unlikely to be either very effective or have a very long life.

This model was born out of the frustration of being expected to assist with inappropriate mediation proposals - or to repair them after an initial failure. (See Fig 2)

FIG 1

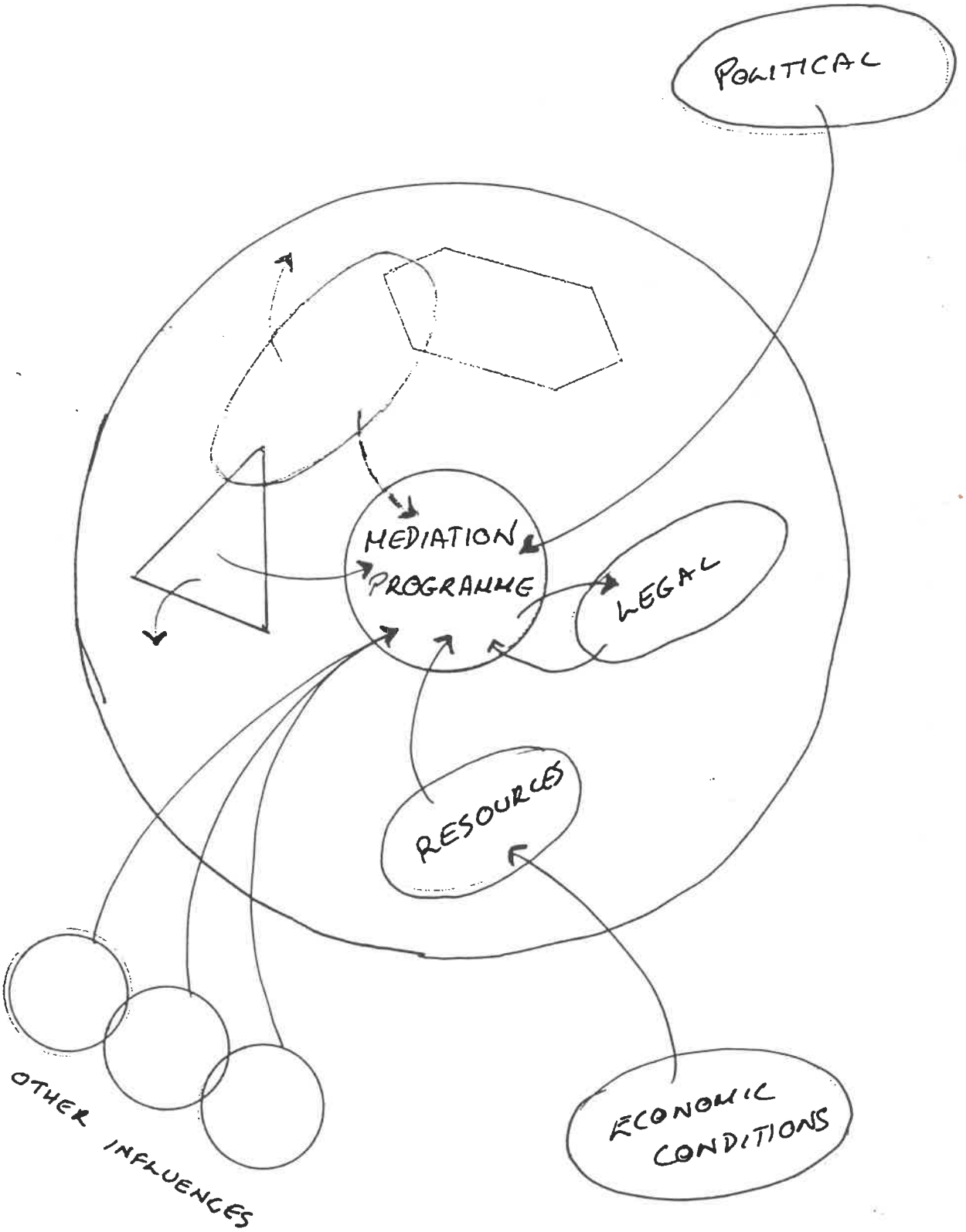
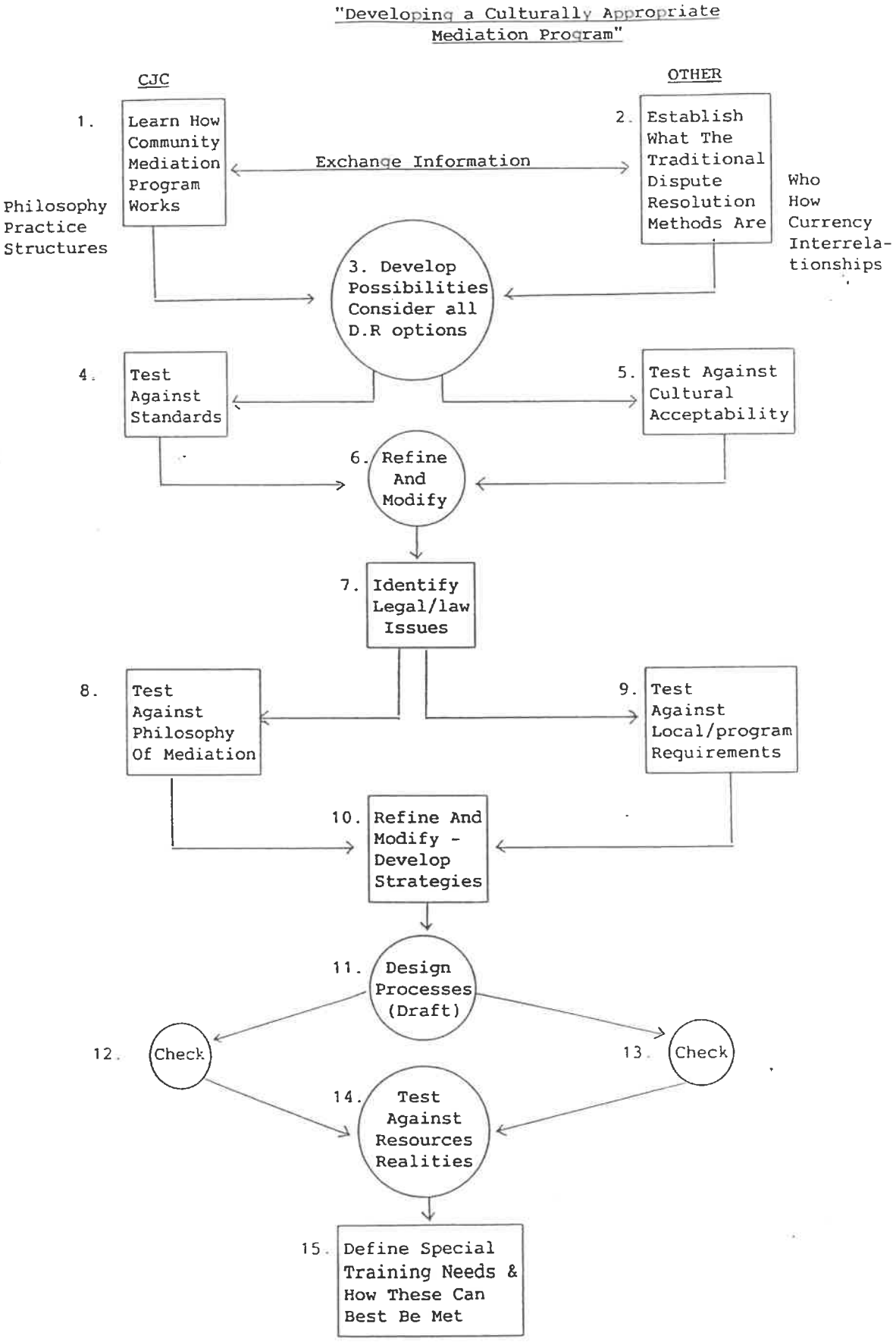

POLITICAL
MEDIATION PROGRAMME
LEGAL
RESOURCES
ECONOMIC CONDITIONS
OTHER INFLUENCES

FIG 2



Wendy Faulkes
Director CJCs

October 26, 1993

The first stage is one of the planners informing themselves about how a mediation programme works, and to establish the culture's traditional methods of dealing with disputes. We need to ask what the traditions of the culture will accommodate and whether part of the agenda for the programme is to promote some changes in the culture. After an information exchange it should be possible to develop the possibilities - at this stage neither rejecting nor accepting very much at all.

The next stage is to test these possibilities against the standards of mediation on one hand, and cultural acceptability on the other. This will lead to the ability to refine and modify the proposal.

By this stage many issues will be emerging and it is important that these issues and their relative importance be clarified. Any such issues, along with the refined proposal need to be tested again. Is it consistent with the philosophy of mediation? Or have we drifted away? On the other hand, there are likely to be requirements of the local community, or the sponsors of the programme (the Minister, perhaps, or the Department). Are these being met? Or is the refined proposal now in conflict with them? Does it undermine the rights won by a specific group?

This process will allow these issues to be fully explored and the proposal to be further modified if necessary. At each stage of modification the check - against mediation standards and philosophy on one hand, and cultural requirements on the other - needs to be completed.

Finally it will be possible to develop strategies, design the processes and test against the realities of resources, personnel, time and other constraints. The process of checking for acceptability at each stage should continue.

This model is intended as a 'skeleton' - a bare minimum really. Whilst impossible to depict in a two-dimensional chart it is misleading to consider only one culture - all of the cultures within our multi-cultural society co-exist within the dominant culture.

Overlaying the whole model is the most important question - 'Is it in the public interest?' Most of us would be unwilling to discard the hard-won rights - to equal access and opportunity, for example, or for consumer or environmental protection. This is not a question to be asked at the end, but should be an active consideration right from the start.

This model is not intended as a check-list of all the issues. It is to enhance the likelihood that all relevant issues will be considered, and a real attempt made to resolve the conflicts and inconsistencies which are inevitable. It is a framework to promote discussion, not a detailed formula.

Let me go back now to a more detailed consideration of the model, to 'flesh out' the skeleton a little. It is vitally important to understand the implications of

- operating a mediation programme and
- incorporating a mediation programme into a community.

I will assume that the 'design team' includes members of the 'other culture', and not dwell on this part of the process. The specifics of course differ according to the culture.

What is the philosophy of mediation? This philosophy includes such elements as:

(a) it is a neutral forum; it is non-judgmental - the mediators do not make decisions about who is right and who is wrong;

(b) it is self-determining; it does not impose a solution or settlement;

(c) it is an empowering process; it leaves the ownership of the dispute with the disputants. They are the only people who know all about the dispute and they are the ones who have to live with the consequences of its resolution or non-resolution; it assumes

they can and will make reasonable decisions for themselves, and that they have the right to do so.

(d) it is based on open and honest communication between the parties in dispute;

(e) it seeks co-operative solutions rather than an adversarial contest or resolution by superior power or force.

It is a common misconception that

- confidentiality and
- voluntary attendance

are essential to the philosophy of mediation. They are not. A mediation programme could be designed to provide for mandatory mediation, in public - it could still be legitimately termed 'mediation' - it may not be particularly effective in many circumstances, but this does not make it not 'mediation'. These two elements of confidentiality and voluntary attendance are, in effect, cultural factors and should be considered in the light of other cultural needs.

A *mediator*, however, must be

- impartial;
- non-judgmental;
- able and willing to leave the decision making to the parties;
- able to focus the attention of the parties on positive and co-operative outcomes.

Whenever the third party neutral begins to

- give advice;
- decide what the outcome should be and push the parties towards it;
- decide who is right and wrong, truthful or not;
- take sides, become an advocate;
- make decisions for the parties;

the process changes from one of mediation to any one of many other processes. This process may or may not be helpful to the parties but IT IS NOT MEDIATION. (See Attachment).

A 'generic mediation process' - i.e. one stripped to its bare bones - could be expected to include

- an (implied) agreement to mediate;
- a statement from each party, in the presence of the other;
- an identification of the issues;
- an orderly discussion on the issues;
- generation of options for settlement and/or future;
- negotiation of outcome.

This is a logical progression - but not strictly essential. It is the qualities and actions of the Third Party Neutral that make it mediation (or not):

- being non-judgmental
- being impartial
- leaving the decision making to the disputants
- focussing on positive and co-operative outcomes.

Before work can begin in earnest on 'developing possibilities', *all* dispute resolution options should be identified and considered. I would expect many to be quickly eliminated, but some should perhaps remain on the sidelines for a while.

ATTACHMENT

Dispute Resolution Process - Definitions

Adjudication:	Presence of a third party who has the authority to intervene in a dispute whether or not the principals want it, to make a decision and to enforce compliance with that decision.
Arbitration:	Both principals consent to the intervention of a third party whose judgment they must agree to accept beforehand.
Mediation:	Involves a third party who intervenes in a dispute to aid the parties in reaching an agreement. Both parties must agree to the intervention of a mediator, who can be appointed by an authority, or approached by the parties.
Conciliation	This may precede or form part of any ofthe other processes. In conciliation, a third party neutral acts to assist the parties by bringing them together, and/or transmitting offers between them
Dispute Counselling	This is a relatively unexplored and undeveloped process by which one party to a dispute is encouraged to develop methods and techniques which will enable direct negotiation with the other party. It is largely an educational function which encourages dispute resolution behaviour, and discourages disputing behaviour. It is a TPN process which can be delivered to both parties separately.
Conflict Management:	This is a third party neutral intervention which assists the parties to establishe adequate rules and structures for necessary communication even though the dispute continues and there is little or no goodwill between the parties. It may be necessary over a long period of time to enable sufficient trust to develop so that other negotiations may be successful.

ATTACHMENT (continued)

Independent Expert Appraisal: This refers to the appointment of an independent expert on the subject matter of the dispute who can appraise the technical issues in dispute, and can advise on the technical aspects of the case. An independent expert is appointed by the parties, or perhaps by the mediation agency at their request. This expert is a third party neutral with special technical expertise, and who may have a range of mediation skills. However, the process is one of providing information to the parties jointly, not advising them separately.

Early Neutral Evaluation: Like Independent Expert Appraisal, this is a Third Party Neutral intervention which will assess the arguments which will be put forward by both parties, and may advise on the probable outcome. Its use may be principally to create doubts in the minds of the parties that they have a "certain winner" on their hands.

Facilitated Settlement: Although similar in some aspects to mediation, this moves away from a mediation process when the facilitator adopts a role that involves diagnosis of the dispute, advice on possible outcomes (see ENE), or making substantive recommendations. This process may involve some investigatory functions, if the agency involved is responsible for compliance with certain statutes as well as resolution of the dispute (e.g ADB, HREOC, Ombudsman)

Issues Identification: Perhaps only the first phase of many facilitated settlement processes, this more-or-less relates to the procedures being adopted in some courts, in pre-trial conferences. Particularly in relation to these court processes, more work on specific definitions and appropriate terminology needs to be done.

Generation Of Options: This may also form part of many other dispute resolution processes (including mediation), but is mentioned separately because of its use in some workplace disputes, where it is often part of a training process. In these circumstances, the training process may have been implemented in order to resolve disruptive conflict, or the conflict may have come to the surface during the course of a training exercise.

WENDY FAULKES
DIRECTOR CJCs NSW

October 28, 1993

Much more work needs to be done on defining *other* ADR processes as clearly as we have defined mediation, as it is not until the processes are defined that standards can be articulated. Most of us are familiar with the old debates on terminology, so rather than re-visit this, I have appended to my paper a list for discussion.

I would like to re-visit briefly the US research on the emergence and transformation of disputes - as this gives us a chance to clarify the most appropriate process to fit the dispute. (See Fig 3) This chart illustrates the way that disputes typically emerge, and the role of the Third Party at each stage

The first stage in a dispute is an Unperceived Injurious Experience (UnPie) - where a person has an injurious experience, but because of lack of knowledge or understanding of rights and norms, does not perceive it as injurious.

Recognising that the experience is injurious is the 'naming' part of the process - which turns the UnPIE into a PIE. At this stage the injured person feels wronged and believes something can be done to remedy the wrong. Educating - on human rights, and legal rights - and a raising of expectations is necessary if the first stage of the transformation, the 'naming' stage is to be accomplished.

'Blaming' - attributing the injury to the fault of another person or social entity - transforms the PIE into a grievance. At this stage the injured person wants the person responsible to remedy the wrong. (At this stage also the terms become more recognisable.)

At the 'blaming' stage, grievance handling personnel might make the injured person aware of options, and act more as support and encouragement to seek a remedy. This role may include counselling, education or even investigation.

In 'claiming', the grievance is conveyed to the person believed to be responsible, and a remedy is asked for. At the 'claiming' stage where the experience is voiced to the other person, the third party role is more likely to be as a conciliator, or in some circumstances as an advocate.

The grievance is not transformed into a dispute until the 'claim' is rejected or delayed. The Third Party's role after the grievance is transformed into a dispute may be one of those we probably have less trouble defining - mediator, arbitrator or adjudicator.

This concept is useful in considering the purpose of a programme and the usefulness of a specific process. The time frame for this process may be years, or may be accomplished in seconds! Most programmes are probably conceived because of recognised cost and trauma of the end of the process.

To go back to the design model.....

Having considered the options and developed possibilities, the next step is to test against standards on one hand, and cultural acceptability on the other.

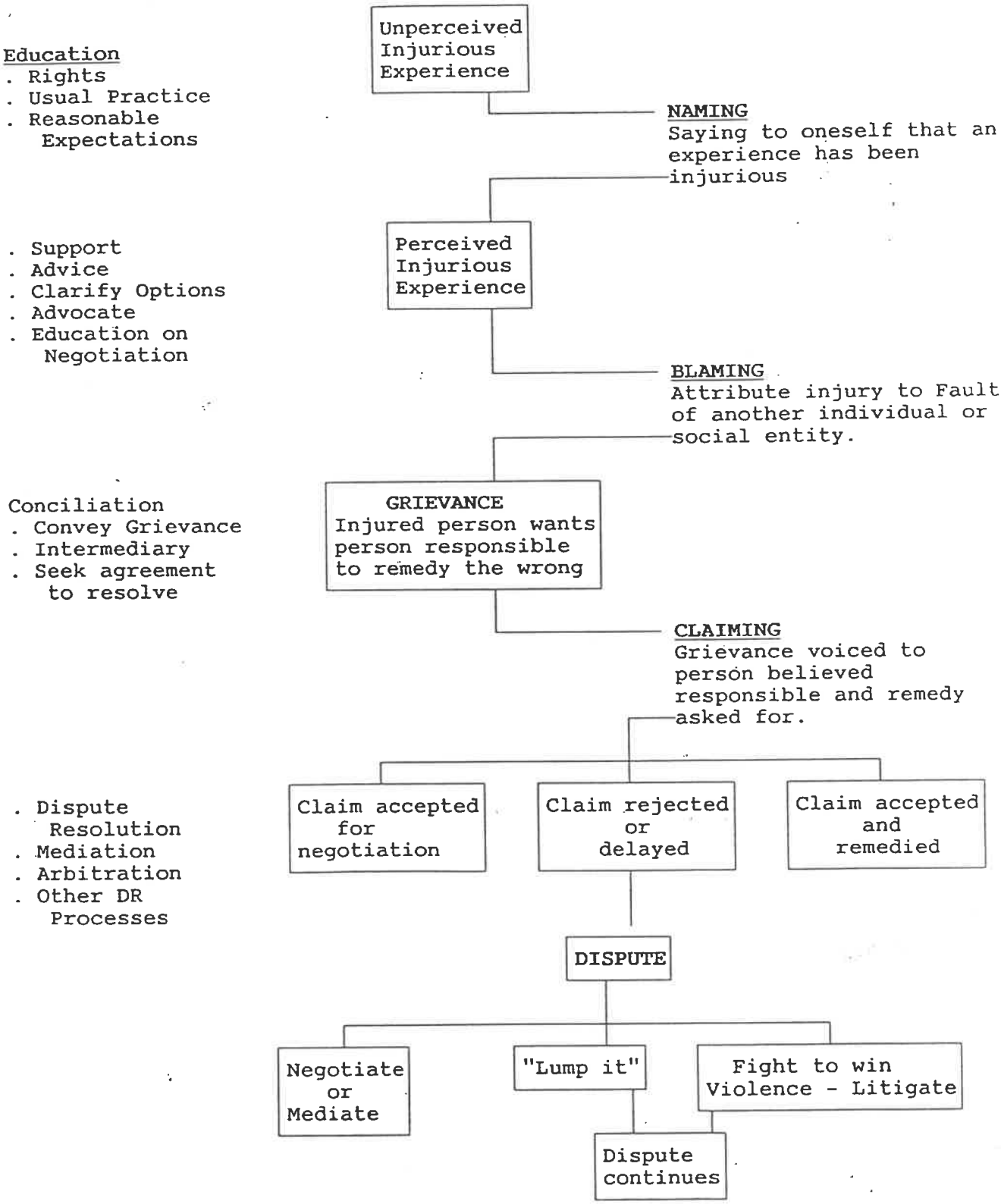
CJCs have led the way in Australia in developing acceptable (and achievable) standards of mediation practice.

Many people believe that they 'mediate' - some may even be effective in resolving conflict - or more often resolving problems. However, few are aware of the essential elements of mediation, and most are unlikely to be particularly skilled in their application.

To establish a mediation programme based on self assessment of abilities in tasks that have perhaps not even been articulated seems to be akin to a few people interested in first aid setting up a hospital, or, to put it in the context of the legal culture, a bunch of 'bush lawyers' and JPs opening a court.

FIG 3

EMERGENCE AND TRANSFORMATION OF DISPUTES



WENDY FAULKES CJCs, OCTOBER 1993

Based on "Emergence Transformation of Disputes: Naming, Blaming & Claiming". Abel, Sarat and Felstiner, 1982

Attention to appropriate standards and competencies in the field of mediation is every bit as important as ensuring legal (or any other professional) practice is of an acceptable standard. To do otherwise is to fail in our application of professional ethics.

'Mediation' may be seen as a 'soft option', but in many circumstances it is intervening in the lives of the disputants in a most significant way. 'Bad' mediation, where, for example, the mediator makes decisions, or even encourages parties to accept certain outcomes, can severely disadvantage a disputant, in just the same way that bad legal advice can. Where 'poor mediation' makes a dispute worse, or fails to assist the parties towards resolution (or at least understanding) of the dispute, the disputants can leave believing that nothing can be done to resolve it, leading in turn to acceptance of the status quo, depression or even a violent solution.

When testing against cultural acceptability, the issues will be as diverse as the cultures.

We could use our imagination to raise issues which could be important within certain cultural groups.

- Are females acceptable as mediators; is a segregated mediator panel acceptable?
- Do mediators have to be 'people of status' to be accepted?
- How important is anonymity?
- Do mediators have to subscribe to certain religious or political beliefs?
- Can the programme accept funds from Government?, from the Church? from Macdonalds?

After again refining and modifying the proposal, legal issues will be emerging. How will the proposed programme relate to existing systems?

The way these issues are determined may affect the cultural acceptability of the programme, especially if the 'other' culture is, for example, the Court. For example, in considering a court annexed scheme, it could be important to consider the following:-

- Will the agreements be legally enforceable?
- Can/should mediation be ordered by the Court?
- Can documents be subpoenaed?
- Can mediators report to the Court?
- Do mediators have to be lawyers to be acceptable to the Court?
- If an agreement is broken, what sanctions are appropriate?
- What will the Court do if the mediator/agency refuses the case? Can they in fact refuse, if it is ordered by the Court?
- Should people be given a second chance? A third, fourth, fifth?
- Should some types of disputes be specifically excluded?

This essentially consultative process of refining and modifying, and testing against often competing needs continues to the real test - that of resource allocation.

These are difficult economic times. In designing process to fit the times we would be foolish to fail to recognise the economic realities. Mediation in Australia has gained substantial acceptance simply *because* it is less expensive than the courts. This is a very dangerous argument to use, even though compelling to politicians and administrators. It is also misleading. Yes, mediation can be a less costly system than the Courts, but it doesn't come for free.

We should be arguing that mediation programmes are more appropriate for certain disputes, not just that they are cheaper and faster. It is, long term, a much more sustainable argument. To do this coherently we must be able to present a clear understanding of how

disputes emerge, and of the dispute resolution processes that may be appropriate at any given stage.

By consistently using a design model it should be easier for us to demonstrate that the eventual proposal has taken into account the needs of the culture, the sponsors (and funding agency) and the community in which it is to operate.

Diligent use of a design model will also make the work of implementation more efficient and effective. The specifics of the mediation process and training will fall quickly and painlessly into place, provided the programme design is consistent with the expressed philosophy.

A final question I would like to raise - and it is today a question which I don't intend to answer - relates to the *scope* of mediation programmes. In these days of increasing specialisation (some law firms even have ADR specialists!), should each programme be specialised, or can we be all things to all people?

The answer may seem simple enough in metropolitan Sydney, where four million people are in disputes of one kind or another. But what about in Moree? or Mudgee, or even Dubbo? This is where, to go back to the Process Design framework, the impact of reality and resources must be taken into account.

Often the first casualties in times of economic stringency are access and standards. There is no easy answer to the question of access in a country as big and as sparsely populated as Australia. It is up to us to look to technology to help us provide an accessible service, not right now, perhaps, but down the track a bit.

On the question of standards we can only look to ourselves. *We* must maintain our own standards and *we* must not sit by silently while mediation programmes are planned and implemented with little regard to standards - on the basis of 'it's cultural', 'it's traditional' and 'it's cheap'.

These are not enough.

Mediation might be able to change the world, but only if we can say

- 'It's cost effective';
- 'It works', and
- 'People use it'.

If we do it right we will be able to demonstrate that mediation can grow from cultural roots and, nourished by good practice and ever improving standards, it will bear fruit well beyond 2000.

Mediation in Aboriginal Communities:

Incorporating Community Development into Alternative Dispute Resolution Provision for Aboriginal People

Robin Thorne

Co-ordinator, Aboriginal Alternative Dispute Resolution Project, Western Australia

I appreciate the opportunity to speak to you on the developments that have taken place in the area of mediation/alternative dispute resolution, for the Aboriginal community, in Western Australia.

It needs to be understood that I speak about the AADR Project which was directed mainly at the Nyoongar cultural group of Aboriginal people, in the South West of WA. This is the area my people identify with.

The Aboriginal population in WA is made up of a number of cultural groups, the majority of which we have had neither the opportunity, or the resources, to discuss the relevance of these issues with local people. Those among you who understand the geographical problems which need to be taken into account in WA, can hopefully, understand why we haven't achieved this yet.

The task of creating an awareness among local Aboriginal people in WA, that this an area of expertise that can be adapted for application and acceptance within our community too, is one that has been very difficult, but also very rewarding.

I hope I can do that effort a service in the telling here today.

Some background information:

BACKGROUND

The Aboriginal Alternative Dispute Resolution Project (Project), was established in mid 1991 through the efforts of a number of Aboriginal community leaders, staff and members of the Special Government Committee on Aboriginal/Police and Community Relations (SGC).

The SGC was able to secure a funding grant of $90,000 for the AADRP through the Federal Government's 'Community Relations Strategy', sub section 'Mechanisms to mediate conflict, and to achieve systemic change', and along with an input of around $21,000 from the State, the Project became reality from mid 1991. A committee was formed, comprising representatives from relevant Aboriginal and Government agencies.

In October 1991, with the appointment of the Project Coordinator, the development of the AADRP began.

Forum

To place the Project in context, it must be acknowledged that the initial attempt to establish an ADR approach to resolving Aboriginal family feuds in W.A occurred in 1988, due to a number of Aboriginal community leaders in WA, pushing strongly for a non-violent means of dispute resolution for Nyoongar families affected by feuding, they have persisted for around fifteen years, since the late 1970's.

This first project was called the Aboriginal Initiatives and Support Forum (Forum), a project that was also created through co-operation between Aboriginal community leaders and the SGC, as a response to the level of feuding that was occurring in the Nyoongar community.

The Forum comprised a committee of prominent local Aboriginal people and with support from the SGC staff, was able to secure funding through the WA Aboriginal Affairs Planning Authority.

The committee appointed a full-time co-ordinator, Mr Andy Nebro, a prominent Nyoongar person and recognised community leader. Work began on attempting to resolve a number of those current feuds that I mentioned.

As the Co-ordinator was a person who was a recognised Aboriginal leader, the project traded much in the initial period, on the strength of his reputation. Much of the success achieved by him, with the assistance of the SGC Field Officer Mr Venis Collard, was due to their reputation for strength and neutrality. As both are ready to admit, those early days involved a lot of 'flying by the seat of their pants', due mainly to the fact that the supports that would normally be expected to be put in place to assist the development of such a program, in this case were sadly lacking.

No formal training was provided to build on the experience and skills of the Co-ordinator and the SGC field officer, and few resources were allocated to developing a model of mediation/conciliation or a training program for community mediators. As the host agency, the SGC filled in many of these gaping holes, through the sharing of staff and resources. The Forum was still responsible for resolving a number of high profile, very intense feuds.

This support from the SGC, is an aspect that has fortunately been provided to the AADRP also, and has meant the survival of this very important initiative for the Aboriginal community.

When funding support was withdrawn by the AAPA in 1990, the Forum effectively folded. The Project can rightfully be seen as continuing on the work the Forum began in 1988.

The Forum was responsible for establishing the concept of non-violent dispute resolution in the consciousness of the Nyoongar community in South West WA, and was successful, as I said, in resolving several high profile inter-family feuds.

The Aboriginal community response to the demise of the Forum was to continue to contact the SGC when seeking help for feuding problems. The same was true of many government agency staff who had previous assistance through the Forum. These people were seeking the kind of practical assistance they knew they were not likely to get from any other source.

Aboriginal leaders and the SGC saw no option but to respond to this continued demand, by creating a professional mediation/conciliation service, incorporating the supports so lacking in the Forum experience, and capable of providing the same level of service for the Aboriginal people of W.A., that would be demanded by the wider community.

Early AADRP Developments

As I indicated earlier, prior to the Forum, Aboriginal people of WA had little experience of established mediation services and practices. The early developmental work began prior to the appointment of the project Co-ordinator. The staff of the SGC established contact with the NSW Community Justice Centre. The CJC Director, Ms Wendy Faulkes showed a great deal of interest and support for the AADRP proposal, and offered to be an informal consultant to the Project. Through Wendy Faulkes and Mr Michael Ashford, formerly a Mediator with the NSW CJC and now living in WA, the SGC were able to gain access, not only to a good deal of relevant literature, but also to people with whom they could discuss problems, issues and concepts in a thorough manner.

One of the most useful outcomes from this early stage, was the drawing up of a fifteen stage flow chart for the AADRP model's development. This was provided by Wendy Faulkes, and has been most important in maintaining a sense of direction and progress for us all.

Mike Ashford assisted SGC staff in conducting three community workshops on ADR with Aboriginal leaders and other interested people. His interest has been ongoing, appreciated and free!

These workshops provided an opportunity to build on the work of the Forum by getting feedback from the Aboriginal community on how the concept of ADR fits with previous experiences and to identify issues, from an Aboriginal perspective, that might cause difficulties in the application of an ADR process to Aboriginal people's disputes.

These initial workshops were very important in showing local Aboriginal people, that the AADRP was something that could only develop into an Aboriginal appropriate service, if local Aboriginal people assisted in examining the concepts and then putting their thoughts and feelings forward, so the Project could be formed with those important considerations as an inbuilt part of the project, from the start.

This approach created a level of interest in the Project from this early stage that has been maintained with the Nyoongar community.

THE NATURE OF FEUDING

I feel it is necessary for me to give a clear picture of the area of disputation that the Project is aimed at resolving. This will help to provide a background to the adaptations and issues the project has had to incorporate, or overcome, in reaching the present stage of development.

Among Nyoongar people, the term feuding causes no offence or misunderstanding. When you go into the Aboriginal community in WA and mention feuding, people immediately know what you are talking about. Feuding refers to disputes between Aboriginal family groups, that nearly always end up in physical violence against people or property, or at least involve the threat and/or fear of violence.

Due to the dynamics of Aboriginal extended family relationships, there is always a high potential for rapid escalation of disputes, with the added concern that large numbers of people will become involved as retaliation and payback become issues for families.

The level of violence is often very serious, houses have been smashed, people have been hospitalised and maimed, and some have lost their lives. People are often frightened when they witness what seems to be a trivial incident, only to see the people concerned suddenly become involved in what seems to be a full-scale battle. The speed and intensity at which these incidents can develop, are frightening to people who have no background knowledge

of a dispute. Because there might be a history of feuding between the families involved, these sorts of incidents occur because long held grudges have been activated.

This scenario often happens when a family are angry at something another family might have done, and decide that payback must be taken out on them. So, while the incident or remark that triggers the violence may appear trivial, the meaning placed upon it can be quite substantial.

Payback

Payback attacks may be carried out immediately after an incident, or could take months before certain members of a family are able to get the people they want in the right circumstances.

Not being able to get at people who may be imprisoned by the justice system only adds to the families' frustration. therefore the intensity, when that payback is extracted, is much more severe than if some satisfaction could have been extracted at the time of the original incident.

It is a fallacy to assume that Aboriginal people who are affected by these things, should feel satisfied that because the person has been arrested, they should be happy to let 'Justice' take its course. Aboriginal people's experience of 'justice', is, in the main, a totally different one to that of non Aboriginal people.

Suffice to say in this forum, however, that even for a great many urbanised Aboriginal people in WA, there has to be an element of payback, undertaken by family members, before things can be properly settled in their hearts and minds.

Other Factors

A lot of feud related violence is alcohol affected. Feuders are more likely to take offence over trivial incidents and remarks when they have been drinking heavily. They are also more likely to attract the attention of the Police and the media.

Several qualifications should be made at this stage.

- Not all the incidents are trivial; some involve cases of serious spouse abuse, rape, and assault causing death.
- Not all feuding has a long history based on a vendetta model; some feuds begin with present day incidents that spark them off.
- Not all fights are underwritten with alcohol; feuding takes place in prisons, is carried on between students at schools, and can involve pre-meditated violence such as when one party mobilises its forces and sets out for a 'square up'.

A lot of feuding occurs during the summer and at night time, when people are more actively involved in outdoor activities. As a result of these activities people come in contact with each other more frequently than in winter.

This type of contact promotes the type of incidents and chance remarks that eventually leads to confrontation and fighting, especially at sporting events.

Outsiders

Families have also told us of the frustration they feel when they make their peace, only to have it stirred up by visiting friends and relatives. They often feel powerless because the outsiders will arrive looking for trouble. At other times, the sheer physical presence of large groups of people is provocation enough to start a fight.

Changing patterns

The pattern of feud-related fighting has changed over the past twenty years. It is generally accepted that up until about 1970, disputes were fought out between two people, on a one-to-one basis. Two men would have a fist fight and then have a drink together afterwards; if anyone joined in to make it two or more against one, an elder would intervene and ensure a fair contest.

Everyone present was a witness to the outcome, and families were shamed if a son or brother lost the fight but wouldn't let the matter rest.

A family was obliged to punish that family member for trying to stir things up again. That punishment was very often quite severe. I know of instances where certain members of my extended family, uncles, etc, were said to have been badly hurt, or hospitalised in these circumstances.

Modern Dynamics

Today the dynamics have changed. A member of one feuding family will often be caught alone and assaulted by a group from the opposing family. The victim will then gather a group of supporters and retaliate when one of the protagonists is caught alone.

Having an established pattern of behaviour can lead to people being attacked at venues they attend regularly, withdrawing money from ATM's, going to the DSS, the CES or attending courts.

In the old days, fights took place with fists, more or less under Queensberry rules. Today attacks may be made with knives, baseball bats, machetes and iron bars, with no holds barred.

The fear of accidental injury or death to children has increased enormously since the Project has begun working in this area. When you add to this the mobility of modern forms of transport, the potential for rapid escalation in the number of incidents, and the intensity of the violence is increased enormously.

As I am sure people at this forum well know, these modern factors are not confined to disputes between Aboriginal people.

Impact of Drugs on Feuds

A serious concern regularly expressed about a very worrying trend which has become evident in Aboriginal feuds, is that the number of drug related inter-family feuds seems to be on the increase. This is something that causes Aboriginal people much anxiety and one that many Aboriginal leaders hope will warrant closer attention, research and action by the authorities.

Micro-political Factors

The micro-politics of Aboriginal organisations is known to frequently exacerbate conflict between Aboriginal families. These organisations are growing in resources, influence and status. Aboriginal people often view the election of office bearers as power struggles between different families, rather than individuals.

When one family gains control, other people express their dissatisfaction over the spending of money and the allocation of other resources. This dissatisfaction leads to boycotts of the organisation's program which further entrenches the power of the incumbent family.

Added tension is created when questions arise about whether elections have been conducted within the spirit as well as the letter of the constitution.

Physical fighting between Aboriginal organisations may be unheard of, but the atmosphere created by the inter-family politics that gets played in them, is generally accepted as generating a climate of hostility which fosters feuding.

Systemic Factors

Feuding can also be regarded as an outcome of systemic factors. Much of the frustration, resentment and hostility associated with feuding can be directly seen as a response to the continued presence of institutionalised prejudice and discrimination against Aboriginal people in our society.

If I can quote from the Evaluation Report of the AADRP:

> "A detailed study of one feud in 1988 found that while the initial incident was a fight over the ownership of a women's sports uniform, the contributing factors included poorly maintained houses, overcrowding, poor drainage, unsanitary conditions, depressing surroundings, and unemployment.
>
> The hostility produced by these harsh material conditions became turned in on the Aboriginal people themselves because systemic discrimination disadvantaged some Aboriginal groups more than others; for example, some families were seen to be favoured by government agencies in terms of jobs and housing.
>
> Another type of structural factor was identified as playing a prominent role in feuding. Conflict among Aboriginal people occurs when the police respond to feuding in a way that is perceived to be unfair.
>
> A recurring theme during the interviews was that when police arrive at the scene of a dispute they, like anybody else, respond more positively to the party with whom they can most positively identify, and who sound the most reasonable.
>
> Articulate Aboriginals who know how the system works quickly realise this and manipulate the situation to their favour. That produces resentment within members of the disadvantaged party who feel they have no option but to redress the perceived injustice by resorting to physical violence." (CHADBOURNE 1992)

Cost Of Feuding

> "Members of the Forum carried out foundation work in documenting the costs of feuding upon families involved, the Nyoongar people as a whole, and the broader WA community.
>
> Their most detailed account shows how one feud affected nine government and Aboriginal agencies and led to:
>
> - ten people being charged;
> - extensive damages to houses, cars and government property;
> - physical, psychological and emotional injury to individuals;
> - damage to relationships within families, marriages and friendships;
> - an unknown number of people being imprisoned; damage to the status and reputation of the Aboriginal community;
> - and costs of up to $300,000.

The interviews conducted for this evaluation confirm that the details of this account are valid for a wide range of feuds." (CHADBOURNE 1992).

COMMENT

I am aware that the picture I have just painted is likely to seem bleak, complex and possibly distressing. I assure you that it is an accurate picture of the daily existence of many grass roots Aboriginal people.

Having these issues and factors in mind, I would like to move on to outlining the way the project has incorporated these into the development

DEVELOPING THE AADRP MODEL

The initial period of the pilot was devoted to the project team familiarizing themselves with the CJC programme and process of mediation as used in New South Wales.

The task then for myself as the Co-ordinator, has been to adapt a very successful process as applied in NSW, into a culturally sensitive and suitable process that would have acceptance and application for the Nyoongar people of South West W.A., and to provide a model that might form the basis of a much wider application for Aboriginal people, both in terms of W.A. and Australia.

A four step process of community consultation was undertaken throughout the South West; to develop awareness of the project among Nyoongar people; to seek a community response to the methods being undertaken; and also, to seek expressions of interest from Nyoongar people interested in becoming mediators for their community.

Community Consultation Meetings

The first step was to arrange community consultation meetings. These were from twenty minutes to two hours duration.

The purpose of the meetings was to familiarise people with the aims and objectives of the project, and to identify whether there was sufficient support for a community workshop in the region. The meetings were held in nine towns and regional centres, and in four metropolitan centres, with attendances ranging from four to eighteen people, and took place over weeks.

