

## *REPORT ON THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS*

As provided for under clause 4 of its charter, NADRAC has provided of its own motion the following comments to the Attorney-General in relation to the Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation.

Council supports the thrust of many of the recommendations in the Report, especially the call for greater emphasis on alternative (or primary) dispute resolution combined with appropriate case assessment and referral.

It makes the following comments concerning proposals contained in the Report that are particularly relevant to alternative dispute resolution policy and practice.

### **Obligations on mediators**

The Report recommended (Recommendation 5) '... that Part VII of the Family Law Act 1975 be further amended to: **require mediators**, ... to assist parents ... , **develop a parenting plan**; ... [and] **require mediators**, .... to assist parents.... to first consider a starting point of equal time where practicable...'

Such an amendment would place new statutory obligations on mediators that may conflict with accepted standards of mediation practice. The nature and implications of this obligation would need to be considered carefully.

Most mediators would take the view that the matters discussed at, and the outcomes arising from, a mediation process belong to the parties concerned, taking into account children's needs. Although parenting plans may suit some parties, others may prefer other outcomes, for example, informal arrangements or consent orders. Similarly, equal time arrangements may suit some families, but may not be an appropriate arrangement for all children.

The term 'conciliation' is more commonly used to describe processes where the ADR practitioner advocates specific outcomes. If there is to be a clear statutory requirement that mediators promote certain outcomes, then NADRAC suggests that the process be called 'conciliation' rather than 'mediation' and that the practitioners bound by the requirement be called 'conciliators' rather than 'mediators'.

### **Mandatory mediation**

The Report recommended (recommendation 9) '... that the Family Law Act 1975 be amended to **require separating parents to undertake mediation or other forms of dispute resolution** before they are able to make an application to a court/tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts/tribunal.'

NADRAC supports this recommendation in principle and believes that mandatory mediation can be an effective process, subject to appropriate assessment and professional standards. There are, however, potential problems in the recommendation that will need to be addressed.

*Meaningful involvement*

It will be important to ensure that mandatory mediation is a meaningful process. Negative impacts on the effectiveness and acceptance of mediation would result if mandatory mediation became merely a procedural step which parties undertake in order to be able to make an application to a court or tribunal. These impacts could include an increase in bad faith negotiation, early termination, a drop in agreement rates, greater entrenchment of the dispute, reluctance to use mediation at a later stage, increased costs to agencies, lower job satisfaction on the part of mediators, and increased public dissatisfaction both with mediation and the family law system as a whole.

NADRAC therefore suggests that there be flexibility in any requirement to use mediation, so that the appropriate intervention is used in the right case and at the right point in time.

#### *Scope of dispute resolution processes*

The Parliamentary Committee's recommendation refers to mediation 'or other forms of dispute resolution'. Some could claim that an exchange of solicitors' letters or an attempt at direct negotiation constitute forms of dispute resolution. If this is not the intention of the proposal, the Government may need to specify and define the range of dispute resolution processes that would be required prior to making an application to a court or tribunal.

#### *Establishing compliance*

Procedures and definitions would need to be developed to determine compliance with the requirement to use mediation. For example, one parent may accept mediation but the other may refuse. It is unclear whether the first parent would then be entitled to make an application to a court or tribunal. If not, one parent could effectively prevent the other from gaining access to the court/tribunal by refusing (or delaying) mediation. Evidence may be required of refusal to use mediation. For example, mediators may need to write formally to each party to invite them to attend. Issues of compliance may also arise where parties agree in principle to attend but no agreement can be reached about practical arrangements, for example, time, place, mediator, or who should attend (eg new partners, stepchildren, grandparents, etc). Situations where a mediator declines a case or where parties attend but do not participate in good faith also need to be considered.

#### *Assessment*

Recommendation 9 needs to be considered in conjunction with the concept of an assessment process (see below). Mandatory mediation should be subject to the same screening process as voluntary mediation and mediators should be able to decline cases that are unsuitable. In this regard there needs to be assessment of factors other than those listed. Examples are negotiating capacity, power balance, mental health issues and practical feasibility. The AIJA/NADRAC paper on court referral to ADR that was launched last week would be a useful resource in this regard.

NADRAC notes that assessment is a continuous process rather than a one off event. Circumstances change and more information is gathered as a case progresses through the system. Assessment therefore needs to take place at each stage of the process and responsibility for such assessment needs to be shared across relevant agencies.

## Single entry point

At Recommendation 11, the Report recommended '... a shop front single entry point ... with the following functions: ... provision of information about shared parenting, the impact of conflict on children **and dispute resolution options**; ... case assessment and screening by appropriately trained and qualified staff; ... power to request attendance of both parties at a case assessment process; and ... **referral to external providers of mediation** and counselling services with programs ... including assistance in the development of a parenting plan.

NADRAC supports the concept of an entry point in principle, but would be interested in looking at the details about how this concept would work in practice. For example, the Parliamentary Committee recommended that all people go to the entry point as a first step, but at paragraph 4.99 of the Report it suggests that there may be an exception to this requirement in cases of imminent danger. NADRAC supports this proviso as the requirement to use a single physical entry point could place at risk those escaping family violence. There may be other instances where a single entry point is neither appropriate nor feasible, such as mental health issues or communication difficulties. Such situations may not always be immediately obvious or clearcut. NADRAC therefore suggests that there be a degree of flexibility and discretion in the means by which people access the proposed new family law system.