The meetings provided an important source of information and support for the project, many people simply came along to examine what we were on about, and once their curiosity had been satisfied and they had the chance to have their say on the matter, they were happy to leave things at that.

A number of people gave a commitment to come to the information workshops, so that they could have a chance to 'get their teeth into the issues'.

Community Workshops

The second step involved the community information workshops, which were held in four regional centres in the South West and Wheatbelt region, and in two metropolitan centres, over six weeks. These were full-day workshops. The six workshops attracted an average attendance of eighteen to twenty people.

The workshops provided a detailed picture of the project that would help to achieve two things:

1. To give people the chance to look at this picture and to talk about their feelings; how they felt about what we were doing; did they think we were on the right track?; did their community have the need for such a service?; were there people in their town who might either be interested or, though they weren't at the workshop, should be given a chance to learn about this stuff, because they might make a good mediator? and

2. To provide those people interested in becoming a mediator for the AADRP, the sort of detail that would ensure that they knew the commitment they would be making up front, and allowing them to make an informed choice; out of this, an idea of the overall number of people who might be interested in taking part in mediation training could be formed.

The Project met the expenses for those people who committed themselves to attending. This meant catering for lunch, morning and afternoon tea; meeting travelling expenses for people who travelled up to two hundred-odd kilometres to attend; and paying for accommodation for people where appropriate.

Expression of Interest

The third step was to circulate 'expression of interest' forms through Aboriginal organisations, community groups, through the project's rapidly growing network, as well as to the people who participated in the workshops.

After the meetings and workshops, there was an increased awareness and interest in all the communities visited. This resulted in interest being expressed by people who weren't at workshops or meetings, but had heard positive things about the project from family or friends and wanted more information. This was dealt with, by providing information over the phone and by mailing information out to people.

Selection

The fourth step involved shortlisting sixteen people for interview from the applications received. The interviews took place in five country towns and in the Perth metropolitan area. Twelve people were selected for mediation training.

Training

The training program took place on August 5-7th 1992 in the offices of the SGC in Subiaco. In preparing for the workshop, we were able to draw upon training videos and other materials produced by the NSW Community Justice Centre, as well as the material and role plays developed by the Project team.

The project Co-ordinator, the Field Officer and Executive Officer of the SGC, and Mike Ashford, then with the Social Impact Unit, jointly facilitated the workshop. The AADRP training course was scheduled for only 24 hours, and offered on a full-time basis, due to half the participants being from the country. This meant the Project having to arrange for the transport, accommodation and catering of country people, as well as negotiating time off with employers, for people from the country and the city, who worked.

None of the employers approached refused permission for their staff to attend. This is another indication of the extent to which feuding is an issue that is understood to be a part of life, for many Aboriginal people.

The idea was to get the right mix of theory and practice. This was made more important because of the different learning background of the course participants.

Throughout the course, the convenors and participants reviewed the program, pooled ideas and impressions, made adjustments and suggested changes for future sessions.

Without exception the people who participated felt the training course was excellent. The aspects they said impressed them most were the planning and delivery of the presentations and skills workshops. Whilst acknowledging that the course was far too short, I feel the comments expressed by the participants showed that we were able to create the right blend in terms of learning styles.

Those with a background of institutional learning felt the training contained the right balance of theory and practice; those who had some difficulty with the amount of theory, felt that they had a good level of practical learning in the workshop settings.

This information was very important in terms of planning towards future workshops. Particularly as the inherent complexity of feuds requires us to ensure that our training not only develops the skills, but also develops the confidence of community mediators to a level where they will function well under the pressure of mediation.

The importance of developing ongoing follow up activities was also discussed in detail at the workshop. Developing a program of regular meetings to maintain skills, through role plays, the opportunity to share experiences with peers, information sharing of relevant materials etc. This follow up aspect has proved to be a commitment the project has not been able to meet at this point. It will be a central aspect of the future development of the service.

Accreditation

Community mediation services in WA are moving toward creating standards of training and accreditation. I look forward to the impact this will have on mediation services in WA.

I believe it will bring a positive outlook to mediation services, and will allow, I hope, uniformity in professional service delivery, for all community mediation clients in WA.

ADAPTATIONS TO THE PROCESS

Pre-mediation

The Project has had to put the focus of the process on premediation in order to be successful with feuding families. In pre-mediation, it is vital to adapt our approach to fit the situation we are faced with.

Due to the numbers of people involved in a feud, geographical considerations, and the way families feel about 'outsiders', the project has had to offer a mobile, outward bound service. Because of these factors it is important we take the service to the families concerned.

Many Aboriginal families think that we form part of what they see as 'crisis intervention services' and we are often judged on this basis. Based on past experience, Aboriginal people expect crisis intervention agencies are unable to deal with their problems, therefore, they expect that we will also try our luck with them, get frustrated, then leave like all the rest. This is a part of the pre-mediation negotiation dynamics.

Incorporating a pre-mediation strategy that can lessen the impact upon feuding families daily lives, of the policy and practices of government agencies, Aboriginal organisations, local government and the attitudes of local business and community people is vital.

Implementing a referral process that will lessen the impact of these issues, must be achieved before we can hope to get families to focus on the issues important to the resolution of the feud. This must include developing a dialogue between families and police, creating an opportunity to negotiate issues between families and Homeswest, so that their accommodation problems can be properly negotiated, if the feud can be resolved. Another might be the negotiation of a future active role in the local Aboriginal organisation, or its programs.

Each effective referral that we can offer, remarkably lessens the degree of intensity within families, as does our readiness to come to their homes, to sit and talk through people's collective feelings and frustration as a family group. Once we can see that families are gaining respect for our role, and they are beginning to think of mediation as an option, we can discuss the commitments the family will have to take on board before we can jointly decide if mediation is the best option, or if another approach can gain an outcome.

These commitments include:

- identifying all the key players in the feud, and convincing their own family members that their endorsement and/or participation in mediation is essential;
- providing full and reliable information about the background to the feud, and the dynamics of the situation, so that a joint decision can be made about whether the feud is suitable for mediation;
- obtaining their families agreement to accept and to abide by the ground rules set for the mediation session;
- assisting in identifying appropriate mediators.

An adaptation to the pre-mediation process, is that the AADRP pre-mediation, or intake, includes Step 8 (the private/ caucus session) of the CJC model of mediation.

Aboriginal families will not come to mediation unless they know beforehand what they are letting themselves in for, unless they know in advance what issues are on the agenda. For example, Aboriginal families would not be willing to attend mediation if they knew that contentious issues, such as charges that may be pending, deaths associated with a feud, or chargeable offences such as rape and child abuse would be publicly discussed. This modification was made to take into account people's need to discuss all the issues within the mediation process. It also allows for the application of mediation in a variety of venues, without the creation of unnecessary problems like trying to have a private session with half the members of a large group of people, meeting in an open space.

Pre-mediation is the most time consuming stage of the process because of the importance we have placed on gaining maximum support and commitment from feuding families, to jointly reach the most practical and preferred outcome for them.

This means pre-mediation can take from several weeks, to several months or more.

MEDIATION ADAPTATIONS

The AADRP mediation model contains several modifications to the CJC model. None of these changes represent any change to the underlying philosophy of mediation. The AADRP and CJC models share the same concept, definition, rationale, objectives and elements of mediation. The role, qualities, and required skills of the mediators are the same in both models.

This is not to say that the modifications are unimportant. It is simply to emphasise that implementing them will not compromise the assumptions on which mediation is based.

Also, because the modifications take into account the culture and circumstances of Aboriginal people, they help preserve the integrity of the mediation process when used to assist feuding Aboriginal families.

Advocates

The AADRP has also added to the mediation process a new category of person - Advocates. Advocates hold an important position in the Aboriginal family structure. They may not have been involved in the physical aspects of feuding but they are influential, partly because they are family leaders and partly because they have the confidence and expertise to communicate with outsiders.

At the pre-mediation stage they play a role in identifying the key players and getting commitment from the diverse members of their extended families. During the mediation session, each family can have its own advocate who would:

(a) provide support for their own people, to ensure that all the important issues are considered in the mediation process, and

(b) provide support for the mediators, to help them maintain control of the meeting.

Another modification came from the AADRP mediator training program held in August 1992. During the first day of the program, the participants experienced difficulty in digesting the twelve step approach to the CJC model.

They wanted a way to identify and understand where they were at a given time in the process, so they could say, 'Okay, this is where I am up to and this is what I do next'.

The solution involved grouping the NSW CJC twelve steps into four broad stages:

- story telling/summarising issues
- establishing the agenda/issues to negotiate
- exploring/discussing items on agenda
- writing up agreements and de-briefing.

This allowed the participants to feel much more comfortable in being able to maintain their confidence in applying the process whilst under pressure.

Referrals and Outcomes

The project began to receive referrals from very early on, the first feud to be mediated was referred in November 1991, and mediated in February 1992. Referrals currently number around fifty six (56), with thirty four of these meeting both the project's and the Aboriginal community definition of inter-family feuds. A further seven are multi-party disputes, though not interfamily conflicts. The remaining fifteen were one to one disputes, intra-family disputes, or disputes that had no previous history and have not reached the stage of involving significant numbers of the immediate and/or extended family. In fact, since the evaluation report on the AADRP was completed in December 1992, this indicates a steady increase in the rate of referrals to the service.

Because of the lack of resources available to the Coordinator, coupled with the demands of intensive premediation intake work, it was discovered early on in the life of the project, that taking on the role of conflict manager once involved in doing intake on a feud, was simply the most practical way to achieve results for our clients.

This means that we must become a link between feuding families; between either or both families and the agencies identified as being players in the dispute; as well as being a link between affected agencies in organising a co-ordinated approach to resolving the dispute.

Even when a particular feud can't be mediated, using a conciliation approach can have a marked effect on the level of violent activity related to the feud, because ongoing discussion and effective referrals, create a breathing space and a resultant decrease in intensity in disputes.

This process also allows regional agency managers of government and Aboriginal agencies to have direct input into the process of resolving long term feuds that have had a considerable impact on their agencies, both in terms of monetary and human resources.

Once these managers are able to see how genuine feuding families can be in seeking constructive resolution processes for their disputes, in complete contradiction to past history, they are more prepared to make their agency's resources and programmes more accessible to relevant family members.

Involving recognised Aboriginal community leaders in aspects of the process, is another important element of the Project's success with the Aboriginal community. Grassroots Nyoongars see the recognition of these people as a practical demonstration of the project's preparedness to make a priority of maintaining the Aboriginality of this service.

Achievements

The major achievements of the Project to date are:

- The development of Aboriginal identified, culturally sensitive alternative dispute resolution procedures, for the resolution of Aboriginal inter-family and inter-personal conflict.
- The development of an ADR Training Programme, to teach the specific skills needed for resolving Aboriginal multi-party disputes, or feuds.
- Selection criteria and processes for the identification, selection and training of Aboriginal community mediators in Western Australia.
- The creation of a considerable network in the Aboriginal community, through the level of community consultation practised by the Project staff.
- To have gained recognition and support from within the Aboriginal community, of the Project's importance as a necessary and viable option for resolving very complex and intense disputes.
- To have gained a parallel level of recognition and support within many of the Government and community 'Crisis Intervention Agencies' in WA, as they have acknowledged the importance of the work of the Project.
- To have received the recognition and support of all other community mediation services in Western Australia, in establishing the service as one of the leaders in the field of community mediation in terms of creativity, innovation and leadership, in terms of playing a role in the formation of those community mediation services into a cohesive group where the creation of a set of standards for accreditation, selection, service delivery etc of mediation, can be established in the near future.
- To have met the objectives of the Commonwealth's 'Community Relations Strategy' to the point where the Project was adjudged to be one the ten projects to show 'Best Practice' out of a total of almost ninety projects on a national basis.

WHERE TO FROM HERE?

I hope I have given you all a picture of the issues, process, factors and events that have been part of the development of the Aboriginal Alternative Dispute Resolution Service. I hope also, that it explains why we may be saddled with this large title.

Whether mediation is the rock on which we build the service, dispute resolution among and within the Aboriginal community, by definition, means that we will always need to incorporate a number of defined ADR processes into the practical application of our service, be those processes mediation, conciliation, negotiation, local Aboriginal ways and customs, etc.

It is important that our main aim is to provide the means for resolving each identified dispute, in a way that Aboriginal families will feel they can accept and support. We are therefore, an Aboriginal Alternative Dispute Resolution Service.

Current Status

The service is likely to be located within the Strategic and Specialist Services, of the newly formed Ministry of Justice. Negotiations for the transfer are hoped to be finalised within the next several weeks.

I hope that our work to this point in time, and as we continue to develop, is looked at in a positive way, by other parts of the Aboriginal community who may be affected in a similar way by disputation within their communities, as well as those among you already delivering Mediation, or ADR services to the community, but have not been able to gain acceptance or trust, within local Aboriginal communities. If it can be recognized that, for Aboriginal people, life is no more simplistic nor are problems any less complex than with any other section of the community, then I believe this will be a start.

The reality may be accepted later, this being that very often life, for Aboriginal people, is in actual fact, much more complicated and problems are much more complex than for members of the wider community, and this is due to the extent that agencies and politics that may be considered to be peripheral nuisances to many others, are in fact, major players in many Aboriginal disputes. This reality, coupled with Criminal Justice processes that alienate Aboriginal people, rather than assist them, all add to this complexity.

I feel confident that the Aboriginal Alternative Dispute Resolution Service, has shown a capacity to resolve these disputes, despite that complexity, and we have achieved this with the support of our grass roots community. That is the achievement of which I have been the most proud.

We all have a long way to go before non violent resolution options are likely to be the first choice for our people's. We need to remain strong in our commitment if we are to succeed in making it that first choice.

Mediation in Aboriginal Communities:

Getting to Grips with the Issues

Workshop Presenter

Robin Thorne

WA Aboriginal Alternate Dispute Resolution Program

Workshop Reporter

Dale Bagshaw

School of Social Work and Social Policy
University of South Australia

Robin described the Western Australian Aboriginal Alternative Dispute Resolution Project stressing that he was talking on behalf of one cultural group only. This is the only project which offers a proactive rather than a reactive option for Aboriginal people. Mabo has set up another political process which has diverted attention away from important issues. Robin feels we need to change the perceptions of non Aboriginal people towards Aboriginal people and that influence occurs on a personal level.

1. People involved in conflict/feuding (small country town - local level)

People involved usually include a couple of families, long term residents, friends for many years and children who grew up together. Feuding affects relationships at school, work and in the recreation and social arenas. There are only a few Aboriginal families in the town, often isolated within their own local community with no local Aboriginal support group (or they don't access a group)

2. Consequences of conflict or feuding in a community

As a result of feuding in a small community the families experience 'cold shoulder', verbal abuse, written abuse (graffiti), emotional trauma, physical violence - often causing injury, home and personal property damage and restricted movements of family members. A consequence may be that the families concerned have to leave town as they often see no other options. There is a fear of retaliation and 'pay back'

3. Extended family involvement

As the dispute escalates there are increasing numbers of people involved which can extend into the city and across the country

4. Involvement of other parties

Other parties who may become involved in a dispute at a local level include the police, education, welfare, courts, medical, hospital, Homeswest, Local Shire and fringe people. These dynamics can occur at a local level or at any level and often involve psychological warfare.

5. Further escalation of conflict

Conflict can erupt further through wider extended family involvement. Involved family members can be located in other country towns and different suburban areas in the city so again there is a high likelihood of house and property damage, families being terrorised, people being assaulted, vehicles smashed and movements of family members being restricted through fear. As a result of this wider conflict there may be further escalation of conflict between families, further tension and fear of reprisals and wider police involvement. Other legal organisations may become involved as well as the Local District and Supreme Courts. There is a strong possibility that escalating numbers of people will be sent to gaol.

6. Aboriginal people and the courts

Aboriginal people may not want to attend courts because of fear of imprisonment, reprisals or of the court system itself. As the dispute escalates there will be increases in the number of people charged, going to court and being put in prison and in the amount of injury - physical (including death), emotional and psychological. There will be increased damage to relationships between marital couples, children, extended family and friends. There will also be an escalation in property damage to houses, vehicles, private property and government property. The monetary cost is often exorbitant. Ultimately this damages the reputation of Aboriginal people.

7. Agencies which may become involved

Where there is conflict or feuding the following agencies may become involved mediation agencies, special government committees, police, Aboriginal Legal Service, courts, prisons, Homeswest, Aboriginal Affairs Planning Authority, Department for Community Development, Ministry of Education, Aboriginal organisations.

8. Dynamics of feuding (see Attachment A)

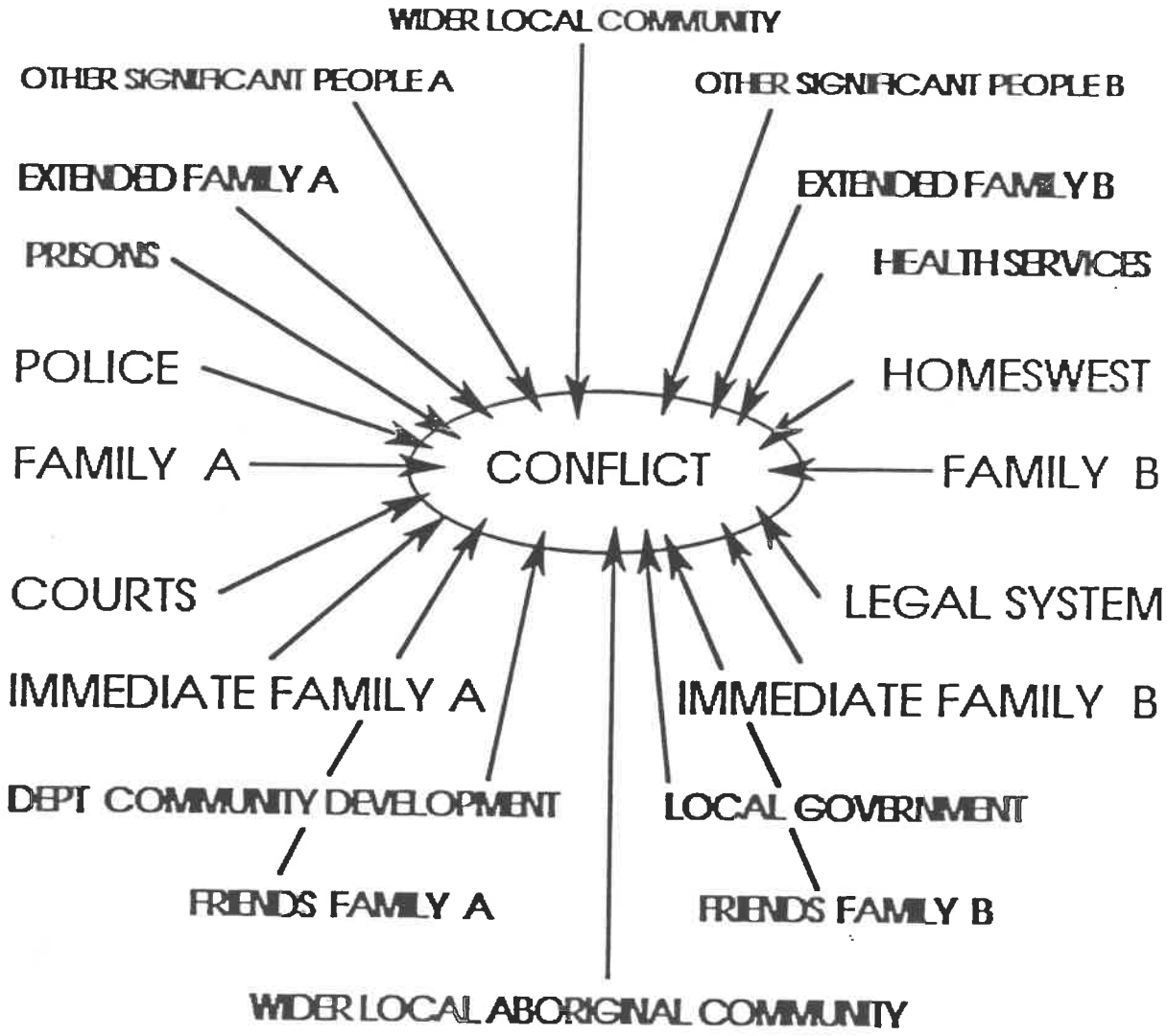
9. Why does feuding occur?

Reasons put forward for Aboriginal feuding include individual rivalry, protecting family honour and jealousy. Most times conflict or feuding starts over silly little things such as children fighting or people carrying yarns. Mediation has the best chance of resolving the issues mentioned here in a way that can satisfy most, if not all, the different people who may become involved. Mediation allows for all these people to play as active a part in the resolution of issues as they may have played in the creation and continuation of the dispute. The key to success is to empower Aboriginal families to be strong enough to push for a satisfactory solution to their own problem.

10. Factors that create an imbalance between feuding families and which affect the way others within the family tend to respond to particular families (see attachment B)

ATTACHMENT A

DYNAMICS OF FEUDING



ATTACHMENT B

FACTORS THAT CREATE AN IMBALANCE BETWEEN FUEDING FAMILIES, AND WHICH AFFECT THE WAY OTHERS WITHIN THE COMMUNITY TEND TO RESPOND TO PARTICULAR FAMILIES

FAMILY A

* First to make contact
* Feel less powerful
* Tend to be treated worse

*****

Often regarded as problem family in the community

*****

Tend to have low self esteem

*****

Overcrowding in the home a problem for the family

*****

Family members generally known to police because of record of offending

*****

Family members tend to be regarded as lacking in control when drinking at a hotel or at home

*****

Few family members play local sports, or may be thought of as bad sports

*****

Family may be regarded as bludgers because of a poor employment background in the community - even if only recently moved in

*****

Family members may have difficulty and lack confidence when trying to communicate and/or socialise with others in the community

FAMILY B

* Reluctant to participate
* Feel more powerful
* Tend to be treated better

******

Well regarded in the community

******

Generally high self esteem

******

Overcrowding tends not to be a problem for the family

******

Family members generally tend to have good reputation and can relate better to police

******

Family members tend to be regarded as able to control their behaviour when drinking at a hotel or at home

******

Family may be well regarded as sportsman and women in the local area

******

Family may also have a strong long-term employment history in the community

******

Family members are able to communicate well and freely with other people in the local community

11. Objectives of the mediation meeting:

- to settle the dispute;
- for all parties to accept the consequences of the fight that have occurred so far, including charges and sentences that have been handed down by the court;
- for all parties to agree on how to handle things from here on;
- for each family/party to understand each other's point of view;
- to meet again if the need arises (can be organised by Co-Ordinator of the ADR project);
- to settle any other matters agreed to by those present.

12. Ground rules for conflict resolution meetings

Ground rules and objectives act as a guide and can be added to with the consent of all present. Standard ground rules for conflict resolution meetings include the following:

1. no person under the influence of drugs or alcohol will be allowed to attend the meeting;
2. no-one leaves the meeting until it is finished;
3. no shouting or butting in when someone else is talking;
4. everyone is to listen to the other's point of view;
5. everyone has 15 minutes to tell their story;
6. everyone present has a responsibility and a part to play in fixing the problem;
7. parties are to focus on 'what are we going to do?'
8. a Co-Ordinator will follow up with every family after the meeting.

It is stressed that everyone is present of their own free-will and the mediators are neutral and will not be taking sides.

Community Consultation and 'Locally Undesirable Land Uses'

Workshop Presenter

Paul Cosgrave

Nsw Waste Recycling and Process Service

Workshop Reporter

John Steele

Community Mediation Services of South Australia

Paul outlined his role within the NSW Waste Recycling and Process Service. He made the general point that in today's very complex society there is a great deal of interdependency. Many large development proposals were blocked because the needs of the local community were given more weight that the needs of the wider community. The ensuing conflicts could involve much expense to resolve. Paul thought the basic choice of approach in these situations was whether to 'moralise' or 'manage'. It was observed that interests in these situations are generally somewhat mixed in reality: the services needed to see themselves more as community members and the community more as service users, rather than becoming completely polarised.

Discussion then revolved around what was the preferable approach to resolving conflict in these situations. Reference was made to a scale of community consultation - from citizen manipulation at one extreme to citizen control at the other. It was generally agreed that the appropriate strategy was one which took account of the real needs of the parties involved. There needed to be a certain level of trust established to enable this to occur. Preferably the process should be designed sensitively and creatively so as to suit the problem at hand. What was *essential* was a difficult question to answer, but it was important to keep thinking about such issues. If anything, willingness to participate was probably the really essential factor, rather than a commitment to reaching an agreement. Consultation and negotiation were not always appropriate for these disputes: sometimes it was more in the public interest that Parliament or the Courts make a decision.

Where ADR was appropriate, how could people best be encouraged to use these processes? Were people culturally inclined to do so or not? Several members of the group agreed that the best strategy for gaining wide acceptance of ADR was to demonstrate its effectiveness, to 'get runs on the board'. The environmental field was ideal for promotion because disputes were often well-publicised, unlike family and neighbour mediations which were private processes. Establishing a consultation or negotiation mechanism before crises arose was a great advantage because it created trust in the process.

Communication of the availability of such a process was obviously essential: indeed, communication of information generally was a vital ingredient in the success of these processes. Although it was the general practice to research the problem then consult the community, it was recognised that early consultation was generally a better way.

Innovative Responses to Youth Homelessness

Rhian Williams

Conflict Resolution Service, ACT

Resolve, the Youth Mediation Programme of the Conflict Resolution Service, began operating at the end of 1990. A group of young people aged between 13 and 18 were trained as mediators and the goal of the service was to provide an effective and empowering dispute resolution service to young people and those with whom they were involved.

It was felt that mediation was an appropriate strategy for use by young people with conflict as it s process that treats the concerns of all those involved with respect and allows for parties in dispute to build their own mutually acceptable solutions. Mediation is regarded as developmentally appropriate for adolescents and other young people as it provides a balance between autonomy and interdependence. The service had provided mediations for parents and young people prior to the training of young mediators; however, it was felt that having young people as mediators would enhance the Service's ability to provide a quality service to young people in the ACT.

The Conflict Resolution Service is a community based mediation service and aims to reflect the community through its panel of mediators. It has been shown that when parties in dispute are matched with mediators of a similar background, taking into account factors such as age, gender and culture, they feel more comfortable with and confident in the abilities of the mediators. Young people are no exception, and having a young person as a mediator goes a long way towards countering a young person's fear that mediation is an adult process where the needs of the adults involved are the only ones that will be taken seriously.

In November 1991, Resolve applied for funding from the Innovative Health Services for Homeless Youth Programme to run a pilot mediation training programme for young people who were, or had experienced being, homeless. The aim was to train a group of young homeless people in the process of mediation and ultimately to offer them employment as mediators with Resolve and the Conflict Resolution Service.

There were several other objectives for this programme. The goals were to enhance the health, work and living skills of the young people participating in the programme; to improve their access to dispute settlement services such as Resolve, and to provide them with a normalising and empowering approach to conflict and conflict resolution. It was decided that the training programme was to follow the same format as previous mediation training programmes, and that people would be trained to the same standards.

Initially there was some concern that it would prove impossible to get together a group of young people who would be able to commit to undertaking such an intensive training course. It was originally envisaged that there would be a group of ten trainees but by the time the training had started there were actually thirteen.

There were several key elements that were included in the training programme which started in May 1992 and went through until June 1992. The trainees were paid an allowance to cover their travel and other expenses and were provided with a simple meal at

each training session. A model of positive feedback was developed and used throughout the entire training programme. In that time, the training group not only stayed together but they also showed great skill and ability in mastering the mediation process. Twelve of the original thirteen trainees finished the training programme.

So what was achieved? Resolve now has a group of mediators who are committed both to the process of mediation and to the Conflict Resolution Service. Both Resolve and CRS mediators were involved in the training programme as coaches, role-players and observers and this provided them with excellent opportunities to practise and develop their skills. Having as mediators young people who have experienced homelessness has meant that our base for referrals for mediation has become much broader and we have gained a certain degree of 'street cred'.

A research project looking at the assertiveness and self-esteem of the trainees prior and subsequent to the training programme was conducted. It was found that people's assertiveness was increased by doing the training programme and that the increase was of statistical significance and that people seemed, on the whole, to feel more comfortable about being assertive.

A wide range of people involved with the trainees have given extremely positive feedback about the effects of the training programme. School counsellors, carers, support workers and others have expressed that they feel the training was a wonderful experience for the young people and that it has had a significant positive impact. One support worker said that he has noticed a remarkable increase in the self-esteem of one of the young men who participated in the training and that he (the young man) seems much happier and more relaxed.

The trainees themselves rated the training as a really worthwhile experience. One young man returned to school and he said that the training programme had given him both the confidence and the desire to return to college. Other trainees said they felt that they had really achieved something by finishing the training programme and that it had improved their confidence and they felt that the skills they had learnt would make a difference in their lives.

Several of the trainees had had direct experience of the Juvenile Justice system both in the ACT and other states. At the time the training programme was being held the ACT Law Reform Committee was investigating the possibility of establishing a pilot victim/offender mediation programme in the area of juvenile crime. The trainees met with members of the Committee and put on a demonstration of the mediation process. This was the first opportunity that the Committee had had to hear from young people and in particular young people who had direct experience of the Juvenile Justice system.

A Juvenile Justice Consultative Group was formed and several of the trainees have continued to participate in the meetings and the discussion of that group. This has meant that young people are playing a role in the decision making processes that affect them and that have for a long time excluded them. Undoubtedly if these young people had not participated in the mediation training programme these opportunities would have been denied them.

Homelessness is an issue that will not go away. For a person to have experienced homelessness does not mean that the best that society can do for them is to bandage them and see them as always in some way damaged and therefore less. People who have experienced homelessness have a wide range of positive insights, that as members of our community they can bring to enhance both mediation services and other types of services. The challenge for mediation is to remain relevant and accessible and to be inclusive in the way that mediation is defined and provided. Mediation can change the world only if it remains something that belongs to all members of the community.

Innovative Responses to Youth Homelessness

Workshop Presenter

Rhian Williams

Conflict Resolution Service ACT

Workshop Reporter

Warwick Claydon

School of Management and Law
Edith Cowan University, Western Australia

Resolve is a community based mediation service in Canberra. It is a conflict resolution service which has been in existenc since 1975. In 1990, Resolve decided to open mediation training to the public. It decided to target young people, in particular the homeless, with the view of providing them access and equity to alternative dispute resolution services. Resolve wanted to evolbe a programme which had relevance to young people, or which young people could own, particularly those who had been told what to do in the past or had been 'done over' by the court system.

In 1990 Resolve obtained funding to establish the training programme. The training programme commnced in 1991 and a project officer was appointed in April that year to co-ordinate the programme. It is a mediation training programme which mirrors the community through the mediators who are trained. Any person who has not experienced homelessness or imprisonment cannot act effectively as a mediator in the context of serving homeless youth. The programme is designed to empower young people and to establish role models from their own group.

The homeless are perceived to have problems associated with life circumstances which are dysfunctional. They were perceived as having innate skills to facilitate mediation and cope with conflict. They know by experience what is or what is not conflict. Recruiting young people to become mediators was seen as enhancing the ability of the mediation service.

The funds were obtained not only to pay for the co-ordinator, but to pay the young people to attend the session and to feed them.

The training is experientially based, using such techniques as role playing or games. It is designed to create an environment to discuss issues and to provide a safe climate in which to take risks.

The overall objective of Resolve is to provide alternative dispute resolution techniques to empower young people to develop options in a free, impartial and confidential environment.

The overall objective of Resolve is to provide alternative dispute resolution techniques to empower young people to develop options in a free, impartial and confidential environment, and to provide community education as to how one can deal with conflict.

Young people tend to dislike conflict, and in the absence of mediation skills either fight or withdraw. The programme seeks to enhance the living skills of young people and to give them the opportunity to take responsibility in conflict situations.

One game involves throwing tennis balls within a small group from one nominated person to another in quick succession. The objective is to create a learning environment and to encourage people to feel comfortable. The activity draws people closer. It creates a need to focus one's attention. It is effective because it is fun. Calling the person's name who is about to catch the ball personalises the activity. How does the game relate to conflict? The game is an efective method of communication. It does not matter if one drops the ball. The objective is to get people to observe, to externalise conflict, to take risks, and to encourage participation. The game can be made more complicated by throwing balls clockwise and anti-clockwise simultaneously. This demonstrates that new environments can be confronting.

The initial training programme envisaged the recruitment of ten young homeless persons who had been in youth refuges, Dr Barnardo's Homes or Street Link. The initial expectation was that only two would succeed as mediators. Information sessions and dates were advertised and provided. The applicants apparently selected themselves. They were interviewed to assess self-esteem and assertiveness. There was built in an evaluation and questionnaire. The interviewer asked the questions and the applicant filled out the answers. No applicant was rejected. Thirteen were admitted to the programme and training occurred over a six week period: five Saturdays, three Wednesdays and Sundays. Some participants were still at school. The ages of the participants ranged from 14 to 21. The sessions ran from 10am to 5pm on weekends, and from 4pm to 10pm on Wednesdays. Housing problems tended to affect attendance. Homelessness can involve either having no home , or lack of continuity of housing for family or other reasons. Thus, the participants were paid $25 per session and given a meal. Applicants were required to ring the co-ordinator if they could not atttend a particular session. If a participant missed a session, he/she had to negotiate his/her way back into the programme. Of the thirteen, one person dropped out over the seventy hour training programme. The low attrition rate was attributable to the adequate support given to the participants.

The Canberra programme is seen as a pilot to establish a national scheme. It has been independently evaluated and has been highly successful in terms of positive outcomes and clear objectives. Seven participants currently work as mediators. One person was considerd unsuitable for mediation. Those who completed the programme have performed a wide range of mdiations, including facilitating a union declaration on the juvenile justice system. Victim-offender mediation is currently being considered as another area of activity. Evidence has been submitted to the Committee on Offender Mediation about the need for confronting offenders about the consequences of their actions. A recommendation is to trial victim- offender mediation in the ACT with young people who have been offenders acting as facilitators.

The participants in the programme were trained to mediate disputes involving others, such as parents and adolescents, schools and groups. For example, a daughter may want to negotiate with her mother to get her property out of the mother's house, or to maintain contact with her siblings after leaving the home. A father and son may see their relationship deteriorating and may want to negotiate another effective relationship or to establish some ground rules on sex or the use of the telephone.

There are housing problems in Canberra which affect young peopl. The ACT has large blocks of flats. Many young people do not feel that this type of accommodation is safe, and would like to move. Some have been sexually harassed. Disputes occur over appropriate

housing. Young homeless are entitled to claim a homeless allowance. There are, however, bureaucratic and other impediments to making claims. First, the young person must get a parental letter which makes it clear that it is impossible for the young person to live at home. Domestic dissiculties which are intermittent are not sufficient grounds for an entitlement. A young person may be reluctant to ask for a parental letter if the parent is an abuser.

The Canberra Conflict Resolution Service and Resolve focus on resourcing people. The professionals in the organisation identify what disputes or issus are suitable for mediation.

Young people like to function in big groups. Adults find this phenomenon confronting. Mediation can be used to discuss young people's problems including public policy issues. The strategy is to identify young people's concerns for the community and by changing the focu to the community, th concerns can be dealt with as a community issue. Co-mediation in this context is an appropriate tool. The object is to match an adult mediator with a youth mediator and get the co-mediators working together. The purpose is to identify groups as stakeholders. The two services have paid employees. This compares with Youthline which functions with the support of volunteers.

Resolve operates on the intake model of mediation. One person contacts the mediation service which later makes contact with the other party. Resolve has an intake interview to explain the mediation process. The disputing parties are encouraged to make informed choices. The intake interview is designed to manage any resistance to the mediation process. There is an interval of at least two days between the intake interview and the mediation itself. The mediation takes place over two sessions. The first session involves identification of issues; th second is a negotiating session.

Has the service been accepted by the young and the community in general? What about the future?

In Canberra, there is still the view that mediation is an extension of the counselling process. This issue has to be overcome. mdiation is a different process. Some people are referredfrom counselling to mediation, but generally mediation is an unsuitable vehicle for people in need of counselling. Young people have some resistance to taking care. The object of mediation is to identify isues which can be negotiated and those which cannot, such as abuse. Later, the object is to get the parties to construct an agreement for themselves.

Resolve has been successful and innovative with this programme, but it will cease because there is no further funding. More people could be trained as mediators, but there are no resources available to train them.

Young mediators are trained to work with those undergoing training. The use of mediators is resource intensive. Training must involve positive feedback and positive aspects of each training session must be drawn out. Mediation is confidential. A young person may have a dispute with the Department of Social Security or Austudy. Resolve can facilitate a meeting between them at which the issues can be negotited.

Ethnic involvement in mediation processes is increasing. There is a flow on effect through users recommending the process to friends and the proliferation of conflict resolution courses. Where mediators have strong links in their community, the more the community uses the service

Mediation as a community strategy must have a broad range of representation with respect to classes, age groups and issues. IIf the community is empowered, then the community can mediate itself. If young people are in dispute with each other, then the process is to use young mediators. If the disputants include both young and older peopl, then the co-mediation involves a suitable mix of individuals. Older people in the dispute are matched

for type with a mediator. The dynamics of mediation change depending on the type of mediators employed. Feedback is also affected. The mediator's role must be very clear from the outset. The role is to control the process but not the content. Debriefing is an important part of the mediation process. It is essential for quality control to review the dispute and the outcomes from the process. Mediators should not limit time available for mediation sessions, but they should limit the number of sessions.

There is normally a pre-mediation session which is held with the disputants. This takes approximately fifteen minutes and the process is separate from the intake procedure. The purpose is to explain the process, to make introductions and check to see if changes are required.At the session, the disputants are informed that the mediator is a neutral participant. The disputants are asked to state why they want the service. An agenda is drawn up and each issue is discussed. The mediators may see the disputing parties separately. During the discussions, mediators encourage the generation of options. If a settlement is reached, the parties are encouraged to commit it to writing. Anxiety during the session is apparently minimal because of the earlier preparation.

Mediators are supervised through the debriefing process with their co-mediator and their supervisor. Mediators can be counselled, and have regular inservice training.

Mediators's skills are assessed by competency based training and assessment. The same standards are applied for both adults and young persons. Initially mediators are given provisional accrditation. Full accreditation is reviewed every two yars. Feedback on mediator performance is south from disputing parties.

The process is important, and so is communication. Reaching agreement is not necessarily important, and mediation cannot be used to dictate a solution.

Disputes in Retirement Communities

Stella Sykiotis

The Accommodation Rights Service Inc.

INTRODUCTION

It is well accepted that the Australian population is ageing. The proportion of people over the age of 60 is expected to increase from presently 16% of the population to 20% by early next century. In the next ten years, faster growth is expected in this age group than other age groups.

This demographic trend and the fact that people are retiring earlier has contributed to the demand for alternative, specific housing arrangements for older people. Government and charitable bodies have been unable to meet this demand.

A number of factors in the late 1970's including, increasing land values, the availability of lump sum superannuation payments, the cessation of government funding for self care units, all contributed to the rapid growth of a private retirement village industry offering resident funded accommodation.

It is difficult to say exactly how many older people currently reside in retirement communities as this will depend on the definition of 'retirement village'. There is also a lack of accurate and comprehensive data. However, it is clear that many thousands of older people have chosen the retirement village lifestyle in New South Wales and it is expected that the numbers will increase.

WHAT IS A RETIREMENT VILLAGE?

Legislation governing retirement villages is largely state based and accordingly differs across the country. In New South Wales, the legislation defines a retirement village generally as:

- a residential complex;
- exclusively or predominantly occupied or (intended to be) occupied by retired people over the age of 55 years;
- resident has paid an entry contribution or some consideration to continue occupancy.

The definition is very broad and covers a wide variety of villages from very small self care complexes to very large complexes with three tiers of care including self care, hostel and nursing home accommodation. It includes complexes owned and managed by charitable organisations, private for profit organisations and strata title complexes. It covers complexes offering a wide range of services and amenities including a "resort" lifestyle to those with very minimal services.

DISPUTES IN RETIREMENT VILLAGES

In order to design appropriate dispute resolution mechanisms, it is essential to understand the context or environment in which disputes arise.

There are a number of characteristics of retirement communities which affect both the type of disputes which arise and the appropriate mechanisms which could effectively be applied to address these disputes.

PARTIES TO DISPUTES IN RETIREMENT VILLAGES

In retirement villages, one can characterize disputes as generally occurring between four types of parties:

1. Resident v Resident
2. Residents v Residents
3. Management v Resident
4. Management v Residents

Very rarely in my experience, disputes may arise between residents and a resident.

The context in which disputes arise will impact differently on each type of dispute because the power relationships and the issues may be very different between different parties.

Below is a discussion of some factors which have an impact on disputes in retirement villages. There may of course be many other relevant factors not discussed.

CONTEXT OF DISPUTES IN RETIREMENT VILLAGES

1. High density

Retirement villages are generally high density residential complexes. A common reason people cite for moving into these facilities is that their own homes and are too large to manage.

Some residents find it difficult to adjust to closer proximity to their neighbours. Many had previously lived in suburban settings with a backyard and distance from neighbours.

2. Retirement

Unlike many other high density housing communities, many residents in retirement villages may spend a lot of time at home and their daily activities may centre on activities within the complex rather than outside.

3. Isolation

Some retirement communities are physically isolated from community services and residents may find it difficult to access community services and links outside the village.

Many residents may be isolated from their families, friends and other social contacts. This may create an isolation and dependence on relationships within village.

Many residents may be physically frail or have illnesses which create isolation and dependence.

4. Sharing facilities and amenities

Residents generally share common facilities and amenities including gardens, community hall, recreational facilities such as swimming pools. bowling greens etc. They must take the needs and desires of others into account when making decisions

about their own activities. Many residents may not have experienced this in their previous homes where they had complete autonomy.

5. Sharing costs

In addition to sharing the use of facilities and amenities, residents must also share the cost. This creates considerable scope for disagreement as priorities may differ amongst residents.

Shared decision making necessitates the creation of a structure or framework. In NSW, unlike in strata title complexes, there is no definitive legislative framework for structured group decision making in retirement villages. Disputes may arise as to what is a fair and appropriate structure for decision making.

6. Group dynamics

High density and the need to share facilities and their costs, can create factions and groups within the village. There may be competition amongst groups, pecking orders, oppression of minorities etc.

7. Relationship with management

The owner/manager of the village can have considerable impact on relationships within the village. Where there is a high level of frailty and social isolation, residents may become dependent on the management and staff. This can make residents vulnerable and become disempowering.

Where residents have made a considerable financial investment in the village, there may be tensions and conflict between the financial interests of the management and the residents.

In many cases, considerable tensions arise from different perceptions of the role of management. Residents may perceive the management as being employed by them to manage the complex and accordingly accountable to them; management on the other hand may perceive themselves as owning the complex and having the right and the responsibility to make decisions.

8. Residents as consumers

The relationship between the owner/manager and the resident in a retirement village is largely defined by the contractual arrangements between the parties.

These can be complex and are often presented in a way that makes them inaccessible to the consumer. Legal advice can be very costly and often does not adequately inform the prospective resident of the product they are purchasing.

As the contracts which define the product are generally developed by the retirement village industry, they tend to favour the manager/owner of the village and an unequal contractual relationship is often established between residents and management. The legislative framework in New South Wales, the Retirement Village Industry Code of Practice 1989 and the Retirement Villages Act 1989 attempts to redress this balance to some extent by ensuring information is provided to the consumer. However, it does not regulate the terms and conditions of contracts and essentially, the consumer must beware.

This inequality in the contractual relationship can have a significant impact on the relationship between residents and management and is often at the root of many disputes in retirement villages.

DISPUTE RESOLUTION MECHANISMS

The New South Wales legislation creates a two tier dispute resolution mechanism. The first tier is outlined in the Code of Practice and creates an informal Disputes Committee which cannot make legally binding decisions.

The Code requires that the management of a retirement village must convene a Disputes Committee to 'hear and mediate' disputes that arise within the village. The Committee must comprise three people: a representative of residents, a representative of management and an independent person chosen by the representatives. The Committee must advise the parties in writing of its decision within 30 days. Residents and management must decide the charter for the Committee. The Code gives little other guidance or structure.

Many difficulties arise in implementing this structure. The process of the Committee is unclear. Many of those involved do not understand the fundamental differences between arbitration and mediation. The range of issues to be dealt with are unclear. As there may not be a screening process, disputes may come before the Committee that are unsuitable for mediation, for example a dispute involving the terms of the residence contract where the bargaining power between the parties is grossly unequal.

Practical issues arise such as how to ensure confidentiality, protection of Committee members from defamation or other liabilities, procedural fairness, representation of parties (particularly where a resident may be fearful of confronting the management), who will carry out and meet the costs of the administration required for operation of the committee including notifying parties, correspondence, storage of documents etc.

If the Disputes Committee is to play an important role in providing an inexpensive dispute resolution mechanism within retirement villages, further work must be done by the regulators to provide additional guidance to residents and management.

The Community Justice Centres in New South Wales are able to provide a more effective mediation service to residents than that currently provided by Village Disputes Committees.

The second tier of dispute resolution is reference of the dispute to the residential Tenancies Tribunal. The Tribunal provides an informal and relatively inexpensive forum, however its decisions are legally binding. The laws of evidence do not apply although the legislation ensures procedural fairness. Costs are reduced by requiring parties to present their own matters although parties may be legally represented at the discretion of the Tribunal. Whilst the Tribunal member is clearly an arbitrator, he/she may also attempt to conciliate disputes between the parties.

Conflict Resolution:

Community and the Environment

Bruce Coates

Estuary Management, NSW Department of Public Works

INTRODUCTION

The dictionary defines conflict as a sharp disagreement or incompatible behaviour.

When individuals or groups have differences of opinion about catchment management, or compete for the use of natural resources it usually ends up with conflict.

Conflict can occur over all sorts of things such as the validity of data and information or it may involve friction based solely on personality differences. Conflicts are often territorial over who controls what. It certainly occurs between government agencies and sections of the community when it comes to environmental management.

Yet conflict is not necessarily a bad thing. It's a natural by-product of the strength of our feelings and our passion about an issue. For effective management these conflicts should not be suppressed or ignored. However, it takes great skill to handle conflict well and achieve an equitable outcome.

It is clear that natural resources are limited and rival claims for their use or conservation are going to be common. Conflict can occur as a result of the differing values people place on the environment. It may involve vested interests or credibility. Even our differing level of awareness can cause conflict.

Examples, and there are many, include:

- development versus conservation;
- extractive industries versus habitat protection;
- competing demands for access to resources;
- acid sulphate runoff from farms causing fish kills;
- commercial versus recreational fishing;
- the allocation and cost of water supplies;
- logging versus national parks.

So what is happening that's leading to all these conflicts? Why is it that decision makers always seem to be involved in bitter disputes with the community over the environment?

Perhaps we should look at some of the things we can do to create chaos, and then try and avoid them.

Playing with misinformation

Putting out misleading facts or interpretations of the data. The community grapevine can create chaos in a very short time with the wrong information.

Don't talk to the community, and keep a few secrets

If you hear something of value to your 'enemies'. don't tell them. Keep it to yourself. You will succeed in being alienated and left out of everything.

Establish multiple groups

Get several teams working on the same thing and don't tell them about each other. Keep them in the dark.

Allow personality conflict to develop

Put two people who hate each other on the same team. Allow the friction to grow and worry about it later. Let disputes drag on and let festering wounds develop.

Deliver overnight decisions

Release an overnight policy strike and then see who loves you. Newcastle increased the price of water overnight and caused a major public outcry. In the long run it worked itself out.

Neglect the Environment in the 90's

Do lots of cursory stuff and hand out brown paper bags filled with glossy brochures. Don't mention the environment in any of your strategic plans or annual reports.

Play with the media

Let anyone talk to the media, especially if you are in a delicate political position. Encourage multiple press leaks. Attack ministers through the media.

Be indecisive

Don't make hard decisions too quickly, or don't make them at all! Let community groups complain about an issue for years. Show some healthy indifference. Sit behind your desk and decide not to worry about it. Make sure you indicate all sorts of possibilities to everyone and see what happens.

Encourage Ministers to sit on controversial reports

Hide everything and believe that the media won't find out. No-one would possibly leak it; they all love you, don't they?

Raise expectations and don't deliver

Ask the community what they want, raise their hopes and then say they can't have it because it costs too much.

Stick to antiquated legislation and procedures

Don't amend them, and hide behind all their complexities.

These are just a few. I'm sure we can all think of lots more. If you pursue just a couple of these, you can usually end up with a bun fight in no time at all and a very disgruntled community.

WAYS TO AVOID UNNECESSARY CONFLICT

So, what can be done to avoid or minimise conflicts?

You could avoid creating chaos in the first instance.

The main thing appears to be communication. Talking to people, even if it's an informal yarn, with or without a beer. Develop informal networks and strike up a friendly association with your opponents before war breaks out.

The other thing is listening. It's no use setting up a community network or liaison group if you are not going to listen to what they are saying.

The third is to take notice of what is being said and take action.

Other ways include:

Appropriate structures
Adopting clearly stated policies and procedures which have the support of all concerned.

Climate
People are much more likely to agree with a decision if they have been involved. Open communication should be practised all the time to avoid misunderstandings and address conflicts before they become entrenched.

Wider Involvement
It is important to involve all the stakeholders and facilitate wider community participation.

Awareness
Awareness campaigns can provide valuable information about the problem and the solutions being considered

These are just the basics. I'll talk about some of these approaches in more detail later with a case study example.

THE REALITY

Let's be realistic about conflicts and admit that they are still going to occur no matter what we do. There are always going to be those wildcat conflicts that no-one could pre-empt and that are likely to go on and on, no matter what.

CONFLICT RESOLUTION STYLES

Let's look at some of the different styles of conflict resolution and consider their appropriateness for different situations. Some people may want to share their experiences with these styles. Simplistically, there tend to be five common approaches described in the literature.

1. **Competition**
   People often adopt a blind competitive approach. They want to win at any cost. Often they don't care that their needs are met at the expense of others. This lack of co-operation is usually very assertive and is often seen as being aggressive. It usually ends up in a win-lose outcome. Relations between the people usually

become embittered and everyone ultimately loses out. It requires a great deal of strength not to respond in kind to someone else's competitive approach.

2. **Avoidance**

Avoidance is unassertive behaviour. It's also unco-operative. It is where people avoid the issue rather than seeking to resolve it. It can sometimes be used as an approach when emotions are running high, as it can allow tempers to cool down. However, as a permanent strategy, ignoring the conflict often increases it. Instead of helping it to go away, it makes matters worse. Avoidance often leads to ineffectiveness.

3. **Accommodation**

Merely giving in to someone else's solution is co-operative but unassertive. It means putting the other party's needs above your own even when your own are important. If the other organisation happens to be a government department with a great deal of power then you may have no other choice.

On the other hand, if we are less concerned about the outcome than the other party is, it may be an approach that provides long term goodwill that may make the sacrifice worthwhile.

4. **Compromise**

If both parties are committed to mutually exclusive goals, they can at least partially fulfil their needs by coming to some sort of compromise. This is where each side gives a little bit and gets a bit in return. It can be a useful temporary solution to a very complex or lengthy conflict.

5. **Problem Solving**

Problem solving is generally the most appropriate approach to adopt for resource management conflicts even though it often requires assertiveness to ensure that all the needs and concerns of the stakeholders are addressed.

Problem solving can avoid unnecessary compromises if the time resources and level of commitment permit. It involves generating more creative solutions that people will be more likely to implement because they have been involved in their development.

Problem-solving includes:

- admitting that a conflict exists
- identifying the values, interests and needs of all parties involved
- developing options with the other party and identifying the likely consequences both positive and negative
- selecting the options that best meet the needs of those involved
- co-operatively implementing the options chosen and evaluating the results

Each of the five different styles have their place. Each can be useful in particular situations. The skill involves knowing which one is the more appropriate.

The problem solving approach is optimum for generating creative solutions that best meet the needs of all concerned. However, in some situations it can be useful to compromise so that you can reach an agreement that is mutually acceptable as well as partially satisfying.

Avoidance also has its place, particularly if time and resources are not available to reach a permanent resolution. Even competition and accommodation may be appropriate if power or politics are major unresolvable issues.

The real objective is to stretch and expand our capacity to handle conflict by being flexible and adopting whatever style best suits the situation.

APPROPRIATE STRUCTURES AND COMMUNITY PARTICIPATION:

THE CATCHMENT MANAGEMENT APPROACH

Community participation and integration are the focus of the Total Catchment Management initiative in NSW. 'Community and Government Working Together' is the espoused cornerstone of resource management policies.

One of the roles of catchment management committees and estuary management committees is to provide a forum for active community participation in resolving disputes about resources management.

Committee members represent a cross section of the community and have a role in resolving issues rather than lobbying for their own particular interests. This means airing and debating issues between the various sectors of the community so that they can work towards a shared goal. However, even when there is a shared goal there may still be disputes as to how best to achieve results. The committees are ideally placed to take a broader view and assess individual needs against the needs of the whole estuary or catchment.

By acting as a forum the committees can work towards achieving a consensus on what is best for the community and the environment. This participatory process can be very time consuming and is sometimes frustrating. A great deal of interaction and discussion is usually required to reach consensus.

Other committees that are not committed to a consensus approach may come to a decision earlier but there is often a question about people's commitment to the outcome. Because catchment committees are about achieving attitudinal and behavioural change in the long term the consensus approach is more appropriate.

Carcoar Example

What has been happening at Carcoar reservoir shows how the TCM approach can achieve a dramatic change in community attitudes, a high level of co-operation and co-ordination between both agencies and industries and lead to a community based improvement in water quality.

Carcoar reservoir is a water supply storage on the Belubula River near Blayney in central Western NSW. The water is used for irrigation and stock and domestic supplies downstream in the Belubula and Lachlan River systems. The storage itself is used extensively for recreational fishing and sailing.

The reservoir has a long history of water quality problems brought about by excessive nutrients in the Belubula River. High levels of phosphorus and nitrogen often lead to the development of blue-green algal blooms during the summer months.

The potential toxicity of these algal blooms has repeatedly caused warnings to be issued restricting the use of the lake for contact recreational sports. Warnings have also been issued about using the water for stock and domestic consumption.

The annual phosphorus loading in Carcoar storage are considered amongst the highest for any reservoir in Australia. These levels were thought largely to arise from point sources such as an abattoir and sewage treatment works in the town of Blayney, some 2.5 kilometres upstream.

There is a long history of public controversy about the problems. Accusations over responsibility and blame for the problems, which included litigation against industry, were dividing the community. Employment opportunities were being threatened by the possible

closure of the abattoir. This would have caused considerable hardship within the town and threatened the economic viability of many small businesses. In addition, the cost of upgrading the town's sewage treatment plant appeared prohibitive. Rural landholders in the catchment were being blamed for excessive nutrients in their runoff.

The high level of community disputation eventually led to the formation of the Carcoar Catchment Management Committee as a sub-committee of the Lachlan CMC. The committee brings together representatives from many sectors of the community, local industry, government agencies and local government. It is a round table forum where people with different perspectives can come together to deal with the issues and seek agreement on ways of resolving them. This is enabling the committee to look at the issues from the various economic, social and environmental perspectives. Everyone has an equal say and each perspective carries equal weight. One of the most significant features is that the committee operates by consensus with agreed objectives.

The committee co-ordinated a range of studies by government agencies to identify the sources and comparative loads of nutrient inputs to the Belubula River. Work concentrated on phosphorus levels as they were considered to be the major limiting factor for blue green algal growth.

As a result of the studies, the four main sources of phosphorus and their relative load were identified as the Blayney Abattoir (42%), rural lands (28%), urban and industrial lands (16%) and the sewage treatment works (14%). The committee considered that all sources were significant and needed to be addressed in a co-ordinated way.

A water quality management plan has been developed, outlining both short and long term strategies for reducing phosphorus loads to an acceptable level. Significant improvements have been made to waste water management at the Abattoirs through the collaborative efforts of the company and government agencies.

An artificial wetland has been designed and constructed at the upstream end of the storage as an interim measure to intercept nutrients before they enter the reservoir. The wetland is the collaborative effort of several agencies, a university, local schools and community members.

A comprehensive range of research, by various organisations, has been incorporated into the wetland project. These should improve the design, operation, efficiency and management of constructed wetlands. Local schools are making a significant contribution to the project by establishing aquatic plants and monitoring aspects of their growth and habitat changes over time. Students are also involved in the Streamwatch program to monitor water quality in the catchment. These activities are related to various curricula at primary and secondary levels and are being supported by funds from the Department of Water Resources.

The high level of public involvement has engendered an enormous sense of community ownership of the problems and the solutions such as the wetland. The wetland is always referred to as *'our wetland'* rather than the government's. This sense of ownership should ensure the wetland's future.

The level of public participation in identifying the underlying economic, social and environmental issues and developing agreed strategies, has many benefits. This has brought about a great sense of awareness about water quality problems and their causes. It has also brought the community together to modify behaviour to achieve agreed objectives.

STEPS IN CONFLICT RESOLUTION

There are five main steps in conflict resolution:

1. Defining Needs and Concerns

Facilitators should avoid preconceived ideas about solutions as they may limit the process of developing creative solutions.

Everyone's underlying needs should be listed: for example open space, access, sufficient fish, or aesthetic environment. Ideally committees will assemble all the relevant stakeholders to ensure active community participation.

Often people are not clear about what they want, but they are certainly sure about what they don't want. This may be useful as it can be the first step to coming up with what they do want instead.

To help the process along it is often useful to turn negative statements into positive counterparts, for example someone concerned about the use of pesticides by a neighbour needs to be assured of a clean water supply.

2. Exploring the Options

The next task is to generate new solutions. Brainstorming can be used to explore different options. If necessary, time limits may need to be set. All ideas should be welcomed even if they are far-fetched. Humour can often help the process. It can also release tension and generate lateral thinking.

Ideas should be allowed to flow without stifling new possibilities or requiring people to stand behind them. Ideas should be accepted without prejudice, commitment or evaluation.

What seems impossible now may generate good ideas later. All ideas should be recorded without criticism. Brainstorming can occur in formal workshops or informal situations such as on a field tour.

3. Divide and Conquer

Issues that are easily solved can be tackled first. However, the situation often develops where the whole problem cannot be solved in one go and smaller bits need to be tackled first.

Complex multifaceted problems can be broken down into more manageable sections. A number of practical solutions may arise by working on smaller sections of a larger problem.

In the process goodwill can be generated so that the harder issues can be tackled at a later time.

4. Solutions

Explore creative solutions and alternatives so that both parties can emerge with more of what they want. The consequences of the options need to be considered. Objective yardsticks should be developed to measure the fairness and practicality of options, for example water quality, or costs involved.

The use of 'currencies' can also be investigated. These are concessions that can be traded relatively easily. They may be easy for one party to give, yet be highly beneficial for the other to receive. They can be very useful in designing solutions that meet the needs of all the stakeholders.

5. Developing Win/Win Outcomes

A critical skill is the win/win approach. There is a popular misconception that there must always be a loser if there is a winner. This may be the case in most sporting contests, but it is not necessarily so in other situations.

Often everyone can win a little and get most of their needs met. The focus should be on achieving as many wins as possible for all concerned. This will often result in more effective solutions, improved relationships and a higher level of commitment to the solutions.

- ***Co-operation***

  The objective is to create partners and not opponents. Look for similarities rather than differences. This involves working together so that each party gets more of what they want, and everyone is satisfied with the outcomes. Agreeing on options dramatically improves working relationships.

- ***Supporting others' views***

  Consider competing interests as a unique opportunity to be creative. Strengthen your own case without destroying the opposition's.

- ***Don't confuse problems with personalities***

  The two are quite separate. Be hard on the problem but sympathetic to the individuals involved. Reframe personal attacks into objective issues that need to be addressed. For example, 'the developer is irresponsible' can be reframed to 'the development should focus more on conservation'.

- ***Try to be fair***

  Phrases such as 'we need to find a solution that's fair all round' can be useful as solutions often break down if they are not fair and equitable. Companies that exploit their workers end up having strikes and countries that oppress their citizens create a climate for revolution.

  You don't have to be noble to adopt the win/win approach. It is simply a wise strategy that results in mutual gains.

- ***Impasses***

  Sometimes, no matter how hard you try, you can't resolve the issue. Sometimes it may be that the situation is too tense or vital information is being withheld. If so, call a halt, but a temporary one. Always leave the door open to return to negotiations at some time in the future.

  Try to finish a meeting on a positive note, saying 'we all agree to meet next month'.

- ***Persevere***

  As with anything that's worth achieving, the outcomes can be time consuming and elusive. Time spent on developing mutually acceptable solutions saves hassles in the future.

GUIDELINES FOR EFFECTIVE NEGOTIATIONS

1. Set Goals

Goals are the key to defining what outcomes are wanted.

2. Preparation

Having all the facts is a distinct advantage. Doing your homework helps prepare your case. Ask yourself what the benefits are to each of the parties who might be involved and anticipate any objections.

3. Project Yourself

When preparing your own case, consider the other parties' as well. Get to know your opponents' strengths and weaknesses. Pre-empt their arguments and the options they may be considering.

Think about the benefits they may receive from your proposals. If you can put forward a case showing how it meets their needs instead of just stating your own, you can make 'yes' seem a lot easier.

4. Establish Objective Criteria

Acceptable guidelines should be established as early as possible. This will enhance the chances of reaching an amicable and fair solution. This can be useful if one party has undue power over the other. You may want to establish a criterion that 'no one person will be unduly disadvantaged'.

5. Reframe Questions

Reframing the questions is an effective antidote. It can help clarify meaning, explore options or move from the negative to the positive.

For example, if someone says 'It's too expensive', ask 'compared with what?'. If they say 'You can't do that here', ask 'What would happen if we did?'

If someone is negative and says 'It will never work', move to the positive by asking 'What would it take to make it work?'

By reframing questions you can move the process forward.

6. Be Aware of Signals

Part of the art of listening is reading the signals that are being sent. These are the indirect messages about the other side's needs and concerns.

If someone says, 'The area is too large to apply corrective measures every year', they are probably saying that if you reduced the area or altered the time frame or offered a subsidy it might be acceptable.

It's also useful to read the body language to pick up unstated opposition to a proposal.

7. Appropriate Assertiveness

There is a positive way of telling someone your feelings without damaging the relationship. You can communicate assertively without being aggressive. It is an 'I' statement. It lets them know your feelings without blaming them or demanding that they change.

It involves an objective statement about your feelings, stating your preferred outcome. For example: 'When everyone is yelling, I feel like walking out. What I would like to feel is OK about having a disagreement.'

Your statement is clean (without blame), and clear (stating your point of view). You have a good chance of being understood without inflaming the situation.

8. Take Time

You should ask for the time needed to resolve the dispute. Don't try and rush it. If someone surprises you with a question, it is appropriate to ask for time to assess the facts and consider a response. Give other people time and avoid the ambush. Make appointments.

9. Reinforce Common Ground

If you get stuck in a disagreement, you can usually find some common ground to agree on and restate as a summary. For example, 'I'm sure we both want to manage the wetlands effectively'.

Even if you can't agree on anything, start agreeing on the timetable for the negotiations so that you are setting up the right climate.

10. Take Notes

It is always useful to take notes, especially when negotiations are protracted. There is always the potential for misinterpretation or distortion. It can also help to summarise the meeting. Send out a note to all parties outlining what was agreed to and what still needs to be addressed.

11. Community Education

It is important to have community support. You can achieve this through participation or raising awareness.

Writing and publishing clear and concise information in a logical sequence promotes understanding and minimises conflict.

12. Networking

It is most important to keep the lines of communication open. Developing friendly, informal networks gets people involved.

People need to feel involved to be committed to the outcome.

The use of the two crucial C's avoids the third one:

COMMUNICATION and *CONSULTATION* reduce *CONFRONTATION.*

Many thanks to Daphne Brehm and Helena Cornelius, Conflict Resolution Network, and Diana Day, Department of Water Resources.

Complaint Handling in the Public Sector

David Landa

New South Wales Ombudsman

The Ombudsman investigates complaints about the administrative conduct of the public service including local government, police and prison officers. The Ombudsman is an independent officer responsible only to the Parliament and in essence the office exists to protect the rights and interest of consumers of government services and to ensure public officers act fairly and reasonably. In essence, the Ombudsman is a quality control mechanism on the delivery of service from the public sector.

Until recently, the way in which that service was delivered was basically reactive. By that I mean the office would react to the complaints it received, investigate the complaints and make findings and recommendations if the complaints were found to be justified. Alternatively, and in most instances, where complaints were found not to be sustained, the Ombudsman's report would indicate that the complaint was not sustained and explain in full the reasons why that conclusion was reached. This in essence endorsed the action therefore of the public agency complained against.

Some may say my Office sees the world only in terms of the complaints we receive. I don't think that's true, but my office certainly sees most of what's going on in the complaint-handling field.

We see a strong congruence between complaints and disputes. When we investigate, we find all too often that at the heart of a complaint is a dispute of some kind, which may well have been festering for some time.

While it was considered that the function of the office in this manner helped improve the delivery of service in the public sector, it could be said that as prevention is better than cure, a pro-active approach could achieve equal if not better results. It was with this in mind that my office commenced a program that I am here to outline to you today.

In 1991, my Office carried out a survey which revealed major scope for improved complaint management across the public sector. We called this initiative CHIPS (Complaints Handling in the Public Sector). We began looking more closely at how public authorities handle complaints from the public, hoping that identifying a best practice could cut costs and increase effectiveness.

The following year the government unveiled its Guarantee of Service for the public as users of government services and the Ombudsman suggested that integrating the two programs would allow each to enhance the other. This having been agreed, decisions were made as to the next step in what was clearly an ongoing long term program

PRELIMINARY STRATEGIES

- Publishing guidelines for effective complaint management, to assist agencies setting up or modifying procedures for complaint handling;
- Devising a format and standards for annual reporting of complaint handling;

- Holding seminars jointly with the Office of Public Management, linking the two programs, CHIPS and the Guarantee of Service, and looking at ways of resolving complaints and disputes;
- Promoting Alternative Dispute Resolution (ADR) techniques generally and mediation in particular, for resolving complaints and disputes.

IMPLEMENTING THOSE STRATEGIES

Guidelines

After consulting agencies involved in the original survey, the office published 'Guidelines for Effective Complaint Management'. Initial distribution was at the joint seminars held in August and September 1992. Demand from NSW and other states has been such that a second, revised edition is planned.

Standards and Reporting

Reporting standards were developed by the office in consultation with a range of agencies. A committee constituted from the Office of Public Management, Auditor-General, Treasury and the Ombudsman's Office examined the standards and their implementation. The committee accepted the standards and decided they could be implemented within the scope of the existing reporting requirements, by means of a joint directive of the Office of Public Management and Treasury (which has responsibility for the *Annual Reports Act*).

The result will be agencies dissecting complaints they receive into three basic categories. At one end of the range will be complaints involving allegations of criminal and/or corrupt conduct, which may have to be dealt with by the police or the Independent Commission Against Corruption (ICAC). At the other end of the spectrum will be 'service-delivery' complaints (about a third of the complaints brought to this office). If these are handled effectively 'in-house', we can concentrate the office's investigative expertise on the more significant matters. When resources are tight and complaints which warrant attention have to be declined, this assumes increasing importance. In the middle, will fall complaints of varying seriousness, where individual decisions will have to be made as to how the problems they raise may best be dealt with.

Joint Seminars on CHIPS and the Guarantee of Service

Seminars were held jointly with the Office of Public Management. These outlined the linkages between the Guarantee of Service, complaint-management, best practice in the resolution of complaints and disputes and the use of mediation in appropriate cases.

ADR and Mediation

It was decided early that of the range of ADR techniques, mediation offered the greatest prospect, on the basis that anyone mastering mediation, can readily use lower-level techniques in appropriate situations.

Increasing people's awareness of the benefits available from mediation is important and the office has been fostering this. Rather than just talking about it, however, we decided to actually train people in the theory and practice of mediation.

We have now held a number of intensive four-day courses, training over 100 people from thirty-eight public-sector or related organisations. The training has drawn would-be mediators, as expected, but, significantly, has also attracted a high proportion of relatively senior managers. This confirms the view of mediation as both a productive management strategy and a valuable managerial competency. The training is ongoing.

Thereafter

Realising the full potential of the Guarantee of Service will involve changes in publicsector culture. The Guarantee of Service sets goals and some objectives. Financial constraints provide pressure to achieve more with less. Total Quality Management (TQM) is a useful concept, aimed at greater 'customer satisfaction'. To move from policy to implementation, however, needs more than just discussion.

THE ROLE OF CHIPS

All organisations get complaints (trying to avoid them by doing nothing eventually attracts complaints of inaction). The CHIPS program provides means for achieving change using resources available from effective complaint management:

- **Market Research**

  One of the best (and cheapest) forms of market research is available from the complaints that organisations get.

  Complaints are commonly quite concrete and tightly-focused on specific problems, usually avoiding the "wish-lists" which may come from lobby groups or consultative councils or which may surface in orthodox market research. They are often representative - for every complaint made, there are many which go unvoiced.

  In the private sector, many organisations regard complaints as a valuable resource, and work through them very carefully to wring every possible advantage from them.

- **Recording and Reporting**

  To make proper use of the resource represented by complaints, there has to be enough of a system to record them, classify, aggregate and analyse them, and then report on them in ways that will provide feedback to drive necessary change.

  The office has looked at systems for doing this and is currently test-bedding one which may prove useful to other public sector bodies. This is a technological solution, using an interactive computer system, the cost of which may be defrayed by savings in handling enquiries more economically.

- **Cost-effectiveness / Achieving savings**

  If complaints are a fact of life, there is still the choice of suffering from them or benefiting from them. In the private sector, there is the capacity to enhance profits; in the public sector, the capacity to enhance the organisation's public image, win public goodwill and, in times of economic stringency, save money.

  An early apprehension about putting resources into complaint-management was that this would reduce capacity to carry out core functions or that it simply couldn't be afforded. The answer is almost certainly that, except on the shortest of short-term views, it cannot be not afforded. In the broadest terms, the goals are to make the Guarantee of Service work, to move TQM from a concept to a reality and to save money while doing it.

  Savings come in two basic ways. Complaints commonly highlight disjunctions between policies and implementation. Remove these, and inefficiencies of one kind or another are eliminated. Money is saved or output goes up. Complaint-handling serves that purpose. Complaints, themselves, need to be handled effectively but they can also be handled more or less economically. In both areas, ADR generally and mediation in particular, can enhance performance.

- **The Role of Mediation**

  One of the best ways of extracting maximum benefit from complaints is an interactive approach to resolution and in that, mediation (and the lower-level approaches mediation equips people to use) offers the most effective interaction.

  Too often the office sees situations where in the relationship between the public and an agency, a contact produces a dissatisfaction, the dissatisfaction, if not handled properly, turns into a complaint and a complaint leads to an investigation, where someone (possibly everyone) loses. This costs money. It also costs goodwill.

  If this process never starts, or can be stopped early, everyone benefits. This is just one way an effective in-house complaint-handling system 'pays its way'.

- **Using Mediation**

  While use of mediation is common enough in the private sector, the public sector has tended to find it a resource either not available or, if so, not affordable. We saw value, therefore, in creating a pool of trained people. They could facilitate the use of mediation 'in-house', or lower level resolutions, where appropriate. Being trained, they could recognise situations where mediation was not appropriate or where mediation had to be undertaken by someone from outside the organisation. That need could then be met by the pool providing someone who was and would be seen to be independent, with our office operating as a resource of last resort.

  The office is well on the way to formalising such a pool under the provisional title of a Public Sector Mediation Group. Support for it has been widespread. In many cases, co-mediation, two mediators sitting together, would make sense, to pair newlytrained mediators with those having more experience, to take advantage of particular expertise, to achieve gender-balance or balance cross-cultural needs.

  Apart from practitioners, such a group is attracting interest from managers who simply want to manage better, who want to know **and** keep abreast of what is happening in the field and who want to be properly equipped to make necessary decisions about channelling problems into the most appropriate area for resolution.

FOR THE FUTURE

Sticking to the old ways is no longer the answer. It is not enough for an Ombudsman merely to find fault, without contributing to the improvement of the systems and the attitudes which so often produce the faults and the complaints that we receive.

The New South Wales Ombudsman's Office is uniquely placed for an overview of complaint-handling policies and procedures of public authorities and to make constructive comparisons. The office thus has the capacity to move information, ideas, experience and skills between authorities, promoting a higher general standard of in-house complaint-handling by the authorities themselves, to their benefit and that of the community generally.

Dispute Resolution:

Negotiation in Industrial and Employment Areas

Professor Brian Brooks

Chairman, NSW Industrial Relations Mediation Services Group

THE CONTEXT

The NSW Law Reform Commission Discussion Paper on 'ADR Techniques' concludes:

> 'dispute resolution processes defy neat classification. In theory they range along a continuum from private mediation between the parties on the one hand to formal adjudication by a court on the other. Along this continuum the resolution process moves from consensual to adversarial and is conducted with increasing formality'.

WHAT IS MEDIATION?

> 'the 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.'

WHY MEDIATE?

1. The parties must be prepared to compromise in principle rather than wanting to enforce their strict legal rights.

2. The possibility of winning the litigation must be outweighed by such factors as:
   (a) the likely delays in the resolution of the dispute;
   (b) the loss of revenue during a dispute;
   (c) delay in getting to final hearing and staff turnover in the meantime i.e. material witnesses leaving;
   (d) the likely need in litigation for unproductive management time and too great a diversion from revenue producing activities;
   (e) the effect of oustanding claims on property which is essential to the company's business.

3. The dispute is very complex factually or the applicable law is unclear.

4. The parties have a worthwhile business relationship which they wish to preserve.

5. The parties believe that everyone involved in fact wants the matter resolved and that no party has a commercial or other vested interest in delays.

6. Executives senior to those involved in the matters in dispute are prepared to invest time early in dispute resolution.

7. The parties would prefer the dispute to remain private and its outcome to remain confidential.

8. The parties can be assured that attempts to compromise will be without prejudice in the event of subsequent litigation.

9. Time spent in isolating the real issues is seen as not wasted if litigation or formal arbitration becomes necessary.

10. Definite time limits are set for the alternative resolution process.

11. The parties preserve scope for a compromise which a court would not have power to award.

12. The participating executives have authority to compromise on behalf of their employer.

CHARACTERISTICS OF MEDIATION

1. Originates in an agreement between disputants to call in the aid of a facilitator to assist in the settlement of negotiations by private consultations with each disputant.

2. The facilitator has no authority to impose a solution.

3. The entire process remains at all times flexible and is consensus oriented.

4. The process is dependent on the continued willingness of the parties to continue it until such time as either they agree upon the terms of a settlement or one or other of them terminates the negotiations.

ADVANTAGES OF MEDIATION

1. Mediation is much cheaper than litigation.

2. It is also cheaper on the public purse.

3. It is both an expeditious and informal way to resolve disputes.

4. The parties retain control over the process.

5 The process is flexible.

6. As the parties are more directly involved in the settlement process, there is a greater likelihood that a solution will be arrived at which is mutually satisfactory.

DISADVANTAGES OF MEDIATION

1. It is not suited to all disputes.

2. The effectiveness of the process is very much dependent on the effectiveness of the mediator.

3. It is said to deliver second class justice.

4. Mediation process presupposes parties of similar intelligence and bargaining power.

ESTABLISHING A SERVICE

1. Is there agreement that a mediation service is needed?

2. If so, how is the service to be described?

3. Once described what type will it be?
   (a) a government service, part of the present system (NZ);
   (b) a private, user-pays service (USA);
   (c) an adjunct to the existing ADR services? (e.g. ACDC)

4. If 3(b):
   (a) what form? (eg, company limited by guarantee?)
   (b) where located?
   (c) how governed?
   (d) how staffed?
   (e) how operated? (eg, code of conduct; register; payments?)
   (f) how available? (eg, individuals? assocations? lawyers?)

SOME PROBLEMS

1. The training and accreditation of mediators;

2. The role of the mediator: passive or active?

3. Who 'owns' the process and who pays?

4. How to maintain confidentiality?

5. Representation by legal advisers?

6. How to measure 'success' or 'failure'?

7. Relations with existing tribunals?

8. A conflict with the obligations of state and federal industrial legislation?

9. Is mediation available irrespective of whether parties are covered by state or federal awards or agreements?

10. Should mediation be a presumptive prerequisite to formal adjudication?

11. Is there a distinction between 'rights' and 'interests' mediation?

12. How to prevent the process becoming bureaucratised and more a case-management procedure emphasising cost-efficient finalisation therefore turning into a settlement conference rather than being a flexible, consensual, people-oriented and interest-based process providing durable, quality resolution for the parties involved?

DRAFT OBJECTIVES FOR THE INDUSTRIAL RELATIONS MEDIATION SERVICE

1. To provide mediation services in NSW and elsewhere to facilitate the resolution of industrial relations disputes and difficulties and to assist with the negotiation of enterprise agreements or other instruments affecting labour relations;

2. To promote the use of mediation and related alternate dispute procedures in the resolution of industrial relations matters;

3. To establish and staff an organisation having the capacity to properly manage the cost-effective provision of mediation and related procedures and to generally carry on the work of the IRMS in NSW and elsewhere;

4. To educate mediators, employers and employees (and other persons) about the nature and methodology of mediation and related alternative dispute resolution procedures and their practical application to the resolution of industrial dispute and difficulties;

5. To educate mediators, employers and employees (and other persons) about the nature and process of negotiating and enterprise agreements and other arrangements or instruments affecting labour relations;

6. To conduct and sponsor research into the techniques for; the resolution of industrial relations disputes and the facilitation of negotiation between employers and employees or their representatives;

7. To identify and develop sources of funding to maintain and further the work of the IRMS;

8. To do or omit to do all such other acts and things as the IRMS may consider necessary or convenient to enable it to attain the objectives set out above.

The State as a Player:

Some Issues for Mediation

Workshop Presenter

Marg Herriot

Legal and Policy Officer
Community Justice Program, Queensland

Workshop Reporter

Anne Duffield

Research Assistant, Faculty of Law, University of Sydney

Marg Herriot, Legal and Policy Officer of the Community Justice Program of the Alternative Dispute Resolution Division of the Queensland Department of Justice and Attorney-General presented this thought provoking workshop. She looked at the topic from the perspective of the state running the service and from the perspective of the state being a party.

Nils Christie believed that conflicts belong to the parties, but they have been stolen from them by the state and by lawyers. People have been pushed to the edge of their disputes. He argued that disputes should be returned to the parties so that people can relate to each other. Mediators share this view. They believe that the parties should be able to resolve their own disputes in most cases. This self determination may not be appropriate for all disputes, especially where there is power imbalance or where it is necessary to establish a principle.

Where the state runs the mediation service, the question arises whether the state is helping return the dispute to the parties or merely shifting control from one arm of government to another. It may be suggested that it is a conflict in terms for a government agency to assist in the private ordering of disputes.

The Community Justice Program was established in 1990 to deal with neighbourhood and some family disputes. It is now a separate division of the Department of Justice and the Attorney-General. Thus it is in the same Department as the Courts. It has legislative safeguards. The question arises as to how appropriate legislative provisions are in this area.

The nature of the disputes dealt with by the Community Justice Program has changed since its inception. Neighbourhood disputes have gone from being 70% of the caseload to 50%. The number of family and workplace disputes has increased. The Program has a citizens' complaint service for minor complaints referred by the police. These are usually complaints about the way the police speak to people. They are not complaints about behaviour which (if true) would amount to official misconduct. A victim/offender mediation service has

been established. This is a court-based program to which certain kinds of offenders are referred before they are sentenced. The Aboriginal Mediation Initiative has trained a panel of Aboriginal mediators and is setting up a pilot scheme which will be tailor-made for disputes involving Aboriginal people. The Community Justice Program is also increasingly dealing with public issue disputes. All this activity is encouraging.

The fact that the Program is a division of a government department assists in establishing good links with other agencies especially the police. However, a government mediation service is open to the following criticisms:

1. lack of independence
2. increased state control or intrusion
3. dissipation of legitimate conflict
4. bureaucratisation.