## Families Tribunal

The Report recommended (at Recommendation 12) ... that the Commonwealth Government establish a national, statute based, Families Tribunal with power to decide disputes about [parenting arrangements] and property matters by agreement of the parents. The Families Tribunal should have the following essential features: ... [i]t should be child inclusive, **non adversarial**, with simple procedures that respect the rules of natural justice.... [m]embers of the Families Tribunal should be appointed from professionals practising in the family relationships area ... [t]he Tribunal **should first attempt to conciliate** the dispute ... [a] hearing on the dispute should be conducted by a panel of three members comprising **a mediator**, a child psychologist or other professional able to address the child's perspective and a legally qualified member ....'

While NADRAC welcomes the desire to create a less adversarial system for making decisions about disputes involving children, it is concerned that the establishment of a new Families Tribunal could simply lead to another formal layer in the family law system which, by creating more confusion, uncertainty and forum-shopping could, in fact, lead to an increase in litigation and a decrease in use of ADR services. NADRAC therefore would prefer to see greater emphasis on informal dispute resolution combined with a simpler, rather than more complex, statutory framework.

If, however, a Families Tribunal were to be established, a number of operational issues would need to be addressed.

### *The relationship between Tribunal conciliation and earlier dispute resolution steps*

The requirement for the Tribunal to first conciliate needs to be considered in conjunction with the previous step of mediation. If conciliation by the Tribunal is merely a repeat of the earlier dispute resolution intervention it could become merely

another routine but futile and wasteful step. Alternatively, Tribunal conciliation could become the preferred dispute resolution process, in which case many parties would seek to bypass the earlier mediation stage.

In NADRAC's view these forms of ADR need to be developed as complementary but distinct processes. Referral policies and procedures and practices would need to be developed to ensure the processes 'mesh' together. For example, in some cases a mediator could recommend that conciliation by the Tribunal be bypassed, such as where the parties have made all reasonable efforts to resolve their matter. In other cases, a mediator or case assessor faced with a highly resistant party could recommend that the matter go straight to conciliation by the Tribunal without undergoing the earlier mediation stage. The Tribunal conciliator could also refer back to further mediation outside the Tribunal.

#### *The role of the Tribunal conciliator*

It is unclear from the Report how the conciliation would occur in practice. NADRAC notes, however, that issues may arise where a member who has conciliated the matter then goes on to hear the same case. Policies and procedures will need to be developed to address this issue.

#### *Training and qualifications of Tribunal members*

The effectiveness of a Families Tribunal will depend largely on the competence of its members to undertake their roles.

All members involved in hearing matters would need specific skills in decision-making. A new training regime may be required to assess members' current skills and to provide courses on additional skills necessary to their decision-making role. In this regard, NADRAC would observe that a mediator is not trained as a decision-maker and, like other professionals, would not necessarily have the right skills to be a member of a panel with determinative functions.

Conversely, if all Tribunal members are involved in conciliation, then they should all be competent to undertake this role and would need to have undertaken, or be provided with, mediation or conciliation training. NADRAC's 2001 report on ADR Standards provides guidance on how such training could be developed.

#### **Child inclusive practice**

At recommendation 13, the Report recommended '... that all processes, services and decision making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them'.

NADRAC agrees with this recommendation. It is consistent with the principle of child focussed and child inclusive practices that were supported in NADRAC's submission to the Parliamentary Committee.

#### **Timing of mediation**

The Report recommended (Recommendation 14) '... that in the period immediately following separation .... parents be required to access the single entry point and **begin the process of mediation** (including the commencement of a parenting plan) ...

NADRAC sees this recommendation as unduly prescriptive. As outlined in the AIJA/NADRAC paper on court referral to ADR, research into ADR indicates that the appropriate timing for a referral to ADR varies widely from case to case. Although mediation soon after separation can be helpful in many instances, in some cases it can occur at too early a stage. As the Report noted, the period immediately after separation can be quite chaotic and stressful for many families. In such situations parents may not yet be ready to plan future long term arrangements and the requirement to do so may well increase stress, escalate parental conflict or lead to premature and ultimately unworkable agreements.

### **Training of family law practitioners**

The Report recommended (Recommendation 20) '... that there should in future be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in **social sciences and or dispute resolution** methods.

NADRAC supports this recommendation and notes that many legal training courses already include dispute resolution methods. In implementing this recommendation, NADRAC suggests that the amount of study be defined or quantified, for example, a single lecture, a unit of study or an additional qualification in its own right.

### **Family conferencing**

The Report recommended (Recommendation 24) '... that the Commonwealth Government: .... develop a range of strategies to ensure that grandparents, and extended family members, **are included in mediation** ....., in particular the **development of a wider family conferencing model**.

NADRAC supports this recommendation, with the proviso that there be flexibility in deciding whether, when and how extended families are included in mediation. Cultural groups have different practices with regard to the input and involvement of extended family members and mediators should respect these cultural differences.

NADRAC believes there is room for innovative strategies and approaches in family mediation and would be happy to contribute its advice on the development of a wider family conferencing model at a later stage.