Professor Margaret Thornton in her article 'Mediation policy and the state' (Volume 4, Number 3, *Alternative Dispute Resolution Journal*) believes that it is unlikely that a government agency would be independent. At the policy level the Community Justice Program has achieved independence through dialogue with the government over policy initiatives. Most projects have been proposed by the Program. There is interaction between the government and the agency.

The victim/offender mediation service was proposed by the Program, but the Attorney-General limited the range of offences where a referral could be made. This was because the government felt that it could not sell the service to the public if minor assaults were included. Thus the government is exercising control by excluding victims of certain kinds of offences from the service. When complex parameters are established, it may be argued that disputes are not being returned to the parties. Practically, it is necessary to educate other agencies so that the victim is not referred by the court. The Program has to sell the idea. This is a problem which government-run services have. On the other hand community based services have to sell their ideas to government.

The objectives of the government may not be objectives for program managers. The government can be concerned with case management - getting cases settled quickly. The government wants to know how many people do not go to court because they go to the mediation service. The program managers are concerned to see whether people are taking responsibility for their own conflicts and whether they are satisfied with the service.

The government does not interfere with any particular case, but it may restrict the kind of cases which can be mediated. When cases are referred to the service by the courts, the service does not see its role to report back to the courts.

The Program has found it hard to maintain independence, but it feels it is important to have a statutory framework. Perhaps its greatest protection lies in the fact that it has attracted good people who have established their own culture. They are dedicated to maintaining the self determination principles of mediation.

A state mediation service is open to the criticism that the state can exert pressure through mediation to change people's behaviour. It may be paternalistic. The tentacles of state control extend through the community, but the community expects the state to provide methods of dispute resolution. The proponents of mediation feel that, with an appropriate culture, the state can put in place a service that gives disputes back to the people.

Mediation is, nevertheless, an intervention and when it is a state service it may be viewed as an intrusion and an extension of control. For example, victim/offender mediation services can be used to extend state control over offenders. Community based services may be better.

In Queensland, the advisory council of the Community Justice Program sought community opinions about victim/offender mediation and set up consultative committees. There was political pressure for something to be done. In the Australian Capital Territory, victim support groups called for a service. The ACT Conflict Resolution Service, as part of their youth program, trained young offenders as mediators. These factors worked together towards the establishment of a service, but it took longer. The state control involved in a community service may emanate from the referring body.

The philosophy of the Community Justice Program provides a safeguard against state control and intrusion. This philosophy emphasises that mediation should not be directive - the dispute should be left to the parties. Some court based programs are more directive.

The community mediation panel is selected by the Community Justice Program, but those on the panel would not feel that they are agents of the state and this is a safeguard against state control. The statutory framework is a safeguard and a hindrance. Budgetary autonomy could be a safeguard. Perhaps it could be based on case load. Success rate may assist.

The principle of voluntariness provides a safeguard. Where a matter is referred to the Program by the court, the mediators stress that mediation is not ordered by the court and the parties may leave. The manual which clearly states the policies and procedures of the Program is certainly a safeguard against state intrusion. The main asset is again the establishment of the culture of mediation.

Thirdly, it is argued that mediation services are used by the state to dissipate legitimate conflict by treating disputes separately and privately. An important safeguard against this is the development of a code of ethics so that mediators know when to terminate a mediation and refer the dispute to a more appropriate agency. It is important that all agencies, especially the developing court annexed mediation services, have a clear idea of the rationale of mediation and make their mediators aware of this.

Finally, it may be questioned whether a bureaucratic service can be alternative and informal. The policy and procedural safeguards may counteract the tendency to bureaucratisation, but there is a risk of rigidity.

The fact that the Community Justice Program is a division of a government department not only creates these dangers but also provides certain trade-offs. For instance, it has resources, accountability (financial, and for its actions), credibility, a wide range of effect, consistency and quality control. These enable the Program to do such things as run a television campaign. Thus it may influence a wide range of people. It may be questioned whether it is a legitimate goal of the government to affect culture. Being a Division enables the Program to promote the service to other government departments and change their culture.

If the culture is changed to such an extent that parties use a mediation service rather than talk to each other about even simple disputes, then it may be an increase of state power. Intake officers try to guard against this by asking the parties whether they have talked to each other and suggesting how they might approach this.

When considering the role of the state, it may be useful to look at who is suggesting that there is too much state control and to look at how things work in practice. ADR has been said to be a movement without a theory. There are certainly tensions in its evolution.

The occasions on which the state is a party to mediation are increasing. Traditionally people could only challenge an administrative decision in court if there was an error of law. Another alternative was direct action which may result in the police being involved. Ministers may mediate if they understand mediation and see it as politically wise.

In the case scenario (see Attachment) presented by Marg Herriott it was important to consider who were the parties - the spokespersons of the three groups, the Minister or a person nominated from the Department (who needs to be someone who can make decision) and, perhaps the police. Another consideration was whether a government department should be treated differently in the manner in which the initial approach was made. For instance, if there had been previous communication, a telephone call might be better than the standard letter.

A question of policy may arise. If the dispute was about a cabinet decision, it might be said that another division of government does not have the 'right to question'. It might also be seen as undesirable for a minister to meet with individuals to make such a decision. (It happens every day, but usually behind the scenes.)

Mediation with a government department is different in that it is necessary to get guarantees that the decision will be enacted. It will vary depending on whether the politicians or the bureaucrats attend. This affects the power in the mediation.

The intake procedures where the disputes are multi-party, and where the dealings are with spokespersons, are extensive and often face to face. It is important to try to ascertain the issues and to ensure that there are no more parties.

There are limitations where the state is a party to mediation. The process can only lead to a recommendation which then has to be passed by the Cabinet. It is a learning process for all participants.Considering the state as player both from the perspective of a party and the perspective of the state-run program proved to be thought provoking from theoretical and practical viewpoints and promoted interesting discussion.

ATTACHMENT

SUNNY PARK LAND USE SCENARIO

A large area of parkland owned by the Department of Public Works, and known colloquially as "Sunny Park", is situated in an inner city southern suburb of Brisbane

Over the last 10 years the Department has not used the land, however it has maintained it. Some of the local residents have put up some swings and a slide and during the day children use it as a play area. A group of Aboriginal people also use the area as an irregular meeting spot, usually on Friday and Saturday nights. It is also used by a group known as the Community Artists Collective for public dramatic and artistic performances; a number of permanent artistic structures have been constructed there.

Two months ago the Department announced a Cabinet decision to sell the site for an office block development. Following this announcement there has been a number of protests and public demonstrations opposing the proposal. As a result the Department fenced the land so that the public couldn't get access.

Nonetheless some of the Artists Collective managed to get inside and establish a number of works they call "Protest Art". These involve installations using toilets, mannequins and large signs denigrating the Department. The Police have been called and two of the group have been arrested and charged with trespassing.

Another group member has approached you to ask that a mediation with the Minister be arranged.

After talking to Party A you decide to open a file and you proceed to write a letter inviting the Minister to participate in a mediation or to nominate an appropriate person to attend.

Two days later the Minister's policy adviser phones you to discuss the matter. She tells you that the matter is "not negotiable" and she berates you for having the audacity to write to the Minister. She says that you have no right to question a cabinet decision. Nonetheless you explain the mediation process and the benefits of it for this kind of dispute.

Further protests follow, and the protesters appear to have community support. The matter has blown up out of all proportion and appears to be a bit of an embarrassment to the Minister. His cabinet colleagues are pressuring him to "sort the matter out". The Minister has a change of heart about mediation.

Another member of the Minister's staff phones you to say that the mediation can proceed and that the Director of Works (who made the decision) and the Minister's policy adviser will attend. He insists that the mediation take place by Wednesday next week, and stipulates that he will not meet with the two artists who have been charged by police.

You arrange the mediation with the following parties.

- Jack Smith, Director of Works, Department of Public Works
- Mary Banes, Ministerial Policy Adviser, Public Works
- Jamie Lynd, Community Artists Collective
- Patsy Howard, Community Artists Collective
- Terry West, Community Artists Collective
- Jan Brush, parent and local resident
- John Harbour, Aboriginal elder.

Other people invited have declined to attend.

Managing Cultural Diversity

Workshop Presenter

Daphne Brosnan

NLLIA Centre for Workplace Communication and Culture

Workshop Reporter

Joan Cain

Family Court of Australia

1. **The group watched a video entitled 'Real Australians'.**

   Questions: What emotions or physiological reactions did you experience when watching this video segment?
   What physiological reaction do you experience when faced with cultural diversity?

   Discussion: Nobody is neutral when faced with cultural diversity;
   Same with mediation;
   Mediators are not 'neutral' - they carry a lot of cultural and emotional baggage with them;
   Need to raise awareness of the values one brings to cross cultural encounters.

2. **The group broke into smaller groups of three or four who were asked to defend certain statements.**

   Aim: To reflect on assumptions and look at the range of values that exist in relation to cultural diversity.

   Issues: Do all minorities feel the same towards diversity?
   Do people from non-English speaking backgrounds have a homogeneous or monolithic view towards diversity?
   What are the effects of decades of assimilationism on Australian practitioners' approach to the question of culture?
   To what extent did the shift to multiculturalism alter that view, and in what ways?

3. **Discussion: Multiculturalism and the New Workplace Culture**

Cultural diversity does not lead naturally to social harmony.

There are changes in management, restructuring etc, and changes in organisational culture.

Work is now becoming part of a person's lifestyle. There are now flattened hierarchies, new communication systems and contents, participative schemes, staff are now 'team members', there are new ways of learning, working and communicating, relying more than ever on using cultural diversity as a resource.

Cross-cultural communication is too often seen as an individual concern or the concern of EEO or anti-discrimination rules.

Although important, cultural diversity is more than that.

Multiculturalism needs to be seen in a positive way - it may transform the way mainstream operates, culturally and economically and where access to wealth, symbols and power is possible for all.

4. **Identity Development Spectrum**

The group looked at the minority spectrum and the dominant/mainstream spectrum and how migration as a process affects identity and behaviour. The positions which members of the dominant and minority groups take will depend upon the degree of threat or acceptance they perceive in a cross-cultural interaction.

Discussion: There are many identity positions people can take.

There is nothing 'fixed' about identity positions.

A tolerant person will not always meet with a like-minded person.

Query whether the mediator's idea of mediation is what the parties want.

Different ideas of mediation around the world, based on different assumptions.

Query whether confidentiality (as it applies in mediation) exists for certain cultures.

There may be different values held by the parties - may be a clash of values.

Survival is often the name of the game.

Every now and again we are challenged about what our views are.

STEPS IN MEETING THE CHALLENGE OF CULTURAL DIVERSITY:

1. Interrogate our motives.
2. Experiment and recognise failure.
3. Re-educate ourselves to the issues.
4. Need to rebut intimidation.

Enterprise Bargaining

An Industrial Relations Reform Aimed at Improving Individual Enterprises

Sophia Symeou

Industrial Relations Consultancy
NSW Department of Industrial Relations, Employment Training and Further Education

I am pleased to have been asked to address this conference on the topic of industrial relations reforms aimed at improving individual enterprises.

On 31 March 1992, the Industrial Relations Act 1991 came into force. The legislation grew out of the NSW Government's commitment, on coming to power, to introduce measures to enhance productivity and efficiency at the enterprise level.

Industrial relations reform was seen as pivotal to that aim. It was felt that the industrial relations system in NSW at that time no longer represented the needs of the majority of workers or employers. We had a system which allowed participants in the industrial relationship to abrogate responsibility for industrial harmony to a third party in the form of the industrial tribunals.

The tribunals, for their part, had no effective sanctions with which to reinforce their authority.

The award system set conditions on an industry-wide or occupational basis (through the use of common rule awards) not allowing for the specific needs of individual enterprises.

In addition the dramatic demographic, structural, economic and technological changes which had an enormous effect on the workforce and the nature of work over the previous two decades were not reflected in the Industrial Arbitration Act 1940.

There was obviously a need for major reform.

The first step in this reform process was the commissioning of a full investigation into the industrial relations system, by Professor John Niland. This investigation gave rise to the Green Paper "Transforming Industrial Relations in NSW" released by the NSW Government in 1989.

The Green Paper identified areas for reform within the industrial relations structure.

It showed that the strong centralist focus of the industrial relations system had given rise to a situation where there was a constant drumbeat of industrial disputation underlying the economic activities of the State.

By requiring all industrial disputation to be referred to the Industrial Commission (as was the requirement of section 25A of the Industrial Arbitration Act 1940) the system actively discouraged the resolution of problems at the enterprise level.

This of course had enormous implications for enterprise productivity, particularly in industries which were vulnerable to work stoppages, such as those in the construction industry and those requiring continuous production.

Professor Niland saw that by creating a greater emphasis on processes at the enterprise level, there would be advantages for both employees and employers. He argued that a stronger focus on the enterprise would foster productivity and efficiency and allow businesses to respond more easily to the pressures of international competition as working conditions could be tailored to meet the specific needs of individual enterprises. At the same time workers would benefit through having more direct input into, and hence control over, their working conditions.

It is these concepts which formed the enterprise focus of the Industrial Relations Act 1991.

The Act gives effect to them in three different ways, through:

- enterprise agreements,
- the industrial relations calendar, and
- the use of mandatory grievance and dispute handling procedures.

ENTERPRISE AGREEMENTS

Legislation on enterprise agreements, was initially introduced in January 1991 by means of an amendment to the Industrial Arbitration Act 1940. These provisions were updated in the Industrial Relations Act 1991. In particular, the requirement that agreements be ratified by the Industrial Relations Commission was removed.

WHAT IS ENTERPRISE BARGAINING?

- Enterprise bargaining refers to the negotiation of employment conditions at the enterprise level.
- Can give rise to an enterprise agreement or an award.
- Enterprise agreements offer the greatest level of flexibility to parties to determine their employment conditions.
- The process of enterprise bargaining creates win/win solutions for the parties to the agreement.

ENTERPRISE BARGAINING UNDER THE IR ACT 1991

- The Industrial Relations Act 1991 provides that enterprise agreements may be negotiated with:
  - a union representing employees in the enterprise;
  - a duly elected works committee;
  - not less than 65% of employees of the enterprise.
- An agreement may cover all of the employees in an enterprise or just certain classes of employees.
- It may regulate all conditions of employment or only specific conditions.
- Agreements must contain:
  - a strictly limited term of between 1 and 3 years;
  - grievance and dispute handling procedures;
  - minimum standards on working hours, sick leave and rates of pay.
- Agreements may not override other legislated minima such as:
  - annual leave,
  - long service leave,
  - parental leave.

- Agreements are subject to a strict vetting procedure before registration.
  The **Registrar** ensures that the agreement complies with all the statutory requirements of the Act.
  The **Commissioner for Enterprise Agreements** ensures that parties understand their rights and obligations under both the proposed agreement and the award regulated conditions it will replace.
- An agreement which is harsh, unfair or unconscionable, or was entered into under duress can be challenged in the Industrial Court.

HOW CAN IT BE USED TO IMPROVE EFFICIENCY?

- Enterprise agreements focus on the needs of the enterprise and the people who work within it. They need not be affected by any State or nation-wide agendas.
- The process of negotiation requires the people who work in the enterprise to take responsibility for their employment conditions.
- This means that conditions of employment can be negotiated to suit both the needs of the enterprise and of the people in it.
- Efficiencies can be achieved either directly or indirectly.
- **Direct** efficiencies can result from things such as changes to work practices, reductions in demarcations, and the introduction of flatter management structures.
- **Indirect** improvements can come from things such as the introduction of 'family friendly' policies. These changes result in improvements in morale and employee commitment to the organisation. These can then result in increases in productivity and decreases in such things as absenteeism and stress-related illness.
- Enterprise bargaining brings employers and employees together with the goal of achieving mutually acceptable outcomes. This will result in lower levels of industrial disputation.
- The mandatory use of grievance and dispute handling procedures will also result in lower levels of industrial disputation.
- As a result, there will be an improvement in the standard of service provided to clients.

CONCLUSION

Enterprise bargaining means employers and employees working together to produce mutually acceptable outcomes which result in increased productivity and efficiency at the enterprise level.

Enterprise agreements under the Industrial Relations Act 1991 are the best means of progressing enterprise bargaining.

Enterprise Bargaining

Workshop Presenter

Sophia Symeou

Industrial Relations Consultancy,
NSW Department of Industrial Relations,
Employment and Further Training

Workshop Reporter

John Keogh

University of Western Sydney

Enterprise bargaining grew from the need to improve workplace conditions through industrial relations reform aimed at improving individual enterprises. When the Industrial Relations Act 1991 came into force on 31 March 1992, an opportunity was presented to enhance productivity and efficiency at the enterprise level.

The previous industrial relations system abrogated responsibility for industrial harmony to the industrial tribunals without providing the necessary sanctions to cater for the specific needs of individual enterprises.

The NSW Government had commissioned Professor John Niland in 1989 to investigate the system and make specific recommendations for reform.

His investigations gave rise to the discussion paper, *Transforming Industrial Relations in NSW*, and highlighted the dissatisfaction levels of industrial disputation underlying the economic activities of NSW.

Commentary on the **existing** system included:

- Failure to stick to our bargains;
- Avoidance of settling our own disputes;
- The Commission has served us well in the past;
- Employees don't want to lose advantages already gained;
- The need to develop policies for economic rationalism within industrial groups;
- The methods adopted for the resolution of grievances and disputes;
- A greater respect for the maintenance of a concluded bargain.

Professor Niland argued that a stronger focus on the enterprise would foster productivity and efficiency and allow businesses to respond more easily to the pressures of competition. Workers, at the same times, would benefit through their ability to negotiate directly over their working conditions.

The Industrial Relations Act 1991 introduced enterprise agreements, the industrial relations calendar and the use of mandatory grievance and dispute handling procedures. Enterprise bargaining encouraged negotiation of employment conditions at the workplace level which could result in an enterprise agreement or an award.

The agreements could be negotiated with a union representing employees in **that** enterprise or with a duly elected works committee. The Act provides that the Enterprise Agreements may be negotiated with not less than 65% of employees of the enterprise and may cover all of the employees in an enterprise or just certain classes of employees.

Individual rights under the Act are protected through victimisation clauses while voluntary unionism and access under grievance procedures to communicate with union representatives are preserved.

During enterprise agreement negotiations parties are expected to:

- be fully conversant with existing conditions;
- know concisely what they want;
- prepare items for the discussion agenda;
- set negotiation parameters;
- meet, discuss and negotiate, and
- find an acceptable level of agreement between all the parties to the negotiations.

Enterprise agreements must contain: a strictly limited term of between one and three years; grievance and dispute handling procedures; minimum standards on working hours, sick leave and rates of pay.

Under the grievance procedures (minimum requirements) the employee must notify the employer and deal with a supervisor as close as possible to source of the problem. There are graduated steps for further discussion and reasonable time limits must apply. Work must continue throughout the course of dealing with the grievance. The Act differentiates between grievances and disputes. Grievances are seen as interpersonal difficulties while disputes are categorised as disagreement events nominated in the Act concerning matters of interpretation, operation and application.

Enterprise bargaining aims to encourage employers and employees to work together to produce mutually acceptable outcomes which result in increased productivity and efficiency.

Community Group Relations

Workshop Presenter

Sue Thompson

NSW Police Service, Gay And Lesbian Liaison Program

Workshop Reporter

Mary Pekin

Canberra Mediation Service

Ms. Thompson started with a definition of what came to our minds when the term: 'Community Group Relations' was used.

A general consensus was that it included any group of people who had a sense of cohesion based on any number of continuums such as age, religion, culture, different ethnicity, different geography, different gender, employment status and so on. The group would not be homogeneous, and would be changing in composition.

Ms. Thompson then looked at why people might start to identify themselves as a subgroup. Reasons put forward were:

- to gain status, identity, support;
- advocacy;
- formation of relationships;
- to do tasks;
- to deal with threats;
- for enjoyment;
- to share a common experience of oppression.

We then looked at why **bigger** groups put pressure on **smaller** groups:

- belief systems and fears held by the bigger group that lead to myths and judgments about the smaller groups;
- lack of knowledge;
- history. (Ms Thompson gave the example of Joan of Arc and the burning of 'witches'. The term `faggots' arose from the times when gay men were used as the bundle of sticks to light the fires for burning witches.)

Generally the point was made that Big vs. Small is often a matter of perception, not reality.

Ms. Thompson then outlined the duties of her position as she has developed them:

- to develop programs that build cooperation and interaction between gay and lesbian groups and the police;
- to advise the Commissioner and the Minister of Police about all issues and policies relating to gay and lesbian groups;
- a liaison function: ensuring two way communication between herself and others such as Commissioner, Minister, Board, police patrols, gay and lesbian media, Ombudsman, research / academics, overseas media, Government organisations, Community leaders, Community groups such as Mardi Gras, AIDS Council and Counselling Services;
- a monitoring role: monitor police functions which may have detrimental effects on gay/lesbian and police relations;
- to liaise with mainstream and gay/lesbian media;
- to educate the community and police about gay/lesbian issues;
- a client function - to attend to complaints relating to police action or inaction;
- a resource function - to answer requests from local, National and International community.

One of the key things that Ms. Thompson has learned is that conflict arises which may involve a person, but because of the Big vs. Small context it is vital to also deal with groups in terms of the conflict. The group has an interest in the individual's conflict .

Ms Thompson then gave a series of examples outlining how she would deal with different conflicts that cross her path.

In the last four years there have been 16 'gay-hate' murders. Eight school boys from the same school were arrested and Ms. Thompson then intervened on a number of levels. In conjunction with colleagues she ran a workshop for other kids at the school. She then developed a program for the school in conjunction with Youth Workers, School Counsellors, and Police. Ultimately she worked with the Department of Education to develop a package to help kids deal with homophobia. The kids began to understand that everyone has rights and feelings and start to deal with peer pressure themselves.

Turning around the media is a key intervention in community group relations. For example, getting the Police Minister to launch a report on gay / lesbian violence suddenly gives credibility to the issues. To tackle a huge issue like anti gay / lesbian violence the needs of the **individual** could be catered for by advertising the names of the Police gay / lesbian officers in the Press. **Groups** could become involved by setting up Community Violence Committees, use of advertising via posters and letters, setting up a Streetwatch Committee which is attempting to restore community group relations through government response - the Department of School Education, the Attorney General's Department, the Department of Housing, the Police Service, the Department of Community Services, and through Gay and Lesbian groups.

Organising the community to play a more positive role may involve strategies such as setting up non gay and lesbian community members to speak out against gay and lesbian violence to the Media, for example, the independent MP, Clover Moore, speaking to Parliament and the media against it, and promoting the Homosexual Vilification Law.

Another important question that Ms. Thompson addressed was how to decide at which level to intervene to try to resolve the dispute. A cautionary note was that if you start small - or at a low level - and they say "No", and you have to go higher, you may have made an enemy for life.

The Women's Out West Program

Pam Greer

Aboriginal Community Worker

Earlier this year I presented a paper called "Bruises Don't Show on a Black Woman's Face".

I started off talking about the shocking statistics on violence and Aboriginals. Aboriginal females were the victims of 79% of all chargeable homicides in the Northern Territory yet we are only about 25% of the total population. For every white death in the Northern Territory 10 Aboriginal people die from family violence.

In two states more women have died from violence in their communities than all of the total national deaths in custody. In one town in the Northern Territory five women died from violent assault over the last five years.

In one Queensland community, more women have died as a result of violence than all the deaths in custody in that state. The point we're trying to make here is that black deaths in custody (males) takes up all of the space but women don't get a look in on the issues of violence and domestic violence and sexual assault. We're continually trying to get funds to do work in the communities who have trained Aboriginal people working there. A very clever Aboriginal woman actually got these figures out. They are more startling than most people thought. And the problem still remains unresponded to.

Between 70% and 80% of all young Aboriginal or Torres Strait Island women going through the Court systems have been sexually assaulted. It is estimated that domestic violence affects 90% of Aboriginal and Torres Strait Islander families as victims

What we're saying here is there are no statistics for women across all states. The hard evidence is from the Northern Territory and Queensland and then those figures are applied inappropriately to the vast area of NSW.

The Women's Out West Project is something that came out of my time working in the Department of Health. I was called the State Co-Ordinator for Aboriginal Affairs and we had something like 105 Aboriginal health workers all over the State. It was my role once a year to go out and do a review of the services. The only area which was looked at with any concentration was the child and maternal health area because we'd been having an extremely high death rate in babies about that time. In fact that is how the Aboriginal Health Unit was established. So we began looking at Aboriginal health generally. And I thought it was very funny that there was nothing specific for women. So I decided I would like to go out to Wilcannia and do some work with the women out there.

So in 1988 we loaded up our van. There were five of us: workers in Domestic Violence, Aboriginal Health, Sexual Assault, Education and Family Planning. And we had a lawyer from the Women's Legal Resource Centre. Instead of just landing out there, I first went out and spoke to the women in Wilcannia and said: "If we came out to do some terrific things, would you tell us what you really wanted and is it a good idea?" We spoke to the elder women about this and they said, "Yes, its a good idea, but what happens after you've been here?". I said, "What do you mean, what happens after we've been here?" "What

happens after, will you come back?" And I said, "Well, is that what you want, do you want us to come back?". "Oh yes, everybody wants you to come back."

So we actually had to have a verbal contract with the elder women in the community to do a second trip before they allowed us to do the first one and I thought that was very exciting.

We also went out with a blank page. We wanted it to be totally in the control of the women in Wilcannia, so we didn't go with an agenda. We were to go out first in October 1988. The verbal agreement said, "You come back in March 1989, don't wait to the end of October." So I thought that was a good move.

So we said, "Well where would you like us to be?" And they said, "Would you camp on the river?" The white woman in the group said, "Oh yes, it would be lovely". So we said "Yes". I tried to be excited but, I mean, this was my lifestyle a few years ago. White people call it camping, we called it living.

Anyhow, we set up camp and we sat on the riverbank and we waited for women to come to us. And we spent most of the first day just sitting there in the heat and the flies. And then people did come and they set up things for us. They said, "Are you going to sleep out here?" and we said, "Yes". "Well, alright, the women know that you're here and they'll be coming in their own time". So they said they'll bring their fishing lines, and we thought "Oh". And we sat fishing, we caught yabbies in the buckets and filled in the time. And then they did come.

Men respected this stage. I don't know whether it was real respect but we didn't have any men coming out and wanting to take over or giving women a hard time that we knew of while we were there. But at all times we were checking out what the womenwanted.

Our project continued that way. We finally convinced them that sleeping in the back lots was not a good thing to do. But we did it for the first three times we went out there. After that we became quite mobile so we actually started moving to other places. The Law Foundation gave some money because they wanted some information spread out far and wide so we became very mobile during that stage. We even chartered a small plane.

We went up as far as Tibooburra and down to Wilcannia again. The pleasing thing about Wilcannia now is that it's almost at the stage where they don't need us. The women have got their own power with their access to a lawyer. This is absolutely amazing to have in Wilcannia, a woman lawyer who belongs to women only, for the support of victims.

Of course, nobody in Wilcannia has access to anything like that. We did always have white women as well involved in the project because there's nothing out there - Wilcannia is 200 kilometres from Broken Hill. Wilcannia doesn't even have a doctor. There isn't a hairdresser in the town, there's no dentist, there isn't a chemist. So if you could talk Aboriginal men into using condoms, there would be nowhere to buy them. But there are something like nine liquor outlets in Wilcannia.

They get their fresh fruit and vegetables from Adelaide so they're quite limp by the time they reach Wilcannia. The river is dying; people who were able to live out at the river can't do that any more because it's full of carp and even the carp can't survive because of the green algae And the graziers, the farmers, are worried about their cattle dying and their cattle are dying everywhere so we're really concerned about our being there. In fact the hospital thought that there was an epidemic of petrol sniffing a few months ago. Kids would come in with skin rashes but it was in fact the river. There is an assumption that if anything goes wrong with inflammatory conditions, it must go back to petrol sniffing . It wasn't until some white kids actually had skin conditions that they decided that it was from the green algae.

Having a lawyer was just wonderful. Whatever happened the night before, we'd hear about it either half way through the night or first thing in the morning. We'd get a bulletin from town on who got bashed up; who was raped and who would be charged. All of these things came out.

So, just as one exercise we took turns on Court days, going and sitting at the back of the Court. We had a couple of hours each going in and just watching the men going in and out and how they were pulled up over the excuses they all had. And the Magistrate who was working there at the time was really concerned, and she said on a number of occasions she didn't want to be responsible for sending a man to gaol. With every black man who went to gaol there was a candidate to be a black death in custody. And then we came in and said, "So what if he hangs himself? Did I make him punch me in the mouth? Ddid I make him shoot me in the leg? Did I make him stab me?. It's not your responsibility." It took a long time to hear another Aboriginal woman out there say, "You know you're right". And that for her was a very powerful thing to say.

The program has been a very rewarding experience for me. We didn't go out always giving, giving, giving, or have the towns people taking, taking, taking. It was a two-way thing at all times. The women out there were not very comfortable with doing any writing and evaluating our project so the first year we asked them to do an evaluation in a different way. We were there for five days so we chose five very large gum trees; we bought five pieces of cardboard of different colours and stuck them on the trees and called each tree "Monday" to "Friday". We then asked people if they felt like it when they came or sometime during the day or if they stayed the night, if they would like to write something on that cardboard. And a few people made a few stabs. But we said "If you don't feel like it, would you like to pick up a gum leaf, a seed or a feather, just something which will reflect how you feel in the day?". So the first two days we had bits of grass, all sorts of shiny stones, feathers and things stuck up there. For the last three days you couldn't put a pin between the stuff that was given. People kept remembering things they wanted to say so they kept going back. The evaluations from the first visit were nothing, we have nothing to show for it but from the second one we have big pieces of cardboard like this with all of this writing and we still kept. So we've got this huge evaluation that looks like this and we also have this official report which was written up. The Law Foundation is not interested in our feathers and leaves and things so we had to write up something to record what the women had told us.

In relation to violence against women, the Police also have an attitude. "This is their culture; that's domestic violence and that's sexual assault." And this is why Aboriginal women need help for being raped and bashed.

So not only did we need to educate the women; we were in a very difficult way trying to educate the Police as well. There have been real moves from other areas. I'm on the Committee of the Domestic Violence Council. I was involved in the strategic plan for domestic violence and mediation and went out for about a month to Aboriginal communities and asked Aboriginal women what they want. The Strategic Plan says this is what people want and this is the way the Police will respond, and we give this information out to people with that paper.

So it's not only pressure from the top; it's pressure from the bottom as well. It has to get better if the community is saying: "This is not the way the law acts". And if the community is better at the law than the Police then there's something wrong. And that's how it goes in the end because the women in the community knew more about domestic violence than they did because that wasn't a priority with the Police. So, things are starting to happen. And we have seen some results in that area that have been good for women.

We asked the women if they wanted to form a Local Domestic Violence Committee, and they said, "Not many of us write very well. We couldn't write reports and we couldn't send them in letters and things." We said, "It's alright. You don't have to be a formal

committee." So they are registered as an informal Local Domestic Violence Committee but they are included and we send them out reports, information, videos and other records and just keep them in touch. And the women who are actually doing things out there, such as acting as advocates for each other, as support if called to go to hospital or called to go to the Police, they're really enjoying their role. And it's good

Anne Cohen was out last year. She went out and she actually slept in Wilcannia. She was the first bureaucrat to ever do that; everybody else flies out and flies back the same day. We were actually there running a sexual assault workshop and she came up the last day and she said she was mad keen to go out and have a women's camp on the riverbank.

She explained to the women that she didn't have any money something that she would do for the women and children was to try lobbying on their behalf. They needed something like $15,000 to buy a place for a drop in centre and I think she was back in Canberra for about two months and she said "These women need $17,000 to set up their Centre". The money was found, and they actually bought this place outright with $2,000 for renovations.

When I was on the Domestic Violence Committee years ago I went with a lawyer to the Aboriginal Legal Service and asked them to review their policy that they do not represent one Aboriginal against another. This policy was set up to protect Aboriginal people from white people. But what's happening now is that the policy is protecting the perpetrators of violence from them all.

We have a campaign on at the moment, a drive to have half of those funds given to women to set up an Aboriginal Women's Legal Service and we're seeking funds from outside to get that service going as well. Because it's needed to keep Aboriginal women represented.

On the question of using mediation as a dispute resolution process, I think women were born with these skills! But it is up to your community as to who is recognised or is called as a mediator. I have seen instances when men start to have a meeting where there is a mediation starting to take place and then they forget what it's about before they get through the process. I've seen women be more successful in using mediation processes, and then if you say, "What a wonderful mediator you are", they say, "What's that? What are you talking about?". It's all about that kind of thing. But there have been different roles for Aboriginal men and women and I believe traditionally that those mediation roles were there as well. It's like everything else, it's been bred out of us or lived out of us because of the fast lane just like in NSW, where a whole generation of kids don't know whether they're black or white and they're uncomfortably caught between two cultures.

I think that mediation and choosing mediators is a fairly new idea for the Aboriginal people in the far west of NSW. It's a new idea in the sense of people having more control over their own lives. I don't think the idea that people actually mediate their problems is on too many peoples' lips and in front of their minds because most of the community is split anyhow into factions of two, sometimes three groups. So when outsiders go in, they always need to make sure that these are equally represented in any negotiations. God help you if you go into a town and you aren't aware of those sorts of things and you do it quite innocently. You don't get back and you don't get the co-operation of the people in the future. All of that's worthwhile knowing if you're planning to develop any programs in communities.

Australian Alternative Dispute Resolution at the Cross-roads?

Justice Paul Stein

NSW Land and Environment Court

In the past two or three years Alternative Dispute Resolution in Australia has made enormous strides - both in official recognition and public perception. Many new demands for practitioners of ADR have arisen. New areas have been opened to mediation and other forms of ADR. Mediation has also been embraced by a number of courts. But despite, or rather because of these gains, it is my contention that Australian ADR is at the cross-roads. To be a little provocative, it seems to me that from here ADR can go forward and obtain a permanent accepted place in conflict resolution in the 21st Century. Alternatively, it can go backwards and become a marginalised option.

I make no bones about my long time support for Alternative Dispute Resolution, but a number of relatively recent developments have caused me to have some apprehension for the future. I perceive a danger that the movement may be highjacked or discredited. If this occurs, great harm will be done to the concept of mediation and also to the large number of professional and ethical practitioners in the area. The challenge for the Australian Dispute Resolution Association (ADRA), and those interested in furthering mediation of public and private disputes, is to prevent this occurrence.

KEY CONCERNS

The key areas of concern are:

- Training of mediators;
- Accreditation of mediators;
- Consumer protection for users of ADR;
- Protection for practitioners of ADR.

One must accept that the private confidential process of mediation may be open to abuse. Because the process is necessarily 'behind closed doors' there is a need for at least some minimal regulation to protect users and the integrity of the process. I am not an advocate of heavy regulation and accept the dangers to a fledgling industry of an over-zealous licensing type bureaucracy. Nonetheless, consumers of any service are entitled to reasonable protection from unqualified or untrained providers and to protection from breach of trust. At the very least consumers are entitled to know that minimum standards have been met.

So far as I am aware there is no formal statutory based accreditation system in place in New South Wales save the Community Justice Centres. Section 11 of the *Community Justice Centres Act* 1983 (the *CJC Act)* provides for accreditation of a mediator by the Minister for Justice for a term not exceeding 3 years. Only adequately trained mediators are recommended for accreditation and the Minister may revoke such accreditation at any time. The *CJC Act* also provides that it is an offence for any unaccredited person to indicate or infer that he or she is accredited as a Community Justice Centre mediator (sl9).

The *CJC Act* provides that a mediator must take an oath or affirmation of secrecy in the following terms:

> '....that I will not, either directly or indirectly, except as permitted under section 29 of that Act, and either while I am or after I cease to be, a mediator, make a record of, or divulge or communicate to any person, court or tribunal any information, document or other matter disclosed during or incidentally to a mediation session.' (Schedule 3, *Community Justice Centres Act* 1983)

Until the oath or affirmation of secrecy is taken the person cannot exercise the functions of a mediator. (s29(1) *CJC Act*)

A CJC mediator, acting in good faith for the purposes of carrying out her or his functions, is exonerated from any liability, action or claim. Further, mediation services are privileged with respect to defamation (s28(3)) and anything said or any admission made in a mediation session is inadmissible before a court (s28(4)).

All of these provisions are good common-sense consumer protection measures.

To be contrasted with these protections is the balance of ADR - at least the non-court based programmes. Where are the protections for users and practitioners alike? Some will say the contract which may be entered into between the mediator and the parties. But contractual rights may be difficult to enforce and nice legal issues may arise. In addition, the harm may have been done by, for example, a breach of confidence.

Also, it has been suggested that in many situations no contract is in fact utilised. There are doubtless scandals waiting to happen. My concern is not only for the participants in such an event, but for the immeasurable harm which may be done to the concept and future of mediation as a viable alternative means of conflict solving.

The training of mediators is another issue. Since there are no statutory requirements for qualification of a mediator (other than under the *CJC Act*), no training is required in order to proclaim oneself as a practitioner. There are, of course, a number of short and long ADR training programmes and courses which have been developed over the past five years or more - several within universities and some with private institutions. Some of the programmes are excellent. Others, however, may be deficient in content and expertise. Who accredits the training courses, or for that matter the trainers? At least where a university is involved, one may have some confidence in quality control. I ask, are there recommended courses and does ADRA have a role to play in this area? The high standards of mediators (both their skill and integrity) must be maintained for the sake of the public confidence in mediation as a respectable and acceptable alternative dispute mechanism.

At the moment it is possible for someone without any training whatever to hang out his shingle and say, 'Come to me, I am a specialist mediator who will solve all your disputes for a fee'. This is just not good enough! The virtual absence of regulatory controls permits the occasional charlatan to exploit the situation to the detriment of ADR and the large numbers of well trained, highly skilled and motivated professionals who 'believe' in mediation as an empowering means of conflict resolution.

In the context of training and accreditation of mediators the report of the NSW Law Reform Commission is a disappointment. Its sole recommendation was an informal register located in the Attorney General's Department for anyone claiming to be a mediator to list her/his details and qualifications. The information (self notified) was to be publicly available. The proposal was rightly rejected by the Attorney-General. Further, I am not aware of any proposal to establish an industry code of conduct for mediators but, in the absence of any statutory requirements, this may be one way to proceed.

MULTI-PARTY INTEREST DISPUTES

The question of the mediation of multi-party environmental disputes and other public interest disputes also needs to be examined. With careful identification of all relevant stakeholders and possible issues, mediation of some entrenched public disputes, often about resource utilisation, may be capable of successful resolution. But it is important to appreciate that these disputes will not respond to a cheap quick fix. Rather, the mediation process may of necessity need to be protracted if it is to be genuine and the agreement 'hold'.

It is also important to recognise that some public disputes (as opposed to private disagreements) may not only be incapable of a mediated resolution, but also inappropriate for mediation. The fact is that some resource development projects should not be permitted to proceed, even with modifications. For example, it may be that a dispute involving an old growth forest containing the habitats of numerous rare and endangered species of fauna and flora is inappropriate to a mediated solution. The answer to some developments will, in the public interest, be an emphatic 'no'. It must be acknowledged that some issues should not be compromised.

Let me give an example from the consumer law area. Say a financial provider breaches the law by overcharging a customer. Only a relatively small amount is involved and a mediation between the customer and the financier quickly reaches an agreement satisfactory to both. But what if there have been 5,000 or so similar instances of consumers being overcharged? What of them? And should we be more concerned with upholding the Rule of Law, i.e., that the financier obey the law and the rights of all affected consumers be vindicated?

The same situation may pertain in environmental law where 'any person' may proceed in the Land and Environment Court to enforce a breach of the law. This is a right given to every citizen in the State. One must take great care not to mediate away rights unless the agreement is an eminently suitable one.

There is another danger. Litigation is inherently expensive and risky. Legal aid is presently unavailable in environmental law. In these circumstances there is 'pressure' upon a potential litigant to utilise mediation as a cheaper option. The option may be utilised partly because the individual or group cannot afford to proceed in the court to enforce rights granted by the Parliament. In this way there is a danger that ADR may become a 'poor persons' justice' and the important voluntary element in mediation may become diminished. This must not be allowed to occur. Where public 'rights' are concerned I do not believe that it is appropriate to wholly replace access to justice in the ordinary courts by the processes of ADR. All options must be readily available and people must not feel that they are required to mediate. Coerced mediation is no mediation at all.

COURT ANNEXED MEDIATION

This brings me to some criticisms which have been made about court annexed mediation schemes. It has been suggested by some commentators that such mediation poses a threat to public confidence in the courts. In short, it is claimed that the cherished independence of the courts is at risk.

It is argued that even if the mediator had no further contact with a matter after a failed mediation, an unsuccessful litigant 'is likely to feel that the court as an institution was, or may have been, prejudiced by poison privately fed in by the other side during mediation'. (1)

It is also maintained that the caucusing aspect of mediation could lead to the public generally believing that it is normal for a litigant to have private access to a Registrar or Judge. Because courts are integrated institutions the independence of the courts is at risk if

they practise mediation (2). These critics see great benefit in a mediation service, but only outside the court system. Courts, it is said, must not stray from their conventional role.

I do not accept these criticisms. The Land and Environment Court has been extremely careful to protect the confidentiality of mediations. No oral reports are made. Neither are written ones. Nothing appears on the court file concerning a mediation. All documents prepared for mediation are returned to the participants at the conclusion of the mediation. Judges and Assessors do not mediate. Mediations are purely voluntary, and remain so at all points of time.

No user dissatisfaction has surfaced (including the Law Society's Young Lawyers' Survey) (3) which indicates any concern with confidentiality, private access of one party to the court or any threat to the jealously guarded integrity and independence of the court. Sometimes I think we under-estimate the intelligence of litigants and the public generally. Most parties before the courts want to be able to consider options for resolving their disputes. I do not believe that the public confidence in the court system has or will be eroded because of the court's voluntary mediation programme nor by the conciliation conferences by Assessors (4). On the contrary, I think it has been enhanced for offering people a real choice.

I perceive the challenge for ADRA and practitioners of ADR is to press for solutions to the problems I have discussed. Only if these issues are adequately addressed will ADR attain the respect of the public and a lasting place in dispute resolution.

---

(1) T.F.M. Naughton QC, 'Mediation and the Land and Environment Court of NSW', *Environmental and Planning Law Journal,* vol 9, no 3, June 1992. See also response by Justice Pearlman, Chief Judge, in *Environmental and Planning Law Journal,* vol 9, no 5, October 1992.

(2) 'The Courts and Mediation - A Warning' *Australian Law Journal,* vol 67, July 1993, pp491-493.

(3) J Muller, 'Report on Young Lawyers' Survey - Mediation in the Land and Environment Court', *LEADR Brief,* vol 3, nos 3 and 4, May/August 1992, pp8-10.

(4) S34 of the *Land and Environment Court Act 1979.*

Public Inquiries/Public Hearings in Environment and Planning

John Woodward

Chairman, Commonwealth Commission of Inquiry, Shoalwater Bay

I propose to touch on, in this paper, some aspects of public inquiries and public hearings and complementary processes which may be integrated into them as a means of `resolving' environmental and planning issues. These kinds of issue may involve a wide range of matters, eg, resource values and uses, development and conservation, and planning issues. They will also involve controversy and conflicts of views and interests, of expert opinion and of information about those issues.

My concern here is to consider public inquiries/hearings as part of a process leading to decisions by government at the national, state or local spheres on these issues. I am a firm believer in these public processes which, if done well in appropriate cases, will lead to sounder decisions and decisions which will gain a broader community acceptance than one might expect if decisions are made without the benefit of these public processes.

Credibility of the public inquiry/hearing, its public standing, open and accessible processes, and rigorous assessment and evaluation of all information, views, and expert opinion are the keys.

COMMUNITY DISTRUST

Community suspicion and distrust of internal workings of government across the three spheres of government seems to be an increasing phenomenon in Australia. Concerns are expressed and reinforced by media coverage. The distrust appears to centre around such perceptions as:

- hidden agendas within government or bureaucracy in relation to policies and developments;
- 'nods and winks' by government or its agencies to proposals;
- decisions behind closed doors;
- lack of rigour of evaluation and assessment within the internal processes of government;
- bias toward certain interests;
- inadequate public participation - lack of openness and access to information, reports, etc.

There is widespread non-acceptance of decisions which are perceived to be arrived at by government in this way. Governments, elected representatives and public servants all need to face up to these contemporary perceptions.

'We are elected to make decisions, it's our responsibility' is not an adequate response.

Generally it calls for both improved processes within the three spheres of government which reflect some aspects of public inquiry processes, so far as is practical, and the use of public inquiries and facilitation processes in selected cases or in defined circumstances to assist government to make decisions.

KEY ELEMENTS

Some key elements for public inquiries involving controversial questions about the environment, planning, or resources uses are worth reflecting on. They are essentially a question of credibility of processes and outcomes:

1. An independent, impartial person (or persons) who must be, and must be seen to be by the community, independent and at arm's length from all parties, including public authorities and government.

2. Inquiries need to be undertaken *before* final decisions are made by government and by public authorities, not generally as a post decision rescue measure - although where the decisions have gone wrong, public inquiry is obviously an option.

3. The public inquiry should be open, informal and accessible to all participants - without the forms of legal/judicial processes and procedures.

4. Interested parties and persons must have an opportunity of being heard. This may take different forms but some face-to-face experience between inquirer and participants is essential.

5. All persons/parties need to be treated on an equal footing, eg, a conservation group is treated in the same manner as a public authority in the inquiry process. No one party has more 'status' than another.

6. The inquiry processes should facilitate and encourage a free flow among parties of all information and documents which are submitted to the inquiry.

7. All information which is under consideration by the inquiry, including all background information, should be publicly disclosed by the inquiry.

8. Information to be treated as confidential needs to be justified as warranting confidentiality and all participants should be aware of the process by which confidentiality is claimed and established. Usually information warranting confidentiality will be rare. I am not referring here to confidential disclosure in, say, mediation, but to information, eg, financial information private to a party which should not be publicly disclosed.

9. The processes and procedures, including the processes of evaluation of information, expert opinion and views, must be clearly apparent to all participating parties - transparency of processes is a key element of an inquiry's public credibility.

10. The inquiry process needs to be publicly seen to scrutinise and evaluate data, expert opinions, views and interests of all participants.

11. Flexibility of approach and procedures is essential and should reflect the nature of the matters in dispute and the number of potential parties and interests.

12. Localities and surrounding areas involved should be inspected by those conducting the inquiry in the presence of all interested parties, who should feel free to draw attention to and speak about their interests and concerns during the inspection.

CIRCUMSTANCES FOR INQUIRY

Circumstances where a government may choose to hold a public inquiry/public hearing are not easily defined, but factors such as the following may be appropriate triggers:

- multiplicity of parties holding a range of strongly held, different interests and views, where the issues are significant to a region or locality;
- consideration of resource values and uses which appear to be incompatible;
- major controversial development with potential for significant impact on the environment;
- environmental, resource, planning, policy considerations;
- where a government or a public authority has an interest in the outcome of a proposal, eg, proprietary interest, financial return, landowner, etc;
- where the public authority is both proponent and decision-maker, 'Caesar to Caesar' situation, eg, major public works.

My comments are relevant to each of the three spheres of government national, state and local - although there are likely to be differences of scale, subject matter, and composition of the inquiry forum for each government sphere.

ONE AVENUE OF RESOLVING CONFLICTS

Of course, public inquiries/hearings are only one avenue of 'resolving' conflicts and disputes on controversial developments, land and resource use alternatives, environmental and conservation issues, etc. They are not appropriate to all cases. In some instances the usual internal processes of government may be adequate. In others, alternative resolution processes may be appropriate. For example, mediation may be used to resolve some kinds of environmental and planning issues. Consultative and facilitating processes are other ways of resolving or moving towards resolution of certain issues.

'RESOLUTION'

The meaning of 'resolution' as an outcome of dispute resolution processes needs some clarification. It is likely to have different senses depending on the nature of the issues in dispute and the processes undertaken to 'resolve' it:

- **Consensus**. This is usually the sense used in mediation which will involve an outcome of compromise and agreement acceptable to all parties.
- **Narrowing grounds of dispute among parties**. This may involve defining/identifying the key points in contention, or the aspects in dispute on a particular issue - say, hydrology, or air quality and emissions.
- **Identifying common ground issue-by-issue.** Some common position may be arrived at on one issue and not another, or on some aspects of an issue but not all aspects.
- **Acceptance of basic data and information**. Agreement may be reached that further data is required, the kind of data required, and by whom it should be gathered; or that basic data is adequate on some issues and not on others, etc.
- **Dispelling misinformation, ignorance and false perceptions on issues through exchange of and access to information.**

'Resolution' may also have the sense of resolving matters without agreement or consensus, but where all conflicting views and interests have been heard and considered prior to the decision maker determining the matters in issue. This is the usual sense of 'resolution' in public inquiries/hearings.

NO CONSENSUS OUTCOME

Most, if not all, resource use, development planning and environmental controversies involving a multiplicity of competing parties, interests and views, that I have encountered, have not been capable of consensus outcomes.

In these kinds of disputes and controversies, values, beliefs, philosophies and interests of participants are so diverse and at odds with one another that no compromise/consensus is likely to emerge.

MEDIATION

I do not see mediation as an appropriate process for these kinds of matters, ie, for resolving the issues in question so that governments can then make decisions. Mediation in these situations in the sense of an agreed outcome acceptable to all participants is most unlikely.

In most cases it would be a waste of time and effort to try mediation; although in some less complex disputes, mediation may be an effective process, eg variations to some land uses and the appropriate controls, or an extension to dwellings involving neighbour objection.

Another instance could be an existing contaminated site where all interested parties would have a *mutual interest* in an outcome, ie cleaning up the site and making it safer.

It is virtually impossible to mediate with parties who have no genuine interest in an outcome involving compromise or perhaps any change from the status quo. This is not uncommon in some environmental inquiries.

REJECTION OF MEDIATION

There is a far more significant reason for rejecting mediation as an appropriate process for many environmental and resource use issues. The process of assessment and evaluation needs to be *public,* and all relevant information identified and made publicly available (subject to exceptional cases of confidentiality). Furthermore, middle ground or compromise resolutions, or situations with which the parties may be willing to live, are just not appropriate as the benchmark in most instances of environmental/resource use inquiries.

Firstly, there may be statutory provisions which require matters to be considered and addressed. There may be terms of reference which need to be addressed. There is also the public interest. There are questions as to what may be the values of resources and the optimum uses of resources after rigorous evaluations of all relevant information, and of community and expert views. There are questions of intergenerational equity. In these cases, therefore, it is not a question of adopting positions which parties may feel they can live with. Some projects deserve to be refused, some deserve to be approved, irrespective of the views of those for or against.

However, I am not rejecting mediation out of hand in certain environment and planning matters. Generally these matters will be discrete, involving mutual interests and incentives to resolve a problem or dispute.

MEDIATION AND FACILITATION

Mediation in the sense of consensus outcome should be distinguished from the process of consultation and the process of facilitating parties to reach agreement on some aspects in contention without arriving at an agreed decision. I have found that mediation and facilitation are frequently confused, both conceptually and in practice.

It is the facilitating and consultative processes *within* public inquiries and public hearings which I wish to highlight in this paper, and not mediation. I see little role for mediation within public inquiries/hearings for the reasons already outlined.

In a recent conference comprising in the main local government representatives and officers, I was struck by uncertainties and confusion about mediation processes. The distinction between mediation and consultative and facilitating processes was blurred. The two tended to overlap in the minds of many of those present. Questions of:

- how to handle confidentiality;
- how and what to report back to Council, the decision maker;
- how to handle the 'mediation' process - usually mediation meant facilitating exchange between parties in conflict;
- whether to use independent persons or Council officers;
- whether a structured process for handling local government disputes on planning and environmental matters is appropriate

were all areas of uncertainty.

I also observe a trend to formalise mediation processes and to structure them, and I wonder if this trend continues whether it may undermine mediation as a useful conflict resolution process.

CONSULTATIVE AND FACILITATING PROCESSES

I see consultative and facilitating processes playing an important role in assisting public authorities towards making decisions. They also have an important role in the public inquiry/public hearing process. I do not see them as a means of resolving controversies in consensus-type determinations. I see them more in some of the senses I have already alluded to - narrowing grounds of dispute, identifying common ground, agreement on adequacy or inadequacy of existing data, etc.

Complementary (not alternative) resolution processes integrated into the overall public inquiry procedures and processes should, in my view, include consultative and facilitating processes designed to try to reach understanding and agreement on various aspects or issues under consideration by the inquiry.

THREE EXAMPLES

Let me give three examples where these processes can work well within a public inquiry context:

1. *Identifying issues to be addressed by inquiry.*

   A significant early step in the environmental public inquiry is to ask parties to identify the environmental issues which the inquiry needs to address and to seek agreement from all parties on those issues as relevant to the inquiry. This step helps to give focus to the inquiry, provides opportunity for the inquiry to ask parties to address those issues in their submission in an orderly way and in the framework of those identified issues. This approach assists in the consideration and evaluation of all information on those issues, issue by issue, when the inquiry is considering all submissions. It also assists parties to cross-reference and more easily digest and respond to other submissions issue by issue.

2. *Identifying available sources of relevant information and gaps in information.*

   A further significant step is to identify all available relevant information to the inquiry in the public domain, to clarify with parties the information (eg, reports, studies) they are likely to submit to the inquiry, and to identify gaps in information and how those gaps may be overcome.

3. *Reviews of expert/consultant opinions and reports on specific issues.*

As part of the inquiry process, I am a firm believer in public expert review sessions of the inquiry focussed on contentious issues where experts/consultants on that issue from parties to the inquiry are brought together to consider the data and the professional views of each other on that issue. This form of peer review under the supervision and adjudication of those conducting the inquiry is a valuable step in resolving or clarifying questions and understanding about technical data and expert opinion. In my view, in the public inquiry process it is generally a superior method to cross examination of expert witnesses. It also saves time and costs.

NSW COMMISSIONS OF INQUIRY

It is fair to say, I believe, that in relation to matters referred to them since 1980 the Commissions of Inquiry for planning and environment in NSW have received acceptance by NSW governments during this time as an effective means of resolving issues and leading to determinations which `stick'. There has been an acceptance on both sides of politics of their value and usefulness. Also, I believe there has been an acceptance of their value in the wider community, notwithstanding disappointments from some participants at the outcome of these inquiries.

It should also be acknowledged that many matters which one might think appropriate for public inquiries have not been referred to the Commission.

PUBLIC HEARINGS

Public hearings also have an important role. I use 'public hearings' as a means of distinguishing them from 'inquiry'. This distinction is contained in the NSW Environmental Planning and Assessment (EPA) Act. Public hearing is a process under Section 68 for a hearing to deal with objections to draft Local Environmental Plans prepared by councils. It has a traditional focus of 'objections' being heard one by one, from numerous and disparate objectors, to proposed zonings of identifiable parcels of land within the draft plan.

My experience is that the s68 type public hearing is not really adequate to deal with significant alternative land use issues often thrown up by planning instruments concerned with zoning and land use controls. It has its place for dealing with one-off or smaller scale adjustments to zoning provisions, particularly in existing urban areas.

Although there is a difference between an inquiry and hearing in the type of forum and its functions, in reality there is no reason to make a clear-cut distinction between a public inquiry and public hearing in respect of most contentious environmental and planning matters. For local government the idea of public hearings may seem more comfortable by reason of, for example, familiarity, less formality, smaller scale and less costs than an inquiry.

No provision is made in NSW for councils to call upon a public inquiry/hearing under the EPA Act in relation to, for example, major local controversial developments before decisions are made, or to publicly inquire into alternative land uses and controls for areas of land.

Other circumstances where councils could consider a public inquiry/hearing *prior* to decision include:

- major controversial development in the local government area where council is and remains the consent authority (ie, where the State Government does not intervene and become the determining authority);
- where council is both the proponent and consent authority for a development;

- where council or members of a council are publicly perceived to have an interest in the outcome, eg, where it may previously have indicated a position on the proposal.

Appeal lies to the Land and Environment Court *after* a decision or deemed decision or refusal on a development application by a council in NSW. The public inquiry/hearing is not seen therefore as a substitute for appeal, but as a pre-decision process. Public inquiry/hearing prior to decisions by council is likely however to reduce occasions of appeal if the inquiry/hearing is well conducted and credible.

COUNCILS' DISCRETION

Councils would need to have discretion to call a public inquiry/hearing. In my view, legislative provisions ought to be made to give councils this discretion. I am surprised that there appears to be resistance within local government in NSW to councils having this discretionary power. I am not aware of the situation in other States.

Provisions would need to be made in NSW to give a council a discretion to call a public inquiry/hearing, and appoint an appropriate person(s) to conduct it, for the purpose of hearing and reporting on major local developments and land use issues to councils for council's determination.

Appeal rights to the Land and Environment Court against a council's decision (ie, after the decision) should remain. Objection on the grounds of duplication is not well founded. It would be rare to run the same issues of merit through the court again, if the public inquiry/hearing is well conducted.

TIME DELAYS

Often inquiries are considered time consuming, adding to delays in decision making. Much depends on the nature of the inquiry and the tasks it is set to do. I do not think the objection on grounds of delay can generally be made out, compared with time taken to process similar controversial and complex matters through government without inquiry. However, time is an important consideration - the public inquiry process should seek to reduce delay. The more formalised and legalistic processes become, the more time inquiries are likely to take to complete.

CONCLUSION

For the reasons outlined here, public inquiries/hearings are a valuable process to be used by any of the three spheres of government as a means to resolve controversial environmental and development and planning issues in appropriate cases, leading to sounder decisions and generally to broad acceptance by the community of consequent decisions by government.

Complementary dispute resolution processes incorporated within the public inquiry make a valuable contribution to the resolution of matters in dispute and assist in the community acceptance of both credibility of the public inquiry and the decisions which flow from the inquiry's findings and recommendations.

Conflict Resolution in a Large Complex Public Organisation

The New South Wales Department of School Education

Laurie Dicker

Director, Personnel, Metropolitan West Region
NSW Department of School Education

ENVIRONMENTAL OVERVIEW

The Department of School Education in NSW is one of the largest employing authorities in education in the world, and caters for approximately 770,000 students in 2221 schools in which 2.5% of students are Aboriginal and approximately 20% are from a non-English speaking background. 48,000 teachers and 9,500 ancillary staff are employed in those schools.

Metropolitan West Region

The Metropolitan West Region covers the north western part of the Sydney Metropolitan Area. In addition to being a major residential area, it contains several industrial areas, rural areas and growing commercial and administrative centres.

It is a dynamic Region, with diverse social, economic, cultural and demographic features. While it reflects the general trends and aspects of Australian society, the Region has a number of special characteristics that have implications for educational planning.

Major urban developments are occurring in parts of Blacktown, Penrith and Hawkesbury. The North West Sector has been identified as one of Sydney's future areas of residential expansion. The first stage of development has occurred following the Parklea Release in 1991. Other residential developments are occurring in the Glenmore Park area south of Penrith and are planned for the Scheyville area.

Rapidly growing new communities require infrastructure development that will continue to have a significant impact on the distribution of educational resources within the Region. The shift in population to new areas necessitates the provision of new schools and the transfer of human and other resources.

Student Population

The dynamic nature of the Region is enhanced by the high percentage of young people. The population of the Region is approximately 868,750 with 34.5% under the age of nineteen, compared with 29.8% for the Sydney Metropolitan Area (Australian Bureau of Statistics, June 1989).

There are 117,017 students enrolled in government schools.

Cultural Groups

The Anglo-Australian community is the largest in the Region but there are many other cultural groups including Aboriginal communities, and ethnic communities of the postwar period. These groups bring vitality to the Region and contribute to its cultural diversity.

It is expected that the Region will continue to settle significant numbers of immigrants from non-English speaking backgrounds.

Socioeconomic Features

There are significant socio-economic variations within the Region. Some areas contain high income earners with expensive housing, while others are characterised by low incomes, high levels of unemployment and public housing. There are areas with a significant proportion of single parent families and recipients of welfare. Some areas are characterised as 'staging areas' for newly arrived immigrants, and others provide cheaper rental accommodation for transitory population.

School Environment

Our schools provide a secure, stable environment for students, many of whom also look to the school to provide wider cultural opportunities.

Parents' aspirations for their children and attitudes towards education show marked differences. Many parents actively support the school while others tend to restrict their involvement to the early years of schooling.

Schooling

Schooling is unique in that it provides for the development of our most precious possession: our children. Schooling must be viewed in the context of the society in which we exist and the society to whom we are accountable. But that society is now more complex than ever before.

There is an increasing pressure on people to be more adaptable, flexible and mobile. Consistent with that trend is a demand for greater choice in schools; both for the type of school and the curriculum offered. Parents are more likely to question rather than accept the values, directions and subject choices of their local schools.

Parents are seeking and demanding further information about schools, their curricula options, values and directions before making choices.

There is an increasing public expectation of schools. Demands on schools and the Department of School Education will continue to be multiple, changing and conflicting. Parents will continue to expect that government schools will uphold traditional values especially on such matters as discipline.

Where employment is available there is an increasing tendency for both parents to work thus increasing the demand for child care and pre-school education. There is a tendency also to delay marriage and having children. Approximately 40% of marriages end in divorce or separation. There is an increase in single parent families and de facto relationships. An increase in the number of disfunctional families adds to the pressure on limited welfare resources and results in increasing demands on schools to address the problems of the family and society.

There is increasing demand from the community for schools to cater for the socially and economically disadvantaged and intellectually and physically disabled.

The Australian economy is in deep recession from which it will emerge very slowly. The current unemployment rate is 11% nationally but in Metropolitan West this figure is much higher especially for young people. Unemployment is expected to remain high through to early in the next century.

In recessionary times schools are too often targets for society's frustrations and there are increasing demands on schools to provide solutions to the current economic and social problems. These conditions produce on the one hand a hard nosed pragmatic rationalism while on the other hand there is a demand for a more flexible, adaptable, proactive learning environment to cater for the future.

Education throughout the world is increasingly taking a higher profile on the political agenda at all levels. There is an increasing tendency for governments as distinct from educational bureaucracies, to set the educational agenda, indicate the direction and determine policies.

There is an increasing attention to equity groups and a reflection of their needs in curriculum directions and resource allocations.

All of this is happening in a period of economic recession with its consequent budget restraints on all organisations.

In summary, schools operate in a society that will continue to change but the direction of change will be less predictable. Who, five years ago predicted the current situation in USSR, Germany, Yugoslavia, Middle East, China and South Africa? Who can confidently predict the conditions that will exist in the year 2000?

Society will be more characterised by unclear loyalties, acceptance of dissent, pluralism, innovation, flexibility, technological change, low growth and a greater questioning of political structures, process and affiliations.

In former times there was a clearly defined relationship between the home and the school. The home, in concert with the church and other agencies, fulfilled the social role of inducting the child into society. The boundaries of teaching programs and processes were closely drawn. The rudiments of knowledge were stressed and there was a social consensus that some topics would be excluded from the school. Parents and teachers held clear expectations of each other's task.

The scene has changed. Parents now hold quite diverse views on the function of a school. Schools have come to be required to deal not only with matters of fact but also with a wide range of learning outcomes as well as attitudes, values and beliefs and increasingly, in recent years, with personal morality and ethical issues. Society is exerting a stronger influence on the school's role and schools tend to be playing an expanded role in the community. Further, the school has come to realise that the biases in presentation of the mass media, particularly television, are sometimes in conflict with family values and beliefs and inconsistent with the aims of the school. Thus teachers and pupils increasingly face changing, complex, societal situations which are less clearly defined.

Schools are places where pupils are preparing for informed and reasoned involvement in community life, including its policies, by calm and cooperative study of social issues. Schools are not places for recruiting into partisan groups.

Discussion of controversial issues is acceptable only when it clearly serves the purpose of the school's program. Such discussion is not intended to advance the interest of any group, political or otherwise. Teachers and visiting persons in schools have a privileged position. They have the opportunity, denied to many other concerned people, to influence pupils and therefore they have a special responsibility to maintain objectivity, to avoid distortion of discussions, to acknowledge the right of pupils and parents to hold a different viewpoint.

The school should ensure a balanced and reasonable consideration of various viewpoints and to this end it should observe balanced presentation, both in relation to views presented by speakers and expressed in material to be studied. It is the principal's responsibility to determine where this balance rests.

This environment is one which is increasingly more conducive to conflicts, disputes and grievances.

DISPUTE PREVENTION

In addressing the whole area of disputes it is important, in the first instance, to create or improve the learning and working environment to an extent where, hopefully and through good leadership and management disputes and grievances are least likely to occur. This preventative approach is the focus for most of the Department's strategies.

As an organisation it is important to prepare people to deal with all disputes and grievances and in doing so the Department has given priority to the following matters:

- Identify the areas of potential conflict.
- Provide information relating to legislation, policies, procedures, working conditions, determinations and regulations.
- Provide training and development in two major areas:
  a. information awareness;
  b. skills development such as
     - leadership
     - management
     - communication
     - interpersonal skills
     - research
     - consultation
     - mediation
     - conciliation
     - arbitration.
- Revise curriculum and support documents to raise awareness and develop skills in students in relation to the areas of potential dispute situations.
- Provide financial and human resources to support school personnel in this process.

Identified Areas of Potential Conflict

Grievances, disputes and conflicts will mostly occur in the following areas:

- Industrial Relations
- Anti Discrimination
  (race, gender, sexual harassment, age, homosexuality, disability)
- Staff Welfare
  (employee assistance, compensation, O.H.S., efficiency)
- Child Protection
  (child sexual assault,improper conduct)
- Violence
  (critical incidents in schools)
- Student Welfare.

Let me now outline for you the programs put in place to address these important areas.

Industrial Relations

Industrial relations in education has been characterised in the past by confrontation, with both sides taking an adversarial stance in a highly centralised, legalistic arena of the Industrial Commission.

In 1991 the Minister outlined a policy which emphasised the need to resolve grievances and disputes at the school level where industrial relations was to become an integral part of good management.

In 1992 the Minister called for a review of industrial relations structures, policies and practices. Mr Ted Heagney, a retired industrial commissioner, conducted the review, identified unsatisfactory past practices and made recommendations for the future.

Ted Heagney emphasised the distinction between conflict prevention and conflict resolution and the importance of consultation, negotiation and collaboration as essential elements of good industrial relations and personnel management.

He found a good deal of common ground existed between the Department and the Teachers' Federation in respect to a desire to establish procedures which dealt swiftly with conflict and produce a resolution that was seen by all parties to be just and reasonable. This was seen as most likely to occur as close to the source of conflict as possible.

Since the Heagney Review in 1992 a number of initiatives have been put into place.

Regular monthly meetings are held between the union and Department at state and regional levels and soon at school level.

Joint Union/Department working parties were formed to deal with major outstanding issues. The Teacher's Handbook, outlining working conditions has been rewritten, a project which has been on the agenda for over 20 years.

- Grievance/dispute resolution procedures have been agreed upon and set into the award.
- Staff Welfare Officers have been appointed to all regions and staff now have access to a toll free 008 number to discuss personal issues or grievances.
- A one day training course has been written and is currently being implemented jointly for every Principal and Teachers' Federation representative across the state.

The aim is to produce a working environment in schools which is based upon consultation, negotiation, collaboration and a participative style of management. On those occasions when conflict does occur the objective is to resolve it as quickly and effectively as possible at the school level using if necessary a series of mediation processes. In the spirit of the Industrial Relations Act 1991 these processes must occur before the matter is dealt with at regional or state levels or is taken to the Industrial Commission for arbitration.

Staff Welfare

Associated with improvements in industrial relations is the emphasis on enhancing practices related to staff welfare. As mentioned earlier, a staff welfare officer has been appointed to each region and staff welfare committees are being formed, with representatives from schools, regions and unions.

The staff welfare officer provides advice to individuals or groups, enhances an understanding of working conditions and entitlements, coordinates EEO policies and

practices, provides career counselling, assists with O.H. & S. programs and is a focal point for the discussion of personal grievances.

The Minister recently announced the establishment for next year of an Employee Assistance Program which will give 24 hour access to professional counselling for teachers and ancillary staff. This service will be provided free of charge to school personnel and will be on a confidential basis.

Each workplace is encouraged to establish an Occupational Health and Safety Committee. There is also close liaison with Work Cover, G.I.O. Workers' Compensation teams and HealthQuest (the government medical service) to assist in the early resolution of welfare issues.

Anti-Discrimination

The N.S.W. Anti-Discrimination Act of 1977 and its subsequent amendments make it unlawful to discriminate on the grounds of race, gender, marital status, physical impairment, homosexuality, age and intellectual impairment. Since 1989 racial vilification is also unlawful.

In Metropolitan West Region all senior staff members and principals have been inserviced on matters of Anti-Discrimination and EEO. The main program involved input from Steve Mark from the Anti-Discrimination Board and representatives from the AIDS Council and organisations for the physically disabled. Much of the day's program was dealing with case studies.

Gender Discrimination

With the phasing-in of merit selection in executive and some classroom teaching positions and the gradual phasing-out of seniority as a criterion for promotion, more females have been successful in gaining promotion although at this stage females are still in the minority in senior executive positions.

Sexual Harassment

The NSW Department of School Education is committed to a policy of equal employment opportunity for all of its employees and equal educational opportunity for all students.

The Department recognises that sex-based harassment can deny equality of opportunity and can result in an offensive and stressful work or learning environment for those who are subjected to it.

Sex-based harassment is therefore unacceptable. The Department is committed to providing a working and learning environment which is harassment free.

Guidelines have been introduced into schools for dealing with cases which come to notice. These guidelines aim to ensure appropriate conduct, effective work performance and a cooperative atmosphere in which the rights of individuals are respected.

Anti-Racism

The N.S.W. Department of School Education has responded in various ways to the challenge of education for life in a dynamic multicultural society. These responses have included the Aboriginal Education, Multicultural Education, Ethnic Affairs and Equal Employment Opportunity policies which continue to achieve increased access, participation and outcomes for Aboriginal and Torres Strait Islander students and employees as well as those from non-English speaking backgrounds. These policies have contributed to the education of all Australians about the nature of our multicultural society.

In recent years, Australians have become increasingly aware of the role of various forms of racism in Australian history and society and of the damage that racism has caused and is still causing both to the victims of racism and to society as a whole. Increased acceptance of the multicultural and multiracial character of our society is challenging previous policies of segregation, exclusion and assimilation - key elements in the historical development of racism in Australian society.

Silence and denial are fundamental to racism. People who are subjected to racist discrimination and intimidation have often been silent about what has happened. Many have come to believe that racism is inevitable or at least unavoidable and those who practise racism have been inclined to deny its existence or not to admit or recognise their own racist behaviours. The result is that racism has been perpetuated by silence and denial - its effects hidden, misunderstood or ignored. It is in this way that racism has become so pervasive that it seems acceptable and normal.

While external avenues of complaint will always remain open, the Department acknowledges its responsibility to provide internal mechanisms for action. The success of legislation has shown that effective action and sanctions against racist behaviour are an essential counterpart to education and the promotion of racial harmony through the curriculum for the dismantling of racism.

To assist the implementation of this policy the Department has produced a Prejudice Project Kit which aims to provide appropriate training to staff, students, parents and the community.

The training program, coupled with regional and school programs will enable each school and workplace to develop strategies for the promotion of a positive non-racist environment.

Each workplace is to appoint an anti-racism contact officer to whom individuals and groups can bring complaints and who will gather information and alert the executive to the complaint.

Regions ensure that training and development funds are set aside for this program.

Any person or group with a complaint should seek assistance from the nominated anti-racism contact officer in their workplace.

They may approach any staff member to help them bring their complaint to the contact officer. A parent/guardian may lodge a complaint on behalf of their child.

The nominated contact officer will:

- obtain the details of the complaint ;
- inform the person(s) making the complaint of:
    1. the process by which the complaint will be investigated;
    2. their right to be protected from victimisation;
    3. their right to approach an external body such as the Anti-Discrimination Board or Ombudsman.

The contact officer will **immediately** refer the complaint to a member of the school executive or senior officer for action.

Child Protection

A significant area of potential conflict relates to the protection of children from other children, teachers, parents and members of the community who might use their age, size or

position to take advantage of a child. This might result in child sexual assault or improper conduct of a sexual nature.

Since 1987 it has been mandatory for teachers to report any case of suspected child sexual assault. To assist principals and teachers, training programs have been conducted each year. Cases are referred to the Department of Community Services and Police. If they decide not to proceed with cases involving school personnel the matter is dealt with by the Department of School Education.

Because of the sensitive nature of these matters these cases are usually dealt with by directors or assistant directors in consultation with counsellors and staff involved, the Department's legal officers, staff from Community Services and Police.

Violence

Recently the media has highlighted the increase of reported incidents of violence in schools. To some extent the increase can be explained by the demand now for schools to report incidents of violence in schools.

Violence in schools is not acceptable in any form though it is becoming more difficult to separate the increasing violence in society from the school environment. The 65 reported cases across NSW in Term 3 1993 is serious though it is a relatively low figure for 2200 schools and 770,000 students and indicates that, in general, schools are relatively more safe than other areas of the community. Many of those reported cases involved outsiders entering school premises.

The Department firstly emphasises the preventative approach to dealing with violence. Teachers are themselves very significant role models. The key learning area of Personal Development/Health/Physical Education provides an opportunity to involve students in preventative programs. Student welfare policies and practices emphasise positive school discipline.

A new training course (Resources for Teaching Against Violence) is about to be implemented and includes modules on managing aggressive behaviour, domestic violence, violence against homosexuals and teaching about non-violent relationships.

An additional $5 million has been allocated in 1993/94 budget to address violence. Each region has an additional $50,000 to review and refocus its programs. An additional 102 staff will be appointed in the areas of specialist teachers for behaviour disordered students, Aboriginal and other community liaison officers, school counsellors and teachers' aides. Training programs are being developed for parents of children K-2, cluster directors, school executive and community liaison officers.

These strategies will be supplemented by the provision of additional curriculum support materials focussed on effective communication, conflict resolution skills and responding in non-violent ways. This will be supported by staff development courses to prepare teachers.

Student Welfare

Student Welfare is an area of potential dispute grievance and conflict.

In Metropolitan West Region there is an emphasis on the pro-active approach to welfare issues through a number of programs aimed at preventing dispute situations.

The region employs 90 school counsellors all of whom having a teaching background and qualifications in psychology. All are skilled in counselling, mediation and conflict resolution.

The **STAR Program (Students at Risk)** is a special project aimed at increasing the retention rate of high risk students especially those experiencing homelessness, family dislocation, violence and abuse. It addresses the needs of Aboriginal and Torres Strait Islander students and those from non-English speaking backgrounds, low socioeconomic backgrounds and those with disabilities.

This region initiated a **Behaviour and Attendance Program** in which six staff are allocated temporarily to schools to allow them to develop a whole school change management approach to student welfare. It allows executive and teachers to be released to develop positive plans and policies to address welfare, behaviour and discipline issues.

The **Home School Liaison Program** was implemented first in Metropolitan West Region in 1986. There was an initial reduction of absenteeism of approximately 80%. Since then the HSLO team has been working more with chronic absenteeism. The focus is on negotiation with the student, parents and school to better fit the curriculum program to meet the needs of the student. The team works with the local schools and police to conduct the breakfast program in Mt Druitt.

Three **Alternative Learning Centres** have been established to assist students whose placement in a regular school has completely broken down. Highly skilled and experienced staff work on the student's survival and interpersonal skills.

The Department of School Education is focusing on **preventative drug education** within a broad framework of student welfare, personal development and health education; on assisting schools to develop in students from Kindergarten to Year 12 the skills for making informed decisions about drugs; and on promoting self-help and positive alternatives to drug use. Parents, too, are encouraged to participate in drug awareness programs.

The aim is to establish ongoing programs in schools which will increase both awareness of the complex issues involved and the level of skills which will lead to positive attitudes, decisions and behaviour in relation to substance use and abuse.

Consistent with current research findings, the school programs include:

- accurate information about drugs;
- alternatives to drug use;
- development of self-esteem;
- development of skill in:
  - assertiveness
  - forming and maintaining relationships
  - communication
  - decision-making.

A support kit is available to schools and the Drug Education consultant is active in developing positive programs supporting schools, conducting inservice courses aimed at preventative strategies and developing supportive networks.

Peer Support and Student Leadership programs are positive pro-active initiatives to assist in the area of student welfare.

Critical Incidents

A critical incident is defined as an event which causes disruption, creates danger or risk and traumatically affects individuals. It includes matters such as:

- fire, flood, earthquake;
- bombs, explosions, break-in;
- students lost or taken hostage;
- violence, assault, sexual assault;
- suicide, death.

The guidelines for dealing with critical incidents emphasise prevention, developing plans and strategies, evacuation, gathering information, and identifying and providing support.

CONFLICT RESOLUTION

While the emphasis has always been on creating a positive learning and working environment in which conflicts and disputes are least likely to occur the reality is that conflict is inevitable and people require skills to deal with it.

In Metropolitan West conflict resolution is built into many of the training and development courses. In addition we use external organisations or people such as the Conflict Resolution Network or Greg Tillett to conduct programs for school people.

In the last few years the industrial environment has seen a profound shift from the highly centralised, legalistic system whereby disputes were settled by decisions of an external arbitrator to a system now based more on a negotiation approach. Genuine efforts are made now to settle disputes as close as possible to the source within reasonable time limits and where third parties may sought to assist the process in the first instance.

Individual Disputes

In the day-to-day operation of schools and the Department of School Education most disputes involve individuals or small groups of people and require particular skills for resolution. It is important to act quickly, correctly and with sensitivity.

From my own experience in dealing with disputes and grievances over many years in a wide variety of situations I find it important to come down to simple basics in dealing with the situations.

- Clarify the REAL issue. Map the development of the dispute then separate the cause from the symptoms.
- Quickly identify the relevant policies, guidelines, legislation.
- Clarify FACTS. Clear the PHOG (Philosophy, Hearsay, Opinion, Gut feeling).
- Identify who was and is still involved.
- Establish a climate of respect for each person's position and the direction from which they come.
- Canvas possible strategies for resolution.
- Identify who is to be involved in the resolution.
- Outline expected outcomes and an agreed timeline for settlement.
- Monitor the results.

And finally, when all else fails

- USE COMMON SENSE.

How Appropriate Are These Strategies in Your Organisation?

Workshop Presenter

Laurie Dicker

NSW Department Of School Education

Workshop Reporter

David Conquest

NSW State Rail Authority, Employee Complaints Service

A number of different dispute resolution strategies were raised. The main thrust seemed to be that dispute prevention strategies were as important as dispute handling. It was agreed that with appropriate preventative strategies being put in place the level of conflicts in the organisation would reduce. The other aspect dealt with developing strategies to effectively handle conflicts when they do arise, as surely they will, no matter how effective your preventative strategies are.

Some of the main strategies discussed are briefly listed below:

- Providing training and support to staff, management and those officers responsible for handling conflicts;
- It was considered important to determine who your organisation's customers are, for once this was established, a better understanding of their needs and views would be obtained resulting in better conflict prevention and resolution strategies being developed;
- It was considered that inviting participation from customers could result in conflicts being reduced. Customers could provide suggestions or even get involved in committees that provide advice and liaise with management;
- The provision of information to staff and customers could also help in conflicts being reduced;
- Creation of a good working environment for employees;
- The establishment of conflict resolution officers in the organisation;
- The establishment of proper procedures to deal and manage conflict when it does occur.

It was agreed that a lot of the above strategies could be developed and immplemented in a number of organisations, but that the extent to which it could be done would depend on the organisation itself. Factors such as organisation structure, organisation culture, type of industry and nature of the company would affect the types of conflict resolution strategies that could be employed. It was agreed that a good understanding of the organisation would be a prerequisite to developing strategies that would be appropriate for it.

Whether the strategies that are developed are informal or formal or somewhere in between would depend on the organisation and the objectives it wishes to achieve.

Environmental, Development and Planning Issues

Intervention, Management, Resolution and Provention

*Michael Ashford**

Manager, Community Advisory Section
Department of Resources Development, Western Australia

* The views expressed in this paper are those of the above individual and should not be construed as representing any official organisation position

Conflict

IS a natural part of human social relationships. It occurs at all levels of society - intrapsychic, interpersonal, intragroup, intergroup, intranational, international.

IS NOT the opposite of order.

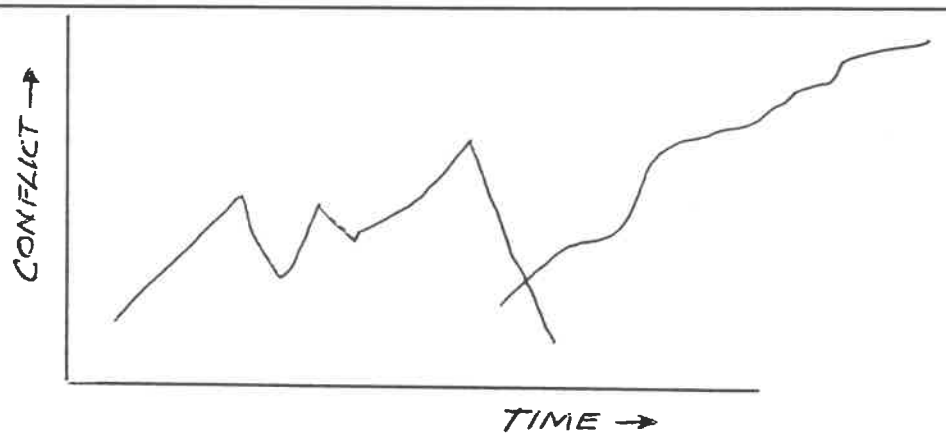
IS highly patterned; can be analysed; is predictable.

THERE IS orderliness, although can become disorderly

CAN BE a very helpful part of society

IS a living, dynamic, multidimensional and complex series of interactions and inter-dependencies between social entities

NOTES:



Intervene at the lull, not at the peak of conflict

If there is no attempt at resolution, the overall trend of conflict will rise,

Conflict

Conflict opposition among social entities directed against one another

Competition opposition independently striving for something of which the supply is inadequate

Rivalry opposition which recognises one another as competitors

Opposition social entities function in the disservice of one another (includes conflict, competition, rivalry)

Cooperation social entities function in the service of one another

---

NOTES:

Sources of Conflict

Biosocial

- instincts, hormones
- frustration to aggression to conflict
- relative deprivation

Personality and interactional

- "difficult people"
- "rub each other the wrong way"
- personality clash
- different orientations (eg democratic vs autocratic)

Structural

- rooted in society / organisations
- actual or perceived inequity
- class, status, power

Cultural and Ideological

- clash of culture
- political, social, religious beliefs
- conflicting values

These often converge

NOTES:

Types of Conflict

Interest clash of opposing interests

Induced intentionally created to achieve other than explicit objectives

Mis-attributed incorrect attribution as to the behaviours, participants, issues, causes

Illusionary based on misperceptions or misunderstandings

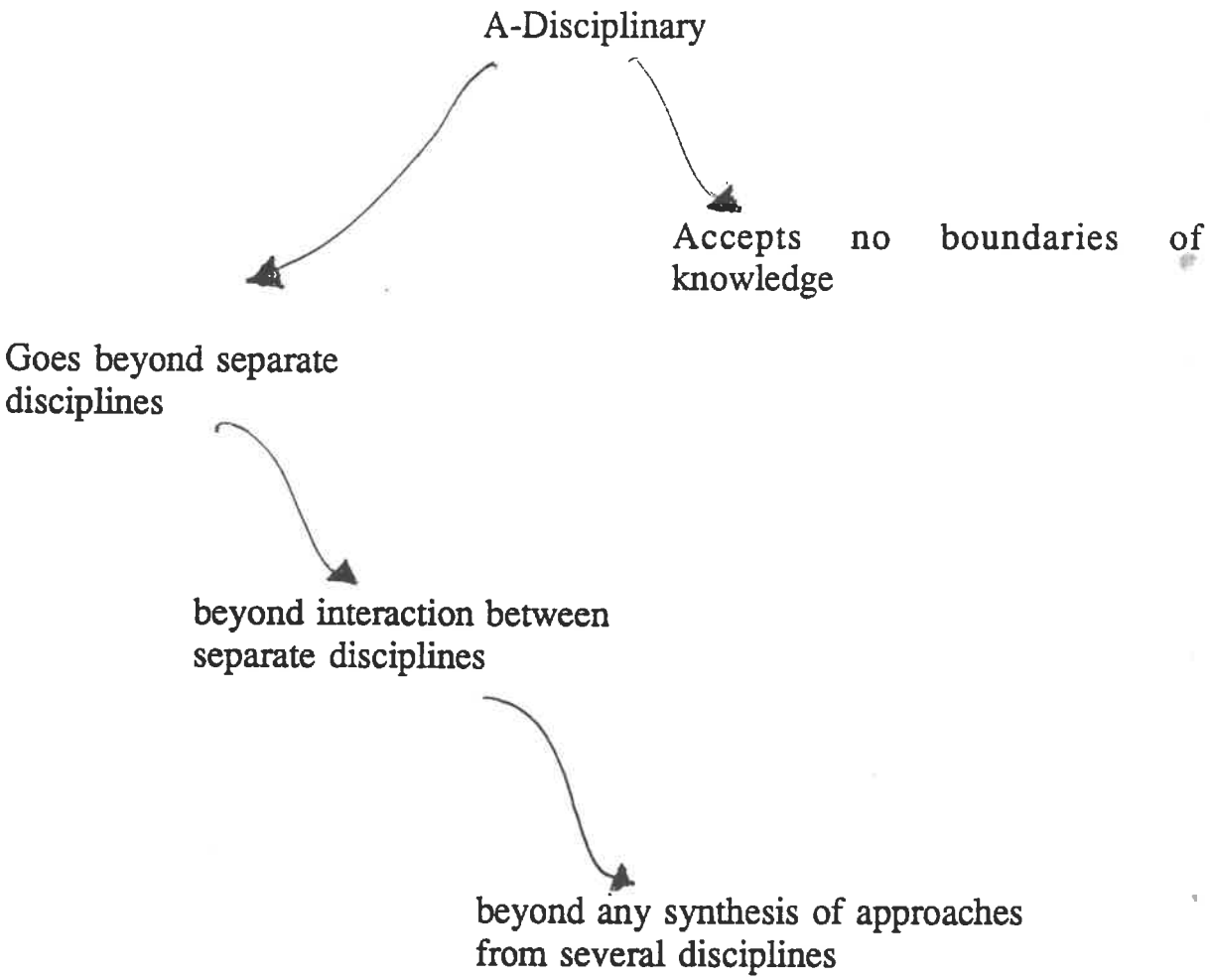
Displaced directed toward persons or concerns other than the actual offending parties or real issues

Expressive characterised by a desire to express hostility, antagonism or other strong feelings

---

NOTES:

Conflict, its Resolution and Provention



NOTES:

Conflict

Intervention when an outside party enters into a conflict with the objective of influencing the conflict in a direction the intervenor desires. It alters the power configuration among the social entities.

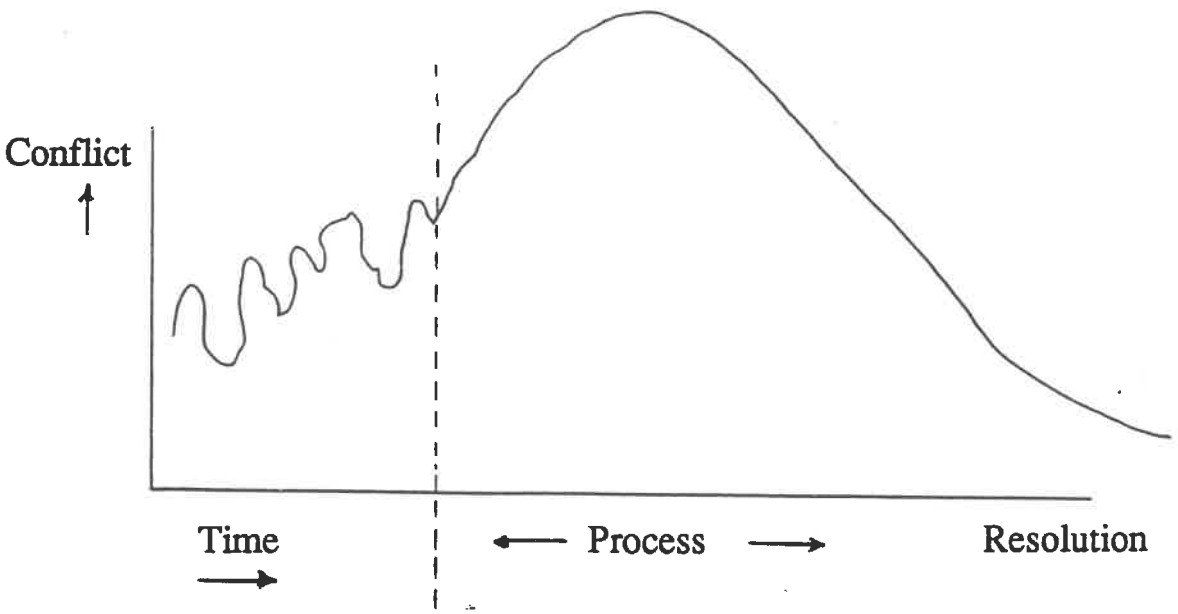
Settlement imposed or arranged by co-ercion by one party or by powerful outsiders. Relationships remain fragile and liable to be overturned at the earliest opportunity.

Management a framework where the conflict ceases to interfere with work, lifestyles. It acknowledges the underlying dispute still exists.

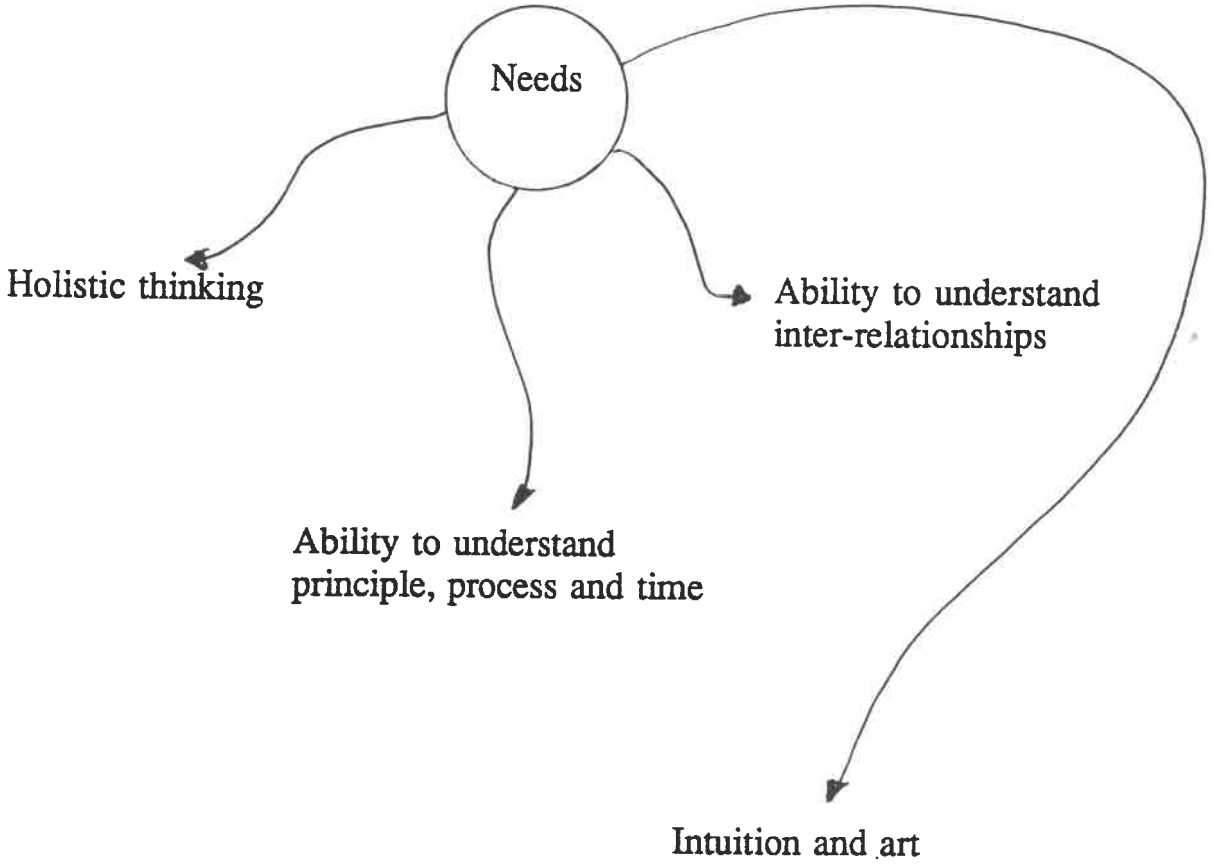
Resolution process where the dispute no longer exists and all parties accept the terms of resolution. Provides durable, long term and self supporting solutions. Removes underlying causes and establishes new, satisfactory relationships.

Provention actions to remove sources of conflict and promote collaborative and valued relationships which control behaviours. The future is analysed and anticipated. Steps are taken to remove sources of likely conflict.

GRAPH



Analysis, Management and Resolution of Conflict



NOTES:

Dynamics of Environmental / Land Use Conflict

Conflict*

* Add entities and sources

Characteristics of Environmental / Land Use Conflict

Complicated Network of Interests

New parties emerge

Forms of power differ

Decision making procedures differ

Levels of expertise vary

Lack of continuing relationships

Accountability is unequal

No Standardised Procedures

No guidelines

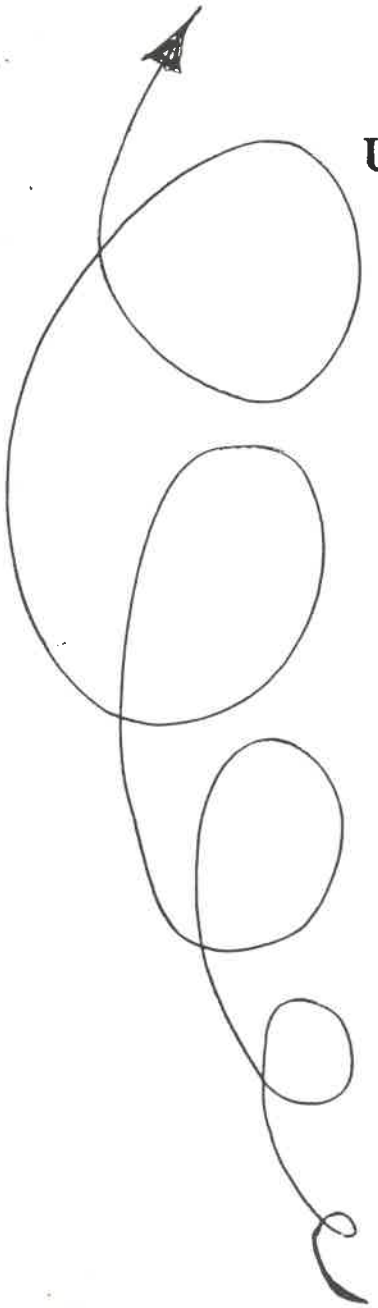
Government legislation, regulations and actions vary and part of a complex system

A Broad Range of Issues

New issues emerge

Technical information important and often not available

Beliefs and values differ



Unmanaged Conflict Spirals .....

Sense of crisis emerges

Perceptions distort

Conflict goes outside and beyond

Resources are committed

Communication stops

Positions harden

Sides form

Problem/issue emerges

Leading to a range of outcomes: direct action, reallocation of resources, legal action, law enforcement, sanctions and the parties are motivated by revenge.

Conflict Analysis

People

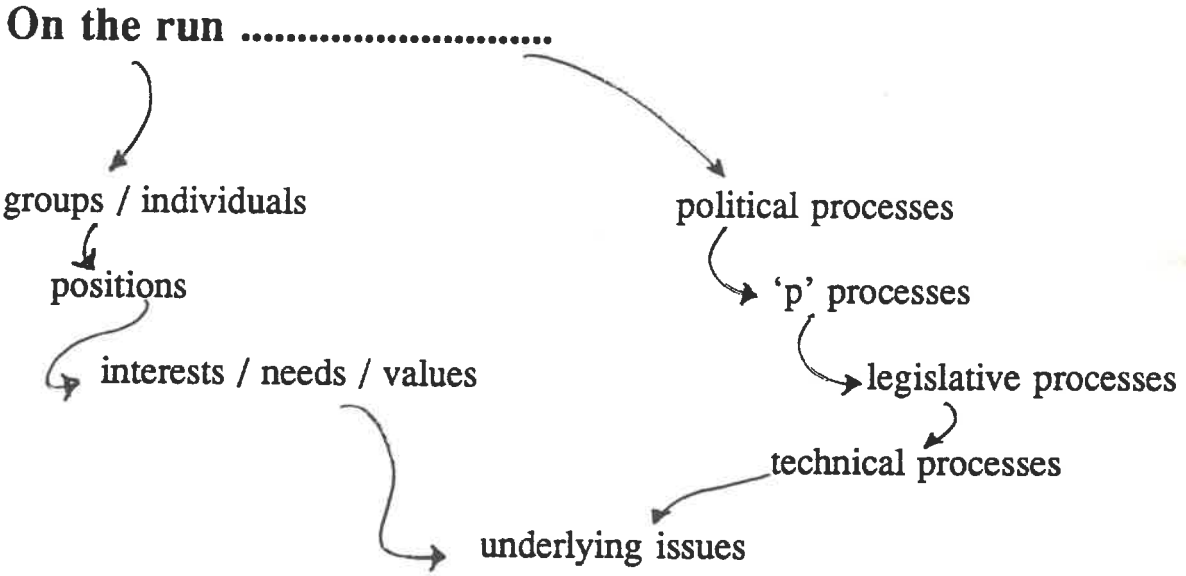
Interest groups
individuals
goals
attitudes
values
perceptions
motivation
style
power

Relationships

history
dynamics
trends

Substance

central issues
options available
secondary issues
events



Techniques **S**trategy **P**rocess **I**ssues **N**eeds/Values/Interests **P**osition **G**roup/Individual

Conflict Analysis

* The dynamic integrated structure of environmental / land use conflict is multi-levelled, with each level consisting of sub-systems which are both whole in themselves and parts of a larger whole. As wholes become parts of other wholes, the level of complexity becomes higher.

'Holons' are subsystems which are both wholes and parts. Thus we have an apparent contradiction present - individual assertion to be a part and an integrative assertion to the whole in order to sustain the system. This is a dynamic interaction and interdependancy is the prevailing framework.

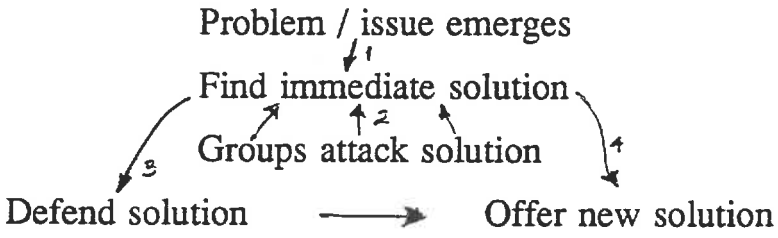
NOTES:

Old Ways of Managing Environmental / Land Use Conflict

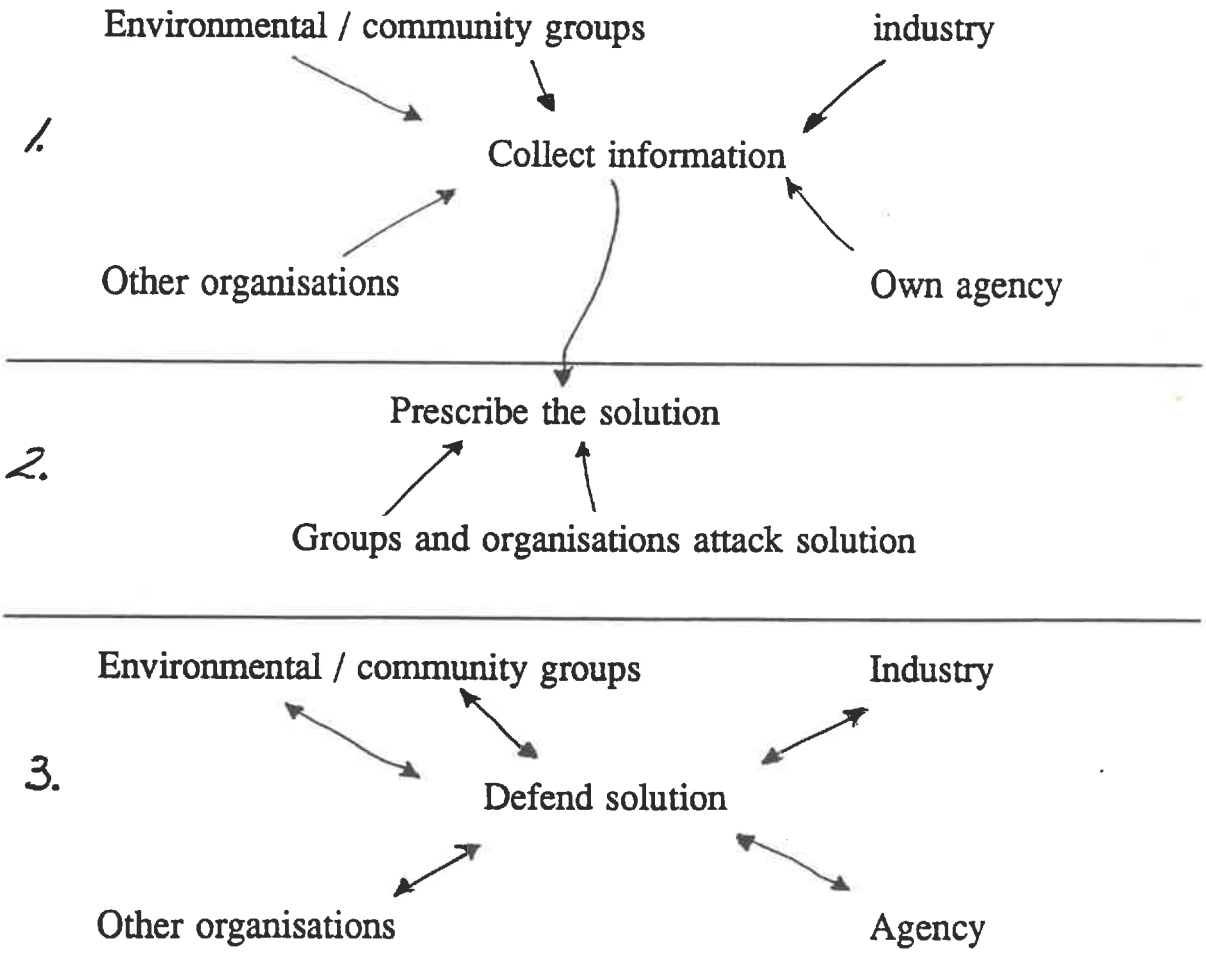
Avoid the issue

Charge into battle, beat the opponents

Find a quick fix



Fall into the 'solomon' trap



Public Participation and Environmental / Land Use Conflict

Public participation is conflict management

Public participation is conflict resolution

Public participation can become conflict provention

Environmental / Land Use Dispute Resolution

Is characterised by certain elements - voluntary participation, consensus building, joint problem solving and negotiation. Consensus is the key element of the process.

Principles

Representation of all affected parties

All parties cooperate in setting agenda and designing the process (which is flexible)

Problem solution orientation

Process which is educational, open and highly visible

Fact finding

Consensus decision making

Solutions based on interest, not positions

Phase by phase process with distinct time limits

Focussing the process of implementation

Process guided by neutral third parties

NOTES:

New Processes and Criteria

Public enquiries - formal and informal

Terms of reference directed towards resolution

Issue(s) clearly defined and dealt with expeditiously

Full public participation

Interest groups resourced for meaningful participation

Matter(s) of the dispute protected during the enquiry process

Access to all relevant information by all participants

Identification of all parties facts, opinions and values

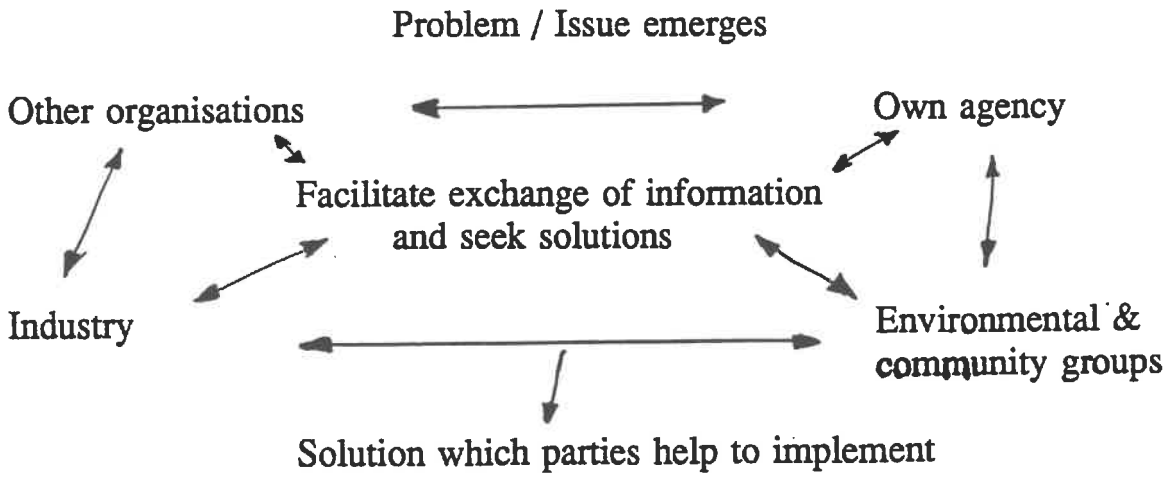
Disputed facts, opinions and values highlighted

Process of evaluation and analysis by the enquiry to be transparent

Ideally, public acceptance of final recommendations - obtained by transparency and the reasons for findings explicitly and comprehensively presented

Ongoing Management

The decision maker is a facilitator, focus is on the problem, parties meet face to face and sort through differences, parties help shape process and decisions are made by consensus.



Management Resolution Provention

Resolution is characterised by a solution which is:

- complete - issues disappear from political / public agenda
- acceptable to all parties
- self supporting - no necessity for policing
- satisfactory - all perceive it as fair and just
- uncompromising - goals are not sacrificed
- innovative - new and positive relationships established
- uncoerced - arrived at by parties without imposition by outsiders

Technical

Information

Political Participation 'p'olitical

Information

Legislation

BIBLIOGRAPHY

1. H Bisno, Managing Conflict, California: Sage Publications, 1988.
2. J Burton edt, Conflict: Human Needs Theory, Hampshire: The Macmillon Press, 1990.
3. J Burton and F Dukes eds, Conflict: Readings in Management and Resolution, Hampshire: The Macmillon Press, 1990.
4. J Burton and F Dukes eds, Conflict: Practices in Management, Settlement and Resolution, Hampshire: The Macmillon Press, 1990.
5. E De Bono, Conflicts: A Better Way to Resolve Them, London: Penguine Books, 1985.
6. H Cornelius and S Faire, Everyone Can Win, How to Resolve Conflict, Brookvale: Simon & Schuster, 1989.
7. A F Acland, A Sudden Outbreak of Common Sense. Managing Conflict through Mediation, London: Hutchinson Business Books, 1990.
8. R Fisher and W Ury, Getting to Yes, London: Hutchinson Publishing, 1982.
9. W Ury, J Brett and S Goldberg, Getting Disputes Resolved. Designing Systems to Cut the Costs of Conflict, California: Jossey-Bass, 1988.
10. R Neuman, edt, Resolving Environmental Disputes in the Public Interest, Brisbane: Environment Institute of Australia, 1992.
11. L Susskind and J Cruikshank, Breaking the Impasse. Consensual Approaches to Resolving Public Disputes, USA: Basic Book, 1987.
12. S L Carpenter and W J D Kennedy, Managing Public Disputes, California: Jossey-Bass, 1988.

Cross Cultural Communication in Dispute Resolution

Workshop Presenters

Catherine O'Grady and Jan Porter

National Centre for English Language Teaching and Research

Workshop Reporter

Peter D. Irving

Lawyer/mediator

ADR is currently developing in Australia a culture of linguistic diversity. In Australia, one hundred and forty two different languages are spoken and twenty five percent of the population comes from a non-English speaking background (NESB).

There is a need to address areas of misunderstanding in cross cultural dispute resolution. A knowledge of linguistics helps overcome some cultural misunderstandings. Some interpreters can provide a very valuable insight and there should be extensive interviews with them and with the disputants and mediators. There is also a need to recruit mediators of NESB. Simulations of cross cultural mediations are a very enlightening training tool.

COMMUNICATION DEMANDS ON DISPUTANTS

There is a need to address these demands in cross cultural dispute resolution.

The workshop was broken up into three groups who were asked to list some difficulties which had been experienced in mediations where one or more parties were of NESB.

The difficulties listed were:

1. Understanding the subtleties of the idiomatic English expressions (eg 'over the moon', 'red herring') or technical or professional terms (such as 'options' or 'defined'');
2. Differences within cultures (Serbian/Croatian etc);
3. Understanding non-verbals, body language or tone and pitch of voice;
4. Gender difference and what is acceptable behaviour;
5. Cultural subtleties - understanding the moral codes/politeness;
6. Acceptability of mediation;
7. Acceptability of the mediators on such criteria as age, gender and class;
8. The use of interpreters and their understanding of their role and task;
9. Parties misunderstanding the mediation process due to inadequate information from intakes via the Telephone Interpreter Service or agency;

10. Cultural differences (eg not taking the word of the agency at face value);
11. Process takes more time; delay changes the process;
12. Interpreters who are not professional. There were reports of:
    - one interpreter reprimanding a party;
    - another stating what the party 'should' say.

HOW WERE THESE DIFFICULTIES ADDRESSED?

In answering this question, the groups came up with the following responses:

1. Speak in simple concrete language, eliminate jargon and idiomatic language;
2. When in doubt, check with participants;
3. Speak slowly and clearly, but without condescension;
4. Provide information, forms, booklets etc in different languages;
5. Use well trained interpreters - but not spouses, siblings etc;
6. Be open to ongoing feedback and be flexible;
7. Education about the process during intake must be:
    - more detailed and
    - face to face;
8. Have a competent interpreter;
9. Move more slowly through the process;
10. Recognise when values clash;
11. Report to co-ordinator;
12. Insist that interpreters interpret the words, and check this with the parties;
13. Explain the interpreter's role to the parties.

VALUES AND IDEOLOGIES UNDERLYING ADR IN AUSTRALIA

ADR is often contrasted to the adversarial system of dispute resolution. The communicative demands on disputants in an ADR process are quite different from those required in an adversarial system of dispute resolution. In mediation, the disputants are required to:

- tell their story clearly
- express their needs and concerns
- generate options
- negotiate
- seek clarification.

These demands require literacy skills.

Mediation is an activity type, that is, it arises from a particular political and social context. The social and political context provides certain values and ideologies which underlie the activity. In Australia, some values and ideologies underlying mediation are:

- individual responsibility;
- equality;
- voluntariness;
- freedom of choice;
- self determination;
- honesty - an assumption that people will be honest;
- withholding of information is considered dishonest;
- a presupposition of equal power relationships, and the need to redress power imbalances;

- a presupposition of the neutrality of the mediator;
- an exclusion of retribution, paying for sins etc;
- the non-judgmental quality of the process;
- an assumption of assertiveness.

A large number of people in the Australian population may not share these values and ideologies.

Indeed, the differences in cultural values and ideologies relating to mediation are sometimes quite profound. That this is so was dramatically demonstrated in excerpts of a video recording of a simulated mediation involving parties from different cultures.

The dispute was between two neighbours. Julie, an Australian woman, was a temporary resident in an Arabic country. Her Arabic neighbour, Mrs Rabi, was very welcoming of her and the two ladies enjoyed a warm and cordial neighbourly relationship. Julie kept a goat in her backyard to provide a ready supply of milk. The goat found a hole in the fence through which it used to go into Mrs Rabi's garden and eat her plants. Mrs Rabi was not happy with the situation and said so to Julie in a polite, but somewhat oblique manner. Julie was not attuned to the nuances and carried on unaware that a problem existed until she was asked, to her surprise, to attend a mediation.

In the simulation, the role of the mediator was played by an Imam from a local Arabic community in Sydney. He was in fact an experienced mediator within his own community. Although the simulation was unscripted, he acted as he would have done in a real life mediation within his community.

The conduct and character of the mediation were strikingly different from that of mediation as we understand and practise it in Australia. Some of those differences were the timing of the mediation in relation to the history of the conflict, the purpose of the mediation, the tone of the mediation and the role of the mediator.

The mediation had been initiated by Mrs Rabi in the hope that it would avoid confrontation with Julie, to preserve the good neighbourly relations that existed and to promote a sense of harmony.

In opening the session, the mediator put the proceedings straight away into a religious context, not only because of his clerical position (he was also robed), but also by the use of explanatory remarks to Julie, such as 'according to our religion...' and 'the Prophet encourages us to...'. He brought the authority of his vocation to the mediation and did not attempt to 'change hats'.

The mediator called Julie 'a friend of our country' and he addressed her as 'sister Julie' and addressed Mrs Rabi in a similar way.

He confirmed that the mediation was aimed at achieving harmony between neighbours and in the community generally. Julie, having failed beforehand to understand that conflict existed, was confused at what she perceived to be the premature calling in of a third party. She said to Mrs Rabi, 'I wish you had told me sooner'. To which Mrs Rabi replied, 'I did not want to confront you. His Eminence can help.'

The matter was superficially resolved in that Julie agreed to take steps to ensure that her goat would no longer stray into Mrs Rabi's garden. It is interesting to note, however, that in a debriefing of the role players following the simulation, 'Julie' remarked that she felt an outsider and uncomfortable during the mediation and most importantly, she would probably avoid all further contact with 'Mrs Rabi'. It may be said, therefore, that due to different perceptions of the process, the mediation had failed to achieve its fundamental aim -

harmony. Instead of preserving the relationship as the indigenous disputant had hoped, it had served only to undermine it from the point of view of the foreigner.

The video demonstrated that we cannot make assumptions about NESB disputants and their understanding and acceptance of the philosophy and process of mediation.

HOW PROBLEMS IN CROSS CULTURAL ENCOUNTERS CAN ARISE

1. **Non-Understanding:**
   Simply put, this is failing to understand what has been said. Usually this will be due to language difficulties and does not give rise to judgments being made by either party.

2. **Mis-Understanding**
   This occurs where the words are understood, but the intention behind them is mis-read. In the video recording of the simulated mediation, Julie understood what Mrs Rabi said to her when she first alluded to the problem of the goat, but the indirectness of her words failed to convey to Julie her true meaning.

3. **Clashes in Outlook and Values**
   When this occurs, it may lead to disagreement with, or even disapproval of, values expressed by words or behaviour.

DIFFICULTIES SOME NESB PARTIES MAY HAVE WITH THE STRATEGY OF RE-FRAMING

Re-framing is a strategy used by mediators to translate into neutral terms emotionally charged or `toxic' language used by one of the parties. Re-framing may create problems if, for example, it enforces directness on a party whose cultural values require her to be indirect.

Other problems which may arise from re-framing are the following:

1. A re-frame may be too formal.
2. Important feelings can be lost. This is particularly important where the culture of the NESB disputant values emotion as an expression of self.
3. Sometimes in 'taking the sting out', the meaning is also taken out.
4. A re-frame can suggest a solution.
5. A re-frame may present a danger of the mediator taking too much control.
6. Interpreters may interpret inappropriately.
7. The re-frame might undermine the NESB disputant's strategies.

Some of the responses suggested by the groups for overcoming these difficulties were:

1. To match the mediators with the disputants;
2. There should be consultation between interpreters and disputants prior to the mediation;
3. Mediators should take care not to make pronouncements.

One problem for an NESB disputant using English is that in using the English language the disputant has already removed herself one step from an accurate representation of herself. This could mean that the disputant has less confidence to correct or refute inaccurate re-framing by the mediator. Indeed there may be cultural factors for that party which militate against disagreement with an authority figure (assuming that the mediator is seen as an authority figure). In such cases, the easier option is simply to agree with the re-frame with all its inaccuracies.

Where there is an NESB disputant together with an interpreter, the potential for the disputant to lose ownership of ideas is multiplied. This can lead to a sense of powerlessness and a loss of trust in the mediator and the mediation process.

SOME ASPECTS OF DISPUTANT LANGUAGE WHICH MAY BE PROBLEMATIC

We assume that participants in a mediation resolve their disputes by being open and direct. We also assume that they will be assertive. Some disputants prefer indirectness of language. Others believe that general harmony is more important than the needs and wants of the individual.

In Eskimo societies, disputes are not solved by direct confrontation between the disputants. The plot of the dispute is acted out by clowns and buffoons in costume (no doubt putting humour to good effect) and the spectators decide the outcome.

In Arabic societies, the language of dispute resolution uses fable and metaphor. To the uneducated observer, the parties appear to be telling a story about people other than themselves. But this style of dispute language has the effect of being conciliatory and it distances the parties from their own dispute.

Thus, in mediation between Arabic spouses, the wife might say:

> 'I know a woman in my neighbourhood who has a difficult life because her husband does not give her enough money for housekeeping.'

A skilled mediator might then invite the other party to help his wife by suggesting advice she might give to her friend.

The skills in recognising the need for fantasy and indirect language to deal with uncomfortable realities are not unknown to us. Social workers investigating child abuse often find that the child is unable to use direct language and is able to communicate only through telling stories and using dolls.

Mediators in cross cultural conflict must develop skills in recognising situations where direct speech is not the appropriate style of dispute language.

The groups suggested the following strategies for coping with indirectness:

1. Training courses should include some input on different cultures, the varieties of indirectness and the extent to which mediation may be seen as threatening;
2. Interpreters should be encouraged to talk with the mediators regarding the approaches and strategies of indirectness that they need to be aware of;
3. Go along with the participant's approach. A mediator might see a party using indirect language as being resistant. There is a need for mediators to consider that everything the participants bring to the mediation is co-operative in its own way. The task of a mediator is to perceive how the participant is being co-operative and to support that process of co-operation;
4. Be flexible;
5. Mediators should match indirectness with their own metaphors.

WHAT ARE THE IMPLICATIONS FOR PRACTICE, TRAINING AND POLICY?

1. Practice

- Mediators should be aware of their own flexibility/biases.
- Learn from interpreters.
- Caucus with interpreters during the mediation on cultural matters.

- Talk with interpreters prior to mediation and debrief with them afterwards.
- Question the assumptions/values underpinning mediation.
- Consider all aspects of culture - gender, age, class, disability etc.
- Continually check and ask for feedback.
- Take a 'one down' position.
- Only well trained mediators should be used.

2. Training

- More information should be given about cultural differences.
- Assumptions and biases about mediation should be examined and challenged.
- Special consideration should be given to techniques of re-framing.

3. Policy

- Committees of interpreters should be set up.
- There is a need to research the effectiveness of intervention strategies.

Establishing a Youth Mediation Program

Yolanda Pannuccio

Program Co-ordinator, Youth Mediation Program
Werribee Support and Housing Group

I am currently working at Werribee Support and Housing Group to establish a Youth Mediation Program there. My task at the moment is to set up a mediation service that is based at a housing group and at a school and involves the two organisations.

The auspicing body is the housing group. The background to the program is that the housing group was receiving a high number of referrals from the local secondary college which has over 1,000 students. A number of young people were going to the housing group seeking housing assistance and the reason they wanted to leave home was that they couldn't handle the ongoing conflicts with their parents. Some young people had experienced violence at home. There was a considerable percentage of young people who cited ongoing conflict with their parents as their reason for wanting to leave the family home. So the housing group and the secondary college got together; neither of them had the resources to deal with this on their own, so they put in submissions for a mediation program. The original submission had a direct service component as well as a community education focus. The idea was to educate young people in conflict resolution skills, educate parents and provide some education to professionals working in the area to get them to recognise the signs of conflict at home and how to deal with it.

My background is that of a mediator with the Noble Park Family Mediation Centre. I was selected in their first intake of mediators in 1985. At the time I was 18 and I was specifically selected to deal with parent/adolescent disputes. After a couple of years of mediating I went on to be the mediator co-ordinator/trainer with that organisation and I did that for a few years before moving on to the Dispute Settlement Centre program which is similar to the Community Justice Centre program here in NSW. I was employed as the training consultant with that program. I dealt with neighbour disputes and while I was with them they picked up family law and parent/adolescent disputes as well.

The Dispute Settlement Centre Program has now been reduced - the funding has been cut back and I moved on from there and I'm at Werribee now so my background is that of a community mediator.

Today I will start off by looking at parent/adolescent disputes and developing an understanding of those disputes and then go on to talk about mediation, look at a brief overview of the different models of mediation that are being used at the moment and then I'll talk about the model we are using out at Werribee because it's slightly different to a traditional community based model.

Studies have shown that for most young people, or most adolescents, this period results in an increase in conflict with their parents. They suggest that the young person is rebellious during this stage and that the purpose for that is so that they can develop an identity in their own right. It is part of separating themselves from the others and being acknowledged as an individual. The research shows that the conflicts can result in a deterioration in the relationship between the parents and the young person. But other research shows that where

you have got conflict it doesn't necessarily have to result in a deterioration of relationships - it can have positive consequences such as the promotion of communication, problem solving and positive changes for individuals involved.

Watching the young person move away or develop their own identity, the fear of letting go, the value clashes, can be really emotional too. There's a lot of emotion behind parent/adolescent conflicts which results in uncertainty between the individual and within the relationship during that time. There are also other pressures that result in parent/adolescent conflicts. For example, the young person may be stressed out with their own situation at school and not have the energy to deal with ongoing conflicts with the parents so it really explodes. Similarly, there are pressures on families and on parents at the moment: the lack of jobs, the uncertainties for young peoples' futures. Many parents are wanting to do the right thing by their child or the young person; they want the young person to succeed. It would be fair to say that every parent wants the best for the young person. So they are concerned at the moment. We're in a climate where there are no university places or it is very difficult to get in, jobs are scarce for young inexperienced people so when these young people are at school the parents are often reminding them that this is the situation and that can really put a lot of pressure on young people and can result in clashes at home.

Parenting styles also can result in conflict. Parents may feel uncomfortable changing the way they parent or they may fear losing control of that young person and what the consequences might be for them.

Another thing that often comes up is the difference in parenting styles between one parent and the other. One parent is okay about something so the young person goes off and does it. The other parent finds out about it and all hell breaks loose. That produces a conflict between the adults which also affects the young person so you get a triangular system of conflict.

There are also cross-cultural issues for families who come from a different cultural background. When the young person goes through that stage of transition and they are developing their own identity they sometimes take on the opinions or the views of the dominant culture. Part of the parent's fear of letting go or moving away is that they are not only losing the young person or losing control but there is also the fear of losing their cultural base and their cultural values. They are really experiencing a loss of their roots.

There are three common themes in parent/adolescent conflict. Behind the conflict about, say, the boyfriend or the friend, there are **process issues** - conflicts over **how the decisions are to be made**. **Substance issues** concern **what the decision should be**. The young person may be saying, "I choose my friends, and this is who I choose". The parents say, "I have a responsibility to make sure you're safe, they're a bad influence, so I'm going to choose your friends".

There are also **value issues**. Value issues are those values and principles that are behind the decisions we make. For families of non-English speaking backgrounds, these value issues come up in a lot of situations because there may be a totally different value base behind the parent's decision making from the young person's decision making.

How do parents and young people actually go about sorting out their conflicts? They may end up clashing. One person may try and approach the issue, then they get all steamed up, and they're at it, on for young and old. That's not surprising because the values or the emotion behind the conflict can result in an explosion and those emotions take over the way you deal with the issues. Another way is to withdraw. They try to escape the situation by running away, by withdrawing, by sneaking around and doing their own thing anyway. And what is the result of that? That the person who tries to sort it out is left with an unresolved issue, feeling really frustrated. The person who has taken off to try and escape

the situation really feels stressed because they know that the issue is unresolved and that they eventually are going to have to face the situation. So it creates stress for everyone.

We would agree that the best method of dealing with parent/adolescent conflicts or any conflicts for that matter, is to sit down and to discuss the issues and tell each other how you feel so that the emotions don't take over and to negotiate a resolution that you are both happy with. And that's great if you belong to the Brady Bunch!! How many families actually do that? In reality you have a whole lot of other things happening.

What happens when families don't find an appropriate way of dealing with conflict, is that it can result in harbouring resentment for one person. If conflict is dealt with appropriately and people are given the chance to be heard and have their say and to be understood, then it can have a positive outcome because they feel heard, they feel respected and it results in changes that are good for everyone. It acknowledges that changes are needed and it finds the best changes for the family. But when it's not dealt with appropriately, some people, particularly young people, feel that they are not heard, no-one is listening, nobody understands them and if this is the situation over a long period of time this then results in their developing a low self-esteem, believing that no-one wants to understand them. It can lead to their feeling quite powerless.

In extreme cases they might really lose faith in themselves. So it's really important that parents and young people do find a way of communicating and that everybody in the family is given equal respect and that they are given a chance to have their say and to confer. Even if the end result, the final decision, isn't what they want, the process of how decisions are made is really important. And that's what mediation is all about. It's about giving people an opportunity to come together and hear each other and to communicate with respect and come up with resolutions.

I'd like now to look at mediation itself, and the principles underlying it. Some of these are:

- Co-operation
- Trust
- Respect
- Self-determination
- Empowerment
- Desire for resolution in a voluntary process
- Full disclosure
- Realistic expectations
- No judgment (as far as that's possible)
- Safe forum
- Neutrality
- Time to concentrate on resolving the conflict
- A chance to listen and be heard.

These are the principles we are promoting in mediation, and these principles need to be reflected in our service in everything from the way we work with individuals to the way we contact Party 2, to our response to people when they contact us. These principles are not just for the mediation sessions. These principles need to guide the establishment of the service from beginning to end.

In Australia we've seen parent/adolescent mediation services really evolve out of other types of mediation services. The community based mediation services themselves have really evolved out of neighbour disputes - neighbour mediation and family law mediation. The Family Mediation Centre discovered that in Colorado they were using this process for parent/adolescent disputes so that they then recruited younger mediators to enable that

process to be applied to parent/adolescent disputes. The other evolution has been mediation coming out of therapeutic approaches. Some people who've come from a family therapy background have picked up on mediation as a form of dispute resolution and made a move towards starting up mediation services.

Community mediation looks at the family controlling the context and the mediator controlling the process. In **therapeutic mediation** the worker combines mediation processes and skills with therapeutic methods and practices.

Community mediation developed out of a community education process. It is based on the principles that in mediation you can show people a better way of dealing with conflict and through that experience they can learn to deal with ongoing conflicts in a more appropriate way. You give them the resources to be able to do that based on an education background. The therapeutic model is based on a healing background. When you look at the adaptation of therapy to mediation, it's really used in major crises to give people a chance to look at that healing process and focus on that. Some practitioners have made the move from that towards an earlier intervention model, but still use the methods and processes of therapy. The main focus of a therapy service is that it starts from that healing base. It's healing first, conflict resolution second. The community mediation model comes from an early intervention model that looks at education first and healing as a result of that process. Basically they have a common concern. In terms of early intervention in a crisis, you need different strategies, different approaches, and I suppose in that respect, therapy does have a role to play. There is a debate as to whether you can actually move from therapy to mediation and still call it mediation.

One of the features of the community mediation models is the selection of a panel of sessional mediators who come from the community so you have a range of backgrounds on your panel, a range of age groups and the balance of gender. In this way, you can match your mediators to your clients as closely as possible. This is really important in parent/adolescent dispute, as it enables you to use a young person with an older mediator. They have an equal role in that mediation session and they are able to role model the co-operative relationship between a younger and older person.

One of the criticisms of the basic community model was that the intake worker often did the intake and then did not go on to mediate the session. So you had people telling a story in intake and then telling the same story again in mediation to totally different people. And then if there was follow up, and it was a face to face follow up or phone call, it went back to the intake worker.

There was a criticism of lack of consistency from one stage to the other and it was thought that there wasn't enough linkage between intake and the mediation.

The mediation or the conflict resolution process doesn't start with the mediation session itself. That's when you get them together to communicate and negotiate but actually the conflict resolution process starts from the first point of contact with that agency and that is what is often referred to as intake. It has two functions: an assessment and a preparation function. You are checking out in intake whether the case is appropriate for mediation and whether the parties are ready for mediation.

In the model that we are adopting out at Werribee, there's more provision for the intake worker to do preparation work with both family members.

With young people especially there needs to be a bit of work on the servicing, to develop the confidence to present their point of view and to look at the implications of that.

With this model there may be one or more preparation sessions with the individual. Then when they are ready, and they can tell us when they're ready, they go into a mediation session which is really the family session. The focus in that structured session is on

communication and negotiation. With our service we have a two and a half hour time limit to the mediation. The reason we have come up with that time is that the concentration span of the young person is less than that of an adult. In any case, mediation is pretty intensive and people can be worn down quickly. There is provision to run a number of sessions if it is necessary in order to cover all the issues, and there is no limit to the number of sessions that they can have. The follow up again is a bit different in that we're looking at individual follow up with each family member so that we can provide them with some resourcing. If there are issues that are still there, (for example, they might take their agreement home and it's not working, something has come up and it is not a happening thing) they may come back to mediation and refine that agreement. Or we can talk to them about what other things they might be able to do.

The one worker works through the whole processing as a constant, rather like the conference manager. Then, at the mediation stage you have a sessional mediator who comes in to work with the intake worker, so we are not losing that role modelling.

You may also have a situation where the other family members don't want to use mediation. In that case you resource them and you refer them. In resourcing them you work with them on conflict resolution options as well.

If it is the young person, you help them to consider questions such as: what can you do at home to help improve the situation? How have you dealt with them in the past? What are your choices, what are your options? In this way you can resource that young person to deal with the situation better at home and maybe to understand why the conflicts are happening. Similarly with the parents, if the young person doesn't want to come in, we can work with the parents and ask in their own case, "What can you do?". The principle is you can't force another person to change, but you can focus on yourself and you can do things differently to improve the situation. So there's provision to do that sort of work.

Accessibility of the service is one of the important principles of mediation. We're setting up a mediation service; we're dealing with young people and with parents. We've got two client groups. If you look at everything about the service it has to be targeted to the needs of those two client groups. The parents and young people have different needs. They see the world differently. So we have to think about that in everything we do and it really duplicates your work because it takes a considerable amount of energy. Take, for example, your promotional material, your pamphlets: do you use pamphlets? Pamphlets work with adults probably but do they work with kids, with young people? What is another way of getting to the young people? Maybe stickers, fridge magnets or things like that that are different, that are novel and that young people will be attracted to. But you try giving a sticker to an adult and see the way they'll look at you. So, in setting up the service you've got to think of your chief client group and work out different ways of making the services accessible to them.

Next, we need to think of a physical location and we want to maintain the perception of neutrality. Where are we going to put the service? Shopping centres? Young people hang out at shopping centres. How will the parents respond? They shop there. So that would be considered of mutual benefit. At Werribee, we have a school and a housing group, both involved in this project, so we could provide mediation at both venues. Let's consider the school situation first of all. When do parents go to school? When there's trouble. So if we set up a mediation at the school and they have been referred to the service from the student welfare coordinator what's going to be the perception of that parent and that young person?

If you're going to provide a service in the school you need a location that allows anonymity to the client. So what I've done out at Werribee is to provide the intake stage, the first point of contact, at the school. It's accessible to young people, it's easier for them to get to the worker. But we've put it in the library so they can get there without everyone else knowing that they're going there, so it's an anonymous type of location. The same thing happens with parents. They can come in and have that intake stage at the school but since

they're coming to the library, it's not as obvious as going to the main office area. But the mediation sessions are a bit more challenging. That's when you get them both together. So what we've opted to do is to actually provide the mediation sessions at a different venue so we're really getting onto neutral ground there.

Another issue is the housing group. We might be dealing with young people who have recently taken off from home and who want to use mediation to re-establish contact with their parents or to negotiate things like getting their belongings out of the house or setting up a time to visit their siblings. But if we provide the mediation at the housing group, the perception of the parents will be that we are supporting the young person. To get around that we need to find neutral venues. As a solution, we've found neighbourhood houses in the area to use as venues for those sessions.

Outcomes of mediations between parents and young people may differ. If the family comes to mediation early, say, within the first week of the young person moving out, it's seen as a temporary thing. Then they are likely to return home. If they have been out of the home for a long period of time and are getting used to living independently, and the family is getting used to having a bit of peace at home, it's harder for them to negotiate that return. A lot of families experience a sense of relief because they may have been fighting all the time, and now things are peaceful, they may say, "We can't go back to that!". You need to try and help them see that they don't have to go back to that chaos, that the young person can return home without the chaos. But its a very emotional issue.

There are three aspects to homelessness. It's not just about having a roof over your head; it's about access to financial support and emotional support as well. Maybe we can't negotiate them back into the house to have a roof over their head, maybe they're relying on the housing service for that, but perhaps we can negotiate access to some form of financial support, and emotional support so that if they do end up in trouble they can pick up the phone and talk to Mum and Dad or to their brothers and sisters. They don't actually have to live in the house with them. Where the Young Homeless Allowance is an option, the parents need to identify that the young person is homeless. The young person may choose to use mediation to talk about that issue; to talk about whether they do go back and if they don't go back how they are going to survive financially.

We don't believe that it is appropriate to use mediation to deal with cases where there's been a history of violence. The power imbalance is just too great. Normally violence will be disclosed at the intake stage and it's dealt with there. In that case, instead of recommending mediation, we work with that individual on that level, offering resources and referrals. If it does come out in mediation, then it doesn't necessarily have to be a crisis at that point. It depends on whether it's an ongoing thing. If the young person says, "I'm afraid to go home because I am going to get belted," then the mediators have a responsibility to step in there and say, "Well, it's our responsibility to make sure everyone is safe. We've said we're providing a safe environment and we'll organise for that young person to go into community care for that night." Associated with the housing group is an adolescent community placement program which involves the young person staying with a family on a short term basis. So the parents can be assured that the young person is going to be with a family, not living independently or on the street and we've got time to check out that safety aspect.

Another aspect of accessibility is the hours of operation of the service, taking into account school hours and work times. It is necessary to provide an after hours service so that no family members have to take time out of school or work.

In order to be used, the service has to have acceptability and respect from the users. Peer relations is the best method of promotion to get to the kids but if they don't like you or if they decide that they are going to hold something against you, basically in a school environment word spreads like wildfire. The intake worker needs to establish a relationship with the young people on another level outside the service so that they can be accepted as a

person. That is a big difference from our traditional neutral third party who hasn't had contact with the client but you're working in a close knit community here. So we are running conflict resolution skills classes in the hope that through those workshops they'll learn about our service, they'll learn some skills in conflict resolution and they'll learn about us.

The title of this workshop was 'Establishing a Youth Mediation Program', but that is somewhat misleading. The implication of calling it 'youth mediation' is that we're only dealing with the young person or that youth is the problem. It raises the point that you have to acknowledge that there are **two** clients, and there is a real danger that if you call the program "youth mediation" you imply that there is something wrong with the young.

Finally, in mediation the voluntary nature is really important and there has to be a desire for resolution. That has implications for the way we contact Party 2. The system that is fairly common is to send a letter off to Party 2 inviting them to contact the service. That is seen as being non-coercive and gives them a choice of coming without putting the pressure on. Some services ring Party 2 to come in. The danger with that is that you're catching them on the hop. You don't know who's around; you don't know if they can talk freely and they may resent your intrusion. I've even known of some services that have actually rolled up to the young person's house after seeing the parent. I have real problems with that. I think if we're serious about sticking to the principles of mediation then we've got to really look at our processes and be careful that we adopt processes that do promote these principles.

Whatever service model is adopted - and there is room for a variety of different models - if it is to be called a mediation service, it has a responsibility to adhere to mediation principles.

Rental Bond Mediations

David Syme

Director, Conflict Resolution Service, ACT

Sue Sheridan

Mediation Co-ordinator, Conflict Resolution Service, ACT

(*Note*: This paper, which formed the background to the workshop, was originally published in the *Australian Dispute Resolution Journal*, August 1993)

The ACT office of Rental Bonds was established in August 1991. The legislation provides for the mediation of disputes about rental bonds.

As far as the Conflict Resolution Service (CRS) is aware, the formal use of mediation in relation to rental bond disputes is unique in Australia. NSW has a tenancy advice service which plays a mediation role in relation to ongoing tenancies, but does not handle rental bond disputes. Several overseas countries, including New Zealand, do have tenancy mediation services which deal with a range of tenancy issues including rental bond disputes. CRS has had to develop its own processes for dealing with rental bond disputes, and this is still in the early stages.

PROCEDURES

Where the parties do not agree on the disbursement of the bond at the end of the tenancy, the Office of Rental Bonds refers them to CRS, who then invites them to attend mediation. Letters are sent to both tenants and landlords/agents at the same time. All parties are informed that they may use the Small Claims Court whether or not they decide to use the service. Contact details about where to obtain information about their rights and obligations under the Act is also provided. Some preliminary exchange of information may be required for the parties to make an informed choice about using the service.

If both parties agree to use CRS, assistance may be in the form of transmitting information or requests between the parties ('conciliation'), and/or in the form of a face to face mediation session.

Intake staff may engage in a considerable amount of telephone or written communication before and after arranging a mediation. Information about the dispute, referral for legal or other advice and the exchange of proposals are provided by staff to assist in the resolution of the dispute.

In all cases where the parties have accepted CRS assistance, the service attempts to follow through with negotiations until final Refund of Bond Claim forms are lodged or an application is made to the Small Claims Court.

DISPUTES REFERRED

138 disputes were referred between December 1991 and June 1992. 63% of these involved agents, 37% private landlords.

Amounts in dispute varied from very small amounts up to four figure sums. Frequently other tenancy issues were involved, such as re-letting fees, harassment and informal arrangements regarding use of facilities.

As well as the parties referred, there are often other negotiations taking place such as between tenants (group houses, separated couples, etc), agent and landlord, or principal and property manager. For example, an agent may attend a mediation, but will need to consult with the landlord before making a final decision.

OUTCOMES

56% accepted the assistance of the service, 22% through non face-to-face 'conciliation' and 34% through face-to-face mediation. 28% declined assistance and 16% were pre-resolved. Private landlords were slightly more likely to accept assistance than were agents (58% acceptance vs 47%).

51 mediation sessions were scheduled. In four cases, one party withdrew at late notice and in another four, one party failed to show up. Of those attending for mediation, 70% reached an agreement either verbally or in writing.

Follow-up indicates that for those attending mediation, 65% had formally settled their claims by the end of July 1992. This compares with 43% of conciliated cases and 17% of declined cases. Interestingly, those who failed to reach an agreement at mediation were almost as likely to finalise their claim as those who reached an agreement (62% vs 66%). It seems that many parties resolved their disputes following the mediation even though they were not ready to reach an agreement at the session itself.

As at the end of July, none of the mediated cases had proceeded to a Court hearing. Four disputes had gone to Court for determination. Two of these were 'declined' cases and two were 'conciliated'. It seems that those who attended mediation were nearly four times more likely to reach final agreement than those who declined, regardless of whether agreement was reached at the mediation session.

It is possible that there were some other differences between those who decided to use mediation and those who declined. However, the service has found no major obvious differences between the two groups.

COMPARISON WITH OTHER TYPES OF DISPUTES

Generally rental bond mediations are seen as quicker and less emotional than other types of mediations, but they do have difficulties of their own.

Ideally mediation attempts to find a 'win-win' outcome through principled negotiation. However, negotiations about rental bonds are generally about dividing up a fixed sum of money. They therefore tend to take the form of distributive bargaining ('cutting up the cake') rather than integrative bargaining ('making the cake'). Parties' attempts to intimidate, delay or bargain in bad faith have been a feature of a few mediations. An early stop to the mediation has been required on some occasions.

Many parties approach the mediation without any willingness to compromise or negotiate. Ironically, disputes over smaller amounts can be more difficult to resolve than those involving larger sums. Since the refund of most of the bond has been agreed to and refunded, the residual amount may be quite small. For example, a tenant and an agent were disputing an amount of $15 - one day's rent. As both thought they were in the right, they were determined to pursue the matter in Court as a matter of principle!

Negotiating advantages are more mixed and complex than first expected. While tenants may require funds quickly, they often have more time available to spend in mediation or in Court proceedings. For commercial reasons agents have less time available for mediation. Agents tend to have more information, such as detailed records and past experience, while private landlords tend to be the least informed of all groups. As mediation involves negotiating with the other party rather than persuading the mediators of the correctness of one's position, legal knowledge or detailed record-keeping does not represent a significant advantage. It is important, however, that all parties are informed about their legal rights and obligations.

Bond disputes represent the end of a tenancy rather than the negotiation of future arrangements. Hence there is often little motivation to ensure future goodwill.

The involvement of real estate agents provides a circumstance different to most other mediations. Some agents have trouble defining their role in the negotiation and mediation process. Some see themselves as the 'arbitrator' who decides the correct amount of bond owing to the owner and the tenant. Others see themselves as the 'go between' between tenant and owner, and others as clearly representing the owner's interests. In spite of these difficulties, mediation does seem to play an important role in the resolution of rental bond disputes.

SUMMARY AND RECOMMENDATIONS

While it is too early to draw definite conclusions, the mediation of rental bonds does appear to have a valuable role in helping to resolve disputes. The ability to discuss issues in a neutral and structured setting, and with confidentiality ensured, greatly increases the likelihood of the dispute being resolved at an early stage. This seems to be regardless of whether or not agreement is reached at the mediation itself.

Mediation is not a panacea for all rental bond disputes. it is excellent for some disputes, satisfactory for many, but is quite unsuitable for others. It should therefore continue to be an optional rather than a compulsory step.

Speedy access to arbitration, such as through a Court or a tribunal, is also required for those who are unable to resolve their disputes in other ways. Formal linkages between the different agencies involved in the resolution of rental bond disputes need to be developed further.

Community education for tenants, agents and private landlords is essential. Some clarification on issues such as 'normal wear and tear', termination of lease penalties and other tenancy issues would help to avoid many of the disputes occurring about rental bonds.

The application of mediation to ongoing tenancy disputes, such as repairs, rentals, quiet enjoyment, leasing and sub-leasing disputes should be further developed. Mediation at an earlier stage of some tenancies could prevent later disputes about bond money.

The scheme introduced in the ACT for handling rental bond disputes is a significant innovation. It does not represent a complete response to dealing with landlord/tenant conflicts but is able to play a valuable complementary role to other facilities set up to resolve disputes.

Tenancy Dispute Resolution

Workshop Presenter

David Syme

Conflict Resolution Service, ACT

Workshop Reporter

Margaret Maljkovic

NSW Department of Housing

BACKGROUND ABOUT THE CONFLICT RESOLUTION SERVICE, ACT

The Conflict Resolution Service mediates a variety of disputes. Since the A.C.T. Assembly introduced legislation in 1991 that provides for the mediation of disputes about Rental Bonds, the service has seen an increase in rental bond mediation. Rental bonds are held by the A.C.T. Office of Rental Bonds until both parties agree on their release. If the parties do not agree fully on the release of the bond, they are referred to the Conflict Resolution Service by the Office of Rental Bonds. The parties are not bound to accept mediation, but it must be offered before they are permitted to proceed to the Small Claims Court.

Research done between December 1991 and June 1992, showed the Service had a 56% rate of acceptance of mediation. Of the parties accepting mediation, 70% reached an agreement. The amount in dispute did not appear to have an impact on whether the parties reached an agreement or of the degree of conflict.

CONTENT OF WORKSHOP

David Syme's tenancy dispute experience is primarily rental bond disputes, therefore the workshop focused on the issues arising in these disputes.

There were two role play simulations in the workshop, involving all participants, to generate discussion and analysis of the issues arising for the parties in dispute.

The following issues or observations arose.

Simulation 1

When signing a lease, the tenants are handed a contract whose nature is already fixed. It is a set of conditions imposed on them over which they have no power. Their choice is either to accept it, or not to move in.

Another point raised was that a parent/child relationship often develops between tenant and agent where the agent takes on the authoritative role. The agent may be condescending towards the tenant, because of the power relationship.

Simulation 2

There were two scenarios involving a bond dispute. In Scenario 1, the bond was held by the agents. In Scenario 2, the bond was held by the Rental Bond Board. In both scenarios the tenants and the agents both thought they were entitled to the bond.

Scenario 1: The agents hold the bond

The agents have a lot of power in this situation, because they hold the bond and the tenants have to ask them for it.

- **Tenants' feelings/perceptions**

  When asking the agents for the bond, the tenants felt they had to plead for the bond because of the unequal balance of power.

  They felt vulnerable and conscious of the power imbalance. They felt that the agents had abused the power relationship and the tenants' trust.

- **Agents' feelings/perceptions**

  The agents felt confident and powerful in the situation, because they held the bond. They felt they did not have to compromise.

Scenario 2: Bond held by Office of Rental Bonds

The parties had mediation to resolve the dispute

- **Tenants' feelings/perceptions**

  The tenants felt they had bargaining power and were willing to compromise.

  The tenants were willing to resolve the dispute and wanted to discuss the issues.

- **Agents' feelings/perceptions**

  The agents did not feel as confident and felt they had to 'play up to' the tenant.

  The agents felt annoyed at having to spend time in mediation because:

  - They were not being paid for the time;
  - They were too busy to spend a lot of time.

  The agents preferred to go to the Tribunal, rather than mediation because:

  - A decision could be made, the outcome would not be their responsibility;
  - Mediation was considered 'touchy-feely' and the agents did not want to discuss feelings with the tenants.

  The agents were also concerned about the impact on their contract with the employer, if there was an unfavourable outcome.

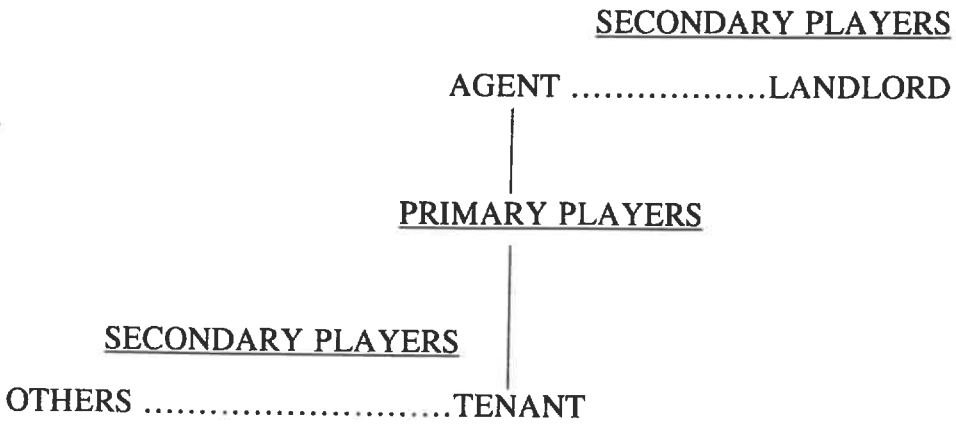
  The tenants have an emotional investment in the situation because the tenancy is their home, whereas the agents see it as a business arrangement.

The role of mediation and the bond being held by a neutral body has the effect of equalising power between agent and tenant.

ISSUES/PROBLEMS THAT ARISE IN MEDIATION

There is a complexity of relationships in mediation, because of secondary players on both parts. On the agent's there is the landlord in the background, while the tenant may have co-tenants or partners, also having an investment in the outcome. When mediating, the secondary players need to be considered.

DIAGRAM OF RELATIONSHIP



The agents have a central role because they act on behalf of the landlord and are advocating for the landlord. The agents also influence the relationship between the tenants and the landlord.

Delays can occur, because the agents may not have the authority to accept an agreement. The agents may deliberately use their limited authority and claim they need to discuss with the landlord as a delay tactic, if the outcome does not favour them.

Some agents see mediation as a way of getting what they want. By being nice to the tenant things are worked out better for them than they may be in Court.

If agents use the Service frequently, they may become familiar with the mediator and demonstrate their familiarity in the session, by asking personal questions, etc. This can lead to the tenant doubting the neutrality of the mediator.

STRATEGIES

- Be aware of the various players operating in the mediation.
- Establish the extent of the agents' authority and to what extent they can accept an agreement on behalf of the landlord, prior to the commencement of mediation.
- Describe the role and process of mediation clearly. Be sure the tenant is clear about it, particularly if the agent has a lot of mediation experience.
- Rotate mediators, to alleviate the problem of familiarity with agents.

The Potential of Dispute Resolution Skills for Landcare and Other Community Conservation Groups to Solve Land Management Problems

Peter Curry

Peter Curry and Associates, WA

BACKGROUND

Environmental action by rural communities to address complex problems in land degradation and its management throughout Australia has been focused by the Landcare movement over the past eight years. Landcare has grown exponentially (1) at a time when most rural sectors experienced unprecedentedly poor terms of trade and equally unprecedented pressures on their social fabric. Early achievements of many Landcare groups have been phenomenal (1,2). In 1992/3 in WA alone, an estimated 3.5 million trees were planted on farms and 13,000 km of fencing erected to protect waterways, degraded areas and remnant bush from grazing.

As local forums in which neighbours share the replanning of local land management practices, they have had most success where communities have few industries, few land uses and common economic interests, such as in the wheat & sheep-farming districts of WA.

Most of the 1400 or so groups Australia-wide are less than 3 years old and remain in what can be regarded as a dependent establishment phase. Some longer-established groups have impressive levels of operational and community infrastructure while remaining substantially funded through Government supports. Others have successfully obtained their main operating funds through support from local business.

The pattern of development for landcare groups nationally has considerable variation between the states, but has been led by state government agencies throughout. In Western Australia, the formation of landcare groups has been achieved with remarkable uniformity through provisions (under the state Soil and Land Conservation Act) for establishing land conservation districts (LCDs)(3). LCD groups require Ministerial approval for their committee membership and continuity, a statutory Commissioner to endorse their operations, and Federal plus some State funding for much of their early activities. Groups which face complex planning and management scenarios (diverse communities, more intensive land use and subdivision, competing non-agricultural land uses and higher levels of public interest) have mainly fared poorly in terms of starting up, securing community support or receiving government assistance.

PATTERNS OF CONFLICT AND GROUP MANAGEMENT

Many established Landcare groups have reported conflicts sufficient to constrain progress or threaten their coherence. In some more closely settled and diversified communities, various types of unaddressed conflict between land users and government departments have been sufficient to prevent group formation (4).

Concerns over perceived controlling and competitive roles of government agencies, and trust issues, have been identified within such conflicts (4,5,6,7). Elsewhere, government-resourced regional catchment projects have addressed complex land and water management problems with great success, through building community participation to meet objective environmental standards. In so doing they have chosen to avoid identifiable government structures and programs based on particular disciplines or industries (5,6).

Groups' abilities to plan from their needs, differences and concerns have often been enhanced by group facilitation techniques (8). In most instances, facilitators have been young land science professionals contracted through Federal funding. They have been trained and directed to work alternately in facilitatory, organisational, technical advisory and leadership roles within the groups, in order to achieve both agency (employer) and group (client) goals. Rejection of the facilitation process has sometimes occurred, particularly when some groups have suspected that the outcomes of the process were not free from agency or technical expectations. In spite of such unpromising circumstances for third party processes, group facilitation has often been reported as being successful, at least to the point of defining aims and bringing out some underlying issues. Professional facilitation training and a community willingness to tolerate unfamiliar processes, particularly when groups were truly ready to devise their own goals and plans, have been vital (1).

Of concern to some is a perception that the basis of community participation in Landcare groups has remained inequitable where broadacre farmer members or other influential participants or industries are seen to have overriding influence in diverse communities. A recent survey also suggests that LCD committees mostly operated with under-representation of women and through stereotyped gender roles (9).

Current controls and allocation mechanisms for public funds and agency programs discourage established groups from seeking incorporation, independence, and permanence. In WA, status other than the LCD is perceived by some as a loss of priority rights to funding opportunities and technical services controlled by the agencies.

FUTURE OPPORTUNITIES

The 'stronger' forms of third party assistance to groups, such as using mediation to resolve valuable deep-rooted internal or external conflicts, have rarely been used. Federal agencies (10) have shown some interest in the potential of mediation in environmental problem-solving. To solve multi-party environmental management problems within diverse communities, it may be advantageous for local groups to adopt more permanent incorporated constitutions which heighten community identity rather than the agency alignment of their technical activities.

Land conservation(=Landcare) groups in mixed broadacre rural, special rural and industrial/residential communities will then be better placed to be either formed initially or, at an opportune time, reconstituted and consequently strengthened, rather than being threatened, by the focus of wider community values. Such independently constituted groups can account and report on their use of any government moneys, while government agencies would be relieved of any need to monitor and assess group behaviour and activities as measures of success for their own programs.

Such independent groups could give useful periodic public feedback on their incremental achievements and give constructive criticism on the value or quality of government agency services they have experienced. They could develop truly innovative goals and programs appropriate to the district. They could seek high levels of co-operation with local government, and generate sponsorship income and local endowments to secure the financial and administrative supports they need, for the long-term nature of their district task in conservation and management.

They could pursue new problem-solving skills, eg. in:-

- problem analysis
- conflict resolution
- mediation
- co-operating through specific agreements (eg. with bordering drainage catchments and their neighbour groups)
- administration of voluntary organisations
- group inputs to rural planning
- community consultation
- team-building
- & multi-cultural involvement (eg. districts with strongly ethnic horticultural communities).

Associated state government agencies operate through policy and executive decision rather than empowered problem-solving, so provide few sources of appropriate skills. Collaborative and uncontrollable decision-making processes generally are a source of conflict within state agencies, whose traditional 'extension' services have been based on a retained technical expertise which delivers management recommendations to individual 'clients' or interest (industry) groups.

Landcare groups which continue investigating and developing independent but radically collaborative approaches, and building community confidence in them, have the capacity to improve their quality of life by co-operatively revitalising their land, water and social environments. They will also be signposting changes required in the nature of the government services they experience and the assumptions about the relationships between communities and governments that underlie them.

REFERENCES

1. Campbell, A. 1992. *Landcare in Australia. National Landcare Facilitator Third Annual Report*, November 1992.
2. Roberts, B and Schultz, M. 1992. *Runs on the board - A Stocktaking of Progress and Constraints in the Australian Land Care Movement 1988-1992*, Land Use Study Centre, University of Southern Queensland, Toowoomba.
3. Riches, J.R.H. and Robertson, G.A. 1992. *Land Conservation Districts In Western Australia. Proceedings of the 5th Australian Soil Conservation Conference*, Vol. 8, pp. 27-8, Department of Agriculture, Perth.
4. WA Legislative Assembly. 1991. Select Committee into Land Conservation. *Final Report*. Perth.
5. Carr, A. 1992. *Community participation in water quality monitoring: the case of Water Watchers. Centre for Resource and Environmental Studies Working Paper* 1992/6, The Australian National University
6. Hollick, M. and Mitchell, B. 1991. *Integrated catchment management in Western Australia: background and alternative approaches*. Report ED 606 MH, Centre for Water Research, University of Western Australia.
7. Scarisbrick, B. 1992. 'Landcare - the road ahead - how to avoid getting bogged'. in (2) pp.122-130.
8. Rush, J. 1992. *A Review of the Efficiency of Landcare Group Facilitator Projects Part One: Facilitators and Co-ordinators*. Land Branch, Land Resources Division, Department of Primary Industries and Energy, Canberra.
9. Curtis, A., Keane, D. and Delacey, T. 1993. *Land Conservation District Committees, Western Australia: An Evaluation Using LCDC reports*. Preliminary Report, The Johnstone Centre, Charles Sturt University, Albury, NSW.
10. Boer, B.. Craig, D., Handmer, J., and Ross, H. 1991. *The Potential Role of Mediation in the Resource Assessment Commission Inquiry Process*. Discussion Paper no. 1, Resource Assessment Commission, Canberra.

Sustainable Development and 'Landcare': Dispute Resolution for Communities

Workshop Presenter

Peter Curry

Peter Curry and Associates, WA

Workshop Reporter

Diana Day

NSW Department of Water Resources

This well attended workshop got underway with an unusual start: a request that each member of the group state one thing they had heard about Landcare.

Responses included:

'Quite a lot'
'How do you define Landcare?'
'I think I know, I heard a lot'
'Don't know!' (suggested by a Chair of a Landcare group!)
'I heard a bit - because it's very important'
'I came to find out'
'It's community based'
'I've heard about it - it's a fringe activity'
'I know nothing. Is it a generic term?'
'I think I saw an ad of children planting trees'
'It works'
'There seem to be men only in Landcare'
'It addresses degradation in rural areas'
'It's ecological health care'
'I know from Lisa Curry and the Uncle Toby's ads'.

As many of the workshop participants were from quite diverse community mediation areas the comments are perhaps not surprising.

Following these revelations Peter Curry summarised some key points on Landcare:

- It evolved as people increasingly recognised that land degradation problems reached outside the farm gate.

- The National Soil Conservation Program started funding these groups directly and indirectly.
- That in 1988/89 a joint Australian Conservation Foundation/National Farmers Federation petition led the Federal Government to cook up the National Landcare Program.
- That Landcare funding was really only in dollar terms enough to pay for a 9 km ring-road around Melbourne.
- Peter Curry saw Landcare as an extraordinarily catalytic process in solving environmental problems in Australia.
- There are 1400 groups in rural Australia (with big 'holes' in cities).

Peter Curry's conclusions were that Landcare groups:

- were successful in simpler situations
- were not empowered - were tied to State agencies who called the shots
- had great opportunities for evolving to a 'second wave' of independent groups in more diverse districts to redress the big environmental and social issues in rural Australia
- had no mechanisms to resolve high level conflict. Adapting ADR skills of participative planning and problem solving will impact on political processes. ADR had great potential. People also needed to be made more at ease with collaboration. --generalisations were risky.

At this point in the workshop participants were asked to read a short 2 page paper on *The Potential of dispute resolution skills for 'Landcare' and other community conservation groups to solve land management problems.*

After reading the paper the group was re-formed into three sub groups, each to tackle and answer one of three questions. The idea was that each of the groups brainstorm a solution to one question on ADR, public involvement and Landcare.

These three questions each had a theme. They were:

THEME 1: INVOLVEMENT (Group 1)

> **By what means could participation and involvement of rural and semi-rural communities be broadened in Landcare?**

THEME 2: COMMUNITY GOVERNMENT (Group 2)

> **What operating and negotiating principles might be useful for Landcare groups in developing relationships with government agencies?**

THEME 3: GETTING ADR AND OTHER SKILLS (Group 3)

> **What means are available for rural and semi rural groups to obtain group problem-solving and conflict resolving skills?**

(an offer of group 4, SOMETHING ELSE? was not taken up)

A modest scrabble ensued as people divided themselves into 3 units. But there were still questions before we began to tackle formal themes.

Some of these were:

> Is the country any different from the city in terms of co-operation amongst individuals and groups? (mixed responses)

What is the value of being in a Landcare group?

Why would people be motivated in the structure of Landcare? Why don't people join it?

Answer: (Peter Curry):

The structure of Landcare does turn people off. There were local perceptions too. Control by State government is a major impediment in local multiple use situations.

Government tends to say we need regional structures and Landcare groups. Some say we can't cope with this administration. There are benefits in working with neighbours and sharing resources.

Landcare was less bureaucratised in NSW (a NSW Landcare Chair).

The brainstorming proved amazing, at least in Group 3 where your reporter sat. Ideas came thick and fast. There was no time to waste in the ten minutes allocated and the final products reflected diverse and thoughtful contributions.

BRAINSTORMING RESULTS

THEME 1: INVOLVEMENT

By what means could participation and involvement of rural and semi rural communities be broadened in Landcare?

- Involve schools more both through students and through them, the parents. tree planting/fencing. ceremonies, eg tree dressing, community drama encourage supporters, let doubters watch.
- Holidays: develop ecotourism and leisure involvement, eg visits by the community to a fertility site within a sand-dune area.
- Ask people how they want to be involved, use extensive networks, identify other interest groups, eg clubs. get sponsorship and perhaps employer support. use employment schemes.
- Presence at agricultural shows, carnivals, cultural events (include Aboriginal groups) and fun events.

THEME 2: COMMUNITY GOVERNMENT

What operating and negotiating principles might be useful for Landcare groups in developing relationships with Government agencies?

- Assess problems and get help from helpful bureaucrats.
- Set priorities and identify needs.
- Lobby through local government and local members. There should be a closer connection to local government rather than directly lobbying institutions for funds.
- Talk to other groups to gain independence.

THEME 3: GETTING ADR AND OTHER SKILLS

What means are available for rural and semi-rural groups to obtain group problem solving and conflict resolving skills?'

- Set up a conflict resolution network.
- Train groups in brainstorming.
- Involve the CWA.
- Establish new meeting rules. No standardised structures. Assign roles of facilitator, scribe, timer, chair.

- Each Landcare group do ADR training for a percentage of members.
- Survey other people in the community to see what processes they use for this, eg CWA, church.
- Have local media report on new conflict resolution methods, results in the area or elsewhere.
- Get information on outside case studies.
- Have a Landcare information section in local newspapers.
- Work through processes carefully before solutions - get outside facilitators and iterate solutions with local group first.
- Encourage the group to report more adequately to local community. Make all they do transparent and open.
- Make access to conflict resolution skills more easy, ie at local schools, universities.
- Increase awareness of external study potential.
- Do schools reflect the Landcare issues?
- Cross fertilise with all other Landcare groups in terms of process.
- Have an ADR 'dog and pony show' to travel around Landcare groups.
- Show Landcare groups the bigger picture, ie through State/national/regional conferences.
- Structure agendas to reflect ADR processes, ie generate options and solutions.
- Analyse more the long term impacts of Landcare work. Does it reduce conflict?
- Encourage skills that deal with diversity.
- Initial Town Hall meetings needed.
- Get local industry to pay for media on environmental management and local Landcare initiatives.

The workshop went quickly and all participants seemed satisfied with their involvement. A lot was learned about Landcare and the diversity of backgrounds gave significant texture to the recommendations.

PANEL DISCUSSION

Negotiating Changing Concepts of Family Units and Relationships

Eric Stevenson

Unifam Family Counselling and Mediation Service, NSW

Anne Henderson

Department of Social Security

Sr Bernadette Curtin

Centacare, NSW

Robert Vial

Lawyer/Mediator, Victoria

Issues, Needs and Options in Mediation with Differing Family Constellations

Eric Stevenson

INTRODUCTION

The International Year of the Family 1994 will give all family mediators an opportunity to review their terms of reference. Our common theme is to help with the formation and enrichment of the family as a functional unit in the Australian community. If the full impact of our contribution to the coming year of family celebration is to be achieved it will be necessary for us to be clear as to what particular types of family institutions are being celebrated and, therefore, how our skills can best be applied on their behalf.

DEFINITION OF FAMILY

Controversy already exists as to what constitutes the human family unit. But it is the parents and parent figures of this generation themselves (and their charges) who are the ones who are rightfully drafting the definition of family for today. It is merely our responsibility as mediators to affirm what resources they possess and what action they are taking to care for their dependent members.

I would, therefore, like to present a definition which encompasses all cross-generational nurturing systems of goodwill. The word family projects an image of an intimate, interdependent relationship involving one or more responsible adults who have the capacity to care for themselves and each other, to include dependent persons in the caring group and to provide for their varying needs. The dependents may be children (natural, adopted, orphaned, foster, step or of unknown parentage) and frail aged and handicapped persons, unable to cope in certain areas of their lives without the wiser, stronger, more resourceful, more stable parenting entity.

Such a family focus will act as a corrective to mediators preoccupied with particular issues and assist them with the recognition of a wider range of needs and options for resolution.

THE DIFFERING FAMILY CONSTELLATIONS

Of Australia's four and a half million families, just over two and a half million have dependents - see Attachment (a). Of these, 74% are couple families, 1% are single male parent and 13.5% are single parent families. Single parent families are increasing - see Attachment (b). The remaining 10% contain an important range of innovative family systems which also demand our attention.

The NSW Law Reform Commission's report on de facto relationships concludes that 4.7% of all couples in Australia live in a de facto relationship. This is an increasing percentage which is matched by the dramatic increase in ex-nuptial births during the last 20 years - see Attachment (c).

Over 800,000 Australian children are involved in separating families. In 1991, the number of divorces reached the 1981 peak which was the greatest incidence since the introduction of the Family Law Act - see Attachment (d). Of these 54% involved children under 18 - see Attachment (e).

The Patterns of Parenting Discussion Paper (Family Law Council) reminds us that 'it is uncommon for children to have no step-parents several years after separation - although their step-parent is likely to be living with the non-custodial parent. This is because mothers are less likely than fathers to re-partner and children are more likely to live with mothers'. Take note, however, that a significantly high proportion of lone parents over 45 are males - see Attachment (f).

The children in recently remarried families tend to report receiving 'little general support' from their new step-fathers. There is almost universal agreement in research studies that 'a continued relationship with **both** natural parents is generally beneficial for children, but visits frequently decrease over time'. A recent study has found 'an association between the non-custodial parent's re-marriage and decreased visits as the new family competes for the access parent's time and attention'. 'Loss of contact between children and fathers in the early post-separation period is likely to become permanent'. (*Patterns of Parenting after Separation*, Family Law Council, 1991). Thus the pattern is emerging of a child in a blended family in which there is little support from a male parent figure.

A consideration of these new but less than radical family formations raises a number of topics for discussion.

THE ROLE OF THE MEDIATOR

Emilia Renouf (*Australian Dispute Resolution Journal*, November 1992) and others have drawn attention to the use of therapeutic mediation which is one way of addressing the apparent deficiencies and pathologies in family systems. Consideration could also be given to the advantages of retaining a strictly mediatorial role and practising a collaborative model with other specialists as and when required. In a more preventive role, mediators could give attention in dealing with focussed issues (such as custody and access) to the generation of options intended to counteract negative trends (e.g. loss of interest of visiting parent). This may include the careful involvement of other family members in the negotiation process, together with a more holistic goal orientation.

THE FULCRUM FOR DECISION MAKING IN THE CREATION OF PARENTING PLANS

We note Recommendation 5 in Appendix 1 of the Family Law Council's comments on the Operation of the Family Law Act (*Joint Select Committee Report*) that 'a parenting plan should be set out in a manner which allows parents freely to decide the level of responsibility they intend to adopt for their children after separation'. It was Professor John Haynes who first drew our attention to the audacious tendency in Australian family conciliation practice to take the right of decision making away from the parents. We should seriously consider giving back to parents the right of deciding what is best for their child. This will involve mediators in helping parents and surrogates to negotiate the status of executive functionaries within their families and the degree to which adolescents, step-parents, grandparents, elder siblings and juniors share those executive functions in various areas of family activity and at various times.

THE CREATION OF A RELATIONSHIP ORIENTED SETTLEMENT

In the survey conducted by the Institute of Family Studies on reasons for deciding to separate - see Attachment (g) - 73% of the parties gave 'relationship problems' as the cause of breakdown. This overpowering evidence from clients themselves should drive us to discover ways in mediation of replacing their former intimate dysfunctional association with a workable business arrangement (see Ricci's model presented at the UNIFAM workshop in 1989). A conscious emphasis upon their need to communicate continually about their growing children, and an inclusion of creative options for maintaining a business-like contact with each other are worthy of consideration.

In this regard mediators might also look again at the suitability or otherwise of applying strategies and models which may increase misunderstanding and hostility. The imprudent use of caucus is an example of introducing procedures which may be counter-productive for family unity. While it is useful in situations characterised by suspicion and fear (ie of one of the parties), caucus is a potentially intrusive model in the kind of communicating and relating which characterises an ongoing association between two persons committed to a dynamic joint parenting agreement.

THE APPROPRIATE USE OF LANGUAGE

The Joint Select Committee on the Family Law Act recommended no changes in the custody/access terminology. The Family Law Council's commentary substitutes the word **'care'** for use in drafting parenting plans. Even if the revision of the Act still leaves us with the antiquated terminology, there is every reason immediately for all mediators to adopt the less divisive and more descriptive wording. Win/lose words which are not native to the family's communication patterns are not conducive to the honouring of agreements.

FLEXIBILITY OF ARRANGEMENTS

The Family Law Council recommends a parenting plan format which allows for 'maximum flexibility' to meet the changing needs of the children and the parents. Skilful inclusion of such options will help to preserve the life of the separated family even where the agreement is ratified by the Court.

PREVENTIVE NEGOTIATIONS FOR FAMILY ABUSE

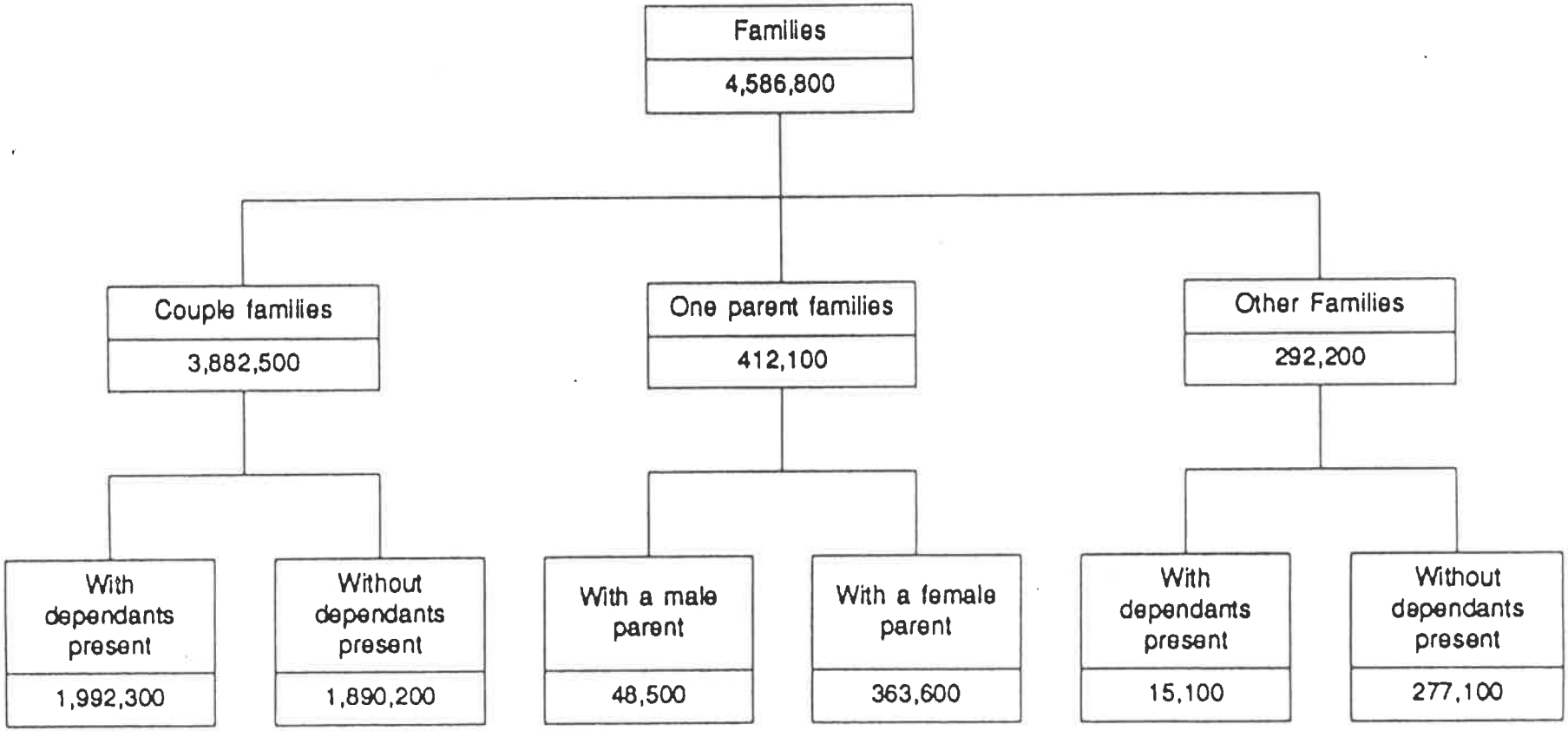
Suspected abuse or neglect of children reported to the Department of Community Services has ranged around 16,000 cases per year in recent times. Approximately 50% of female victims are killed by spouse or de facto spouse compared with approximately 10% of male victims. These figures are a solemn warning to mediators not to mediate abuse of any kind and to have set in place well framed domestic violence policies. It is possible, however, to incorporate in parent planning and family formation agreements rules of behaviour which will act as a guide to both children and parents in forbidding the use of violence to settle family fights and the abuse of less powerful family members not protected by the traditional incest taboos of a fully biological family. Margaret Newman writes helpfully about negotiating intimacy between step-siblings and between step-parents and children (*Step-Family Realities*, Doubleday, 1992).

SUMMARY AND DISCUSSION STARTERS

In this paper I have raised the question of family definition and thus the extent to which legal, moral and social issues distract family mediators from supporting families of a different shape as functional units in society on their own terms. The emergent patterns of family living have been illustrated with reference to ABS tables and other research. This was done with a view to restoring autonomy in mediation to families of all kinds and in helping mediators to adopt a more preventive role in option generation than merely obtaining a written agreement. The adoption of strategies to improve a good ongoing working relationship between separated parents has been encouraged. This included reference to language used in agreements, flexibility of arrangements and the incorporation of family norms for the protection of dependents in changing family units.

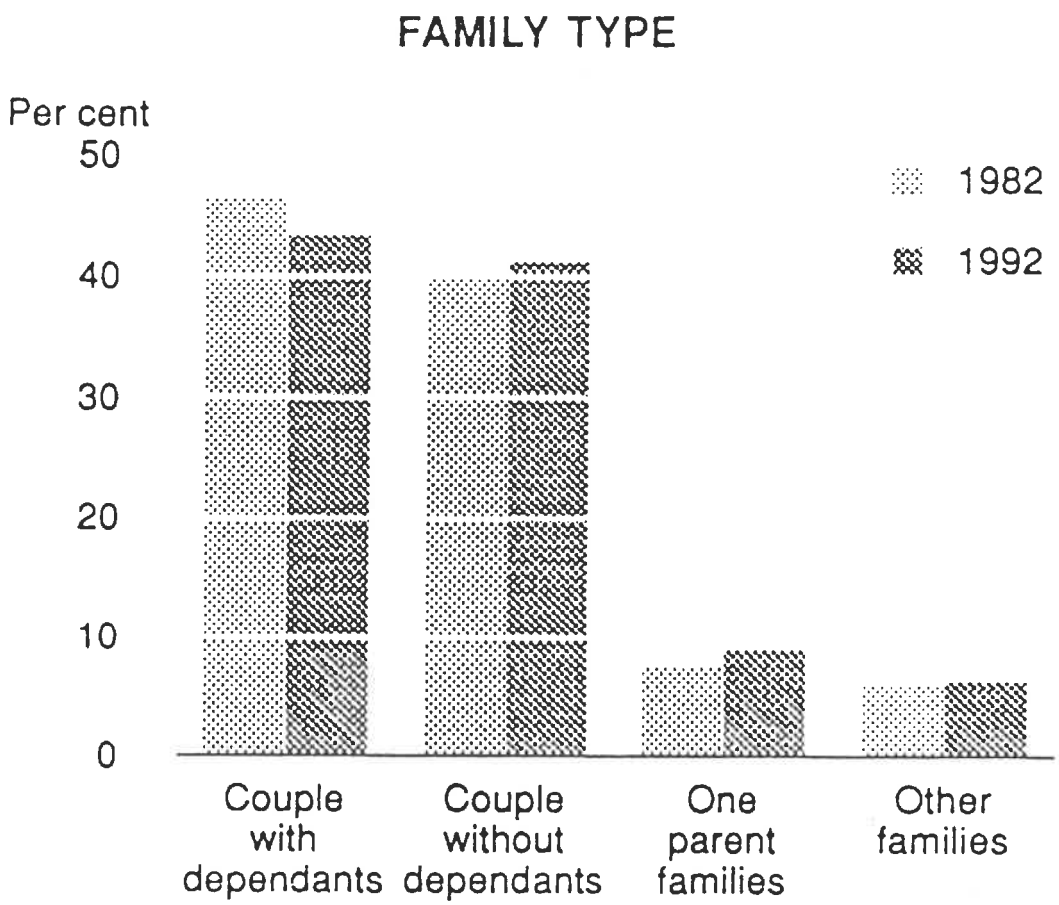
ATTACHMENT A

AUSTRALIAN FAMILIES, JUNE 1992



Source: Labour Force Status and Other Characteristics of Families, Australia, June 1992 (Cat. no. 6224.0)

ATTACHMENT B



BIRTHS

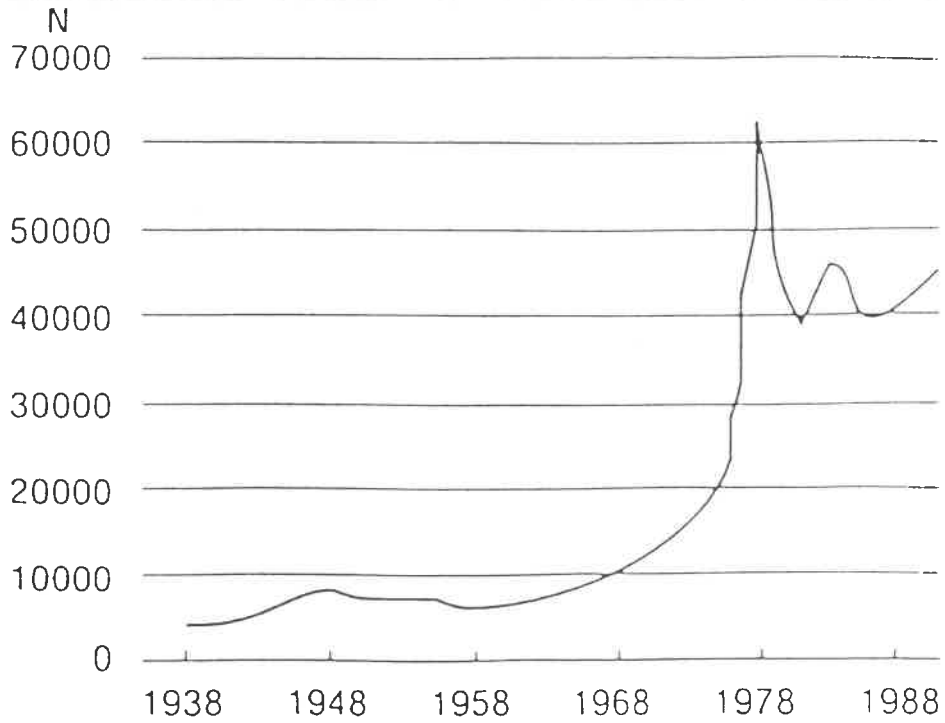
	Total births	*Proportion of births that were ex-nuptial (per cent)*	*Proportion of ex-nuptial births with paternity acknowledged (per cent)*
1971	276,361	9.3	n.a.
1976	227,810	10.1	n.a.
1981	235,842	13.2	60.5
1986	243,408	16.8	70.6
1991	257,247	23.0	79.5

n.a. not available

Source: Births, Australia (Cat. no. 3301.0)

ATTACHMENT D

Figure 1 *Number of Divorces, 1938 to 1991*



Sources:Vamplew,W.Ed. Australian Historical Statistics and ABS. Divorces Australia (CAt. No 3307.0).

ATTACHMENT E

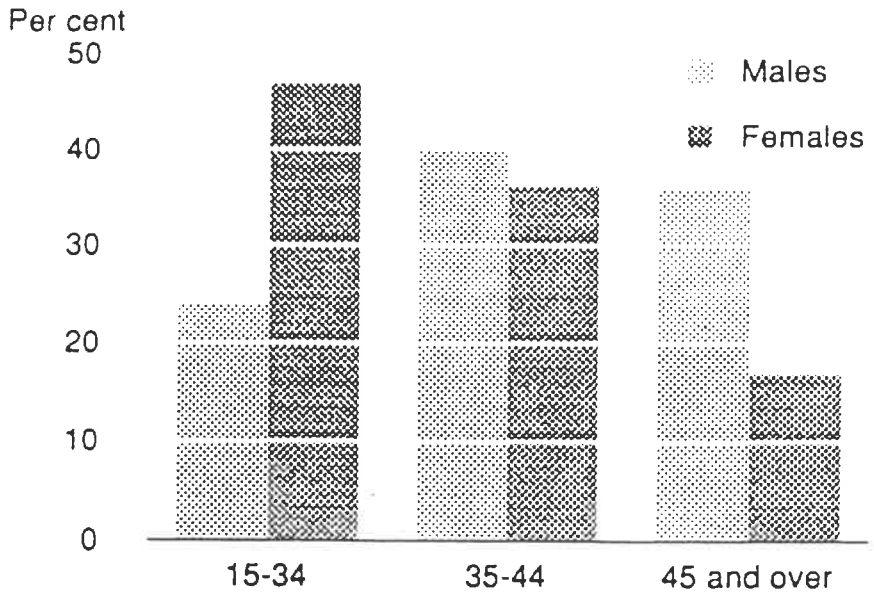
Table 3 *Divorces with children aged less than 18 years*

Year	Total No. divorces	No. of divorces with children	% of divorces with children	No. of children (under 18 yrs) involved in divorce
1986	39,417	23,530	59.7	45,231
1987	39,725	23,293	58.6	44,050
1988	41,007	23,585	57.5	44,395
1989	41,383	22,874	55.3	43,317
1990	42,635	23,707	55.6	44,913
1991	45,630	24,726	54.2	46,696

Source: Australian Bureau of Statistics, Divorces, various years.

ATTACHMENT F

LONE PARENTS: AGE DISTRIBUTION BY SEX, JUNE 1992



Source: Labour Force Status and Other Characteristics of Families, Australia, June 1992 (Cat. no. 6224.0)

ATTACHMENT G

Table 2 *Reasons given by men and women for first deciding to separate*

Reasons	Men %	Men n	Women %	Women n	Total %	Total n
Relationship problems	44.2	(38)	36.5	(35)	40.1	(73)
Grew apart	7.0	(6)	8.3	(8)	7.7	(14)
Things wouldn't change	26.7	(23)	28.1	(27)	27.5	(50)
Infidelity	30.2	(26)	22.3	(21)	25.8	(47)
Personality (alcoholism, violence)	2.3	(2)	28.1	(27)	15.9	(29)
External pressures (work, in-laws, illness)	8.1	(7)	6.3	(6)	7.1	(13)
Other	9.3	(8)	14.6	(14)	12.1	(22)

Source: Institute of Family Studies Annual Report 1982-83.

Changing Services for Changing Families

Anne Henderson

As a social worker with the Department of Social Security I see people of all ages, from all kinds of families. The point at which I see them often involves some kind of change in the family structure that has left one member of the family in particular needing income support. I thought that in my short address today, I'd like to concentrate on two particular client groups that I see quite often: homeless young people and sole parents who have recently separated.

Most of you will be aware of the controversial nature of the social security payment called the Young Homeless Allowance. This is a payment to assist young people under the age of 18 years who are unable to live at home. To determine whether they meet the criteria to receive the payment, social workers must first listen to the young person's story and then contact both the parents to hear the other side of the story.

Since its introduction in 1986, the criteria for payment has included situations where a young person is not allowed to live at home under any conditions (that is, they have been thrown out by their parents), or where it is unreasonable for them to live at home because of sexual abuse, domestic violence or other exceptional circumstances.

In 1992, however, an extra category of eligibility was introduced. We can now also consider whether there is a history of severe domestic disharmony. From my understanding, this addition came about because there were increasing numbers of young people presenting with a complete breakdown in the family relationships, often after a new blended family had been created and the young person and the new step-parent had been unable to negotiate a safe, workable relationship.

We could probably suggest many reasons why this might happen. There may be difficulties in handling the feelings that arise as the natural parent forms a new relationship. There may be a clash between the previous family rules and expectations and the new family life. There may be intrusive step-parenting behaviours or there may be a clash with this adolescent stage of development and the sexuality inherent in the formation of a new family unit.

Many of the young people we are seeing tell a similar story:

> 'I've never got along with my stepfather,' said Jody, aged 16. 'We argue all the time about everything. He puts me down, doesn't like my friends. He's never hit me, but he's been really aggressive towards me. Mum takes his side. They've got two younger children now and they think I'm a bad influence on them. I was in trouble at school. There was a big fight about it at home and I left. There's no way I'd go back.'

When I ring to talk to Jody's mother (and I must have Jody's permission to do this), I know what I'm likely to hear. Mum's been caught in the middle for some time. Torn between her daughter's changing needs and trying to establish a new family unit. Not knowing much about conflict resolution, struggling under financial pressures and guilt. What can she say when I ask one of our standard questions: 'Is Jody allowed to live at home?'

> 'Of course she is ...but, things are really much better here without her. I hate to say that, but I have to think of the others in the family. It's probably better if she doesn't come home.'

All too often Jody, her mother and stepfather have never had opportunity and support to negotiate how they can live in harmony together. And at this point, what can I offer them? I can spend some time counselling them individually or perhaps refer them to another counselling or mediation service. But the sad reality is that there are very few appropriate services and the damage may already be too great.

In some of these families, the usual adolescent/parental struggles unfortunately escalate to the point where the 'escape' of the adolescent from the family home seems the only option.

In other families that I see, it is the escape of the mother from the family home that becomes the only option, and these women may come to Social Security for the Sole Parent Pension.

Many of you will be aware of the difficulties faced by newly separated women. They have to face problems finding accommodation, dealing with the grief and loss of the relationship, adjusting to their changed status and to a much lower standard of living. The introduction of the Child Support Scheme to collect maintenance for children has helped many parents to reduce the conflict over maintenance.

But these problems can be compounded if the woman is leaving an abusive relationship. A survey done in one of the Department's regional offices in Western Sydney last year found that 50% of women applying for the Sole Parent Pension had experienced some form of domestic violence before separating from their partner.

With the Child Support Scheme, however, there is an obligation on women applying for a pension to take action for maintenance. So the sole parent leaving an abusive relationship faces an additional dilemma Should she pursue maintenance and risk further harassment? Many non-custodial parents still consider that maintenance and access are linked, although this is not legally correct. Should she seek an exemption from maintenance action, and in so doing release the other parent from ongoing financial responsibility?

I have raised this issue today just to highlight one example of how our society's expectations have changed as the family unit has changed, and a woman can be faced with the difficulties this raises.

For both these groups of clients that I have briefly mentioned, social workers in the Department of Social Security provide support and information to help them to emerge from a family unit caught in conflict, into new and uncharted territory.

The interesting thing to consider is: how will these individuals progress in their relationships with those family members that they are leaving? Will young Jody be able to maintain contact with her family, or perhaps even go back home at some time? Will the separating woman be able to negotiate a safe or comfortable relationship with her ex-partner?

Don Edgar from the Institute of Family Studies has been quoted as saying:

> 'The family is not breaking up. It is breaking out. Out of the mould that was previously the norm.'

As family units and relationships change, we will need to provide new forms of services that are more accessible and appropriate to help these clients, and to minimise the traumatic effects of these changes on all the individual family members involved.

Outcomes for Children Following Parent Separation/Divorce through the Mediation Process

Sr Bernadette Curtin

In couples mediation, we find that on the mutually agreed agenda of the parties are the issues of children and property. More times than not, the parties opt for the issue of the children to be their priority.

The issues for the parents' agreement therefore focus on:

- **GUARDIANSHIP**
  This is usually accepted as the joint responsibility for the children, particularly in the following areas:

  1. **Health**
     In serious illness, surgical procedures, accidents requiring special care etc;

  2. **Education**
     Where further studies than usual may be indicated;

  3. **Religion**
     In a case where a parent or child wants to change from, say, a 'mainstream' religion to perhaps a particular sect;

  4. **Travel**
     In cases where international travel is required.

  In all the above, both parents are obliged to be in consultation with each other, including the issue of travel, where passports would need to be signed by each parent.

- **CUSTODY**
  Using terminology that will be accepted to both parents and children, 'custody' means the day to day care of board, lodging, routine etc.

- **ACCESS**
  A term which is often misunderstood. Access in its correct meaning is the children's right to both parents, and not, as it is often wrongly interpreted, as the non-custodial parent's right to the child/ren.

- **MAINTENANCE**
  The material needs of the child/ren are often dealt with in both issues, namely, 'Children' and 'Property Settlement'. If the parents agree on a certain amount of maintenance for the children, there may be no need to work on the Child Support formula. If the established formula (Social Security/Taxation Department) is not acceptable, consultation with the appropriate government departments would need to

take place. This could be due to extreme differences in the wage earning capacity of each parent. The formula is based on income and needs.

To arrive at a more practical working through of definitions, privileges and rights, we engage the parents more in their roles and responsibility of co-parenting, and suggest that this can be difficult when the family are together as a unit, and more so, but achievable, when separation takes place.

MYTHS OF PARENTING AFTER SEPARATION

There are a number of frequently held myths about parents' rights and responsibilities. These include:

- That parents have rights of access to children (and not the other way around);
- That access equates with maintenance;
- That the access parent has no responsibility for the material cost of the children when and if the custodial parent enters into another relationship.

Both parents need to recognise that each of them shares the rights and the responsibilities of the children, and that this time of separation need not necessarily be a win/lose situation. At times, separating couples increasingly tend to focus on their own needs rather than those of the children, which generally leads to frustration and hostility.

The outcome for the children following the separation or divorce of their parents often depends on a number of factors:

- What was life like before in the family? Couples are often separated before coming to mediation and more often than not 'psychological' separation has been taking place before the final break in the marriage. It is during this time that the children can be getting mixed messages and confusion about some differences in the parents' behaviour.
- When the process of the actual separation is taking place - whether it is stormy, mutually acceptable, painful or with a sense of relief - it can cause difficulties for the children later on as often the children are left with a sense of guilt ('What have I done to cause this trouble...').
- Where and how children see their position with their parents subsequent to the separation is significant.
- It will also depend on whether the parents have the capacity, the ability or the willingness to co-parent the children in the light of the children's needs.

If the 'before', 'during' and 'after' stages are as positive as possible, the children will probably cope, and in some cases better than when the parenting had been inconsistent and disruptive while the family were together, (even though, if asked, the children would generally express the wish that their parents had stayed together).

In spite of everything, depending on age and gender, children in many cases have strong mechanisms of adjustment for change in their lives.

Difficulties are increased if and when:

- siblings are separated
- children are placed 'in care' and neither parent has guardianship.

If the latter takes place there are obviously good reasons at the time, but later changes to the care order may be acceptable to all concerned, and in the best interests of the children.

THREE CO-PARENTING STYLES (Maccoby, Depner & Mnookin, 1990)

Divorced couples differ with respect to their predominant style of dealing with the fact that they are both functioning as parents of the same children, albeit in different households. Three major styles or patterns can be identified:

1. **Co-operative Group**
   Parents talk with each other frequently about the child/ren and argue seldom. They attempt to co-ordinate rules between the two households and try not to undermine each other's parenting.

2. **Hostile Group**
   They maintain contact with each other but argue frequently, challenge the other's standards and values, often trying to sabotage the children's visit to the other parent. There may be last minute changes in visitation arrangements which will lead to irritation.

3. **Disengaged Group**
   The parents are not disengaged from the children, but from each other. There is very little communication between the parents, even though the children are spending time in both households.

Over time, the disengaged pattern becomes more common, and the conflicted pattern less so.

A central tenet of the 'Social Exchange Model', a social psychological theory with an economic perspective, is that people implicitly 'compute' the estimated psychological 'profit' (ie, the psychological rewards less the costs) of a potential or actual relationship when deciding whether to enter into it or to remain in it. (Braver, Wolchik, Sandler, Sheets, 1993.)

This perspective has frequently been used in the divorce area to predict the decision to divorce or to remain in the marital relationship and has not commonly appeared applicable to parent/child relationships.

Levinger, in 1979, saw this perspective as an appropriate one for predicting the behaviour of the non-custodial parent because whether to continue the relationship with the child and maintain the parent/child dyad becomes an open question on the decision to divorce.

So the balance becomes evident -- frequency and quality of the visiting relationship and the level of the fulfilment of the children's support obligation. Therefore, anticipated costs will be looked at against perceived rewards. The greater the perceived rewards and the less the perceived costs of the parent/child relationship to the non-custodial parent, the greater the parental involvement is predicted to be.

According to Levinger's analysis, a ***reward*** may be of two varieties:

- an advantage of continuing the relationship or
- a disadvantage of terminating it.

At the same time ***costs*** have two varieties:

- a disadvantage of maintaining involvement in the relationship or
- an advantage of terminating it.

Levinger then conceptualised the rewards and costs as one of three types:

1. Affectional or Interpersonal

Rewards

This category concerns the ways in which the non-custodial parent benefits, in an interpersonal way, from a close and supportive relationship with the child. Examples are the enjoyment that the non-custodial parent experiences while visiting and the social approval obtained from significant others for being involved.

Costs

This category includes aspects of the interpersonal circumstances of non-custodial parents that make it costly for them to continue a strong level of support and contact with their children. These interpersonal circumstances include the post-divorce relationship with the custodial parent (eg, the degree of conflict and anger in this relationship), with the child (eg, stressful interactions during visits), and with other people (eg, objections of a new spouse and [step] children).

2. Material or Tangible

Rewards

This category includes those factors that might be considered the benefits, in time or money, of maintaining a close and supportive relationship with the child. In this case, the benefits considered are actually the avoidance of the material costs of terminating the relationship: in other words, the perceived probability that there would be little cost involved in not paying or visiting.

Costs

In this category are the tangible costs in time or money that the non-custodial parent must bear to maintain a close relationship. Economic privations and competing demands on the time that non-custodial parents might spend visiting are examples of material costs.

3. Symbolic or Moral

Rewards

This last category refers to moral rewards that accrue by continuing the involvement with and supporting the child, both financially and emotionally. These benefits are experienced to the degree, for example, that the non-custodial parent has a symbolic commitment to the parent role, feels guilty about how the marital disruption may impact the child, or both.

Costs

Variables in this category concern the moral or symbolic costs to the non-custodial parent of maintaining a supportive relationship with the child. Examples are the belief that the child support amount is unfair or that the child support money is not being used for the child's benefit (Silver & Silver, 1981) or is actually unnecessary for the child and the custodial parent. To the degree that the non-custodial parent considers these arrangements wrong, he or she bears a moral cost by continuing to abide by them.

FACTORS AFFECTING CO-PARENTING STYLES

- Age of Children
- Family Size
- Interparental hostility
- Legal conflict
- Discrepant perceptions of pre-separation roles
- Concern about the child's well-being in the other household
- Parents' new relationships.

If and when parents accept the decision to separate, it is beneficial for all concerned that together they tell the children in an appropriate way, depending on the age of the children, what is happening and stressing:

- You are and always will be loved by your Mum and Dad;
- This is happening because .... between Mum and Dad and not because of anything about you;
- We each want the best for you;
- Mum and Dad will live separately, but you will have two homes, because we each want to share our homes with you and you to share your life with us.

All this needs to be verified by ensuring the children will be well cared for in each of their homes.

In order for this co-parenting to take place effectively, clear and consistent arrangements need be made between parents about times of visits, pick up places, transport and most importantly that only positive input from each parent to and about the other parent be made to the children.

Changing Families: How Does the Law Deal with Them?

Robert Vial

I would like briefly to consider how the law is attempting to deal with the new and changing relationships brought about by different concepts and patterns of family which we see emerging.

It is clear that the traditional roles of men and women have radically altered, and a growing number of relationships do not now reflect some of the concepts which underlie legislation or more formal and traditional resolution processes.

CHANGING RELATIONSHIPS

Some of these changes have been touched on by Eric Stevenson with the figures he presented to us.

Those of you who work with families well know that family dynamics can be complex.

Stereotyped roles are changing. Greater numbers of women are in careers, wanting their spouses to assist with roles at home. Parenting roles are changing generally, with many men wishing to be more involved in family life. The work demands on people are changing. There is a growing incidence of blended families.

Equally, the expectations of parties upon separation from a relationship are changing, and it is important to address these issues and the effects on the children. The changed relationships and working patterns also affect the resolution of disputes relating to contributions, inheritances, superannuation and maintenance.

THE ROLE OF THE LAW

The basic concepts of law have not changed in relation to family matters, for example in guardianship and custody matters. On the other hand, child support arrangements have changed, and access is being dealt with in a more fluid way. The court may, for instance, make arrangements for varying amounts of time for access, and may consider more flexible ranges for parenting agreements.

To a large extent, however, the law is not dealing with many of the issues which arise in separations today, for example in cases of domestic violence or of child abuse. It is questionable how effective laws in these areas are. On the whole, most of the amendments to the Family Law Act are procedural, and the law often only deals with part of the matters at issue between separating couples. Underlying issues, such as the parties' future relationship with each other and the children can only be dealt with in a formal way.

The law can give guidelines for parties who decide to attend mediation. It is crucial that parties do obtain the legal information that will assist them to negotiate from an informed base, but it is the negotiation process itself that is important in mediation. The role of the mediators is to assist the parties to negotiate for themselves the most appropriate outcome.

The law may be needed to assist those who need to have their rights asserted, for example in the provision of child support, and this change has helped many people to enforce maintenance agreements. The needs of a sole parent, however, often cannot be dealt with adequately by the legal processes.

There may be a question over how effective the law can in fact be in helping couples to reach real resolution of their disputes. It may be able to decide 'who gets the Mercedes', but cannot, by its nature, deal with interpersonal issues. There may be a legal climate which discourages parties from consultation and negotiation, and the life experiences of judges may not necessarily reflect the diversity of the wider community.

EXAMPLES

Property Settlements

How does the law deal with contributions, inheritances, superannuation? Such things as the length of marriage, age of the people, their future resources and needs are relevant. The basic principles of family law are also taken into account. (See Attachment.)

Parenting Agreements

In mediation, the *needs* of all parties must be explored and any arrangements suggested and agreed upon must be reality tested. The needs and interests of the parties can be explored more deeply in mediation, for example where one of the parties is sick changes to access arrangements can be more readily made. The Court tends towards certain common rulings, such as access visits every second weekend.

Therapeutic Mediation

The law cannot deal with underlying issues. It is there to make a decision. Mediation can, and there is a growing feeling in Victoria that mediators and agencies have a greater role to play in assisting parties through changes in their lives in a positive way. It is important to go past agreements to look at how things are going to be in the future and how the parties are going to deal with the changes in their relationships and with those that surround them.

The rights of others and the wellbeing of the family system can be explored in mediation. Future parenting relationships are important in mediation. The changing roles and expectations of spouses can be accommodated in mediation where the Court cannot explore this.

ATTACHMENT

FAMILY LAW PRINCIPLES SUMMARISED IN LAY TERMS

In reaching a decision in relation to property settlement, the Family Court follows a three step process.

1. Identify and value **all** property as at today;

2. Look at what **contribution** was made to that property by or on behalf of either/both parties;
   (This includes all contributions whether financial, non-financial, direct, indirect, or pertaining to the welfare of the family.)

3. The Court would then consider if any variation need be applied to the division of property given each party's **future needs** such as income, earning capacity, care and control of the children, skills, qualifications, age, health.

   Financial considerations such as superannuation, trusts and so on would also be considered.